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Department
for Environment
Food & Rural Affairs

Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate

December 2014

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1 : Introduction

1.1 Scope of this guidance

1.1.1 This guidance is for commons registration authorities and the Planning Inspectorate in relation to their functions and powers under Part 1 of the Commons Act 2006, except sections 16 and 17 for which separate guidance for such applications can be found on the Planning Inspectorate's website[1]. Part 1 concerns the maintenance of the registers of common land and town and village greens – and how they can be amended to add new information or amend existing information.

1.1.2 Part 1 has been fully implemented[2] in a minority of registration authorities and partially implemented in all remaining registration authorities through the Commons Registration (England) Regulations 2014, which came into force on 15 December 2014.

1.1.3 Throughout this guidance references to:

- 'the Act', 'Section X', 'Schedule X' mean the Commons Act 2006;
- 'the Regulations', 'Regulation X', 'Schedule X to the Regulations' mean the 2014 Regulations;
- 'chapter X' or 'paragraph X' mean the relevant chapter or paragraph within this guidance;
- 'the registers' means the register of common land and the register of town or village greens;

unless specified otherwise.

Pioneer authorities

1.1.4 In October 2008, Part 1 was fully implemented in the following seven registration authorities, which are referred to as the 'pioneer authorities' wherever relevant:

- Blackburn with Darwen Borough Council

[1] http://www.planningportal.gov.uk/planning/countryside/commonland/commonland

[2] Except Section 25 (electronic registers).

- Cornwall Council
- Devon County Council
- County of Herefordshire District Council
- Hertfordshire County Council
- Kent County Council
- Lancashire County Council

1.1.5 Pioneer authorities were subject to the Commons Registration (England) Regulations 2008 and the Commons Registration (England) (Amendment) Regulations 2009. Both have been revoked and replaced by the 2014 Regulations, which are largely the same as the 2008 and 2009 Regulations with a few notable changes reflected in this guidance.

1.1.6 All advice in this guidance applies to the pioneer authorities except in relation to the time-limited functions which have elapsed. The pioneer authorities remain subject to the deadlines previously specified by the 2008 and 2009 Regulations, but these are now specified by the 2014 Regulations. For pioneer authorities the transitional period ended on 30 September 2011, but they have until 31 December 2020 to make and advertise proposals under Schedule 2.

1.1.7 All applications made to, and proposals made by, pioneer authorities under the 2008 Regulations automatically switch to the equivalent stage in the 2014 Regulations. This also applies to the Planning Inspectorate.

2014 authorities

1.1.8 On 15 December 2014, Part 1 was fully implemented in Cumbria County Council and North Yorkshire County Council, which are referred to as the '2014 authorities' wherever relevant.

1.1.9 All advice in this guidance applies to the 2014 authorities. For the time-limited functions (e.g. making proposals under Schedule 2), 2014 authorities generally have the same amount of time as that given to pioneer authorities, but the transitional period and transitional application period were extended by one year to 4 and 3 years respectively.

1965 authorities

1.1.10 For all other registration authorities, Part 1 has been implemented solely for the purpose of processing five types of application to correct the register. These registration

authorities, referred to as ‘1965 authorities’ wherever relevant, will process and determine ‘corrective’ applications under:

- Section 19(2)(a) to correct mistakes made by the registration authority when it made or amended an entry in the register;
- Schedule 2, paragraph 6 to remove ‘buildings’ wrongly registered as common land;
- Schedule 2, paragraph 7 to remove ‘other land’ wrongly registered as common land;
- Schedule 2, paragraph 8 to remove ‘buildings’ wrongly registered as town or village green;
- Schedule 2, paragraph 9 to remove ‘other land’ wrongly registered as town or village green.

1.1.11 Schedule 8 to the Regulations lists which Regulations apply to 1965 authorities. Essentially the only Regulations which apply are those related to the processing of the five types of corrective application above. They cannot process any type of application other than the five above. They cannot make proposals, nor can they review their registers. Only the following advice applies to 1965 authorities:

- chapter 1 (but ignore advice related to new events and historic events);
- paragraph 2.6.23 and chapter 2.8;
- chapter 5.3 to 5.21; and
- chapter 7.5 to 7.9 (but ignore anything specific to Section 19(2)(b) to (e) as they have not been commenced).

1.1.12 Chapters 5.3 to 5.21 provide advice on processing applications. However 1965 authorities should ignore any advice relating to the format of the registers. This is because, until Part 1 is fully commenced, 1965 authorities will maintain their registers under the 1965 Act even for amendments related to corrective applications granted under Part 1. However, the model entries for corrective applications do apply; they are specified in Schedule 3 to the Regulations.

1.1.13 The 1965 authorities should continue to deal with applications under the 1965 Act as normal.

1.2 The problem with the registers

1.2.1 The Commons Registration Act 1965 Act established definitive registers of common land and town and village greens in England and Wales and to record details of rights of common. Registration authorities were appointed to draw up the registers. Applications were invited between 2 January 1967 and 2 January 1970[3] for the provisional registration of common land, greens, and rights of common, and registration authorities were also able to register land on their own initiative. The registers remained open for objection until 31 July 1972[4]. Disputed provisional registrations were referred to a Commons Commissioner (appointed under the 1965 Act) for determination, but unopposed provisional registrations became final automatically.

1.2.2 The 1965 Act provided that, where land was eligible for registration under the Act (as common land or a town or village green), a failure to register it resulted in the land being deemed not to be common land or a green after 31 July 1970[5]. Similarly, a failure to register rights of common which were eligible for registration caused the rights to cease to be exercisable[6] after the same date.

1.2.3 The task of establishing registers was complex and the 1965 Act proved to have deficiencies. Some land provisionally registered was wrongly struck out, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Insufficient notice requirements for applications resulted in provisional registrations becoming final without landowners' knowledge, who therefore did not submit objections. The Court of Appeal held that even where land was wrongly registered as common land, the Act provided no mechanism to enable such land to be removed from the register once the registration had become final[7].

1.2.4 The 1965 Act allowed for amendment of the registers for events which occurred after 1970 which should have been recorded in the registers, i.e. either to add new information or amend existing information. But there was no obligation to record these events in the register. For example, where a right of common was created in 1986 but has

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[3] Commons Registration (Time Limits) Order 1966 (SI 1966/1470) (a later date of 31 July 1970 applied to land registered following applications made by the registration authority itself).

[4] Regulation 4(2) of the Commons Registration (Objections and Maps) Regulations 1968 (SI 1968/989), as amended by the Commons Registration (Objections and Maps) (Amendment) Regulations 1970 (SI 1970/384).

[5] Section 1(2) of the 1965 Act, as prescribed by the Commons Registration (Time Limits) Order 1966 (SI 1966/1470), as amended.

[6] Section 1(2)(b) of the 1965 Act states that such rights are rendered not 'exercisable'. In *Central Electricity Generating Board v Clwyd County Council*, Goff J. concluded that the fact that rights of common were no longer exercisable meant that they were extinguished, and this finding is now generally accepted.

[7] *Corpus Christi College, Oxford v Gloucestershire County Council*.

not been registered. Many such events have not been registered which is why the registers are now significantly out-of-date.

1.3 Part 1 of the 2006 Act

1.3.1 Part 1 retains but updates the registration system established by the 1965 Act, and allows the registers to be amended to reflect:

- new events which happen from 15 December 2014 onwards and either need to be added to the registers or affect existing information within them (e.g. an application to extinguish rights of common). These applications are made under Sections 6 to 15;

- anomalies and mistakes related to existing entries in the registers. These applications are made under Section 19, which allows correction of the registers in prescribed circumstances, and Schedule 2 which allows land to be added to the register if it was not finally registered, or removed from the register if it was wrongly registered; and

- historic events which occurred between 1970 and 14 December 2014 but were not registered (e.g. an application to delete from the register rights of common which were extinguished by deed in 1980). These applications are made under Schedule 3 which allows the registers to be brought up to date to reflect these events during (and after) a 'transitional period'.

1.3.2 New event applications can be made under Sections 6 to 15 to amend a register in relation to a number of changes, e.g. the creation of new rights of common or variation of existing rights. Part 1 and regulations made under the 2006 Act prescribe the manner in which such applications can be made to amend a register. Applications can also be made under Section 19 to correct certain errors and omissions in the registers.

1.3.3 The new event applications regime will deal with applications to amend a register arising from events which occur from 15 December 2014 onwards. It is not possible to amend the register under Sections 6 to 15 in respect of events which took place before that date[8]: such events must be dealt with under Section 19, Schedule 2 or Schedule 3, if at all.

1.3.4 The Act provides that amendments which can be made to the registers under Sections 6 to 15 do not have legal effect until the register records the amendment. For example, a right of common is not extinguished until the register is amended to that effect.

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[8] With limited exceptions in relation to the registration of new town or village greens where the use of the green was challenged before the date of the application for registration.

1.3.5 Sections 6 to 15 allow more types of amendments to the registers than the 1965 Act. For example, Sections 10 (attachment) and 11 (re-allocation of attached rights) introduce new types of amendments not found in common law.

2 : The registers

2.1 The registers

2.1.1 The registers comprise two separate, but near identical, registers: the register of common land, and the register of town or village greens[9].

2.1.2 The registers are held by registration authorities, which in England are county councils, district councils in areas without a county council and London borough councils[10]. The Court of Common Council of the City of London and the Council of the Isles of Scilly are not registration authorities for the purposes of the 2006 Act, and there are no registers for these areas. It is not possible to register common land or town or village greens in these areas (see also chapter 2.2).

2.1.3 Defra's records suggest that there are 25 registration authorities which have no land registered. However, all registration authorities may be required to consider an application for the registration of new common land or a new town or village green, and are likely to receive searches from conveyancers seeking information about registered land within their area (see chapter 2.9).

2.1.4 Registration authorities need to keep a stamp with an impression containing the information prescribed in Regulation 3(1), for use in stamping documents in accordance with the requirements imposed in relation to the register sheets[11], the register maps[12], and supplementary maps[13]. The stamp can also be used for any other relevant purpose such as authenticating an official copy of the register issued under Regulation 53, or confirming the date of receipt of an application form.

2.2 Exempted land

2.2.1 Part 1 does not apply to the New Forest, Epping Forest or the Forest of Dean[14]. Common land or new town or village greens cannot be registered in these areas (see

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[9] Section 1.

[10] Section 4(1).

[11] Regulation 8(2), and see the provision for a stamp to be entered on the prescribed forms 1 to 3 in Schedule 2 to the Regulations.

[12] Regulation 9(6)(b).

[13] Regulation 13(5)(a).

[14] Section 5(2) and 5(3).

paragraph 2.1.2 for areas without a registration authority). The extent of the New Forest is the Perambulation referred to in the New Forest Act 1964. Questions on whether land is exempted from Part 1 must be referred to the Secretary of State for determination[15]: contact Defra for further advice (commons.villagegreens@defra.gsi.gov.uk). Land exempted under Section 5 should be recorded in the general part of both registers[16].

2.2.2 Section 11 of the 1965 Act enabled other land to be exempted from Sections 1 to 10 of the 1965 Act by order made by the Minister of Land and Natural Resources. A list of exempted lands is at Annex A. An order of exemption was made by the Minister only for lands regulated under the Metropolitan Commons Acts 1866–1898, Part I of the Commons Act 1899, a local Act, or an Act confirming a provisional order of regulation made under the Commons Act 1876. Such exempted land may be registered under paragraph 2 or 3 of Schedule 2 (land not finally registered as common land or town or village green under the 1965 Act).

2.2.3 Registration of land under paragraph 2 or 3 of Schedule 2 does not allow rights of common to be registered over the land. A requirement of Section 11 of the 1965 Act was that no rights of common had been exercised over the land for at least thirty years. It is likely that no rights of common will have been exercised for at least seventy years and were abandoned. In Defra's view, registration under paragraph 2 or 3 of Schedule 2 will not extinguish any right of common which subsists but cannot be registered[17].

2.3 Straddling agreements

2.3.1 A registration authority may make a 'straddling' agreement with a neighbouring registration authority (under Section 4(3)) to assign responsibility for land which straddles their shared boundary, so that one acts as the registration authority for the whole of that land. Registration authorities could make straddling agreements under Section 2(2) of the 1965 Act. Any agreements in force before 1 April 1974 ceased to have effect on that date[18], but an agreement which was in force on 1 October 2008 in the pioneer authorities or 15 December 2014 in the 2014 authorities[19] remains effective by virtue of Section 17(2)(b) of the Interpretation Act 1978. Existing[20] and new straddling agreements should be recorded in the general parts of the registers[21].

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[15] Section 5(4).

[16] Regulation 5(2)(c).

[17] There is no equivalent in the 2006 Act to Section 1(2)(b) of the 1965 Act, which extinguished any right of common which could have been, but was not, registered under the 1965 Act. Section 1(2)(b) did not operate to extinguish any right of common exercisable over exempted land, because such rights could not be registered under the 1965 Act.

[18] Section 189(1) of the Local Government Act 1972 (repealed).

[19] *I.e.* the date of repeal of the 1965 Act in relation to those registration authorities.

[20] Regulation 4(2)(a) of the General Regulations 1966.

[21] See Regulation 5(2)(a) and model entry 1.

2.3.2 Registration authorities should consider whether new straddling agreements are required for agreements which ceased to have effect in 1974 and were not replaced, and one of the registration authorities purports to include registered land in the area of a neighbouring registration authority in its own registers. However, the area to which the Part 1 applies cannot be amended by any new straddling agreement made after Part 1 comes into force, so pioneer authorities would need to put in place new or replacement straddling agreements well before that date.

2.4 Agency agreements

2.4.1 Registration authorities can make agency agreements where some or all of their registration functions will be exercised by a neighbouring registration authority under Section 101 of the Local Government Act 1972. The agency authority becomes the registration authority for the purposes of the functions specified in the agreement. Agency agreements should be recorded in the general part of the registers[22].

2.5 Provisional registrations

2.5.1 Every provisional entry made under the 1965 Act (see chapter 1.2) should have become final, unless cancelled[23]. Every subsisting entry in the registers will have effect on the commencement of Part 1, regardless of whether or not it has been marked as final. There remains a duty for the registration authority to mark an entry where it remains outstanding (see paragraph 5.2.8).

2.5.2 Defra is not aware of any outstanding cases for referral to the Commons Commissioner for determination. If there were any, they would have become immaterial when Part 1 was commenced and cannot now be referred.

2.6 Form of the registers

2.6.1 A separate register must be maintained for each of registered common land and registered town or village green. They are identical in appearance except for minor variations in the headings. Both registers consist of:

- a general part — containing general provisions relating to the register as a whole;

[22] See Regulation 5(2)(b) and model entry 2.

[23] See Sections 6(2) and 7(2) of the 1965 Act, regulation 3 of the Commons Registration (Disposal of Disputed Registrations) Regulations 1972 (SI 1972/437) and regulation 3 of the Commons Registration (Finality of Undisputed Registrations) Regulations 1970 (SI 1970/1371).

- a register map — Ordnance Survey map sheets showing the areas of land registered in that register;

- individual register units for each registration of land — containing separate sections in relation to the land, rights of common exercisable over the land, and (generally) ownership of the land; and

- supplemental maps — showing the land to which rights of common are attached.

2.6.2 The Regulations prescribe the form and content of the registers, similar to that made under the 1965 Act[24]. Registers and register maps compliant with the 1965 Act regulations remain valid under the Regulations[25].

The general part

2.6.3 This contains general provisions relating to the register as a whole. It includes particulars of:

- agreements of the registration authority;

- exempt land; and

- transfers of responsibility for maintaining any register or register unit, including straddling agreements and agency agreements (see chapter 2.3) and assignment of registration authority functions due to local government reorganisation.

2.6.4 The general part can be found at Form 1 of Schedule 2 to the Regulations.

The land section

2.6.5 This records the common land or town or village green comprised in each register unit, with a reference to the register map.

2.6.6 Notes may be recorded for matters which affect the public interest in registered land. Under Regulation 46 the registration authority can, either on its own initiative or on an application, note details of specified enactments which affect the management, regulation or access to registered land: model entry ME21 provides an example. An authority may cancel a note that is no longer valid.

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[24] Principally, the General Regulations 1966, the Commons Registration (Objections and Maps) Regulations 1968 (SI 1968/989), and the Commons Registration (New Land) Regulations 1969 (SI 1969/1843).

[25] Regulation 14.

2.6.7 The notes may also contain details of private and charitable rights and interests in registered land (e.g. easements or mineral rights) made under the 1965 Act[26]. It is not possible under Part 1 to make notes of this kind.

2.6.8 The land section can be found at Form 2 of Schedule 2 to the Regulations.

The rights section

2.6.9 This records the nature and extent of each right of common exercisable over the land described in the land section. Rights of common are generally attached to land (the 'dominant tenement'), and the owner or occupier of that land is entitled to exercise the right of common. The dominant tenement must be described in column 5 of the rights section by reference to a supplemental map (see paragraph 2.6.20).

2.6.10 Entries made under the 1965 Act may define dominant tenements by parcel numbers on an Ordnance Survey map. These remain valid but the registration authority must update them in accordance with the new regulations when any part of the entry is amended. New entries must define a dominant tenement by reference to a supplemental map.

2.6.11 Where the right of common is attached to land with a dwelling house (e.g. farmhouse) the entry in column 5 would need only describe the dwelling by its postal address and Ordnance Survey grid reference[27], but a supplementary map may be used for better identification.

2.6.12 There is another type of right of common: a right of common in gross. These are not attached to land, but are instead held personally (e.g. under a deed) and may be freely bought or sold as incorporeal assets. The name and postal address of the owner must be described in column 5[28]. Registration authorities which recorded the ownership of a right of common in gross elsewhere in the register should ensure that new or amended entries adhere to the current Regulations.

2.6.13 The rights section can be found at Form 3 of Schedule 2 to the Regulations.

Register maps

[26] Regulations 22–24 of the General Regulations 1966.

[27] Regulation 13(7). The requirement to specify a grid reference (provided in the format: TQ123567 or preferably TQ12345678) ensures that the dwelling may be subsequently identified even where the name or number of the dwelling has changed, or the dwelling has been rebuilt.

[28] Regulation 6(4)(e).

2.6.14 These must be prepared in accordance with the detailed requirements of the Regulations, including requirements as to endorsement of the maps, the provision of a key, the notations for marking boundaries etc., and the arrangement of map sheets.

2.6.15 A register map may comprise one or more map sheets, and one sheet may show the land registered in one or more register units. Each sheet must be numbered, and the register map must be bound together in loose-leaf form[29].

2.6.16 The map must comprise Ordnance Survey sheets. The scale of the map must be not less than 1:2,500, except land which is wholly or predominantly moorland, where the scale must be not less than 1:10,560, i.e. 6 inches to one mile[30]. These requirements apply only to new register maps. Moorland' is defined as land shown as such on Defra's 'moorland map'[31], which may be viewed at www.magic.gov.uk/Datasets/Dataset_Download_MoorlandLine.htm.

2.6.17 Where amending an existing register map prepared at a scale of less than 1:2,500 for land which is not wholly or predominantly moorland, the amendment must be made at a scale of not less than 1:2,500, using an inset map or preparing a replacement map sheet.

2.6.18 A register map prepared before 1 July 1968[32] used a notation different to that required under Regulation 10. Amendments to such maps must conform to the requirements of Regulation 10.

2.6.19 A registration authority may use overlays to show certain details with greater clarity, and may prepare a fresh edition of a register map or sheet at any time. But previous editions of a register map or sheet remain part of the register[33].

Supplemental maps

2.6.20 The registration authority may adopt the map of a dominant tenement (for applications to register a right of common) as a supplemental map or it may prepare its own. A supplemental map may depict more than one dominant tenement, but each must be clearly labelled by cross-reference to the entry in the rights section of the register[34], and preferably by the use of different coloured markings. A supplemental map must be at a scale of at least 1:10,560[35].

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[29] Regulation 9(5).

[30] Regulation 9(8).

[31] Regulation 2(1).

[32] Regulation 16 of the Commons Registration (General) Regulations 1966 (the General Regulations 1966) (SI 1966/1471).

[33] Regulations 11 and 12.

[34] See standard entries 3 and 4 in Schedule 3 to the Regulations.

[35] Regulation 13(3).

2.6.21 Existing entries may describe the dominant tenement by reference to parcel numbers on an Ordnance Survey map, or occasionally by other means (e.g. farm name or farm subsidy claim units). Where such entries are amended, the registration authority should use the information supplied by the application to transfer it to a supplemental map which is either prepared for the purpose or which uses the map supplied in the application or proposal (if suitable).

2.6.22 All supplemental maps must be kept together as part of the register[36]. Where registration authorities have, as a matter of practice, referred in the register to supplemental maps kept with application files, they should ensure that the supplemental map is retrieved and kept in accordance with the Regulations, whenever the opportunity arises in relation to an inquiry relating to particular rights of common.

Power to supplement entries

2.6.23 Under regulation 7(7) a registration authority can supplement an existing entry with information that provides a clearer interpretation of the entry.

The ownership section

2.6.24 This section contains claims and directions as to the ownership of registered land. Part 1 treats the ownership section as transitional and confers powers to abolish the ownership section in due course[37].

Conclusiveness of ownership section

2.6.25 The ownership section of the registers cannot generally be relied upon other than as an indication of claims to ownership when the land was registered, or, where the Commons Commissioner determined ownership, a presumption as to ownership at the date of the Commissioner's determination. Where the title to registered land is found in the Land Registry's register of title, that information should be considered conclusive.

Vesting of ownership in local authority

2.6.26 There are two exceptions to the general position on the conclusiveness of the ownership section which arise only where the question of ownership was referred to a Commons Commissioner under Section 8(1) of the 1965 Act because no person was registered as the owner of the land:

[36] Regulation 13(6).

[37] The ownership section is referred to only in paragraph 8 of Schedule 3.

- if the Commissioner concluded that a town or village green had no owner, he was required to direct the registration authority to register the local authority[38] as owner;

- if the Commissioner was satisfied that a local authority owned the town or village green or common land, he was required to direct the registration authority to register the local authority as owner of the land[39].

In either case the land became vested in the ownership of the local authority by virtue of Section 8(4) of the 1965 Act[40].

2.6.27 The ownership of certain greens was set out under an inclosure award and vested in a particular person or body by that award[41]. These are good examples of evidence of the ownership of the green but an alternative claim to ownership of the land may be possible on the basis of adverse possession since the land was vested in the local authority, person or body[42]. Registration of title in the Land Registry's register of title should be considered conclusive.

First registration in the register of title

2.6.28 Since 1967, the title to land registered in the registers has been required to be registered in the register of title on any sale or conveyance of the land[43]. On the first registration of such land (in the register of title), it has been and remains the practice of the Land Registry (where the first registration is known to relate to registered land) to send to the registration authority a notice (in form B52) to that effect. On receipt of such a notice, paragraph 8(2) of Schedule 3 and Regulation 48 now require the registration authority to delete any corresponding entry in the ownership section of the registers, and to substitute a reference to the registration in the register of title in accordance with model entry ME 23 or 24.

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[38] The local authority required to be registered as owner was to be determined in accordance with Section 8(5)–(6) of the 1965 Act (as substituted by Section 189(2) of the Local Government Act 1972).

[39] Note that such a direction can only arise where the question of ownership was referred to the Commissioner for determination under Section 8 of the 1965 Act, because no person had claimed to be owner of the land under Section 4 of the 1965 Act. A claim to ownership by a local authority will not attract the vesting provision in Section 8(4) of the 1965 Act, even if the claim was disputed and the Commissioner determined the local authority to be registered as the owner under Section 6 of the 1965 Act.

[40] Section 8 of the 1965 Act was repealed by the 2006 Act, but the effect of any vesting is preserved by paragraph 9(1) of Schedule 3 to the 2006 Act.

[41] Many inclosure awards provided for a recreational allotment or green to be vested in the churchwardens of the parish: the functions of the churchwardens are now (in relation to former rural parishes) those of the parish council or parish meeting (Sections 6 and 19 of the Local Government Act 1894), or (in relation to former urban parishes), the district council (articles 4 and 6 of the Overseers Order 1927 (SI 1927/55).

[42] See Defra's *Guidance note on adverse possession of common land and town or village greens*.

[43] Section 12(a) of the 1965 Act, repealed by the Land Registration Act 1997 in 1998 upon the extension of the requirement for compulsory first registration throughout England and Wales.

2.6.29 Regulations made under the 1965 Act required a similar amendment to be made in the same circumstances[44]. So there can be a presumption that registered common land or green, the title to which is not registered in the register of title, has not changed hands since 1967, and that an entry in the ownership section of the registers remains correct. However, the Land Registry has not sent notice of first registration in every case[45], and where necessary, the presumption must be tested by a search made of the register of title.

2.6.30 Where the ownership of any registered land is disputed, the registration authority has no power to amend any entry in the ownership section of the register (other than in accordance with paragraph 2.6.28, or where an error was made in the original registration, for the purposes of Section 19(2)(b)). Any person seeking to amend an entry as to ownership should obtain title in the Land Registry's register of title, which should generate a notice from the Land Registry to the registration authority enabling the deletion of the existing ownership entry.

Removal of ownership section from the registers

2.6.31 Part 1 is intended to secure a gradual migration of ownership information from the ownership section of the registers to the register of title held by the Land Registry. Paragraph 8(3) of Schedule 3 confers powers on the Secretary of State to make regulations requiring registration authorities to remove and archive the ownership section from the registers. Defra expects to employ these powers at a later date, when the title to a substantial majority of all registered land is recorded in the register of title, and we are satisfied that there is no benefit in registration authorities maintaining the ownership section as an integral part of the registers. We expect that regulations will provide for the ownership section of the registers to be kept as a historical archive.

2.7 Declarations of entitlement to exercise rights of common

Background

2.7.1 The rights section of the register does not specifically record the details of the person entitled to exercise a right of common attached to land. It records only the details of the person who applied to register the right. Even at the time of the application, that person may not have been entitled to exercise the right (for example, the applicant may have been the landlord of a dominant tenement subject to a tenancy, where the tenant was entitled to exercise the right). The 1965 Act made no provision to record details of the person entitled to exercise an attached right of common from time to time, nor was it

[44] See Section 12(b) of the 1965 Act and regulation 21 of the General Regulations 1966.

[45] In the past, the Land Registry has had no means of knowing whether particular land was registered in the registers, unless its status was apparent from the register map or from information provided by the registrant.

possible to register the transfer of a dominant tenement to a new occupier or owner[46]. In effect, many entries in the rights section of the register continue to show (correctly, if unhelpfully) in column 3 of the register the identity of the original applicant for registration of the right, notwithstanding subsequent changes in ownership or occupation of the dominant tenement[47].

2.7.2 Section 3(5) enables regulations to permit 'other information' to be included in the registers. Regulation 43 provides for commoners to include in the rights section of the register a declaration of their entitlement to exercise an attached right of common. This will mean that for the first time commoners can show in the register that they are the person currently exercising a right of common, thus the rights section of the registers becomes more informative.

2.7.3 The declaration of entitlement will benefit the declarant because:

- the declarant will be readily identifiable to the registration authority and the public as the person claiming to be entitled to exercise the right of common;
- the declarant will be notified of proposed changes to the register unit over which the right is exercisable;
- the declarant can be expected to be given notice of any application made under Section 16 or Part 3 of the 2006 Act which affects the register unit;
- in areas where a commons council is being, or has been, established a declaration will readily identify a commoner's eligibility to be appointed as a member of, or to otherwise participate in, a commons council.

Procedure

2.7.4 An applicant may make a declaration only if both the following conditions apply:

- the applicant is the owner or tenant of a dominant tenement, and
- a registered right of common is attached to that dominant tenement.

2.7.5 The owner of a right held in gross may not make a declaration, because the registers should show the owner as the owner of the right, and no declaration is therefore

[46] Unless the dominant tenement was transferred to two or more owners of separate parts (*i.e.* on an apportionment).

[47] Some registration authorities have 'updated' the details in column 3, but without legal power.

necessary. A tenant may make a declaration if a lease is held of the dominant tenement of more than six months.

2.7.6 Applicants must apply using form CA15. The applicant will also need to obtain details of the register unit number and the rights entry number.

2.7.7 The application form should require the applicant to calculate the number of rights to which entitlement is claimed. If the applicant claims entitlement to all of the rights attached to the dominant tenement, then the number of rights will be the number shown in the register. However, if the applicant is claiming entitlement to an apportioned number of rights, the applicant will need to calculate the number of rights to which entitlement is claimed by using the following formula:

$$\frac{\text{total number of rights over the dominant tenement}}{\text{total area of dominant tenement}} \times \text{area of applicant's part of dominant tenement}$$

2.7.8 The applicant will also need to support the application by supplying evidence of entitlement to the rights. This means that the applicant will need to demonstrate ownership of part or the whole of the dominant tenement, or a tenancy of it. The requirement will be satisfied either by a copy of the relevant entry in the register of title, or an epitome of title[48] (if the dominant tenement is unregistered), or if the applicant is a tenant with a leasehold estate, a copy of the lease agreement.

2.7.9 When a registration authority receives an application from someone wishing to make a declaration of entitlement, the authority should ensure that it is content with the evidence supplied. The registration authority will need to check that it is satisfied with the number of rights being claimed, particularly where the declaration relates to only part of a dominant tenement.

Difference between a declaration and apportionment

2.7.10 Registration authorities should be aware of the potential for people to confuse apportionment and declarations by wrongly attempting to apportion their right by making an application to register a declaration. Where a declaration application relates to a portion of the registered right of common, but not all of it, the registration authority should establish whether the land to which the right was attached (the dominant tenement) has been apportioned. If so, the registration authority should advise the applicant to withdraw the declaration application and instead apply to register an apportionment. After the

[48] An epitome of title is a list of previous deeds (documents to show proof of ownership) or conveyances (documents showing transfers of land from one party to another) which form the title to a property.

apportionment is registered, the applicant can apply to register a declaration relating to the whole of the now apportioned right.

2.7.11 A declaration of entitlement should be entered in the register in accordance with model entry ME10 (in relation to a declaration of entitlement to a whole right) or ME 11 (in relation to a declaration to part of a right).

2.7.12 The registration authority should send a copy of the updated register to the applicant.

2.7.13 A registration authority can charge fees for applications to declare an entitlement to rights.

2.7.14 A registration authority may cancel a declaration if it has reasonable cause to do so (e.g. if it becomes aware that the declarant has died or sold the interest in the dominant tenement). It must, before doing so, give notice of its intention to the declarant (at the last known address) and have regard to any comments received before deciding whether to cancel the entry. Where a declaration relates to only part of a right, the declaration should be cancelled in accordance with model entry ME 12; a declaration in relation to the whole of a right may be cancelled by striking through the entry in column 6 of the rights section of the register.

FAQs

Q: What if the registration authority believes that the calculation of the number of rights the applicant is claiming entitlement to is wrong?

2.7.15 The registration authority should not knowingly record an incorrect declaration. If the application appears to be completed incorrectly, the authority should respond to the applicant explaining what seems to be at fault, and giving the applicant an opportunity to put things right.

Q: What if a declaration was made and the registration authority now knows that it is out-of-date, what should it do?

2.7.16 The registration authority has a power under Regulation 43(6) to remove any declaration which it believes to be out-of-date or otherwise incorrect. No application is necessary for this purpose.

2.8 Copies and inspection of the registers

Dissemination of information

2.8.1 Most registration authorities will hold much data comprised in and relating to the registers. In addition to the registers themselves, authorities may hold applications to

register land and rights of common (including those made between 1967 and 1970 under the 1965 Act), objections to applications and background information about what is shown on the registers (such as the ownership of land to which rights of common are attached, or anomalies in what is registered).

2.8.2 A registration authority is under a duty to:

- progressively make the information available to the public by electronic means which are easily accessible; and

- take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information[49].

2.8.3 The use of electronic means to make information available or to organize information is not required in relation to information collected before 1 January 2005 in non-electronic form[50].

Inspection and making copies

2.8.4 Section 20 provides for a right of public access to the registers, and to records held in connection with applications for registration under Part 1 of the 2006 Act or under the 1965 Act. Section 21 provides for the admissibility in evidence, and the issue of, official copies.

2.8.5 Section 20(1)(a) confers in particular a right for the public to inspect and make copies of the register, and any register map. This right is unconstrained by regulations, and a registration authority must therefore accede to any request for these purposes during normal office hours. In Defra's view, a person need not make an appointment for this purpose (but a registration authority may wish to recommend an appointment where assistance is likely to be sought). No charge may be made to any person who wishes to inspect or make copies of the register (but the registration authority may charge for copies it provides).

2.8.6 Section 50(1) of the Copyright, Designs and Patents Act 1988 provides that:

> "Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright."

[49] Regulation 4(1) of the Environmental Information Regulations 2004 (SI 2004/3391).

[50] Regulation 4(2) of the Environmental Information Regulations 2004.

So there is no infringement of copyright where a person wishes to make a copy of, for example, a register map. In Defra's view, "make copies" means a person taking copies using, for example, a public photocopying machine, a camera, tracing paper, or by transcription.

2.8.7 Regulation 53 provides that a request to inspect documents ancillary to the register or to take copies of such documents, must be treated as a request for information under the Environmental Information Regulations 2004 ('EIR') or, where EIR do not apply, the Freedom of Information Act 2000 ('FOI').

2.8.8 The EIR apply to "measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect"…"the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components". The scope of the EIR has been interpreted very broadly, and in Defra's view, the registers, and most documents which relate to an application in relation to the registers, will fall within the scope of the EIR. The date of a document is immaterial to a request under the EIR. If, in a registration authority's view, any document does not fall within the scope of the EIR, a request for inspection of such a document must be treated as falling within the scope of FOI.

Withholding information

2.8.9 The EIR allow for the withholding of information where specified conditions are met and it is in the public interest to withhold that information. Registration authorities should refer to their own EIR co-ordinator for advice on handling any request for information under the EIR, particularly where a refusal is contemplated.

Providing copies

2.8.10 Where a request is made to the registration authority to provide copies of the registers or ancillary documents (other than copies made by the public, or an official copy under Section 21 and Regulation 53), such a request may be made under EIR, or should be treated as a request under EIR.

2.8.11 Under EIR, no charge can be made for the inspection of public registers[51], though a charge may be made for the supply of copies. Registration authorities may otherwise charge a reasonable amount for the supply of environmental information, which may include the costs to the registration authority of releasing it under licence from a copyright holder. These charges should not exceed the cost of providing the information. Charges should be set out clearly in a schedule of charges published by the registration authority.

[51] EIR, regulation 8(2)(a).

2.8.12 Regulation 53 enables the registration authority to supply an official copy of the register or records held in connection with the register. An official copy must be certified as a true extract or copy of the document. The charges for official copies must not exceed the registration authority's costs in providing official copies.

2.9 Searches

2.9.1 Registration authorities may expect to receive requests for searches of the registers, generally employing question 22 on search form CON29O. Registration authorities which are not unitary authorities will generally receive such questions referred to it by local district councils.

3 : Preparing for commencement — working with stakeholders

3.1 Introduction

3.1.1 Implementation of Part 1 of the 2006 Act marks a clean break with the 1965 Act. The 1965 Act has been repealed in relation to pioneer authorities and 2014 authorities[52], and Part 1 fully brought into force[53]. Registration authorities need to prepare for implementation to ensure that the duties placed on them can be discharged fully and promptly.

3.1.2 Part 1 of the 2006 Act is the first new legislation to permit a general review and revision of the registers since they were drawn up in the 1960s. The objective of updating the registers can only be achieved if the participation of stakeholders is actively encouraged, yet many of those with an interest in registrations are likely to fall outside formal networks and be hard to reach, while others may not be aware of their opportunity to act.

3.2 Preparing for implementation of Part 1

3.2.1 The registration authority will need to take a number of steps in preparation for the implementation date. Where appropriate, links are shown to more detailed guidance:

- Prepare a notice of the transitional application period[54].
- Decide and publish fee amounts for all relevant applications (see chapter 5.3).
- Create or amend any straddling agreements with a neighbouring registration authority (see chapter 2.3).
- Consider the impact on any pending application under Section 15, or under Section 13 of the 1965 Act (see chapter 5.2).

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[52] Part 1 of Schedule 6, and art.2(1)(h) of the Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008 (SI 2008/1960) and art.3(1)(i) of the Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014.

[53] Except Section 25 (electronic registers).

[54] Regulation 39.

3.2.2 The table below sets out the tasks on which authorities can prepare for Part 1, the recommended deadline for completion of tasks and the level of priority.

Task	Timetable for completion
Conclude review of the registers - check all possible sources of information (see separate sheet on sources of information) - compare to register - draw-up list of anomalies	April 2015 (legal deadline is 14 December 2017)
Contact people affected by anomalies in registers - (using list prepared during the review) contact and encourage applications from people for the purposes of paragraph 2 of Schedule 3 to correct the register during the transitional application period	July 2015
Make proposals to correct anomalies in registers (NB only those with a public interest) - (using list prepared during the review) prepare proposals to correct the register under paragraph 2 of Schedule 3 during the transitional application period	Legal deadline for proposals is 14 December 2017
Publicise the new rules and transitional period - *e.g*. attend county shows or other events with large farming/commoning presence (in areas with agricultural use of common land) - e.g. host events inviting parish councils, commoners' associations and other interested parties	Ongoing
Publish on website all information related to Part 1 - notice of transitional period - application fees - explanation of Part 1 with emphasis on transitional application period - application forms (optional) - lists of cancelled and finalised commons and greens (optional) - links to commons registration material on www.gov.uk - local publicity material - ensure the A-Z has entries for commons and greens	December 2014

3.3 Publicising Part 1

3.3.1 Regulation 39 requires the registration authority to advertise the start of the transitional application period (and, in effect, all of Part 1) by publishing a notice on its website and by serving the notice on local authorities in the area, any bodies which represent commoners (e.g. commons council or association) and any other person the registration authority thinks fit (see chapter 4.4). These requirements should be seen only as a baseline for engagement with stakeholders in the local community, and a registration authority should take additional steps to promote awareness of the transitional application period, and the implementation of Part 1 generally, consistent with the pattern of registrations in its area. For example, a registration authority with substantial registrations of common land used for agricultural grazing should take steps to ensure that commoners exercising rights of common are informed of the transitional application period, are aware of the limited opportunity to apply to amend the registers during that period, and understand the procedure for doing so.

3.3.2 Registration authorities should draw up a communications plan, in advance of the commencement of Part 1 of the 2006 Act, setting out their agenda for engagement with stakeholders either side of the commencement date. The plan should identify: stakeholders, the best way to communicate with them; and a timetable. The plan should be agreed with the registration authority's communications officers.

3.3.3 The most effective communication will be achieved where registration authorities work with other stakeholders to ensure that all those with an interest are aware of their opportunity to act. That will help ensure that the message reaches those who are often hardest to reach: for example, isolated hill farmers who are not members of the farming representative bodies, or householders whose land is wrongly registered, but who are not part of the commoning 'network' in their local community.

3.3.4 Registration authorities should consider taking the following steps, where relevant, to ensure that stakeholders are sufficiently informed about the commencement of Part 1:

- Supplying stakeholders with information about Part 1, including what opportunities exist to amend the registers, and who is able to act, e.g. factsheets, application forms, extracts of the registers, guidance on applications, websites, and contacts.

- Making individual contact with stakeholders, e.g. parish councils, to explain their potential role in relation to Part 1, and to explain what information is already recorded in the registers in relation to their locality (for example, by supplying extracts from the register maps).

- Seminars or briefing sessions for stakeholders to explain what is happening.

- Including information about Part 1 in local authority free magazines. Consider whether there are opportunities to obtain coverage in free magazines etc. published

by other tiers of local government (e.g. National Park authorities, district councils and town or parish council newsletters).

- Seeking editorial coverage in local press and radio. Coverage of this kind can be far more effective in reaching the potential audience than public notices. Local newspapers may be willing to publish articles of local interest (e.g. an appeal for information about wrongly registered land).

- Use existing knowledge of errors (or possible errors) in the registers — such as where the curtilage of a dwelling has been apparently wrongly registered as common land — to notify informally those with an interest (e.g. landowners or right holders) of their opportunity to amend the registers.

- Contact local and national representative bodies to inform their staff and so they relay information about Part 1 to their members or subscribers. Registration authorities may offer or be invited to attend such events to provide briefings. The following bodies may be interested:

    - Country Land & Business Association (CLA)
    - National Farmers' Union
    - Tenant Farmers' Association
    - Ramblers' Association
    - Open Spaces Society
    - British Horse Society
    - Central Association of Agricultural Valuers
    - Agricultural Law Association
    - Campaign to Protect Rural England
    - National Trust
    - Royal Institution of Chartered Surveyors
    - Commons councils and commoners' associations
    - common landowners' associations

- federations of common graziers
- civic societies
- recreational user groups (such as footpath or bridleway user groups)

- Publish information on the registration authority's website: notice of the transitional period, application fees[55], notices of applications and proposals and decisions relating to them[56]. Possibly also application forms and guidance. It should be easy to find the relevant pages of the website, and any alphabetical index should contain links to 'common land', and 'village green').

- Briefing the local access forum which will be interested in the potential impact of applications for the registration and deregistration of common land and town or village greens, and whether the registration authority can make proposals for the registration of such land.

- Inform other local authority staff with an interest: press officers, countryside and rights of way officers, highway authority officers[57], and officers providing a front-line service dealing with public enquiries (such as contact centre staff).

[55] Regulation 39(1)(a).

[56] Regulations 21(1)(a), 22(2) and 36(4).

[57] Highway authority officers may have responsibility for, or knowledge of, highway schemes across registered common land or town or village green involving exchange land.

4 : The transitional period under Schedule 3

4.1 Introduction

4.1.1 Schedule 3 provides for a transitional period during which the registers can be brought up to date.

4.2 Responsibility to act during the transitional period

4.2.1 The transitional period imposes requirements or expectations to act on both the registration authority and on stakeholders. The registration authority must conduct a review of the information in its registers, determine applications and consider whether proposals should be brought forward to amend the register to reflect qualifying events which should be recorded in the public interest. Examples of such events are likely to include a compulsory purchase order which has caused land to cease to be common land or green (and therefore eligible for deregistration), in exchange for other land which has become common land or green (and therefore eligible for registration). Proposals under Schedule 3 must be made and publicised on or before 14 December 2017[58].

4.2.2 In Defra's view, the registration of any qualifying event which affects the extent of registered land should be regarded as affecting the public interest. Where a registration authority makes a proposal to amend the registers to reflect such an event, it should ensure that full effect is given to the event — so that if, for example, a compulsory purchase order made provision both for the extinguishment of rights of common and for land to cease to be common land, a proposal should be made to record the full effect of the order, including the deletion of the rights from the register, notwithstanding that the extinguishment of rights in isolation might be regarded as a matter only of private interest.

4.2.3 The registration authority must also determine applications from the public to register qualifying events, and work with stakeholders to raise awareness of the opportunity to apply during the transitional period (see chapter 4.4). It is the responsibility of stakeholders to apply to amend the register to reflect qualifying events which should be recorded in pursuance of any private interest. For example in the case of an unrecorded surrender by deed of a right of common, it would be in the common land owner's interests

[58] Regulation 18(3).

to register the extinguishment, because failure to do so would cause the right to be revived at the end of the transitional period[59].

4.2.4 While the Regulations permit a registration authority to make a proposal for exactly the same purposes as any person may make an application under paragraph 2 of Schedule 3, registration authorities should consider carefully whether to make a proposal which confers no benefit other than to private interests. Generally, any qualifying events which affect only the extent or description of a right of common, or the persons entitled to exercise those rights, may be taken to affect only the private interests involved, and therefore, Defra considers that a proposal made solely for the purposes of paragraph 2(2)(a) and (b) of Schedule 3 will seldom confer any wider public benefit.

4.2.5 There is no obligation during the transitional period to update the rights section of the registers to correctly identify the persons entitled to exercise rights of common attached to land: the register will continue to show such rights as attached to land, and therefore the rights will remain exercisable by the person in ownership or occupation of that land. Indeed, there is no power for anyone to apply to register an apportionment under Schedule 3 as a qualifying event, unless the apportionment is a prerequisite to the registration of another qualifying event relating to only part of a right of common. (An application could be made under Section 8 but a fee will be charged.)

4.3 Duration of the transitional period

4.3.1 The transitional period lasts four years, beginning on 15 December 2014 and ending on 14 December 2018. The transitional period is time-limited in order to encourage, as soon as possible, the updating of the registers to reflect unregistered events.

Applications submitted during the transitional application period

4.3.2 Applications and proposals can be made under paragraph 2 of Schedule 3 within the first three years of the transitional period, so that there is time for them to be determined during the fourth year. The first three years are known as the 'transitional application period', which runs from 15 December 2014 until 14 December 2017. An application made during the transitional application period must be determined, and the register duly amended, by the end of the transitional period on 14 December 2018[60].

Applications submitted after the transitional application period but during the transitional period

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[59] Section 18 of the Act provides for the conclusiveness of register entries, and paragraph 3 of Schedule 3 makes additional provision regarding the extinguishment of unrecorded rights of common at the end of the transitional period.

[60] Regulations 38 and 41(1).

4.3.3 Applications may continue to be made between 15 December 2017 and 14 December 2018, but an application fee will apply (if the registration authority has specified a fee amount for each type of application, e.g. creation £X, variation £Y). These applications must be determined by the end of the transitional period on 14 December 2018.

Applications submitted after the transitional period

4.3.4 Applications can be made after the end of the transitional period under paragraph 4 of Schedule 3[61], but any such 'late' application will be required to be accompanied by an application fee (if specified, see paragraph above). Furthermore the registration authority may only grant the application if, in addition to the usual criteria, it determines that it would be fair to do so having regard to any reliance placed on the unamended register by a third party (the fairness test)[62]. So there is a strong incentive for applications to be made within the transitional application period.

4.4 Reviews conducted by registration authorities

Publicising the review

4.4.1 Regulations 39 and 40 require a registration authority to publicise the transitional period, the types of qualifying events that are covered by it and that applications can be made in order to register their effect, and carry out a review of the information contained in its registers and consider whether to make proposals to amend the registers in consequence of qualifying events.

4.4.2 It is important that, during the transitional period, steps are taken by registration authorities to communicate the requirements of the transitional period effectively to those who may have interests in the registers which need to be updated. For example:

- common owners who have acquired and extinguished rights of common (perhaps in order to increase control over common land valued for sporting use) will need to ensure that the extinguished rights are removed from the register;

- highways authorities will need to register exchange of land schemes in relation to roads built on common land and greens acquired under compulsory purchase powers;

[61] Regulation 42.

[62] Regulation 41(4) and (5).

- commoners who have acquired rights of common in gross will need to ensure that their details are updated.

4.4.3 Every registration authority is required to take some preliminary steps to publicise the transitional period in its area:

- to place notice of the transitional period on its website; and

- to serve notice of it on:

    - every other local authority in its area (including parish councils and the chairman of any parish meeting);

    - bodies which represent the interests of commoners, such as commons councils/associations, landowner and farmer representative bodies, amenity groups, bodies representative of land managers and land lawyers; and

    - any other persons thought appropriate.

Researching evidence for amendments to the registers

4.4.4 Registration authorities should seek to build up a record of anomalies which should be corrected in the registers in the public interest (see chapter 4.2). Such anomalies will often already be known to registration authorities. The amendments can be divided into two classes: events which occurred after 1970 and ought to be registered during the transitional period to have continuing effect; and mistakes, oversights or other errors in the registers which can be registered during or after the transitional period.

4.4.5 Registration authorities are expected to make proposals during the transitional application period to amend the registers but only in respect of qualifying events affecting the public interest. Research should reveal other purposes for which amendments may be desirable, but because these amendments cannot be sought under paragraph 2 of Schedule 3, they are not required to (although they may) be pursued during the transitional period.

4.4.6 The following are examples of amendments which may be registered during or after the transitional period:

- significant errors in the boundary of registered land, particularly where arising from an error on the part of the registration authority at the time of registration (under Schedule 2 or under Section 19);

- other significant errors arising from an error on the part of the registration authority at the time of registration (under Section 19);

- exempted areas of land which may be registered under paragraph 2 or 3 of Schedule 2;

- other unregistered lands statutorily recognised as common land or green (e.g. where the land is included in a scheme of regulation under Part I of the Commons Act 1899), which may be registered under paragraphs 2 or 3 of Schedule 3;

- town or village greens wrongly registered as common land (under paragraph 5 of Schedule 2);

- shortcomings in identification of dominant tenements (e.g. where rights are attached to a farm holding, but the extent of the holding is unidentified: under Section 19).

4.4.7 Acquiring such information may require significant research on the part of the registration authority, but although the evidence relating to the group of amendments above need not be gathered during the transitional period itself, registration authorities are encouraged to research the registers and the scope for amendments as early as possible, particularly having regard to the cut-off date for proposals.

Sources of data

4.4.8 Registration authorities should have particular regard to the information available from Defra's casework database (see www.gov.uk) about consents issued by the Secretary of State in relation to common land and town or village greens.

4.4.9 The information available from the database will include, in particular, consents relating to the following events, which should be reflected in appropriate entries in the registers:

- Compulsory acquisition of land and (where appropriate) rights of common for development, for which purposes a certificate has been granted by the Secretary of State under Section 19 of the Acquisition of Land Act 1981. In such cases, the compulsory purchase order, and the Secretary of State's certificate, will identify the land taken for development and the rights of common acquired, and the replacement land given in substitution. Where a certificate is granted under Section 19(1)(b) of the 1981 Act[63], no replacement land is provided, but the effect of the order is that the taken land nevertheless ceases to be common land, or town or village green, as the case may be, and any rights of common exercisable over the land are discharged. Where a certificate is granted under Section 19(1)(aa) of the 1981 Act, the land is purchased in order to secure its preservation or improve its

[63] Or a certificate under paragraph 11(1)(b) of Schedule 1 to the Acquisition of Land (Authorisation Procedure) Act 1946.

management, and does not cease to be common land or green, nor are any rights discharged.

- Compulsory acquisition of rights over common land or town or village green, for which purposes a certificate has been granted by the Secretary of State under paragraph 6 of Schedule 3 to the Acquisition of Land Act 1981. In such cases, the compulsory purchase order, and the Secretary of State's certificate, will identify the rights acquired and the rights of common affected, and any replacement land given in substitution. Where a certificate is granted under paragraph 6(1)(a), 6(1)(aa) or 6(1)(c) of Schedule 3 to the 1981 Act, no replacement land is provided, and the compulsory purchase order should be inspected to ascertain the effect of the order on the rights of common.

- A scheme of regulation under Part I of the Commons Act 1899, or an order for regulation under the Commons Act 1876: in such cases, the land subject to regulation (as shown in the map to which the scheme or order refers) should be consistent with the area registered under the 1965 Act, unless the scheme or order has been subsequently amended.

- Inclosure of land authorised by the Secretary of State under Section 22 of the Commons Act 1899.

- An order of exchange of land under Section 147 of the Inclosure Act 1845.

- A declaration made by deed under Section 193(2) of the Law of Property Act 1925 which declares that that Section is to apply to the land specified in the deed: in such cases, the land specified in the deed should be consistent with the area registered under the 1965 Act, unless the deed has been subsequently amended.

- A consent under articles 7, 8 and 12 of the Greater London Parks and Open Spaces Order 1967[64], which enable the permanent inclosure of common land or green; under article 15, which confers on London borough councils powers to exchange parts of common land or green for land adjoining; and under article 17, which confers on such councils powers to use portions of common land for street improvements.

4.4.10 An entry in the casework database which precedes the date of the provisional registration of land under the 1965 Act will rarely be relevant to the review.

[64] The Order was confirmed by the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.

Example

Common land 'A' was subject to an order of exchange confirmed in 1955 and ceased to be common land, and land 'B' was created common land in substitution at the same time. In 1967, land A was nevertheless registered as common land, and land B was not registered, and that registration became final in due course. The effect of registration of land A is that the land has conclusively become common land (subject to any rights of common which may have been registered as exercisable over it), and land B has ceased to be common land[65]. Neither application nor proposal to register the effect of the exchange may be made under paragraph 2 of Schedule 3, because the land was not registered common land at the time of the exchange[66]. (However, it may be possible to register land B under paragraph 2 of Schedule 2, and it may also be possible to deregister land A under paragraph 6 or 7 of Schedule 2, but only if certain conditions are met.)

4.4.11 Registration authorities should, in the first instance, seek information about such events from local resources (such as county highways departments or local archives). Records relating to older events may also be lodged in the National Archives, and the database may give details of the relevant file number (usually commencing with the prefix 'MAF…'). In relation to compulsory purchase orders, reference should be made to the appropriate compulsory purchase authority. Where records cannot be obtained from these sources, Defra may be able to help.

National Archives

4.4.12 The National Archives website search function can be used to run searches for key words such as commons and greens in the registration authority's area, e.g. specific commons or general files for commons and greens in the area.

Local online archives

4.4.13 Where available, the online archives of the registration authority may contain details relating to commons and greens, e.g. schemes of regulation for commons and greens.

Commons Commissioners' decisions

[65] See Section 1(2) of the 1965 Act.

[66] See paragraph 2(2)(c) and (d) of Schedule 3.

4.4.14 The commons commissioners' decisions database[67] may include decisions on common land and greens in the registration authority's area, which can be compared to the register. Decisions may also be relevant to applications and proposals under Schedule 2.

Highways Agency

4.4.15 The Highways Agency should be able to provide information about road exchange schemes managed by the Agency on behalf of the Secretary of State for Transport. There are land and property acquisition offices in Bedford, Birmingham, Dorking and Manchester. The Exeter office deals with property management and disposal.

Local parish councils

4.4.16 Parish and town councils in the registration authority's area may have information about anomalies relating to boundaries, wrongly registered land, or non-registered land.

Registration authority's files for correspondence about commons and greens

4.4.17 The registration authority's own files may yield information about anomalies regarding boundaries and wrongly registered or non-registered land, e.g. letters from residents which says their house or garden was wrongly registered under the 1965 Act. These archives may include schemes of regulation made under Part I of the Commons Act 1899, or orders of regulation made under the Commons Act 1876 (they may be held by the district council). Comparing these documents with the registers may highlight anomalies.

[67] www.acraew.org.uk/index.php?page=commissioners-decisions

5 : Dealing with applications and proposals

5.1 Introduction

5.1.1 The advice in this chapter applies to all applications and proposals referred to in chapters 6, 7 and 8, but special rules apply to particular types of applications: see the advice and the Regulations on the relevant application.

5.2 Transitional arrangements

5.2.1 The commencement of Part 1 in relation to the pioneer authorities and 2014 authorities has effect subject to transitional arrangements for applications already made under Section 13 of the 1965 Act. This section explains these arrangements.

Section 13(a) of the 1965 Act

5.2.2 Section 13(a) of the 1965 Act was repealed on 1 October 2006[68]: from this date, no application could be made to remove land from the register on its ceasing to be common land or town or village green. However, a saving to the repeal[69] provided that applications could still be made under Section 13(a) of the 1965 Act insofar as the application is in consequence of an instrument arising from the exercise of any statutory powers (e.g. an exchange of land under Section 147 of the Inclosure Act 1845, or on a compulsory purchase order). Any such application will fall automatically on the commencement of Part 1, and cannot continue to a determination: accordingly, a new application must be made pursuant to Section 14 or paragraph 2 of Schedule 3, as appropriate. A further saving[70] provides that applications which were made under Section 13(a) of the 1965 Act before 1 October 2006 and which were not determined by that date may continue to be dealt with as if Section 13(a) of the 1965 Act had not been repealed. In Defra's view, where such an application, on determination, requires land to be removed from the register, any amendment to the register must be made to the registers held under the 2006 Act but in accordance with regulations made under the 1965 Act.

Section 13(b) of the 1965 Act

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[68] Article 2(h)(i) of the Commons Act 2006 (Commencement No. 1, Transitional Provisions and Savings) (England) Order 2006 ('the 2006 commencement order') (SI 2006/2504).

[69] Article 3(3) of the 2006 commencement order.

[70] Article 3(4) of the 2006 commencement order.

5.2.3 Section 13(b) of the 1965 Act was repealed on 6 April 2007[71]: from this date, no application could be made under the 1965 Act to add land to the register on its becoming a town or village green, and instead, Section 15 was brought into force for the same purpose[72]. However, a saving to the repeal[73] provided that applications could still be made under Section 13(b) of the 1965 Act insofar as the application is in consequence of an instrument arising from the exercise of any statutory powers (e.g. an exchange of land under Section 147 of the Inclosure Act 1845, or on a compulsory purchase order), or on new land becoming common land (other than by virtue of an instrument in exercise of any statutory powers), such as on a grant of a new right of common over previously unregistered land. Any such application will fall automatically on the commencement of Part 1, and cannot continue to a determination: accordingly, a new application must be made pursuant to Section 6, 14 or paragraph 2 of Schedule 3, as appropriate. A further saving[74] provides that applications which were made under Section 13(b) of the 1965 Act before 6 April 2007 and which were not determined by that date may continue to be dealt with as if Section 13(b) of the 1965 Act had not been repealed (including an application to register land as a new town or village green). In Defra's view, where such an application, on determination, requires land to be registered, any amendment to the register must be made to the registers held under the 2006 Act but in accordance with regulations made under the 1965 Act.

Section 13(c) of the 1965 Act

5.2.4 Section 13(c) of the 1965 Act was repealed on 1 October 2008 in the pioneer authorities[75] and on 15 December 2014 in the 2014 authorities[76]: from those dates, no application can be made to the affected authorities under the 1965 Act to amend the register where any rights become apportioned, extinguished or released, varied or transferred. However, a saving to the repeal[77] provides that applications which were made under Section 13(c) of the 1965 Act before 1 October 2008 or 15 December 2014, as applicable, but were not determined by that date may continue to be dealt with as if Section 13(c) of the 1965 Act had not been repealed. In Defra's view, where such an application requires an amendment to the register, the amendment must be made to the registers held under the 2006 Act but in accordance with regulations made under the 1965 Act.

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[71] Article 3(e)(i) of the Commons Act 2006 (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007 ('the 2007 commencement order') (SI 2007/456).

[72] Article 3(c) of the 2007 commencement order.

[73] Article 4(3) of the 2007 commencement order.

[74] Article 4(4) of the 2007 commencement order.

[75] Article 2(1)(h) of the Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008 ('the 2008 commencement order') (SI 2008/1960).

[76] Article 3(1)(i) of the Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014 ('the 2014 commencement order') (SI 2014/3026)

[77] Article 3(2)–(3) of the 2008 commencement order or article 5(2)-(3) of the 2014 commencement order.

5.2.5 In Defra's view, an application may reasonably be treated as made before 15 December 2014 if it is consigned to the post (as evidenced by a postmark) on or before 14 December. If an application arriving after 15 December does not bear a postmark, or the postmark is illegible, the evidential burden rests with the applicant to show that the application was posted before 15 December.

Section 15 and the 2007 Interim Arrangements Regulations

5.2.6 Applications made under Section 15 before 1 October 2008 in the pioneer authorities or 15 December 2014 in the 2014 authorities, will have been dealt with under the Interim Arrangements regulations[78]. Those 2007 Regulations are revoked in the pioneer authorities and 2014 authorities so applications must instead be processed under the 2014 Regulations. Regulation 54(4) and (5) provide that anything done under the 2007 Regulations need not be done again, and that Regulations 15 to 19 and 26(3) and Schedule 4 do not apply. The effect of the disapplication of Regulation 26(3) is that an application made to a pioneer authority before 1 October 2008 or 2014 authority before 15 December 2014 cannot be referred to the Planning Inspectorate for determination.

Section 14(b) of the 1965 Act

5.2.7 Under Section 14(b) of the 1965 Act, the High Court may order a register to be amended if: "the register has been amended in pursuance of Section 13 [of the 1965] Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act; and…the court deems it just to rectify the register." An application could be made to the court under Section 14(b) of the 1965 Act even in relation to an amendment made to the register under Section 15 of the 2006 Act[79]. Section 14(b) of the 1965 Act was repealed on 1 October 2008 in the pioneer authorities and on 15 December 2014 in the 2014 authorities, but a saving to the repeal[80] provides that in relation to any amendment before those dates, as applicable, Section 14(b) of the 1965 Act continues to apply as if it had not been repealed.

Finality of registrations

5.2.8 Under Sections 6(2), 6(3) and 7(2) of the 1965 Act, a registration authority was required to amend its register where any registration became final, or had been cancelled or become void (on the direction of the Commons Commissioner or otherwise). Where a

[78] The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (SI 2007/457).

[79] Article 4(1)(b) of the 2007 commencement order.

[80] Article 3(6) of the 2008 commencement order and article 5(4) of the 2014 commencement order.

registration authority has failed to carry out the necessary amendment to the register, the duty to make the amendment is preserved by a saving[81].

Registration of person as owner of land

5.2.9 Under Section 8(2) or 8(3) of the 1965 Act, a registration authority was required to register a person as the owner of land on a direction of the Commons Commissioner. Where a registration authority has failed to carry out the necessary amendment to the register, the duty to make the amendment is preserved by a saving[82].

5.3 Fees

5.3.1 For most types of applications, the applicant must pay a "reasonable" fee set by the registration authority. The registration authority does not need to process an application until the specified fee has been paid.

5.3.2 The registration authority should set its application fees at full cost recovery. Fee amounts must be specified on the registration authority's website before they take effect. The first time fees are published they take effect immediately, but where amounts are subsequently amended, the new amounts must be published 14 days before they take effect.

5.3.3 When setting fees for the first time, the registration authority is encouraged to consider the fee amounts published by the pioneer authorities as the basis for its own, and to substitute its own amounts when its own costs have been calculated, i.e. after processing applications.

5.3.4 No fee is chargeable for the types of applications listed in Schedule 5 to the Regulations:

- Section 6 if the creation of a right of common results in new common land (a fee can be charged where the right would be exercisable over existing registered common land);

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[81] Article 3(4) and (5) of the 2008 commencement order and article 4(1) and (2) of the Commons Act 2006 (Commencement No.1 and Savings) (England and Wales) and Commencement No.5 (England) (Amendment) Order 2010 (SI 2010/2356). The Commons Registration (Disposal of Disputed Registrations) Regulations 1972 (SI 1972/437), as amended by SI 1993/1771, require entries to be made in the prescribed manner for the purposes of Section 6(2) of the 1965 Act. The Commons Registration (Finality of Undisputed Registrations) Regulations 1970 (SI 1970/1371) require entries to be made in the prescribed manner for the purposes of Section 7(2) of the 1965 Act.

[82] Article 3(2) of the 2006 commencement order.

- Section 7 if the variation would result in the registration of new common land (a fee can be charged where the variation would not result in the creation of new common land);

- Section 10;

- Sections 15(1) and (8);

- Section 19(2)(a) to correct a mistake made by a registration authority, and 19(2)(c) to remove a duplicate entry in the register;

- Schedule 2, paragraphs:

  - 2 or 3 to add common land or town or village green

  - 4 to register waste land of a manor as common land

  - 5 to correct town or village green wrongly registered as common land;

- Schedule 3, paragraph 2 – any application made during the transitional application period (but fees can be charged for applications made after both the transitional application period and the transitional period).

5.3.5 Authorities must refer certain types of applications to the Planning Inspectorate for determination. If it is a type of application which is chargeable, the Planning Inspectorate will also charge a fee for its portion of the work. Unlike authorities, the Planning Inspectorate's fees are set in the Regulations, but it cannot charge a fee for the applications listed in Schedule 5 to the Regulations. Where the registration authority thinks an application could be referred to the Planning Inspectorate and it is a chargeable type of application, it should inform the applicant that they would need to pay a fee to the Planning Inspectorate for its portion of the work.

5.4 Discharge and delegation of functions by local authorities

5.4.1 The determination of applications and proposals under Part 1 is a quasi-judicial function. Section 13 of the Local Government Act 2000 (functions which are the responsibility of an executive) enables regulations to prescribe functions of a local authority which may, or may not, be undertaken by an executive of that authority. The

principal regulations are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000[83]. Regulation 2(1) explains that:

> "(1) The functions of a local authority specified in column (1) of Schedule 1 to these Regulations by reference to the enactments, directions and guidances specified in relation to those functions in column (2) are not to be the responsibility of an executive of the authority."

5.4.2 The Local Authorities (Functions and Responsibilities) (England) (Amendment No. 3) Regulations 2008[84] amend the 2000 Regulations by reserving local authority functions under Part 1 to full council, or a committee of the council. Such functions must not therefore be exercised by an executive of a local authority[85]. These functions include, not only the determination of an application under Part 1, but also a decision whether to make a proposal under Part 1.

5.4.3 The powers of a local authority to protect common land under Sections 41 and 45 of the 2006 Act are also reserved in the same way, and decisions on such matters must also be taken by full council, or a committee of the council.

5.4.4 Any decision making power, whether it is one which must be taken by the council, or a committee of the council, or one which may be taken by an executive, may be delegated to an appropriate officer[86]. Many decisions taken by registration authorities under the 2006 Act are of an administrative or quasi-judicial nature (e.g. extinguishment of rights of common under Section 13). Authorities should ensure that appropriate delegations are in place so that routine applications may be determined in good time.

5.4.5 Registration authorities should particularly consider whether such delegations are required to decide not only whether to grant or refuse an application or proposal, but also whether to accept or reject a: withdrawal (see chapter 5.13), amendment (see chapter 5.14), repeat application or proposal (see chapter 5.15), or partly grant or refuse an application (see chapter 5.16).

5.5 Site visits and powers of entry

5.5.1 Registration authorities may wish to inspect land in connection with an application or proposal under Part 1: for example, where a householder seeks to adjust the boundary

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[83] SI 2000/2853.

[84] SI 2008/2787.

[85] A cabinet is a type of executive of a local authority: see Section 11 of the Local Government Act 2000.

[86] Section 101(1)(a) of the Local Government Act 1972.

of common land which includes the curtilage of the dwelling. There are no powers of entry to land under the 2006 Act, and a registration authority should not normally enter land without the permission of the landowner. In many cases, particularly where an application is made by the landowner, such permission will be willingly given. If permission is refused, it may be possible to inspect the land from public highways (including public rights of way) which pass across or near to the land.

5.5.2 Registration authorities should be cautious of exercising any right of access to land under Part I of the Countryside and Rights of Way Act 2000, under Section 193 of the Law of Property Act 1925, under any other legislation which confers a public right of access to common land, or any common law right to use of a town or village green. Such rights are invariably conferred for the purposes of recreation (or for similar purposes), and in Defra's view, a landowner would be entitled to require a registration authority's officer to leave such land if that officer were present for the purposes of a site survey. Accordingly, where a registration authority requires to inspect such land, it should seek permission from the landowner notwithstanding any public right of access, and should respect any refusal.

5.5.3 Where a registration authority wishes to inspect land which is unclaimed, no permission to enter can be obtained, because no-one is known to have the authority to give such permission. In such a case, a registration authority may reasonably enter the land to inspect it. For the purposes of deciding whether land is unclaimed, the registration authority is advised to adopt the criteria in Section 45 (powers of local authorities over unclaimed land), that is that no person is registered as proprietor in the register of title maintained by the Land Registry and the registration authority cannot otherwise identify the owner. The registration authority should not assume that land is unclaimed merely because no person is recorded as owner of the land in the ownership section of the commons register.

5.5.4 A registration authority has a power under Regulation 33(2) to conduct a site inspection of land affected by an application or proposal, but where the registration authority appoints an inspector to hold a public inquiry into an application or proposal, Regulation 33(1) requires that the inspector must inspect the land unless permission is refused.

5.6 Electronic communications

5.6.1 The use of email can speed up the application process, and is generally less costly and burdensome for all parties. Regulation 50 permits the use of electronic communication where the email would result in the recipient receiving the information in substantially the same form as if it had been sent in printed form, provided that the recipient has consented to receive communications in this way. However, any person may communicate with the registration authority by email, without the authority's prior consent to using this medium. Registration authorities are therefore advised to establish and advertise email accounts which may be used in relation to business relating to Part 1 (they may, of course, wish to use customer contact centres for this purpose), so that correspondence may be taken forward in the absence of particular staff.

5.6.2 An electronic communication need not be signed, but in case of any doubt, registration authorities should take care to establish the genuineness of any correspondent. However, no application may be submitted by an electronic communication.

5.7 Applications from unincorporated bodies

5.7.1 Applications may be made by either an individual, or (as circumstances may require or allow) by other bodies, whether incorporated (such as a local authority or a limited company) or unincorporated[87] (such as an association or partnership). Where an application includes the name of such a body, the registration authority should take care to ensure that the application is treated as having been made by that body, rather than the individual who has signed the application.

5.7.2 A registration authority will need to carefully consider whether to accept a withdrawal of, or amendment to, such an application, particularly as a proprietorial interest in the application may well extend beyond those who have signed the application form. Refer to chapters 5.13 and 5.14.

5.8 Vacant Church of England benefices

5.8.1 Occasionally, an application or proposal may relate to an interest in land, or in a right of common, which belongs to the incumbent of a benefice of the Church of England (i.e. a rector, vicar or priest in charge). Where the benefice is vacant there would be no-one with the authority to act on behalf of that interest unless special provision were made for the purpose. Regulation 49 provides that, in these cases, the Diocesan Board of Finance for the diocese in which the land is situated may act with respect to the interest, and the registration authority should ensure that any notice or correspondence in relation to a vacant benefice is sent to the appropriate Diocesan Board of Finance.

5.9 Stamp Duty Land Tax

5.9.1 Where an application is made to amend the register affecting a right of common, the application may be liable to Stamp Duty Land Tax (SDLT), but only if the value of the transaction is greater than the current SDLT thresholds: for transactions involving non-residential property, of land up to £150,000 on which the annual rent is £1,000 or more, or on other land of over £150,000.

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[87] 'Person' is defined in Schedule 1 to the Interpretation Act 1978 to include "a body of persons corporate or unincorporate".

5.9.2 SDLT may be due if the application is made (under Section 6, 7, 10, 12 or 13, or under paragraph 1 of Schedule 1) to create, vary, attach, transfer, extinguish, or sever a right of common and the applicant or anyone connected with the application is giving more than £150,000 for the purposes of the application (or, if less, the annual rent is £1,000 or more). SDLT will not normally apply in relation to an application under Schedule 3 to update the registers to register a historic event which occurred before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities.

5.10 'Applications' not duly made

5.10.1 A registration authority is under no duty to proceed with an application which does not comply with the requirements of the Act or the Regulations. So, for example, if information required by the Regulations is not supplied with the application, the registration authority need not formally acknowledge the 'application' nor proceed to publish notice of the application. But the registration authority should explain to the applicant what is needed to put the application in order, and afford the applicant time to comply. A registration authority should not use its powers to direct the provision of additional information under Regulation 20(2) at this stage, because to do so would be to give rise to a presumption that the application had been duly made.

5.10.2 If, following a request for the application to be put in order, the applicant fails to comply, the registration authority should explain that it cannot deal with the application as it stands, and return both the application and the fee. A registration authority has no power to charge a fee for an application which is not duly made, until it has been put in order.

5.10.3 Does a defect in an application — a failure to comply with some requirement of the 2006 Act or the Regulations — invalidate the application, so that it cannot be proceeded with, even if the registration authority would prefer to waive the non-compliance? In Defra's view, no: the registration authority must consider the consequences of non-compliance, in deciding whether to proceed with the 'application' as it stands. In some cases, the registration authority may decide to waive non-compliance, and it would be open to a person adversely affected by that decision to challenge it in the courts. In *R v Soneji and another*, Lord Steyn, summarising how the courts had viewed whether adherence to statutory requirements as to procedure were mandatory or directory, said that: "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."[88]

5.10.4 Some commentators have drawn attention to the judgment of the Court of Appeal in *R (Winchester College) v Hampshire County Council*, which focused on an application under Section 53(5) of the Wildlife and Countryside Act 1981 ['the 1981 Act'] to show a way on the definitive map and statement as a byway open to all traffic. The case turned

[88] At paragraph 23.

on the requirements of Section 67(6) of the Natural Environment and Rural Communities Act 2006 ('the NERC Act'), which provides that: "For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act." So the case examined, not whether a surveying authority could accept an application under Section 53(5) of the 1981 Act which did not fully conform to the requirements of paragraph 1 of Schedule 14 to the 1981 Act, and regulations made under that Act, but whether such an application (if it had been accepted) was sufficient for the purposes of Section 67 of the NERC Act, i.e. whether the application was 'made in accordance with paragraph 1'.

5.10.5 In paragraph 55 of the judgment, Dyson LJ said: "I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the 'trigger' for a decision under section 53(2) to make such modifications to the [definitive map and statement] as appear requisite in consequence of any of the events specified in subsection (3)." In other words, the court makes clear that it is merely determining how Section 67 should be applied to the circumstances, and not suggesting that applications which fail the Section 67(6) (NERC Act) test should also be considered not to be valid applications for the purposes of Section 53(5) (of the 1981 Act).

5.11 Management of an application

5.11.1 This section describes the procedures to be undertaken by the registration authority on receipt of all applications.

Forms

5.11.2 Applications must be made in writing on the relevant form provided by the Secretary of State[89]. There are 15 forms named CA1 to CA15 available at https://www.gov.uk/common-land-management-protection-and-registering-to-use#commons-registration. The table below specifies the correct form for each type of application.

Type of application	Correct form
Section 6 – creation of a right of common	CA1

[89] Regulation 16(1)(a).

Section 7 – variation of a right of common	CA2
Section 8 – apportionment of a right of common	CA3
Section 10 – attachment of a right of common	CA4
Section 11 – re-allocation of a right of common	CA5
Section 12 – transfer of a right of common in gross	CA6
Section 13 – surrender or extinguishment of a right of common	CA7
Schedule 4, paragraph 8 – statutory disposition pursuant to section 14	CA8
Section 15(1) & (8) – registration of town or village greens	CA9
Section 19 – correction of the register	CA10
Schedule 1, paragraph 1(6)(b) – severance by transfer to a public body	CA11
Schedule 1, paragraph 3(7)(b) – severance authorised by order	CA12
Schedule 2, paragraphs 2 to 9 – adding to, or removing land from, the registers of common land and town or village greens	CA13
Schedule 3 – application to record an event which occurred between Jan 1970 and the day Schedule 3 commenced (1/10/2008 for pioneer authorities or 14/12/2014 for 2014 authorities), but was not recorded in the register	CA14
Regulation 43 of the Regulations - declaration of entitlement to exercise a right of common	CA15

5.11.3 The application forms are in two parts for applications under Sections 6, 7, 12, 13 and Schedule 1, paragraph 1(6)(b). Part A allows for an express grant (deed) and Part B allows for the registration of the deed's effect. Applicants do not need to use Part A but would need to provide evidence of the express transfer. For example, for applications under Section 6, a right of common can be legally created in Part A of the form, but if the applicant does not complete Part A then a deed drawn up by a lawyer would suffice.

5.11.4 The application must be signed by every applicant or the applicant's representative (or secretary or other authorised officer of any incorporated or unincorporated body).

Fees

5.11.5 A fee must accompany the application if a fee is chargeable and the registration authority has published a fee for that type of application. Neither the registration authority nor the Planning Inspectorate is required to take any action until the fee is paid (see chapter 5.3)[90].

Initial checks

5.11.6 The registration authority should check to see whether the applicant has supplied all the requisite information and documents and has signed the application. This includes the application fee, where relevant, and an Ordnance map of sufficient precision and scale, if necessary, as applicants can describe the land by reference to the register unit numbers of provisional registrations under the 1965 Act[91]. Maps must be at a scale of at least 1:2,500, except in the following cases where it must be at a scale of at least 1:10,560: (a) wholly or predominantly moorland, (b) land to which a right of common is attached, (c) a neighbourhood or locality related to an application to register a town or village green under Section 15(1)[92].

5.11.7 In relation to an application under Section 7, 11, 13, paragraphs 1(6)(b) or 3(7)(b) of Schedule 1, or under the Regulations for the purposes of Section 14 or of paragraph 2 or 4 of Schedule 3, the registration authority should establish if the application relates to the whole or only part of a right of common attached to land, and if it relates to only part, that another application has been made to apportion the rights of common for the purposes of Section 8[93] or of paragraph 2 or 4 of Schedule 3[94]. Where another application is required, both applications must be submitted at the same time (and both fees paid), although the apportionment must be effected in the register before the variation (see chapter 6.3).

Acknowledgement

5.11.8 As soon as is practicable after receiving the application, and if satisfied that the application is duly made, the registration authority must send the applicant an acknowledgement of receipt. This must include a unique reference number allotted to the

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[90] Regulation 17(7).

[91] Regulation 19.

[92] Regulation 19(5).

[93] Paragraph 3(1)(a) of Schedule 4 to the Regulations.

[94] Paragraph 18(1) of Schedule 4 to the Regulations.

application and a postal and email address to which the applicant may write[95]. The registration authority should also stamp the application form, either with the date of receipt, or of the date on which the application was decided to be treated as duly made.

5.11.9 Either at the same time, or as soon as possible thereafter, the registration authority should write to the applicant:

- specifying or quoting the unique reference number and postal and email address with which the applicant may communicate;

- enclosing a copy of the notice published on the registration authority's website (see paragraph 5.11.18);

- directing the applicant to supply any further information or documents and the deadline for complying (see paragraph 5.11.17).

Ownership of land

5.11.10 A registration authority may be required to ensure that an application is made, or consented to, by the owner of land: for example, in relation to an application under Section 13 for extinguishment of a right of common attached to land, the application must be made either by the owner of the common over which the right is exercisable, or the owner of the dominant tenement to which the right is attached (or the owner of the right of common in gross).

5.11.11 In any case where the registration authority is required to be satisfied as to ownership of land, it should look to see that sufficient evidence is supplied with the application.

5.11.12 Evidence of ownership may often be shown by production of an office copy of the register of title held by the Land Registry. The name of the owner will be shown in the title register and the plan will show the land to which the title relates. Where appropriate, the owner must be the same as the applicant (or person required to give consent): for example, if the owner is a registered limited company, then an authorised representative will need to apply (or give consent) on behalf of the company; if there are two or more owners as tenants in common (i.e. each of whom owns a share of the land as a whole), then both owners will need to apply (or give consent).

5.11.13 Where the title to land is not registered in the register of title, the applicant will need to supply an epitome of title: a copy of conveyances of the land, identifying the purchaser and the land which is conveyed, going back at least 15 years.

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[95] Regulation 20(1).

5.11.14 A registration of ownership of common land, recorded in the ownership section of the registers, should not be treated as conclusive evidence of ownership (see paragraph 2.6.25).

5.11.15 The registration authority should confirm that the title relates to the whole of the land referred to in the application. In certain cases, an application from the owner of part (rather than the whole) of a common may be acceptable: please check the relevant Regulation. Where an application is received from the owner of only part of a historic dominant tenement to which rights of common are attached, a separate application must be made under Section 8 for the right to be apportioned between the applicant and the residue of the historic dominant tenement (see chapter 6.3).

5.11.16 Ownership is defined in Section 61(3)(a) as the "ownership of a legal estate in fee simple in the land", and owner means the person holding that estate. In effect, ownership means the freehold ownership of land. A lease or tenancy does not qualify as ownership, and therefore, where an application must be made by the owner of land, or the owner of land must consent to an application, an application (or consent) from a lessee or tenant cannot be accepted.

Power to specify directions

5.11.17 If the registration authority needs further information from the applicant in order to determine the application, then it may require this to be provided. The registration authority has the power to direct the applicant to supply any further information or documents in order to determine the application and to specify a time for complying with any such direction. Where the applicant fails to comply, the registration authority can abandon the application[96].

Notices

5.11.18 The registration authority must take the following steps as soon as reasonably practicable after receiving the application (if duly made):

- publish a notice of the application on its website;
- email a copy of the notice to any person who has requested to be kept informed of any applications or proposals submitted under Part 1 and has supplied the registration authority with an email address for that purpose;
- serve the notice on each person specified in Schedule 7 to the Regulations for that type of application.

[96] Regulation 20(2), (3) and (4).

5.11.19 The regulations do not specify a minimum period for retaining website notices, but Defra's advice is that registration authorities should retain them for a minimum of 6 weeks.

5.11.20 Registration authorities must maintain a list of persons who wish to be notified by email of applications and proposals made under Part 1 in relation to the registration authority's area. The requester opts in to receive all notices[97].

5.11.21 In relation to the persons specified in Schedule 7 to the Regulations, for all types of applications notice must be served on:

- anyone who has registered a declaration of entitlement to exercise a right of common;
- any commons council for the land; and
- any registered owner of a right of common in gross which is exercisable over the land to which the application relates. The registration authority does not need to serve notice on the registered owners of rights of common in gross if it considers that such persons are so numerous that it would not be reasonably practicable to serve notice on all of them.
- the individuals specified in the table. For example, for applications under Section 6, notice must be served on (a) the owner of the land over which the right will be exercised, and (b) the owner of the land to which the right will be attached.

5.11.22 The registration authority does not need to serve notice on a landowner where it is not reasonably practicable to identify that person[98].

5.11.23 Additional publicity requirements apply to an application to add or remove land from a register under Section 15(1), 19 (if it would add land to, or remove land from, the register) or Schedule 2, requiring the registration authority:

- to post a site notice for no less than 42 days at or near at least one obvious place of entry to the land (or if there are no such places, at or near at least one conspicuous place on the boundary)[99];

[97] Regulations 21(1)(b) and 22(5).
[98] Regulation 21(3).
[99] Regulations 21(5)(a) and 22(3).

- to serve notice of the application on every other local authority relating to that area (including any parish council or the chairman of a parish meeting, and any National Park authority[100]).[101]

5.11.24 One notice should suffice for contiguous areas of land. In order to keep costs down, multiple notices should be the exception, not the rule. Where the site notice is removed, obscured or defaced prior to the expiry of the 42 day period through no fault of the registration authority, it will be treated as having complied with site notice requirement.

5.11.25 The registration authority is responsible for drafting the notice. It is important that the notice complies with the requirements of the Regulations, is sufficiently descriptive, and explains fully the details associated with the application including, for example, giving sufficient explanation of the effect of the application. Registration officers may find it useful to consult with legal officers to confirm that draft notices comply fully with the regulations as an incorrectly worded notice could leave a registration authority's determination open to legal challenge.

5.11.26 Regulation 23 describes the details which should be included in a notice of an application or proposal. Failure to draft the notice correctly may require a new one to correct it and any such costs will be borne by the registration authority. The notice must contain the following details—

- a reference to 'the Commons Act 2006' and the provision of the 2006 Act under which or pursuant to which the application is made;
- the name of the applicant and of the registration authority;
- the location and name of the land affected by the application[102];
- a summary of the effect of the application;
- both a postal address and an email address for the registration authority, to which any representations concerning the application may be sent;
- an explanation that such representations will not be treated as confidential;

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[100] 'Local authority' is defined in Regulation 2(1).

[101] Regulations 21(5)(b) and 22(4)(e).

[102] Regulation 2(2) provides that, in relation to an application or proposal to register or amend the register in relation to a right of common, the land affected by the application means the registered land over which the right is exercisable.

- the date on which the period for making representations expires, which must not be less than 42 days after the date of the service, publishing or, as the case may be, posting of the notice; and

- the address of the registration authority at which the application and any documents accompanying it are available for inspection.

Inspection of applications

5.11.27 Copies of an application and any accompanying documents must be made available for inspection at the address mentioned in the notice of application. Registration authorities should take care to ensure that inspection may take place during normal office hours within the 42 working days ending with the deadline for making representations[103].

Representations

5.11.28 Anyone can make a representation regarding an application within the deadline specified in the notice of application. The person making the representation must state his or her name and address, their nature of their interest (i.e. do they have a legal interest in the land?) and the grounds on which it has been made. The representation must be made in writing and signed by the person who has made it[104]. After the deadline for representations has elapsed the registration authority must notify the applicant that no representations were received or send to the applicant all representations received, as the case may be. Where representations are copied to the applicant, the applicant has 21 days, or such longer period as the registration authority may specify, to write to the registration authority with a response. Any such response must be made in writing and signed by every applicant.[105]

5.11.29 In Defra's view, a registration authority may object to an application which it has received by making a representation to that effect. However, an objection would normally be appropriate only where the registration authority itself has some interest in the matter under consideration. If the registration authority is aware of an impediment to granting an application, other than one in which it has an interest, that is a ground for refusal (or for concluding that the application is not duly made), rather than a ground for making an 'internal' representation.

5.11.30 A registration authority which makes a representation on an application made to it must consider whether the application should be referred to the Planning Inspectorate under Regulation 26(2). In such a case, the registration authority clearly has

[103] Regulation 24.

[104] Different requirements apply to representations made by email: see Electronic communications.

[105] Regulation 25.

'an interest in the outcome', and it will need to consider whether that interest is "such that there is unlikely to be confidence in the registration authority's ability impartially to determine"[106] the application.

Hearings and public inquiries

5.11.31 Many applications and proposals will be routine and will not attract significant interest. In such a case, where the registration authority intends to grant the application, there is no need to hold a hearing or inquiry. Where a registration authority is minded to refuse an application, it must afford the applicant an opportunity to be heard before reaching a final decision[107], particularly having regard to the requirements of the Human Rights Act 1998[108]. An opportunity to be heard means that the applicant is able to present a case to the decision taker, to explain orally the key aspects of the application, and to address any points of contention (but not necessarily to question any other person). It may not be necessary for such an opportunity to be heard to be open to third parties, nor any other person making representations on the application, unless the registration authority wishes to afford them the same opportunity. However, if the registration authority considers that the civil rights of any third party are brought into question by the application or by any proposal (e.g. if the application relates to the registration of land as common land, and the owner objects to the application), the registration authority should afford a similar opportunity to be heard to that person. Where an opportunity to be heard is provided, the only requirements are those implied by Regulation 27(7).

5.11.32 Some applications and proposals may generate considerable controversy, particularly those to register new land, e.g. under Section 15(1), or under paragraph 4 of Schedule 2. Certain applications and proposals must be referred to the Planning Inspectorate for decision (see chapter 5.19). The registration authority or the Planning Inspectorate can permit the applicant or other parties an opportunity to be heard, or hold a public inquiry.

5.11.33 Registration authorities are advised that for contested applications to register new town or village greens under Section 15(1), the courts have commended independent inquiries. In *R (on the application of Whitmey) v The Commons Commissioners*[109], Arden LJ said that, in relation to an application for registration of a new green under Section 13 of the 1965 Act, the registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry. …The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest." More nuanced

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[106] Regulation 26(3).

[107] Regulation 27(7).

[108] See article 6(1) of the Convention Rights: "In the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[109] Paragraphs 29 and 30.

views were expressed by the High Court in *R v Suffolk County Council, ex parte Steed*, where Carnwarth J said: "Some oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled"; and in *R (Cheltenham Builders Limited) v South Gloucestershire District Council*, where Sullivan J said:

> "…discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application. Coupled with the obligation to act fairly, the registration authority is also under an obligation not merely to ask the correct question under the Act, but to 'take reasonable steps to acquaint [itself] with the relevant information' to enable it to correctly answer the question: …."

5.11.34 Public inquiries are governed by Regulations 28 to 31, 33 and 34. An independent inspector (e.g. barrister) can conduct public inquiries on behalf of registration authorities. Notices of public inquiries and hearings should be published on the registration authority's website for at least 6 weeks. The inspector can give written directions for public inquiries or can hold a pre-inquiry meeting. The Planning Inspectorate, but not a registration authority, can hold hearings under Regulation 32.

Determination

5.11.35 The registration authority must determine an application made to it or a proposal made by it, having afforded an opportunity:

- for representations to be made on the application or proposal;
- for the applicant (in relation to an application) to comment on those representations (paragraph 5.11.28);
- where appropriate, for a hearing of the applicant or any other person interested in the application or proposal (paragraph 5.11.31); and
- where appropriate, for a public inquiry into the application or proposal (paragraph 5.11.31).

5.11.36 The registration authority may wish to afford a further opportunity for the exchange of representations between parties interested in the application or proposal, in order to promote a full and fair exchange of views. See chapter 5.17 for guidance on applications or proposals to which there is no objection.

5.11.37 When the registration authority is satisfied that all parties have been given a sufficient opportunity to make their views known, it must proceed to a determination. The

registration authority must, in determining an application or proposal, take into account the matters set out in Regulation 27(1).

5.11.38 In addition, a registration authority must statutorily have regard to the following matters:

- its duty to conserve biodiversity, and its duty to further the conservation of the 'Section 41 list' of features of principal importance for conserving biodiversity[110];

- its duty (in relation to any land designated as a site of special scientific interest), "to take reasonable steps, consistent with the proper exercise of its functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest"[111];

- its duty to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions[112];

- its duty (in relation to a National Park) to have regard to the purposes for which National Parks are designated, and if it appears that there is a conflict between those purposes, it shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park[113]; and

- its duty (in relation to an Area of Outstanding Natural Beauty) to have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty[114].

5.11.39 Applications must generally be granted if made in accordance with the criteria set out in the legislation[115], and there will seldom be circumstances in which the registration authority's decision to grant or refuse an application is subject to discretion which may be influenced by the duties referred to above. For example, in relation to an application to register land as a town or village green under Section 15(8), the registration authority may not reject an the application because it considers the application land to be unsuited to registration, but may reject it if it concludes that the applicant is not the owner

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[110] Section 40 of the Natural Environment and Rural Communities Act 2006.

[111] Section 28G of the Wildlife and Countryside Act 1981.

[112] The Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716), regulation 3(4).

[113] Section 11A of the National Parks and Access to the Countryside Act 1949; a similar duty arises in relation to the Norfolk and Suffolk Broads under Section 17A of the Norfolk and Suffolk Broads Act 1988.

[114] Section 85 of the Countryside and Rights of Way Act 2000.

[115] Section 24(4).

of the land, or the necessary consents have not been obtained and included with the application.

5.11.40 In relation to an application relating to a site of special scientific interest, Section 28I of the Wildlife and Countryside Act 1981 requires that: “Before permitting the carrying out of operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest”, the registration authority must notify Natural England of the proposed operations, and take into account any representations received from Natural England within 28 days of the notice before deciding whether to permit the proposed operations. Consent granted under Part 1 will rarely constitute consent to ‘operations’, but a registration authority should consider consulting Natural England under Section 28I in relation to an application which may have significant practical effect on any land designated as a site of special scientific interest — for example, an application under Section 15 to register land as a new green, or under paragraph 4 of Schedule 2 to register waste land of the manor.

5.11.41 The registration authority must consult Natural England on any application under Section 6 to create new rights of common grazing and under Section 7 to vary existing rights of common grazing. Contact details for Natural England can be found at www.gov.uk/government/organisations/natural-england.

5.12 Check list for applications

5.12.1 The following generic check list briefly outlines, in chronological order, the steps to be taken when processing applications. Additional, or in some cases, varied, steps may be required in relation to particular types of applications: see the specific guidance and the Regulations.

The steps:

- Ensure the application has been duly made, including whether the correct fee and all requisite information and documents have been enclosed (including a map in the correct scale), and that the correct form has been used.

- Allot the application a unique reference number.

- Acknowledge receipt of application and specify the unique reference number and contact address and email address to which the applicant may write.

- As soon as practicable after receipt of application, publish a notice of application and serve it in the specified manner.

- Make available the application and all relevant documents for inspection.

- Write to applicant with any directions as to information or documents that must be supplied and the deadline for compliance.

- As soon as possible after deadline for representations, collate any representations received then (as appropriate) notify the applicant that either none was received or send copies of all representations to the applicant, giving 21 days to reply.

- Decide whether the application must be referred to the Planning Inspectorate for determination.

- For applications under Section 6 or 7 only, consult Natural England for its view on whether the common can sustain the new right together with any other rights which exist over that land.

- Decide whether application is to be granted, taking into account all the evidence, representations and advice.

- If the application is granted, amend the register accordingly.

- Inform the applicant and any person who made a representation whether the application was successful and state the reason for the decision.

- Publish a copy of the decision and reason for it on the registration authority's website.

5.12.2 The Association of Commons Registration Authorities for England and Wales (ACRA) provides comprehensive checklists which detail every step for applications, but they are only available to ACRA members. Registration authorities are encouraged to join ACRA which can assist with advice and support. Details on how to join can be found at www.acraew.org.uk.

5.13Withdrawal of applications

5.13.1 There is no provision in the 2006 Act or the Regulations for the withdrawal of an application. Defra's view is that an application (which the applicant wishes to withdraw, or with which the applicant no longer wishes to proceed) remains extant, and in general, the registration authority is required to determine whether to proceed with the application, and whether it should be granted. The circumstances in which a registration authority will accept the withdrawal of an application will vary: an authority may almost always accept the withdrawal of an application which is required to be made by a specified person (e.g. an application under Section 6 by the owner of land to register the grant of a new right of common over that land), where that person no longer wishes to proceed with it. But the registration authority should be far more cautious in accepting the withdrawal of an application apparently made in the public interest to register new land (e.g. as a town or

village green, under Section 15(1)), where the applicant no longer wishes to proceed with it, but other persons wish to see the application proceed to a determination.

5.13.2 Particularly in relation to the purported withdrawal of an application made in the public interest, if the evidence is wanting, or there is some legal impediment to the application, it may not be difficult for the registration authority to determine to refuse it. Equally, if there is no objection, and the evidence is sufficient, it may decide to grant it. If the position is somewhere in between, the registration authority may decide to publicise the application (if it has not already done so), and afford an opportunity to any person with an interest to make representations, or to be heard (which offer may not be taken up), and then make a decision on the evidence available.

5.13.3 In the *Trap Grounds* case the House of Lords concluded that in considering a proposed amendment to an application to register a town green made under Section 13 of the 1965 Act (which similarly made no provision for amendment or withdrawal), the "registration authority should be guided by the general principle of being fair to those whose interests may be affected by its decision"[116].

5.13.4 There is room for some uncertainty about the correct approach, and registration authorities should seek to act reasonably in all the circumstances. Given the absence of provision for withdrawal in the legislation, it may be said that an applicant is required only for the purpose of making an application in the first place. The application, once it is (properly) made, thereafter takes on a life of its own, and is capable of being assessed on its content, irrespective of the interest — or lack of it — that the applicant subsequently takes in it. If the applicant wants to withdraw it, the registration authority can still press ahead and grant or refuse it.

5.13.5 In the Court of Appeal judgment on the *Trap Grounds* case, the court quoted Vivian Chapman's report on the original registration application:

> "My view is that an applicant under s 13 has no absolute right to amend or withdraw an application. It is not unknown for campaigners to make and then purport to withdraw and resubmit s 13 applications as a tactic to inhibit the development of land. I should make it clear that there is no question of such a tactic in this case but I consider that the registration authority must have a power to insist on determining a duly made application so that the status of the land is clarified in the public interest. However I consider that it is, as a matter of common sense, implicit in the 1969 Regulations that a registration authority does not have to proceed with an application that the applicant does not wish

[116] *Oxfordshire County Council v Oxford City Council and another and others*, at paragraph 111, see also paragraph 61.

> to pursue (whether wholly or in part) where it is reasonable that it should not be pursued. It would be a pointless waste of resources for a registration authority fully to process an application that the applicant did not wish to pursue whether wholly or in part unless there were some good reason to do so."

5.13.6 Carnwath LJ commented: "That approach, with respect, seems to me sensible, and unobjectionable as a matter of law, although the final decision remains a matter for the discretion of the registration authority."[117] In the House of Lords, Lord Hoffmann seems to endorse the approach of Carnwath LJ[118]. That approach was in relation to an application to register a new town or village green under Section 13 of the 1965 Act, supported by a statutory declaration, but the same approach is commended in relation to an application made under Part 1.

5.13.7 However, it may be reasonable to permit the withdrawal of applications, where this is considered to be the most reasonable course of action in the particular circumstances. There might be cases where a registration authority's persisting with an application in which all interest had fallen away, or perhaps been replaced by hostility to it, might be depicted as more unreasonable than allowing its withdrawal, but the exercise of such reasonableness is an non-statutory concession. A registration authority might also permit a withdrawal where the application is of no interest or benefit to anyone but the applicant, and to proceed with the application in the face of the applicant's desire to withdraw would be perverse: such cases are far more likely to arise in relation to applications under Sections 6 to 13 than under Section 15. But equally, if someone else is eligible and willing to fill the original applicant's shoes but the registration authority refuses to (continue to) consider the application, that may be found to be unreasonable.

5.13.8 Where an application is required to be made by a particular person[119] and that person seeks to withdraw the application, it will seldom be appropriate to proceed with the application, even if the registration authority is prepared to grant the application. In the absence of continuing support from the person who was required to make the application, it may be unlawful for the registration authority to proceed to grant it.

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[117] Paragraph 104.

[118] See paragraph 61, where Lord Hoffmann agrees with the general remarks of Carnwath LJ at "73–75", which appears to be a mistaken reference, possibly for paragraphs 103–105.

[119] *E.g*. an application to register a town or village green under Section 15(8) must be made by the owner of the land.

5.14 Amendment of applications

5.14.1 Similar considerations to those set out in chapter 5.13 (Withdrawal of applications), apply to a request to amend an application. There is no statutory right enabling an applicant to amend the application once it has been duly made.

5.14.2 A registration authority's power to allow an amendment to an application made under Section 13 of the 1965 Act was considered by the House of Lords in the *Trap Grounds* case. Lord Hoffmann said:

> "…it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. I agree with the approach taken by Mr Chapman and the general remarks of Carnwath LJ [2006] Ch 43, 73–75[120]. In case there should be any doubt, I add two footnotes. First, there is no rule that the amended application must be for substantially the same land as the original application. If it relates to a larger or different piece of land, the inspector or registration authority may well think that fairness requires republication of a new application. But the matter remains one for the exercise of their discretion. Secondly, the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties."[121]

5.14.3 Baroness Hale added that:

> "…the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it."[122]

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[120] See paragraph 61, where Lord Hoffmann agrees with the general remarks of Carnwath LJ at "73–75", which appears to be a mistaken reference, possibly for paragraphs 103–105.

[121] Paragraph 61.

[122] Paragraph 144.

5.14.4 Although the House's decision in the *Trap Grounds* case applies to applications to register new greens under earlier (now repealed) legislation, Defra considers that similar considerations apply to any application made under Part 1, and that the guidance given by the House in that case remains valid. In many cases, registration authorities may find it straightforward whether to allow an amendment to an application made under Sections 6 to 13, because no prejudice would be caused by the amendment to other parties.

5.14.5 In Defra's view, a good rule of thumb is that, where the registration authority considers the amendment to be so significant that a new notice of the application as amended ought to be published, then the registration authority may decide to refuse the amendment, on the grounds of possible prejudice to other parties. But each case will need to be considered on its merits (and in some cases, the acceptance of a significant amendment may be the fairest way of proceeding, if the alternative would be to start all over again).

5.15 Repeated applications

5.15.1 Defra takes the view that an identical, or near identical, application to one previously made and refused would entitle the registration authority to refuse to accept it, on common law grounds of *res judicata*[123]. The House of Lords has held that the principle applies to non-judicial adjudications in the field of public law notwithstanding that the original adjudication was not made by a court[124]. Moreover, the House has held that: "It will be an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings"[125]. Substitute for 'litigated' the word 'raised' and Defra believes this principle would also apply to non-judicial adjudications in public law.

5.15.2 Repeated applications are most likely to occur in relation to the registration of new greens under Section 15(1). It is difficult to imagine that any court would uphold an applicant's right to make repeated, time consuming and costly applications in respect of the same land, even though the Act is silent on the subject.

5.15.3 If a repeat application was similar, but not the same, as that made previously, the registration authority may need to consider the new evidence or material, and consider whether its earlier decision remains appropriate. That need not take very long, and there could be a delegation to officers for the purpose. But this option is nevertheless potentially costly (not least because of the cost of publicising repeated applications), and is probably relevant only where the application is sufficiently novel that it merits some element of fresh consideration.

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[123] 'A matter [already] judged'.

[124] *Thrasyvoulou v Secretary of State for the Environment*.

[125] *Yat Tung Investment Co. Lt. v Dao Heng Bank Ltd*, at page 590.

5.15.4 Exceptionally, Defra takes the view that, where an application was made under the 1965 Act, which was determined and refused, it is open to the applicant to make a fresh application for the same purpose under the Act, if the applicant believes that the new application would be successful because the statutory criteria have changed. The registration authority will need to consider whether the new statutory criteria would permit a different outcome when applied to the known facts (as decided upon by any hearing or inquiry held by the registration authority into the previous application). Unless the new application asserts that the facts have materially changed, it should not be necessary for the registration authority to hold a fresh hearing or inquiry into the evidence tested in the original application.

5.16 Granting an application in part only

5.16.1 A registration authority may conclude that an application should be granted only in part, because the criteria are met only in relation to that part.

5.16.2 A registration authority's power to grant an application made under Section 13 of the 1965 Act in part only was considered by the House of Lords in the *Trap Grounds* case. Lord Hoffmann said:

> "I also agree with the Court of Appeal that the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed."[126]

Again, although the House's decision in the *Trap Grounds* case applies to earlier (now repealed) legislation, we consider that similar considerations apply to an application under Part 1, and that the guidance given by the House in that case remains valid.

5.16.3 However, before granting an application or proposal in part only, the registration authority should consider whether, had the application or proposal been submitted in relation only to that part, the application or proposal would have satisfied the requirements of the 2006 Act and the Regulations.

[126] Paragraph 62.

Example 1

Mrs H applies under Section 6 to grant a right of common attached to Whiteacre Farm to graze 100 sheep over Blackacre Down (which is not registered common land). The registration authority consults Natural England on the application in accordance with Regulation 35, which replies that it is content that Blackacre Down is capable of sustaining the new right of common.

The registration authority subsequently discovers that Mrs H's right relates to only the bottom half of Blackacre Down, and is minded to grant the application only in relation to that half.

Before granting the application, the registration authority again consults Natural England, which comments that the bottom half of Blackacre Down could not in itself sustain the new right. The registration authority agrees with Natural England's assessment, and refuses to grant the application.

Example 2

Mr J is owner of Bluewater Farm, and claims to be entitled to exercise a right to graze 100 sheep on Blackacre Common attached to land comprised in Bluewater Farm. The owner of Blackacre Common agrees with Mr J to buy out the latter's rights of common, in return for compensation, in order that the owner can better manage the sporting rights on Blackacre Common.

Mr J applies under Section 13 to extinguish his rights of common. The registration authority discovers that Mr J owns only 90% of the land to which the rights of common are attached, and that 10% of the land was conveyed to a neighbouring farmer in 1987 (without any specific term in the conveyance relating to the rights of common). The registration authority notes that, in order to register the extinguishment of part of the right of common in relation to only part of the historic dominant tenement, the application under Section 13 must be accompanied by an application for apportionment under Section 8. Mr J and the registration authority agree that Mr J should submit a new application under Section 8. After advertising the new application, no representations are received in relation to either application, and the registration authority decides to grant the application under Section 8, and to grant the application under Section 13 in relation to the part of the historic dominant tenement owned by the applicant (so that a right to graze 10 sheep remains registered as attached to the land no longer owned by Mr J).

5.17 Applications (and proposals) to which there is no objection

5.17.1 It may be that, after duly publicising an application or proposal, no representations are made (or that any representations do not object to the application being granted). In such a case, the registration authority must nevertheless consider the application or proposal on its merits. An application or proposal should be granted only if it is made in accordance with the criteria in the legislation, and the absence of opposition to its being granted must not be taken as suggestive that those criteria are met and need not be considered.

5.17.2 It is particularly important that an application or proposal is fully examined where, if granted, it would have some effect on the public interest, such as where land would be deregistered. For example, an application to deregister land under paragraph 6 of Schedule 2 may not attract representations from third parties, but the registration authority should nevertheless satisfy itself that the application contains sufficient evidence to merit granting the application. In this example, the registration authority should look, in particular, to see convincing evidence that all of the land referred to in the application was and remained covered by a building, or the curtilage of a building, during the relevant period of time. It is for the applicant to adduce such evidence, and in its absence, the application must not be granted.

5.17.3 Convincing evidence is evidence of a kind which gives rise to a prima facie presumption of the correctness of the evidence. It should not give rise to significant doubts in the mind of the registration authority about the correctness, robustness or validity of the evidence. In this example, convincing evidence might include photographic evidence of the land at dates which are attested, or evidence from maps at a sufficient scale. Witness testimony may constitute convincing evidence, having regard to the context (such as the time which has elapsed since the period to which the evidence relates, the relationship between the applicant and the witness, etc.). The registration authority should be particularly cautious in accepting the applicant's assertion as to the facts, without supporting evidence, particularly in the absence of any third party who may wish to comment on or test such assertion.

5.17.4 Where appropriate, in the absence of sufficient evidence to enable an application to be granted, the registration authority may use its powers to require the provision of further information under Regulation 20. Where an application or proposal has been referred to the Planning Inspectorate for determination, the Inspectorate may, in the same circumstances, request the provision of further information. However, it is the responsibility of the applicant, or the registration authority making the proposal, to adduce sufficient evidence to enable the application or proposal to be granted, and the registration authority should refuse an application or proposal which lacks such evidence.

5.18 Proposals

Scope of proposals

5.18.1 A registration authority may in certain circumstances make a proposal for amendment of the register. A proposal is an application the registration authority makes to itself. Registration authorities may make proposals for the following purposes:

- Section 19 - correction, for any of the purposes described in that section;
- paragraphs 2 to 9 of Schedule 2 - non-registration or mistaken registration under the 1965 Act; and
- paragraph 2 of Schedule 3 - transitional application period for updating registers.

5.18.2 Registration authorities should consider bringing forward proposals for amendment of the register where:

- there is a public interest in the amendment being made (e.g. the amendment would secure the registration of additional land as common land, to which public access would be secured);
- the amendment is consequential to a public interest proposal (e.g. the adjustment of rights of common consequential to the compulsory acquisition of common land); or
- the registration authority (or any predecessor of the authority) was responsible for a mistaken entry in the register, and no person has a personal interest in correcting the mistaken entry, or any person with such an interest cannot be identified (e.g. because the ownership of the land is unclaimed).

5.18.3 Registration authorities should not bring forward proposals in circumstances where a person with a personal interest in amending the register could make an application for that purpose, unless one of the tests above is met. In particular, a registration authority should not bring forward a proposal in order that a person need not pay a fee for an application, or because there is a mistaken entry in the register for which the registration authority was not itself responsible. (In determining responsibility for a mistaken entry, the registration authority should not assume responsibility for the identification of mistakes in anything done by another party to a registration, unless the authority had a duty at that time to identify and correct such mistakes.)

5.18.4 A registration authority which decides to make a proposal must prepare a statement describing the proposal and explaining the justification for it[127]. The registration authority should provide the same information and evidence as that expected in an application made to it.

[127] Regulation 18.

5.18.5 Regulation 22 sets out the requirements on a registration authority to publicise a proposal and regulation 23 prescribes the information which must feature in the notice (the requirements are the same as applications). Notices must be sent to:

- the owner of any of the land to which the proposal relates;
- any person who has registered a declaration of entitlement to exercise a right of common over any of the land to which the proposal relates;
- any commons council established for, or other body which represents the interests of rights holders over, the land to which the proposal relates;
- any registered owners of a right of common which is exercisable over any part of the land to which the proposal relates;
- other local authorities within the registration authority's area; and
- any person who has supplied an email address for the purpose of being notified of proposals.

5.18.6 There are exceptions to the list above. The registration authority is not expected to serve notice on a landowner where it is not reasonably practicable to identify that person, which in Defra's view would mean if a Land Registry search draws a blank and there is no other source of information locally (e.g. commons council/association or rights holders). Neither is the registration authority expected to serve notice on the registered owners of rights of common in gross if they are so numerous it would not be reasonably practicable to serve notice on them all.

5.18.7 Where the proposal would either add land to, or remove land from, either register, the registration authority must post a site notice for not less than 42 days at or near at least one obvious place of entry to the land. If there are no such places then the notice can be posted at a conspicuous place on the boundary of the land. In Defra's view, one notice would suffice for contiguous areas of land. In order to keep costs down, multiple notices should be the exception, not the rule. Where the site notice is removed, obscured or defaced prior to the expiry of the 42 day period through no fault of the registration authority, the authority will be treated as having complied with site notice requirement.

5.18.8 A registration authority should not hesitate to notify other persons it thinks would have an interest in a proposal, or to use other mechanisms to publicise the proposal.

5.18.9 There is a cut-off date for registration authorities to bring forward certain types of proposal. For pioneer authorities, a proposal under Schedule 2 must be prepared and

publicised by 31 December 2020, and a proposal under paragraph 2 of Schedule 3 by 30 September 2010[128]. For 2014 authorities the cut-off dates are, respectively, 15 March 2027 and 14 December 2017. A registration authority cannot make a proposal after the relevant cut-off date, but for Schedule 3 purposes the authority may invite another party to apply.

5.18.10 A proposal is subject to the same requirements as an application in terms referral to the Planning Inspectorate for determination.

Applications by the registration authority to itself

5.18.11 A registration authority cannot make an application on behalf of the public to itself, but it can make proposals in the public interest even where the authority has no direct interest in the land or right affected. A registration authority should not seek to circumvent the regulatory procedure for making and determining proposals by making an application to itself for the same purpose: for example, such an application should not be used as a mechanism for escaping the deadline for proposals, because the Regulations clearly contemplate that the registration authority should make a proposal and determine it within the time allowed.

5.18.12 However the registration authority may apply to itself where it has a direct interest in the matter[129]. For example where land is owned by the registration authority; the registration authority is entitled to a right of common by virtue of ownership of a dominant tenement to which the right is attached; or, the registration authority owns a right of common in gross. Where the registration authority has a direct interest in a matter, but can make a proposal to secure the outcome sought, it should proceed by way of a proposal.

5.18.13 In the case of any application to itself, the registration authority must consider whether the application should be referred to the Planning Inspectorate under Regulation 26(2), (3) and (4). As applicant, the registration authority clearly has 'an interest in the outcome' of the application (and probably an expectation that it will be granted), but the registration authority must decide whether that interest is "such that there is unlikely to be confidence in its ability impartially to determine"[130] the application.

5.19 Referral to the Planning Inspectorate

The Planning Inspectorate's role

[128] Regulation 18(2) and (3).

[129] Strictly, the registration authority should, where appropriate, pay a fee to itself too.

[130] Regulation 26(3).

5.19.1 The Planning Inspectorate was appointed by the Secretary of State to inquire into and determine certain applications and proposals[131]. The Planning Inspectorate has generally the same powers as a registration authority in determining an application or proposal, so the majority of the advice in chapter 5 applies to it. For example, the Planning Inspectorate can direct the applicant to supply further information or evidence and the deadline for doing so, and can treat the application as abandoned if the applicant does not comply[132].

Deciding whether to refer

5.19.2 The following applications should be referred to the Planning Inspectorate:

- applications and proposals under Section 19 which affect the extent of registered common land or green, or what can be done by virtue of a right of common;
- applications and proposals under any of paragraphs 4 to 9 of Schedule 2; and
- any application or proposal in which the registration authority itself has an interest in the outcome, where there is unlikely to be confidence in the registration authority's ability impartially to determine it.[133]

5.19.3 Regulation 26(3) says, in relation to the first and second categories above, that they should only be referred where objections are received from persons with a legal interest in the land (objectors must specify the nature of their interest in the land). In Defra's view this means a private legal interest such as owner or tenant, rather than someone who for example has a right of access to the land under the Countryside and Rights of Way Act 2000. Where no objections are received or where the objections are not from persons with a legal interest in the land, the registration authority must determine the application.

5.19.4 For the third category, the registration authority should not refer a case simply because it has an interest in the outcome, but where the interest would seriously call into question the registration authority's ability to determine it impartially. An application relating to land owned by the registration authority should not qualify as the authority's role is to determine the application in accordance with the objective criteria in the 2006 Act. Nor should a registration authority refer a case simply because it (whether an officer, Member, committee or executive) has discharged a function or expressed views on a related matter in a different context. For example, an application to register land as a new village green where the registration authority grants planning permission for development of the land or expressed support for the development. If the registration authority owns the

[131] Regulation 4.

[132] Regulation 26(5)(b), (6) and (7).

[133] Regulation 26(3).

land, there might not be confidence in its ability to impartially determine the application, but if an independent inspector is appointed to determine the application then the decision will be impartial. This advice also applies to proposals made by the registration authority.

5.19.5 Where an application to register an appointment (Section 8 or Schedule 3) is to be referred to the Planning Inspectorate, the primary application must also be referred[134]. The apportionment does not take place until the effect of the primary application is registered. If the primary application fails so must the apportionment application. Primary applications are specified in paragraphs 3(1) and 18(1) of Schedule 4 to the Regulations.

The registration authority's role prior to referral

5.19.6 In any case which is to be referred to the Planning Inspectorate, the registration authority must first process the application or proposal in the specified manner (including publishing notice of the application), and invite representations to be sent to the registration authority within the specified period of time.

5.19.7 After the deadline for representations, and after seeking the applicant's views on the representations (for applications, not proposals), the registration authority should then refer the case to the Planning Inspectorate, enclosing any documents which are relevant to the case. This includes the application or proposal, supporting documents, other relevant documents possessed by the registration authority, including extracts from the relevant registers, and any representations received[135]. Where the registration authority makes a representation, it should include it with the other documents.

5.19.8 The Planning Inspectorate will ask the registration authority to complete a 'referral letter' to confirm some details, including the reason for referral. If the Planning Inspectorate thinks that the criteria for referral do not apply, it will return the application to the registration authority for determination. The registration authority will be expected to provide a clear reason as to its interest in the matter and why there is unlikely to be any confidence in its ability to impartially determine the application. The Planning Inspectorate assumes the registration authority's work is correct so the authority should double-check it prior to referral.

5.19.9 The address for referred applications is:

Common Land Casework

The Planning Inspectorate

[134] Regulation 26(4).
[135] Regulation 26(5).

Rm 3/25B Hawk Wing

Temple Quay House

2 The Square

Bristol

BS1 6PN

The registration authority's role after referral

5.19.10 The Planning Inspectorate may decide to hold a site visit, hearing or inquiry to assist in its determination of a referred case. The registration authority may sometimes wish to participate, and should make its wish to do so clear to the Inspectorate. In any case, where the Inspectorate decides to hold a hearing or inquiry, the registration authority should provide a venue and administrative support wherever possible.

5.19.11 The legislation does not specify a time period for retaining website notices of hearings or inquiries, but Defra suggests they should be retained for a minimum of six weeks.

The registration authority's role after determination

5.19.12 When the Planning Inspectorate has determined the referred case, it will notify the registration authority of its decision, publish a copy on its website, and then send to the registration authority the details of all persons who made representations. The registration authority must notify the applicant and anyone who made representations of the decision and publish the decision and the reasons for it on its website[136].

5.19.13 Where the Inspectorate decides to grant a referred case, the registration authority must make the appropriate amendment to the register, in accordance with the application or proposal and determination, as soon as practicable after the decision has been received.

5.20 Granting an application: amending the register

5.20.1 Where any application or proposal under Part 1 is granted, the registration authority must amend the register to record the effect of the application (e.g. to remove land from or

[136] Regulation 36.

add land to the register, or to amend the registration of a right of common). The amendment must conform to the Regulations. Model and standard entries are set out in Schedule 3 to the Regulations for this purpose[137].

5.20.2 Exceptionally, where the Secretary of State grants an application for deregistration and exchange under Section 16, the Planning Inspectorate (acting on behalf of the Secretary of State) will itself prepare an order under Section 17 requiring the registration authority to amend the register in accordance with the order and the Regulations.

5.20.3 Where an amendment (other than a deletion) is to be made to a particular entry on a register sheet, registration authorities should transfer the contents of the entire sheet to the new prescribed form[138].

5.20.4 A registration authority which wishes to ensure that a register is in accordance with regulations made under the 1965 Act should refer to those regulations. The registration authority can modify a register by transferring information in the register to a format prescribed under the Regulations made under the 2006 Act.

Model and standard entries

5.20.5 No new entry should be made in any part of the registers (including the notes section) unless provision is made for that purpose in the Regulations. In general, any new entry should be made in accordance with the relevant prescribed model or standard entry. A model entry shows the approximate form which an entry should take, but whereas the model refers to a fictional example, the registration authority will need to adapt the model entry to the particular circumstances. This will mean that the wording of the entry required to be made is almost entirely different to that in the model entry, but the classes of information conveyed will be consistent with the model. Conversely, a standard entry should be applied in as nearly the same form as possible (completing any missing text and deleting inappropriate text as necessary).

5.20.6 An amendment made to the registers in consequence of an application, proposal or order under Section 17 may require the employment of more than one model entry: for example, an order under Section 17 to deregister the release land and to register the replacement land, which relates to land subject to rights of common, and where the replacement land is to be registered as a separate register unit, will require the employment of model entries ME13, ME15 and ME18,

5.20.7 The following table of model and standard entries may be useful:

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[137] See the definition of 'Model Entry' and 'Standard Entry' in Regulation 2(1).

[138] Regulation 8(1).

Table I: Model Entries

Model/ Stan-dard entry no.	Register part	Purposes	Comments
ME1	General	Agreement between registration authorities	Agreements under Section 2(2) of the 1965 Act or Section 4(3)
ME2	General	Transfer from one registration authority to another	Transfers under local government reorganisation and agency agreements under Section 101 of the Local Government Act 1972
ME3	Rights	Newly created right of common attached to land	Creation of a new right under Section 6, 14, 17, or paragraph 2 or 4 of Schedule 3
ME4	Rights	Variation of a right of common	Variation of a right under Section 7, 14, 17, or paragraph 2 or 4 of Schedule 3
ME5	Rights	Apportionment of a right of common	Apportionment under Section 8 or paragraph 2 or 4 of Schedule 3, including where the application relates to a primary application under Sections 7, 11, 13, paragraphs 1(6)(b) or 3(7)(b) of Schedule 1, for the purposes of Section 14, or under paragraph 2 or 4 of Schedule 3
ME6	Rights	Attachment of right of common	Attachment under Section 10
ME7	Rights	Re-allocation of attached right of common	Re-allocation of an attached right under Section 11 (note that the variation in the extent of the dominant tenement in consequence of the apportionment will be apparent only from inspection of the supplemental map)
ME8	Rights	Transfer of right of common in gross	Transfer of right held in gross under Section 12, or paragraph 2 or 4 of Schedule 3

Model/ Stan-dard entry no.	Register part	Purposes	Comments
ME9	Rights	Surrender and extinguishment of right of common	Surrender and extinguishment of right under Section 13, 14, or paragraph 2 or 4 of Schedule 3
ME10	Rights	Declaration of entitlement to attached right of common	Declaration under Regulation 43
ME11	Rights	Declaration of partial entitlement to exercise attached right of common	Declaration under Regulation 43
ME12	Rights	Cancellation of declaration of partial entitlement to exercise attached right of common	Cancellation of declaration under Regulation 43
ME13	Rights	Deregistration and exchange: amendment of right where replacement land registered as new register unit	Section 14, 17, or paragraph 2 or 4 of Schedule 3 (only where a right of common was exercisable over the release land and the replacement land is registered as a new register unit)
ME14	Rights	Severance by transfer of a right of common	Paragraph 1 or 3 of Schedule 1; paragraph 2 or 4 of Schedule 3
ME15	Land	Deregistration of part of registered area	Deregistration under Section 14, 17, 19, or paragraphs 6 to 9 of Schedule 2, or paragraph 2 or 4 of Schedule 3
ME16	Land	Deregistration of whole of registered area	Deregistration under Section 14, 17, 19, or paragraphs 6 to 9 of Schedule 2, or paragraphs 2 or 4 of Schedule 3
ME17	Land	Registration of new land as addition to registered area	Addition under Section 14, 17, 19, or paragraphs 2 to 4 of Schedule 2, or paragraph 2 or 4 of Schedule 3
ME18	Land	Registration of new land as new register unit	Addition under Section 14,15, 17, 19, or paragraphs 2 to 4 of Schedule 2, or paragraph 2 or 4 of Schedule 3

Model/ Stan-dard entry no.	Register part	Purposes	Comments
ME19	Land	Town or village green wrongly registered as common land	Paragraph 5 of Schedule 2
ME20	Land	Deregistration of part of registered area and registration of replacement land	Section 14, 17, or paragraph 2 or 4 of Schedule 3 (*i.e*. exchange land, where replacement land is registered as part of the same register unit)
ME21	Land, Notes	Note of matters affecting the public: deed under Section 193(2) of the Law of Property Act 1925	Regulation 46
ME22	Land, Notes	Note of matters affecting the public: scheme of regulation under Part I of the Commons Act 1899	Regulation 46
ME23	Owner-ship, Notes	Registration under Land Registration Act 2002 (where no registered owner)	Regulation 47(2)
ME24	Ownership	Registration under Land Registration Act 2002 (where an owner is registered)	Paragraph 8(2) of Schedule 3 and Regulation 47(3)
SE1	Register map	Indorsement: new edition of register map/sheet	Regulation 9(6)(a)
SE2	Register map	Indorsement: replaced edition of register or register map/sheet	Regulations 8(3), 12(3)
SE3	Rights	Reference to supplemental map	Regulation 13(4)
SE4	Supplemental map	Indorsement: supplemental map	Regulation 13(5)(b)

5.20.8 The registration authority should also obtain and keep a stamp, described in Regulation 3(1), which should be used to authenticate any new register form or map sheet taken into use.

5.21 Judicial review

5.21.1 Section 19(7) provides a power for the High Court to order the register to be amended where an entry, or any information in an entry, has been secured by fraud and it would be just to amend it.

5.21.2 There is no appeal against a determination made by a registration authority, whether to grant or reject an application or proposal. Decisions by the registration authority (including applications not properly made or allowing an application to be withdrawn) may be challenged in the High Court by judicial review. The registration authority may itself seek to quash a decision by this means.

6 : New event applications under Sections 6 to 15

6.1 Section 6: creation of a right

Introduction

6.1.1 Section 6 enables the creation of a new right of common where it is created by express grant and then only if the newly created right is attached to land (i.e. there must be a dominant tenement to which the right is attached). It is not possible to create new rights of common over an existing registered town or village green, but a new right may be created over an existing registered common.

6.1.2 Section 6 prohibits the creation of a right by reservation or prescription or of a new right in gross. So a new right of common can only come into effect by means of an application under Section 6. The effect of creating a right of common over unregistered land will be to cause that land to become registered as common land.

6.1.3 Section 6(6) provides that a new right of common to graze animals cannot be registered if in the registration authority's opinion the land over which the right is exercisable would be unable to sustain the exercise of that right together with any existing rights exercisable over that land. In such cases, Regulation 35 requires the registration authority to consult Natural England on the sustainability of the application.

Procedure

6.1.4 An application under Section 6 may be made only by either:

- the owner of the land over which the right of common will be exercisable; or
- the owner of the land to which the right of common will be attached.[139]

6.1.5 Where an application relates to the creation of a new right over an existing area of common land, the applicant may specify the land over which the new right will be exercisable by reference to an existing commons register unit. However, if the right will be exercisable over only part of that unit, the application must include a map which identifies

[139] Paragraph 1(1) of Schedule 4 to the Regulations.

the relevant part of the register unit. In any other case, the applicant must supply a map which specifies the land over which the right will be exercisable (i.e. the new common).

6.1.6 The registration authority must look for evidence of:

- the application having been made in form CA1;
- the capacity in which the applicant is entitled to apply (i.e. as owner of what will become (or is already) the common, or owner of the dominant tenement);
- the following people having consented to the application: the owner of what will become (or already is) the common (unless the owner is also the applicant), any relevant leaseholder of that land, and any other person who has a relevant charge over the land; and the owner of the dominant tenement to which the new right is to be attached (unless the owner is the applicant);
- a description of the right to be created;
- a description of the common (including, subject to paragraph 6.1.5, a map);
- a description of the dominant tenement (including a map);
- where the application is to create a new right of grazing, evidence that the land can sustain the new right taken with any existing rights of common;
- evidence of ownership of the common and, where the application is made by the owner of the land to which the new right will be attached, ownership of the dominant tenement.[140]

6.1.7 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.1.8 An amendment of the register required in consequence of an application for creation of a new right of common which is granted should be made in accordance with model entry ME3. Where, in consequence, new land is required to be registered, the register should be amended in accordance with ME18.

[140] Paragraph 1(2)–(3) of Schedule 4 to the Regulations.

Interpretation

6.1.9 Section 6(6) provides that where the right of common to be created is a grazing right, then the registration authority must refuse the application if, in its opinion, the common would not be able to sustain the new right along with any other rights which exist over that land. Regulation 35 requires the registration authority to consult with Natural England on the question of sustainability. Although Natural England will provide its view on the common's ability to sustain the new right, the registration authority must make the final decision as to whether to grant the application. Enquiries should be directed to the manager of the local Area Office.

6.1.10 In Defra's view, the registration authority may, in determining the sustainability test, take into account that some registered rights exercisable over the land are not exercised, having regard to the likelihood whether the exercise of such rights is likely to be revived in the foreseeable future.

FAQs

Q: Must a new right be created over existing common land?

6.1.11 Not necessarily. A new right of common can be created over existing common land, over new land (not currently registered), or over both. The result of registering a right of common over new land would see such land becoming registered as common land.

Q: If, in the case of a new grazing right to be created over an existing common, Natural England takes the view that the common cannot sustain the existing rights plus the right to be created, can the registration authority still grant the application.

6.1.12 Yes, it can. Though the registration authority must consult Natural England, it is the registration authority that makes the final decision. However the registration authority should consider very carefully the advice given by Natural England, and, if it resolved not to accept that advice, should explain (in its decision) why it preferred to adopt a different conclusion.

Q: Can an applicant register a right acquired through prescription or create a new right in gross?

6.1.13 No. From 1 October 2008 in the pioneer authorities or 15 December 2014 in the 2014 authorities, a new right can be created only by means of an application under Section 6, where the right is attached to land. Furthermore the new right will operate at law only when, the application has been granted, and the new right is registered. It may be possible to register a right acquired by prescription before the cut-off date during the transitional period: see chapter 8.2.

6.2 Section 7: variation of a right

Introduction

6.2.1 Section 7 enables the variation of an existing right. A right is considered varied if it is:

- to become exercisable over new land instead of all or part of the land over which is was previously exercisable;
- to become exercisable over a piece of land which is in addition to the existing area of land over which it is exercised; or
- otherwise altered in what can be done by virtue of the right.[141]

6.2.2 So a variation includes an alteration in the quantification of the right (for example, the number of animals that may be grazed by virtue of a right), as well as an alteration in respect of the land over which the right is exercisable so as to introduce new land in addition to or in substitution for all or part of the land over which it was formerly exercisable. But a variation cannot, for the purposes of Section 7, include an alteration in the dominant tenement.

6.2.3 Section 7(2) provides that a right of common cannot be varied so as to become exercisable over new land if that land is already registered as a town or village green. Section 7(5) places a restriction on the power to vary a right of common consisting of the right to graze animals, similar to the restriction contained in Section 6(6), in that the registration authority must be satisfied that the land is capable of sustaining the variation. In such cases, Regulation 35 requires the registration authority to consult Natural England on the sustainability of the application.

6.2.4 A variation cannot include a reduction in the land over which a right is exercisable (other than in the circumstances described in Section 7(1)(a)) — it may be possible to effect such an alteration by means of an application for surrender under Section 13.

Procedure

6.2.5 Applications under this Section may only be made by:

- the owner of any part of the land over which the right to be varied was exercisable prior to the variation (the owner of the common);

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[141] Section 7(1).

- the owner of the land over which the right to be varied becomes exercisable as a result of the variation (i.e. where the varied right becomes exercisable over new land); or

- the owner of either the land to which the right to be varied is attached (the dominant tenement) or, as the case may be, the registered owner of a right in gross[142].

6.2.6 The registration authority must look for evidence of:

- the application having been made in form CA2;

- the capacity in which the applicant is entitled to apply (i.e. as owner of the existing or new common, the dominant tenement or right held in gross);

- the following people having consented to the application: the owner of what already is or what will become the common (unless the owner is also the applicant); any relevant leaseholder of that land, and any other person who has a relevant charge over the land; the owner (unless the owner is also the applicant) of the dominant tenement to which the right is attached or, as the case may be, of the right held in gross;

- identification of the numbers of the register unit and rights section;

- a description of the variation to be registered (including, where applicable, a map);

- a description of the dominant tenement (including a map), except where the right is held in gross;

- only where the application concerns a right of grazing, evidence that the land can sustain the variation taken with any other rights of common;

- evidence of ownership of the common and, where the application is made by the owner of land to which the right of common is attached, ownership of the dominant tenement[143];

- where the application relates to only part of a right of common, identification of the part of the land to which the right is attached and an accompanying application to apportion rights under Section 8[144].

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[142] Paragraph 2(1) of Schedule 4 to the Regulations.

[143] Paragraph 2(2)–(3) of Schedule 4 to the Regulations.

[144] Paragraph 2(4) of Schedule 4 to the Regulations.

6.2.7 Where an application under Section 7 relates to only part of a right of common attached to land, then an accompanying application must be made under Section 8 to apportion the right as a prerequisite to the determination of the application under Section 7[145].

6.2.8 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.2.9 An amendment of the register required in consequence of an application for variation which is granted should be made in accordance with model entry ME4. Where, in consequence, new land is required to be registered, the register should be amended in accordance with ME17. No land can be deregistered in consequence of a variation, even if the effect of the variation is to abolish all rights of common exercisable over a specified area of registered land.

Interpretation

6.2.10 Section 7(5) provides that where the right of common to be varied is a grazing right, then the registration authority must refuse the application if, in its opinion, the common would not be able to sustain the varied right along with any other rights which exist over that land. Regulation 35 requires the registration authority to consult with Natural England on the question of sustainability. Although Natural England will provide its view on the common's ability to sustain the new right, the registration authority must make the final decision as to whether to grant the application. Enquiries should be directed to the manager of the local Area Office.

6.2.11 In Defra's view, the registration authority may, in determining the sustainability test, take into account that some registered rights exercisable over the land are not exercised, having regard to the likelihood whether the exercise of such rights is likely to be revived in the foreseeable future.

FAQs

Q: We have received an application to vary grazing rights from 100 sheep to 15 cattle. However, the applicant has confirmed occupation of only half of the dominant tenement to which the right is registered as attached. Can the applicant vary the rights for the whole dominant tenement?

[145] Paragraph 2(4) of Schedule 4 to the Regulations (see also chapter 6.3).

6.2.12 The applicant can apply to vary the applicant's share of the rights, but the register must be amended to show the apportioned rights before an application can be made under Section 7. So the applicant should make two applications, one to apportion the rights of the dominant tenement under Section 8 and the other to vary the rights under Section 7. Both application forms enable the applicant to indicate that concomitant applications have been made.

6.3 Section 8: apportionment

Introduction

6.3.1 Section 8 enables the amendment of the registers where rights of common are to be apportioned. Apportionment occurs where land to which rights of common are attached (the dominant tenement) is divided into two or more parcels in separate ownership (e.g. where the owner sells only part of the land and retains the remainder, or where the owner sells different parts of the land to two or more different buyers). Note that apportionment is about changes to the nature of the dominant tenement, and not to the common. (A change in ownership of all or part of the common would not give rise to any requirement for apportionment — see paragraph 2.6.24.)

6.3.2 Under the 1965 Act, it was possible, but not obligatory, to register any apportionment. Under the 2006 Act, the principle remains broadly the same: apportionment may be registered, but (in general) it need not be. Rights are shown in the registers as attached to the historic dominant tenement with which they were associated when an entry in respect of those rights was last made in the register. Subsequent changes to the dominant tenement can be, but need not be, recorded.

6.3.3 But there is an exception: apportionment must be registered in anticipation of a further amendment to the register relating to only part of the historic dominant tenement, in which case, the apportionment must be registered first. Such a case may arise in relation to an application under Sections 7, 11, 13, paragraphs 1(6)(b) or 3(7)(b) of Schedule 1, or for the purposes of Section 14, where the application relates to only part of a right of common attached to land, and therefore requires another application to apportion rights of common under Section 8[146]. If it does, both applications must be submitted at the same time, although the apportionment must be effected in the register before the variation (see paragraph 6.3.11).

[146] Paragraph 3(1)(a) of Schedule 4 to the Regulations (see also paragraphs 2(4), 5(3), 7(4), 12(4), 13(4), 8(9) of Schedule 4).

Example

Blackacre common is subject to rights to graze 100 sheep, where the register shows that the rights are divided equally between two farms (or dominant tenements) A and B, each dominant tenement having the right to graze 50 sheep attached to it.

The owner of Farm A dies and the farm is divided equally between that owner's two children: two new dominant tenements A1 and A2 come into being, each owned by one of the children. The operation of Section 8(3) of the 2006 Act will ensure that to each dominant tenement is attached the right to graze 25 sheep, without any requirement to modify the register.

Farm B is sold to a developer who in turn sells it off in 50 plots of equal size, each with a house built on it. Each of those plots will have the right to graze one sheep. The register will show a common subject to two separate rights to graze sheep attached to the two 'historic' dominant tenements, A and B. The register would in each case identify the rights and identify the land to which they were attached. At the conclusion of the events described above, the owners of the new dominant tenements formerly comprised in farms A and B will be able to trace their entitlement to exercise their rights of common by reference to the historic dominant tenements subsisting in the register[147]. For example, each owner of a house built on farm B will be able to show that they occupy 1/50th part of the area of the historic dominant tenement B, and (applying the rules of *pro rata* apportionment) therefore each has attached to it 1/50th of the rights recorded as attached to historic dominant tenement B. It will be possible to show that each owner is entitled to exercise the rights by virtue, firstly, of the attachment of the rights to their house and curtilage (the attachment of the rights to dominant tenement B will still be shown in the commons register), and, secondly, ownership of the house and curtilage (which information is likely to be registered in the register of title to land kept by the Land Registry).

6.3.4 The Regulations provide that application may be made to register apportionment, even though such an application may be unnecessary[148]. Registration of apportionment will update the register to show the entitlement belonging to the owner of the relevant part of the historic dominant tenement, and may offer some presentational advantages to that owner. However, the owner of part of a historic dominant tenement may instead apply to

[147] The common law principle is that a right of common may be exercised by the owner of the land to which it is attached, or if the land is let, the tenant.

[148] Paragraph 3(2) of Schedule 4 to the Regulations.

register a declaration of entitlement to part of the right of common attached to that dominant tenement: see chapter 2.7.

6.3.5 An application may instead be made for apportionment of a right of common pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 18 of Schedule 4 to the Regulations), where the circumstances giving rise to the apportionment occurred after the date of provisional registration of the right but before either 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities, and where the apportionment is a prerequisite to the registration of any other qualifying event under Schedule 3 which relates to only part of a right of common registered as attached to land. For example, if a right of common attached to a historic dominant tenement was extinguished in part by a deed of surrender in 1982, an application may be made during the transitional period under paragraph 18 of Schedule 4 to the Regulations to apportion the right, and under paragraph 16 of Schedule 4 to the Regulations to amend the register to record the extinguishment of the relevant part of the right. Please see chapter 8.4.

Procedure

6.3.6 An application under Section 8 must be made by the owner of at least part of the land comprised in the historic dominant tenement. An application may be made by two or more persons, having two or more titles in the historic dominant tenement. It is not necessary that all the owners of the historic dominant tenement join in the application.

6.3.7 The registration authority must look for evidence of:

- the application having been made in form CA3;
- the applicant being the same person (or persons) who made the primary application, if relevant (but see paragraph 3 of Schedule 4 to the Regulations);
- ownership of the land comprised in the application, including evidence of the owner's entitlement to apply;
- details of the register entry which identifies the common or town or village green over which the right is exercisable, and the right to be apportioned;
- a map showing the extent of the land to which the right is attached, and identifying the ownership of at least the part of the land comprised in the application (such a map must be an Ordnance map at a scale of at least 1:10,560, and must show a contemporary representation of relevant field boundaries);

- a calculation of the pro rata apportionment of the right[149].

6.3.8 An application may relate to the whole of a historic dominant tenement, but the application must then be made by two or more persons having title to all of that land. An application from a person who cannot show ownership of any part of the land must be refused. So, for example, where an historic dominant tenement is divided on sale into three lots, A, B and C, the purchasers of lots A, B and C may apply jointly to register apportionment across A, B and C, but must show evidence for the ownership and extent of all three lots. Alternatively, the purchaser of lot C may apply to register apportionment only in respect of lot C (but will still need to show evidence for ownership or tenancy of lot C).

6.3.9 An application cannot be accepted to register apportionment across the whole of an historic dominant tenement without evidence of ownership and extent of the whole, because the registration authority cannot be satisfied of the pattern of lands to which the rights should be apportioned. Where, in the example above, the purchaser of C applies to register apportionment only in respect of lot C, the residue of the historic dominant tenement comprising lots A and B should be treated as one unit (since the registration authority will have no immediate way of knowing the extent of A and B).

6.3.10 The application must show a calculation of the apportionment of the rights. The registration authority must verify it. Any apportionment must follow the rule of *pro rata* apportionment contained in Section 9(5), so that the rights formerly attached to the historic dominant tenement become attached to each of the new dominant tenements in strict proportion to the area of each.

6.3.11 Where the right attached to land which forms <u>part</u> of a historic dominant tenement is to be surrendered, re-allocated, varied or severed in accordance with the provisions in Part 1, it will be necessary to amend the register to record the apportionment of the right as a prerequisite to the surrender, re-allocation, variation or severance. In these cases <u>only</u>, the registration authority <u>must</u> register the apportionment before granting the application in relation to part of the historic dominant tenement, so that the rights in relation to the residue of the historic dominant tenement remain unaffected.

6.3.12 The rateable apportionment of a right of common is the apportionment of that right *pro rata* to the area of the dominant tenement. So, for example, if a right of common to graze 100 sheep is attached to a historic dominant tenement of area 40 hectares, the purchaser of 5 hectares of that tenement will be entitled to an apportioned right of:

$$\frac{\text{total number of rights over the dominant tenement}}{\text{total area of dominant tenement}} \times \text{area of applicant's part of dominant tenement}$$

[149] Paragraph 3(4) of Schedule 4 to the Regulations.

i.e.

$$\frac{100 \text{ sheep}}{40} \times 5$$

= 12·5 sheep[150].

6.3.13 The area of a parcel of land can be obtained using GIS mapping software. The MAGIC service also offers a facility to measure the approximate area of a defined parcel of land (www.magic.gov.uk).

Amendment of the register

6.3.14 Each dominant tenement arising from the apportionment should be specified by reference to a supplemental map, on which the dominant tenement should be identified by suitable colour marking[151]. Two or more dominant tenements may be shown on the same supplemental map. Where the historic dominant tenement was previously specified in the register by reference to OS parcel units, or any means other than a supplemental map, one or more supplemental maps must be drawn up for that purpose. Parcel numbers may sometimes be identified by reference to the register maps themselves (but check first that the register map is of the same edition, if specified), or other copies of the relevant edition of the OS map held by the registration authority. Raster images of historical maps are available from a number of companies.

6.3.15 In relation to any part of the historic dominant tenement for which ownership information is not supplied by the applicant (i.e. the residue of the historic dominant tenement), the details which should be entered in column 3 of the rights section of the register for the residue should be the original applicant for registration of the right which is being apportioned — that is, the details shown in the current entry in column 3. No assumption should be made as to the present ownership of that part of the historic dominant tenement, because the present owner is not a party to the application.

6.3.16 An amendment of the register required in consequence of an application for apportionment which is granted should be made in accordance with model entry ME5.

Interpretation

[150] See paragraph 6.3.19 for advice on the treatment of fractional rights.
[151] Regulation 13.

6.3.17 Any former common law principle by which a right of common may be extinguished owing to the development of the dominant tenement so that it is incapable of benefiting from the right is abolished by Section 13(3). So rights attached to land remain attached to that land whatever the use to which the land is put. It follows that an application for apportionment relating to part of a historic dominant tenement which has been developed for non-agricultural use should be treated in the same way as if the land were still in agricultural use.

6.3.18 Section 8(3) provides that, where the commons register has not been amended to reflect an apportionment of rights, the rights which arise as a result of that apportionment are to be treated as if they were separately registered. This provision is intended to ensure that each of the rights arising as a result of the apportionment is treated for the purposes of Part 1 of the Act as if it were registered, so that, for example, application may be made under Section 13 to surrender and extinguish the right notwithstanding that the right is not itself reflected in an individual entry in the register at the time of the application. However, the effect of paragraph 3(1)(a) of Schedule 4 to the Regulations is to require a further application to be made for apportionment of the right, to enable such an application to be registered.

6.3.19 An apportionment of rights may give rise to a potential fractional quantity of rights: for example, if a right to graze four cattle attached to a historic dominant tenement of one hectare were apportioned between three parcels each comprising one-third of the historic dominant tenement, that would give rise to a notional apportionment attached to each parcel of a right to graze 1⅓ cattle. In Defra's view, such a right is not recognised in law, and the registration authority is advised to round down any such fractional right (so that, in this case, the register would be amended to show three rights to graze 1 animal each). In effect, the balance of any fractional rights must be considered extinguished.

6.3.20 In Defra's view, this result, arising from an application to register apportionment, must be distinguished from the consequences where no such application is made. In that case, any fractional right which may arise in consequence of the rules of *pro rata* apportionment would be unexercisable, but (by virtue of Section 13(3)) would not cease to exist, unless and until the apportionment were registered.

6.3.21 Common law provides that a right cannot be apportioned if it is unquantified, or if it is attached to a dwelling-house, and apportionment of such rights would be likely to increase the burden on the common. For example, the following rights are typical of those which are not quantified:

- an unquantified right of turbary,
- an unquantified right of estovers (e.g. firewood for the hearth),
- an unquantified right of piscary.

6.3.22 (Unquantified means that the right is not quantified by weight, size or number. A right to take 'sufficient peat for the hearth' would be an unquantified right of turbary. A

right to take one barrow load of firewood would be quantified.) Where an unquantified right is for the benefit of the holding as a whole, rather than attached to a particular dwelling-house or building, it may be reasonable to permit apportionment if the effect would not increase the overall burden on the common. For example, a right to take bracken as cattle bedding may be implied to be a right to take sufficient bedding to meet the needs of all the cattle which may be over-wintered on the dominant tenement: if the dominant tenement is divided into two or more holdings in separate ownerships, it may be reasonable to treat each of those holdings as entitled to the same right, impliedly limited by the number of cattle which may be over-wintered on that holding.

6.4 Section 9 and Schedule 1

Introduction

6.4.1 Section 9 effects a prohibition on the severance of rights of common, barring the exceptions specified in Schedule 1 and any other Act.

6.4.2 In 2001, the House of Lords determined in *Bettison and another v Langton* and others that a consequence of the quantification of grazing rights on registration under the 1965 Act was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached (or, alternatively, to sell the land and retain the rights). This is known as 'severance'. Severance causes management difficulties for common land where some right holders have no close contact with the common and those who manage it.

Severance by transfer to public bodies

6.4.3 Schedule 1 sets out the exceptions to the prohibition on severance contained in Section 9. Paragraph 1 of Schedule 1 contains a limited exception to the prohibition in relation to rights acquired by a commons council (established under Part 2 of the 2006 Act) (or an equivalent body designated by order under paragraph 1(5) of Schedule 1) and Natural England, provided that the transfer of the severed rights to such a body is duly registered in accordance with sub-paragraph (6).

6.4.4 Where rights are to be acquired by Natural England, paragraph 1(2) of Schedule 1 provides that notice must be given of its intention to the owner of the land over which the rights are exercisable and (where there is no commons council established under Part 2 of the Act) to such persons (if any) as are considered to represent the interests of the commoners. The notice must be given at least two months before the intended transfer, and must include the information required in paragraph 1(3) of Schedule 1, and Regulation 45 prescribes additional requirements. A commons council (if there is one) must give its

consent to the severance, and Natural England must take into account any other representations received in response to the notice, before deciding whether to proceed.

6.4.5 The Secretary of State has made the Dartmoor Commons (Authorised Severance) Order 2008[152] under paragraph 1(5) of Schedule 1, which enables the Dartmoor Commoners' Council, in relation to the Dartmoor commons, to acquire rights of common by severance from the land to which they are currently attached; and to veto any such acquisition of rights by Natural England. In relation to the Dartmoor commons, the Dartmoor Commoners' Council must therefore give its consent to any severance in favour of Natural England.

Procedure

6.4.6 Applications under paragraph 1 may be made only by either:

- Natural England; or
- a commons council[153].

6.4.7 Where a body having statutory management functions over a common has been appointed for the purpose by order made under paragraph 1(5) of Schedule 1, an application may also be made by that body.

6.4.8 The registration authority must look for evidence of:

- the application having been made in form CA11;
- the owner of the dominant tenement to which the right of common is attached having consented to the application, and if appropriate the Commons Council (or designated body) having consented to the application;
- identification of the register unit numbers and entries in the rights section;
- a description of the dominant tenement (including a map), and evidence of its ownership;
- notice having been given in accordance with paragraph 1(2) and (3) of Schedule 1 and Regulation 45;

[152] SI 2008/1962.

[153] Paragraph 12(1) of Schedule 4 to the Regulations.

- consent having been given under paragraph 1(4) of Schedule 1 (where appropriate)[154].

6.4.9 Where an application under paragraph 1 of Schedule 1 relates to only part of a right of common attached to land, then an accompanying application must be made under Section 8 to apportion the right as a prerequisite to the determination of the application under paragraph 1 (see paragraph 6.3.3)[155].

6.4.10 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.4.11 An amendment of the register required in consequence of an application for severance by transfer of an attached right which is granted should be made in accordance with model entry ME14.

Interpretation

6.4.12 Section 9 sets out principles relating to the prohibition of severance.

6.5 Section 10: attachment

Introduction

6.5.1 Section 10 enables a right of common held in gross to be attached to land, so that the right becomes exercisable by the owner (for the time being) of the land to which it is attached. It is immaterial whether a right has previously been severed from a dominant tenement, or has always existed in gross. The right may be attached to a new dominant tenement on an application to the registration authority. An application for the attachment of a right of common to land must be made by the owner of the right, and the person entitled to occupy the land, if different, must consent to the application[156].

Procedure

6.5.2 Applications under this Section may be made only by the owner of the right of common held in gross. It is not necessary that the applicant is entitled to occupy the land

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[154] Paragraph 12(3) of Schedule 4 to the Regulations.

[155] Paragraph 12(4) of Schedule 4 to the Regulations (see also chapter 6.3).

[156] Section 10(2).

to which the right is to become attached, but if the applicant does not, the consent must be obtained of the person entitled to occupy that land.[157]

6.5.3 The registration authority must look for evidence of:

- the application having been made in form CA4;
- identification of the register unit numbers and the rights section entries to which the application relates;
- a description (and map) of the land to which the right is to be attached;
- (where not the applicant) consent from the person entitled to occupy the land to which the right is to be attached;
- evidence that the applicant is the registered owner of the right in gross.[158]

6.5.4 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.5.5 An amendment of the register required in consequence of an application for attachment of a right of common which is granted should be made in accordance with model entry ME6.

FAQs

Q: Does this provision require registered owners of rights in gross to attach their right to land (in other words, to a dominant tenement)?

6.5.6 No, it is at the registered right owner's discretion whether to attach the right to land.

Q: Can a right in gross be attached to land where the person entitled to occupy that land does not consent?

6.5.7 No, where the person entitled to occupy the land does not consent to an application under Section 10, the application cannot proceed.

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[157] Section 10(2).

[158] Paragraph 4(2) of Schedule 4 to the Regulations.

6.6 Section 11: re-allocation of attached rights

Introduction

6.6.1 Section 11 enables a right of common attached to a dominant tenement to be concentrated on part of the dominant tenement where another part is to be developed for non-agricultural use. For example, suppose a commoner owns land (the dominant tenement) to which a right to graze 100 sheep is attached. If one tenth of the land is developed for a new road, the effect of the *pro rata* rules of apportionment would be that a right to graze 10 sheep would attach to the owner of the road (presumably to no benefit). The effect of a timely and successful application under Section 11 will be that the developed land will cease to have any rights attached to it, and the land which remains undeveloped will enjoy all of the rights which formerly attached to the whole of the dominant tenement.

6.6.2 Only the owner of the dominant tenement to which rights are attached may apply to the registration authority to exclude part of the dominant tenement ('the relevant part') from the register. An application may be made where the relevant part is not used for agricultural purposes, or has planning permission for non-agricultural use. An application may also be made where the relevant part is subject to a compulsory purchase order which has been confirmed, but before the land is vested in the acquiring authority.

6.6.3 The relevant part must still be in the ownership of the applicant at the time of the application: for example, an application may be made where planning permission has been granted for development of the relevant part (but it is still in the applicant's ownership), but an application can no longer be made if the relevant part has been sold to a developer in order to implement the planning permission.

Procedure

6.6.4 Applications under this Section may only be made by the owner of the land to which the right of common is attached[159].

6.6.5 The registration authority must look for evidence of:

- the application having been made in form CA5;
- consent from any relevant leaseholder of, or charge holder over, the land to which the right of common is attached;

[159] Section 11(1).

- identification of the register unit numbers and entries in the rights section;
- a description of the land to which the right of common is attached;
- the applicant as the owner of the land to which the right is attached;
- the application identifying the 'relevant part';
- the circumstances by which one of Sections 11(2), 11(3) or 11(4) is satisfied in relation to the relevant part (e.g. a copy of planning permission for development, a statement supported by evidence of the use of the relevant part for non-agricultural purposes, or a copy of the confirmed compulsory purchase order and evidence that the relevant part has not yet been vested in the compulsory purchase authority).[160]

6.6.6 Where an application under Section 11 relates to only part of a right of common attached to land, then an accompanying application must be made under Section 8 to apportion the right as a prerequisite to the determination of the application under Section 11 (see paragraph 6.3.3)[161].

6.6.7 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.6.8 An amendment of the register required in consequence of an application for re-allocation of attached rights which is granted should be made in accordance with model entry ME7. Note that the variation in the extent of the dominant tenement in consequence of an application under Section 11 which is granted will not be apparent from the amended register entry, but only from inspection of the supplemental map for the amended dominant tenement.

Interpretation

6.6.9 Application can be made to re-allocate rights where part of the dominant tenement is to be put to non-agricultural use (e.g. it may have planning permission for development).

6.6.10 Paragraph 5(4) of Schedule 4 to the Regulations defines use of land for agricultural purposes as:

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[160] Paragraph 5(2) of Schedule 4 to the Regulations.

[161] Paragraph 5(3) of Schedule 4 (see also chapter 6.3).

- growing crops,
- pasture or grazing,
- forestry,
- keeping land as woodland or scrubland,
- any purpose in respect of which a payment is made under the EC Single Payment Scheme.

Land which is used for any of these purposes will not qualify as the 'relevant part' unless Section 11(3) or (4) applies.

6.6.11 Where an application is made as a result of compulsory purchase of the relevant part of the dominant tenement, the order must normally first be confirmed by the authority which made it, or by the Secretary of State. An application cannot succeed in such a case until the order is confirmed. But the application must be made before the relevant part becomes vested in the compulsory purchase authority (or any other person), under the terms of the order, because once the vesting takes place, the owner of the remainder of the dominant tenement will no longer be the owner of the relevant part, and will not be entitled to apply under Section 11.

6.7 Section 12: transfer of rights in gross

Introduction

6.7.1 Section 12 enables the transfer of any right of common held in gross (that is, a change in the ownership of a right which is not attached to any land). The transfer is not legally effective until it has been registered.

Procedure

6.7.2 Applications under Section 12 can be made only by either:

- the registered owner of the right in gross, or
- the transferee of that right, meaning the person to whom the right in gross will be transferred.[162]

[162] Paragraph 6(1) of Schedule 4 to the Regulations.

6.7.3 Where the current owner of the right is not the registered owner, that person must first apply under paragraph 2 of Schedule 3 to update the register to show ownership, during the transitional period (see chapter 8.6). If application was not made for this purpose during the transitional application period, application must be made under paragraph 4 of Schedule 3. Alternatively, it may be possible to obtain the consent of the registered owner to an application under Section 12 to transfer the right direct to the transferee (in effect, cutting out any intervening owners).

6.7.4 The registration authority must look for evidence of:

- the application having been made in form CA6;
- the applicant's capacity to apply;
- (where the applicant is the transferee) consent from the registered owner of the right in gross;
- identification of the register unit numbers and the rights section entries to which the application relates.[163]

Amendment of the register

6.7.5 An amendment of the register required in consequence of an application for transfer of a right held in gross which is granted should be made in accordance with model entry ME8.

FAQs

Q: If a registered holder of a right in gross sells the right to somebody else, is it really necessary for the new owner of the right to register the transfer since the new owner will have proof (e.g. a conveyance) of holding of the right?

6.7.6 Yes, because the conveyance does not operate at law until the transfer has been registered. The registered owner owns the right until such time as the owner's name is replaced in the register by another person's. It is essential that anyone who has "bought" a right in gross applies to register the transfer as soon as possible. A conveyance is redundant for the purposes of transferring ownership.

[163] Paragraph 6(3) of Schedule 4 to the Regulations.

6.8 Section 13: surrender and extinguishment

Introduction

6.8.1 At common law, a right of common could cease to exist by being surrendered by its owner (usually by a deed of release) or by being extinguished by operation of law. Section 13 requires the surrender of any right of common to be effected in a prescribed form, and delays the effect of the surrender until the right has been removed from the registers.

Procedure

6.8.2 An application under Section 13 must be made by:

- the owner of the dominant tenement to which the right of common is attached (or, in the case of a right held in gross, the owner of the right), or
- the owner of at least part of the common over which the right is exercisable.[164]

6.8.3 If the applicant is the owner of all or part of the common over which the right is exercisable, the application must include the consent of the owner of the land to which the right of common is attached (or the right in gross), any relevant leaseholder and anyone who has a relevant charge over the land to which the right is attached[165].

6.8.4 The registration authority must look for evidence of:

- the application having been made in form CA7;
- the applicant's entitlement to apply, including evidence of ownership of the dominant tenement, the right held in gross, or the common over which the right is exercisable, as the case may be;
- details of the register entry which identifies the common or town or village green over which the right is exercisable, and the right to be extinguished;
- (save where it is a right in gross), a description (including a map) showing the extent of the land to which the right is attached.[166]

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[164] Paragraph 7(1) of Schedule 4 to the Regulations.
[165] Paragraph 7(2) of Schedule 4 to the Regulations.
[166] Paragraph 7(3) of Schedule 4 to the Regulations.

6.8.5 For applications to extinguish only part of a right of common, the application must be accompanied by a separate application for apportionment. For example, if a right to graze 30 cattle is registered as attached to three fields of equal size, A, B and C; only field C has passed into the ownership of the applicant; and the applicant wishes to extinguish the applicant's right to graze 10 cattle, the application to extinguish those rights must be accompanied by a separate application for apportionment of the rights between field C, and fields A and B. The apportionment will ensure that the right of common available to the owner of field C is a separate right in the register, which may then be extinguished under Section 13[167].

Amendment of the register

6.8.6 An amendment of the register required in consequence of an application for extinguishment which is granted should be made in accordance with model entry ME9.

Interpretation

6.8.7 Section 13(3) prevents the extinguishment of rights of common through common law mechanisms, which are believed to comprise:

- Unity of ownership (or unity of seisin): where the common land and the right of common come into the same ownership (typically, where the dominant tenement to which a right is attached is acquired by the owner of the common), then the right is extinguished. The effect of Section 13(3) is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner.

- Abandonment: where the owner of the rights can be shown to have irrevocably turned away from the use of the rights.

- Implied release: where a collective release of rights can be inferred over part of the common, typically where that part is inclosed by encroachment and the commoners acquiesce in the loss.

- Alteration to the common, comprising destruction of the common land (such as where the land is reclaimed by the sea) or exhaustion of the product (such as peat which is subject to rights of turbary).

- Alteration to the dominant tenement, comprising the demolition (without replacement) of a building to which rights (particularly rights of turbary) are

[167] Paragraph 7(4) of Schedule 4 (see also chapter 6.3).

attached, or the conversion of land to which rights (such as grazing) are attached to a use incapable of benefiting from the right (such as a reservoir).

6.8.8 These mechanisms are considered to be either redundant or of doubtful relevance where the existence of common land, and rights of common, is recorded in statutory registers. The powers in Section 13 provide a mechanism to extinguish rights of common on the application of any person. It is not necessary or expected that an application to extinguish a right of common is accompanied by any evidence that the right has already ceased to exist by operation of these common law mechanisms, not least because they have been abolished.

6.8.9 However, the abolition of these common law mechanisms under Section 13(3) does not affect any extinguishment which may have occurred by virtue of one or more of the mechanisms before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities. In such a case, application may be made during the transitional application period under paragraph 2 of Schedule 3 to cancel the registration of the right: see chapter 8.7.

6.9 Section 14: statutory disposition

Introduction

6.9.1 Section 14 allows for the making of regulations providing for the amendment of the registers consequent on a disposition arising under statute. There are a number of relevant instruments arising under statute by virtue of which common land or greens may be acquired (generally compulsorily) and removed from the commons register, sometimes in exchange for other land being added to the register. Similarly, rights of common may be acquired and extinguished, sometimes becoming exercisable instead over land given in exchange. These instruments are said to effect a 'disposition' in relation to the land or rights of common.

6.9.2 Paragraph 8 of Schedule 4 to the Regulations places a duty, generally on the person making, or having the benefit of, a relevant instrument, to apply to the registration authority to make amendments to the registers consequent on the disposition made by the relevant instrument. For example, in relation to a compulsory purchase order, the obligation falls on the compulsory purchase authority (please note that, where an order is confirmed by the Secretary of State, any obligation arising from it to make an application does not fall to the Secretary of State). Similarly, where application must be made under a local Act to the Secretary of State for consent to an exchange of land, the obligation will fall on the applicant. Paragraph 8(5) and (6) of Schedule 4 to the Regulations provides that on an exchange of land, any land given in exchange must be registered, and that the disposition is not to have effect until its effect is registered.

6.9.3 Regulation 44 applies to any relevant instrument (such as a compulsory purchase order) which gives rise to a duty to apply under paragraph 8 of Schedule 4 to the Regulations, where the relevant instrument provides for:

- the extinguishment of a right of common,
- the extinguishment of a right of access for open-air recreation,
- the extinguishment of a right to indulge in lawful sports and pastimes,
- conferment, or vesting in any person, of a right over land given in exchange for a right extinguished as above,
- any land to cease to be common land or town or village green,
- any land to become common land or town or village green.

6.9.4 In any of these cases, Regulation 44 provides that the relevant instrument does not operate in law, in so far as it purports to have any of the effects described above, until the disposition made by the relevant instrument is registered on an application made for the purposes of Section 14. So, for example, a compulsory purchase order does not extinguish a right of common until the extinguishment has been registered (nothing in Regulation 44 affects the general operation of the order, or restricts the powers of entry conferred on the compulsory purchase authority).

6.9.5 The same principles apply to other relevant instruments where a duty to apply to register the effect of the instrument arises under paragraph 8 of Schedule 4 to the Regulations. For example, where common land is acquired under Section 13 of the New Parishes Measure 1943 for building a church or connected purposes, Regulation 44 provides that the land will continue to be registered common land until the land and any rights of common are removed from the commons register in accordance with an application made by the Diocesan Board of Finance for the diocese in which the land is situated, notwithstanding the apparent effect of Section 15(1) of the Measure.

6.9.6 It follows that registration authorities should endeavour to grant an application made for the purposes of Section 14 (under paragraph 8 of Schedule 4 to the Regulations) as quickly as possible, so that there is no unnecessary delay to the instrument having effect on registration.

6.9.7 A relevant instrument may not come into effect until long after the date on which it is made or confirmed, so the registration authority must inspect the terms of the instrument to establish that it has come into effect. The mere fact, for example, that a compulsory purchase order has been made does not mean that the exchange has come into effect: see *Interpretation*.

Procedure

6.9.8 Applications for the purposes of Section 14 can only be made by the person on whom the duty to apply is imposed by the Regulations. Please refer to the table contained at the end of paragraph 8 of Schedule 4 to the Regulations for details.

6.9.9 The registration authority must look for evidence of:

- the application having been made in form CA8;
- the instrument cited in the application being one of those specified in the table set out in paragraph 8 of Schedule 4 to the Regulations;
- the capacity in which the applicant is entitled to apply (i.e. that the applicant is the person identified in column 4 of the table);
- a copy of the relevant instrument, and any consent, authorisation, approval or certificate which has been given for the purposes of the instrument;
- the relevant instrument having come into effect;
- details of the register unit and, where applicable, register entry to be amended;
- a description of the amendment required to be made to the registers.

6.9.10 Where an application for the purposes of Section 14 relates to only part of a right of common attached to land, then an accompanying application must be made under Section 8 to apportion the right as a prerequisite to the determination of the application for the purposes of Section 14[168].

6.9.11 The registration authority should proceed according to the generic guidance in chapter 5.11.

Amendment of the register

6.9.12 Any amendments of the register required in consequence of an application for the purposes of Section 14 which is granted should be made in accordance with any one or more of the following model entries as may be appropriate to the circumstances: ME3, ME4, ME9, ME13 (on an exchange), ME15, ME16, ME17, ME18 or ME20 (on an exchange).

Interpretation

6.9.13 A duty to apply for the purposes of Section 14 will most frequently arise in relation to a compulsory purchase order made by a compulsory purchase authority (such as a

[168] Paragraph 8(9) of Schedule 4 to the Regulations (see also chapter 6.3).

highway authority or the Secretary of State). For example, a compulsory purchase order may provide for the acquisition of common land for the purposes of a new road scheme and the discharge of all rights of common over the land. The order may also provide for other land to be given in exchange for the taken land, and for the rights of common to be vested so that they become exercisable over that land.

6.9.14 However, a compulsory purchase order does not normally have effect in relation to registered land on the date on which it is confirmed, and the registration authority must satisfy itself, in relation to any application for the purposes of Section 14, that the relevant provisions of the order have come into effect. For example, the Compulsory Purchase of Land (Prescribed Forms) (Ministers) Regulations 2004[169] (which prescribe forms for use in connection with the compulsory purchase of land which is subject to the procedures contained in the Acquisition of Land Act 1981) set out the following provisions in relation to an order providing for the vesting of exchange land[170]:

> 4(2) As from the latest of the dates mentioned in sub-paragraph (3) of this paragraph, the exchange land shall vest in the person[s] in whom the order land was vested immediately before it was vested in the acquiring authority, subject to the like rights, trusts and incidents as attached to the order land; and the order land shall thereupon be discharged from all rights, trusts and incidents to which it was previously subject.
>
> 4(3) The dates referred to in sub-paragraph (2) of this paragraph are—
>
> > (i) the date on which this order becomes operative;
> >
> > (ii) the date on which the plot of the order land is vested in the acquiring authority;
> >
> > (iii) the date on which the corresponding plot of the exchange land is vested in the acquiring authority.

An order which adopts the above form of words will not come into effect in relation to the register land until the date on which the last of the conditions specified in article 4(3) is satisfied. The registration authority, on receiving an application in relation to a compulsory purchase order, will therefore need to inspect the terms of the order, and to see evidence that each of the conditions which must be met before the vesting provision comes into effect has been satisfied, and the date on which it was satisfied.

6.9.15 Although the registration authority cannot register the effect of a compulsory purchase order under Section 14 until the vesting provision comes into effect, it should be

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[169] SI 2004/2595.

[170] Article 4(2) of Form 2 in the Schedule to the Regulations (an alternative form is also prescribed).

noted that Regulation 44 provides that the vesting is not to occur in law until the effect of the order is registered, and it is therefore particularly important that prompt application is made to secure registration of the effect of the order, so that the vesting may take effect in law.

Other relevant legislation

6.9.16 Applications must be made to the registration authority for the purposes of Section 14 where an instrument is made under any of the enactments listed in the table contained in paragraph 8 of Schedule 4 to the Regulations. That table is believed to be comprehensive to the pioneer authorities and 2014 authorities of all statutory powers by which land may cease to become common land or green, land may become common land or green, rights of common may be extinguished, or rights may be vested over other land.

6.9.17 However, Defra cannot rule out the possibility that other enactments, particularly local enactments of some antiquity, also give rise to events requiring amendment of the registers. The identification of any such enactments (for the purposes of Section 14) would require the Regulations to be amended. Any registration authority which is aware of any power not listed in the table should contact Defra for advice.

6.10 Section 15: registration of greens

Growth and Infrastructure Act 2013

6.10.1 The Growth and Infrastructure Act 2013 amended the law on registering new town and village greens. Section 15C of, and Schedule 1A to, the 2006 Act exclude the right to apply under Section 15(1) where a trigger event has occurred in relation to the land. The exclusion remains until a corresponding terminating event occurs. Trigger and terminating events are in Schedule 1A and relate to the identification of land for potential development through the planning system. This took effect on 25 April 2013.

6.10.2 The 2013 Act reduced the two year period of grace during which an application can be made where use of the land as of right comes to an end. The period of grace is now one year. It also introduced landowner statements which bring to an end any period during which recreational use as of right has taken place on land. These changes took effect on 1 October 2013. Guidance is available: https://www.gov.uk/government/publications/guidance-to-commons-registration-authorities-in-england-sections-15a-to-15c-of-the-commons-act-2006.

Introduction

6.10.3 Section 15 enables land to be registered as a town or village green provided it fulfils the criteria for registration.

6.10.4 Section 15 was brought into force throughout England on 6 April 2007[171], and applications were subject to the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007[172].

6.10.5 The 2007 Regulations have been revoked in the pioneer authorities and the 2014 authorities and replaced by the 2014 Regulations - see the Transitional arrangements in chapter 5.2.

Procedure

6.10.6 Anyone may apply to register land as a green under Section 15(1), provided the right to apply is not excluded under new Section 15C(1). Landowners may apply under Section 15(8) to register their land and such applications are not affected by the 2013 Act changes.

Section 15(1): registration on the application of any person

6.10.7 Before the registration authority can accept an application for consideration, it must first establish whether the right to apply has been excluded in relation to that land. If the right to apply has been excluded, the registration authority cannot consider the application.

6.10.8 An application under Section 15(1) must indicate which one of the following criteria applies:

- Use continuing — Section 15(2) applies where land has been used 'as of right' for lawful sports and pastimes for 20 years or more before the application is made, and this use continues at the date the application is submitted.

- Use ended no more than one year ago — Section 15(3) applies where recreational use 'as of right' for 20 years or more ended on or after 6 April 2007 but no more than one year before the application is submitted[173].

6.10.9 The registration authority must also look for evidence of:

- the application having been made in form CA9;

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[171] See the Commons Act 2006 (Commencement No.2, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/456).

[172] SI 2007/457.

[173] This was two, but was reduced to one, year by Section 14 of the Growth and Infrastructure Act 2013, which commenced on 1 October 2013 by article 6 of The Growth and Infrastructure Act 2013 (Commencement No. 2 and Transitional and Savings Provisions) Order 2013 (SI 2013/1488).

- the other criteria in Section 15(2) or (3) having been met, namely that:
    - a significant number of
    - the inhabitants of any locality, or any neighbourhood within a locality
    - indulged…in lawful sports and pastimes
    - as of right
    - on the land
    - for a period of at least twenty years;
    - where relevant, the date of cessation of such use;
    - where relevant, any interruption of such use owing to statutory periods of closure;
    - where relevant, any planning permission affecting the land.

6.10.10 On the question of whether the use as of right satisfies the 20 year period, the registration authority will need to check its register of landowner statements to determine whether a statement has been made at any point in relation to the land (see the 2013 Act changes above). The burden of proof that Section 15(2) or Section 15(3) applies rests on the applicant for registration. It has been said that "it is no trivial matter" for a landowner to have land registered as a green, and that accordingly all the criteria for registration must be "properly and strictly proved" and careful consideration must be given by the decision-maker to whether that is the case[174]. Those *dicta* were approved by Lord Bingham and Lord Walker in the *Beresford* case[175]. But the standard of proof is the usual civil standard, i.e. the balance of probabilities.

Section 15(8): registration on the application of the landowner

6.10.11 A landowner may apply under Section 15(8) to register his land as a green. (Such applications are unaffected by the Growth and Infrastructure Act 2013.) In such a case, the applicant does not need to satisfy any of the criteria in Section 15(2) or (3). However, where there is any relevant leaseholder of, or charge holder over, the land, such

[174] By Pill LJ, in *R v Suffolk County Council*, *ex parte Steed*.
[175] *R v Sunderland City Council, ex parte Beresford*.

as a tenant, or a mortgagee, the applicant must provide evidence that that person's consent has been obtained[176].

6.10.12 Such consent may come in the form of a signed document which includes their name and address, a statement of the nature of their relevant interest in the land, and their formal consent to the application. The applicant must also supply evidence of ownership of the land to which the application relates.

All applications under Section 15

6.10.13 An application under Section 15 must include a map showing the area of land sought to be registered as a green, unless the application relates to the whole of the registered common land comprised in a register unit[177]. An application under Section 15(1) must identify the locality or the neighbourhood within a locality relied upon; and an application under Section 15(8) may identify the locality or neighbourhood within a locality of which the inhabitants are to have the right to indulge in lawful sports and pastimes on the land[178]. If the locality or neighbourhood is not coextensive with an administrative area (such as an electoral ward or a parish), nor comprises a geographical area which may be briefly described in terms which leave no doubt as to its boundaries (such as an isolated village), then a map must be included with the application showing its extent[179]. There is Court of Appeal authority in the Leeds Group case[180] that 'neighbourhood' may be read as meaning 'neighbourhood or neighbourhoods': see further paragraphs 6.10.22 *et seq*. The above requirements would have to be complied with in relation to each neighbourhood relied on for the purposes of a Section 15(1) application or selected for the purposes of a Section 15(8) application.

6.10.14 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

6.10.15 Please be aware that due to the exclusion of the right to apply, prospective applicants may contact the registration authority for confirmation of whether or not the right has been excluded in relation to the land with which they are concerned.

Interpretation

[176] See Section 15(10) for the definition of a 'relevant' leaseholder or charge.

[177] Paragraph 9(b) or 10(1)(b) of Schedule 4 to the Regulations, as read with Regulation 19(2) and (3).

[178] There is no obligation to identify a locality or neighbourhood for the purposes of an application under Section 15(8): where no such identification is made, it is uncertain whether any right of use of the land for lawful sports and pastimes is conferred on local people (however defined) or on the public generally.

[179] Paragraph 9(c) or 10(2) of Schedule 4 to the Regulations.

[180] *Leeds Group plc v Leeds City Council*.

6.10.16 This part of the guidance - interpretation of the criteria for applications under Section 15(1) - is relevant to applicants and all registration authorities. It is irrelevant to applications under Section 15(8) except for the purposes of identifying a 'locality' or 'neighbourhood within a locality'.

"Significant number"

Meaning of 'significant number'

6.10.17 The criterion requires that "a significant number of the inhabitants" of a locality or a neighbourhood within a locality have indulged in lawful sports and pastimes on the land for at least 20 years. In the *McAlpine Homes*[181] case the High Court provided some useful guidance about what 'a significant number' might mean[182]. The court did not accept that the expression was synonymous with a considerable, or a substantial, number. The reason given was that a neighbourhood might have a very limited population, and a significant number of its inhabitants might not be capable of being described as considerable or substantial. This implies that what constitutes a 'significant number' is relative to the size of the population of the relevant locality or neighbourhood (and the larger the population, the more considerable the number of its inhabitants required to have used the land). However, there is no scientific approach to assessing whether this criterion is met. Whether the evidence shows that a significant number of the inhabitants of any locality or neighbourhood within a locality used the land for informal recreation is, according to the court, very much a matter of impression. The key question is whether the number of inhabitants using the land was sufficient to signify that it was in general use by the local community (i.e. the inhabitants of the relevant locality or neighbourhood) for informal recreation, rather than occasional use by individual trespassers.

6.10.18 The concept of use by 'a significant number' of inhabitants was first introduced by way of amendment[183] to Section 22(1) of the 1965 Act, which as originally enacted provided that land would be registrable as a town or village green if it was "land on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years". That was the third limb of a tripartite definition, according to which land was also registrable as a town or village green if it had been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality, or it was land on which the inhabitants of any locality had a customary right to indulge in lawful sports and pastimes. The three classes of registrable land have often been referred to as 'class a', 'class b', and 'class c' greens respectively. In practice, registration of class a and class b greens was limited to the initial registration period prescribed under the 1965 Act for the registration of existing commons and greens (ending on 31 July 1970); the effect of non-

[181] *R v Staffordshire County Council ex parte Alfred McAlpine Homes Ltd*.

[182] At paragraph 71.

[183] By Section 98 of the CROW Act, with effect from 30 January 2001.

registration by that date was to extinguish recreational rights over land in those categories[184], and no new class a or class b greens could be created after that date.

Predominance of use

6.10.19 In the *Sunningwell*[185] case, it was contended on behalf of the landowner that land would not qualify for registration as a class c green under the original wording in the 1965 Act if it had been used for sports and pastimes by persons who lived outside the locality as well as by inhabitants of the locality. Reliance was placed on the law relating to proof of customary rights of recreation, as summarised in *Hammerton v Honey*[186]. Lord Hoffmann said that he was willing to assume that the user should be similar to that which would have established a custom, but on that footing, it was sufficient that the land had been used predominantly (as opposed to exclusively) by inhabitants of the locality.

6.10.20 However, his view has been superseded by the amendment made to the original wording in the 1965 Act by Section 98 of the CROW Act. The question whether a predominant user requirement was to be read into the amended version of the 1965 Act arose for decision in the *Warneford Meadow*[187] case. For land to qualify for registration under Section 22 of the 1965 Act in its amended form, as under Section 15(2) or 15(3) (of the 2006 Act), it had to be land on which "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality" had indulged in sports and pastimes. The decision is therefore applicable by analogy to Section 15. The High Court held that there was no implicit requirement for most of the users to have lived in the locality or neighbourhood. The provision was clear in its terms: so long as a significant number of the inhabitants of the locality or neighbourhood were among the recreational users of the land, it did not matter that many or even most users came from elsewhere[188]. In the *Paddico* case, Vos J simply noted, without analysis, that the predominance test had "been replaced by the requirement for usage by 'a significant number" of inhabitants'[189].

6.10.21 However, in a dissenting opinion in the *Leeds Group* case, Tomlinson LJ said that he had "grave doubts about imputing to Parliament an intention to relax the requirement that the right to enjoy the green should attach to the inhabitants of a single

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[184] See paragraph 18 of Lord Hoffmann's opinion in the *Trap Grounds* case.

[185] *R v Oxfordshire County Council and another ex parte Sunningwell Parish Council*.

[186] In which Sir George Jessel MR said: "if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."

[187] *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and another) v Oxfordshire County Council*.

[188] It was further held that if there was ambiguity, it could be resolved by reference to *Hansard* pursuant to the principles laid down in *Pepper v Hart* [1993] AC 593: www.bailii.org/uk/cases/UKHL/1992/3.html, the Government spokesman introducing the amendment to Section 22 of the 1965 Act having clearly stated that the intention was to remove the need for applicants to demonstrate that use was predominantly by people from the locality.

[189] *Paddico (267) Ltd v Kirklees Metropolitan Council & Others*, at paragraph 97(vi).

area, however defined"[190]. His opinion was not shared by the majority, but Arden LJ and Sullivan LJ did not specifically address themselves to the question of the predominance test surviving the CROW Act amendment.

"The inhabitants of any locality, or of any neighbourhood within a locality"

Determining the relevant locality or neighbourhood within a locality

6.10.22 An applicant for registration under Section 15(1) is required to identify, by description or by reference to a map, the area relied upon as the 'locality' or 'neighbourhood within a locality', a significant number of the inhabitants of which have used the land for recreation. In the Laing Homes[191] case, the High Court endorsed the view that the question of what was the relevant locality (or neighbourhood within a locality) was a matter of fact for the registration authority to determine in the light of all the evidence, which might contain a number of conflicting views on the topic. Subject to considerations of fairness towards the applicant and supporters and objectors, the registration authority should be able to decide that question in the light of all the evidence, whether or not the answer corresponded with the locality (or neighbourhood) put forward by the applicant. Fairness would require that the parties should have a reasonable opportunity to consider and comment upon, and if necessary call further evidence to respond to, the introduction of a new candidate locality or neighbourhood. However, that opinion was expressed in the context of the 1965 Act and the regulations made under that Act, which the court interpreted as not requiring applicants to commit themselves to any particular locality or neighbourhood in their application forms. Although it is Defra's view that an analogous approach is appropriate in the context of the 2006 Act and the Regulations, given the public interest element in town or village green claims referred to by Sullivan J in the *Laing Homes* case[192], that has yet to be judicially affirmed.

Meaning of 'locality'

6.10.23 There is a body of authority to the effect that 'locality' in the 1965 Act meant a legally recognised administrative area, such as a civil parish or an ecclesiastical parish. The High Court so held in *Ministry of Defence v Wiltshire County Council*. Sullivan J agreed in the *Cheltenham Builders*[193] case, although he made clear[194] that his views on the subject were *obiter*. In the *Laing Homes* case, he confirmed that an ecclesiastical parish qualified as a 'locality'. Lord Hoffmann in the *Trap Grounds* case referred to "the insistence of the old law [meaning, presumably, Section 22 of the 1965 Act as originally

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[190] At paragraph 44.

[191] *R* (*on the application of Laing Homes Ltd) v Buckinghamshire County Council*.

[192] At paragraph 143. Compare the remarks of Carnwath LJ in the Court of Appeal in the *Trap Grounds* case, at paragraph 103, approved by Lord Hoffmann in the House of Lords in the same case, at paragraph 61.

[193] *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire Council*.

[194] In a short subsequent judgment dealing with relief.

enacted] upon a locality defined by legally significant boundaries"[195]. And in the *Paddico* case, the High Court, after reviewing all the authorities, decided that a 'locality' for the purposes of the 1965 Act, "is to be understood in all the legislation (before and after the [CROW Act] amendment) as meaning an administrative district or an area within legally significant boundaries"[196]. There would seem to be no reason for 'locality' to be interpreted any differently in the 2006 Act.

6.10.24 In the *Paddico* case, Vos J thought that a conservation area could qualify as a 'locality', because it was designated under statute, and had legally significant boundaries[197]. In the *Laing Homes* case[198], Sullivan J cast some doubt in passing on whether an electoral ward constitutes a locality within the meaning of the statute. There is no judicial decision one way or the other on that question, and the law cannot be taken as settled. But paragraph 9(c)(i) of Schedule 4 to the Regulations requires that an application under Section 15(1) "must…(c) contain a description of the locality or the neighbourhood…by reference to— (i) the name of any parish, electoral ward or other local administrative area with which it is coextensive", and therefore[199] Defra's view is that an electoral ward will qualify.

Distribution within a locality

6.10.25 The requirement is that there is use by "a significant number of the inhabitants" within the locality. It appears that the distribution of the inhabitants within the locality is immaterial, provided that they are sufficient to constitute a significant number. In the *Paddico* case, Vos J said that he "was not impressed with [the] suggestion that the distribution of residents was inadequately spread" across the specified localities. He noted that the majority of users making declarations lived closest to the claimed green, and that this was precisely what one would expect[200].

Whether 'the inhabitants of a locality' can mean more than one locality

6.10.26 In the *Trap Grounds* case, Lord Hoffmann seemed to presuppose that 'locality' by itself meant a single locality[201]. That would be consistent with the law of customary recreational rights as it was declared to be in *Edwards v Jenkins*. In that case, Kekewich J held that a customary right could only exist for the benefit of the inhabitants of

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[195] At paragraph 27.

[196] Paragraph 97(i).

[197] Paragraph 106(ii).

[198] At paragraph 138.

[199] The words from the start of the sentence to 'therefore' are only relevant to the pioneer authorities and 2014 authorities.

[200] At paragraph 106(i).

[201] At paragraph 27 ("The fact that the word 'locality' when it first appears in subsection (1A) must mean a single locality… .").

one parish, and a claim on behalf of the inhabitants of three parishes to be entitled to recreate on land in one of them was accordingly bad. He considered that earlier judgments recognising customary rights for the benefit of the inhabitants of a 'district'[202] could be read as using the word 'district' in the limited sense of an individual "division of the county defined by and known to the law, as a parish is", rather than in the extended sense of a grouping of adjoining or contiguous parishes. He said he could find nothing in the earlier cases to justify interpreting the word as meaning more than "the particular division known to the law in which the particular property [the land subject to the custom] is situate".

6.10.27 However, doubts about the correctness of so strict an approach were subsequently expressed (*obiter*) by the Court of Appeal in *New Windsor Corporation v Mellor*[203]. Lord Denning MR said that so long as the locality was certain, that was enough. Brightman J reserved his position, but said if the point were relevant to the appeal he would feel it difficult to understand why a customary right could not exist over land in one locality for the benefit of the inhabitants of that and one or more other localities. If the Edwards v Jenkins approach was questioned in the context of customary rights, there may be an even stronger argument for adopting a more relaxed approach in the case of statutory greens, especially following the CROW Act amendment which had "the effect of weakening still further the links with the traditional tests of customary law"[204]. But in the Paddico case, the High Court concluded that an application under the 1965 Act could only succeed if the user were by the inhabitants of a single locality[205]. The court's conclusion in relation to the 1965 Act as amended by the CROW Act is *obiter*, and the defendants were not represented by counsel, so that there remains some lingering uncertainty whether it can be regarded as settled that 'locality' must be read in the singular only when it first appears in Section 15(2) or 15(3). Indeed, in *Paddico*, Vos J concluded with a plea to be overruled, saying that: "I am by no means sure that the strict interpretation of the word locality in Section 22(1) of the 1965 Act was mandated by the older cases, but that construction has now been reiterated too often and at too high a level for it easily to be changed. It may be hoped that the hangover of cases governed by the old law will be few and far between, and that the more liberal and intelligible rules contained in the 2000 Act and ultimately in the 2006 Act will hold sway for the future"[206].

Meaning of 'neighbourhood'

6.10.28 The concept of a 'neighbourhood' is more flexible than that of a 'locality', and has no connotation of legally recognised boundaries. This was confirmed by Lord Hoffmann in the *Trap Grounds* case[207]. There is no requirement for a range of community

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[202] *Bourke v Davis* (1889) 44 Ch D 110, at p 120; *Earl of Coventry v Willes* (1863) 9 LT (NS) 384.

[203] At pp 387, 396.

[204] In the words of Carnwath LJ in the *Trap Grounds* case in the Court of Appeal, at paragraph 65.

[205] At paragraphs 97(ii) and 101.

[206] At paragraph 121.

[207] At paragraph 27.

facilities or indeed any community facilities. In the *Cheltenham Builders* case[208], Sullivan J gave a housing estate as an example of a neighbourhood. However, he rejected the notion that a neighbourhood might be any area of land that an applicant chose to delineate on a plan, saying that the registration authority had to be satisfied that an alleged neighbourhood had a sufficient degree of cohesiveness. A boundary line such as the one drawn by the applicants in that case, which bisected gardens, streets and an area of open space, is unlikely to be accepted as delineating a neighbourhood. In the *Warneford Meadow* case[209], the court rejected an argument that a neighbourhood need not have defined boundaries and said that to qualify as a neighbourhood an area must be capable of meaningful description and must have 'pre-existing' cohesiveness. That would seem to mean that the attribute of cohesiveness should have predated the period of use relied on and should not be dependent on use of the claimed green — in other words, it is not enough that the only unifying feature of the claimed neighbourhood is its inhabitants' use of the claimed green. It is a question of fact, taking all the circumstances into account, whether a particular area possesses the necessary attribute of cohesiveness.

6.10.29 According to the High Court in *Leeds Group plc v Leeds City Council*[210], the cohesiveness issue should be approached in the light of 'neighbourhood' being an ordinary English word, and of judicial *dicta* to the effect that Parliament's intention in introducing the 'neighbourhood' alternative was clearly to avoid technicalities and make registration of new greens easier[211]. But the court was not prepared to accept that a 'neighbourhood' need be no more than the geographical area in which users of the land lived. The judge said he had "difficulty with the view of the Inspector … that there was one composite neighbourhood here, a neighbourhood of those that enjoyed the facilities. Such a construction would, to my mind, denude the word 'neighbourhood' of any real meaning."[212] However, although that finding was not challenged in the Court of Appeal, Tomlinson LJ commented, *obiter*, that he was not convinced by the judge's view.

Whether a neighbourhood must lie within a single locality

6.10.30 In the *Cheltenham Builders* case[213], Sullivan J said (*obiter*) that "neighbourhood within a locality" meant a neighbourhood lying wholly within a single locality. In the *Trap Grounds* case[214], Lord Hoffmann (also *obiter*) disagreed with him, saying that such an interpretation would introduce the kind of technicality which the amendment to Section 22 of the 1965 Act was clearly intended to abolish, and there was nothing in the context to preclude the phrase being construed as meaning 'neighbourhood within a locality or localities'. The point was not argued before the judicial committee, but Lord Hoffmann's

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[208] At paragraph 45.

[209] At paragraph 79.

[210] At paragraph 103: this aspect of the judgment in the High Court was not appealed.

[211] See, in particular, paragraphs 26–27 of Lord Hoffmann's opinion in the *Trap Grounds* case.

[212] At paragraph 106.

[213] At paragraph 88.

[214] At paragraph 27.

dictum might be considered to carry more weight, and was endorsed by Arden LJ in the *Leeds Group* case in the Court of Appeal[215]. On that approach, the words "within a locality" would serve to emphasise that a neighbourhood may be smaller than a locality, and need not have legally significant boundaries like a locality, but not impose any restriction on what may qualify as a neighbourhood for the purposes of Section 15.

Whether there may be more than one neighbourhood within a locality

6.10.31 That construction is founded on Section 6(c) of the Interpretation Act 1978, which provides that in any statute, the singular includes the plural unless the contrary intention appears. On the same basis, the a majority of the Court of Appeal held in the *Leeds Group* case that 'neighbourhood' could be read as meaning 'neighbourhood or neighbourhoods'. Sullivan LJ quoted as particularly convincing the words of the inspector appointed by the local authority, that: "it would be an absurdity, and a manifest distortion of Parliament's intentions, to hold that a town or village green can only validly be registered … where it can be shown that all, or the predominant bulk, of the users came from the 'neighbourhood' on one side of the open space, and not the other."[216]

Meaning of 'locality' in the expression: 'any neighbourhood within a locality'

6.10.32 There was no appeal from the judgment of the High Court in the *Leeds Group* case which, in considering whether the two neighbourhoods were "within a locality", rejected an argument that a 'locality' in that context is limited in size to an area which is not too big for the claimed green to have served as a recreational facility for a broad spread of its inhabitants. The court also agreed with the inspector who had recommended registration that there was nothing in the authorities to compel the conclusion that a geographical area which had ceased to be a legally distinct administrative district upon local government reorganisation in 1937 could not still count as a 'locality' for the purposes of the neighbourhood criterion in Section 22 of the 1965 Act as amended.

The inhabitants on whom is conferred (by virtue of registration) a right of lawful sports and pastimes

6.10.33 Registration as a green operates to confer a right to indulge in lawful sports and pastimes on the land on, in Lord Hoffmann's words in the *Trap Grounds* case[217], "the relevant inhabitants". It was common ground among the parties in the *Warneford Meadow* case, and accepted by the court, that this meant the inhabitants of the locality or neighbourhood on the basis of which the land was found to qualify for registration under

[215] At paragraph 57.

[216] At paragraph 27: the case related to an application brought under Section 13(b) of the 1965 Act, but the relevant language is identical.

[217] At paragraph 69.

Section 22 of the 1965 Act[218]. The position would be the same in the case of a Section 15(1) application. Where registration was achieved on the basis of user by a significant number of the inhabitants of more than one neighbourhood (or locality), the rights would enure to the benefit of the inhabitants of each of those neighbourhoods (or localities). In the case of a Section 15(8) application, the right will enure to the inhabitants of the locality or neighbourhood nominated by the landowner in making the application[219].

"Indulged…in lawful sports and pastimes"

What qualifies as 'sports and pastimes'

6.10.34 This criterion requires that the applicant provides evidence of use of the land for lawful sports and pastimes by a significant number of inhabitants of the locality or neighbourhood[220] relied upon. It was established in the *Sunningwell* case that "lawful sports and pastimes" is a composite class which includes any activity that can properly be called a sport or a pastime. There is no necessity for any organised sports or communal activities to have taken place. Solitary and informal kinds of recreation, such as dog walking and children playing (by themselves or with adults), will satisfy the criterion. Lord Hoffmann agreed with what Carnwath J had said in the *Steed* case[221] about those being potentially the main functions of present day greens.

6.10.35 It is not necessary for local inhabitants to have participated in a range of diverse sports and pastimes. The majority of the House of Lords in the *Trap Grounds* case held that the rights to which registration as a green gives rise are rights to indulge in all manner of lawful sports and pastimes, however limited the number of activities proved to have taken place during the period of user leading to registration. That will extend to new sports and pastimes invented after the date of registration: *Sunningwell*, citing the recognition in *Fitch v Rawling* of a custom to play cricket even though the game was unknown in 1189. However, it does not follow that one-off activities such as an annual Guy Fawkes night or May Day celebration would suffice to justify registration. In the *Redcar* case[222], Lord Walker in the Supreme Court took the opportunity to repudiate the suggestion that land might qualify for registration on the basis of a bonfire every 5th November, saying that such activity would be "far too sporadic to amount to continuous use for lawful sports and pastimes"[223].

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[218] See paragraphs 80–82. The suggestion that rights enured for the benefit of the inhabitants of any locality or neighbourhood who could establish that a significant number of them had used the land in a qualifying manner was not supported because following registration, there was no mechanism for establishing any such thing.

[219] The position is uncertain where no nomination was made by the landowner.

[220] Throughout the remainder of chapter 6.10 the use of the singular should be read in the context of the preceding guidance.

[221] *R v Suffolk County Council, ex parte Steed*.

[222] *R (on the application of Lewis) v Redcar and Cleveland Borough Council and another*.

[223] At paragraph 47. The suggestion was based on a reading of paragraph 49 of Lord Hoffmann's opinion in the *Trap Grounds* case: see paragraph 105 of Lord Scott's opinion in the same case. The possibility that an

Lawfulness of sports and pastimes

6.10.36 Until recently, little attention has been paid in the authorities to the meaning of the word 'lawful'. In the *Redcar* case in the Supreme Court[224], Lord Hope said (*obiter*) that the word indicates that the sports and pastimes "must not be such as will be likely to cause injury or damage to the owner's property", citing *Fitch v Fitch*. In that case, it had been held that a customary right to play at lawful games and pastimes in a field did not entitle local people to trample down the grass, throw the hay about, and mix gravel through it so as to render it of no value. There was no discussion of whether injury or damage had to be intentional, or amount to the commission of a criminal offence. In the *Warneford Meadow* case[225], it was noted that such conduct as occurred in *Fitch v Fitch* would amount to the modern day offence of criminal damage. The court interpreted the word 'lawful' as meant to exclude all activities which would be illegal in the sense of amounting to criminal offences (whether or not they caused damage to the owner's property), such as joy-riding in stolen vehicles or recreational use of proscribed drugs. Activities may, of course, be prohibited on pain of a criminal penalty by the general law or by local byelaws. A submission that all tortious activities were also excluded was rejected, on the basis that such a construction would nullify the purpose of the provisions since all 'as of right' use is trespassory in character. Trespass which is intended to intimidate, obstruct or disrupt a lawful activity on the land is a criminal offence of aggravated trespass[226] and therefore might well fail to qualify as lawful use — but it seems unlikely that users could be shown to have intended to intimidate, obstruct or disrupt a lawful activity — even if they had that effect.

"As of right"[227]

Nec vi, nec clam, nec precario

6.10.37 Indulgence in lawful sports and pastimes on the land which is the subject of the application must have been 'as of right' throughout the period of user relied on. In the *Sunningwell* case it was held that use is not 'as of right' unless it is *nec vi, nec clam, nec*

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annual bonfire might justify registration as a green is referred to by Lord Scott in the *Trap Grounds* case citing the registration of Bittacy Green. But the circumstances of that registration (determined by the Commons Commissioner) were exceptional, and partly described by Lord Scott in paragraph 90 of his judgment. The land had long ceased to be used as a green, but was claimed to be historically a green; only evidence of use of the land before 1952 was admissible — at least 24 years before the date of the hearing; most of the green was earlier legally appropriated for other uses, leaving a small area of limited utility: the evidence for that area appears scant, but testimony was admitted of use for an annual bonfire. See the Commissioner's decision at: www.acraew.org.uk/uploads/Greater%20London/BITTACY%20GREEN%20-%20BARNET%20NO.VG.40.pdf.

[224] At paragraph 67.

[225] At paragraph 90.

[226] Section 68 of the Criminal Justice and Public Order Act 1994.

[227] Section 15B of the Commons Act 2006, commenced in October 2013, introduced 'landowner statements' through which landowners can end any 'as of right' recreational use of their land.

precario, translated by Lord Hoffmann as meaning not by force, nor stealth, nor the licence of the owner; and if those requirements are met, it is irrelevant whether the users believe themselves to be entitled to do what they are doing, or know that they are not, or are indifferent to which is the case[228].

Appearance to the landowner

6.10.38 In the *Redcar* case, the Supreme Court held that if the traditional 'tripartite test' was satisfied, that was sufficient. There was no need to ask any further question, such as whether it would have appeared to a reasonable landowner that users were asserting a right to indulge in lawful sports and pastimes. That is not to say that the user does not have to have been "of such amount and in such manner as would reasonably be regarded as being the assertion of a public right", but that goes to the "quality of the user relied on" rather than to the 'as of right' criterion[229]. The general law of prescription requires that the user relied on should be shown to have been "of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed"[230]. That is why use which is "trivial and sporadic"[231] will not suffice to justify registration, and why an annual bonfire by itself will not do[232].

Symmetry between user and rights and the 'deference' test

6.10.39 It is also a principle of prescription, reaffirmed in the *Redcar* case[233], that there must be equivalence (or symmetry) between the user relied on to establish the right and the way the right may be exercised once it has been established. That was what led in the *Laing Homes* case, and in the *Redcar* case at first instance and in the Court of Appeal[234] to its being held that if local inhabitants deferred to the landowner (or his lessees or licensees) whenever they wished to use the land for their own purposes, even if only on a few days a year, the land could not qualify for registration as a green. The reasoning was that, following registration, the local inhabitants would have priority over the landowner; therefore, if they did not act as if they already had priority, they did not give the appearance of asserting a right. The Supreme Court held that the lower courts had been

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[228] Overruling the Court of Appeal's decision in the *Steed* case, according to which use was not 'as of right' for the purposes of a claim under Section 22 of the 1965 Act unless users also had a subjective belief in the existence of a right for the local inhabitants to recreate on the land.

[229] See the analysis of Lord Hope at paragraphs 67–69.

[230] In the words of Buckley LJ in *White v Taylor (No 2)* [1969] 1 Ch 160, at p 192, cited by Lord Hope in the *Redcar* case at paragraph 72. Compare *Hollins v Verney* (1884) 13 QBD 304, cited at paragraph 32.

[231] In the words of Lord Hoffmann in the *Sunningwell* case, at paragraph 357.

[232] See paragraph 6.10.38.

[233] In particular by Lord Hope at paragraph 71.

[234] *R (on the application of Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes plc*, *R (on the application of Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes (Teeside) Ltd*.

in error to think that the effect of registration as a green would necessarily be to confer unrestricted rights of recreation on local inhabitants. There was nothing in the 1965 Act, or the 2006 Act, or any of the speeches in the *Trap Grounds* case, to compel that conclusion. Instead, in a case where the land has been used by both the owner and the local inhabitants during the pre-registration period, neither interfering with the other, the local inhabitants' rights will be qualified; after registration, they will have to allow the owner to continue using the land in the same way as before. In a case where the owner did nothing with his land, the local inhabitants will gain "full and unqualified recreational rights over it"[235]. It follows that there is no inconsistency between local inhabitants refraining from interfering with the owner's activities and their using the land in a way that is comparable with the exercise of an existing right.

6.10.40 Thus, in the *Redcar* case, the land was held to be properly registrable despite the inspector's finding of "overwhelming" deference by local inhabitants to its use as a private golf course. It would seem that the *Laing Homes* case was also wrongly decided to the extent that the decision depended on local inhabitants not interrupting the agricultural licensee's hay-making activities or disturbing the hay crop itself. Taking *Fitch v Fitch* as long-standing authority for the proposition that a customary right to indulge in lawful games and pastimes could co-exist with a right of the landowner to grow grass for hay without interference, Lord Walker described taking a single hay crop from a meadow as "a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring"[236]. Similar considerations would apply where use for lawful sports and pastimes by local inhabitants had peacefully co-existed with other kinds of use by the landowner (or by other people with the landowner's authority) during the period of user relied on.

Rights of way

6.10.41 The principle that user should be "of such a character…as to indicate an assertion…of a right of the measure of the right claimed" underpins the distinction drawn in the authorities between use which would suggest to a reasonable landowner the assertion of a right to indulge in sports and pastimes all over the land (which will count towards a claim under Section 15(2), (3) or (4)), and use which would suggest to a reasonable landowner the assertion of a right of way (which will not). This distinction was first drawn in the *Laing Homes* case, where the inspector was held to have erred in reaching his conclusion that there was abundant use of the three fields in question for lawful sports and pastimes without having separated out, and discounted, highway-type use of the footpaths around the edges of the fields[237]. Those particular paths had not long before been added

[235] See, in particular, paragraphs 70–75 *per* Lord Hope, 99–105 *per* Lord Brown and 114–115 *per* Lord Kerr.

[236] See paragraphs 28–29, and paragraphs 63, 73–75 *per* Lord Hope. It is not clear whether Lord Walker intended to suggest that the owner might have exclusive use of the land for the purpose of cultivating a hay crop until late summer, or merely that user would need to co-exist alongside agricultural use until late summer.

[237] See paragraphs 88–110.

to the definitive map of public rights of way on the basis of recent user evidence, and it was not appropriate for that same user also to be relied on for the purposes of the town or village green claim. But a similar distinction has to be drawn if and to the extent that particular routes across or around a claimed green have been used in a manner suggestive of the exercise of a public right of way even though no such right has been formally established or even claimed.

6.10.42 The theme was developed at first instance in the *Trap Grounds* case by Lightman J[238]. Use of a defined track to get to a particular destination (e.g. crossing the claimed green as a short cut to a school, a bus stop or the local shops), or as the shortest route linking two highways, is likely to give the appearance of highway-type use rather than green-type use. Even if the purpose of the journey is recreational (for example, to reach a viewpoint), it may be undertaken in a manner suggestive of the exercise of a public right of way. A circular walk around a field (as in *Laing Homes*) or a lake (as in *Dyfed County Council v Secretary of State for Wales*) may become a public footpath. On the other hand, if walkers deliberately diverge from the track[239], or people depart from it to carry on other recreational activities, their use of the track as well as the adjoining land may count as use for lawful sports and pastimes. In the *Dyfed* case, the Court of Appeal drew a distinction between "pure walking" (which was capable of founding a claim to deemed dedication of a highway notwithstanding the recreational as opposed to "business" purposes) and use of the route as a mere "incident of" or "ancillary to" activities such as sunbathing, swimming, fishing and picnicking (which was not). In the *Trap Grounds* case, the House of Lords refused to declare that as a matter of law, all pedestrian recreational use of tracks traversing a claimed green should be discounted in assessing the amount of use for lawful sports and pastimes, and set aside the declarations made by Lightman J on the subject. Lord Hoffmann accepted that he (and Sullivan J in *Laing Homes*) had made useful common sense observations about the significance of the activities of walkers and their dogs, but declined to offer any guidance of his own. Like Carnwath LJ in the Court of Appeal, he emphasised that these are matters of fact for decision-makers.

Use by (existing statutory) right

6.10.43 In Barkas (Supreme Court) the Lords held that land is not used 'as of right' for sports and pastimes if the users already have a statutory or other legal right to use it for those very purposes. In such a case the use is referable to the existing right; it is 'by right', or 'of right'. Examples of statutory provisions which in express terms confer rights on members of the public to use land for lawful sports and pastimes are Section 193 of the

[238] At paragraphs 102–105.

[239] Although not, according to Sullivan J in *Laing Homes*, if their dogs are let off the lead to roam while the owners stay on the track — even where the dogs have to be fetched back.

Law of Property Act 1925 (the right to take air and exercise on certain commons and waste lands) and Section 2 of the CROW Act[240].

6.10.44 If land is held on trust for the purpose of recreational use and enjoyment by the general public (or a section of the public including the users of the land), the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. The clearest example of a statutory trust is that imposed in terms on open space land held under the Open Spaces Act 1906 by Section 10 of that Act, which obliges the local authority to "hold and administer the open space in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and…for no other purpose". Land held under Section 164 of the Public Health Act 1875 or any other legislation which requires the local authority to make the land available for public recreation is effectively held on a statutory trust for that purpose. In the case of Section 164 of the 1875 Act, this has been recognised by the courts[241], and by Parliament in assimilating it with Section 10 of the 1906 Act for the purposes of land disposals and appropriations in Sections 122 and 123 of the Local Government Act 1972. Defra takes the view that land held on a charitable trust for public recreation should be treated in an analogous manner to land held on a statutory trust for that purpose.

6.10.45 In the *Beresford* case, Lord Walker said[242] that the position would be the same (that is, recreational users would not be trespassers) if there were no statutory trust in the strict sense, but land had been appropriated by a local authority for the purpose of public recreation. A statutory provision which he may have had in mind when he said that (having mentioned it earlier in the same paragraph) is Section 19 of the Local Government (Miscellaneous Provisions) Act 1976, which empowers local authorities to provide public recreational facilities free of charge.

6.10.46 If any of the three "vitiating circumstances", as Lord Hope described them in the *Redcar* case, applies, the application must fail.

'Nec clam': without secrecy, openness

6.10.47 '*Nec clam'* has received little attention in the authorities. It means that the use must be open, so that the owner can see that it is taking place and resist it if he wishes. Use that was surreptitious, for example under cover of darkness or of dense vegetation, would not qualify. Nor would use which took place only when the owner, or his

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[240] Indeed, Section 12(4) of the CROW Act specifically provides that: "The use of any land by the inhabitants of any locality for the purposes of open-air recreation in the exercise of the [CROW rights of access] is to be disregarded in determining whether the land has become a town or village green."

[241] *Hall v Beckenham Corporation*; *Blake (Valuation Officer) v Hendon Corporation*. A useful summary of earlier judicial decisions about the effect of Section 164 of the 1875 Act is contained in *Western Power Distribution Investments Limited v Cardiff County Council*.

[242] At paragraph 87.

agents, were known to be away (but use which happens to take place when the owner is away would qualify, if merely part of the overall pattern of use).

'Nec vi': physical force, notices, challenges

6.10.48 The core meaning of '*vi*' is by physical force. For example, no fences, walls, gates or hedges must have been broken or cut through in gaining access to the land. (However, if the landowner neglects to repair such a breach, there will come a point when entry by that means will cease to count as forcible and 'as of right' use can recommence, enabling a fresh 20 year period to start running.) But there is a line of authority, starting in private easement cases, to the effect that use does not have to involve force to be *vi*; it is enough for it to be contentious. In *Dalton v Angus* Bowen J suggested that the peaceable character of user could be destroyed by "continuous and unmistakeable protests" on the landowner's part. The proposition that user could be rendered vi by the landowner's objecting to it, without necessarily physically interrupting it, was accepted and applied in *Newnham v Willison*, *Smith v Brudenell-Bruce*, and the *Cheltenham Builders* case. Lord Rodger endorsed the principle in the *Redcar* case in the Supreme Court[243] (albeit *obiter*), observing that in Roman law (where the expression originated) "it was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it". Oral challenges to local inhabitants, if made on a sufficient scale to become common knowledge, would be one method of communicating a prohibition on use. Another would be the erection and maintenance of suitably worded notices in prominent positions.

6.10.49 The efficacy of notices has been considered in the Redcar case at first instance[244] and in the *Warneford Meadow* case. The particular wording relied upon was held to have been inadequate in each instance. That was because the wording of the respective notices ("Warning. It is dangerous to trespass on the golf course" and "No public right of way") did not amount to an unambiguous prohibition on use of the land for lawful sports and pastimes. A contrast was drawn with wording such as "Private property. Keep out", "Do not trespass", or "Private property. Access prohibited except with the express consent of [the landowner]". The last of those examples was wording used by Oxford City Council on notices erected after the date of the application for registration in the Trap Grounds case, which both Lightman J and Carnwath LJ considered would have been adequate for the purposes of rendering user vi had they been erected in time.

6.10.50 In the *Warneford Meadow* case[245], the court set out a number of principles relevant to the efficacy of notices for this purpose. In summary, the fundamental question is what the notice would have conveyed to a reasonable user: would a reasonable user have known that the landowner was objecting to and contesting his use of the land? (Another way of putting that question is whether a reasonable landowner would have

[243] At paragraphs 88–91.

[244] There was no appeal against this aspect of the High Court's judgment.

[245] At paragraph 22.

understood his notice to have that meaning.) Evidence of the actual response by users is relevant to that question. The nature and content of the notice, and its effect, must be examined in context[246]. It should be read in a common sense and not a legalistic way. Evidence as to what the owner subjectively intended the notice to achieve is strictly irrelevant in ascertaining its objective meaning. However, if the owner's intention was communicated to the users or a representative of the users, that might reinforce or explain the message conveyed by the notice. If it is suggested that the owner should have done something more than erect the notice, whether in the way of putting up another notice or otherwise, the court should consider whether anything more would have been proportionate to the user in question[247]. Fencing off the area concerned, or taking legal proceedings against users, will not always be necessary. The aim is to let the reasonable user know that the owner objects to and contests his user.

6.10.51 In *Betterment Properties (Weymouth) Ltd v Dorset County Council and Taylor*, the High Court considered the effect of contentious user in the round, taking into account the effect of signs erected by the landowner, warnings off, and breaking down of fences. The judge reviewed the law as to contentious user[248] and adopted the following test:

> Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.[249]

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[246] Thus on the facts of the *Warneford Meadow* case, the locations of the "no public right of way" notices in question (at the points where defined footpaths entered and left the claimed green), the making shortly before their erection of an application for a modification order adding the footpaths to the definitive map, and the existence of alternative access points to the land, strengthened the case for reading them as evincing an intention not to dedicate the paths as highways, rather than a prohibition on general recreational user: see paragraph 49 of the judgment. A submission that "the Authority's objection to a lesser burden on the land (use of paths as public rights of way) must have by implication and without more included objection to a greater burden ie recreational use of the entire Meadow" was briskly rejected by the Court (paragraph 55).

[247] In *Smith v Brudenell-Bruce*, Pumfrey J said that "user is contentious when the servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user". In the *Warneford Meadow* case, it was doubted whether a means-related test was appropriate; in the court's view, a landowner could not escape doing what was necessary to put reasonable users on notice of his objection by claiming to be unable to afford it.

[248] At paragraphs 99–129.

[249] At paragraph 121. The test was adapted from the judgment in *Smith v Brudenell-Bruce*, and the uncertainty over the relevance of a 'means test' was set aside.

6.10.52 The court concluded that a reasonable user of the land would have known that (during part of the period of 20 years' use) hedges and fences had been broken through to gain access against the wishes of the landowner and that the landowners had erected signs which had been torn down and re-erected, and that the landowner was doing everything, proportionately to the user, to contest the user and to endeavour to interrupt it. The court was "not prepared to hold that the landowners were acquiescing in the user just because they did not add legal proceedings to the other steps they were taking to attempt to stop the user."[250]

6.10.53 There is an unresolved question as to what happens if local inhabitants continue to use land in defiance of suitably worded prohibitory notices. In the *Beresford* case, at paragraph 72, Lord Walker said (*obiter*) that a landowner who put up a notice stating "Private land — keep out" would be "in a less strong position, if his notice is ignored by the public" than a landowner who put up a notice expressly permitting use. On the other hand, Lord Rodger's *dictum* in the *Redcar* case[251] might suggest that the notice would have continuing effect.

6.10.54 Does user became contentious once the landowner objects to an application to register the land as a green (especially where that application is withdrawn or rejected, but a further application is submitted later)? In the *Cheltenham Builders* case, the court commented, *obiter*, that it did, because the applicants had withdrawn, apparently in the face of the landowner's objection to their application[252]. In the *Betterment* case, the High Court doubted the position taken in the *Cheltenham Builders* case and said, also *obiter*, that it did not, because following the original application, "nothing changed on the ground in terms of the character or extent of the user. … Further, the landowners did not take any physical steps to follow up their stance nor did they take any other steps to communicate the terms of the objection more widely." Moreover, the landowner's objection was unlikely to have been known to many users.[253] It appears, therefore, that whether a landowner's objection to an application renders use contentious may depend on the circumstances, including whether the applicants persist in the application, whether the objection is backed up by other actions to challenge use, and whether the objection is widely communicated to users.

'Nec precario': without licence or permission

6.10.55 The term *nec precario* refers to use for which the landowner has given neither express nor implied permission. The example of a notice granting express permission given by Lord Walker in the passage from his speech in the *Beresford* case was in the following form: "The public have permission to enter this land on foot for

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[250] At paragraphs 122, 127.

[251] See paragraph 6.10.51.

[252] At paragraph 70.

[253] At paragraph 137.

recreation, but this permission may be withdrawn at any time"[254]. However, no particular form of wording is required, so long as that is the substance of the message conveyed to users.

6.10.56 It was held in the *Beresford* case that a licence may be implied from overt conduct of the landowner. Lord Bingham said:

> "I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."[255]

6.10.57 The House of Lords stressed, however, that permission cannot be implied from mere inaction on the part of a landowner with knowledge of the use to which his land is being put: that is acquiescence or tolerance which will not prevent the use being as of right. There must be "a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass"[256]. Acts encouraging use will not suffice for the purpose. The facts of *Beresford*, in short, were that the landowners had grassed over the claimed green, installed wooden benches around three sides of it, laid a non-turf cricket wicket, and kept it regularly mown. The House of Lords held that the land had nevertheless qualified for registration as a green by virtue of local inhabitants' informal recreational activities. The examples offered of what would constitute an implied licence were now and again closing the land to all comers (whether or not coinciding with the landowner's wishing to use the land for his own purposes), or charging them for admission[257].

"On the land"

Traditional character of land

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[254] At paragraph 72.

[255] At paragraph 5.

[256] At paragraph 75 *per* Lord Walker.

[257] See the above passage from Lord Bingham's speech, and paragraph 83 *per* Lord Walker.

6.10.58 It was held by the House of Lords in the *Trap Grounds* case (although the judicial committee expressed varying views on the point) that there is no legal requirement for land to consist of grass or conform to the traditional image of a town or village green in order to qualify for registration. Any land can so qualify provided that it has been used in the requisite manner for the requisite period. 'Land' may be covered by water[258].

Inaccessibility of land (coverage by dense vegetation)

6.10.59 Another question raised in the *Trap Grounds* case was whether land can qualify for registration as a green even if some of it was inaccessible throughout all or part of the relevant period. The court was asked whether land could have become a green even though by reason of impenetrable growth only 25% of it was accessible for walkers. The inspector had advised that it could; recreational use of tracks, glades and clearings could amount to recreational use of the land viewed as a whole. In the High Court, Lightman J refused to do any more than give guidance "of the broadest kind"[259]. He agreed that the existence of inaccessible areas did not preclude land being held to be a green, and pointed out that such areas might form part of the scenic attraction and might even themselves provide recreational opportunities. For example, a pond could be used for feeding ducks or sailing model boats. Overgrown areas might provide a habitat for wildlife to the benefit of bird watchers and others interested in nature observation. The question whether land could properly be described, viewed as a whole, as having been used for recreation notwithstanding the inaccessibility of parts was to be approached in a common sense rather than a mathematical way. However, a registration authority should not strain its finding of fact on that question, and did not need to do so, having regard to the availability of power to register a part or parts of a claimed green[260].

6.10.60 In the House of Lords, Lord Hoffmann[261] said he was very reluctant to express a view on the inspector's conclusions without inspecting or at least seeing photographs of the site, but agreed that in principle it was unnecessary for users to have set foot on every part (or even the majority) of the land included in an application, saying:

> "If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flowerbeds, borders and shrubberies on which the public may not walk".

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[258] See the definition of "land" in Section 61(1).

[259] At paragraph 95.

[260] See chapter 5.16.

[261] At paragraph 67.

Buildings on land

6.10.61 Where a specific area has been unavailable for sports and pastimes for all or part of the relevant period by reason of being built upon or closed off for use (for example as an electrical substation), it will be appropriate to exclude it from the registration. Physical separation of an unused area from the rest of the land (for example by a wall or fence) will point towards exclusion. In any other case, it will be a matter of fact and degree whether or not an inaccessible or otherwise unused area of a claimed green should be regarded as an intrinsic part of the whole and as such, qualify for registration.

"For a period of at least twenty years"

6.10.62 There must be evidence of qualifying use for a period of at least twenty years. It is not necessary for particular individuals to have used the land for the full period of twenty years, but there should be evidence that local inhabitants taken together have used the land for the full period. Guidance as to how to approach the evidence of witnesses who can only claim shorter periods of use is to be found in the McAlpine Homes case. More caution will be required in a case where relevant circumstances have changed during the twenty years (such as ownership of the land, or its condition, or the use made of it by the owner, or the character of the neighbourhood). In such a case, it may be unsafe to draw inferences from evidence about recreational use during one part of that period about recreational use at other times.

6.10.63 Where as of right use of the land for lawful sports and pastimes continues at the date of the application, the application must be made under Section 15(2). Where such use has ended by the date of the application, it should be made under Section 15(3).

6.10.64 A period during which use of the land was prohibited by reason of any enactment must be disregarded: see paragraph 6.10.67. This would not affect the exclusion of the right to apply under Section 15C(1) because, in Defra's view, recreational user as of right can continue to accrue towards the required 20 years even if the right to apply is excluded.

Transitional questions

Whether use by the inhabitants of a neighbourhood must take place wholly after 30 January 2001

6.10.65 Under the 1965 Act (as originally enacted), an application to register land as a green was required to show use by "the inhabitants of any locality". Section 98 of the CROW Act amended the 1965 Act (with effect from 30 January 2001) to provide for use by "the inhabitants of any locality, or of any neighbourhood within a locality", and the same expression is used in Section 15. Is use of land by the inhabitants of a neighbourhood within a locality prior to 30 January 2001 capable of sustaining an application under Section 15(1)? Could an owner reasonably have been expected to resist recreational use on the part of people living nearby when such use was incapable at that time of giving rise to a claim to register the land as a green?

6.10.66 In the Leeds Group case, the Court of Appeal accepted that an application to register land as a green could be founded in use by the inhabitants of a neighbourhood, prior to the amended requirement for use by "the inhabitants of any locality, or of any neighbourhood within a locality" coming into force on 30 January 2001. Sullivan LJ noted that "the use was clearly of such an amount and manner as would reasonably be regarded as the assertion of a public right" and concluded, as regards the landowner's position, that "the fact that their recreational user of his land is more than trivial or sporadic will be sufficient to put him on notice that a right may well be being asserted, so he must choose between warning them off, or finding that the apparently asserted right has been established."[262] In the Leeds Group case, the application was made under Section 13(b) of the 1965 Act, but the decision appears to put beyond doubt any similar question in relation to Section 15.

Statutory closure

6.10.67 Any periods of statutory closure of the land must be left out of account when considering whether the twenty years' use criterion has been satisfied[263]. Statutory closure occurs where access to the land was forbidden because of temporary special restrictions imposed by a local authority or the Government. An example of this might be where the area of land was closed by order during an outbreak of foot-and-mouth disease[264]. If there was such a closure during the period of 'as of right' use specified in the application, the applicant must state the period which is to be excluded. In such a case, there must be evidence of twenty years' use not taking account of the period of statutory closure (so if the land was closed by order for a period of six months, use will need to be shown over a period of twenty years and six months, but disregarding the six months closure within that longer period).

Permission granted after twenty years' use

6.10.68 Section 15(7)(b) relates to an application to register land where there has been at least twenty years' use of the land as of right for lawful sports and pastimes by a significant number of the inhabitants of a locality or neighbourhood, since when the use has continued up to the date of the application but latterly with the landowner's permission. But for Section 15(7)(b), Section 15(2) would be prevented from applying because the continuing use would be *precario* and so not 'as of right' (see paragraph 6.10.55). However, Section 15(7)(b) provides that in such a case the belated grant of permission is to be disregarded, so Section 15(2) can continue to apply. The working of Section 15(7)(b) may be illustrated by the following example:

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[262] At paragraphs 31–32.

[263] Section 15(6).

[264] An inspector may prohibit the entry of any person onto land in a designated Protection Zone under article 36 of the Foot-and-Mouth Disease (England) Order 2006, SI 2006/182. Similar powers were available to inspectors under predecessor legislation.

> Mrs C is the owner of Riverside View, an area of land in Riverford village. Riverside View has been used for sports and pastimes by the inhabitants of Riverford village for many years, as of right. Mrs C observes that at least twenty years' use has indeed been clocked up, and the local inhabitants have a strong case for registration of the land under Section 15(1). Mrs C erects notices at Riverside View, welcoming local people to the land but noting that such use is by permission, and may be revoked at any time.
>
> Local users see no reason to object to the notices, because they can continue to use the land, and do not consider making an application under Section 15(1). Use therefore continues, but it is no longer as of right. However, when the parish council reviews the notices, it concludes that there has been a challenge to use, and the council applies to register the land under Section 15(1). Section 15(7)(b) provides that, in such circumstances, the continuing use, after the notices have been put up, is still regarded as "as of right" and an application may still be made under Section 15(2) at any time while that use continues (even though, were it not for Section 15(7)(b), the use would no longer qualify as being 'as of right').
>
> Were no-one to act, then after a further two years had passed, Mrs C could exclude the public from the land, and any application subsequently made to register the land under Section 15(1) would be bound to fail unless made promptly[265].

6.10.69 The special provision made by Section 15(7)(b) has no relevance to an application where Section 15(3) applies. It can be relied upon only where the use is continuing (notwithstanding that the use is now by permission) at the date of the application. In Defra's view, Section 15(7)(b) can be relevant only to a permission which was granted on or after 6th April 2007 because it cannot have been intended to have retrospective effect on the actions of landowners who had taken steps, before that date, to bring to an end use as of right.

FAQs

Q: How do I establish whether the right to apply has been excluded over the land?

[265] In the *Trap Grounds* case, Lord Scott said, in relation to an application under Section 13 of the 1965 Act, as amended, that: "if an application is made or legal proceedings are commenced reasonably promptly after and in response to action taken by the landowner or others to obstruct the continued indulgence as of right by the relevant inhabitants in lawful sports and pastimes, the said indulgence shall be taken to have continued to the date of the application or the commencement of the legal proceedings" (paragraph 113(3)).

6.10.70 Before the registration authority can accept an application under Section 15(1) for consideration, it must establish whether a trigger event has occurred in relation to the land which excludes the right to apply. The registration authority needs to contact any Local Planning Authority (LPA) in respect of the land and the Planning Inspectorate for confirmation of whether a trigger event or corresponding terminating event has occurred.

Q: How long is the period of grace for applications?

6.10.71 It is 1 year from the date on which use as of right comes to an end. A registration authority cannot accept an application where use of the land as of right ended more than 1 year before the application is made.

Q: Could there be a fresh application to register land under the new measures, even though a previous application to register the same land was turned down under the law as it stood previously (under the 1965 Act)?

6.10.72 This would depend on the circumstances. If the new application relied on a material change — whether this be one of the changes in the law introduced in Section 15, or different evidence that was being presented about the use of the land — then a new application could be made, so long as the application was made within the specified time period after 'as of right' use was ended.

Q: Can a registration authority refuse to decide repeated applications?

6.10.73 Yes, in certain circumstances — see chapter 5.15. Defra's view is that whilst a registration authority is required to consider a revised case, it would be able to summarily reject repeated successive applications provided they do not raise any new issues for consideration. Where the application brings forward new evidence, it may be that the registration authority need do no more than review its original decision having regard to the new evidence. It is by no means obvious that the registration authority need, for example, reopen any previously held hearing.

Q: Does a council-owned green lose its protection if the council sells it?

6.10.74 In Defra's view, no. It has been suggested that the disposal of a green by a local authority under Section 123 of the Local Government Act 1972 frees the land of any recreational rights. There is no reason to suppose from the language of the Section that Parliament intended to do more than regulate the circumstances in which land may be disposed of by a local authority: it would be surprising if, for example, a disposal caused recreational rights to be lost, any more than one would expect rights of common to be lost if a common were sold. However, it seems likely that the courts will in due course be asked to rule on this point.

Q: Can registered common land also be registered as a green?

6.10.75 Yes. The 1965 Act set out the system for the registration of both common land and greens. It prevented registration of common land as a green but the new measures in the 2006 Act do not. Consequently, if the use of the land meets the criteria it will be possible to transfer it from the register of common land to the register of town or village greens. The land will then cease to be registered common land (but any right of common exercisable over the land will also transfer to the register of town or village greens, and will remain exercisable over the land). Where a former green was wrongly registered under the 1965 Act as common land, application may alternatively be made under paragraph 5 of Schedule 2 if it can be shown that the land was a town or village green at the date of the provisional registration.

Q: How are registered greens protected?

6.10.76 Town and village greens, including those newly registered, are protected by:

- Section 12 of the Inclosure Act 1857 against injury or damage and interruption to their use or enjoyment as a place for exercise and recreation. Causing injury to village greens is a criminal offence.

- Section 29 of the Commons Act 1876 makes encroachment or inclosure of a green, and interference with or occupation of the soil, a criminal offence unless it is with the aim of improving the enjoyment of the green.

Q: What happens if an offence has been committed?

6.10.77 Where an offence has occurred under the above protections, action in respect of Section 12 of the 1857 Act can be brought by the owner or a parish council or parish meeting (or where there is no parish, the district council). Any parishioner can bring an action under Section 29 of the 1876 Act. See Defra's *guidance note on the management and protection of registered town or village greens*.

Q: How can greens be maintained?

6.10.78 The owner of a green cannot do anything that interferes with the lawful recreational activities of the local inhabitants. Greens in local authority ownership are generally managed by the authority under the Open Spaces Act 1906 or by a scheme of regulation under Part I of the Commons Act 1899, but the law makes no provision regarding the maintenance of privately owned greens.

7 : Rectification applications and proposals

7.1 Introduction to Schedule 2 and Section 19

7.1.1 Part 1 provides limited powers to correct some errors and omissions in the registers, particularly where they occurred at the time the registers were initially drawn up under the 1965 Act. Part 1 does not address all such errors or omissions: certain errors, such as the mistaken quantification of rights of common, will seldom be eligible for correction; while omissions of registration will typically only be eligible for rectification where the land was provisionally registered under the 1965 Act, but that registration was cancelled in specified circumstances.

7.1.2 Paragraphs 2 to 5 of Schedule 2 enable land to be added to the registers, or for land to be moved from the register of common land to the register of town or village greens, in recognition of past mistakes or omissions. In summary, applications or proposals may be made to add common land or greens to the registers which are recognised as such by or under any statute, to reinstate waste land of the manor as common land where its provisional registration was cancelled in certain circumstances under the 1965 Act, and to transfer common land to the register of town or village greens where it can be shown it was incorrectly recorded in the register of common land.

7.1.3 Paragraphs 6 to 9 of Schedule 2 enable land to be deregistered where certain criteria are met. In summary, applications or proposals may be made to remove from the registers common land or green which was built upon at the time of registration and has remained built upon ever since, and to remove common land or green the registration of which was not inquired into by a Commons Commissioner, and which can be shown not to have been common land nor green at the time of registration.

7.1.4 The practical difficulties of demonstrating that land was or was not properly registered some forty years ago can be considerable. Evidence may no longer be available, witnesses may have died or moved away. Local communities may be challenged to defend the registration of land long after the original reasons for the registration have been forgotten, and long after witness testimony as to the use of the land could have been given. Paragraphs 6 to 9 of Schedule 2 therefore do not simply provide for a ‘retrial’ of the registration of any land: instead, they ensure that certain registrations may be treated as having been wrongly registered if they meet the tests laid down in the 2006 Act.

7.1.5 Land may be eligible for deregistration under Section 19(2)(a) if the original registration was made as a result of a mistake by the registration authority (e.g. if the map supplied by an applicant for provisional registration of land related to parcel ‘A’, but the registration authority wrongly registered parcel ‘B’).

7.1.6 There is a deadline for applications under Schedule 2: for pioneer authorities it is 31 December 2020 and for 2014 authorities it is 15 March 2027. There is no deadline for applications under Section 19.

7.2 Paragraphs 2 and 3 of Schedule 2: registration of statutory common land or greens

Introduction

7.2.1 Paragraphs 2 and 3 of Schedule 2 enable the registration of land which was specifically recognised by or under an earlier statute as being common land or a town or village green, but which was not registered under the 1965 Act. The criteria for registration as common land under paragraph 2 of Schedule 2 are set out in paragraph 2(2), and include the qualification that the land is regulated under the Metropolitan Commons Acts 1866, Part I of the Commons Act 1899, a local Act[266], or an Act confirming a provisional order of regulation made under the Commons Act 1876, or is otherwise recognised as common land by or under any other enactment[267]. The criteria for registration as a green under paragraph 3 of Schedule 2 include the qualification that the land was on 31 July 1970 land allotted by or under any Act for the exercise or recreation of the inhabitants of any locality.

7.2.2 For example, a local Act may have defined the extent of a common in a plan deposited with the House authorities during the passage of the corresponding Bill through Parliament, but part (or all) of the lands defined in the plan was overlooked and not registered under the 1965 Act. Paragraphs 2 and 3 of Schedule 2 enable the land to be registered.

7.2.3 It will generally be possible for commons exempted from registration by order under Section 11(3) of the 1965 Act to be registered under paragraph 2 of Schedule 2, and for allotted recreation grounds not registered under the 1965 Act to be registered under paragraph 3 of Schedule 2, and Defra encourages local authorities to make proposals to register such land.

7.2.4 Registration authorities should seek to ensure, as a function of their duty to review the registers during the transitional period, that the registers are consistent with the extent of common land and greens as defined in statutory schemes, orders etc, insofar as they remain current. Particular care should be taken to compare registration with commons and greens defined in schemes of regulation made under Part I of the Commons Act 1899

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[266] For an example, see Part XV of the County of Kent Act 1981, in relation to the Tunbridge Wells and Rusthall Commons.

[267] For an example, see the reference to land specified as common land in the Second Schedule to the Broxbourne and Hoddesdon Open Spaces and Recreation Grounds Act 1890 (ch. xlvii).

(or in the Metropolitan Police area, schemes for regulation of commons and greens made under the Metropolitan Commons Acts 1866–1898). Defra's electronic casework database (search online for "pink slip/casework cards") contains a record of such schemes and orders confirmed by the Secretary of State and Parliament, respectively. (The requirement for schemes of management to be confirmed by the Secretary of State was abolished in 1980, so schemes made after are not included.) Registration authorities should make proposals to correct discrepancies.

7.2.5 Paragraphs 2(2)(d) and 3(2)(e) of Schedule 2 enable regulations to prescribe other criteria which must be met in order that land is eligible for registration under either paragraph, and paragraph 14(3) of Schedule 4 to the Regulations provides that land is not to be eligible for registration if, at the time of the application or proposal, the land is covered by a building or the curtilage of a building. The purpose of this criterion is to ensure that land is not registered which has none of the characteristics of common land (or green), and which might lead to the creation of new anomalies in the registers which the 2006 Act is intended to help resolve. However, this exception does not apply if the owner of the land has given his consent to the application or proposal. It should be noted that 'owner' is defined in Section 61(3)(a) as the person holding a legal estate in fee simple in the land. Accordingly, where simple encroachments have recently taken place onto the common (for example, the extension of a garden, or enclosure of the land for parking a vehicle), reliance should be placed on the register of title or other title documents to determine ownership, unless the person having control of the encroachment can prove that they have acquired a title by adverse possession[268].

Procedure

7.2.6 The registration authority must look for evidence of:

- the application having been made in form CA13;
- a description of the land to be registered;
- details of the statutory recognition of the land (in accordance with paragraph 2(2)(b) or 3(2)(a) of Schedule 2); and
- where any land contained in the application is land covered by a building or the curtilage of a building, the consent of the owner.[269]

[268] See Defra's guidance note on adverse possession of common land and town or village greens.

[269] Paragraph 14(3) and (4) or (5) of Schedule 4 to the Regulations.

7.2.7 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

Amendment of the register

7.2.8 An amendment of the register required in consequence of an application or proposal under paragraphs 2 or 3 of Schedule 2 which is granted should be made in accordance with model entry ME17 or ME18 as appropriate.

7.2.9 No new right of common can be created as a result of an application or proposal granted under paragraphs 2 or 3 of Schedule 2. However, where such an application or proposal results in the extension of an existing area of registered land, and the rights of common registered as exercisable over the land comprised in the existing register unit would have been exercisable over the application or proposal land if it had been duly registered under the 1965 Act, the registration authority may, in Defra's view, amend the register (employing ME17) so that the existing rights become exercisable over the application or proposal land as well as the other land comprised in the register unit.

Interpretation

7.2.10 The word 'curtilage' is not defined in the 2006 Act, but has been considered by the courts in various contexts, in particular in the context of planning and development legislation. From such cases, it appears that the question of whether land is considered to be within the curtilage of a building is a question of fact and degree[270]. Earlier decisions suggested that the key factors to be taken into account were the physical layout of the land and buildings, past and present ownership and past and present use and function[271]. However, recent judgments appear to place more weight on present use and function than common ownership[272]. Examples include a yard, basement area, passageway, driveway and garden which are ancillary to the house.

7.2.11 In Defra's view, an application or proposal under paragraph 2 of Schedule 2 can only satisfy the criterion in paragraph 2(2)(b)(iv) ("is ... otherwise recognised or designated as common land by or under an enactment") if that recognition or designation remains current in law. So, for example, if it is shown that land was common land subject to a deed of dedication for public access under Section 193 of the Law of Property Act 1925, but the deed had subsequently been revoked, then the application or proposal could not succeed. Similarly, if a scheme of regulation had been made under Part I of the Commons Act 1899,

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[270] *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* and *Dyer v Dorset County Council*.

[271] *Attorney-General v Calderdale Borough Council*.

[272] *Sumption v Greenwich London Borough Council; Morris v Wrexham County Borough Council; Lowe v First Secretary of State*.

but subsequently amended to exclude an area of land, an application or proposal to register that excluded area of land could not now succeed. This requirement is explicit in relation to applications or proposal under paragraph 3: see paragraph 3(2)(c) of Schedule 2.

7.3 Paragraph 4 of Schedule 2: re-registration of waste land of the manor

Introduction

7.3.1 Paragraph 4 of Schedule 2 enables certain land to be registered as common land. An application or proposal may be made only in respect of land which is not registered as common land or a green, which is waste land of the manor at the date of the application, and was provisionally registered as common land under the 1965 Act (see chapter 2.1), but was subsequently cancelled.

7.3.2 The criteria for registration of land under paragraph 4 of Schedule 2 are set out in paragraph 4(2) to (5), to the effect that:

- the land is waste land of a manor,
- the land was provisionally registered as common land under Section 4 of the 1965 Act,
- there was an objection to its provisional registration, and
- the provisional registration was subsequently cancelled on account of one or more of the following:
    - the registration was dismissed by the Commons Commissioner solely because the land had ceased to be connected with the manor,
    - the registration was dismissed by the Commons Commissioner because the land was not subject to rights of common, and the Commissioner did not go on to consider whether the land qualified instead for registration as waste land of the manor, or
    - the registration was withdrawn at the request or with the agreement of the applicant for registration.

7.3.3 The Court of Appeal decided in 1978 in the *Box Hill* case[273] that 'waste land of a manor' must still be in the ownership of the lord of the manor, but the court's decision was subsequently overruled in 1990 by the House of Lords in the *Hazeley Heath* case[274]. Between 1978 and 1990, many provisional registrations of common land were cancelled by the Commons Commissioner solely on the grounds of the *Box Hill* judgment, or were withdrawn by the applicant for registration in anticipation of cancellation, and were out of time or ineligible for appeal following the decision in *Hazeley Heath*. Cases meeting the criteria specified in paragraph 4(3) and (5) of Schedule 2 may be the subject of a fresh application or proposal for registration.

7.3.4 Cases where an application for provisional registration was withdrawn after an objection will also be eligible for consideration under paragraph 4(5) of Schedule 2 whether or not the reason for withdrawal was the decision in the *Box Hill* case. This is intended to enable fresh consideration to be made in respect of cases where applications for registration of a common were withdrawn by agreement between the several applicants, often in advance of a hearing before the Commons Commissioner. Such agreements generally led to the Commissioner cancelling the registration by consent, without the opportunity for the wider public interest to be considered in relation to the application.

7.3.5 Paragraph 4(4) of Schedule 2 enables cases to be reviewed where the Commons Commissioner concluded, on an objection to the registration of land as common land, that the land was not subject to rights of common, but did not consider whether the land might qualify for registration as waste land of the manor. Where none of the parties appearing before the Commissioner argued that the land might also qualify as waste land, the Commissioner often concluded that the registration should fail without further consideration. However, there is some authority to support the view that the Commissioner ought to have examined the evidence before coming to a decision in such cases, since there is a public interest aspect to the registration of common land and whether land should or should not be registered should not be treated solely as a matter of dispute between the parties to the application[275].

7.3.6 Where land is registered under paragraph 4 of Schedule 2, it will not be possible to claim or register any rights of common which were formerly exercisable over that land. Such rights were extinguished for want of registration, under Section 1(2)(b) of the 1965 Act. However, registration will not affect any other rights, such as tenants' rights of grazing, over the land, and see paragraph 7.3.12.

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[273] *Box Parish Council v Lacey*.

[274] *Hampshire County Council and others v Milburn*.

[275] See the judgment of Lord Denning MR in *Corpus Christi College, Oxford v Gloucestershire County Council*: "I cannot think it correct for the commons commissioners to treat these cases as if they were pieces of civil litigation, such as a *lis inter partes*, in which the applicants have to prove their case. … The hearing by the commissioner should be regarded more as an administrative matter, to get the register right, rather than as a legal contest. The commons commissioner should inquire carefully whether any land is common land, and, if it is, register it in the land section accordingly."

Procedure

7.3.7 The registration authority must look for evidence of:

- the application having been made in form CA13;
- a description of the land to be registered;
- the provisional registration of the land as common land under Section 4 of the 1965 Act;
- the circumstances in which the provisional registration was cancelled (including, where relevant, the Commons Commissioner's determination); and
- the status of the land as waste land of the manor.

7.3.8 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

7.3.9 Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination. See chapter 5.19.

Amendment of the register

7.3.10 An amendment of the register required in consequence of an application or proposal under paragraph 4 of Schedule 2 which is granted should be made in accordance with model entry ME17 or ME18 as appropriate.

7.3.11 No rights of common can be created as a result of an application or proposal granted under paragraph 4 of Schedule 2. However, where such an application or proposal results in the extension of an existing area of registered land, and the rights of common registered as exercisable over the land comprised in the existing register unit would have been exercisable over the application or proposal land if it had been duly registered under the 1965 Act, the registration authority may, in Defra's view, amend the register (employing ME17) so that the existing rights become exercisable over the application or proposal land as well as the other land comprised in the register unit.

Interpretation

7.3.12 In the case of *Attorney General v Hanmer*, waste land of the manor was defined as "the open, uncultivated and unoccupied lands parcel of the manor other than the demesne lands of the manor". If the land fails any of the criteria the application must fail.

7.3.13 Land which is otherwise eligible for registration under paragraph 4 of Schedule 2, but which has been developed, improved and brought in hand, or otherwise fails to fulfil the character of waste land of the manor, cannot be registered. In Defra's view, the question of whether land is waste land of the manor must be satisfied at the time the application or proposal is submitted.

7.3.14 In Defra's view, 'open' means unenclosed. In terms of 'unoccupied', land does not cease to be unoccupied (and therefore cease to be waste) merely because it is subject to a tenancy, lease or licence whose sole or principal purpose is to enable the land to be extensively grazed. Occupation requires some physical use of the land to the exclusion of others: such might occur if the land were occupied by a quarry, or were improved by a tenant (e.g. by cultivating and reseeding moorland) for his own exclusive use and benefit. Nor does Defra consider that shared upland grazing of manorial origin will have ceased to be waste land merely because there is provision for grazing the land contained in several tenancy agreements. In *R v Doncaster Metropolitan Borough Council, ex parte Braim*, the High Court thought (*obiter*) that mowing land did not constitute cultivation, and that a golf club which enjoyed certain rights over part of the (unregistered) common, but did not have exclusive possession, could not be said to occupy the land.

7.3.15 'Of the manor' was held by the court in the *Hazeley Heath* case to mean land which is or was formerly connected to the manor. The effect of the *Hazeley Heath* case is that it is not relevant for these purposes whether the land continues to be held by the lord of the manor — but the land must be of manorial origin. Land which was never part of a manor, such as land within an ancient borough, cannot therefore be eligible for registration under paragraph 4 of Schedule 2. The vast majority of land in England is formerly of a manor, notable exceptions being Crown land and boroughs, and there are a number of possible sources of information on manors:

- The A2A (Access to Archives www.nationalarchives.gov.uk/a2a/advanced-search.aspx?tab=1) website is likely to be helpful. It's possible to search the name of the location or village and the word manor. This will show whether manorial records are held (manors held regular courts, the records of which have often survived), and whether maps of the manors, or relevant estate maps may be available.

- Local records offices will be able to advise on how to research local areas.

- The National Archives hold a manorial documents register www.nationalarchives.gov.uk/mdr/help/mdr/manorname.htm

- Research can also be undertaken from entering search terms on British History online: www.british-history.ac.uk/place.aspx

- The Victoria County History of England (which was started in Victorian times and which remains incomplete) gives a painstaking analysis of manors and estates in each county where the work has been completed.

7.3.16 It is seldom possible to prove definitively that a particular parcel of land is of a manor. But it should be sufficient to show that, on the balance of probabilities, the land lies in an area which is recognised to have been, or still be, manorial, and that there is no convincing evidence to the contrary.

7.4 Paragraph 5 of Schedule 2: town or village green wrongly registered as common land

Introduction

7.4.1 Paragraph 5 of Schedule 2 enables certain land registered as common land to be transferred to the register of town or village greens. Some greens were mistakenly registered under Section 4 of the 1965 Act as common land, typically because the land was subject to rights of common, and the applicants believed that such land was required to be, or wished to have it, registered as common land. It appears that the effect of Section 1(2)(a) of the 1965 Act was to cause such land to cease to be a green, and it is unlikely that the protection afforded to greens by nineteenth century legislation (notably Section 12 of the Inclosure Act 1857[276] and Section 29 of the Commons Act 1876[277]) extends to such land[278]. Paragraph 5 of Schedule 2 therefore affords a fresh opportunity to ensure that the registration of such land is entered in the correct register.

7.4.2 Many town or village greens were registered as common land under the 1965 Act. Registration authorities should seek to ensure, as a function of their duty to review the registers during the transitional period, that they identify such greens, and consider what evidence may be available to support an application or proposal under paragraph 5 of Schedule 2. Registration authorities may wish to encourage parish councils to make applications under paragraph 5 of Schedule 2, or to bring forward proposals for the same purpose.

7.4.3 An application or proposal under paragraph 5 of Schedule 2 will need to show that, immediately before its provisional registration under Section 4 of the 1965 Act, the land was in fact a town or village green within the meaning of the 1965 Act as originally enacted. It will be most straightforward if it can be shown that the land was allotted as a town or village green under an inclosure award, or any other enactment (such as an order of exchange), and therefore wrongly registered as common land under the 1965 Act.

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[276] Prevents damage and interruption to enjoyment of the green.

[277] Prevents encroachment or disturbance other than to improve enjoyment of the green.

[278] In the *Trap Grounds* case, the House of Lords ruled that land registered as a town or village green under the 1965 Act is subject to the protection afforded by the nineteenth century legislation. By implication, the same protection does not extend to former greens registered as common land.

7.4.4 Alternatively, however, it may be possible to show that the land was, immediately before its provisional registration, a green by virtue of 20 years' use as of right, or because of customary use as a green. These tests will generally be much harder to satisfy than in the case of an allotment, because it will be difficult for an applicant to present sufficient evidence of use for a period of at least twenty years ending in the late 1960s. (Where the land continues to be used as a green, it may be found more profitable for the applicant to proceed under Section 15[279].) However, where there is no objection to such an application, and some evidence of use as a green during the relevant period of 20 years, it may be possible to grant the application or proposal notwithstanding the paucity of evidence.

7.4.5 Any rights of common registered over the land must be transferred from the commons register to the greens register, and will remain exercisable over the land.

Procedure

7.4.6 The registration authority must look for evidence of:

- the application having been made in form CA13;
- a description of the land to be registered;
- the provisional registration of the land as common land under Section 4 of the 1965 Act;
- the circumstances in which the provisional registration became final (including, where relevant, the Commons Commissioner's determination); and
- the status of the land as a town or village green immediately before its provisional registration.

7.4.7 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

7.4.8 Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination. See chapter 5.19.

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[279] However, use of registered common land in pursuance of recreational rights conferred by Part I of the CROW Act must be disregarded for the purposes of an application under Section 15(1): see Section 12(4) of the CROW Act.

Amendment of the register

7.4.9 An amendment of the register required in consequence of an application or proposal under paragraph 5 of Schedule 2 which is granted should be made in accordance with model entry ME19.

7.4.10 Where an application or proposal under paragraph 5 of Schedule 2 is granted, ME19 requires the land to be removed from the commons register and inserted in a new register unit in the register of town or village greens. However, any rights of common previously exercisable over the common will remain exercisable over the land now registered as a green, and the information contained in the rights section of the old register unit should be transferred to the new register unit.

7.5 Paragraphs 6 and 8 of Schedule 2: deregistration of buildings

Introduction

7.5.1 Paragraphs 6 and 8 of Schedule 2 enable the deregistration of land which is covered by a building or the curtilage of a building. Typically, such land may have been registered so as mistakenly to include cottages or gardens on or abutting the common or green. The criteria for deregistration under paragraph 6 and 8 of Schedule 2 are set out in paragraph 6(2) and 8(2) respectively, to the effect that:

- the land was provisionally registered as common land or green under Section 4 of the 1965 Act,
- on the date of the provisional registration, the land was covered by a building or was within the curtilage of a building,
- the provisional registration became final,
- since the date of provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.

7.5.2 It is immaterial for the purposes of paragraphs 6 and 8 of Schedule 2 whether the building was lawfully present on the land at the date of provisional registration. Nor is it necessary that the land has been covered by the same building throughout the period since the date of provisional registration — it would be sufficient, for example, that the land had at the date of registration been covered by a garage, but the garage had subsequently been demolished and the land became part of the garden of the adjacent house. But a substantial intervening period, when the land was no longer covered by a garage, but could not be said yet to have become part of the curtilage of the adjacent house, would be fatal to the application or proposal.

Procedure

7.5.3 The same general procedure applies to applications and proposals under paragraphs 6 or 8 of Schedule 2 as in relation to applications and proposals described in chapter 5.11. Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination.

7.5.4 The registration authority must look for evidence of:

- the application having been made in form CA13;
- a description of the land to be deregistered;
- the provisional registration of the land as common land under Section 4 of the 1965 Act;
- the circumstances in which the provisional registration became final (including, where relevant, the Commons Commissioner's determination); and
- the land having been covered at the material times by a building or the curtilage of a building.

7.5.5 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

7.5.6 Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination. See chapter 5.19.

Amendment of the register

7.5.7 An amendment of the register required in consequence of an application or proposal under paragraph 6 or 8 of Schedule 2 which is granted should be made in accordance with model entry ME15 or ME16.

Interpretation

7.5.8 See paragraph 7.2.10 for advice about the interpretation of 'curtilage'. For example, if a house had been built on one part of a registered green, Defra would not expect the whole of the green to be regarded as the curtilage of the house. If the house had a physical enclosure around it to create its own 'space', the curtilage might well be taken as being defined by that enclosure, but would not extend to the rest of the green.

7.6 Paragraph 7 of Schedule 2: deregistration of land wrongly registered as common land

7.6.1 Paragraph 7 of Schedule 2 enables the deregistration of land which was wrongly registered as common land under Section 4 of the 1965 Act, but (unlike paragraph 6 of Schedule 2) its scope is not restricted to buildings and curtilage. As a first step, land is eligible for deregistration under this paragraph if it was provisionally registered as common land under Section 4 of the 1965 Act, and its provisional registration was not referred to a Commons Commissioner.

7.6.2 It follows that an application or proposal cannot be made under paragraph 7 of Schedule 2 where a hearing was originally held into the registration of the land by the Commons Commissioner. However, an application or proposal under this paragraph will not be precluded merely because a hearing was held which considered only the registration of rights over the land, or because a hearing into the ownership of the land was held under Section 8 of the 1965 Act. So, where there is a record of a referral of the registration to the Commons Commissioner (which may be apparent from the registration or from the Commons Commissioners decisions published on the ACRAEW website), the decision of the Commissioner should be carefully inspected to establish the purpose of the referral.

7.6.3 An application or proposal under this paragraph will succeed only if it can be shown that, before its registration, the land was not common land (whether subject to rights of common or waste land of the manor), nor a town or village green within the meaning of the 1965 Act as originally enacted, nor within the definition of land subject to be inclosed under Section 11 of the Inclosure Act 1845.

7.6.4 The exclusion for the purposes of paragraph 7 of Schedule 2 of land subject to inclosure under the 1845 Act ensures that land cannot be removed from the registers under paragraph 7 of Schedule 2 if, at the time of its registration, it was (among other things) a regulated pasture. Regulated pastures are lands which are owned in common by several persons, who also use the land in common at certain or all times of the year (for example, the land may be used to graze in common the stock of all the owners). A number of regulated pastures were incorrectly registered under the 1965 Act, but the continuing registration of such land is not thought to give rise to any difficulties, and confers some benefits in terms of security of status, and public rights of access.

Procedure

7.6.5 The registration authority must look for evidence of:

- the application having been made in form CA13;
- a description of the land to be registered;

- the provisional registration of the land as common land under Section 4 of the 1965 Act;

- the provisional registration having become final without reference to the Commons Commissioner for determination; and

- the status of the land immediately before its provisional registration as not being—

    - land subject to rights of common,

    - waste land of a manor,

    - a town or village green (within the meaning of the 1965 Act as originally enacted),

    - land of a description specified in Section 11 of the Inclosure Act 1845.

7.6.6 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

7.6.7 Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination. See chapter 5.19.

Amendment of the register

7.6.8 An amendment of the register required in consequence of an application or proposal under paragraph 7 of Schedule 2 which is granted should be made in accordance with model entry ME15 or ME16.

Interpretation

7.6.9 Once the provisional registration of the land section of a register unit had been referred to the Commons Commissioner, the registration of the whole unit was before the Commissioner. There was local publicity for the Commissioner's hearing, and local people would have been aware of it. It would have been open to any person to have made a late objection to the provisional registration of any part of the register unit (if they had not made a timely objection). In *Re West Anstey Common*, the Court of Appeal held that: "an objection made under section 4 [of the 1965 Act] to the registration of any land as common land necessarily puts in issue the entire registration." Defra therefore takes the view that the requirements of paragraph 7(2)(b) of Schedule 2 cannot be met in relation to any land contained in a register unit where there was an objection to the provisional registration of any part of the register unit which caused the provisional registration to be referred to the

Commissioner, regardless of whether the provisional registration of that land was specifically considered by the Commissioner.

7.7 Paragraph 9 of Schedule 2: deregistration of land wrongly registered as town or village green

Introduction

7.7.1 Provision similar to paragraph 7 of Schedule 2 is found in paragraph 9 of Schedule 2 for the deregistration of certain registered town or village greens. However, the criteria for deregistration of greens are slightly different. As a first step, land is eligible for deregistration under this paragraph if it was provisionally registered as town or village green under Section 4 of the 1965 Act, and its provisional registration was not referred to a Commons Commissioner.

7.7.2 It follows that an application or proposal cannot be made under paragraph 7 of Schedule 2 where a hearing was originally held into the registration of the land by the Commons Commissioner. However, an application or proposal under this paragraph will not be precluded merely because a hearing was held which considered only the registration of rights over the land, or because a hearing into the ownership of the land was held under Section 8 of the 1965 Act. So, where there is a record of a referral of the registration to the Commons Commissioner (which may be apparent from the registration or from the Commons Commissioners decisions published on the ACRA website), the decision of the Commissioner should be carefully inspected to establish the purpose of the referral.

7.7.3 An application or proposal will need to show that, before its original provisional registration, the land was not common land nor a town or village green. But it would be fraught with difficulty and potential unfairness to try to test, some forty years or more after the event, whether land equally was a town or village green at the date of provisional registration. So paragraph 9(3) of Schedule 2 provides that, in addition, an application or proposal can only succeed if:

- owing to its physical nature, the land could not have been used by members of the public for lawful sports and pastimes throughout the 20 years before its provisional registration under the 1965 Act, and

- the land was not (and still is not) allotted under any enactment, or for the exercise or recreation of the inhabitants of any locality.

Procedure

7.7.4 The registration authority must look for evidence of:

- the application having been made in form CA13;

- a description of the land to be registered;

- the provisional registration of the land as a town or village green under Section 4 of the 1965 Act;

- the provisional registration having become final without reference to the Commons Commissioner for determination; and

- the status of the land immediately before its provisional registration as not being—

  - common land within the meaning of the 1965 Act[280],

  - a town or village green within the meaning of paragraph 9(3) of Schedule 2.

7.7.5 The registration authority should proceed according to the generic guidance in chapter 5.11. In addition, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23).

7.7.6 Where an application or proposal receives objections from any persons with a legal interest in the land, the registration authority must refer it to the Planning Inspectorate for determination. See chapter 5.19.

Amendment of the register

7.7.7 An amendment of the register required in consequence of an application or proposal under paragraph 9 of Schedule 2 which is granted should be made in accordance with model entry ME15 or ME16.

Interpretation

7.7.8 In Defra's view, the test in the first bullet point in paragraph 7.7.3 might be met where, during any part of the 20 year period, for example:

- the land was ploughed for arable cultivation,

- buildings on the land precluded use, or

- fencing effectively excluded public entry onto the land.

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[280] *i.e*. as defined in Section 22(1) of the 1965 Act.

7.7.9 The test in the second bullet point in paragraph 7.7.3 cannot be met in respect of any land which was allotted under an Inclosure Act, provided that the allotment remains in force. Many greens owe their origin to an award under the terms of an Inclosure Act: where an award is relevant to any application under this paragraph, evidence should be presented of the terms of the award, including the extent of the area of land comprised in the award. It is unusual for such an award to have been revoked, but it is immaterial for these purposes whether the land remains in the same ownership as at the time of the award.

7.8 Costs for cases under Schedule 2

7.8.1 The Secretary of State has a power under paragraph 10 of Schedule 2, exercised in Regulation 37, to provide for the award of costs in any application (but not a proposal) made under Schedule 2 which is referred to a public inquiry (but not a hearing) in a case referred to the Planning Inspectorate. Applications under Schedule 2 are particularly likely to involve consideration of complex issues, historical facts, or legal questions. Applications are also more likely to be adversarial than under Sections 6 to 13, with applications from owners to deregister their land opposed by amenity or recreational bodies and local persons, while applications to register land may be contested vice versa. The potential award of costs should discourage unreasonable behaviour by any party to a determination, such as where an application proves to be unfounded but objectors are put to the expense of attending an unnecessary hearing or inquiry.

7.8.2 It should seldom be appropriate to award costs in relation to an application. An award can only be made in respect of costs incurred by the applicant, or by an objector who took part in the public inquiry. An award can only be made against the applicant, an objector who took part in the public inquiry or any registration authority taking part in the public inquiry. Defra does not expect costs to be recovered by any party in the ordinary course of events. However, an award of costs may be made where the following tests are met:

- an application is made under any provision in Schedule 2;
- the application is determined by the Planning Inspectorate;
- the application is determined after a public inquiry;
- the applicant, or an objector or any registration authority taking part in the inquiry behaved unreasonably, causing significant expense to either the applicant or any objector taking part in the public inquiry, which would not otherwise have been incurred; and a claim is made by the applicant or an objector for an award of costs in their favour.

7.8.3 The Inspector will decide any claim for an award of costs, and in doing so, will have regard to the Department for Communities & Local Government's Planning Practice Guidance/Appeals. By way of example, a claim for costs could be made if through one

party's late introduction of evidence, an inquiry had to be adjourned or prolonged, or if an applicant insisted on being afforded an opportunity to be heard, a public inquiry was held, but (both in advance and at the inquiry), the applicant failed to present a reasonable case to support his application.

7.9 Section 19: correction of the register

7.9.1 Section 19 allows applications to correct certain errors in the registers. Section 19(2) sets out the purposes for which a correction may be made. Section 19 does not confer a power to correct all errors in the registers: for example, there is no power to correct an error in the quantification of rights shown in the register, unless the error is attributable to a mistake by the registration authority.

Section 19(2)(a): mistakes made by the registration authority

7.9.2 An application or proposal may be made to deal with a mistake in making or amending an entry in the register (including, by virtue of Section 19(3), a mistaken omission or unclear or ambiguous description of, for example, rights of common), but only where the mistake was made by the registration authority.

7.9.3 A registration authority should not consider itself responsible for any error in the register, solely because it failed to identify and resolve a mistake by another party to a registration, unless the registration authority had a duty at that time to identify and correct such mistakes. Generally, a registration authority was required under the 1965 Act to give effect to any duly made application for registration made to it at the proper time, regardless of its merits.

7.9.4 Such a mistake may arise, for example, where an error was made by the registration authority in transposing onto the register map a plan supplied by an applicant or where in amending an entry in the register the registration authority erroneously added a zero to (or deleted a zero from) the number of rights registered. An error made in a map supplied by an applicant which was faithfully reproduced in the register could not be corrected under this provision, because the registration authority did not make the mistake (but it may be possible to correct it under Schedule 2).

7.9.5 Registration authorities need to be aware of this distinction – i.e. mistakes made by the registration authority and those by other parties - because it is likely that some applicants will inappropriately attempt to apply under Section 19(2)(a) either because they assume that all entries in the registers equate to mistakes made by the registration authority or because they wish to avoid paying a fee, for example, for an application under any of paragraphs 6 to 9 of Schedule 2 to remove land that was wrongly registered.

Section 19(2)(b): other mistakes not affecting land or quantification of rights

7.9.6 An application or proposal may be made to deal with any other mistake, whether made by the registration authority or another person, provided that the amendment would not affect the extent of land registered as common land or as a town or village green, nor the quantification of any right of common. For example, a mistake may have been made by an applicant for registration of a right of common attached to land by which the dominant tenement was wrongly defined. The registration authority would be able to correct such a mistake, provided that the applicant could show how the mistake was made. Similarly, a mistake may have been made in identifying the land over which the right was exercisable (so that the right should have been exercisable over the whole of a register unit, rather than a particular part).

Section 19(2)(c): duplicate entries

7.9.7 An application or proposal may be made to remove a duplicate entry in the register (whether caused by the error of the registration authority or another person). Duplicate entries typically arose where application was made for provisional registration of a right of common under the 1965 Act, both by the tenant of a farm entitled to exercise the right, and the landlord of the farm, and no objection was made to either registration, so that they both became final. This provision enables such anomalies to be resolved.

Section 19(2)(d): updating names and addresses

7.9.8 An application or proposal may be made to update any name or address, principally those which relate to the registered owner of a right held in gross. This power should not be used to update the details of any name or address entered in column 3 of the rights section of the register, because those details relate to the person who applied for registration of the right, and not to any successor in title. The details in column 3, if correct at the time the registration was made, remain correct subsequently, and cannot be amended for the purpose described in Section 19(2)(d).

7.9.9 The name and address of the registered owner of a right of common held in gross may be updated under Section 19(2)(d) only if that owner has changed his name or his address. This provision may not be used to amend the details of the registered owner to substitute another person (other than, for example, the personal representative of the owner, on the owner's death): an application must be made for this purpose under Section 12, or under paragraph 2 of Schedule 3.

Section 19(2)(e): accretion or diluvion

7.9.10 An application or proposal may be made to update an entry in the register to take account of the common law principles of accretion and diluvion. The principles apply to all land where the boundary of ownership follows a body of water — whether river, lake or sea shore. They provide that, if by gradual and imperceptible accretions in the ordinary course of nature, land is added (on one side, in the case of inland water), it falls into the ownership of the person owning the rest of the land on that side, and the boundary line correspondingly advances, and (in the case of diluvion) vice versa. If that side of the body

of water is also subject to rights of common, then the rights of the commoners will adjust along with the rights of the owners.

Procedure

7.9.11 The registration authority must look for evidence of:

- the application having been made in form CA10;
- a description of the land to be registered;
- a statement of the purpose of the application (as described in Section 19(2)(a)–(e));
- the mistake in the register which is sought to be corrected; and
- details of the amendment sought.

7.9.12 The registration authority should proceed according to the generic guidance in chapter 5.11. However, if an application or proposal would either remove or add land to the register, the registration authority must place a site notice at or near an obvious entry point to the land (see paragraph 5.11.23). Given the broad scope of Section 19, the registration authority should be particularly alert to the need to ensure that notice is served on all persons with a potential interest in the application.

7.9.13 Section 19 applications and proposals must be referred to the Planning Inspectorate for determination where they would (a) add or remove land from the register or (b) correct the quantification of rights, and they receive objections from any persons with a legal interest in the land. See chapter 5.19.

Amendment of the register

7.9.14 An amendment of the register required in consequence of an application under Section 19 which is granted should be made in accordance with any one or more of the following model entries as may be appropriate to the circumstances: ME4, ME6, ME7, ME8, ME9, ME14, ME15, ME16, ME17 or ME24. The table below identifies the model entries applicable for the amendments which might typically be made under Section 19.

Part of Register to be amended	**Possible amendments under S.19**	**Model Entry**
Land	Deregistration of the whole of an existing unit	ME16

Land	Deregistration of part of an existing unit	ME15
Land	Registration of new land which results in an increase in the size of an existing registered unit	ME17
Land	Accretion or diluvion	ME17/ ME15
Rights	Amendment to the quantity, number or type of registered rights either held in gross or by a dominant tenement	ME4
Rights	Removal of a right of common from the register	ME9
Rights	Increase or decrease of the area within a registered unit in which a right of common may be exercised	ME4[281]
Rights	Correction of a wrongly defined or ambiguously described dominant tenement	ME7
Rights	Updating the name or address of any organisation/individual who has the benefit of a right held in gross[282]	ME8
Rights	Correction to the registration of a right in gross which has been wrongly registered as being attached to a dominant tenement	ME14
Rights	Correction to the registration of a right which is attached to a dominant tenement but which has been wrongly registered as being held in gross	ME6

[281] Although ME4 illustrates a change in the number and type of livestock which can be grazed, it might also be used as the basis for an amendment of the area over which a right is exercisable.

[282] Section 19 can only be used for this purpose where the holder of a right in gross has legally changed their name (e.g. by deed poll or marriage) or address. Where a right held in gross has been transferred to another person, it will be necessary to make an application under Section 12.

Rights	Removal of a duplicate entry from the rights section of the register	ME9
Ownership	Correction of a name or address in the ownership section of the register[283]	ME24

Interpretation

7.9.15 Corrections may be made for the purposes set out above, whether the error originates from a registration made under the 2006 Act or the 1965 Act, and references to mistakes in Section 19 include mistaken omissions and unclear or ambiguous descriptions[284]. In some cases, an error may meet the criteria under Section 19 and Schedule 2.

Exercise of powers

7.9.16 Section 19(5) provides that the registration authority may not correct mistakes in the register if it would be unfair to do so. For example, if land had been acquired by a person reliant on an inspection of the register which showed it not to be registered common land, but the registration authority had mistakenly excluded that land from the register, it should not correct the mistake if it would, in all the circumstances, be unfair to do so (having regard to the interests of the persons acquiring the land and those interested in correcting the error).

7.9.17 Section 19(7) confers a limited power for the High Court to order the register to be amended where an entry, or any information in an entry, has been secured by fraud and it would be just to amend it. The High Court can also judicially review the actions of a registration authority.

[283] Section 19 can only be used for this purpose where the name or address of the registered owner has changed (e.g. where the owner has legally changed their name or their residential address). The ownership part of the registers is a record of the claimed owner of the common or green at the time of registration and can only be amended to reflect new ownership if notice to this effect if received from the Land Registry.

[284] Section 19(3).

8 : Historic event applications under the transitional period (Schedule 3)

8.1 Introduction

8.1.1 The purpose of the transitional period is to enable the updating of the registers to reflect historic events which either ought to be registered in the public interest, or where one or more of the parties to the event desires its registration.

8.1.2 This chapter deals with applications to register qualifying events for the purposes of paragraphs 2 or 4 of Schedule 3. Applications made for the purposes of Schedule 3 are frequently restricted to those with an interest in the qualifying event, and in such cases, applications from a third party must be refused. For example, an application to register the surrender of a right of common formerly attached to land may be made only by the owner of the common, or of the land to which the right was attached. It is not possible for another person, such as another commoner with rights exercisable over the same common, to apply to extinguish the right.

8.1.3 Qualifying events are specified in paragraph 2(2) of Schedule 3, and are described below. Generally, an application to register a qualifying event will be supported by documentary evidence of the event: for example, an application to register the extinguishment of a right of common will be accompanied by a deed of surrender, by which the person entitled to the right agreed to surrender it. However, in certain circumstances, it may be possible to assert that a qualifying event has occurred which is not supported by any direct documentary evidence: for example, that a right of common to graze pigs on beech mast was extinguished by operation of common law, because (during the qualifying period), the beech trees on the common died, and the right of common became extinguished through exhaustion of the product. Any such application should be supported by other relevant evidence which supports the assertion. The registration authority is under no obligation to gather its own evidence, so an application which adduces insufficient evidence, or the evidence is found wanting as a result of third party representations, should be refused.

8.1.4 There is no provision in Schedule 3 allowing for the deregistration of land other than in consequence of a statutory disposition (such as a compulsory purchase order), and therefore, in Defra's view, an application for the purposes of Schedule 3 cannot secure the deregistration of any registered land, even where an application causes the deregistration of all rights of common over that land, unless the application is consequential to a statutory disposition. For example, an application to register the extinguishment of all rights of common exercisable over a common, in recognition of deeds of surrender previously executed, could properly result in the deregistration of those rights of common, but could not result in the deregistration of that common.

Duration of the transitional period

8.1.5 The transitional period has ended for pioneer authorities. For 2014 authorities, the transitional application period is 3 years and the transitional period is 4 years.

Fees

8.1.6 No fee is payable for any application made for the purposes of paragraph 2 of Schedule 3 during the transitional application period. A fee will be payable for any application made under paragraph 2 of Schedule 3 after the end of the transitional application period, or any application made for the purposes of paragraph 4 of Schedule 3 after the end of the transitional period (unless the registration authority fails to specify a fee).

8.2 Historic creation of right of common

Introduction

8.2.1 The creation of a right of common after 2 January 1970 but before 1 October 2008 in the pioneer areas or 15 December 2014 in the 2014 authority areas, may be registered pursuant to paragraph 2(2)(a) of Schedule 3 (see paragraph 15 of Schedule 4 to the Regulations). The right can have been created by any lawful means: this includes a creation by grant, but also the acquisition of a new right of common by prescription. It may be possible to assert that a right of common has been acquired by lost modern grant if the 'right' has been asserted for a period of 20 years as of right.

Procedure

8.2.2 An application for the purposes of Schedule 3 to register the creation of a new right of common may be made only by either:

- the owner of any part of the land over which the claimed right of common is exercisable;

- the owner of any part of the land to which the claimed right is attached (the dominant tenement) or, as the case may be, the owner of the claimed right in gross[285].

8.2.3 The registration authority must look for evidence of:

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[285] Paragraph 15(1) of Schedule 4 to the Regulations.

- the application having been made in form CA14;

- the capacity in which the applicant is entitled to apply (i.e. as owner of any part of the common, or owner of any part of the dominant tenement or of a claimed right in gross);

- a description of the right to be registered;

- a description of the common over which the claimed right is exercisable (including a map);

- if the claimed right of common is attached to land, a description of the dominant tenement (including a map);

- where the claimed right was created by an instrument, evidence of that instrument or if the right was created by other means, evidence of the creation of the right[286].

8.2.4 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

8.2.5 An amendment of the register required in consequence of an application which is granted for registration of the creation of a new right of common as a qualifying event should be made in accordance with model entry ME3. Where, in consequence, new land is required to be registered, the register should be amended in accordance with ME18.

Interpretation

8.2.6 There is considerable uncertainty whether a right of common could be acquired over land which was already registered (whether as common land or town or village green). This is because the 1965 Act provided that "no rights of common shall be exercisable over [land capable of being registered under the Act] unless they are registered…"[287]. In Defra's view, these words had effect on 31 July 1970, the end of the period referred to in Section 1(2) of the 1965 Act[288], and did not prevent the acquisition of new rights of common by prescription after that date, although regulations made under the 1965 Act prohibited the registration of a new right of common over existing registered

[286] Paragraph 15(2) and (3) of Schedule 4 to the Regulations.

[287] See Section 1(2)(b) of the 1965 Act.

[288] See article 2 of the Commons Registration (Time Limits) Order 1966 (SI 1966/1470), as amended by the Commons Registration (Time Limits) (Amendment) Order 1970 (SI 1970/383).

land[289]. The 2006 Act therefore leaves the door open to the possibility that rights of common can be acquired by prescription under the 1965 Act even in relation to existing registered land, but does not explicitly provide that they can be. The reference to the acquisition of rights by prescription in paragraph 2(2)(a) of Schedule 3 can be explained by the possibility that it allows for the registration only of rights acquired over unregistered land. In Defra's view, a new right may be asserted provided that it was not in existence on 2 January 1970[290], but the matter cannot be regarded as settled, and will need to be determined by the registration authority if it arises.

8.2.7 Equally, it may also be possible to assert the validity of a grant of a right of common over existing registered land, where the right was granted after 2 January 1970 but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities. In such cases, however, the registration authority will need to consider whether the owner of the common was capable of granting a new right having regard to its impact on the exercise of any existing rights of common. For example, where the number of registered rights exercisable over a common under the 1965 Act exceeds the capacity of the common to sustain those rights, then in Defra's view, any new grant would have been invalid at common law, and should not be registered on an application for the purposes of paragraph 2(2)(a) of Schedule 3. It is seldom likely that a new right of common could be acquired over a registered town or village green, without interfering with the local inhabitants' right to use the green for sports and pastimes, and in Defra's view, any application for that purpose should be scrutinised very carefully.

8.2.8 Where an application relates to a new right of common, exercisable over unregistered land, the registration authority must, in registering the new right, also register as common land the land over which the right is claimed to be exercisable.

8.3 Historic variation of a right of common

Introduction

8.3.1 A variation of a right of common occurring after the date of registration of the right but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities may be registered pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 17 of Schedule 4 to the Regulations).

Procedure

[289] See regulation 3(2) of the Commons Registration (New Land) Regulations 1969 (SI 1969/1843).

[290] See article 3 of the Commons Registration (Time Limits) Order 1966 (SI 1966/1470). A period of prescription beginning after 3 January 1950 may therefore be eligible for registration.

8.3.2 An application for the purposes of Schedule 3 to register the variation of a right may only be made by:

- the current owner of any part of the common over which the right was exercisable prior to the variation;
- the owner of any part of the common over which the right which was varied is exercisable at the date of application; or
- the owner of the land to which the right is attached (the dominant tenement) or, as the case may be, the registered owner of the right in gross[291].

8.3.3 If the current owner of a right held in gross which was varied is not the registered owner, a separate and preceding application must be made to register the transfer of ownership of the right from the registered owner to the current owner (see chapter 8.6).

8.3.4 The registration authority must look for evidence of:

- the application having been made in form CA14;
- the capacity in which the applicant is entitled to apply (i.e. as owner of any part of the common, the dominant tenement or right in gross);
- the register unit number and entry number in the rights section of the register;
- a description of the variation to be recorded;
- a description of the dominant tenement (including a map), except where the right is held in gross;
- where the right was varied by an instrument, evidence of that instrument or if the right was varied by other means, evidence of the variation of the right.[292]

8.3.5 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

[291] Paragraph 17(1) of Schedule 4 to the Regulations.
[292] Paragraph 17(2) and (3) of Schedule 4 to the Regulations.

8.3.6 An amendment of the register required in consequence of an application which is granted for registration of the variation of a right of common as a qualifying event should be made in accordance with model entry ME4. Where, in consequence, new land is required to be registered, the register should be amended in accordance with ME17.

Interpretation

8.3.7 A variation may relate to any aspect of the registered right, but most typically will comprise a variation in what may be done under the right (e.g. a variation of a right to graze 100 cattle so as to substitute a right to graze 600 sheep), but may also enable the right to be exercised over new or different land, or adjust the dominant tenement to which the right is attached. The registration authority will need to consider whether the owner of the common was capable of varying the right having regard to its impact on the exercise of other existing rights of common (see paragraph 8.2.7).

8.3.8 A variation cannot cause land to cease to be registered as common land or green, because no provision is made in paragraph 2(2)(b) for the registration of such an outcome: so, for example, where the variation provides that rights of common are to cease to be exercisable over part of an area of registered common land and to become exercisable instead over an unregistered piece of land, it is not possible for an application pursuant to paragraph 2(2)(b) to bring about the deregistration of any part of the registered common land. Conversely, where the effect of a variation is to cause the right to become exercisable over land which was not previously registered land, then that land must be registered as common land in consequence of the variation.

8.4 Historic apportionment of a right of common

Introduction

8.4.1 An apportionment of a right of common registered as attached to land occurring after the date of registration of the right but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities may be registered pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 18 of Schedule 4 to the Regulations), but only where the apportionment is a prerequisite to the registration of any other qualifying event which relates to only part of a right of common registered as attached to land.

> *Apportionment — example 1*: A right of common to graze 100 sheep on Blackacre Moor is registered as attached to land described (in column 5 of the register entry) as parcel numbers 101, 102, 103 and 104 on the relevant OS map. In 1980, parcels 101 and 102 were conveyed into separate ownership from parcels 103 and 104, but the apportionment was not registered at the time. The owner of parcels 101 and 102 then entered into a deed of surrender (with the owner of Blackacre) to extinguish that part of the right attached to parcels 101 and 102, amounting to a right to graze 45 sheep. Paragraph

> 18(1)(b) of Schedule 4 to the Regulations requires that an application for apportionment must accompany an application to register the extinguishment (the primary application) during the transitional period, so that the register is amended to show two separate rights of common, one (to graze 45 sheep) attached to parcels 101 and 102 (which is then to be deregistered), and one (to graze 55 sheep) attached to parcels 103 and 104.

8.4.2 See chapter 6.3 for advice about the registration of apportionment.

Procedure

8.4.3 An application to apportion rights for the purposes of Schedule 3 (as read with paragraph 18 of Schedule 4 to the Regulations) can only be made as a consequence of another application to amend to the register, known as the primary application. The purpose of the primary application is to make one of the following changes to the register: extinguishment, surrender, variation or severance of a right of common as a qualifying event under Schedule 3. Additionally, a primary application may be made because of a statutory disposition as a result of a relevant instrument being a qualifying event. The application to apportion rights must be submitted at the same time as the primary application.[293]

8.4.4 An application to apportion rights pursuant to Schedule 3 must be made by the same person making the primary application[294].

8.4.5 The registration authority must look for evidence of:

- the application having been made in form CA14;
- the primary application, and that the applicant is the same as the person applying to apportion rights;
- the register unit number and entry number in the rights section of the register;
- a description of both the whole of the dominant tenement before its apportionment and the part of the land to which the right which is the subject of the primary application is attached;
- the name and address of the owner of the land to which is attached the part of the right of common which is the subject of the primary application;

[293] Paragraph 18(1)(b) of Schedule 4 to the Regulations.
[294] Paragraph 18(2) of Schedule 4 to the Regulations.

- the applicant's calculation of the apportioned rights between the part of land subject to the primary application and the remainder of that land;

- only where the applicant's claim indicates the rights have been apportioned otherwise than rateably, an explanation of the basis of that claim, a copy of the instrument effecting the apportionment, and in any other case, evidence that the right has been apportioned otherwise than rateably.[295]

8.4.6 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

8.4.7 An amendment of the register required in consequence of an application which is granted for apportionment of a right of common as a qualifying event should be made in accordance with model entry ME5.

Interpretation

8.4.8 Registration authorities should note that any application to register an apportionment, where the apportionment arises from an instrument (such as a conveyance) made on or after 28 June 2005, must be in accordance with Section 9(5), which requires that the apportionment is *pro rata* (see chapter 6.3). Where the apportionment arises from an instrument made after the date of registration of the land, but before 28 June 2005, the effect of paragraph 18(4) of Schedule 4 to the Regulations is that the registration authority must not apportion the rights other than pro rata unless there is contemporary evidence that the parties to the instrument intended some other outcome: such evidence is most likely to be found in the instrument itself (e.g. a clause in a conveyance of part of the dominant tenement providing that the rights are not conveyed with the land and are reserved to the part of the dominant tenement retained by the vendor). A declaration or other statement by the parties to the instrument, made after the date of the instrument itself, will not be sufficient to indicate another outcome, and cannot satisfy the requirements of the regulations.

8.4.9 See also paragraphs 6.3.19 *et seq* as regards apportionment of fractional rights, and of unquantified rights.

8.5 Historic severance of a right of common

Introduction

[295] Paragraph 18(3) and (4) of Schedule 4 to the Regulations.

8.5.1 A severance of a right of common, so that a right of common registered as attached to land is transferred on its own to another person, occurring after the date of registration of the right but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities, may be registered pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 19 of Schedule 4 to the Regulations).

8.5.2 Registration authorities should note that any application to register a severance, where the severance arises from an instrument (such as a conveyance) made on or after 28 June 2005, must be refused in accordance with Section 9(2)–(4), which provides that such an instrument is void[296].

Procedure

8.5.3 An application to register the severance of a right pursuant to Schedule 3 may only be made by:

- the person to whom the right of common was transferred on severance;
- the owner of the right of common at the date of application; or
- the owner of the land to which the right is registered as being attached (i.e. the owner of the former dominant tenement).[297]

8.5.4 The registration authority must look for evidence of:

- the application having been made in form CA14;
- the capacity in which the applicant is entitled to apply;
- the register unit number and entry number in the rights section of the register;
- a description of the dominant tenement (including a map), to which the right was attached and evidence of ownership;
- where the right was severed by an instrument, evidence of that instrument or if the right was severed by other means, evidence of the severance (but see *Interpretation*).[298]

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[296] Section 9 applies only to rights of common which, apart from the Act, would be capable of being severed. An application to register a severance which is contrary to common law (e.g. severance of a right of turbary attached to a dwelling) must also be refused.

[297] Paragraph 19(1) of Schedule 4 to the Regulations.

8.5.5 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

8.5.6 An amendment of the register required in consequence of an application for registration of severance of a right of common as a qualifying event which is granted should be made in accordance with model entry ME14.

Interpretation

8.5.7 Section 9 prohibits further severance of rights of common, whether the severance is temporary (e.g. where the rights are let by the commoner to a third party) or permanent (e.g. where the rights are sold to one person and the dominant tenement is sold to another). Section 9 took effect from 28 June 2005. The Section applies only to rights of common which are both attached to land, and which could have been severed under the law as it stood before enactment of the Act (i.e. following the ruling of the House of Lords in Bettison v Langton). It therefore does not apply to rights of common held in gross (such as those already severed), nor to rights which cannot be severed. Such rights include unquantified rights, typically most rights to take fuel or collect firewood, and rights appendant: in such cases, the common law continues to apply, and the rights may not be severed either temporarily or permanently.

8.5.8 The prohibition on severance in Section 9 may give rise to applications which purport to show that severance took place before that date as a qualifying event. Where an application is supported by good evidence of severance, such as a conveyance under which the land to which the rights are registered as attached is conveyed to one party and the rights are conveyed in gross to another party, the severance took effect before 28 June 2005, and the severance was lawful, that is likely to be sufficient to support an application to register the severance as a qualifying event.

8.5.9 But Regulation 41(3) provides that, unless the instrument or other contemporary evidence showed an intention that the rights should be severed from the land, the registration authority must not grant an application to register a purported severance as a qualifying event.

> *Severance — example 1*: An application is received from Mr A, who formerly owned the whole of Blackacre Farm, a dominant tenement to which rights of common are attached. Mr A asserts that a conveyance in 1980, which transferred part of Blackacre Farm to Mr B's ownership, but purported to retain

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[298] Paragraph 19(2) and (3) of Schedule 4 to the Regulations.

> all the rights of common attached to the remainder of Blackacre Farm for his own use, in fact had the effect at common law of severing the rights of common. The registration authority refuses to register the rights of common as having been severed and held in gross by Mr A, because the instrument (the conveyance) clearly shows that the intention was that all the rights were retained attached to the part of Blackacre Farm retained by Mr A.

8.5.10 A right of common may nevertheless be treated as having been severed, even in the absence of contemporary written evidence, if the application shows that the right was subsequently treated as severed, and there is no other explanation for that treatment but that the right must have been severed at that time.

8.6 Historic transfer of a right held in gross

Introduction

8.6.1 A transfer of a right of common in gross occurring after the date of registration of the right but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities, may be registered pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 20 of Schedule 4 to the Regulations).

8.6.2 A transfer of a right held in gross must have been in writing[299], generally by conveyance, made by the owner of the right (the vendor), in favour of the purchaser. Where the transfer is made by a person other than the person who is registered as the owner of the right, the registration authority will need to see a chain of conveyances between the original registered owner and the person who is to be registered as owner.

Procedure

8.6.3 An application to register the transfer of a right in gross pursuant to Schedule 3 may only be made by:

- the person registered as the owner of the right of common; or
- the owner of the right of common at the date of application[300].

8.6.4 The registration authority must look for evidence of:

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[299] See Section 52 of the Law of Property Act 1925 and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

[300] Paragraph 20(1) of Schedule 4 to the Regulations.

- the application having been made in form CA14;
- the capacity in which the applicant is entitled to apply;
- the register unit number and entry number in the rights section of the register which are to be amended;
- a copy of the instrument in writing by which the right of common was transferred to the owner at the date of the application.[301]

8.6.5 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

8.6.6 An amendment of the register required in consequence of an application which is granted for registration of the transfer of a right of common in gross which is granted should be made in accordance with model entry ME8.

Interpretation

8.6.7 An instrument in writing includes a deed confirming the legal transfer of the right of common.

8.7 Historic surrender or extinguishment of a right of common

Introduction

8.7.1 A surrender or extinguishment of a right of common occurring after the date of registration of the right but before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities may be registered pursuant to paragraph 2(2)(b) of Schedule 3 (as read with paragraph 16 of Schedule 4 to the Regulations)[302]. The outcome of an application relating to a surrender or extinguishment as a qualifying event will be the same: the cancellation of the right from the register. But, in general, a surrender will arise from a documented arrangement for extinguishment of the right agreed between the commoner

[301] Paragraph 20(2) and (3) of Schedule 4 to the Regulations.

[302] The extinguishment of a right of common is referred to in paragraph 2(2)(b) of Schedule 3, and is not, therefore, a 'relevant disposition' defined in paragraph 2(3), whereas a surrender is a relevant disposition.

and the common owner, whereas extinguishment may have arisen in consequence of a common law event.

Procedure

8.7.2 An application to register the surrender or extinguishment of a right of common pursuant to Schedule 3 may only be made by:

- if the right was attached to land (the dominant tenement), the current owner of any part of the land;
- if the right was held in gross, the owner of the right in gross before it was surrendered or extinguished; or
- the current owner of any part of the common over which the right was exercisable.[303]

8.7.3 The registration authority must look for evidence of:

- the application having been made in form CA14;
- the capacity in which the applicant is entitled to apply;
- the register unit number and entry number in the rights section of the register which are to be amended;
- if the right was attached to land, a description of the land to which it was attached; and
- if the right was surrendered or extinguished by an instrument in writing, a copy of the instrument, or by any other evidence of the extinguishment.[304]

8.7.4 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

Amendment of the register

[303] Paragraph 16(1) of Schedule 4 to the Regulations.
[304] Paragraph 16(2) and (3) of Schedule 4 to the Regulations.

8.7.5 An amendment of the register required in consequence of an application which is granted for registration of the surrender or extinguishment of a right of common as a qualifying event should be made in accordance with model entry ME9.

Interpretation

8.7.6 A surrender generally takes place by deed, executed by the person entitled to exercise the right, in favour of the owner of the common.

8.7.7 An extinguishment of a right of common may have occurred at common law. The mechanisms by which rights of common may have been extinguished at common law are set out in paragraph 6.8.7.

8.7.8 Registration authorities should note that the common law mechanisms of extinguishment of rights of common are abolished with effect from 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities by Section 13(3), but Section 13 does not affect the operation of the common law before that date, and in particular, after the date of registration of any right under the 1965 Act[305]. There remains some uncertainty as to whether the registration of rights of common under the 1965 Act modified (to any extent) the operation of the common law mechanisms, and these questions have not been considered by the courts, but Section 13(3) puts these questions beyond doubt for the future.

8.7.9 In Defra's view, an application to amend the register arising from any of these mechanisms cannot cause any land to cease to be registered as common land or green, because no provision is made in paragraph 2(2)(b) of Schedule 3 for the registration of such an outcome. So, for example, where an application is made to amend the register to remove a right of common because the land over which the right is exercisable has been destroyed by the sea, the registration authority may grant the application, but it has no power to amend the register so as to remove the common land from the register (even though the rights formerly exercisable over the land have been extinguished, and, in the example given, the land no longer exists).

8.8 Historic statutory disposition

Introduction

8.8.1 A disposition affecting registered land occurring before 1 October 2008 for pioneer authorities or 15 December 2014 for 2014 authorities may be registered pursuant to paragraph 2(2)(c) of Schedule 3 (as read with paragraph 21 of Schedule 4 to the

[305] That is, between the dates specified in paragraph 2(2)(b)(i) and (ii) of Schedule 3.

Regulations) if it is by virtue of a relevant instrument. A relevant instrument is one defined in paragraph 2(4) of Schedule 3, and listed in column 1 of the table in paragraph 8 of Schedule 4 to the Regulations.

8.8.2 Unlike for the purposes of Section 14, and regulations made under that Section, there was and remains no duty on any party to a statutory disposition to register the effect of the disposition. Equally, however, there is no restriction on who may apply to register a statutory disposition. So applications may be made by a party to the disposition, or by a person with an interest in the land or rights of common affected (such as a commoner), or by a member of the public. It is also open to the registration authority to make a proposal for the same purpose (see chapter 4.2), by 14 December 2017.

Procedure

8.8.3 An application to register a statutory disposition pursuant to Schedule 3 may be made by any person, in consequence of:

- a disposition by virtue of any relevant instrument; or
- the giving of land in exchange for any land subject to a disposition (but see *Interpretation*).[306]

8.8.4 The registration authority must look for evidence of:

- the application having been made in form CA14;
- a copy of the instrument effecting the disposition or exchange and any consent, authorisation, approval or certificate given for that instrument (but see *Interpretation*);
- the instrument having come into effect;
- (if relevant) the register unit number and entry number in the rights section of the register which are to be amended;
- (if relevant) a description of the amendments to be made to the register.[307]

8.8.5 The registration authority should proceed according to the generic guidance for applications in chapter 5.11.

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[306] Paragraph 21(1) of Schedule 4 to the Regulations.

[307] Paragraph 21(2) of Schedule 4 to the Regulations.

Amendment of the register

8.8.6 An amendment of the register required in consequence of an application for registration of a statutory disposition as a qualifying event which is granted should be made in accordance with any one or more of the following model entries as may be appropriate to the circumstances: ME3, ME4, ME9, ME13 (on an exchange), ME15, ME16, ME17, ME18 or ME20 (on an exchange).

Interpretation

8.8.7 Where an application is made for the registration of a statutory disposition pursuant to paragraph 2(2)(c) of Schedule 3, the registration authority should ensure that the relevant instrument has come into effect insofar as it affects registered land, or rights of common: see paragraph 6.9.13. The relevant instruments are listed in the table in paragraph 8 of Schedule 4 to the Regulations.

8.8.8 In any case where an application relates to taken land which is to be deregistered in exchange for replacement land, paragraph 21(1)(b) of Schedule 4 to the Regulations provides that there must be an application in respect of any land given in exchange for the purposes of paragraph 2(2)(d) of Schedule 3. An application which relates only to the deregistration of the taken land (for which the exchange land is a replacement) must not therefore be granted in isolation, but in such a case, the registration authority may register the replacement land without further formality, enabling the application to be granted.

8.9 Late amendments after the close of the transitional period

8.9.1 Regulation 42(1) enables a registration authority to entertain an application for amendment of the registers in consequence of a qualifying event, even though the application is made after the end of the transitional application period. Where such an amendment is sought so as to record the creation or variation of a right of common, any extinguishment of rights by virtue of paragraph 3 of Schedule 3 is deemed not to have occurred[308]. This provision is valuable for enabling out-of-time amendments to be made where the requirement to act during the transitional period was overlooked.

8.9.2 But if anyone who had an interest in registering a qualifying event saw no urgency in applying for that purpose, many qualifying events might remain unregistered and outstanding at the close of the transitional period. That would be an ineffective use of the resources invested in promoting and managing the transitional period, and would leave the registers inconclusive and unreliable. So Regulation 42(1) (as read with Regulation 41(5))

[308] Regulation 42(2).

requires the registration authority to undertake a 'fairness' test in relation to any proposed modification (similar to that required by Section 19(5) in relation to the correction of errors in the register), and Regulation 17 enables the registration authority to impose a fee.

8.9.3 Registration authorities are therefore required to consider whether a modification to the register on an application after the end of the transitional application period would be fair having regard to the extent to which other persons may have placed reliance on the registers without the amendment having been made. So the registration authority must balance the interests of the applicant with those of others with an interest in the registration (which may include both those with a private interest, and the public interest).

> *Fairness test — example*: An application is made under Schedule 3 by Mr D for registration of a right of common acquired by prescription over land owned by Mrs S. The right is claimed to have been acquired by 20 years' use beginning on 1 October 1987. The application is made after the close of the transitional period, so that the right has become extinguished by operation of paragraph 3 of Schedule 3[309]. Mrs S objects to the application, on the grounds that she acquired the land after the close of the transitional period, a search made of the register of common land at the time of her purchase revealed that the land was not registered as common land, and she had no knowledge of any right of common exercised over the land. Taking all the facts into consideration, the registration authority concludes that, "by reason of reliance reasonably placed on the register by a person since the end of the transitional application period, it would be unfair"[310] to amend the register in accordance with the application, and the application is rejected.

[309] Such an application, if granted, would have the effect that the extinguishment of the right by virtue of paragraph 3 of Schedule 3 is treated as not having applied (Paragraph 4(2) of Schedule 3, and Regulation 42(2)).

[310] Regulation 41(5).

Annex A: Commons exempted under Section 11(1) of the Commons Registration Act 1965

Paragraph 2.2.2

NAME	**Area (ha)**
West End Road Recreation Ground (Southampton)	0.6
Cassiobridge Common (Watford)	0.7
Victoria Gardens (Portland)	1.7
Cippenham Village Green Common (Slough)	3.9
Otterbourne Hill Common (Hampshire)	8.5
The Links Common (Whitley Bay)	13.4
Shenfield Common (Brentwood)	13.4
Thorpe Green (Egham)	14.6
West Wickham Common, Spring Park (Bromley)	31.2
Downside Common, Old Common, Little Heath Common, Upper and Lower Tilt Commons, Brook Hill Common, Leigh Hill Common (Esher)	35.8
Ley Hill Common, Coleshill Common, Austenwood Common, Gold Hill Common, Hyde Heath (Amersham)	67.0
The Stray (Harrogate)	87.0
Oxshott Heath (Esher)	92.3
Whitley Common, Hearsall Common, Keresley Common, Stoke Commons, Top Green, Greyfriars Green (Coventry)	144.5
Kenley Common, Coulsdon Common, Farthing Down Common, Riddlesdown Common (Croydon)	161.5
Micklegate Stray (York)	170.0
Mitcham Common (Merton)	174.0
Total	**1,019.9**

Source: *Gadsden, G D, The Law of Commons, 2012*