



Llywodraeth Cymru
Welsh Government

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COMMONS ACT 2006

SECTION 46

A GUIDE TO POWERS OF THE WELSH MINISTERS RELATING TO UNAUTHORISED AGRICULTURAL ACTIVITY

Please note that this document is not an exhaustive guide to the legislation and that it has no legal standing. In case of doubt please refer to the Commons Act 2006 or consult your own legal advisor.

These guidance notes apply to Wales only.

The Commons Act 2006

Introduction to the Commons Act 2006 (“the 2006 Act”)

Common land in Wales amounts to some 175,000 hectares or 8.5% of the land area. The majority of this land is registered under the Commons Registration Act 1965 and is privately owned, with landowners enjoying their rights subject to rights of common held by others (e.g. the rights to graze stock). Common land is predominantly used for agricultural purposes but is also valued for its contribution to the natural and national heritage of Wales, especially nature and habitat conservation – 40% of the commons are designated Sites of Special Scientific Interest (SSSI's) and 50% of the common land is within the protected landscape areas of Wales (National Parks and Areas of Outstanding National Beauty).

The Commons Registration Act 1965 followed earlier legislation which was designed to protect and manage common land and town and village greens. The 1965 Act intended to establish definitive registers of common land and town and village greens and to record details of rights of common. In practice, the task of establishing these registers was complex, and the legislation proved to have deficiencies. For example some land provisionally registered was wrongly struck out, other common land was overlooked and never registered, and some grazing rights were registered far in excess of the carrying capacity of the common. The scope of correcting errors under the 1965 Act was limited – the Court of Appeal ¹ held that even when land had clearly been wrongly registered as common land, there was no mechanism to enable such land to be removed from the register once the registration had become final. There was also little scope under the 1965 Act to update the register with new events, and as a consequence the registers maintained by local authorities have become significantly out of date.

The 2006 Act was introduced to remedy many of the deficiencies of the 1965 Act. The objective of the 2006 Act is the protection of common land and the promotion of sustainable farming, public access to the countryside, and the interests of wildlife. Implementation of the Act is based around 4 themes:

- Part 1 Registration
- Part 2 Management
- Part 3 Works
- Part 4 Miscellaneous (including Section 46 - unauthorised agricultural activities)

¹ Corpus Christi College, Oxford v Gloucestershire County Council [1982] 3 All ER 995.

This guidance specifically deals with Section 46 of the 2006 Act – powers relating to unauthorised agricultural activities.

The Commons Act 2006: Part 4 – Miscellaneous (Section 46 – unauthorised agricultural activities).

What will Section 46 do?

Section 46 of the 2006 Act enables the Welsh Ministers to deal with situations where unauthorised agricultural activities are taking place and damaging the common, and no person is otherwise able to act to control it. There have previously been no reliable methods by which commoners or any other interested group could effectively control or regulate animal numbers or feeding practices which have resulted in a serious impact on commons with regard to:

- Obligations under the European Habitats Directive
- Sites of Special Scientific Interest (SSSI's)
- Restoration and maintenance of habitats and species populations of high biodiversity value under the UK Biodiversity Action Plan.

The implementation of section 46 in Wales enables a notice to be served on any person appearing to be carrying out or causing to be carried out unauthorised agricultural activities on registered common land or certain registered greens which are detrimental to the interests of persons with rights over the land, those who own or occupy the land, or to the public interest.

In the context of unauthorised agricultural activities, the 2006 Act defines public interest as:

- Nature conservation;
- The conservation of the landscape;
- The protection of public rights of access to any area of land; and
- The protection of archaeological remains or features of historic interest

What is the scope of Section 46?

Agricultural activities

Agriculture can broadly be defined as the production of food for human and animal consumption, the growing of plants for fibre and fuels (including wood), and the production of other organically derived products (pharmaceuticals, etc). As such, agricultural activities include (though are not necessarily limited to):

- horticulture;
- fruit growing;
- seed growing;
- dairy farming;
- the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of the land);
- the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds; and
- the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.

Unauthorised agricultural activities

The 2006 Act confines the scope of section 46 to unauthorised agricultural activities. Therefore, section 46 powers may only be used by the Welsh Ministers where a person is carrying out activities for which they have no legal authority, and are not authorised by a person capable of transferring such authority. Examples may include:

- De-pasturing stock by a person with no rights of common;
- De-pasturing one type of animal when the right is confined to other species;
- Exceeding rights of common;
- 'borrowing' rights of common without any lawful authority; or
- Removing or cutting vegetation without lawful authority.

When may the Welsh Ministers exercise their powers under section 46 of the 2006 Act?

Section 46 of the 2006 Act is regarded as ‘the power of last resort’, its use needs to be exercised with discretion and only after all other courses of action have been explored and exhausted.

Therefore, those wishing to use section 46 will need to demonstrate that they have explored all mediation avenues before embarking on legal recourse. Commoners wishing to resort to using section 46 will need to demonstrate that they have sought to resolve disputes through:

- Discussions with those acting illegally.
- Discussions with land owners, other commoners, Commons Associations and Commons Councils (when established).
- Discussions with the relevant local authorities, land agents and the farming unions; and
- Provide any additional evidence (proof of damage) that the common on which the illegal agricultural activity is taking place is in danger of adversely effecting a site of special scientific interest; that where there are links to Glastir the habitats are at risk as a result of such illegal activity.

Section 46 will have the potential to contribute significantly, or in some cases be the only mechanism, to address management difficulties on common land.

The guidance notes written to accompany the 2006 Act suggests that section 46 should not be used where a person is exercising a right of common to which they have entitlement through an entry in the commons register, even if that person is acting outside the terms of an agri-environment agreement or other obligation.

The intention of section 46 is to enable the appropriate national authority (Welsh Ministers) to deal with problems where other persons who could have taken action (such as the owner, the commoners or Commons Councils when they exist) have failed to take action to prevent the activity occurring, and the public interest in the common is being threatened. The power may be used, for example, where one or more persons has been grazing animals on the common without any right to do so, the owner of the commoners have failed to take action, and the public interest in the common is threatened (for example, by over-grazing leading to deterioration of nature conservation, or because animals unlawfully grazing on the common present a threat to lawful recreational activity).

There is clearly an intention that grazing is a key agricultural activity, and that over grazing by those with no or insufficient rights of common is an unauthorised agricultural activity which falls to be regulated.

What Section 46 will not resolve

It will not be a panacea for stopping other forms of illegal activity such as anti social activities – burnt out cars, fly tipping, off roading, quad biking etc. Similarly section 46 will not solve issues surrounding unauthorised access and recreational activities or management of land for other purposes.

How will these powers be enforced in Wales?

Welsh Ministers will enforce section 46 of the 2006 Act. In determining cases the Welsh Ministers will consider the scale of the alleged unauthorised activity. Keeping these powers within the Welsh Government will enable a higher level of control over its application and ensure that a consistent approach is taken across the whole of Wales.

How will the ‘Detrimental Effect’ be assessed?

In assessing the detriment to the public interest Welsh Ministers will, in particular, take account of the impact of the activity on any interest features for which the site may be designated. Each case will be assessed individually and Welsh Ministers will seek, and have regard to advice, from relevant bodies regarded as experts in their chosen field.

Who will represent any case involving the protection of the historic environment?

Where action under section 46 is contemplated to protect archaeological remains or features of historic interest, Welsh Ministers will seek, and have regard to advice, from Cadw.

What will the process be for those wishing to invoke the powers?

In order for the powers to be invoked it must firstly be proved that a person is carrying out, or causing to be carried out by virtue of any arrangements, an agricultural activity on land which is registered as common land or is registered as a town or village green and is subject to rights of common. It would also need to be determined that the activity was unauthorised and having a detrimental effect on those persons with rights and occupying the land or was detrimental to the public interest.

There are several stages to the process for enforcing section 46 as set out in the guidance notes accompanying the Act.

Stage 1

The first step is for the agricultural activity in question to be ruled as unauthorised, either because of a lack of rights of common held by the person undertaking the activity and / or the activity is detrimental to the interests of the person holding the rights or occupying the land or the public interest. Evidence would need to be provided by those wishing to take action (owners, commoners, local authorities, corporate bodies and individuals) that every attempt has been made to resolve any dispute formally in the first instance or by using mediation.

Applications requesting a ruling against unauthorised agricultural activity must be forwarded to the Common Land Unit, Farm Development Division, Welsh Government, 1st Floor, Cathays Park, Cardiff CF10 3NQ for initial analysis. Applications that clearly do not fall under the banner of agricultural activity (i.e. quad biking / off roading etc) will be refused as will any applications that are not of sufficient scale or impact. Other cases will be dealt with by an 'expert group', the makeup of the group varying according to the type of case being brought. The more contentious the case the greater the number of expert witnesses Welsh Ministers will need to call on. Expertise will be drawn from the Planning Inspectorate, Sustainability & Environmental Evidence Division (SEED), CAP Planning Division (CPD), Cadw, Countryside Council for Wales (CCW), relevant Commons Registration Officers from Local Authorities, Legal and any other expert witness as determined by the nature of the activity being challenged. The expert group is tasked with determining whether there is a case and what further action is necessary.

Stage 2

Welsh Ministers (as the appropriate national authority) may serve a notice (Annex A) either on the person actually carrying out the unauthorised activity or on a person who has caused him/her to do so, for example a person who has hired a contractor. The notice may require those carrying out the activity to do any one or more of the following:

- to stop carrying out the activity within a reasonable period of time as may be specified in the notice
- Not to carry out, or cause to be carried out, any other unauthorised agricultural activity on the land which may be judged as detrimental.
- To supply Welsh Ministers with any such information relating to agricultural activities carried out on the land, or caused to be carried out, by him/her as it may reasonably require.

Stage 3

Whilst serving the notice, Welsh Ministers will be required, to the extent that it is appropriate and practicable, publicise its intention to serve the notice. The intention is to give at least 4 weeks' notification and invite representations from any of the following:

- Any person with functions relating to management and maintenance of the land.
- Any person appearing to the authority to own or occupy the land or other rights holders.
- Any Commons Councils (following the implementation of legislation allowing such councils to be set up) or commoners' association.

Stage 4

If the person on whom the notice is served fails to comply with it, Welsh Ministers will apply to the County Court for an order requiring them to do so. The court may make such an order for the purpose of securing compliance with the notice as it thinks fit.

Publicity and Procedural Issues

Welsh Ministers would take account of any civil or criminal proceedings that have been initiated or proposed in relation to the activity, and any actions a commons association / council might have taken to deal with the unauthorised activity, before deciding to exercise the power available to it under this section.

Frequently asked questions – when might Section 46 be used?

A list of questions that we have been asked in respect of when section 46 might or might not be used has been included at Annex B. This list is no means exhaustive; it is only designed to provide pointers as to what action might be taken. Each case will need to be looked at individually and those seeking recourse through the use of section 46 will need to ask themselves specific questions as to whether or not the activity can be classed as agricultural and demonstrate that all attempts have been made to resolve issues and disputes.

A flow chart has been included at Annex C to help applicants determine whether the activity falls to be regulated by section 46.