



The Planning Inspectorate  
Yr Arolygiaeth Gynllunio

## Commons Act 2006

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### General Overview for making an application under Section 16 and Section 38



INVESTOR IN PEOPLE

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# Making an application for consent to construct works on common land or to deregister and exchange common land or town and village greens - General Overview

**Note: The information contained within this guidance relates to procedures in [Wales only](#).**

This leaflet should be read in addition to 'Notes for completing an application to deregister and exchange common land or town or village greens' and/or 'Notes for completing an application form for consent to construct works on common land'.

From 1<sup>st</sup> April 2013 the Countryside Council for Wales ceased to operate, and their functions were taken over by Natural Resources Wales.

The information in this leaflet was correct when it was published, but it has no legal status.

## 1. Introduction

If you are considering works on common land then it will generally fall into two categories:

- Works which are for the management, improvement or protection (or to the negligible detriment) of the common or are otherwise consistent with the traditional uses of the common (e.g. grazing, public recreation), for which a section 38 application may be appropriate; and
- Works that are not consistent with the traditional use of the common, or for its management, improvement or protection, for which a deregistration and exchange application under section 16 of the Commons Act 2006 may be more appropriate.

Under section 38 of the Commons Act 2006, you need the consent of the Welsh Ministers to carry out any restricted works on **land registered as common land** under the Commons Registration Act 1965.

Section 38 also applies to land that is not registered as common land which is regulated by a Provisional Order Confirmation Act under the Commons Act 1876. Section 38 does not generally apply to registered town or village greens [see 'Common Land Guidance – Special Consent Provisions (other than National Trust Land)'] note for

more information on town or village greens], but it may occasionally do so if a green is subject to a scheme or Act.

The Welsh Ministers have appointed The Planning Inspectorate to exercise certain of their functions under sections 16 and 38 of the Commons Act on their behalf.

The Planning Inspectorate is an Agency of the Welsh Government and the Department for Communities and Local Government. Our main work is the processing of planning and enforcement appeals and holding inquiries into local development plans. We also deal with a wide variety of other appeal casework including Environmental appeals and Rights of Way Orders. We deal with appeals in Wales from our office in Cardiff and appeals in England from our Bristol office.

## **2. I need to undertake work on Common Land - Do I need consent or is there another way of doing this work without obtaining consent?**

Restricted works are any that prevent or impede access to, or over, the land. They include fencing, buildings, structures, ditches, trenches, embankments and other works, where the effect of those works is to prevent or impede access. They also include, in every case, new solid surfaces, such as for a new car park or access road.

If you conclude that the proposed works are for the management, improvement or protection (or to the negligible detriment) of the common or otherwise consistent with its traditional uses (e.g. grazing, public recreation) then apply under section 38.

If the proposed works would not, on balance, meet the criteria specified in the above paragraph (e.g. where the proposal is to extend a property or private garden), then it is unlikely that consent would be given under section 38. In such cases, it would be more appropriate to apply instead under section 16 of the Act, and to offer land in exchange for the area required for the works (see "*Notes for completing an application to deregister and exchange common land or town or village greens*").

Section 16 of the Commons Act 2006 allows for an application to remove land registered as common land (so that it ceases to be registered common) and land be offered as a replacement that was not previously common land (and will be registered common land)

An application under section 16 would also be appropriate in situations where works were not anticipated, but an owner nevertheless required the removal of common land status

The National Trust commons are covered by different law to section 38 commons. If you are proposing to construct works on a National Trust common please 'Common Land Guidance – Special Consent Provisions (National Trust Common)' note.

### **3. What steps should I take before applying?**

It is strongly recommended that you should carry out extensive informal consultation **before** submitting an application. This will help you to identify any differences and find early solutions. Good communication at this stage is vital if you are to maximise the possibility of developing a proposal with a high degree of consensus among interested parties. The greater the consensus that you can achieve before submitting your application, the smoother the processing of your application is likely to be. However, it should be pointed out here that reaching a consensus will not necessarily imply success in an application.

Among those you should consider consulting informally are those who you will later need to consult formally if you decide to apply:

- the owners of the land
- the commoners council or association (if there is one)
- all active commoners
- others with a legal interest e.g. tenants, those with easements, other rights or covenants over the land
- any community, district, city or county council (in whose area the common is located)
- Natural Resources Wales
- Cadw
- National Park Authority (if the proposal is in a National Park)
- AONB Conservation Board or Joint Advisory Committee (if the proposal is in an AONB)
- Open Spaces Society

Others you may want to involve at this stage include: all known commoners, whether using their rights actively or not, Wildlife Trusts, Local Access Fora, Ramblers' Association, local amenity societies, and any individual inhabitants who you believe will be directly affected by the proposed works.

Identify clearly **at this stage** what your aims are, and give full consideration to all possible options for achieving them, **before** developing a formal proposal. Recognise and consider the aims and perspectives of other stakeholders in the common as a central part of this process.

**4. I'm not sure of the exact location on the common where I will be undertaking the work or that will be involved in the exchange, can I still apply but include an area of deviation?**

Welsh Ministers must be satisfied that any proposed works or proposed exchange would be of benefit to the users of the common or, in the case of an exchange of land, to the owners of the respective lands and that its terms are just and reasonable. In deciding whether the terms of the proposed exchange are just and reasonable, regard will be given to representations about its effect on the interests of the owners of any common rights over the lands, on incumbrances on the lands and on the general public.

Applications shall not be entertained unless the exact area of land is clearly identified at the outset. Interested persons may be disadvantaged if they do not know at the time of notification of the application precisely what land is involved. This would particularly be the case if they concluded, on seeing the application, that their interests were not affected, but then land not included within the application land is incorporated in an exchange - which would affect their interests. This would be unfair to interested parties and may leave a consent to carry out works or an order of exchange vulnerable to a successful challenge in the High Court.

Whilst there are a number of consent regimes which either specifically, or through practice, operate the principle of 'limit of deviation' this does not remove the fundamental concern that where application is made to carry out works on or exchange common land, those with an interest in any of those issues should be aware at the outset of what is proposed on the land affected.

**5. If I apply under Section 38 or Section 16, is my application likely to succeed?**

The decision will be based on the merits of your proposal, and will balance all the interests in the common, taking account of all views expressed. The criteria to be considered are set out in section 39 of the Act (see **Annex E** of 'Notes for making an application for consent to construct works on common land' for full text of sections 38 and 39) and for section 16 of the Act (see Annex E of 'Notes for completing an application to deregister and exchange common land or town or village green').

These criteria will be viewed in the light of the policy objective of managing, improving or protecting the common, of maintaining its

traditional uses (e.g. grazing, public recreation), and of ensuring that the overall stock of common land is not diminished. This will enable safeguarding the diversity, variety, and overall extent, of common land. You will therefore need to demonstrate, with regard to the criteria for section 39 or section 16, how the proposed works address those considerations.

The information you provide with your application should be as full as possible, particularly with regard to the various interests in the land. As well as providing sufficient facts (e.g. the nature of the proposal and the extent to which common rights are exercised), you should develop your argument as to why you consider your proposal to be justified.

## **6. How do I make an application, and what will happen to it?**

### ***Steps for you to take***

Prepare your application, referring to *Notes for making an application for consent to construct works on common land* and *Notes for completing an application to deregister and exchange common land or town or village green* as appropriate and send it to us at the following address, on or just before the date on which you advertise it.

The Planning Inspectorate Wales

Crown Building  
Cathays Park  
Cardiff  
CF10 3NQ

Tel: 029 2082 3866  
Fax: 029 2082 5150  
E-mail: [wales@pins.gsi.gov.uk](mailto:wales@pins.gsi.gov.uk)

You must advertise your application within 7 days of making it. Advertise your proposal at the main entry points to the common (or in another conspicuous place), if appropriate the replacement land, and in the main local newspaper, and send a copy to key stakeholders (see chapter 3 of this guide for a list of those you should consult).

Allow a minimum of 28 days, from full compliance with the advertising requirements, for people to write to us with their views.

The advertisement must be based on the form of notice at Annex A of the leaflet *'Notes for completing an application to deregister and exchange common land or village greens'* or *'Notes for completing an*

application for consent to construct works on common land' (as appropriate).

You must also make the application and supporting documents available for viewing by any interested party. Applicants often use public libraries, council offices or post offices for this purpose.

### ***Responses, and determining your application***

We will acknowledge receipt of your application as soon as practicable. We will check that all the relevant documentation has been submitted with the application, and will write to you requesting further documents if necessary.

Anyone can comment on your application. Representations from interested parties must be made to the Planning Inspectorate no later than the date stated in the notice, which must not be less than 28 days from the date on which you complied with the advertising requirements.

We will copy any representations that we receive to you. You will then have 21 days to comment on the representations, if you wish to do so.

### ***The application procedure***

We will inform you as soon as possible whether we can decide your application based solely on the written evidence or whether an inquiry, hearing or site visit is needed.

In the case of de-registration and exchange applications we will generally arrange for an inspector to undertake a site visit. This will enable an assessment of the relative merits of the areas of land. The Inspector will invite you and may invite objectors to attend.

All applications are subject to the same rigorous examination, whichever procedure is followed in determining them.

Where there are no (or few) objections, and the issues are relatively straightforward, an early decision is likely to be possible. You will be informed of the decision in writing.

Where more evidence is needed, we may proceed by one of the following options, depending on the particular circumstances of the case:

- site visit – where outstanding queries are resolved by a visit to the area by a planning inspector, who will invite you and may invite objectors to attend;



- hearing – where the outstanding issues can be resolved within one day by an informal meeting of interested parties, facilitated by an inspector;
- public inquiry – where the issues are complex or finely balanced, contentious or raise issues that have wider than local significance. This is a meeting, open to the public and facilitated by an inspector, normally lasting between 1 and 2 days.

In each of the above cases, all the evidence will be considered and a decision made in writing to the applicants.

Further information about procedures for hearings and inquiries is provided in our separate procedural guide.

## **7. The Decision**

Following consideration of an application under section 16, the Inspector will prepare a report to the Welsh Ministers. The report will include conclusions on the issues raised and a recommendation as to whether the application should be allowed. If the application is allowed, and consent is given, the Welsh Government will draft an order and send it to you for comment (this is not an opportunity to change the detail of the application, it is merely to ensure that the order correctly reflects the amendments that will be made to the commons register). Once they are sure the order is accurate in all respects, they will formally endorse it. They will attach your own map(s) to the de-registration and exchange order, send copies to yourself and the Commons Registration Authority and copy the decision letter to all those who made representations. They will ask that you request the Commons Registration Authority to make the necessary amendments to the register within a specified time and confirm when they have amended the register.

In most cases, applications under section 38 will be determined by an Inspector or other appointed person. If the application is allowed and consent is given, we will attach your own plan to the decision letter and send copies of the letter to all interested parties.

## **8. How long will all this take?**

The length of time your application will take will depend on the nature and extent of the proposals, the quality of the information you provide, the number of letters received and the procedure followed (exchange of letters, public inquiry, hearing or site visit).

Whilst the exchange of correspondence is likely to end after the second round, we may cut this short if, for example, the objections are withdrawn or, in a more complex case, it becomes clear early on that an inquiry or hearing will be needed. Conversely, we may extend

the exchange of letters, where this would be useful in clarifying any outstanding points.

As a guide, if there are no objections, and the issues can be resolved by correspondence, we would expect to determine section 38 applications within 12 weeks of receiving the **complete** application papers from you. Where there are objections and an exchange of correspondence is needed we would expect to determine applications within 26 weeks. Where there are objections to a section 38 application that needs a public inquiry or hearing and Inspectors decision; and for all section 16 applications we would expect to determine an application within 12 months. More complex inquiry cases, or cases where an inquiry is held alongside a related inquiry (e.g. into a planning application) may take much longer.

#### **9. What happens if I make a mistake with my application?**

Your application should be complete in all respects when you submit it (see checklist at the end of the Application Form). If it is incomplete, incorrect, or some aspects of it are unclear, we will write to you for the missing information. If a lot of essential information is missing, we will send the papers back to you and ask you to return them only when the application is complete. This may require the re-advertisement of the proposals when the corrected application is re-submitted.

We cannot promise to make any progress on your application until all the required information is received, including your letter confirming that you have met the advertising requirements. Whilst we will process a partial application as far as possible, any omissions will almost certainly lead to delays in the process.

#### **10. What should I do if I need to carry out emergency work on a common?**

It is recognised that from time to time emergencies occur that need intervention to preserve safety. The Act allows the Welsh Ministers to give consent in relation to works which have been commenced or completed, so you may take necessary action and follow it up with an application. You should bear in mind that the work undertaken should be proportionate to the particular emergency and that the same considerations will be applied to commenced or completed works as to an application made in advance of work commencing.

## **11. Complaints and Judicial Review**

### ***Complaining to us***

If you have a complaint about the way the application is being, or has been handled, either by the Inspector or by our Case Officer, you should contact the Complaints Officer at:

The Complaints Officer  
The Planning Inspectorate  
Crown Buildings  
Cathays Park  
Cardiff  
CF10 3NQ  
Telephone: 029 2082 3889

Email: [wales@pins.gsi.gov.uk](mailto:wales@pins.gsi.gov.uk)

Your complaint will be investigated impartially and you can normally expect a reply within three weeks. If an error has been made, we will explain this and offer our apologies, but the law does not allow us to change the decision in any way.

You can find more information on our complaints procedures on our website at:

[www.planningportal.gov.uk/uploads/pins/row/complaints\\_leaflet.pdf](http://www.planningportal.gov.uk/uploads/pins/row/complaints_leaflet.pdf)

### ***The High Court***

Once an application decision is issued we have no power to amend or change it. The only way that a decision may be reviewed is following a successful judicial review.

You must to apply to the High Court for a Judicial Review promptly and in any event not later than 3 months from the date of the decision. To be successful, you would have to show that

- The decision maker has overstepped his/her powers; or
- That Criteria relevant to the type of application have not been met and this has damaged your interests.

You should apply to:

The Administrative Court  
Cardiff Civil Justice Centre  
2 Park Street  
Cardiff  
CF10 1ET  
Telephone: 029 2037 6400  
Website: [www.courtservice.gov.uk](http://www.courtservice.gov.uk)

If you wish to pursue this course of action, you may want to consider seeking advice from a solicitor or the Citizens Advice Bureau.

### ***The Public Services Ombudsman for Wales***

If you think you have been treated unfairly because we or the Inspector have not done our jobs properly, you can contact the Public Services Ombudsman for Wales. The Ombudsman has no power to question the merits of an application or to change the decision. He is concerned only with the way in which we deal with and process applications. The Ombudsman will not usually investigate unless you have complained to us first.

You can contact the Ombudsman at:  
Public Services Ombudsman for Wales  
1 Ffordd Yr Hen Gae  
Pencoed  
CF35 5LJ  
Telephone: 01656 641150 (all calls are charged at local rate)  
Email: [ask@ombudsman-wales.org.uk](mailto:ask@ombudsman-wales.org.uk)  
Website: [www.ombudsman-wales.org.uk](http://www.ombudsman-wales.org.uk)

### ***The Council on Tribunals***

If you have a complaint about the procedure that we used for an application, you can complain to the Council on Tribunals (The Council on Tribunals has no power to question the merits of the application or to change the decision). Their address is:

Council on Tribunals  
81 Chancery Lane  
London  
WC2A 1BQ  
Website: [www.ajtc.gov.uk](http://www.ajtc.gov.uk)

You can find more information on challenging a decision in the High Court on our website at: <http://www.planningportal.gov.uk/>

## **12. How we use your Personal Information**

If you participate in an application under the Commons Act 2006, then the type of personal information contained in your representations will normally include your name, contact details and any other personal information you choose to provide.

We use the information provided to process the application, and this includes making your written representations available to the applicant and other relevant parties.

We publish the Inspector's decision on the Planning Portal. In some cases, we also publish appeal documents and representations, including names and addresses. Phone numbers, fax numbers and e-mail addresses are removed before publication.

The guidance in this leaflet explains the application process in more detail and you are advised to read this leaflet before providing any representations. For further details please see our privacy statement:

[www.planningportal.gov.uk/planning/appeals/online/about/privacystatement=wa](http://www.planningportal.gov.uk/planning/appeals/online/about/privacystatement=wa)

If you have any queries about our use of your personal information please contact us at the address below.

### **Further Information**

Further information about our privacy policy is on the Planning Portal at [www.planningportal.gov.uk/planning/appeals/online/about/privacystatement=wa](http://www.planningportal.gov.uk/planning/appeals/online/about/privacystatement=wa) or on request. If you have any queries about our policy, or wish to request your personal data, then please contact us through the address below:

### **Contacting us**

The Planning Inspectorate  
Crown Buildings  
Cathays Park  
Cardiff CF10 3NQ  
Phone: 029 2082 3866  
E-mail: [wales@planning-inspectorate.gsi.gov.uk](mailto:wales@planning-inspectorate.gsi.gov.uk)  
Website: [www.planning-inspectorate.gov.uk](http://www.planning-inspectorate.gov.uk)

