Common Land & Town and Village Greens

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Key Legislation and Policy

Primary Legislation	• Law of Property Act 1925 • Commons Registration Act 1965 • Wildlife and Countryside Act 1981 • Countryside and Rights of Way Act 2000 • Commons Act 2006 • The Planning (Wales) Act 2015 • Environment (Wales) Act 2016 • Well-being of Future Generations (Wales) Act 2016 • Equality Act 2010 • Human Rights Act 1998
Secondary Legislation	• Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 • The Works on Common Land, etc (Procedure)(Wales) Regulations 2012 • The Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012
National policy and guidance	• Welsh Government - Common Land Consents Guidance August 2014 • Welsh Government – Common land Guidance – Enforcement against unlawful works on Common land, August 2014 • Welsh Government – Guide to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations 2017: Guidance for Applicants, May 2017 • Welsh Government: Commons Act 2006 – Sections in force in Wales, January 2018 • Welsh Government - Guidance to Commons Registration Authorities in Wales on Sections 15A to 15C of the Commons Act 2006

Judgements	• Cheltenham Builders Ltd R oao v South Gloucestershire District Council EWHC Admin [2003] 2803. • R (On the application of Strack on behalf of Woodcock Hill Village Green Committee) v Laing Homes Ltd (t/a Taylor Wimpey) & Anor [2024] EWCA Civ 420) • (Cotham School v Bristol City Council and another [2025] EWHC 1382 (Ch) • See also PROW chapter for relevant judgements
Other guidance	• PINS – Commons Act 2006: General Overview for making an application under Sections 16 and 38 • PINS – The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations 2017 Procedural Guidance, June 2017. • PINS - Commons Act 2006: Procedural Guide for Public Inquiries and Hearings into Applications for Consent for Works on Common Land; and Exchanges of land in respect of Common land and Village Greens, August 2012. • PINS – Commons Act 2006 – Special Consent Provisions: National Trust Commons, April 2012 • Gadsden on Commons and Greens; Sweet and Maxwell (3rd Edition 2020)

Other Relevant Manual chapters

- Public Rights of Way
- Human Rights/Equality

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Introduction

1 Common land in Wales amounts to approximately 175,000 hectares or 8.5% of the total land area. Approximately 45% of common land lies within a National Park and a further 45% is included within Sites of Special Scientific Interest. Figures from the Open Spaces Society suggest that there are around 220 greens in Wales covering 250 hectares.

2 Many commons form vital parts of the economy by maintaining a living for commoners who use the areas to graze their livestock, providing employment and generating income for sporting uses; providing an attractive backdrop to tourist areas, and by preserving examples of the country's heritage with internationally important archaeological sites and historic landscapes.

3 The Countryside and Rights of Way Act 2000 allows access to most common land on foot and other legislation. The Law of Property Act 1925 also allowed foot access to many commons, particularly in urban locations, but also allows for access to those on horseback.

Background

Common Land

4 It is generally accepted that the origins of common land date from the manorial system following the Norman conquest in 1066. Poorer quality land of the manor (waste land of the manor) which was not cultivated by the lord or his tenants may have been made available to those who worked on the manor for:

- pasturage (grazing)
- pannage (turning out of pigs to eat acorns)
- estover (taking timber, bracken and heather)
- turbary (turf and peat)
- common in the soil (right to take minerals) or
- piscary (taking fish).

Other common fields (open field strips) would be available for grazing once the harvest had been gathered.

5 In addition, the Courts began to regard the long-standing use of land by local communities for recreation, sports and fairs as customary. In law such land was recognised as a town or village green and protected from interference. There is no distinction between a 'town' or 'village' green, the terms reflect the setting of the green.

6 In order to improve its productivity landowners began to inclose common land by agreement but mainly by private or public Inclosure Acts. However, during the late 19th century, commons were recognised for their importance as open space and legislation was introduced to protect rather than inclose common land. The Law of Property Act 1925 introduced a right of access to some commons, in particular those in urban areas.

7 Continuing concerns over the loss of common land and town and village greens led to the establishment of a Royal Commission to consider the needs of owners of common land, commoners and the public. In 1958 the Royal Commission recommended legislation to promote the registration of common land and town and village greens, public access and improved management. Whilst the Commons Registration Act 1965 established the registers of common land, town and village greens and rights of common, the provision of public access was not given effect until the Countryside and Rights of Way Act 2000.

8 The Commons Registration Act 1965 established the Commons Registration Authorities (CRA) and appointed them to draw up registers of common land and town and village greens. Applications were invited for the provisional registration of common land, greens and rights of common. Disputed provisional registrations were referred to a Commons Commissioner for consideration and determination. Unopposed provisional registrations automatically became final without further consideration.

9 In practice the establishing of registers was complex and there were several inadequacies. Land was wrongly registered or left unregistered and grazing rights were not recorded correctly. The provisions for correcting errors were limited and even where common land had clearly been wrongly registered there was no mechanism to remove wrongly registered land from the register (Corpus Christi College Oxford v Gloucestershire County Council [1982] 3 All ER 995). Moreover, land eligible for registration but which was not registered was deemed no longer to be common land or a green and unregistered rights of common ceased to be exercisable.

10 The Commons Act 2006 (See Welsh Government: Commons Act 2006 – Sections in force in Wales, January 2018) 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. Amongst other provisions the Act provides for amendments to be made to the commons register to correct errors; for the recording of new town and village greens; the exchange of common land; to prohibit the carrying out of certain works; and allowing for consent to be given for any works.

11 National Trust commons are subject to its own Acts. (see below)

Town and Village Greens

12 Under section 22 of the Commons Registration Act 1965, as originally enacted, a town or village green is land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes. An insertion by the Countryside and Rights of Way Act 2000 provided that land which had been used for at least 20 years by a significant number of the inhabitants of any locality, or neighbourhood within a locality, for

lawful sports and pastimes as of right, and either continues to be so used or has ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions, also falls within the definition of town or village green.

13 Section 15 of the Commons Act 2006 sets out how land may be newly registered as a town or village green. However, subsequent amendments (see Planning (Wales) Act 2015 Section 53) resulted in the application of section 15C in Wales and the insertion of Schedule 1B. These provisions exclude the right to apply for registration of land in Wales as a town or village green where a trigger event (such as the granting of planning permission) has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless a terminating event (such as expiry of the permission) occurs. Full details of trigger and terminating events are set out in Schedule 1B to the 2006 Act. Further information can be found in the Welsh Government document Guidance to Commons Registration Authorities in Wales on Sections 15A to 15C of the Commons Act 2006.

14 In some cases made under Schedule 2 of the Commons Act 2006, it may be necessary to consider whether or not the land was a town or village green. Regard must be given to the definition set out in the Commons Registration Act 1965. Whilst there is no interpretation of the term 'locality' in the Act, the matter is considered in the Welsh Government document Section 15 of the Commons Act 2006: Guidance notes for the completion of an application for the registration of land as a Town or Village Green. More comprehensive advice can be found in guidance published by Defra (See Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate, December 2014). The case of *R (On the application of Strack on behalf of Woodcock Hill Village Green Committee) v Laing Homes Ltd (t/a Taylor Wimpey) & Anor [2024] EWCA Civ 420)* (*Strack)* also provides some useful findings around the definition of locality and neighbourhood which is covered further below.

Registers of Common Land and Town and Village Greens

15 Registration Authorities must hold separate registers of common land and town and village greens. The purpose of the Registers is to record:

- the land, who registered it and when the registration was finalised;
- the rights of common, over which area of the common they are exercisable, the name of the person (the commoner) who holds those rights, and whether the rights arise by virtue of separate land ownership by the commoner; and
- the owners of common land

16 The register must have a register map showing the common land parcels and supplemental maps which show the land to which the rights are attached.

Scope of common land casework and decision making

17 Applications made under section 16 (deregistration and exchange of common land) and section 38 (applications for restricted works) of the Commons Act 2006 are made directly to PEDW as the appointed representative of the Welsh Ministers.

18 Applications under section 19 and Schedule 2 (correcting mistakes and omissions) are made to the CRA. Applications made by the CRA to itself on its own initiative are referred to as 'proposals' not applications. The CRA must refer an application or proposal to PEDW for determination if any of the following apply (See Regulation 15(2) and (3) of the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration Regulations 2017).

- the CRA has an interest in the outcome of the application;
- the CRA has received objections to the application from those with a legal interest in the land;
- the application is looking to add or remove land from the register;
- the application is looking to correct an error in the number of rights of common in the register; or
- the application or proposal is made under Schedule 2 paragraphs 2 to 9 of the 2006 Act.

19 Applications should always be determined in accordance with the relevant criteria set out in the respective part of the Commons Act 2006 and any other relevant legislation. Regard should also be given to any case law.

20 The test to be applied to the evidence is the civil test of the balance of probabilities. However, Inspectors are reminded of the need to be as consistent as possible in their interpretation of the statutory tests, case law, policies and legal advice. The onus of proving the case in support of the correction of the register rests with the person making the application and it is for the applicant to adduce sufficient evidence to merit granting the application.

21 Some commons are subject to historic local Acts specifically related to the individual common and which have provisions of their own for seeking consent. Legal advice has been sought, and which holds the view that applications can be made under either the individual Act or under the Commons Act. If this is raised in casework it is recommended that the following paragraph be included in the decision/report as a procedural matter:

Representations have been made that the application should have been made under the [insert relevant Act]. I am satisfied that an application can be made under either Act. However, as the application has been made under the provisions of [insert relevant Act] I have made my decision/recommendations on that basis. Should consent be required under any other legislation that is for the applicant to seek the necessary consent.

Consent for the exchange of common land and works on common land (Sections 16 & 38 of Commons Act 2006)

22 The Commons Act 2006, along with earlier legislation on common land, enables the Welsh Government to:

- safeguard commons for current and future generations to use and enjoy,
- ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected; and
- increase the number of SSSI in favourable condition.

23 The consent/approval process seeks to ensure that the following outcomes are achieved:

- the stock of common land and greens is not diminished - on balance any deregulation of registered land is balanced by the registration of other land of at least equal benefit;
- works take place on common land only when they maintain or improve the condition of the common or, in exceptional circumstances, where they confer some wider public benefit and are either temporary in duration or have no lasting impact; and
- any use of the common or green is consistent with its status (as common land or green).

24 Sections 16(6) and 39(1) of the Commons Act 2006 set out the criteria to which regard must be given when assessing an application. These are:

- the interests of persons having rights in relation to, or occupying, the land (in particular persons exercising rights of common over it), (in a s16 case this consideration relates to the land to be released from being common);
- the interests of the neighbourhood;
- the public interest;
- any other matter considered to be relevant.

25 The Commons Act 2006 : Common Land Consents Guidance sets out Welsh Government policy in relation to the determination of such casework and provides guidance for Welsh Ministers, PEDW, CRA and applicants. Further guidance is given in Commons Act 2006 : General overview for making an application under section 16 and section 38. Notwithstanding this, every decision must be considered on its merits and may depart from the guidance where considered appropriate. The reasons for departing from the guidance must be made clear in any decision.

26 Furthermore, in applying the criteria consideration must be given to the application not only as it is, but whether it proposes the best possible outcome. It may be that a more acceptable outcome could be achieved by adopting a different approach. For example, an application relates to works at point A whereas the evidence suggests the works could be erected and would have a reduced impact on public access and nature conservation if erected at point B. In cases where, after applying the statutory criteria, there is satisfactory evidence that there is a better approach available, the application could be

approved subject to conditions (in the case of a section 38 application) to improve the outcome or refused. Further examples can be found in Commons Act 2006 : Common Land Consents Guidance paragraphs 3.6 to 3.8.

27 It should be noted that it is not possible to apply conditions to a consent under section 16. If applying conditions on a section 38 consent, these cannot require the submission of further details for approval as there is no power available for discharging such conditions by PEDW, the CRA or any other body. Whilst there is no provision for the imposition of conditions in a s16 case it is generally accepted that a Unilateral Undertaking under section 106 of the Town and Country Planning Act can be provided. (In *Strack* there was no suggestion by the courts that the section 106 in that case was ultra vires).

28 Matters which should be considered in relation to each of the specified criteria are set out in the Common Land Consents Guidance, April 2014. In *Strack* it was held that there is no ranking in the considerations, and no presumption that one will prevail over the others and no prescription of weight to be given to each. That is a judgement for the decision maker.

29 An application should generally not have a negative impact on listed matters. If the tests are not met, then the application would normally be refused. Conflicting factors may need to be balanced against other factors.

30 For the purposes of section 38 the neighbourhood and its extent are not generally in dispute or even raised in the application or objections. However, it may be raised in a s16 case and consideration has to be given as to what constitutes the neighbourhood. The term neighbourhood is not defined by the Commons Act 2006 and the guidance is of little help either. The case of Cheltenham Builders Ltd R oao v South Gloucestershire District Council EWHC Admin [2003] 2803 provides some insight and although more closely related to the creation of town and village greens, advice on the matter can also be found in guidance published by DEFRA. (See Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate, December 2014 paragraphs 6. 10.28 and 6.10.29).

31 The *Strack* judgement whilst concerned with village greens is of some assistance. The CoA found that neighbourhood should be given a broad interpretation relating to the interests of the neighbourhood in its entirety. It also held that the interests of those having rights to the Release Land (in a s16 case) are neither superior or inferior to the interests of those without such rights (ie the general public) and therefore the interests of a neighbourhood closer to the Release Land are neither superior or inferior to the interests of a neighbourhood nearer the Replacement Land nor to the general public interest who may have rights to air and exercise. Therefore, in any casework where it is claimed that deregistration of a common would impact on part or certain streets in a neighbourhood, this should not be considered in isolation but with regard to the exchange of land on the whole neighbourhood including the potential benefits of the Replacement Land. What constitutes a neighbourhood will remain for the decision maker but is likely to cover a large area.

32 The public interest is defined at sections 16(6) and 39(2) of the 2006 Act as including the public interest in:

- 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 and features of historic interest.

33 If the application land falls within a National Nature Reserve or Site of Special Scientific Interest, section 28(G) of the Wildlife and Countryside Act 1981 applies. This imposes a duty on s28(G) authorities, which includes Inspectors carrying out their duties, "*to take reasonable steps, consistent with the proper exercise of the authority's 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*".

34 The general duty in Section 6 of the Environment (Wales) Act 2016 requires public authorities to seek to maintain and enhance biodiversity in the exercise of their functions and the Welsh Ministers should take all reasonable steps to maintain and enhance the living organisms and habitats which are listed as being of principal importance under Section 7 of the same. These statutory requirements must be taken into account in considering the effects on nature conservation interests.

35 In respect of landscape, if a proposal lies within a National Landscape consideration should be given to the statutory purposes of such areas.

36 In making any application the applicant is required to formally consult, amongst others, NRW, Cadw, the Open Spaces Society and, where appropriate the, National Park Authority and AONB Conservation Board or Joint Advisory Committee. Responses from these consultees will assist in considerations.

37 Other matters considered relevant may be taken into account such as an application for works which are of public benefit, either nationally or more locally, but where the application does not serve to improve the common. The decision maker will not necessarily rely on the applicant, supporters and objectors to bring all such matters to their attention but will also rely on their own experience and insight to draw appropriate conclusions. For example, because no one objects to an application it must not be assumed that there would be no adverse impacts. It is necessary to consider what impacts might arise, taking into account the criteria, and applying personal knowledge and experience, together with information available in representations, to make a judgement. However, in considering issues not raised by the parties the decision maker must consider issues of whether to do so accords with the Franks' Principles.

Issues relating specifically to section 16 applications

38 In respect of applications made under section 16 of the 2006 Act, the final decision is made by Welsh Ministers, the Inspector having prepared a report and recommendation for their consideration.

39 The primary objective in determining applications under section 16 is not to facilitate the deregistration of 'unwanted' or 'useless' pieces of common land, but to ensure the adequacy of the exchange land in respect of the statutory criteria. Applicants must propose the provision of replacement land if the area of the release land is more than 200 sqm. However, even if the land to be deregistered is less than 200sqm the Welsh Government expects land to be offered in exchange for the land being deregistered as its policy is not to allow the stock of common land and greens to diminish.

40 In considering an application which does not propose replacement land section 16(7) requires particular regard to be given to the extent to which the absence of such a proposal is prejudicial to the interests of people having rights to or occupying the release land, the interests of the neighbourhood and the public interest.

41 In general, where no replacement land is offered, consent will only be granted in exceptional circumstances, such as where a wider public interest is being served by deregistration which may mitigate the prejudice caused by the loss of the release land. For example, the creation of a slip way for a lifeboat station, or a disabled ramp for a village hall. Even in such cases, land should be offered in exchange unless there is a compelling reason why this is not possible. It therefore follows that where no replacement land is offered it is most unlikely that consent would be granted if no public interest is served by the deregistration.

42 In considering an application under section 16, the Welsh Government – Common Land Consents Guidance paragraph 4.4 indicates that the assumption will be made that the release land is correctly registered. Where access to the release land is limited by inclosure (e.g. by a fence or a hedge), or the release land is occupied by buildings or other works, it will be assumed that such inclosures or works are unlawful and will not endure, unless there is evidence to the contrary (e.g. by reason of a consent granted under section 194 of the Law of Property Act 1925). In such circumstances the proposed exchange will be considered as if the release land were an integral part of the common and properly available for public use.

43 Where the replacement land offered as part of the application is not contiguous with the common in which the release land is situated, the application should contain information, where applicable, regarding:

- existing rights or easements which would allow animals to be moved from the existing common to the replacement land;
- the effect of the movement of animals over different commons on the rights and usage of those with existing rights on different commons; and

- the steps which would be taken to avoid the risk of the spread of any disease.

44 Consent would not normally be granted where the replacement land is already subject to some form of public access, whether that access was available by right or informally, as this would diminish the total stock of access land available to the public.

45 The Countryside and Rights of Way Act 2000 provides rights of access to areas of registered common land and open country (mountain, moor, heath and downland). The land is shown on a map in its conclusive form issued by NRW. If land is exchanged then rights of access under the Act will not apply to the replacement land until the conclusive access land map is reviewed and the exchange land added. Such reviews are required to take place every 10 years; the fact that there will be no formal access to replacement land until the map is updated may have some bearing on the decision. A Unilateral Undertaking may be required as an interim measure.

46 If an application under section 16 is approved, then the decision maker will need to make an Order of Exchange identifying the land to be released and the replacement land (where it is being offered). The CRA will use this to amend the Commons Register.

47 Section 17(6) provides that where an Order of Exchange is made any relevant provision applying to the release land will cease to apply to it but instead will apply to the replacement land. Section 17(6) does not apply to town and village greens. If an Order is made the relevant provision will cease to apply to the release land but will not automatically transfer to the replacement land.

48 There may be instances where section 193 of the Law of Property Act 1925 does not apply to the release land but it is considered appropriate that such rights should apply to the replacement land. Some commons are also subject to Orders of Limitations which include provisions similar to byelaws. Consideration should be given as to whether these should apply to the replacement land.

49 The application of section 193 rights to the replacement land is often requested by interested parties, in particular where there is concern that there will be no access rights under the Countryside and Rights of Way Act 2000 until a review of the access maps.

50 If the decision maker considers that rights should apply to the replacement land then the views of the parties should be sought. It should be noted that whilst access under section 193 includes equestrian access, CROW access rights expressly exclude such a right.

51 In the event that section 193 rights are to apply to the replacement land the Order of Exchange should include the following wording:

Section 193 of the Law of Property Act 1925 (public right of access for air and exercise) shall apply to the replacement land, and the commons registration

authority shall enter a note of the application of the right to the replacement land in the land section of the register.

Issues relating specifically to section 38 applications

52 Commons should be maintained or improved as a result of the works proposed on them. Consent under section 38 should be seen as a gateway which enables works which are sympathetic to the policy objectives of the Welsh Government regarding common land but reinforces controls on development which is inappropriate or harmful.

53 A previous loophole in the legislation was closed in April 2017 since when the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017 apply to common land. Since 16 May 2017 section 38 applications need to be assessed against the thresholds set out in the regulations. Where the works are for a project, which is equal to or exceeds the thresholds, the applicant must seek a screening opinion from Welsh Ministers. However, EIA and section 38 applications are separate controls and section 38 applications should be decided on their merits regardless of whether EIA screening and consent is required.

54 Common land may be regulated by a local Act or subject to a scheme of management made under the Commons Act 1876, the Metropolitan Commons Act 1866 or the Commons Act 1899. Such schemes of management or local Act may allow restricted works to be carried out with or without consent from the Welsh Ministers or even prohibit restricted works. It is generally considered that there is nothing in the section 38 process which dispenses with the need to comply with other schemes. Neither does section 38 consent convey any permission to carry out works that may need consent under other legislation. It is for the applicant to resolve any conflict with other schemes of management and access under section 193 of the Law of Property Act 1925 including whether works granted consent can be lawfully carried out (see the recommended standard paragraph in the Scope of Common Land Casework and Decision Making section above).

55 In deciding whether to grant consent to carry out work on common land the decision maker will need to establish whether the proposed works are consistent with the use of the land as common land. For example, works which would facilitate grazing by a rights holder would be consistent whereas works to extend a private dwelling onto common land would not be. Further guidance on whether or not works would be consistent with the use of the land as common land can be found in the Welsh Government - Common Land Consents Guidance paragraphs 4.7 to 4.11.

56 Some proposed works on common land do not benefit the common but provide an underlying public benefit, such as works for the generation of sustainable energy. In order to balance the Welsh Government's promotion of sustainable energy generation and its policy objectives in respect of common land, there is an expectation that applications for infrastructure projects on common land

would be more successful under section 16 so that an exchange of land can be proposed and taken into account. According to the guidance, an application for consent for such works under section 38 will rarely be granted, unless there are convincing reasons why an application under section 16 cannot be pursued.

57 A similar expectation also exists in respect of minor works undertaken by a statutory undertaker (e.g. a water utility) to provide or improve the public service to local residents and businesses. However, consent may be appropriate where the works are for a temporary duration, or where the works would be installed underground and the proposals ensure the full restoration of the land affected, and the works confer a public benefit (See Paragraphs 4.12 to 4.14 of Welsh Government - Common Land Consents Guidance).

58 Section 39(3)(b) of the Commons Act 2006 provides that consent under section 38 may be granted subject to conditions (but there is no provision for discharging details where further consent is required). Where temporary consent is granted the following two conditions are usually imposed:

- *The works shall begin no later than [x years] from the date of this decision; and shall be completed within [specify] of the date of their commencement.*

  Reason: To ensure the works are commenced and completed within a reasonable timeframe.

- *The works [specify if appropriate] shall be removed and the land reinstated to its previous condition [or condition set out in **] no later than [date] after the completion of the works.*

  Reason: In the interests of [the interests of the rights holders/nature conservation etc]

The first condition gives the local community certainty that the consent will lapse if it is not implemented within the specified time period and the second condition clearly indicates when the works are to be removed.

59 Whilst enforcement powers are available to the public under section 41 of the Commons Act 2006 this is done through application to the County Court and is potentially a difficult and expensive course of action. It may therefore be unlikely that any contravention of a condition will be pursued. Further guidance regarding enforcement can be found in the Welsh Government Common Land Guidance : Enforcement against unlawful works on common land and Unauthorised Agricultural Activity.

60 An applicant may seek to vary or revoke a modification or condition attached to a section 38 consent under section 39(5) of the Commons Act 2006. Any application must be made within 3 months of the decision (see Regulation 19 of The Works on Common Land etc. (Procedure)(Wales) Regulations 2012. If no such application is made and the applicant wishes to vary a modification then a fresh section 38 application should be made.

61 Many applications under section 38 involve the fencing of common land. Such fencing will have implications in respect of restricting public access in accordance with the status of the common (pedestrian and equestrian) or in respect of the obstruction of public rights of way. Access may be provided through the provision of structures such as gates and stiles. Where structures are erected across any public right of way then, whilst consent may be given under the section 38 regime, the applicant will also need to obtain consent from the relevant competent authority, usually the Highway Authority, under section 147 of the Highways Act 1980.

62 In determining any application, regard must be given to the effect of any structures on public access and the need to ensure compliance with the Equality Act 2010 in respect of the erection of structures on public rights of way. Any structures should be specified to an appropriate standard to show compliance with the Act (see archived Defra advice Authorising structures (gaps, gates & stiles) on public). If no information is provided in respect of structures then it may be necessary to obtain it from the applicant. Advice can be found in the Welsh Government Guidance for Local Authorities on Public Rights of Way. Further information regarding the Equality Act is set out in the Human Rights & Equality chapter.

Applications not within the scope of section 38

63 Applications which are not appropriate to proceed under section 38 may often be eligible to be considered under regulation 16. However, in certain cases, it may be possible or more appropriate for applications to be made under other provisions (see Paragraph 4.15 of Welsh Government - Common Land Consents Guidance), such as:

- Powers of compulsory purchase or (in relation to a local authority) appropriation may be used to acquire rights over common land (e.g. a right to bury a pipeline in the land and to confer enduring rights of access for maintenance) instead of a right to acquire the land itself;
- National Trust Act 1971, section 23: in relation to works on common land owned by the National Trust; (see later section)
- Countryside Act 1968, section 9: facilities and buildings undertaken by local authorities on common land or neighbouring land in the interests of promoting public access; and
- Dyfed Act 1987, sections 42 and 65: access over greens and rights over Kingsmoor Common.

64 Applications under these other statutory regimes are subject to the same policy considerations in so far as the considerations are compatible with the requirements of the specific legislation.

Other Matters to be taken into account

65 In considering any application for consent regard should be given, where appropriate, to the duty of the Welsh Ministers to:

- maintain and enhance biodiversity;
- further the conservation and enhancement of SSSI;
- have regard to the requirements of The Habitats Directive;
- the purposes of National Landscapes.

Rectification (Applications under Section 19 and Schedule 2 to the Commons Act 2006

Section 19: Correction of the Register

66 Section 19 allows applications to correct certain but not 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.

67 Applications can be made under:

- section 19(2)(a) to correct a mistake made by the CRA in making or amending an entry in the register. For example, this might be where an error was made by the CRA in transposing onto the register map a plan supplied by an applicant;
- section 19(2)(b) to address any other mistake, whether made by the CRA 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. An example may be where a mistake has been made in identifying the land over which a right was exercisable;
- section 19(2)(c) to delete duplicate entries;
- section 19(2)(d) to update any name or address for example following marriage or moving residence but cannot be used to record a change in ownership rights; and
- section 19(2)(e) to update an entry to take account of the common law principles of accretion or diluvion (the accumulation of deposits along a watercourse (accretion) the erosion of land (diluvion).

Schedule 2: Non registration or mistaken registration

68 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. Applications may be made to add common land or greens to the registers recognised under statute, to reinstate waste land of the manor 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.

69 Paragraphs 6 to 9 of Schedule 2 enable land to be deregistered where certain criteria are met, where the land was built upon and has remained as such or

where land which was not considered by a Commons Commissioner and which can be shown not to have been common land nor green at the time of registration.

70 The Commons Act 2006 sets out the relevant provisions and the Guide to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations 2017 provides specific advice in respect of each relevant section.

Additions to the Register

Paragraphs 2 and 3 of Schedule 2: Registration of statutory common land or greens

71 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 Commons Registration Act 1965. There is no provision which allows these types of applications or proposals to be referred to PEDW.

Paragraph 4 of Schedule 2: Re-registration of waste land of the manor

72 Paragraph 4 of Schedule 2 enables certain land to be registered as common land. An application 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 (see Guide to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations 2017 for advice on the definition of waste land of the manor) at the date of the application, and was provisionally registered as common land under the Commons Registration Act 1965, but was subsequently cancelled.

Paragraph 5 of Schedule 2: Town or village green wrongly registered as common land

73 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.

Deletions from the Register

Paragraphs 6 and 8 of Schedule 2: Deregistration of buildings

74 Paragraphs 6 and 8 of Schedule 2 enable the deregistration of land which is covered by a building or the curtilage of a building and was wrongly registered as common land or as a town or village green. Qualifying land, now recorded on the register, would have been provisionally registered and would have been and continues to be covered by a building or within the curtilage of a building. The issue to be considered is whether the land was included in error and does not include the loss of common land.

Paragraph 7 of Schedule 2: Deregistration of land wrongly registered as common land

75 Paragraph 7 of Schedule 2 enables the deregistration of land which was wrongly registered as common land under the Commons Registration Act 1965. Land covered by a building or within the curtilage of a building is dealt with under paragraphs 6 and 8 of Schedule 2. Land is eligible for deregistration under this paragraph if it was provisionally registered as common land and its provisional registration was not referred to a Commons Commissioner. Land which was not common land or a town or village green, waste land of the manor or not inclosed under section 11 of the Inclosure Act 1845 may be deregistered.

Paragraph 9 of Schedule 2: Deregistration of land wrongly registered as town or village green

76 This provision is similar to paragraph 7 of Schedule 2 but applies to the deregistration of certain registered town or village greens. However, the criteria for deregistration of greens are slightly different. Land is eligible for deregistration under this paragraph if it was provisionally registered as town or village green under section 4 of the Commons Registration Act 1965 and its provisional registration was not referred to a Commons Commissioner. It also must be shown that the land could not be used as a town or village green in the 20 years prior to its provisional registration and was not, and is still not, allotted for recreation and exercise.

77 A recent judgement (*Cotham School v Bristol City Council and another [2025] EWHC 1382 (Ch)* provides useful information relating to the rectification of the register to remove an area of land registered as a village green. It is particularly useful for setting out the considerations around statutory incompatibility (where the registration as a town or village green conflicts with the statutory use of the land), the use of land “as of right” and how the display of signage and interruption to use of land may influence findings on 20 years use. It is also applicable to rights of way work.

Curtilage

78 Curtilage is not defined in the 2006 Act but has been considered by the courts in various contexts, in particular that 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.

79 In respect of an application to deregister land at Blackbushe Airport the High Court (*Hampshire County Council v Secretary of Sate for Environment, Food and Rural Affairs & Blackbushe Airport Limited, [2020] EWHC959 (Admin) Case No. CO/3493/2019)* held that the curtilage of a building as found in the legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the building and not whether the land together with the building fall

within, or comprise, a unit devoted to the same or equivalent function or purpose. The correct principle was that for property to qualify as falling within the curtilage of a building, it must form part and parcel of that building (not whether the building forms part and parcel of some unit which includes that land, or whether those two items taken together form part and parcel of an entity or an integral unit). The question posed by the statute is whether the land forms part of the relevant building, and thus falls within its curtilage. The 'curtilage' question is not correctly addressed by asking what is the curtilage of an institution or use which occupies some larger area than the building itself.

Site visits, hearings and inquiries

80 Although hearings and inquiries are not uncommon, most applications are determined by way of written representations.

81 The holding of site visits, hearings and inquiries is subject to The Works on Common Land, etc. (Procedure)(Wales) Regulations 2012 which outline the general procedures to be followed. Notwithstanding these regulations, hearings and inquiries are normally conducted in the spirit of the Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017.

82 In general site visits, hearings and inquiries are run in a similar manner to other events and the guidance found in the relevant chapters is therefore applicable. However, there are several differences to be aware of, namely:

- if the applicant wishes to be present or represented at a site visit, they must be given the opportunity to do so;
- anyone who has made an objection/representation is entitled to be heard by an Inspector. Therefore, if someone requests to be heard the case will be determined by means of a hearing or inquiry. It is for the Inspector to make the final decision on the most suitable procedure of the two depending on the complexity of the application, the number of objections/representations and whether there is a need for the evidence to be tested by cross examination; and
- the CRA may adopt a neutral stance at any hearing or inquiry. In such circumstances the CRA will usually assist at the event, for example by producing records or clarifying facts, but will not take an active part in the proceedings and will not make a case for or against the application.

83 Inspectors should remember that the 'Franks' Principles', natural justice and human rights also apply to Common Land casework.

84 If a large number of people want to attend an inquiry or the case is particularly complicated a pre-inquiry meeting may be held to deal with procedural matters. Following the meeting the Inspector will issue notes of the meeting which will confirm the parties wishing to speak at an inquiry, forms of evidence and deadlines for the submission of documents and the procedure at any inquiry. For further guidance see the Inquiries chapter.

Costs applications (Schedule 2)

85 In respect of an award of costs, regulation 25 of The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations, 2017 allows an award in relation to an application (not a proposal) made under Schedule 2 of the Act and where the application has been referred to PEDW for determination and a public inquiry is held. No provision is made for costs to be awarded via the written representation or hearing procedures.

86 Further guidance can be found in the WITM chapter on Costs although not all of the content will be relevant to Common Land casework.

National Trust Commons

87 Under section 29 of the National Trust Act 1907, the Trust must keep its commons "unenclosed and unbuilt on for the recreation and enjoyment of the public". This requirement is qualified by powers given in section 29 and in later provisions, including section 23 of the National Trust Act 1971. The National Trust Acts can be read at the National Trust website.

88 The definition of common land for sections 23 and 29 is the same as section 38 of the Commons Act 2006. Section 23 therefore applies to any National Trust owned land which is registered as common land under the Commons Registration Act 1965 or the Commons Act 2006. It also applies to National Trust land not registered as common land but which is regulated by a Provisional Order Confirmation Act under the Commons Act 1876 or which is subject to a scheme of management under the Metropolitan Commons Act 1866 or Commons Act 1899. Section 23 does not generally apply to registered town or village greens, but it may occasionally do so if a green is subject to a scheme or Act.

89 Section 29 permits some works on National Trust land without the need for the consent of the Welsh Ministers. However, works carried out under section 23 that prevent or impede access can only be carried out if the consent of the Welsh Ministers is obtained under section 23(2).

Human Rights Act & The Equality Act

90 PEDW and individual Inspectors are subject to the Public Sector Equality Duty (PSED) (Section 149 of The Equality Act 2010).

91 Where there is the potential for any decision to affect a person with a protected characteristic then due regard must be given under the PSED. Such issues may be relevant in respect of applications under sections 16 and 38. However, in respect of other applications the criteria for determination is limited to matters of fact and it is unlikely that Human Rights/PSED issues will be engaged.

92 Where the decision maker is aware that such issues could be material the Inspector's decision should address the substance of the 'due regard' duty under section 149 of the Equality Act 2010.

93 Further information can be found in the Human Rights and Public Sector Equality Duty chapter of the ITM.

The Well Being of Future Generations

94 The duty placed on public bodies by the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development needs to be considered in common land casework and acknowledged in the decision or report.

95 The following form of wording is considered to be appropriate for use in concluding sections of the decision/report:

96 For applications which are solely based on legal matters, facts, or certain tests and not merits it is unlikely that reference to the WBFG Act will be required.