

Welsh Government – Common Land Consents Guidance

Introduction

The Planning Inspectorate in Wales (PINS Wales) is responsible for the procedural work for all of the Welsh Ministers' casework in relation to common land in Wales (including applications for exchange of land in respect of town or village greens) as well as determining, on behalf of the Welsh Ministers, applications for consent under section 38(1) of the Commons Act 2006 ("the 2006 Act"). PINS Wales' responsibility for procedural work also relates to the Welsh Ministers' consents, certificates and orders under various other statutory provisions in relation to common land and town or village greens identified in paragraph 4.15 below. The Deputy Minister for Agriculture and Fisheries retains responsibility for the Welsh Government's policy in relation to the management and protection of common land and greens.

1 The Guidance

1.1 This note sets out the Welsh Government's guidance in relation to the determination of such casework and is published for the guidance of the Welsh Ministers, PINS Wales, commons registration authorities and applicants for consent. It may also be of assistance to those interested in such applications (perhaps as supporters or objectors).

1.2 The Welsh Ministers and PINS Wales seek to adhere to this guidance in processing and determining applications under section 38(1) and section 16(1) and, so far as is relevant, in relation to other statutory provisions (see paragraph 4.15 below). Every application to the Welsh Ministers must, however, be considered on its own merits and a determination may, in exceptional circumstances, depart from the guidance if it appears appropriate to do so. In such cases, the decision maker will explain why it has decided not to follow the guidance.

1.3 This guidance must be read in conjunction with the 2006 Act, other legislation relevant to the type of application being considered, and the guidance notes published by PINS Wales in relation to particular types of application. The guidance notes are published on the website of PINS Wales, at:

<http://www.planningportal.gov.uk/planning/countryside/commonland/commonlandand>

2 Why is common land important?

2.1 The aim of the Welsh Government's Natural Resource Management Programme is to ensure that we make the most of Wales' natural resources while looking after natural systems and building their resilience and continuing to provide the benefits to people, communities and the economy in Wales in the long term. That is particularly relevant to common land as around 8% of

the land area of Wales is common land, with approximately 45% of common land lying within a National Park and approximately 45% included in Sites of Special Scientific Interest (SSSI).

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

2.3 Individual commoners who still exercise their rights are maintaining a tradition that has been in existence for hundreds of years. This is particularly important in upland areas where commons form a vital element in the local agricultural economy.

2.4 Some of the varied benefits we wish to see our common land delivering are:

Economic

- maintaining a living for commoners who use common land to graze livestock, often with consequential benefits to the wider rural community;
- providing employment and generating income from sporting use
- providing aesthetic beauty in the landscape, which encourages tourism;

Agriculture

- ensuring upland farms can rely on the grazing of common land, which is a significant component of livestock production in Wales;
- maintaining local infrastructure and expertise capable of long term sustainable agricultural management;

Biodiversity

- maintaining natural vegetation rich in flora and fauna;
- protecting a diversity of habitat (on common land, the diversity reflects the lack of incentive to "improve" such land because of the absence of any single controlling interest);
- promoting Sites of Special Scientific Interest and the conservation of other nationally designated sites;
- sustaining grazing systems which are responsible for maintaining many landscape and environmental values on agriculturally-active commons;

Archaeological

- preserving landforms and features in unploughed soils (common land and greens have often been undisturbed for centuries);
- protection of important archaeological and historic sites;

Recreation

- enjoyment of the landscape by visitors and tourists;
- providing open space for surrounding communities;
- use for a wide range of organised activities and local traditional activities;
- commons which are sporting estates contributing to the local economy;

Cultural

- common land and greens providing focus of communities for ancient and traditional activities;
- long-standing traditions associated with the use of common land and greens; and
- increasing the value of open, unenclosed common land and greens as a *de facto* “communal” resource and providing a sense of belonging.

3 Protecting commons — our policy objectives

3.1 The Welsh Government’s desire to protect commons contributes to a number of its strategic objectives:

- reversing the decline of and securing the resilience of our biodiversity by focusing on ecosystems as a whole and their connection with our economy and our communities; and
- through sustainable use of our resources the opportunity to drive growth and exploit new markets, increase efficiency and improve the resilience, safety and prosperity of our communities, our economy and our environment.

3.2 Within those objectives the Welsh Government wishes to see:

- Soil and land managed sustainably;
- Biodiversity valued, safeguarded and enhanced;
- People enjoy, understand and care for the natural environment;
- Improved local environment quality;
- Designated sites either in good condition or improving; and
- Sustainable, living landscapes with best features conserved.

3.3 The 2006 Act, along with a suite of 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 Sites of Special Scientific Interest in favourable condition.

3.4 To achieve this we have a consent/approval process in place to ensure the following outcomes are achieved:

- our stock of common land and greens is not diminished — that, on balance, any deregistration 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).

3.5 Sections 16(6) and 39(1) of the Act set out the criteria to which the Welsh Ministers must have regard when assessing an application. In applying the criteria the Welsh Ministers will look at the application not only as it is, but will consider whether the application proposes the best possible outcome. It may be that a more acceptable outcome could be achieved by adopting a different approach.

3.6 For example, an application relates to works at point A, and the evidence suggests the works would have a reduced impact on public access and nature conservation if erected at point B (and there is no reason why the works could not be erected at point B). In cases where the Welsh Ministers are satisfied that there is a better approach it is open to them either to impose conditions to improve the outcome or to refuse consent for the application before them, where they are satisfied after applying the statutory criteria that there are good grounds for doing so.

3.7 Similarly, if an application proposes the erection of permanent fencing, but the purposes of the fencing will be achieved within a reasonably predictable timescale, or the utility of the fencing should be reviewed from time to time because of its impact, the Welsh Ministers may decide to impose a condition requiring the works to be removed after a period of time, or refuse consent for the works.

3.8 Equally, if an application proposes the erection of temporary fencing to prevent livestock from wandering on to a road running through a common and causing accidents, the Welsh Ministers might want to know whether the applicant has explored the option of asking for a temporary speed limit to be introduced on the appropriate stretch of road to mitigate the risks of an accident whilst preserving the open nature of the land, or for warning signs to

be introduced (e.g. warnings of cattle on road) that would have the effect of slowing traffic down. If these were considered and rejected by the applicant as being ineffective, the Welsh Ministers might want to know why.

3.9 Looking at each of the criteria some of the considerations which should be taken into account include:

3.9.1 the interests of persons having rights in relation to, or occupying the land (and in particular persons exercising rights of common over it)

- What effect will the proposals have on the ability of commoners or other rights holders (including the landowner) to exercise their rights?
- What alternatives have been explored that might reduce the impact of the proposals on the exercise of commoners' rights?
- What effect will the proposals have on other rights holders, such as those with rights of access across the land?

3.9.2 the interests of the neighbourhood

- Does the proposed replacement land or outcome intended by the proposed works add something that will positively benefit the neighbourhood?
- Does the loss of the release land or the construction of the works mean that local people will be prevented from using the common or green in the way they are used to? For example, will the loss of the release land reduce the area of the cricket pitch below a viable threshold, or the works interfere with a regular riding circuit (particularly if any replacement land cannot mitigate the loss)?
- Does the construction of the works or, in relation to any exchange, will the removal of the release land from its status as common land or green, interfere with future use and enjoyment (whether by commoners, the public or others) of the land as a whole (e.g. will fencing sterilise part of the land, rendering it practically inaccessible)? Is it likely or possible that the release land could cease to be available as a means of access between other parts of the land as a whole (e.g. the removal of a vehicular access way from a green would enable the owner to fence off the access way from the green on either side, or otherwise exclude access to it)?

3.9.3 the public interest

The public interest is defined at sections 16(8) and 39(2) of the 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:

- What effect will the proposals have on those wishing to use the common for recreation and access? (In the case of any exchange, it should be assumed that the release land will cease to be available for recreation and access, unless a legally binding provision is intended to be made to assure continued use)
- Are there potential benefits to nature conservation from carrying out the proposals? Does Natural Resources Wales or any other competent person agree with the assessment of any proposed benefits? It may be appropriate to consider indirect benefits - for example, if the works will facilitate the continuation of sustainable grazing systems, which in turn deliver environmental benefits.
- In relation to any exchange, what will be the impact of the replacement land in relation to nature conservation compared with the release land? Does Natural Resources Wales or any other competent person agree with the assessment?
- What will be the impact on the landscape if the proposals proceed? Is the landscape in a specially designated area, such as a National Park or Area of Outstanding Natural Beauty? Will the impact include an adverse effect on the enjoyment of the remaining part of the common or green (e.g. if development of any release land might spoil the view or impair the conservation of wildlife on the remaining part)? What consideration has been given to minimising any impact by good design (e.g. in relation to a fencing scheme, minimising the extent of new fencing by utilising the existing boundaries of the common)?
- Will the proposals help protect archaeological remains and features of historic interest (particularly if there are such features on any land being deregistered)?
- How do the proposals fit into the historical context? For example, in relation to an ancient common, uniformly described in historical documentation with well-defined boundaries, what effect would they have on the local heritage?

3.9.4 any other matter considered to be relevant

This criterion allows other issues to be taken into account when assessing an application. It may include looking at the wider public interest, which may arise, for example in a major infrastructure project.

3.10 In assessing these considerations, the Welsh Ministers will take into account any matter which is relevant. They 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, they will not assume that, because no one objects to an application, that there are no adverse impacts, but will consider what impacts might arise, taking into account these criteria, and applying their

knowledge and experience, together with information available in representations, to make a judgement. If necessary, if there is doubt about the extent of any impact, they will consider using their powers to require a site visit or public inquiry, or to seek professional advice, in order to improve understanding of the merits of the application.

4 Other Policy Considerations

Exchange land in applications to deregister or exchange common land under section 16 of the 2006 Act

4.1 Applicants must propose replacement land if the area of the release land is over 200m² (see section 16(2)). Even in cases where the land to be deregistered is less than 200m² the Welsh Government expects land to be offered in exchange for the land being deregistered as our policy is not to allow our stock of common land and greens to diminish. The Welsh Government does not see the purpose of section 16 being to facilitate the deregistration of “unwanted” or “useless” pieces of common land or green; but to enable registered land to be released in exchange for replacement land of equal value.

4.2 In considering an application which does not propose replacement land, section 16(7) requires that the Welsh Ministers have “particular regard to the extent to which the absence of such a proposal is prejudicial” to the interests specified in section 16(6)(a) to (c) (*i.e.* the “private” interests, the interests of the neighbourhood, and the public interest referred to in paragraphs 3.9.1 to 3.9.3 above). In general, the Welsh Ministers will grant consent where no replacement land is offered only in exceptional circumstances. Such circumstances are most likely where a wider public interest is being served by the deregistration which may mitigate the prejudice caused by the loss of the release land. An example is the creation of a slipway for a lifeboat station, or the provision of a disabled access ramp to a village hall. Even in such cases, land should be offered in exchange unless there is a compelling reason why this is not possible (*e.g.* the registered land is surrounded by development, and it is not practicable to provide replacement land which would be integral to the site). It follows that an application for deregistration where no replacement land is offered is most unlikely to be granted if no public interest is served by the deregistration.

4.3 Nor does the Welsh Government see the purpose of section 16 as enabling the deregistration of land which is claimed to have been wrongly registered: other provision is made for that specific purpose in the 2006 Act.

4.4 In considering an application under section 16, the Welsh Ministers will assume that the release land is correctly registered. Where access to the release land is limited by inclosure (*e.g.* by a fence or hedge), or the release land is occupied by buildings or other works, they will assume that such inclosures or works are unlawful (unless the contrary is shown, *e.g.* by reason of a consent granted under section 194 of the Law of Property Act 1925) and that they will not endure. Accordingly, in those circumstances, they will

consider the proposed exchange as if the release land were an integral part of the common and properly available for public use.

4.5 Where it is proposed to offer land in exchange which is not contiguous with the common in which the release land is situated, the Welsh Ministers would expect to be provided with information on the following issues where applicable:-

- what rights or easements exist which would enable animals to be moved from existing common land to that offered in exchange eg how would access across private land be obtained?;
- how would the movement of animals over different commons affect the rights and usage of those with existing rights on different commons? There could be the danger of interfering with existing rights eg overgrazing, prevention of those persons with existing rights from grazing animals etc, and information would be required as to how those risks would be avoided;
- where animals would be moved over private land and/or different commons, what steps would be taken to avoid the risk of any diseases spreading to/from the other land and/or from one flock or herd to another?

Works on commons under section 38 of the 2006 Act

4.6 Commons should be maintained or improved as a result of the works being proposed on them. The Welsh Government sees Part 3 of the 2006 Act, and its predecessor provision in section 194 of the Law of Property Act 1925, as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character. In other words, consent under section 38 should be seen as a gateway, which enables the construction of works which are sympathetic to our policy objectives for common land, but reinforces controls on development which are inappropriate or harmful.

4.7 In deciding whether to grant consent to carry out works on common land, the Welsh Ministers (and Inspectors) will wish to establish whether the proposed works are consistent with the use of the land as common land. For example, an application for works which facilitate grazing of a common by a rights holder will be considered to be consistent with the future use of the land as common land, whereas an application for works to extend a private dwelling onto common land will be considered not to be consistent with the future use of the land as common land, and will normally be refused.

4.8 Where it is proposed to construct or improve a driveway across a common, consent will be required under section 38 if the works involve the "laying of concrete, tarmacadam, coated roadstone or similar material" (other than for the purposes of repair of the same material). Such an application

may be consistent with the continuing use of the land as common land, even where the driveway is entirely for private benefit, because the construction will not in itself prevent public access, or access for commoners animals. By its very nature, however, paving will have an impact on the enjoyment of the common by reducing the area available for recreation and grazing, by removing habitat, perhaps by affecting drainage, and introducing an urbanising feature into what will normally be an essentially open and natural setting. Nevertheless, the Welsh Government takes the view that, in some circumstances, a paved driveway may be the only practical means of achieving access to land adjacent to the common or green. Moreover, where an existing unsurfaced means of access is already in use, a sympathetic paving proposal may be aesthetically preferable.

4.9 The Welsh Government also notes that the alternative of deregistration of the land covered by a drive, and the substitution of replacement land elsewhere, may be undesirable in that the release land ceases to be subject to statutory protection, and may cease to be available to the community (the potential impact of deregistration may be greater where the release land is core or integral to the enjoyment of the common or green as a whole). These issues will vary according to the particular circumstances and no general rule can be formulated.

4.10 The Welsh Ministers generally have no power to grant consent to construct or improve a driveway across a town or village green, and the construction and subsequent use of such a driveway may well be illegal. Where it is intended to construct a vehicular means of access across a green, the Welsh Government notes that an application may be required under section 16 to deregister the affected land, but where such an application relates to an area of the green which is not more than 200m² in area, the principles set out in paragraph 4.1 to 4.5 above (in relation to the provision of exchange land) will apply.

4.11 Consent will not normally be granted under section 38 for permanent buildings on common land, because such development is normally incompatible with the future use of the land as common land. Where such buildings are intrinsically related to the enjoyment or management of the common, however, such as a cricket pavilion, lambing shed or a keeper's hut, the giving of consent under section 38 may be considered appropriate.

Underlying public benefit

4.12 Some proposed works on common land do not benefit the common but nevertheless there is a potential underlying public benefit, for example works for the generation of sustainable energy (wind farms).

4.13 The Welsh Government wishes to promote sustainable energy generation in an appropriate setting but, equally, its policy is to ensure that the stock of commons is not diminished, that works on common land must maintain or improve the condition of the common, and the use must be consistent with its status as common land. To balance these issues the

Welsh Government's expectation is that applications for such infrastructure projects on common land are more likely to be successful under section 16 of the Act, so that an exchange of land is proposed and can be taken into account. An application for consent to such works under section 38 will rarely be granted unless there are convincing reasons why an application under section 16 cannot be pursued.

4.14 Similarly, works may be proposed in relation to common land which do not benefit the common, but confer some wider benefit on the local community, such as minor works undertaken by a statutory undertaker (e.g. a water utility) to provide or improve the public service to local residents and businesses. In such cases, the Welsh Government's expectation is that applications for such purposes on common land are more likely to be successful under section 16 of the Act, so that an exchange of land is proposed and can be taken into account. An application for consent to such works under section 38 will rarely be granted unless there are convincing reasons why an application under section 16 cannot be pursued. Exceptionally, however, consent may be appropriate where the works are of temporary duration (such as a worksite) or where the works will be installed underground (such as a pipeline or pumping station), and the proposals ensure the full restoration of the land affected, and the works confer a public benefit.

Applications not within scope of section 38

4.15 Applications which are not appropriate to proceed under section 38 may often be eligible to be considered under section 16. In certain cases, however, it may be possible or more appropriate to make application under other provisions:

- Powers of compulsory purchase or (in relation to a local authority) appropriation, for which purposes the Welsh Ministers' certificate is required under the Acquisition of Land Act 1981, section 19 or paragraph 6 of Schedule 3 — these powers may be exercised only by a local authority or other body on which such powers are conferred (such as under an Act of Parliament), and may also 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.
- Countryside Act 1968, section 9: facilities and buildings undertaken by local authorities on common land or neighbouring land in interests of promoting public access.
- Dyfed Act 1987, sections 42 and 65; access over greens and rights over Kingsmoor Common

4.16 Applications under these other statutory régimes are subject to the same policy considerations set out in this guidance in so far as the considerations are compatible with the requirements of the specific legislation.

General policy in relation to consent

4.17 This guidance explains the Welsh Government's policy in relation to consents generally. It should not be assumed that, where this guidance indicates that a consent might be appropriate in the circumstances specified, that an application in those circumstances will necessarily be granted. Such applications will be considered on their merits in relation to the context, this guidance, and specifically that any works proposed should maintain or improve the use of the land as a common or town or village green and the criteria set out in the relevant legislation. Although many proposals are linked to, or are a central part to, a related consent for planning permission, the issues that need to be considered are quite different, as what may be perfectly reasonable from a planning perspective, may, or could, have an adverse impact on the traditional use of the land as a common or green. The Welsh Government, where possible, wishes to protect and conserve the stock of common land and greens and where appropriate to promote its protection and its continued use for traditional activities.

Matters to be taken into account

4.18 In considering any application for consent (or for a certificate), the Welsh Ministers will have regard to the following matters:

- Their duty to conserve biodiversity (see section 40 of the Natural Environment and Rural Communities Act 2006), and their duty to further the conservation of the section 41 list of features of principal importance for conserving biodiversity;
- Their duty (in relation to land designated as a site of special scientific interest), "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" (see section 28G of the Wildlife and Countryside Act 1981);
- Their duty to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions; in particular, it may be necessary for an appropriate assessment to be carried out before a consent may be granted for works which are likely to have a significant effect on an area designated as a special area of conservation under the Habitats Directive or as a special protection area under the Wild Birds Directive (see The Conservation of Habitats and Species Regulations 2010 (SI 2010/490));
- Their duty (in relation to a National Park) to have regard to the purposes for which National Parks are established, and if it appears

that there is a conflict between those purposes (of the national park), the requirement to 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 (see section 11A of the National Parks and Access to the Countryside Act 1949); and

- Their 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 (see section 85 of the Countryside and Rights of Way Act 2000).

5 Enforcement against unlawful works

5.1 Any person (including an incorporated body or local authority) may seek enforcement action against unlawful works by application to the county court under section 41 of the 2006 Act. The Welsh Government has published guidance on taking such action. Unlawful works means works which require consent under section 38, but which have not received such consent.

5.2 Responsibility for the enforcement of the requirement for consent set out in Part 3 of the 2006 Act lies with the local community. Enforcement action may be taken by any local authority (including a community council and a National Park authority), as well as by members of the public and persons representing civic, amenity and recreational bodies. The Welsh Ministers will take enforcement action in the case of any breach in exceptional circumstances only as, in their view, it is more appropriate for action to be taken by those persons whose rights have been affected.