Summary

The Commons Act 2006 (Section 9) prohibits the permanent severance of rights of common, but allows for exceptions in certain specific circumstances. This Guidance deals only with one of these circumstances: Temporary Severance by Letting or Leasing.

The definition of temporary severance, examples of where it may be beneficial, and procedures related to the practice are identified in this document.
1. **Introduction**

1.1 This Guidance Note is issued by the Welsh Government to explain the purpose and intended operation of Section 9 of the Commons Act 2006 ("the Act"), and the exceptions contained in Schedule 1 of the Act.

1.2 Section 9 of the Commons Act 2006 ("the Act") effects a prohibition on the severance of rights of common. However, this prohibition is subject to the exceptions specified in Schedule 1, and is retrospective in its effect from 28 June 2005. This note seeks to explain how the exception outlined in Schedule 1, paragraph 2 of the Act will operate in practice.

1.3 These notes refer to the position in Wales. Advice should be sought from the Department of Environment, Food and Rural Affairs (Defra) with regard to the exercise of powers under the Act in England.
2. **Temporary Severance**

*Definition – What is the temporary severance of rights?*

2.1 Most rights of common are attached to particular buildings or land (known as the “dominant tenement”), and intended for use by the person who occupies that building or land. The dominant tenement has allocated to it the rights to put a specified number of grazing animals upon a particular common, a system of farming that dates back to medieval times.

2.2 Whoever occupies the dominant tenement at any time (whether as the owner or as a tenant) is allowed to use the rights of common belonging to the dominant tenement. Therefore, when a farm which has attached rights is sold, the new owner of the farm receives the right to use the right of common.

2.3 Severance of rights of common only occurs when the person using the rights is different to the person occupying the dominant tenement to which they are attached.

2.4 In the past (prior to 28 June 2005) it was possible for those owning dominant tenements to sell their rights of common to other people. This was called “permanent severance” as the rights were permanently severed from the land to which they were traditionally attached. The new owner was free to use them, rent them out or sell them on to other people as they wished, regardless of whether that person owned any land related to the common. This change in status of the rights was known as holding “rights in gross”.

2.5 The practice of permanent severance is now prohibited under the Act except by order of the Welsh Ministers in very specific and strictly limited circumstances. There are still people who hold rights in gross, and they are still allowed to sell, rent or give these rights to others. It is not allowed for a person who owns a dominant tenement to sell off or give away their rights of common permanently, unless they are also selling or giving away the land that the rights are attached to.

2.6 “Temporary severance”, however, is allowed. “Temporary severance” permits an owner, or occupier, of a dominant tenement to either lease or licence all, or part, of their land but keep the rights of common for themselves. It is also permissible to lease or licence all, or some, of their rights of common whilst continuing to occupy the dominant tenement for a fixed period of time. This can enable a person to supplement their own rights or to gain the use of the rights where they had none of their own. The temporary severance of rights can occur regardless of whether money is involved.

2.7 A number of scenarios are included at Annex A. It should be noted that the examples given are by no means an exhaustive list. The scenarios
are only intended to provide basic illustrative information to those considering entering into a temporary severance agreement. Further information is available from your local Commons Registration Officer.

**Current legislation**

2.8 Although Section 9 of the Act prohibits the severance of rights, Paragraph 2 of Schedule 1 permits temporary severance by means of an Order made by the Welsh Ministers, or, where a Commons Council has been established in relation to a common, any rules which may have been made by that commons council.

2.9 In Wales, under the provisions of paragraph 2, The Commons (Severance of Rights) (Wales) Order 2007 permitted the temporary severance of rights of common to graze animals, from land to which the right is attached, by leasing or licensing the right, for a maximum period of 3 years (renewable). The Order, which had effect from 28 June 2005, came into force on 1 March 2007.

2.10 The Order was intended to be a temporary measure to address the need to account for agreements that were already in place when the Commons Act 2006 prohibitions on severance came into force. Not making the Order would have meant that farmers relying on leasing arrangements would not legitimately be allowed to graze their animals on the relevant commons. At the time the Order was made, it was intended that further legislation would be considered, identifying any need for more specific exceptions.

2.11 The Order has now been reviewed and this guidance sets out the arrangements for temporary severance as identified in the replacement Commons (Severance of Rights) (Wales) Order 2014.

**Other kinds of severance**

2.12 "**Severance by transfer to public bodies**" is considered a limited exception to the prohibition of permanent severance allowed in paragraph 1 of Schedule 1 by order of Welsh Ministers and therefore permissible under the Act. This is not covered in detail by this Guidance Note. This relates to rights acquired by a Commons Council (when established under Part 2) and Natural Resources Wales. This enables the continued acquisition of rights of common in furtherance of nature conservation.
3. Changes to the arrangements for Temporary Severance under the new Order

3.1 The Commons (Severance of Rights) (Wales) Order 2007 allowed the following:

A right of common to graze animals to which section 9(1) of the Commons Act 2006 applies may be temporarily severed from the land to which it is attached by leasing or licensing:

(a) the right of common on its own, provided that the period of the lease or license does not exceed three years; or
(b) the land, or part of the land, to which the right of common is attached, without the right of common.

3.2 These two types of leasing or licensing remain unchanged, except that the 3 year limit in clause 2 (a) is now changed to a period not exceeding 5 years (renewable). This is to bring this leasing/licensing period into line with the 5 year contract period required under Glastir.

3.3 When a temporary severance agreement is already in place, and the holder wishes to enter an agri-environment scheme agreement, it would be advisable to renew the temporary severance agreement at the same time as they enter the agri-environment scheme so that they will both run concurrently.

3.4 Some additional clauses have also been added in the new Order. It is now a requirement that notification of any new leasing or licensing arrangements is given to certain bodies with an interest in the common land. This seeks to ensure effective management of the land and official records. In future, as a minimum, the following people/organisations must be notified of any new leasing/licensing agreements within 28 days:

- The Commons Registration Authority in whose area the land is situated;
- The landowner of the common over which the rights are exercisable;
- The secretary of any relevant commoners association, graziers association, Commons Councils (when established) or any other local body responsible for the management of the common land to which the leased rights of common apply.
- Natural Resources Wales, if the common to which the rights apply includes a site of special scientific interest (SSSI) under the Wildlife and Countryside Act 1981
3.5 We recommend notification of temporary severance agreements using notification form CA.2006 No.1 (TS) (attached at Annex B). Where the form is used, it must be signed by both the lessee and the lessor of the rights. Copies of this form are available from your local Commons Registration Authority (local authority) or may be downloaded from the Welsh Government website. Please ensure that completed copies are forwarded to your local authority, the landowner of the common, commoners association, graziers association, Commons Council (when established), Natural Resources Wales for those commons with a SSSI (or its successor) as appropriate. You should also keep a copy of the form for your own records.

3.6 For best practice, Commons Registrations Authorities should keep the details of the current user of rights of common up to date, once relevant sections of part 1 of the Act have come into force.

3.7 The onus is on the person leasing, or licensing, out the rights or land to notify their Commons Registration Authority. Those exercising their new rights under a temporary severance agreement are advised to have discussions with the dominant tenement owner to ensure that a notification form has been completed and submitted.

3.8 As it is a requirement of every temporary severance agreement to include a notification clause, all temporary severance agreements will need to be notified to the Commons Registration Authority, regardless of whether the agreement is formed in writing or verbally, whether money is involved, and irrespective of the length of the agreement.

3.9 Where rights of common are claimed and exercised in breach of the requirements of the Act this could result in consequences for the person exercising the right or affect future entitlements and attract penalties, for example:

- The person will not be able to use unlawfully acquired rights for the purposes of claiming entitlements under the Single Payment Scheme.
- The person will not be able to use unlawfully acquired rights for the purposes of participation in any agri-environment (e.g. Glastir) or other management agreement.
- The person will have no legal interest in the common for the purposes of objecting to any interference in the common, or benefiting from any compensation offered in consequence of such interference.
- The person will not benefit from the immunity from the duty to take care conferred by section 7 of the Animals Act 1971 in respect of animals straying from unfenced land to a highway.

3.10 To validate a claim for entitlements under the Single Payment Scheme (SPS) you will need to evidence the rights available in any claim on
common land. If you are using Rights of Common by virtue of a Temporary Severance Agreement, to validate a claim for SPS entitlements you will need to provide evidence of notification of the temporary severance agreement.