return to JW asap

Open Spaces Society

BUILDINGS, FENCES OR OTHER WORKS ON COMMON LAND

Information Sheet C1

A practical guide for
those wishing to carry out
a lawful operation on a common
and
those wanting to defend a common against
unlawful or undesirable operations

2006 edition

Open Spaces Society
25a Bell Street, Henley-on-Thames, Oxon RG9 2BA
Tel: 01491 573535 Email: hq@oss.org.uk Website: www.oss.org.uk

10/06

BUILDINGS, FENCES OR OTHER WORKS ON COMMON LAND

CONTENTS

1 Introduction

1.1 This guide should be of interest to four main classes of reader:

A. those who enjoy the open character of a common and believe it should be kept clear of encroachments except where an essential need cannot be met otherwise;

B. owners and managers of a common who consider enclosure or other works would enhance the management or public enjoyment of the common;

C. adjoining owners, prospective developers, utilities and planners who consider that a common provides an opportunity to improve or develop other land or services, possibly to provide a wider public benefit;

D. those in the legal and property professions who would like pointers to some of the problems that can arise.

1.2 There are no commons in Scotland or Northern Ireland and, therefore, this topic concerns England and Wales only. Here, all commons are subject to special protection and restrictions which are in addition to those affecting all land under the Town and Country Planning Acts and other general legislation. Those Acts cannot be ignored and the most relevant are considered in Chapter 8.

1.3 The guide is not and cannot be an authoritative statement of the existing law. Those who need that must refer to legislation and cases, and the books mentioned at the end of the guide. It must also be remembered that the law is always changing: a decision of the High Court or a new Act of Parliament may make some aspect of the paper incorrect.

1.4 Readers in classes B and C must be strongly recommended to obtain expert professional advice and representation. It is not a subject suited to amateur do-it-yourself and not every local solicitor or surveyor may be aware of all the difficulties that could arise but rarely come to his or her attention. However, all those concerned should be mindful of what might be involved so that they can discuss proposals with their professional consultants and consider what actions are the most desirable at any point in the proceedings.

1.5 While much of this guide may appear to be concerned with operations initiated by people not connected with the common, it is important for owners and commoners to realise that it also concerns their own proposals. Objections of others may have to be taken into account.

1.6 If the owners of a common are approached by anyone wishing to do something likely to affect the common, it might be obvious that the request should be rejected or opposed outright, putting an end to the matter. Unless an applicant has compulsory powers (discussed fully in Chapter 9) it has no

practical means of gaining its ends without a contractual agreement with the owners and every commoner (if any). However, if the applicant is persistent and, ignoring all rebuffs, takes other steps with a view to overcoming the opposition, this guide will help to make the opposition as effective as possible.

1.7 While a proposal as first submitted might be unacceptable, the owners of the common may be prepared to consider variations or alternatives without prejudice to the eventual decision. It would then be safest to instruct solicitors to write appropriately to the applicant, seeking information about the financial standing and repute of the applicant and requiring that all exploratory or other preliminary work be done at the applicant's own risk and expense. The owners and commoners should ensure that they are fully indemnified against all fees and legal costs that may be incurable in order to obtain professional (including technical) advice, conduct negotiations, obtain all necessary legal permissions and consents and, if the application is finally approved, prepare and complete all necessary contracts and other transactions.

1.8 Owners and others interested in a common should also be alert for public consultation exercises in connection with—

a. the planning authority's preparation or revision of the development plan or planning framework for the whole or part of their area, and

b. transport, airport, regeneration or other major development proposals.

In these cases, there may be no direct approach to the owners and they should not ignore local press or other publicity and advertisements indicating proposals that may affect their land or neighbourhood in the future.

1.9 A public consultation, particularly under paragraph 1.8a above, will probably set a time limit for reply. Those who do not comment as soon as a harmful proposal comes to their attention may find themselves prejudiced at later stages.

1.10 Consultation under paragraph 1.8b is likely to be more informal and, while there may be time limits for observations, the result of not replying will not cause any rights to be lost. However, those carrying out the consultation will most likely draw attention to the absence of previous comment and allege that this is in their favour.

1.11 It is strongly advised, in both these cases, that observations be submitted as it will ensure that you are recorded as having an interest in the matter and, at later stages, should receive directly more information and be invited to submit further comments.

1.12 Make sure you or the applicant has considered the recommendation in A Common Purpose a guide to agreeing management on common land, compiled by OSS, English Nature, Countryside Agency, National Trust and Rural Development Service.

2 Interpretation

2.1 Glossary

AONB is a designated area of outstanding natural beauty.

Defra means the Department for Environment, Food and Rural Affairs.

GPDO means the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 no 418).

NAW is the National Assembly for Wales which has powers to give consent for works on common land.

operations or *installations* include any building, fencing or other works.

owner of a common includes, where the context permits, a management committee or agent.

s194 means section 194 of the Law of Property Act 1925.

secretary of state refers to the decision-makers on applications for consent under s194 or similar legislative requirements, ie the Secretary of State for Environment, Food and Rural Affairs in England, and the Minister for Environment, Planning and the Countryside for the Welsh Assembly Government in Wales. The latter is also the relevant minister for planning appeals and call-ins, but in England the relevant minister is the Deputy Prime Minister as First Secretary of State. *secretary of state* is also used to refer to one of the predecessor ministers, the first of which under s194 was the Minister of Agriculture and Fisheries.

SSSI is a designated site of special scientific interest.

TCPA means the Town and Country Planning Act 1990.

WAG is the Welsh Assembly Government, which is responsible for policy and advice.

2.2 All references to Acts and orders are, unless otherwise stated, as amended and in force at 31 December 2004.

3 Commons restrictions generally

3.1 Most commons are subject to special restrictions or conditions governing buildings, fencing or other works. These are in addition to those under the Town and Country Planning or other Acts which apply to all land. Certain commons are governed by Acts which relax some of these restrictions either completely or after obtaining the consent of the secretary of state.

3.2 Some older local Acts (sometimes now re-enacted in local consolidation Acts) allow works, especially roads or

limited fencing, on particular commons without the need for specific consent. These commons are usually, but not always, in towns where the commoners' rights have all been extinguished.

3.3 Other Acts (or regulations under them) contain their own procedures for obtaining ministerial consent to particular works on the commons governed by that legislation. Examples are:

a. schemes of regulations under the Commons Act 1899;

b. articles 12 and 17 of the schedule to the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967, which relate to recreational and similar facilities, and new roads or paths, on commons owned or managed by London Borough councils other than the City of London Corporation;

c. section 23(2) of the National Trust Act 1971, which relates to all National Trust commons except for certain works which are permitted under section 29 of the National Trust Act 1907.

3.4 Sometimes an older Act forbids, absolutely, any new works on a common and that restriction still applies unless a later Act overrides it. The 1967 Act (para 3.3 (b) above) permits (subject to Defra consent) building, fencing or other works for particular purposes which were forbidden in Acts governing some individual commons. Other London and local legislation permits some road improvements not otherwise allowable.

3.5 In all other cases, building, fencing or other works on commons are governed by s194 of the Law of Property Act 1925. This requires the consent of the secretary of state to be obtained unless the section otherwise provides. Chapters 4 – 6 deal more particularly with this section.

3.6 It is, therefore, important to know what legislation, powers or restrictions might specifically affect a common in which you are interested.

3.7 **Rights of adjoining owners**

3.7.1 The owner or occupier of property adjoining a common may need access to the common in order to repair or maintain the premises. It might be necessary to erect scaffolding or, for safety reasons, erect temporary fencing around a strip of common. Even if the adjoining owner has no other right for the purpose, this is permitted under the Access to Neighbouring Land Act 1992, by court order if the owners of the common decline to allow the access subject to reasonable conditions.

3.7.2 An adjoining owner also has a right to rebuild or place a new wall along the boundary with foundations that extend under the common, subject to a notice and procedure under the Party Wall etc Act 1996. The

building owner will have to pay for a surveyor to protect the interests of the owners of the common.

3.7.3 While adjoining property may have a right of way over and to maintain an existing track on the common, its owner has no right to alter or widen it, or improve the surface, without the consent of the owners of the common and in accordance with the procedure described in this guide unless a specific right can be proved.

4 When s194(1) applies

4.1 Subject to paragraph 4.4 below, subsection (3) of s194 applies subsection (1) to any *land* which, at the commencement of the Act (1 January 1926) was subject to rights of common, except:

a. where the rights were extinguished by any statutory provision, eg a local Act or an order under the Defence Acts; or

b. where the rights were extinguished by a local authority with the approval of the secretary of state.

4.2 The effect of subsection (3) is to make subsection (1) applicable to a town or village green if it was subject to rights of common on 1 January 1926.

4.3 The mere disuse of rights of common, since that date, and the possibility that neither the common nor rights of common were registered under the Commons Registration Act 1965 does not remove the applicability of subsection (1). However, it might sometimes be difficult to prove the previous existence of a common or rights of common which were not registered.

4.4 Subsection (4) of s194 exempts from subsection (1) *building, fencing or other works* which are:

a. specially authorised by or in pursuance of an Act of Parliament or an order having the force of an Act (see paragraphs 3.2 – 3.4 above and 9.2 – 9.8 below);

b. lawfully erected or constructed in connection with the taking or working of minerals in or under the common (see section 9.9 below);

c. electronic communications apparatus installed for the purpose of an electronic communications code network (see section 9.10 below).

5 Operations governed by s194(1)

5.1 Subject to the exceptions described in chapter 4, subsection (1) of s194 applies to:

> *The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded...*

It applies whether the operations are permanent or temporary.

5.2 Examples of 'other works' are new roadways, car parks, the

concreting or tar paving of existing rough tracks, the construction of ditches, embankments or the installation of other anti-parking devices.

5.3 Also included are utility works (eg electricity, gas, water, sewerage or drainage). Those laid underground, without the need for surface apparatus, should not prevent or impede access for more than a short period and, if the land is properly restored expeditiously, it may be unnecessary to insist on action under s194.

5.4 Nevertheless, the owner of an affected common will wish to ensure that he has given permission subject, if appropriate, to proper conditions and financial arrangements.

5.5 Pylons, poles, wind turbines, transformers and other non-communications apparatus above ground also require consent under s194(1) unless erected under compulsory powers (see also section 8.4 below).

6 Applying for consent under s194(1) and similar legislation

6.1 If a proposal is also subject to planning permission, this should be applied for before applying for consent under s194(1) or similar legislation. However, if the planning application is called in, or an appeal is lodged against a refusal, paragraphs 8.5.4 – 8.5.6 below should be considered as it may be desirable to submit the consent application before the planning application or appeal is considered by Defra, NAW, or an inspector at a public inquiry.

6.2 The prospective applicant for consent under s194(1) or similar legislation can obtain or download forms and guidance notes from:

a. in England—

Common Land Branch, Defra
The Square, Temple Quay,
Bristol, BS1 6EB, tel 0117 372 8883
www.defra.gov.uk/wildlife-countryside/issues/common/legislation/existing/sos-consents.htm

b. in Wales—

Planning Division 1(A), WAG,
Crown Buildings, Cathays Park,
Cardiff CF10 3NQ, tel 02920 823883
www.wales.gov.uk
(the form is not yet on the website).

6.3 It is not necessary to go into all the details of applications here but the following paragraphs deal with the policy aspects and are largely based on those briefing notes.

6.4 Under s194(1), the secretary of state

> *...in giving or withholding his consent...shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act 1876, to be taken into consideration*

and held by the [Secretary of State] before forming an opinion whether an application under the Inclosure Acts 1845 to 1882, shall be acceded to or not.

6.5 This means that he or she *must* be satisfied that it is expedient to give consent having regard to the benefit of the neighbourhood as well as to private interests in the common, and must also take into account any other relevant factors, including any objections which are lodged.

6.6 The 'benefit of the neighbourhood' is defined in the preamble to the Commons Act 1876 as:

> *...the health, comfort and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed, or any part thereof, may be situate...*

And it is considered in the context of the common as a recreational open space.

6.7 The secretary of state has been advised that she should not consider whether any application for consent will be for the future benefit of the neighbourhood, but whether the applicant has had regard to the need for protecting the existing benefit of the neighbourhood arising from the common in its present state. In assessing the expedience of giving consent, account will be taken of any possible additional benefit that may result, but it would not be given priority as a consideration.

6.8 The 1876 Act clearly contemplates that any inclosure will involve some encroachment on the common and some interference with private interests. Therefore the Acts do not require that the proposed inclosure or work must be for the benefit of the neighbourhood and the private interests. They merely have to be taken into consideration in making a decision.

6.9 While the legal advice follows from the wording of s194(1), the same policy is followed in relation to applications under the comparable legislation referred to in paragraph 3.3 above.

6.10 An application will only be considered to the extent that the proposals have been brought to the notice of the public. Therefore, it should include all buildings, fences or works (including gates and stiles) ancillary to a main proposal, and all should be clearly specified and shown on a map or plan of the common, normally at a scale not smaller than 1:2500, also indicating the boundaries of the common as registered (or exempt from registration) and the Ordnance Survey national grid references.

6.11 Copies of a notice of the application should be advertised by publishing it in three successive issues of two of the principal local newspapers (in Wales the requirement is for one

advertisement in two separate newspapers), and by displaying it in the vicinity of the site mentioned in the notice. Copies should also be served on the councils of the districts, boroughs, parishes and communities within which the common is wholly or partly situated.

6.12 The notice should be sufficiently detailed to enable anyone reading it to know whether he or she may wish to object to the application. It should indicate where a map or plan of the proposal can be inspected, and this should be readily accessible to persons living within reach of the common.

6.13 The closing date for objections to Defra or NAW should be not less than 21 days from the date of the first newspaper advertisement. Objections may be made by fax or email.

6.14 The applicant must send to Defra or NAW the application form and all supporting documents as soon as the last advertisement has been published.

6.15 The applicant must also send a copy of the application to the Open Spaces Society at the same time. In Wales the applicant must also notify the Countryside Council for Wales and, if appropriate, the national park authority, at this time.

6.16 The information given should be as full as possible, particularly with regard to the commons registration particulars (or the reason for it not being registered, if known), the proposed operations, the affected and intended benefits to the neighbourhood and private interest, and why it is necessary to use common land where this is not self-evident.

6.17 Consent can only be given or refused for the application as submitted. It is not possible to impose additional considerations or make amendments that might otherwise be thought desirable as the result of the objections received or any public inquiry held. Therefore the application should also include any limitations or time and other conditions which the applicant is proposing or accepting, and these should include any imposed under any planning permission. (However, it is possible for consent to be granted for only part of an application, for example the NAW has given consent for an accessway but not for fencing which was also part of the application.)

6.18 When applications are received by Defra or NAW they will be circulated to consultees which will include, as appropriate, English Nature, the Countryside Council for Wales, the national park authority or AONB conservation board.

6.19 The Open Spaces Society will consider the proposal in accordance with its policy set out in appendix 1 to this guide.

6.20 Comments and objections received will be circulated among those who submit them

and anyone else who requests them. Defra or NAW will consider as much as it can by exchange of correspondence with all concerned and, in some circumstances, a public inquiry may be required.

6.21 Defra and NAW have recently clarified the circumstances in which they will hold a public inquiry.

6.22 Defra states in note 14 of its revised application form that 'applications which generate a significant number of objections, or where the issues are complex, may need to be dealt with by way of a public local inquiry held by an independent inspector'.

6.23 NAW rarely holds an inquiry into a section 194 application. When one is held, it is usually because there are objections to applications being dealt with by other divisions of the assembly relating to the same development. The legislation governing those other applications may mean that a hearing or inquiry has to be held, or it may have been decided that a hearing or inquiry should be held even if there is no requirement to do so. In these circumstances, it is appropriate for the inspector to consider the s194 application (or other common land applications) at the same time. When the s194 application is the only application being considered, an inquiry may be held where there are particular issues which need to be explored by testing the evidence orally. The fact that a large number of objections has been received does not necessarily mean there will be a hearing or inquiry. It will depend more on whether the issues raised within a large number of objections needed to be tested orally. (Email from Mr Ray Baldacchino, Planning Division 1(A), WAG, 11 April 2005.)

6.24 The Open Spaces Society took the Secretary of State for Environment, Food and Rural Affairs to the High Court for her failure to hold a public inquiry into the fencing of Wisley Common in Surrey (*R (Ashbrook)* v *Secretary of State for the Environment, Food & Rural Affairs* [2004] EWHC 2387, 29 October 2004). The Hon Mr Justice Collins in the High Court ruled that it was not necessary to hold a public inquiry into every application for fencing of common land (see *Open Space* spring 2005 page 2).

6.25 As stated above, the decision will be either a consent or refusal of the application as submitted, subject to the limitations or conditions offered at the same time. If the applicant subsequently wishes or is prepared to vary these, it will be necessary to withdraw the original application and submit a fresh one. A successful applicant under this procedure is not absolved from any other necessary legal requirements affecting the proposal.

6.26 In view of these complications, potential applicants are advised

to consult informally with all those likely to be concerned, including the Open Spaces Society, so that the formal application to be submitted contains the proposal, limitations and conditions that are likely to be the most acceptable to everyone. Refer to paragraph 1.12 above.

7 Remedies for unauthorised operations

7.1 Under s29 of the Commons Act 1876, together with s12 of the Inclosure Act 1857, a person who:

a. encroaches on, or encloses a town or village green or a recreation ground allotted by an inclosure award, or

b. erects anything on, disturbs or interferes with, that green or ground otherwise than for its better enjoyment for its proper purpose

may, on the information of any inhabitant of the parish in which the green or ground is situated, be summarily convicted by the magistrates' court and fined at level 1 on the standard scale. Moreover, these illegal actions are also deemed to be a public nuisance which is a common law offence restrainable by an action of the Attorney-General.

7.2 Under s30 of the Commons Act 1876, an illegal inclosure of, or encroachment on, any part of a common not covered by the last paragraph, may be made the subject of a removal order by the county court. This power is not subject to the limitation of s194 which only applies to commons where rights of common were exercised on 1 January 1926, but it is not clear whether anyone without a legal interest in the common (as owner or commoner) can initiate the necessary action.

7.3 Where consent has not been properly obtained under subsection (1) of s194, subsection (2) provides that:

a. the county, borough or district council of the area concerned, or

b. any person in England (where works were erected **since 28 June 2005)**

may apply to the county court for an order for the removal of the work and restoration of the land to its original condition.

7.4 That is the only direct remedy available for a breach of subsection (1) and it is also available when the extent of operations exceeds that which has been given consent. The only other possible remedy is for the planning authority to seek enforcement for any breach of development control requirements.

7.5 The s194(2) remedy is also available against someone who has carried out operations forbidden by another Act to which a common may be subject because, therefore, the operation is not exempt under s194(4).

7.6 When a common is owned by a local authority which is itself the perpetrator of the unauthorised

operations (sometimes also in breach of its duty as planning authority), and no one is prepared to use the subsection (2) remedy. A person who can establish a legal interest in the common may then give serious consideration to seeking judicial review in the High Court, but it must be applied for within three months of the cause which gives rise to it. This is not to be undertaken lightly as it can be expensive, especially if the case is lost or you win initially and it is lost on appeal.

7.7 If the owners of a common are conservators or the National Trust and no commoner is concerned about a breach of the Acts governing that common, action could be taken to initiate the subsection (2) remedy.

7.8 When a local authority is at fault, apart from the possibility of judicial review mentioned above, a complaint to the Local Government Ombudsman is another method of expressing public displeasure but even then, the complainant has to show he or she has been personally disadvantaged.

7.9 Where a common or green has been registered without the ownership being known, or decided under s8 of the Commons Registration Act 1965, s45 of the Commons Act 2006 enables a local authority (including a parish or community council) in whose area the land (or part of it) is situated, to take all necessary steps to protect it, as if it were the owner in possession, and to institute proceedings for any offence.

7.10 A defendant under s194(2), or under s30 of the Commons Act 1876, aggrieved by an injunction or order of the county court, or a complainant aggrieved by a refusal to grant such an injunction or order, may (on giving security for costs) appeal to the Court of Appeal. To find out more about what you can do, see our information sheet C2 *How To Take Action Against Unlawful Encroachments and Works On Commons*.

8 The relationship of consent requirements with planning controls

8.1 Apart from the specific consents that may be required under s194 or other commons legislation, operations may be subject to planning legislation. This chapter considers when this may or may not apply.

8.2 Agriculture and forestry

8.2.1 The use of land for agriculture or forestry is completely exempt from planning control because it does not constitute development under TCPA s55(2)(e). 'Agriculture', as defined in TCPA s336(1), includes the keeping of livestock for the usual farming purposes but not horses for riding or hunting. The stationing of a caravan for the purpose of providing a weather-proof place for storage of and mixing food for cattle has been held to be ancillary to the agriculture use and not a material change of use requiring

planning permission. Unless some hardstanding has been provided without the necessary consent, it might be difficult to deal with such a caravan under s194 and, if it is not mechanically propelled, there is no offence under s34 of the Road Traffic Act 1988.

8.2.2 A common cannot be within the meaning of an agriculture unit (eg a farm). Therefore deemed permission under the GPDO for other agricultural purposes is not relevant to this guide.

8.2.3 While the afforestation of common land is unlikely to be practicable if there are commoners who refuse to surrender their rights, it is a possibility. The formation of private ways for that purpose is permitted development under part 7 of schedule 2 to the GPDO, but these and any protective fencing would be works requiring consent under s194.

8.3 Miscellaneous GPDO permitted development

8.3.1 The following works possible on commons, are 'permitted development' under the following parts of schedule 2 to the GPDO but nevertheless require consent under s194(1):

a. Part 2—Minor operations—including:

   the erection or alteration of a gate, fence, wall or other enclosure more than one metre high adjoining a vehicular highway or two metres high elsewhere, and not part of an enclosure surrounding a listed building.

b. Part 4—Temporary buildings and uses:

   Buildings, moveable structures, works, plant or machinery required during permitted operations (other than mining) on or adjoining that land.

c. Parts 12 and 13—Development by local or highway authorities:

   Small buildings or works for the purpose of the authorities functions on the land, lamp standards, kiosks, shelters, seats and other minor items, or for or incidental to the maintenance or improvement of adjoining highways.

d. Parts 14—16—Works by certain bodies relating to watercourses, land drainage and sewerage.

e. Part 17—Works by statutory undertakers. Many of these, such as public-gas transporters (ie pipelines), will, when completed, be wholly underground except for indicators and warning. But works under part 17G, relating to electricity undertakers, will often be above ground and this is considered more fully in section 8.4 below. Part 17G does not include communi-cations networks which, in any case, are exempt from s194 and are considered in section 9.10 below.

8.4 Electricity installations

8.4.1 Under GPDO part 17G, those electricity undertakers which have appropriate licences from the Secretary of State for Trade and Industry (DTI) under the Electricity Act 1989 for compulsory acquisition, have been permitted development rights to install on, over or under any land electric lines and related transforming or switching stations or chambers and apparatus, and the necessary supporting poles or towers. But the consent of DTI is required under s37 of the 1989 Act, for an overhead line unless exempt under that section or the Overhead Lines (Exemption) Regulations 1990 (SI 1990 no 2035). These provide special protection within a national park, AONB, regional park, SSSI or conservation area.

8.4.2 Under the 1989 Act, schedule 9, those entitled to generate or supply electricity must, in any case, have regard to the desirability of preserving natural beauty, conserving flora, fauna, natural features, historic buildings and objects of archaeological interest and do what is reasonably possible to mitigate the effect of proposals on them.

8.4.3 If proposals for electricity lines and apparatus affecting commons are made, you are advised to discuss them with the local planning authority and to draw attention to the need to obtain consent under s194 or comparable requirements.

8.5 Dealing with operations requiring planning permission

8.5.1 All building, fencing and works not exempt from planning control or deemed to be permitted development require planning permission and it is preferable that this is obtained before application is made for consent under s194 or similar requirements. The necessary publicity for this will give possible objectors their first opportunity to make their views known.

8.5.2 An adjoining owner or a prospective developer wishing to use part of a common for his own purposes may offer to enter into an agreement with the owners of the common and the planning authority (under TCPA s106 or its prospective replacement under the Planning and Compulsory Purchase Act 2004, s46) either to provide other land in exchange, or a sum of money sufficient to acquire and lay out replacement land. Even if the offer appears to be attractive, it should be treated with extreme caution as it can give rise to legal and practical problems which would be best avoided.

8.5.3 Those concerned with the protection of a common must be alert to take appropriate action on any planning application affecting it even though they may anticipate the need for a separate consent under s194(1) or similar legislation. The absence of objection to a planning application which ought to have been known about may be used in argument against

later objections to a consent application.

8.5.4 Even if a proposal is considered totally objectionable by the owners or users of a common, planning permission might still be given for valid reasons, and objections should be phrased with that in mind. Without prejudice to a contention that the application should be refused, there can be an advantage in suggesting alterations or conditions which will make it less damaging. Always emphasise the published current local, regional and national planning policies and those in draft form with which the application does not conform. Attention should also be drawn to the fact that s194 or other consent of a secretary of state will also be necessary if planning permission is given, and this might add to any argument that the application should be called in by the secretary of state for planning if the council is minded to approve it.

8.5.5 If the application is refused and appealed against, or if it is called in, and if there have been objections, there will almost certainly have to be a public inquiry before an inspector acting on behalf of the secretary of state.

8.5.6 There is no advantage for any party to have a separate inquiry for both the planning and s194 or similar procedures. These would be largely based on the same evidence, although the conclusions might be different because of the weight given to relevant factors. If it appears that an inquiry is being fixed in relation to one of the procedures without reference to the other, which is known also to be pending, the departments concerned should be approached to combine the proceedings under a single inspector. If that is impossible and the planning inquiry is held first, all the arguments should be submitted there in the hope of a refusal on purely planning grounds. But, if it is not refused, the arguments will have to be repeated for the s194 application. Separate decisions for each procedure will be necessary even if the inquiries are held concurrently.

9 Operations not subject to s194 and similar legislation

9.1 As described in chapter 4 above, some commons are subject to special legislation which contain their own powers or requirements for allowing buildings, fences or other works. These are, therefore, excepted from s194 by subsection (4). However, they will also be at risk from the compulsory powers dealt with in this chapter.

9.2 Paragraph 4.4 above sets out the operations excepted from the need for consent under s194 by subsection (4).

9.3 Acts of Parliament have given many bodies compulsory powers to acquire land, or rights over or under land, for purposes considered to be in the public interest. These include:

a. government departments for major roads, defence requirements, prisons etc,

b. local authorities for most of their services and to facilitate regeneration,

b. English Partnerships, Welsh and London Development Agencies, regional development agencies, new town and urban development corporations, and housing action trusts, especially for major regeneration schemes,

c. transport and waterway undertakings and Environment Agency for railways, light rail transit, navigation, flood prevention and drainage (many of these will be the subject of orders under the Transport and Works Act 1992),

d. utility (electricity, gas, water and sewerage) and oil companies and their requirements for generation, storage, transmission or distribution,

e. communications organisations and companies with radio and cable networks.

9.4 The works which may be carried out by adjoining landowners under the powers described in paragraphs 3.7.1 and 3.7.2 above are also exempted from control under s194 by subsection (4) because the Acts governing them do not make any special provision for the benefit of common land. However, their effect should not be more than temporary.

9.5 The remainder of this chapter indicates the main powers available to the bodies described in paragraph 9.3 above when the facilities they need can only be satisfied by acquiring or appropriating common land or rights over it. It is not possible here to describe the detailed procedures but the following are the most relevant principles.

9.6 **Compulsory Purchase and Transport and Works Act Orders**

9.6.1 These are orders for which a promoter of the development must seek the confirmation of a secretary of state who, or the National Assembly for Wales which, might indeed also be the promoter.

9.6.2 Often before the formal procedure on a major scheme begins, there will be public consultations including exhibitions of the proposals. These are of varying effectiveness but, however poor it may subsequently be considered by objectors, the promoter will say that consultation has been carried out and claim the reaction has been favourable.

9.6.3 If, therefore, a proposal affecting a common comes to your attention, it is important to bring it to the notice of as many others as possible, and use the local press and other media to express objections prominently. If there is no equivalent local body already, the formation of a friends of the common will be helpful. While the owners and commoners should receive

direct notices of the commencement of formal proceedings, the general public will have to rely on public advertisement in the press and not always prominent site notices. These should be looked out for.

9.6.4 Sometimes a proposal requiring compulsory powers will first be the subject of a separate planning application and attention is drawn to section 8.5 above. But the planning and compulsory purchase procedures may be carried out concurrently and all the documents connected with the proposal, especially the environmental impact assessment, should be studied carefully in the department or library where they are publicly available for inspection.

9.6.5 Usually, objections must be lodged within not less than 42 days from publication of a notice of a proposed order. This, and later time limits given for submitting drafts or proofs of evidence to a public inquiry, must be rigorously observed because extensions are unlikely to be given.

9.7 Acquisition of Land Act 1981, s19 and s18

9.7.1 Compulsory orders for acquiring the whole or part of a common or other open space (other than for defence purposes or a purely underground right) are subject to s19 of the Acquisition of Land Act 1981. This makes the order subject to special parliamentary procedures unless the secretary of state certifies that—

a. there has been or will be given in exchange other land not less in area and equally advantageous to the commoners and the public, which will then form part of the common;

b. the land is being purchased in order to secure its preservation or improve its management; or

c. it does not exceed 250 square yards or is required for the widening or drainage of an existing highway, and the giving in exchange of other land is unnecessary in the interests of the commoners or the public.

9.7.2 The National Trust has its own protection under s18 of this Act, and can insist on the special parliamentary procedure if it is resisting the compulsory powers. If, however, the trust decides not to object or withdraws its objection, this does not override the requirement to comply with s19. The problem outlined in paragraph 9.7.6 below cannot apply to National Trust land as the trust has no voluntary right to dispose of inalienable land and the purchase must remain under the compulsory powers even though it is not resisted.

9.7.3 Regardless of which minister has the duty to consider and confirm the main order, in England the Secretary of State for Environment, Food and Rural Affairs is the one who has to consider whether to give a certificate under s19 in respect

of a common or town or village green.

9.7.4 If, therefore, an order is applied for which affects a common or green, you should not only consider if that is desirable but should also check whether an exchange of land is being offered and how acceptable that might be.

9.7.5 If the secretary of state is unable to certify accordingly, a further period of objection may be advertised and there might even be a further public inquiry unless this is dealt with adequately in the main inquiry. The order, whether for England or Wales, is then laid before parliament and objectors are given 21 days to lodge a petition which is considered by a joint committee of both Houses. If no petition is lodged, both the purchase and (if any) the exchange order will be confirmed.

9.7.6 This procedure is only effective if those whose interests must be acquired—the owners and (if any) the commoners—sustain their objections to the purchase. If they do not object or have been persuaded to withdraw their objections, and are prepared to dispose of their interests voluntarily for the required purpose, the land can be removed from the compulsory purchase order. Then the s19 safeguard is no longer available even if other members of the public continue to object.

9.8 **Other compulsory powers of local authorities and public bodies**

9.8.1 Local authorities and the bodies referred to in paragraph 9.3c above have certain rights to deal with commons which do not require a formal order or the consent of the secretary of state. The following paragraphs outline these and the limitations governing them.

9.8.2 A local authority (including a parish or community council) cannot appropriate a common or town or village green exceeding 250 square yards in its ownership to any other purpose, except in accordance with s229 of the Town and Country Planning Act 1990, and that attracts the procedure of s19 of the Acquisition of Land Act 1981 as in paragraphs 9.7.3 – 9.7.5 above. If it is less than 250 square yards, the council merely has to advertise its intention for two weeks in a local paper and consider the objections received, and there is no right of appeal if the objections are not accepted.

9.8.3 If a local authority wishes to sell the whole or part of its common or green for development, it can do so subject to advertising and considering objections as in the last paragraph (unless the land is subject to special local legislation or charitable trusts) but it is then necessary to consider the powers of the prospective purchaser.

9.8.4 In accordance with the Acts which govern them, the bodies mentioned in paragraph 9.3c above have the right to use or

develop commons, greens and other open spaces in their ownership for any purpose, provided that planning permission has been given. These bodies are, therefore able to assist local authorities and others (including private developers) in carrying out schemes on commons. Objectors have no powers against them if a valid planning permission has been obtained and the land is sold to them by agreement.

9.8.5 Usually these bodies are able and willing to provide replacement open space exceeding the minimum exchange land required under compulsory powers although it may not be made subject to all the rights of a common. However, do not hesitate to express objections and apply pressure for proper and adequate replacement.

9.9 Mineral workings

9.9.1 Consent under s194 is not required for the lawful taking and working of minerals in or under a common. That is because it has always been an inherent right of a lord of the manor without having to consider the effect on commoners' rights. However, the mineral rights may have been sold in the past so that quarrying and mining can be undertaken independently of the interests of the present surface owner.

9.9.2 Nevertheless, mining and quarrying can only be carried out with planning permission unless the operations are exempt under parts 19-23 of schedule 2 to the GPDO. Some permissions, given many years ago, are still live but subject to newer conditions, especially relating to restoration. If there is any concern about what is being done now or threatened in the future, you should consult the planning department responsible.

9.10 Communications installations

9.10.1 When the Law of Property Act was passed in 1925 it exempted from s194 only the telegraph and telephone lines of the Postmaster-General. These were mainly overhead lines on poles alongside roads and, thankfully, have mostly been replaced underground. The only other installations under this power were overhead telephone-lines to isolated houses and farms. Major schemes such as BBC and ITV aerials required land that had to be purchased under compulsory powers.

9.10.2 The Postmaster-General's monopoly was taken away by the Telecommunications Act 1984 ('the 1984 Act') which was amended by the Communications Act 2003 ('the 2003 Act') in accordance with paragraph 4.4c above.

9.10.3 The 'electronic communications code' is contained in schedule 2 to the 1984 Act as amended by schedule 3 to the 2003 Act, and all licensed operators have to comply with it.

9.10.4 A long definition of 'electronic communications apparatus' is

contained in paragraph 2(2) of schedule 3 to the 2003 Act. It can be summarised as meaning:

> Any apparatus designed or adapted for use in connection with a network and the sending or receiving of communications or other signals transmitted by means of the network. It includes any line, conduit, structure, pole or other thing supporting, carrying or suspending the apparatus.

9.10.5 These installations are totally excepted from s194. If the installation (excluding any antenna) is not more than 15 metres above ground level, it may be permitted by the GPDO schedule 2, part 24, unless it is on 'article 1(5) land'—defined in the GPDO as within a national park, the Broads, an AONB, conservation area or site of special scientific interest—or is on a listed building or structure or ancient monument. There are limitations on the sizes of permitted dish and other antenna and other structures.

9.10.6 Security fencing, for apparatus such as a transmission mast, is not excepted under s194(4) but, as that implies taking land out of the common, the operator would almost certainly have to seek a compulsory purchase order and offer land in exchange.

Further reading/Information

Our Common Land: the law and history of commons and village greens by Paul Clayden (Open Spaces Society, 2003 (fifth edition) £25 to non-members, £14 to members, including postage and packing).

The Law of Commons by G D Gadsden (Sweet & Maxwell, 1988)

Encyclopedia of Planning Law and Practice (Sweet & Maxwell) This multi-volume loose-leaf encyclopedia is available and kept reasonably up-to-date at principal reference libraries.

Halsbury's statutes will also be found in principal reference libraries.

Department for Environment, Food and Rural Affairs http:/www.defra.gov.uk/wildlife countryside/issues/common/ index.htm

Office of Public Sector Information, to obtain a copy of the Commons Act 2006. http:/www.opsi.gov.uk/acts/acts/ 2006/20060026.htm
To obtain a copy of the Commencement Order 2006 www.opsi.gov.uk/si/si2006/200 62504.htm

Appendix 1

Open Spaces Society policy on works on common land

1. The Open Spaces Society is in principle against works (including the effect of their

anticipated future maintenance) on common land and will look closely at proposals affecting—

a. **landscape**: any damage to the existing unenclosed and natural character of the common;

b. **access:** the impact on quiet public access for recreation on foot or horseback and on the exercise of common rights (this becoming even more important as the public gains the right to walk on all commons in England and Wales, under the Countryside and Rights of Way Act 2000, in addition to existing rights to walk and ride on some commons).

c. **disturbance:** by possible additional traffic, noise or other nuisances to interfere with or disturb public enjoyment or the grazing of animals. Developments such as wind farms are completely unacceptable.

2. The society is more likely to *look favourably* on application which:

a. **enhance facilities** for quiet public enjoyment of the common, provided that they are well-sited and designed and cause minimum detraction of the natural landscape;

b. **benefit the public** by improving safety or conserving valuable features of the common such as wildlife or archaeology;

c. **benefit the commoners** by enabling the restoration or conservation of grazing areas without the need for fencing;

d. have resulted from **consultation** with the local community and with amenity, conservation and recreational organisations;

e. are part of a **management plan** for the common which was also the result of a full public consultation;

f. are for a desirable purpose appropriate to the urban or rural neighbourhood and **cannot be met by alternative means**;

g. are for a **limited period** during restoration or for unavoidable temporary operations, to be followed by removal and proper reinstatement;

h. offers land **in exchange** which is not less in area and equally advantageous to the public and commoners than that to be taken for the proposed development, provided this does not diminish the value of the revised area of common to the public and commoners.

3. The society is likely to oppose any fencing unless there is an overriding need under 2b or 2g above which cannot be met by alternative means and there is adequate access through it.

4. Without prejudice to the above, any gates or stiles included in fencing applications must be to British Standard 5709:2006.

Appendix 2

Examples of s194 decisions

Malvern Hills, Herefordshire and Worcestershire

Area 67 hectares

Designation and description
SSS1, moorland

Ownership
Seven Trent Water (part) and Malvern Hills Conservators (part)

Rights
Pasture, estovers, piscary and pannage. Rights of pasture are exercised.

Applicant
Malvern Hills Conservators

Works
Cattle-grids, small amount of fencing and gates in accordance with the Malvern Hills Conservators' Management Plan, to assist grazing and access.

OSS position
No objection, as other options had been thoroughly investigated and access would not be impeded.

Determination
No public inquiry. Consent granted.

Decision letter
CL1 78, 7 September 2004 (Defra)

Caldbeck and Uldale Commons, Cumbria

Area
Caldbeck 3726 hectares, Uldale 1381 hectares

Designation and description
In the Lake District National Park, much of the land is SSS1, moorland.

Ownership
Largely owned by the national park authority. Part of Caldbeck Common owned by the Dalemain Estate.

Rights
Various rights but grazing is the main right exercised.

Applicant
Lake District National Park Authority.

Works
Fence approx 8km between Caldbeck and Uldale Commons, to reduce overgrazing and to enable the farmers to enter into Environmentally Sensitive Area (ESA) agreements and wildlife enhancement schemes.

OSS position
Objection because of the adverse effect on landscape character and quality of the commons. No other ESA agreement in the Lake District is dependent on a fence. This would set a damaging precedent.

Determination
Public inquiry. Consent refused. The inspector, Chris Frost, considered that the existence of the fence would detract from the sense of freedom and wilderness and would impede access, and

there would be significant dis-benefits to the neighbourhood.

Decision letter
CL1 1/3/56, 10 April 2003 (Defra)

Ashculm Turbary,Devon

Area
6.5 hectares

Designation and description
SSS1, wet heathland.

Ownership
Hemyock Parish Council

Rights
No rights of common registered.

Applicant
Devon Wildlife Trust

Works
Fence 900m with gates for access and a cattle-handling area with gates for access for grazing.

OSS position
No objection because considered the fencing would open up the area for public access.

Determination
No public inquiry. Consent granted.

Decision letter
Ref: CYD 1077/1344, 29 October 2003 (Defra)

Odiham Common, Hampshire

Area
Approximately 116 hectares

Designation and description
SSS1 heathland and woodland

Owner
Hart District Council.

Rights
Pasture, turbary, estovers, pannage and piscary. The rights of estovers are exercised. Grazing rights have not been exercised since 1996.

Applicant
Hart District Council.

Works
4795 metres of perimeter fencing with gates.

OSS position
Objection because the fence would impede and prevent access, and other alternatives should have been considered. An earlier consent for temporary fencing had not shown any benefit.

Determination
Public inquiry. Consent refused.

The inspector, Elizabeth Fieldhouse, noted that the fence would materially reduce the general accessibility and perceived openness of the common and would remove the ability to walk onto the common in places other than where the common was crossed by customary paths, the fencing of the experimental area had so far failed to produce conclusive evidence for any significant benefits for the neighbourhood, she was concerned at the noise generated by the proposed cattle grids, the fencing would have an unacceptable harmful impact on

the character and appearance of the common.

Decision letter
CL1 1/3/35, 30 June 2003 (Defra).

Clyne Common, Mumbles, Swansea

Area
287 hectares

Designation and description
Subject to a right of public access under section 193 of the Law of Property Act 1925. In an area of outstanding natural beauty.

Owner
Somerset Trust

Rights
Pasture and estovers.

Applicant
Clyne Golf Club Ltd

Works
To erect fencing and gates around Clyne Golf Club's car-park, it would enclose 348sqm of the common.

OSS position
No objection

Determination
No public inquiry. Consent refused

The merits of the application did not outweigh the right of public access or the commitment in the National Assembly for Wales's White Paper—*A working countryside in Wales*, which states that common land should not be developed unnecessarily, access to it should not be prevented or impeded unnecessarily, and the proper management of it should be encouraged.

Decision letter
APP184-09-010, 3 June 2003 (NAW)