

## **PROTECTION OF COMMON LAND**

### **Who owns Common Land?**

- 1 It is a popular misconception that common land is either ownerless or belongs to everyone. In fact, most common land is privately owned (though local councils own a number of commons).

### **What is Common Land?**

- 2 Common land is not defined by who owns it – but by the rights certain individuals (“commoners”) have over it. Those rights are called “rights of common.” As an exception to the rule, waste land of a manor can be common land even though it is not subject to rights of common.

### **What are Rights of Common?**

- 3 Rights of common are, in essence, rights to pasture. The more usual rights of common are:
  - grazing or pasturage;
  - pannage (to put pigs in woodland to graze on acorns and beech mast);
  - piscary (to take fish);
  - turbary (to take peat or turf for fuel);
  - estovers (to take wood and timber for specific purposes); and
  - rights in the soil (right to take sand, gravel, stone, marl and other minerals).

### **Who own Rights of Common?**

- 4 Rights of common are enjoyed by specific commoners (as opposed to all local residents) usually by virtue of the rights being attached to the property they occupy, often adjoining a common. Some rights, however, are personal (‘attached’ to

people) and not attached to a specific piece of land. Such rights are called “rights in gross”. The owner of a common wishing to know who has rights of common simply has to check the Commons Register as all rights of common must be registered in accordance with the Commons Registration Act 1965 or the Commons Act 2006. Commons registers are maintained by Commons Registration Authorities (i.e. the county council, the district council in an area without a county council In England, or county or borough councils in Wales). See paragraphs 7 to 9 below for information held on a commons register.

5. The position concerning rights of common has become more complicated following the commencement of the Land Registration Act 2002. Prior to the coming into force of the 2002 Act, the general principle under the Land Registration Act 1925 and subsequent Land Registration Rules was that rights of common were neither required nor capable of substantive registration, although they were capable of being entered as appurtenant rights to a substantively registered interest. Accordingly, on the registration of the transfer of land having the benefit of rights of common, such benefit might be described in the Property Register of the registered title.
6. Rights of common that were not registered in any way under the Land Registration Act 1925 were binding on purchasers of a registered title – they were overriding interests within the meaning of s.70(1) of the Land Registration Act 1925 as amended by Land Registration Act 2002. Section 11(4) and paragraph 3 of Schedule 1 of the Land Registration Act 2002 (which came into force on 13 October 2003) provides that where easements or profits a prendre (and the latter includes rights of common) are granted or reserved after the provisions came into force, they will not override a subsequent registrable disposition unless they are first registered. However, the grant of a right of common that is registrable under the Commons Registration Act 1965 is not registrable under the 2002 Act (s 3(7) Common Act 2006) and will remain binding on purchasers of a registered title.

### **What information is contained within commons registers?**

- 7 The register of commons, ownership of and rights over them is a statutory document pursuant to section 1 of the Common Registration Act 1965 (due to be repealed by the Commons Act 2006). Registration of common land was conclusive of matters registered as at the date of registration i.e. (i) that the land was common land (ii) of the rights of common over such land (iii) confirmation of those, if any, found or claiming to be owners of the land. Ownership, where title was unregistered, will

depend on the title deeds. Registration of ownership was precluded in the register maintained under the 1965 Act if title to the land was already registered under the Land Registration Acts 1925 and 1966. When the registration process was final but no owner could be traced, local authorities (including local councils) in whose area the common land was situated, were, given the power to take legal proceedings pursuant to s.9 of the 1965 Act to protect the land against unlawful interference by the legal owner. Section 9 of the 1965 Act was repealed in England on 1 October 2006 and 6 September 2007 in Wales.

8 With respect to the registers under the 1965 Act, each area of common land is listed in the registers under a unique 'unit number'. Each unit number in the register is divided in to three sections showing details of:

- a. **Land** - this includes a description of the land, who registered it and when the registration became finally registered. There are also related plans which show the boundaries of the land.
- b. **Rights** - this includes a description of the rights of common (e.g. the right to graze 100 sheep), over which area of the common they are exercisable, the name (if known) of the person (the 'commoner') who holds those rights, and whether the rights arise by virtue of separate land ownership by the commoner (i.e. they 'attach' to their land).
- c. **Ownership** - this includes details (if known) of owners of common land. However, entries in this section of the registers are not held to be conclusive.

9 Ownership of common land under the 1965 Act was not always conclusive. The registers which are to be kept pursuant to s.3 of the Commons Act 2006 will not have an ownership section. However where the ownership of any land registered in any register under the 1965 Act immediately before the new provisions of the Commons Act 2006 come into force, ownership will continue to be registered in that register (s.23, schedule 3 of the 2006 Act which came into force on 1 October 2006 in England and 6 September 2007 in Wales). Even where the ownership register is carried over from the 1965 Act, that entry is not conclusive. This is because section 10 of the 1965 Act provides that registration of matters including ownership were conclusive as at the date of registration.

- 10 Where the title to common land is unregistered, ownership will be evidenced by title deeds if any or by adverse possession. Otherwise, ownership of common land will be recorded in the proprietorship section of the title recorded under the Land Registration Act 2002. If a Commons Registration Authority is notified by the Land Registry that title to common land has been registered, the authority must remove the registration of ownership in the commons register and indicate that the land has been registered at the Land Registry (s.23, schedule 3 of the 2006 Act).
- 11 Schedule 3 of the 2006 Act also states that Regulations made under may require commons registration authorities–
  - a. to remove registration of ownership of land from their registers of common land (and town or village greens);
  - b. to keep or otherwise deal with documents received by them in connection with the registration of ownership of land in such manner as the regulations may specify.

### **How are Rights of Common Protected?**

- 12 Rights of common are legal interests in land. Commoners are entitled to exercise their rights without interference or obstruction. Where a person interferes with, or obstructs the lawful exercise of a right of common, the appropriate action by the commoner is in nuisance for what is called disturbance to the right. Action would be taken against the person causing the nuisance whether it be another commoner, the landowner or a stranger. Damages and/or an injunction are the appropriate remedies.

### **What are the rights of the owner of common land?**

- 13 The essential characteristic of land subject to rights of common is that those rights are in common with the owner of the soil. As the owner of the freehold, the normal presumption is that the owner would own everything upwards to the heavens and downwards to the centre of the earth subject only to the rights of the commoners. Subject to any statutory restrictions, the owner may use the common land for any purposes provided that any such use does not interfere with the commoners' rights.

- 14 The owner may do any of the following:
- a. grant leases of the common land (but any lease will be subject to the rights of the commoners);
  - b. grant grazing rights (provided that there is sufficient pasture left for the commoners);
  - c. pasture his own animals on the common. It is irrelevant that there may not be enough grazing for the commoners' animals;
  - d. plant trees on common land provided such planting does not interfere with the sufficiency of pasturage;
  - e. take trees that grow naturally on common land;
  - f. take game from the common land, and may grant shooting rights to third parties (known as *profits a prendre*);
  - g. grant wayleaves (e.g. rights to utility services to lay pipes and cables over or under the common). Special considerations arise in the case of easements over common land.

#### **Is there a limit to commoners' rights?**

- 15 The rights of commoners are limited and specific but activities which are ancillary to the exercise of their rights of common are also permitted. If commoners carry out activities beyond this however they will be trespassing. Similarly others on the land carrying out activities which are not authorised by the owner or by statute are trespassers.

#### **What obligations do the owners of commons have to manage them?**

- 16 The regulation of non-metropolitan commons is covered by various statutes including:
- a. the Inclosure Act 1845 (as amended);
  - b. the Commons Act 1876 (as amended);
  - c. the Commons Act 1879;
  - d. the Commonable Compensation Rights Act 1882; and
  - e. the Commons Act 1899 (as amended)
- 17 Some orders made under these Acts could provide for improvement of the common which might include draining, manuring or levelling of the common, the planting of

trees, the making of rules and regulations, and the general management of the common. Similarly, provision was made for the regulation of metropolitan commons under a number of Acts. Therefore, where commons are owned by local authorities, these authorities may have active management policies. These are usually directed to the management of the common for public recreation in respect of those commons to which the public have rights of access.

- 18 In the future, under Part 2 of the Commons Act 2006 (which is not yet in force), the appropriate national authority will have power to set up Commons Councils to manage the agricultural activities, vegetation and rights of common. In terms of any general obligation on the landowner to maintain the land, this would relate primarily to:
- a. the requirement to take steps to ensure there was no breach of any common law or statutory duty as an occupier of the land, assuming that the local council is in occupation; and
  - b. any interference with the commoners exercising their rights that may arise by failure to maintain. Thus a commoner is entitled to remove obstructions to e.g. his cattle grazing the grass. It has been held that a commoner may remove a hedge planted on a common. The law on abatement may be a little more restrictive now, however the commoner would be entitled to ask the land owner to remove or modify something causing a nuisance by interfering with the exercise of his right of common.

### **What are Access Rights?**

- 19 Generally, there has been no public right of access to rural commons. However, under the Countryside and Rights of Way Act 2000 (the CROW Act 2000) there is now a general public right of access *on foot* over all registered common land in England and Wales (subject to certain exemptions and exceptions as detailed below). The right of access came into effect across the whole of England on 31 October 2005. In Wales, the CROW Act 2000 is being implemented by the National Assembly for Wales. The new rights started there in May 2005.
- 20 By section 1(1)(b) of the CROW Act 2000 land which is registered as common land under the Commons Registration Act 1965 (where the registration has become final) is access land i.e. land for which there is a new right of access on foot. This does

not apply to village or town greens (unless they were mapped as “open country” under Part I of CROW which seems very unlikely).

- 21 The public may also enjoy a right of access over certain rural commons by orders made under the Commons Act 1876, or over commons subject to a management scheme under the Commons Act 1899, or over commons subject to special Local Acts. Land which is accessible to the public under those provisions is not access land for the purposes of CROW Act 2000. Further, access is available to common land to which section 193 of the Law of Property Act 1925 applies. Section 193 applies to certain specified categories of commons and other land. However, when the CROW Act 2000 comes fully into force, section 193(2) will be repealed and public rights of access previously under that provision will come under the CROW Act 2000.

### **What powers do the police have in respect of common land?**

- 22 The police have a number of powers in respect of collective trespass to land (including common land) pursuant to the Criminal Justice and Public Order Act 1994 (as amended by the Anti Social Behaviour Act 2003). The provisions in respect of common land are, however, slightly different than in respect of other land. By virtue of section 62D(2) of the 1994 Act references to trespassing and trespassers have effect, in respect of common land, as if they were references to acts, and persons doing acts, which constitute-

- a. a trespass as against the occupier, or
- b. an infringement of the commoners' rights.

- 23 Police powers include the following:

- a. to direct two or more persons to leave land (section 61(1));
- b. to arrest someone who does not comply with a direction given under section 61(1) above (section 61(4));
- c. to remove vehicles that have not been removed in compliance with a direction given under section 61(1) above (section 62(1)).
- d. to direct trespassers to leave land (together with any vehicles) where the following conditions are met (pursuant to section 62A(1));

- (i) a person and one or more others ("the trespassers") are trespassing on the land;
  - (ii) the trespassers have between them at least one vehicle on the land;
  - (iii) the trespassers are present on the land with the common purpose of residing there for any period;
  - (iv) that the person has one or more caravans in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans.
  - (v) the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land;
- e. to arrest trespassers who do not comply with a direction made pursuant to section 62A(1) above (section 62B(1)); and
- f. to seize and remove any vehicles left on the land in breach of a direction given pursuant to section 62A(1) above (section 62C).

### **Further offences in respect of commons**

24 A number of other legislative provisions create criminal offences in respect of commons. Members of the public have rights of access to common land (pursuant to section 193 of the Law of Property Act 1925) but any person who, without lawful authority, does any of the following acts commits a criminal offence pursuant to section 193(4) of the Act:

- a. draws or drives upon common land any carriage, cart, caravan, truck, or other vehicle;
- b. camps or lights any fire on common land;
- c. fails to observe any limitation or condition imposed by the Minister under this section in respect of common land.

25 Section 194 of the 1925 Act (which has been repealed by the Commons Act 2006) states:

“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, shall not be lawful unless the consent of the Minister thereto is obtained.”

26 Section 38 of the Commons Act 2006 (which applies to England and Wales but came into force in England alone on 1 October 2007), contains provisions which are similar to section 194 of the 1925 Act insofar as a person will not be able to carry out “restricted works” without the consent of the relevant national authority. “Restricted works” will include, but will not be limited, to the following:

- a. the erection of fencing;
- b. the construction of buildings and other structures; and
- c. the digging of ditches and trenches and the building of embankments.

27 Section 34 of the Road Traffic Act 1988 (as substituted by the Countryside and Rights of Way Act 2000) states as follows:

“34(1) Subject to the provisions of this section, if without lawful authority a person drives a mechanically propelled vehicle—

- a. on to or upon any common land, moorland or land of any other description, not being land forming part of a road, or
- b. on any road being a footpath, bridleway or restricted byway, he is guilty of *an offence.*”

28 Amendments to section 34 of the 1988 Act were also made by Part 6 of the Natural Environment and Rural Communities Act 2006 (which came into effect on 2 May 2006). The provisions are complex and the “Explanatory Notes” published with the Act are set out below. The Notes give the following guidance under the heading “Rights of Way”:

‘Under current law, evidence of use by non-mechanically propelled vehicles of a route for a 20 year period or a dedication for such use gives rise to a public right of way for all vehicles and this public right of way can be recorded on the definitive map and statement is a byway open to all traffic. (The “definitive map and statement” is a document kept by a local authority which shows footpaths, bridleways, restricted byways and byways open to all traffic.)’

In *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519, the House of Lords decided that a right of way may arise where mechanically propelled vehicles have used a route for the 20-year period, even where that use was illegal. Use of footpaths or bridleways by mechanically propelled vehicles has been illegal since the 1930's. Part 6 halts the implied creation of

new public rights of way for mechanically propelled vehicles, preventing post-1930 use of a way by a mechanically propelled vehicle from giving rise to any future public right of way.

Part 6 also extinguishes existing public rights of way for mechanically propelled vehicles, where those rights are not already recorded on the definitive map and statement, although this is subject to certain exceptions.

Property owners and others with an interest in land may have been relying on unrecorded public vehicular rights of way for access to that land. Part 6 ensures that, if the public right of way for mechanically propelled rights is extinguished, these people are provided with a private right of way to access the land by mechanically propelled vehicle.

All claims made under Part 3 of the Wildlife and Countryside Act 1981 to establish new rights for mechanically propelled vehicles which were lodged before 20 January 2005 (in England) or 19 May 2005 (in Wales) will be preserved and dealt with under the old law. So also will applications that were lodged after the relevant date but have reached the stage of being determined by the surveying authority. So too will applications lodged by landowners who want to maintain access to their property by mechanically propelled vehicle.'

**Other Legal Topic Notes (LTNs) relevant to this subject:**

<b>LTN</b>	<b>Title</b>	<b>Relevance</b>
15	Legal Proceedings	Sets out the powers of local councils to commence legal proceedings.
44	Trespass to Land	Sets out in more detail the tort of trespass and provisions of the Criminal Justice and Public Order Act 2004
46	Registered Land	Explains the benefits of registration of title
47	Easements	Sets out the general law of easements.
54	Protection of Ownerless Land	Sets out powers of local councils to protect ownerless common land.
57	Easements over Common Land and Village Greens	Sets out the powers of local councils to grant easements over common land and village greens.
67	Nuisance (private)	Explains the components of the tort of nuisance and remedies.
77	Public Rights of Way	Sets out the rights and responsibilities for a Footpath, Bridleway, Byway Open to All Traffic (BOAT), or Restricted Byway.

© NALC 2011