

COMMONS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Registration

Transitory and transitional provision

Section 22 and Schedule 2 Rectification of mistakes etc under the 1965 Act

114. [Section 22](#) introduces Schedule 2 to the Act, which makes provision for rectification of mistakes and other matters in the commons registers prepared under the 1965 Act.
115. An amendment may be made to the register for any purpose in Schedule 2 either on an application, or following a proposal brought forward by the registration authority itself. Regulations may prescribe a cut-off date after which applications and proposals under paragraphs 2 to 9 of Schedule 2 may no longer be made.
116. [Paragraphs 2](#) and [3](#) of Schedule 2 enable the registration of land which was specifically recognised by or under an earlier statute as being common land or a town or village green, but which was not registered under the 1965 Act. The criteria for registration as common land under paragraph 2 are set out in sub-paragraph (2), and include the requirement that the land is regulated under the Commons Acts 1876 or 1899, the Metropolitan Commons Act 1866, or a local or personal Act, or is otherwise recognised as common land by or under any other enactment⁴. The criteria for registration as a green under paragraph 3 include the requirement that the land was on 31 July 1970 land allotted by or under any Act for the exercise or recreation of the inhabitants of any locality.
117. For example, a local Act may have defined the extent of a common in a plan deposited with the House authorities during the passage of the corresponding Bill through Parliament, but part (or all) of the lands defined in the plan were overlooked and not registered under the 1965 Act. The amendments will enable the land to be registered, subject to any criteria specified in regulations (which may, for example, restrict application to the owner of the land, or require that the land remains common land at the date of the application). It may be possible for commons exempted from registration under section 11(3) of the 1965 Act (a list of which appears in annex B) to be registered under paragraph 2, and for allotted recreation grounds not registered under the 1965 Act to be registered under paragraph 3.
118. [Paragraph 4](#) enables certain land to be registered as common land. An application or proposal may be made only in respect of land which is not registered as common land or a green, and which is waste land of the manor at the date of the application. Waste land of the manor has been defined as “the open, uncultivated and unoccupied lands parcel of the manor”⁵. Consequently, land which is otherwise eligible for registration

⁴ For an example, see the reference to land specified as common land in the Second Schedule to the [Broxbourne and Hoddesdon Open Spaces and Recreation Grounds Act 1890](#) (ch. xlviii).

⁵ *Attorney General v. Hanmer* (1858) 2 LJ Ch 837. The effect of the *Hazeley Heath* case (see footnote 7) is that it is not relevant for these purposes whether the land continues to be held by the lord of the manor — but the land must be of manorial origin.

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under paragraph 4, but which has been developed, improved and brought in hand, or otherwise fails to fulfil the character of waste land of the manor, cannot be registered.

119. The criteria for registration of land under paragraph 4 are set out in sub-paragraphs (2) to (5), to the effect that:
- the land was provisionally registered as common land under section 4 of the 1965 Act,
 - there was an objection to its provisional registration, and
 - one (or more) of the following applies:
 - (i) the registration was dismissed by the Commons Commissioner solely because the land had ceased to be connected with the manor (sub-paragraph (3)),
 - (ii) the registration was dismissed by the Commons Commissioner because the land was not subject to rights of common, and the Commissioner did not go on to consider whether the land qualified instead for registration as waste land of the manor (sub-paragraph (4)), or
 - (iii) the registration was withdrawn at the request or with the agreement of the applicant for registration (sub-paragraph (5)).
120. The Court of Appeal decided in 1978 in the *Box Hill* case⁶ that ‘waste land of a manor’ — the second limb of the definition of common land for the purposes of registration under section 22(1)(b) of the 1965 Act — must still be in the ownership of the lord of the manor, but the court’s decision was subsequently overruled in 1990 by the House of Lords in the *Hazeley Heath* case⁷. Between 1978 and 1990, many provisional registrations of common land were cancelled by the Commons Commissioner solely on the grounds of the *Box Hill* judgment, or were withdrawn by the applicant for registration in anticipation of cancellation, and were out of time or ineligible for appeal following the decision in *Hazeley Heath*. Sub-paragraphs (3) and (5) enable such cases meeting the criteria specified to be the subject of a fresh application for registration.
121. Cases where an application for provisional registration was withdrawn after an objection will also be eligible for consideration under sub-paragraph (5) whether or not the reason for withdrawal was the decision in the *Box Hill* case. This is intended to enable fresh consideration to be made in respect of cases where applications for registration of a common were withdrawn by agreement between the several applicants, often in advance of a hearing before the Commons Commissioner. Such agreements generally led to the Commissioner cancelling the registration by consent⁸, without the opportunity for the wider public interest to be considered in relation to the application.
122. Sub-paragraph (4) enables cases to be reviewed where the Commons Commissioner concluded, on an objection to the registration of land as common land, that the land was not subject to rights of common, but did not consider whether the land might qualify for registration as waste land of the manor. Where none of the parties appearing before the Commissioner argued that the land might also qualify as waste land, the Commissioner often concluded that the registration should fail without further consideration. However, there is some authority to support the view that the Commissioner ought to have examined the evidence before coming to a decision in such cases, since there is a public interest aspect to the registration of common land and whether land should or should not be registered should not be treated solely as a matter of dispute between the parties to the application.⁹

⁶ *Box Parish Council v. Lacey* [1979] 1 All ER 113.

⁷ *Hampshire County Council and others v. Milburn* [1990] 2 All ER 257.

⁸ See the provision for decisions by consent in regulation 31 of the [Commons Commissioners Regulations 1971 \(SI 1971/1727\)](#).

⁹ See the judgement of Lord Denning MR in the *Corpus Christi* case (footnote 2): “I cannot think it correct for the commons commissioners to treat these cases as if they were pieces of civil litigation, such as a *lis inter partes*, in which the applicants

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123. In determining the circumstances of a decision by the Commons Commissioner, reference may be had to copies of the Commissioner's decision letters which are held by Defra (in relation to both England and Wales) in both bound and electronic form.
124. Where land is registered under paragraph 4, it will not be possible to claim or register any rights of common which were formerly exercisable over that land. Such rights were extinguished for want of registration, under section 1(2)(b) of the 1965 Act (see footnote 1).
125. **Paragraph 5** enables certain land registered as common land to be transferred to the register of town or village greens. Some greens were mistakenly registered under section 4 of the 1965 Act as common land, typically because the land was subject to rights of common, and the applicants believed that such land was required to be, or wished to have it, registered as common land. It appears that the effect of section 1(2)(a) of the 1965 Act was to cause such land to cease to be a green, and it is unlikely that the protection afforded to greens by nineteenth century legislation (notably section 12 of the Inclosure Act 1857¹⁰ and section 29 of the Commons Act 1876¹¹) extends to such land¹². Paragraph 5 therefore affords a fresh opportunity to ensure that such land is entered in the correct register. An application or proposal will need to show that, immediately before its provisional registration under section 4, the land was in fact a town or village green within the meaning of the 1965 Act as originally enacted (for example, evidence may be adduced that the land was allotted as a town or village green under an inclosure award). Any transfer will not affect rights of common registered over the land.
126. **Paragraphs 6 to 9** make provision for the deregistration of certain land wrongly registered as common land or town or village green. The registration of land under the 1965 Act gave rise to a number of regrettable errors. People, including landowners, who disagreed with a provisional registration under the 1965 Act were able to make formal objections within a certain time, which were heard by the Commons Commissioner. But once a provisional registration became final, no allowance was made for substantive corrections to be made, whatever the circumstances. In order to publicise provisional registrations, local authorities were required to give notice of them in local newspapers, and to make the provisional registers available for inspection. There was no requirement to serve notice on the affected landowners (because identifying the ownership of such land was often impossible and one of the purposes of the legislation was to clarify ownership). However, it is clear that some landowners did not see the notices or had no reason to look out for them, and as a consequence a number of mistaken or misguided provisional registrations became final without their being aware.
127. The Common Land (Rectification of Registers) Act 1989 made provision for the rectification of certain errors in the registers in relation to dwelling-houses. But the opportunity to make an application under the Act expired on 21 July 1992. Further provision similar to (but not the same as) the 1989 Act is made in paragraphs 6 and 8.
128. **Paragraph 6** deals with the removal of certain buildings from the register of common land. Some common land may have been registered so as to mistakenly include (typically) cottages or gardens on or abutting the common. The error may have gone unnoticed, or that the Commons Commissioner felt unable to correct the error if no timely objection had been made. The paragraph enables the deregistration of common

have to prove their case. ... The hearing by the commissioner should be regarded more as an administrative matter, to get the register right, rather than as a legal contest. The commons commissioner should inquire carefully whether any land is common land, and, if it is, register it in the land section accordingly."

1 Section 1(2)(b) of the 1965 Act states that such rights are rendered not 'exercisable'. In *Central Electricity Generating Board v. Clwyd County Council* [1976] 1 WLR 151, Goff J. concluded that the fact that rights of common were no longer exercisable meant that they were extinguished, and this finding is now generally accepted.

10 Prevents damage and interruption to enjoyment of the green.

11 Prevents encroachment or disturbance other than to improve enjoyment of the green.

12 In the *Trap Grounds* case (see footnote 3), the House of Lords ruled that land registered as a town or village green under the 1965 Act is subject to the protection afforded by the nineteenth century legislation. By implication, the same protection does not extend to former greens registered as common land.

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land registered under section 4 of the 1965 Act, which is covered by buildings or within the curtilage of buildings. The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application or proposal. It is immaterial for the purposes of paragraph 6 whether the building was lawfully present on the land at the date of registration¹³.

129. Paragraph 7 also enables the deregistration of land which was wrongly registered as common land under section 4 of the 1965 Act, but is not restricted to buildings and curtilage (as under paragraph 6). Land will be eligible for deregistration under this paragraph if it was provisionally registered as common land under section 4 of the 1965 Act, and its provisional registration was not referred to a Commons Commissioner.
130. It follows that an application or proposal cannot be made where a hearing was originally held into the registration of the land by the Commons Commissioner. However, an application or proposal under paragraph 7 will not be precluded merely because a hearing was held which considered only the registration of rights over the land, or because a hearing into the ownership of the land was held under section 8 of the 1965 Act.
131. An application or proposal under this paragraph will succeed only if it can be shown that, before its registration, the land was not common land (whether subject to rights of common or waste land of the manor), nor a town or village green within the meaning of the 1965 Act as originally enacted, nor within the definition of land subject to be inclosed under section 11 of the Inclosure Act 1845 (see annex C). The exclusion for the purposes of paragraph 7 of land subject to inclosure under the 1845 Act ensures that land cannot be removed from the registers under this provision if, at the time of its registration, it was (among other things) a regulated pasture. Regulated pastures are lands which are owned in common by several persons, who also use the land in common at certain or all times of the year (for example, the land may be used to graze in common the stock of all the owners). A number of regulated pastures were incorrectly registered under the 1965 Act, but the continuing registration of such land is not thought to give rise to any difficulties, and confers some benefits in terms of security of status, and public rights of access.
132. Provision similar to paragraph 6 is found in paragraph 8 for the deregistration of town or village green registered under section 4 of the 1965 Act, which is covered by buildings or within the curtilage of buildings. The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application or proposal. It is immaterial for the purposes of paragraph 8 whether the building was lawfully present on the land at the date of registration.
133. Provision similar to paragraph 7 is found in paragraph 9 for the deregistration of certain registered town or village greens. However, the criteria for deregistration of greens are slightly different. Sub-paragraph (2) provides that an application or proposal will succeed only if it can be shown that, before its original provisional registration, the land was not common land nor a town or village green. Sub-paragraph (3) provides that the latter condition is satisfied if:
- owing to its physical nature, the land could not have been used by members of the public for lawful sports and pastimes throughout the 20 years before its registration under the 1965 Act (for example, if buildings on the land precluded such use), and
 - the land was not (and still is not) allotted under any enactment as a green, or for the purposes of a green.

¹³ So this paragraph will not enable the deregistration of land where, for example, a garden has been extended onto, and encroached upon, a common after the date on which the common was provisionally registered.

This provision seeks to avoid an application under paragraph 9 seeking to adduce witness testimony as to the actual use made of the green prior to the date of provisional registration, which may be unhelpful so long after the period of use.

134. [Paragraph 10](#) enables regulations to be made to provide for the award of costs arising in determining an application under Schedule 2. Section 24 enables regulations to make provision about applications under paragraphs 2 to 9.

Section 23 and Schedule 3 Transitional

135. [Section 23](#) enables the appropriate national authority to make transitional provisions and savings in connection with the coming into force of Part 1, and introduces Schedule 3, which makes transitional provision for updating the commons registers.
136. The 1965 Act did not require the commons registers prepared under that Act to be kept up-to-date. Provision was made (in section 13) to register certain events, but compliance was optional. Many instruments, and other events affecting entries in the registers (or calling for new entries in the registers), have had effect since the registers were compiled under section 4 of the 1965 Act, but many of these have not been captured in consequential amendments to the registers.
137. [Schedule 3](#) makes provision for updating the registers during a transitional period to capture these events. Section 59(1) enables the transitional period to be commenced in relation to different commons registration authorities at different times.
138. [Paragraph 2](#) enables the appropriate national authority to make regulations regarding the updating of registers by commons registration authorities during the transitional period in consequence of ‘qualifying events’. ‘Qualifying events’ are defined in sub-paragraph (2).
139. Sub-paragraph (2) provides that qualifying events comprise:
- the creation by any means of rights of common after 2 January 1970 (the latest date on which rights of common eligible for registration under section 4 of the 1965 Act could be registered, failing which they were extinguished under section 1(2)(b) of that Act¹⁴) but before the commencement of paragraph 2;
 - any relevant disposition (as defined in sub-paragraph (3)) of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;
 - an extinguishment of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;
 - the deregistration of registered land under a relevant instrument (as defined in sub-paragraph (4)), and the giving of other land in exchange.
140. Regulations may provide for the amendment of the register both on application and on the initiative of the commons registration authority (sub-paragraph (5)). Sub-paragraph (6) states that regulations may require commons registration authorities to take steps to discover information concerning qualifying events. This may include undertaking and publicising a formal review of their registers.
141. [Paragraph 3](#) provides for the extinguishment of rights of common which remain unregistered at the conclusion of the transitional period.
142. [Paragraph 4](#) provides that regulations may enable a commons registration authority to entertain applications for amendment of the registers in consequence of a qualifying event, even though the application is made after the end of the transitional period.

14 See footnote 1.

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Where such an amendment is made, any extinguishment of rights by virtue of paragraph 3 is deemed not to have occurred. It is expected that such regulations will require registration authorities to consider whether confirming such an amendment would be fair having regard to the extent to which other persons may have placed reliance on the registers without the amendment having been made.

143. [Paragraph 5](#) enables regulations under paragraph 2 or 4 to include provision as to what is or is not to be regarded as severance for the purposes of registering qualifying events during the transitional period. It is expected that regulations will, for example, provide that a right is not to be treated as having been severed unless it can be shown that the parties to the severance expressed a clear intention in writing that the right should be severed, or the right has subsequently been treated as severed.
144. [Paragraphs 6 to 9](#) make certain transitional provision as a consequence of the repeal of the 1965 Act.
145. [Paragraph 6](#) preserves the effect of section 1(2)(b) of the 1965 Act, which extinguished rights of common which could have been, but were not, registered at the conclusion of the initial registration period¹⁵.
146. [Paragraph 7](#) preserves the effect of section 21(1) of the 1965 Act, which in turn preserves the right of access under section 193 of the Law of Property Act 1925. Section 193 of the 1925 Act confers a right of access to certain 'urban' commons, particularly those formerly in urban districts or boroughs prior to local government reform, and to commons in respect of which a deed of dedication applying the provisions of section 193 had been executed by the owner. The right of access to 'urban' commons ceased to apply under section 193(1)(d)(i) where the rights of common over such commons were extinguished under any statutory provision. Where such a common was registered under section 4 of the 1965 Act, but any rights remained unregistered and may have been extinguished by section 1(2)(b) of that Act, section 21(1) provided (and paragraph 7 ensures the continuing effect) that the right of access was not to be treated as ceasing to apply by virtue of section 193(1)(d)(i) of the 1925 Act.
147. [Paragraph 8](#) retains the ownership section of the commons registers prepared under the 1965 Act until such time as regulations may provide for their removal and archiving (sub-paragraph (3)). This provision takes account of the gradual migration of ownership information from the ownership section of the commons registers to the register of title held by the Land Registry. Sub-paragraph (2), which reproduces the effect of section 12(b) of the 1965 Act, requires a commons registration authority which receives notice from the Land Registry that the ownership of common land or a town or village green has been registered in the register of title, to delete any entry as to ownership of the land in the ownership section of the commons register.
148. [Paragraph 9](#) preserves the effect of any vesting of unclaimed registered land in a local authority under section 8 of the 1965 Act, and sub-paragraph (2) preserves, where appropriate, the application of sections 10 and 15 of the Open Spaces Act 1906 to such land. These sections place certain obligations on the local authority to maintain the land, and confer powers to make byelaws for the better regulation of the land.

15 See footnote 1.