

COMMONS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Works

Section 38 Prohibition on works without consent

186. *Subsection (1)* of this section prohibits the carrying out of ‘restricted works’ without the consent of the appropriate national authority on registered common land and on certain other land identified in *subsection (5)*. By virtue of *subsection (2)*, ‘restricted works’ are works which prevent or impede access to or over the land, or involve newly surfacing the land with concrete, tarmac, roadstone or the like.
187. *Subsection (3)* specifies that new fencing, buildings, structures, ditches, trenches and embankments are all treated as works for these purposes. This does not mean that such works will in every case prevent or impede access, and whether this is so in any particular case will be a matter of fact and degree.
188. *Subsection (5)* applies the controls in section 38 to all registered common land, and in addition, to certain common land which is not registered, but is regulated by a provisional order of regulation confirmed by an Act made under the Commons Act 1876, a scheme of management under the Metropolitan Commons Act 1866 or the Commons Act 1899, and also to land in the New Forest which is subject to rights of common. These additional categories of land are already likely to be subject to the controls on works under section 194 of the Law of Property Act 1925.
189. *Subsection (6)* specifies certain automatic exemptions to the prohibition on restricted works. These include, in *subsection (6)(a)*, an exemption for particular works, or works of a description, which are carried out under a power conferred by or under an enactment in relation to a particular area of common land (for example, some local Acts establish a board of conservators for a common and give it power to carry out certain types of improvement works on the land for which it is established). *Subsection (6)(b)* exempts works of a description which are carried out under a power conferred by or under an enactment in relation to common land generally (for example, section 82 of the Highways Act 1980 authorises the installation of cattle grids on an area of common land adjoining a road). *Subsection (6)(c)* exempts works authorised under a scheme made under the Metropolitan Commons Act 1866 or the Commons Act 1899, except where the enactment or scheme requires any person to consent to the works. *Subsection (6)(d)* exempts works for the installation of electronic communications apparatus for the purposes of an electronic communications code network, within the meaning of the Communications Act 2003.
190. *Subsection (7)* makes it clear that the conferral of particular functions on a commons council under Part 2 of this Act in relation to any works does not exempt those works from the requirement for consent under section 38. *Subsection (9)* makes clear that consent under section 38 is given for the purposes of section 38 only. It therefore does not exempt the applicant from the need to obtain any other necessary consent to the works — for example, consent of the landowner, or planning permission. Equally, in

*These notes refer to the Commons Act 2006 (c.26)
which received Royal Assent on 19 July 2006*

Defra's view, consent under section 38 would not in itself authorise interference with the exercise of the rights of commoners or others over the land in question by the carrying out of works.

191. Works connected with the taking or working of minerals do not require consent under section 194 of the 1925 Act (which section 38 supersedes), but will require consent under section 38 on relevant land. But paragraph 7 of Schedule 4 includes a transitional provision to prevent this requirement applying to works carried out in accordance with a planning permission under any enactment granted before commencement of section 38, so long as the works are carried out within the period allowed under the planning permission, or any extended period allowed by the planning authority.