

22 NOVEMBER 2022

## **LTN 54 | PROTECTION OF OWNERLESS COMMON LAND AND VILLAGE GREENS**

### **Introduction**

1. Some village greens and common land in England and Wales have no known owners. Local authorities (including local councils) have the power to protect such land. This Note will look at the relevant law, which is mainly set out in section 45 of the Commons Act 2006 (“the 2006 Act”).

### **Section 45 of the 2006 Act – powers of local authorities over unclaimed land**

2. The 2006 Act applies to the following local authorities:
  - a. A county, district or parish council in England;
  - b. A London borough council; and
  - c. A county, county borough or community council in Wales.
3. The powers apply where:
  - a. The land is registered as common land or a town or village green;
  - b. No person is registered in the register of title as the owner of the land; and
  - c. It appears to a local authority in whose area the land or any part of it is situated that the owner cannot be identified.
4. Local authorities have the power, not a duty, to:
  - a. Take any steps to protect the land against unlawful interference that could have been taken by an owner in possession of the land; and
  - b. institute proceedings against any person for any offence committed in respect of the land (but without prejudice to any power exercisable apart from this section).
5. The section does not empower a local authority to incur expenditure on activities to maintain or improve unclaimed land, e.g. litter clearance or tree planting. Authority for the expenditure of this sort is contained in section 137 of the Local Government Act 1972. If a council decides to do work on land, it does not own, and it may expose itself to liability for the same. A council should check if its proposed work affects its insurance coverage. In addition, any work undertaken by a council may lead to an expectation that the council will continue to undertake works in the future. A principal authority may be under a duty to keep the land free of litter under section 89 of the Environmental Protection Act 1990.

6. There is no power for an authority to permit local inhabitants or others to use unclaimed land. Strictly speaking, such an activity is a trespass (in the absence of the consent of the owner of the land), which authority has the power to prevent, not to sanction.
7. However, as section 45 grants powers but imposes no duties, a local authority may lawfully decide to take no action to prevent activities on the land which it deems to be beneficial, e.g., improvements by a local conservation group, or which do no harm, for example, allowing animals to graze (in most cases).

### **Section 38 of the 2006 Act - prohibition on works without consent**

8. Section 38(1) of the 2006 Act provides that a person may not, except with the consent of the appropriate national authority, carry out any restricted works on:
  - a. Land registered as common land;
  - b. Land not so registered which is:
    - i. Regulated by an Act made under the Commons Act 1876 confirming a provisional order of the Inclosure Commissioners; or
    - ii. Subject to a scheme under the Metropolitan Commons Act 1866 or the Commons Act 1899 and
  - c. Land not falling within paragraph (a) or (b), which is in the New Forest and is subject to rights of common.

“Restricted works” are defined as:

- d. Works which have the effect of preventing or impeding access to or over land, namely:
  - i. The erection of fencing;
  - ii. The construction of buildings and other structures;
  - iii. The digging of ditches and trenches; and
  - iv. The building of embankments.
- e. works for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material).

The “appropriate national authority” means the Secretary of State concerning England and the Welsh Ministers concerning Wales (see <https://www.gov.uk/government/collections/common-land-guidance>). This link includes a form to apply for consent if needed or to de-register

part of an area of common land. However, some works do not need consent, such as where works are so small that they do not prevent or impede access to or over the land (see <https://www.gov.uk/government/publications/common-land-guidance-sheet-1b-works-and-processes-that-do-not-need-section-38-consent/common-land-guidance-sheet-1b>). If the council is the owner of common land, it is for the council to decide if the proposed works fit these exemptions and such decisions can be subject to Judicial Review.

9. In determining an application for consent under section 38(1) of the 2006 Act, the appropriate national authority shall, under section 39(1) (have regard to:-
  - a. The interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
  - b. The interests of the neighbourhood;
  - c. The public interest; and
  - d. Any other matter considered to be relevant.
10. By virtue of section 39 (2) of the 2006 Act, reference to the public interest includes the public interest in:-
  - a. Nature conservation;
  - b. The conservation of the landscape;
  - c. The protection of public rights of access to any area of land; and
  - d. The protection of archaeological remains and features of historic interest.

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

LTN	Title	Relevance
15	Legal proceedings	Sets out the powers of local councils to commence legal proceedings.
16	Control of litter	Sets out the general obligations and powers of local councils in respect of litter.
31	Local council general powers	Sets out the powers of local councils to incur miscellaneous expenditure.
53	Protection of common land	Sets out the power and obligations of local councils to protect common land.