

WELSH GOVERNMENT

Common Land Guidance - Enforcement against unlawful works on common land

What controls are there over works on common land?

1. Section 38 of the Commons Act 2006 ("the Act") provides that 'restricted works' on registered common land (or certain other land - see section 38(5)) in Wales require the consent of the Welsh Ministers if they prevent or impede access to the land, or involve the resurfacing of land with a 'hard' surface (such as concrete or tarmac).

What power of enforcement is there?

2. Where restricted works that require consent are carried out on common land without it, section 41 of the Act enables **any person** to make an application to the county court to rectify the situation. The court may make an order either:

- (a) to remove the works and restore the land to the condition it was in before the works were carried out, or
- (b) where consent has been given, but the works have not been carried out in accordance with its terms, to specify how the works are to be carried out.

3. An order is made at the discretion of the judge, who may decide not to grant an order, even where the works have been shown to be unlawful. This may happen where, for example, the judge considers that there has been a substantial delay in applying to the court after the works were carried out, with the result that the works have been in place for many years without objection.

When did this power come into effect?

4. Section 41 was brought into force in Wales on 1 April 2012 and, as mentioned above, any person can take action under it against any restricted works that have been constructed, without consent, since that date. Previously it was possible, under section 194(2) of the Law of Property Act 1925 ("the 1925 Act"), for local authorities, owners of common land, and others with an interest in the land to take action through the courts against unlawful works on common land.

5. If works were erected prior to Part 3 of the Commons Act 2006 coming into force in Wales on 1 April 2012, they contravene the legislation which existed at the time they were erected and section 41 of the Act cannot be used to enforce against them. If the works were erected after 28 June 2005, but before 1 April 2012, action under section 194 of the 1925 Act may be taken by any person by virtue of a modification to section 194(2) effected by paragraph 6 of Schedule 4 to the 2006 Act. If they were erected before 28 June 2005 only certain people can take enforcement action: land owners, Local Authorities and any other person with a legal interest in the land (such as commoners).

6. Whilst section 194 of the 1925 Act has now been repealed by the commencement of Part 3 of, and Part 2 of Schedule 6 to, the 2006 Act, section 16(1) of the Interpretation Act 1978 provides that:

"...where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

...

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

7. In the Welsh Ministers' view, where works were installed before 1 April 2012 without the consent required by section 194 of the 1925 Act, the liability under section 194(2) to be ordered by the court to remove those works would fall within the scope of section 16(1)(c) above, and section 16(1)(e) preserves the right to institute legal proceedings in respect of the enforcement of that liability. This means that proceedings may still be brought against unlawful works erected prior to 1 April 2012.

8. As indicated above, however, the courts may consider the time elapsing before action is taken and may be reluctant to enforce against longstanding unlawful works.

How do I know what works are allowed on common land?

9. Restricted works are works which have the effect of preventing or impeding access to, or over, the common land. They might include fencing, buildings and other structures, ditches, trenches, and embankments. Restricted works also include resurfacing with a sealed surface (such as tarmac) to create, for example, a new car park or access road. Such resurfacing work is not caught, however, if it consists only of the repair of an existing surface on the land made of such material

10. Section 38 of the Act applies to all registered common land and you can find out whether land is registered common land by asking to see the register of common land held by your commons registration authority (the county or county borough council). It also applies to certain other land, including a registered town or village green, which is subject to a scheme of management under the Commons Act 1899, or which is regulated by an Act made under the Commons Act 1876. Your commons registration authority should be able to tell you whether there is a relevant scheme or Act in relation to any land in its area.

11. Other than as indicated in paragraph 10, section 38 does not apply to town or village greens generally. Different enforcement powers are available to local authorities in relation to unlawful works on town or village greens.

Who decides whether works are unlawful under section 38?

12. Anyone proposing to carry out works on a common must make a judgement as to whether those proposals fall within the scope of 'restricted works'. Neither the Welsh Ministers nor the commons registration authority can make someone apply for consent under section 38. Where any restricted works which require consent are carried out

without it, however, anyone can apply to the court to have those works removed. They can also apply to the court where consent has been obtained under section 38, but are not satisfied that the terms of the consent have been properly complied with. This guidance may help you in deciding whether or not to take action against unlawful works, but only a court can ultimately determine whether works have been constructed unlawfully, and the decision to take action rests with the person taking it. With this in mind, anyone considering taking enforcement action is strongly recommended to seek professional advice - legal or otherwise – before making their decision on taking such action.

Does the enforcement power only apply to cases where consent is needed under section 38?

13. Action can also be taken against unlawful works on a number of different types of land:-

Where the land is National Trust land

(a) Commons owned by the National Trust are subject to laws which are different from section 38 of the Commons Act 2006. National Trust land is subject to its own Acts. Under section 29 of the National Trust Act 1907, the Trust must keep its commons “unenclosed and unbuilt on for the recreation and enjoyment of the public”. That requirement is qualified by powers given in section 29 itself, and in later provisions, including section 23 of the National Trust Act 1971. This section provides that the erection of a building (other than a shed for tools and materials or the construction of any other work which prevents or impedes access by the public to any Trust property in Wales to which section 29 of the 1907 Act applies, shall not be lawful without the consent of the Welsh Ministers..

(b) The definition of common land for sections 23 and 29 is the same as for section 38. Section 23 therefore applies to any National Trust owned land which is registered as common land under the Commons Registration Act 1965. It also applies to any National Trust land that is not registered as common land which is regulated by a Provisional Order Confirmation Act under the Commons Act 1876, or which is subject to a scheme of management under Commons Act 1899. Section 23 does not generally apply to registered town or village greens but it may occasionally do so if a green is subject to a scheme or Act.

(c) Under the provisions of section 44 of, and Schedule 4 to, the Commons Act 2006, section 41 of that Act applies in relation to works carried out in contravention of section 23 of the 1971 Act as it applies to works carried out in contravention of section 38 of the 2006 Act.

Where the land is registered as a town or village green, rather than a common

(d) Town and village greens are protected by section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. Section 12 makes it a criminal offence, punishable by a fine not exceeding level 1 on the standard scale, to do any act which injures a green or interrupts its use as a place for exercise and recreation. Section 29 also makes it an offence to permanently encroach upon or inclose a green, or to build upon or disturb the soil of a green otherwise than with a view to its better enjoyment.

(e) There is generally no requirement under the legislation relating to commons and greens to obtain consent to carry out works on a green which are not in contravention of sections 12 and 29. An exception to this is where a green is subject to a scheme of management under Commons Act 1899, or to a Provisional Order Confirmation Act under the Commons Act 1876. In such cases section 38 of the Commons Act 2006 applies, because all land covered by one of these schemes or Acts is within the scope of section 38, regardless of its registration status. Even in these rare cases, consent under section 38 would not authorise works which constitute an offence under sections 12 or 29. Applicants would need to satisfy themselves on this point, as a person responsible for any breach would be liable to prosecution.

(f) Where works are proposed on a green, and there is suitable exchange land available, consideration should be given to applying to the Welsh Ministers for an exchange of land under the section 16 provisions.

Where the land is regulated by a Scheme of Management made under the Commons Act 1899

(g) The following guidance explains the circumstances in which the consent of the Welsh Ministers is needed to carry out works on a scheme common. Where our consent is needed, this is **in addition** to any other consents that may be specifically required under the terms of the scheme (such as from the owner of the land or from the holders of common rights).

(h) In all cases where works are proposed to be carried out on a scheme common by a person other than the landowner, the specific consent of the owner of the land will be needed before they can go ahead. In addition, in many cases, provision is made for the consent of others (such as commoners) to be obtained. Nothing in the Act overrides these requirements.

How do I know if I need the Welsh Ministers' consent for works on a scheme common?

(i) If the terms of the scheme allow works to be carried out without specifying that consent is needed, consent of the Welsh Ministers under section 38 is not required. Read the terms of the scheme carefully as individual schemes vary. As a guide, the current model scheme (set out in 1982 Regulations, SI 1982/209) allows works for:

- Protecting and improving the common, eg drainage, raising, levelling or other works;
- Preventing accidents, eg fencing any quarry, pit, pond, stream or other like place;
- Preserving the turf, shrubs, trees, plants and grass, eg fencing portions for short periods, planting trees and shrubs (for shelter or ornament), placing seats on the common, and lighting the common;
- Otherwise improving the common as a place for exercise and recreation, eg setting apart areas for games, forming grounds for cricket, football, tennis, bowls and other similar games, and temporarily enclosing such grounds with any open fence.

(ii) **ALL OTHER RESTRICTED WORKS** (as defined in section 38(2) of the Commons Act 2006) need the Welsh Ministers' consent under section 38 (as provided for by section 42 of the Act). This includes any works that are specified in the scheme as needing their consent, as well as any that are prohibited by the scheme. If consent is given under section 38, the consent will override any such prohibition in the scheme (subject of course to any other necessary consent that may be required, such as that of the owner).

What is the situation for works on scheme commons that are not "restricted" under the section 38(2) definition?

(iii) Where works that are not restricted are authorised by a scheme without any requirement for our consent, then it follows that the Welsh Ministers' consent is not required to carry them out. Where works that are not restricted are prohibited by the scheme, then the terms of the scheme apply and the works are prohibited.

Some works are exempt by order from the section 38 consent process. Do these exemptions apply where the common is subject to a Scheme of Management?

(iv) The exemptions made under section 43 of the Act apply only to registered common land. They do not apply to scheme commons which are unregistered. In such cases, consent under section 38 should be sought in the normal way for works on scheme commons that would otherwise be exempt under section 43.

Is it possible to make a new Scheme of Management?

(v) Steps were taken in section 50 of the Act to update the powers to make new schemes. Any new schemes will be more flexible and better reflect the principles of the new consent regime. The Welsh Ministers are in the process of developing proposals for future schemes in Wales however, Councils may modify any existing schemes they have under the 1982 Regulations.

MEDIATION

What can I do if I think that works have been constructed unlawfully?

14. Thorough background research is an essential first step if a person is to be clear about the facts and maximise the possibility of developing a good, substantive case. It is important to bear in mind that the works may have been constructed without consent for a variety of reasons. These could include that the person constructing them:

- considered the legislation but did not think they needed consent;
- did not know about the requirement for section 38 consent on common land;
- did know about the requirement but deliberately chose to ignore it; or
- considered the works to be so urgent as to justify going ahead with them before obtaining consent.

15. As court action can be costly, anyone seeking the removal of any works that they consider to be unlawful are advised to seek it through negotiation and dialogue before taking action through the courts.

16. The Welsh Government does not encourage people to construct works without consent, but it recognises that this may occasionally happen because of a misunderstanding rather than wilful defiance of the law - for example, where the works are constructed in ignorance of the controls. When this happens, an application under section 38 is usually the best mechanism to begin to put things right. Wherever this situation arises, the Welsh Ministers are prepared to accept a retrospective application and encourage anyone concerned about unlawful works to ask those carrying out the works to make such an application before they consider pursuing a court action. This is not a soft option for applicants and there is no guarantee that a retrospective application will be successful. If it is not, applicants may well need to dismantle the unlawful works or face court action. If no retrospective application is made, or if the application is rejected, consideration should still be given to alternative resolution procedures, including mediation through an independent party, before pursuing court action.

Information on alternative dispute resolution can be found at <http://www.justice.gov.uk/guidance/mediation/index.htm>.

17. The Open Spaces Society's information sheet, 'How to take action against unlawful encroachments and works on commons in Wales', provides useful advice on the options open to you.

What is the process for taking court action?

18. As taking legal action can be a long and costly process, it is essential to have strong evidence to support it, including witnesses, documents, and photographs. The claimant may be made personally liable for the costs of the action, and any award of costs is always at the discretion of the court. A court may order the claimant to pay the defendant's costs as well as their own. Even if the claimant wins the case, they may not be able to recover their own costs from the defendant.

19. The court has various guidance notes that you should read carefully - see www.hmcourts-service.gov.uk. You, or your solicitor (if you have one), will need to complete a Part 7 claim form (N1), which is available on-line or from your local county court. An example of the form and an illustration of the particulars of a claim are included at Appendix 1 of the Open Spaces Society information sheet 'How to take action against unlawful encroachments and works on commons in Wales'.

20. The form should be sent to the court, together with one copy for each defendant. A court fee is payable, unless the claimant is eligible for an exemption (EX160A *Court Fees — do I have to pay them?*). There may also be further court costs to pay, such as for allocation to a particular process, and the trial fee.

OTHERS WHO MIGHT TAKE ACTION

Do I have to do all this myself or is there someone who can help me?

21. Before the Commons Act 2006 came into force, only landowners, local authorities, and those with an interest in the land, such as commoners, could take action against

unlawful works. While this power was extended by the Act so that any person can take enforcement action it may be appropriate in some cases to draw the attention of some other body, such as the commons registration authority, to concerns about works and ask them to act in the public interest. The following bodies may be among the most likely to pursue, or bring pressure for, an action **but none is under a statutory obligation to do so.**

(i) Owners

Works undertaken on a common without the owner's consent are likely to be a trespass, regardless of whether section 38 consent is obtained. Owners may be in the best position to act against an infringement, as they can take action under the normal laws of trespass, as well as under section 41. They may choose not to, however, or they may themselves be responsible for carrying out the works.

(ii) Commons Registration Authorities

Commons Registration Authorities have long represented the public interest in ensuring that commons are properly protected, and will continue to do so with their role strengthened by the Act through the provision of a new level of certainty.

Authorities may have been reluctant to take action in the past because:

- they viewed such matters as too low a priority;
- a conflict of interest arose (e.g. where the development was promoted by the local authority, or there was a related planning application).

On the question of priority, it is right, in the Welsh Government's view, for commons registration authorities to continue to have discretion on whether and when to act, and to decide where their own local priorities lie.

If, for whatever reason, a commons registration authority is itself responsible for constructing unlawful works, or works that may be unlawful, the extension of the power to take action to any person under the Act provides a valuable safeguard.

(iii) Local Councillors

Lobbying local political representatives, urging them to take action and explaining what remedies are available, can be an effective way of promoting and resolving concerns.

(iv) Open Spaces Society

The Open Spaces Society has considerable experience in taking action against unlawful works. In its information sheet, the Society recommends setting up an action group to protect local commons.

(v) Commoners' Associations

There may be a commoners' association, representing the interests of those who exercise rights of common over the common, which may be willing to take action. A

commoners' association is most likely to be active where livestock are grazed on the common by local farmers.

(vi) Local Access Forums

Local Access Forums have a role in advising local authorities (including community councils) in their area on the best way to prioritise the use of their enforcement powers. The forum's objective should be to help safeguard and promote freedom of access over common land that may otherwise be significantly impeded by actions taken unlawfully on the land.

Forums are also encouraged to consider advising local authorities on the best way to prioritise their enforcement powers under:

Section 45, Commons Act 2006

Under section 45, any common without a known owner can be protected by the local authority, acting as if it were itself the owner. This means, for example, that the local authority may take steps (including court action) to remove trespassers and encroachments on the common.

Section 12, Inclosure Act 1857 and section 29, Commons Act 1876

These powers enable parish councils and parish meetings (or district councils where there is no parish) to prosecute those who are responsible for encroachments on or damage to town or village greens.

Note: For Wales the reference to parish, parish council etc, should be read as community, community council etc. and that for district council should be read as county (borough) council.

ACTION BY COMMONERS

What can commoners do to protect their rights?

Common Law

22. Under the common law, commoners are entitled to the peaceful enjoyment of their rights of common. Where the exercise of those rights is wholly excluded, for example by a hedge or fence, a commoner is entitled by law to 'abate' the works which prevent the exercise of those rights: for example, to pull down as much of the hedge or fence as necessary to enable him to exercise his rights. Abatement is not, however, recommended as an appropriate way of dealing with unlawful works on common land. In almost all circumstances where the rights of a commoner are interfered with, including where the exclusion of rights is only partial, an appropriate approach is likely to be negotiation with, as a last resort, application to the courts for an injunction or order.

Section 38

23. Where restricted works interfere with the exercise of rights of common, but no consent has been obtained for the works under section 38, then an action can be brought under section 41.

24. Where consent has been obtained to restricted works under section 38 it remains open to commoners to take an action against the works under section 30 of the Commons Act 1876 if they consider that their rights are being interfered with. The courts have not been asked to decide on such a case, however, given that the consent process takes account of the commoners' interests.

Section 30 of the Commons Act 1876

25. An action can be brought under section 30 against a nuisance that impedes the exercise of a commoners' rights (as well as against inclosures or encroachments). This may, therefore, give a slightly wider scope for a commoner to take action rather than against restricted works.

Suggested ways of requesting a remedy for suspected unlawful works

26. This guidance is intended to ensure that all persons with an interest in common land are fully aware of their responsibilities and powers with regard to it. This will help to inform them on what options are open to them when notified by someone, or it is suspected, that unlawful works have been carried out.

27. At the very least consideration should be given to writing to anyone suspected of carrying out unlawful works, explaining the legislative position to that person (suggested format of letter at **Annex A** although drafted from the point of view of a local authority, sets out the points that anyone could cover). Such action might arise from a suspicion seen, reported by another local person or organisation, or from investigations after a suspicion has been raised. As a preliminary step, it might be worth writing to the owners of the common to ascertain whether their consent has been given, to try to find out who carried out the works, and to establish whether or not the owner or any other person intends to take any action (see **Annex B**).

FURTHER INFORMATION

28. If you are considering taking enforcement action against works on common land that you consider to be unlawful, you may find it useful to obtain from the Open Spaces Society its information sheet, 'How to take action against unlawful encroachments and works on commons in Wales'. This can be downloaded for free from the Open Spaces Society's website.

Contact details for the Society are:

Open Spaces Society
25a Bell Street
HENLEY-ON-THAMES
Oxfordshire
RG9 2BA
Tel: 01491 573535

Fax: 01491 573051
Email: hq@oss.org.uk
Web: www.oss.org.uk

The Open Spaces Society campaigns to protect common land, open spaces and public rights of way in England and Wales and we seek its views on any applications for consent relating to common land.

Office of Public Sector Information
Commons Act 2006
<http://www.legislation.gov.uk/ukpga/2006/26/contents>

Citizens' Advice Bureau
<http://www.adviceguide.org.uk/index.htm>

Ministry of Justice
Alternative dispute resolution
<http://www.justice.gov.uk/guidance/mediation/index.htm>

HM Courts Service
www.hmcourts-service.gov.uk

Suspected Unlawful Works on [Name of] Common, [County], Registered Common Land Unit [Number]

It has come to our attention that unlawful works may have been carried out on [Name of] Common. The purpose of this letter is to inform you of the law relating to the construction of works on registered common land. If you are not the person responsible for these works, please say so on the attached form and return it to us in the reply paid envelope.

Under section 38 of the Commons Act 2006 (copy attached), consent is needed from the Welsh Ministers to construct any “restricted works” on registered common land, and other land to which the section applies.

“Restricted works” are any works which have the effect of preventing or impeding access to, or over, the land. They might include erecting fencing, constructing buildings and other structures, digging ditches and trenches, and building embankments. They also include laying a new sealed surface on the land, such as for a car park or access road.

Section 38 applies to all registered common land and certain other land (see section 38(5)).

Enforcement Power

Where works that need section 38 consent are carried out without it, section 41 of the Act enables any person, including local authorities, to apply to the county court for the situation to be put right. The court may make an order either to:

- (a) remove the works and restore the land to the condition it was in before the works were carried out, or
- (b) where consent has been given under section 38 but the works have not been carried out in accordance with its terms, specify how they are to be carried out.

Who decides whether works are unlawful?

Only a court can ultimately determine whether works have been constructed unlawfully. Anyone proposing to carry out works on a common must therefore make a judgement as to whether those proposals fall within the scope of “restricted works”. This is not a precise science, but the Planning Inspectorate Wales has produced guidance to help people in making this decision (see Common Land General Overview)

<http://www.planningportal.gov.uk/planning/countryside/commonland/guidance>

In our view, the works on [Name of] Common fall within the category of works that need consent. It is possible to make a retrospective application for consent. The forms for making an application can be obtained from the Planning Inspectorate Wales.

<http://www.planningportal.gov.uk/planning/countryside/commonland/forms>

If you are responsible for these works, we would therefore encourage you, without delay, either to:

- (i) remove the works and restore the land to its former condition, or
- (ii) make a retrospective section 38 application to the Planning Inspectorate Wales.

Please return the attached form in the pre-paid envelope to explain which course of action you are taking.

[If you do not return the form, or pursue either of these actions within the next 28 days, we will consider taking enforcement action through the courts.]

Please delete the option or options that do not apply

I confirm that:

- A. I am not the person responsible for the works on [name of common]
- B. I am the person responsible for the works on [name of common] [In my view, section 38 does not apply in respect of these works because: *[give explanation]*]

I confirm that, within 28 days, I will:

- (i) remove the works and restore the land to its former condition, or
- (ii) make a retrospective section 38 application to the Planning Inspectorate Wales.

Suspected Unlawful Works on [Name of] Common, [County], Registered Common Land Unit [Number]

It has come to our attention that unlawful works may have been carried out on [Name of] Common. We understand that you are the owner of the land and would be grateful for your confirmation on this.

If you are the owner, please let us know who constructed these works, whether or not your consent has been obtained for them, and whether or not you (or any other person you are aware of) intends to take action to have them removed.

If you are not the owner of this common, please say so on the attached form and return it to us in the reply paid envelope.

Under section 38 of the Commons Act 2006 (copy attached), consent is needed from the Welsh Ministers to construct any “restricted works” on registered common land, and other land to which the section applies.

“Restricted works” are any works which have the effect of preventing or impeding access to or over the land. They might include erecting fencing, constructing buildings and other structures, digging ditches and trenches, and building embankments. They also include laying a new sealed surface on the land, such as for a car park or access road.

Section 38 applies to all registered common land and certain other land (see Section 38(5)).

Enforcement Power

Where works that need section 38 consent are carried out without it, section 41 of the Act enables any person, including local authorities, to apply to the county court for the situation to be put right. The court may make an order either to:

- (a) remove the works and restore the land to the condition it was in before the works were carried out, or
- (b) where consent has been given under section 38 but the works have not been carried out in accordance with its terms, specify how they are to be carried out.

Who decides whether works are unlawful?

Only a court can ultimately determine whether works have been constructed unlawfully. Anyone proposing to carry out works on a common must therefore make a judgement as to whether those proposals fall within the scope of “restricted works”. This is not a precise science, but the Planning Inspectorate Wales has produced guidance to help people in making this decision (see Common Land General Overview)

<http://www.planningportal.gov.uk/planning/countryside/commonland/guidance>

In our view, the works on (Name of) Common fall within the category of works that need consent. It is possible to make a retrospective application for consent. The forms for making an application can be obtained from Planning Inspectorate Wales.

<http://www.planningportal.gov.uk/planning/countryside/commonland/forms>

To help us decide what action to take, we would greatly appreciate it if you could complete the attached form and return it in the enclosed stamped addressed envelope within the next 28 days, together with any further information you think might be helpful to us.

Please delete the option or options that do not apply

I confirm that:

- A. I [am] / [am not] the owner of [name of common]
- B. I [am] / [am not] the person responsible for the works on [name of] Common
- C. [The works were constructed by _____] [I do not know who constructed the works]
- D. My consent [was] [was not] obtained for the works
- E. I [am] [am not] intending to take action to have them removed.
- F. [I understand that _____ is intending to take action to have the works removed] [I am not aware of any other person intending to take action]
- G. In my view, section 38 does not apply in respect of these works because: [*give explanation*].