

## COMMONS ACT 2006

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### 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

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.

### ***Section 39 Consent: general***

192. *Subsections (1) and (2)* set out the criteria that the appropriate national authority must take into account when determining an application for consent for works. It must have regard to the interests of those with legal rights over the land, and to the interests of the neighbourhood and the public interest. The public interest is defined in the same terms as used elsewhere in the Act. The appropriate national authority must also have regard to any other matter it considers relevant. These criteria are not prescriptive as to which interest should take precedence.
193. *Subsection (3)* gives the appropriate national authority flexibility to consent to all or part of the proposed works, and if appropriate to propose modifications or impose conditions — in which case *subsection (5)* enables a person carrying out or proposing to carry out the works to apply (within such time limit as may be prescribed by regulations made under *subsection (6)*) for the conditions or modifications to be varied or revoked. *Subsection (4)* allows the appropriate national authority to take account of the cumulative effect of the proposed works, and of works already consented to, on the common land involved.
194. *Subsection (7)* enables the appropriate national authority to consider applications where the works have already been started, or have been completed.

### ***Section 40 Consent: procedure***

195. **Section 40** enables regulations to be made setting out the procedures for making and determining applications under sections 38 and 39(5). The illustrative list of potential subject matter for these regulations, at *subsection (2)*, includes scope for the appropriate national authority to appoint a third party to determine an application.

### ***Section 41 Enforcement***

196. Contravention of the controls on works in section 38 leaves the works open to civil enforcement action, as set out in section 41, but not to criminal prosecution. Under section 194 of the Law of Property Act 1925, only certain persons, such as the lord of the manor and local authorities, may seek an order of the court to enforce against a breach of the requirement for consent under that section. *Subsection (1)* enables any person (including local authorities) to apply to a county court for an order in respect of a breach of the requirement for consent to works under section 38.
197. *Subsection (2)* specifies the orders which a county court may make. Where no consent has been given by the appropriate national authority, the court may order the removal of works and restoration of the land to its previous condition. Where consent has been given but the works have not been carried out in accordance with its terms, the court may either order that the works should be modified to conform to the consent, or that the works be removed and the land restored to its previous condition.

### **Section 42 Schemes**

198. Some commons are subject to schemes of regulation and management under the Commons Act 1899 or the Metropolitan Commons Act 1866. Such schemes contain controls on works, but under current law it is unclear how the controls contained in the scheme and those in section 194 of the Law of Property Act 1925 work together. For example, it is often a grey area whether applicants should apply to the Secretary of State (or, in Wales, the National Assembly) for consent under the scheme or under section 194, and equally, it may be unclear whether works not provided for in the scheme, but which have the consent of the Secretary of State (or the National Assembly) under section 194, are lawful.
199. This section is intended to clarify the situation in relation to such commons. It has different effect in relation to three categories of works, described below:
- where the scheme does not provide for (or prohibits) certain works (so that no person could previously consent to the works being carried out), *subsection (3)* provides that the works may be carried out if consent is granted on an application under section 38, and if the works also have the consent of the owner of the common (unless the works are carried out by the owner himself);
  - where the scheme authorises certain works to be carried out with the consent of the appropriate national authority<sup>1</sup>, *subsection (5)* provides that the works may be carried out if consent is granted on an application under section 38, but consent may no longer be sought under scheme itself;
  - where the scheme authorises certain works to be carried out without consent, section 38(6)(c) provides that such works are exempt from the requirement for consent under that section.

The section also enables regulations to establish deemed consent where an owner has not objected to proposed works within a prescribed period.

### **Section 43 Power to exempt**

200. This section gives the appropriate national authority the power to make an order exempting certain works from the controls in section 38. Any exemption order made by the Secretary of State will, by virtue of section 59(4), be subject to the negative resolution procedure.
201. Under *subsection (1)*, an order may exempt a particular person in respect of specified works on land identified in the order. Alternatively, an order may exempt such a person, or a class of persons, in respect of works of a particular type on any land, or on any specified category of land. ‘Person’ includes a body such as a local authority. *Subsection (2)* provides that the appropriate national authority may issue an exemption for specific works only if it is satisfied that the exempted works are necessary or expedient for any of the purposes in *subsection (4)*, and *subsection (3)* provides that it may issue a generic exemption only if it is satisfied that the works are likely to be necessary or expedient for any of these purposes on any land, or on land of the type in question.
202. In addition, under *subsections (5) and (6)* an order may provide for an exemption in two cases where immediately before commencement, land was exempted from the operation of section 194 of the Law of Property Act 1925:

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<sup>1</sup> Schemes of management made under Part I of the Commons Act 1899 must be made substantially in accordance with a model scheme prescribed under that Act. The model scheme prescribed in the [Commons Regulations 1935 \(SI 1935/840\)](#) was the first to include a requirement for a minister’s consent to be obtained to carry out certain works on the common. It is expected that schemes made under the 1899 Act after that date will include provision to the same or similar effect.

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

- under subsection (3)(a) of that section, because the rights of common had been extinguished under any statutory provision<sup>2</sup>, or
  - by a resolution made by the local authority under subsection (3)(b) of that section, and confirmed by the Secretary of State (or the National Assembly for Wales, as the case may be).
203. An exemption for either purpose would ensure that common land to which the controls in section 194 had already been disapplied under subsection (3) of the 1925 Act, would not again become subject to the controls in section 38. *Subsection (7)* enables the appropriate national authority to provide in the order that any exemption will apply only to works carried out in accordance with the terms of the order.

***Section 44 and Schedule 4 Supplementary***

204. **Section 44** enables the appropriate national authority to amend, by order, local or personal Acts enacted before commencement, in order to ensure that any provision in those Acts about consent for works, or about enforcement against unlawful works on registered common land (or unregistered land that is subject to a scheme made under the Metropolitan Commons Act 1866 or the Commons Act 1899) is consistent with provision in Part 3. An order may also, for the same purpose, amend a provisional order confirmation Act made under the Commons Act 1876.
205. **Section 44** also introduces Schedule 4, which contains supplementary provisions about works on common land.
206. **Paragraph 1** of Schedule 4 amends section 5 of the Metropolitan Commons Act 1866 (which prevents inclosure of metropolitan commons), to restrict its scope to commons which are under the control and management of a London borough council. On these commons, the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 overrides the prohibition on inclosure for certain specified purposes. Article 7 of the Order contained in the Schedule to the 1967 Act enables a local authority to provide and maintain certain recreational facilities on any common under the control and management of that local authority. Article 12 provides that in exercising that power the local authority may not erect buildings or inclose any part of the common without the consent of the Minister. Article 17 provides that the local authority may utilise, alienate or exchange such common land for the purposes of street improvements with the consent of the Minister.
207. Sub-paragraphs (1) to (4) of paragraph 2 amend the Order to provide that the procedures and decision-making criteria in sections 39 and 40 should apply to applications for consent made under article 12 of the Order. Metropolitan commons which are not subject to the Order, being those not under the control and management of a local authority, and those outside Greater London<sup>3</sup>, will be subject to the regime under section 38 of the Act. Sub-paragraphs (5) and (6) clarify the circumstances in which article 17 of the Order will apply to proposed works, and apply the section 40 procedures to applications made under that article in respect of common land.
208. **Paragraphs 3, 4 and 5** provide for the procedures and decision-making criteria in sections 39 and 40, and the enforcement regime in section 41, to apply to applications for consent made in relation to common land belonging to the National Trust, and for sections 39 and 40 to apply in relation to land granted under the New Parishes Measure 1943.

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<sup>2</sup> See, for example, section 1 of the Defence Act 1854, which enables the Secretary of State for Defence to compulsorily acquire rights of common over common land acquired under the Defence Act 1842.

<sup>3</sup> Commons at Epsom, Banstead and Staines formerly lay within the Metropolitan Police District, but are not within Greater London (to which the 1967 Act applies). Those at Banstead and Staines are regulated by schemes of management made under the Metropolitan Commons Acts 1866–1898.

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209. [Paragraph 6](#) is a transitional provision providing the same scope for any person to apply to the county court under section 194(2) of the Law of Property Act 1925, whilst that provision remains in force, for enforcement action against unlawful works. This wider enforcement power will only be available in relation to works carried out on or after the date of introduction of the Commons Bill into the House of Lords (28 June 2005) and before section 194(2) is repealed. It is expected that the commencement order that gives effect in due course to the repeal of section 194 will preserve the scope for enforcement under the section against works undertaken unlawfully before its repeal.
210. The effect of paragraph 7 is addressed in the notes on section 38.