



EXPLANATORY NOTES

Commons Act 2006

Chapter 26

£9.00

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

COMMONS ACT 2006

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Commons Act 2006 which received Royal Assent on 19 July 2006. They have been prepared by the Department for Environment, Food and Rural Affairs (Defra) in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND AND SUMMARY

General background

3. There are around 572,000 hectares of common land in England and Wales¹. Commons were once much more extensive, and in mediaeval times covered most of the least productive lands. Even today, they range from the large hill commons of Wales and the north and south west of England, to the smaller lowland heaths typical of south east England.
4. Most common land is privately owned. Owners of commons (often the lord of the manor) enjoy largely the same rights as other landowners, except that common land is subject to ‘rights of common’ held by other individuals over the common, and to the special statutory controls that apply under commons legislation. Rights of common have their origin in local custom and include, for example, the right to graze stock, to enable pigs to forage on beechmast and acorns (pannage), to remove peat for the hearth (turbary), to fish (piscary) and to collect bracken or firewood (estovers). A glossary of these and other technical terms used in these explanatory notes may be found at annex A. The rights are enjoyed by specific commoners, usually by virtue of the rights being attached to the property they occupy, often adjoining a common. However, many rights of common ceased to be exercised during the twentieth century, owing (among other factors) to changing agricultural practices, increased motor traffic on roads across unfenced commons, and a decline in commoners’ reliance on self-sufficient sources of fuel, timber, animal bedding *etc.*
5. Many commons are still used for agriculture and serve the economic interest of farming communities. They are also valued for their landscape, wildlife and archaeological interests,

¹ Of which, around 550,000 hectares are registered under the Commons Registration Act 1965 (see below). Further facts and figures about common land are available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/facts.htm.

and for public enjoyment. Over half of common land in England has been designated as Sites of Special Scientific Interest ('SSSIs'). There is a public right of access to nearly all common land, either under the Countryside and Rights of Way Act 2000 or under earlier legislation.

Historical and legislative background

6. The Norman conquest of 1066 saw the introduction of the manorial system in which common land and rights of common have their probable origins. Typically, after the harvests had been gathered in each year from the cultivated land of the manor, the open field strips and hay meadows were made available for common grazing by the animals owned by all those who lived and worked on the manor: these were known as the common fields. In addition, there was usually poorer quality land within the manor which was not cultivated by the lord or his tenants, but might be available for grazing by livestock: this was the 'waste of the manor'. There was also common entitlement to other resources, such as coal, peat or brushwood for the hearth, turf for the roof, or fish for the table.

7. Many of these entitlements owed their existence to and were attached to the homes and land (if any) of the manorial tenants, so that the entitlement passed with the occupant of the tenancy. Such rights are described as being 'attached' to land (some other sources may refer to the rights being annexed, appurtenant or appendant to land: any distinction is now for most purposes immaterial). The land to which rights are attached is known as the 'dominant tenement' (the common over which the rights may be exercised is sometimes referred to as the 'servient tenement'). Some rights were either never attached to land, or became severed from the land to which they were attached, and are known as 'rights in gross': these rights may generally be freely bought or sold as incorporeal assets.

8. As time passed, rights of common became recognised and enforceable at law, and some of the earliest case law of England concerns commoners and their rights.

9. It was and remains a general principle of common law that the owners of the soil are entitled to any surplus of grazing on their common land (that is, where the available grazing exceeds that needed to satisfy the commoners' entitlements). Indeed, where there was a permanent excess of land beyond the grazing needs of the commoners' livestock, and other commoners' entitlements, the owner could 'inclose' or 'approve' it (and so remove rights of common from land): the right to do this was confirmed in the Statute of Merton 1235 — the first Commons Act².

10. During this period, some land in or close to communities became frequently used by the inhabitants of the community for the purposes of recreation, sports and fairs³. Where long-standing use could be shown to have occurred, the courts began to regard the use as customary, and the land was recognised in law as a town or village green with protection from interference.

² Repealed by the Statute Law Revision Act 1953.

³ Typically, such land was waste land of the manor. In some cases, rights of common continued to be exercised over the land concomitant with its use as a green, and provision was made under the Commons Registration Act 1965 for registration of a green as subject to rights of common.

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11. Increasing interest in better, more efficient and more profitable agricultural production during the eighteenth century encouraged landowners to improve the productivity of common land by inclosing it. Initially, this was achieved by agreement or more often by private Acts of Parliament, but general legislation, such as the Inclosure (Consolidation) Act 1801 and the Inclosure Act 1845, was eventually passed to facilitate inclosure and reduce the burden on Parliament.

12. But the emphasis changed in the latter half of the nineteenth century away from inclosure and towards the regulation of commons, in recognition of their value as open space and for recreation. The Metropolitan Commons Act 1866 and the Commons Act 1876 saw the first general legislative measures largely intended to protect and manage — rather than inclose — common land⁴. The Commons Act 1899 conferred new powers for the management of common land to be vested in local authorities. Further legislation in the Commons Act 1908 enabled commoners to apply collectively to the Minister for regulations (similar to byelaws) to be imposed to secure the more effective management of the common. But the regulations were limited in scope to restricting the turning out of entire (*i.e.* uncastrated) animals.

13. Reform of property law in the early twentieth century abolished the manorial system. To further safeguard common land, provisions were included in the Law of Property Act 1922 (subsequently consolidated in sections 193 and 194 of the Law of Property Act 1925). These provisions introduced a right of public access to certain commons (chiefly those in or close to urban areas, amounting to about one fifth of all common land), and a requirement for ministerial consent to works that prevent or impede access on all commons which remained subject to rights of common at that time.

14. The remainder of the twentieth century saw the pressure for access to common land grow but, following the Second World War, there was concern about a more insidious loss of common land and town or village greens through encroachment and abandonment of rights of common. Many commons had been ploughed up to increase agricultural production during the war, while others had fallen into disuse. The recreational needs of the public were also increasing. Growing motor traffic and demand for housing and other development were bringing different pressures to bear upon commons and greens. In 1955 a Royal Commission was established to enquire into whether any changes were needed in the law to promote and balance the needs of owners of land, commoners and the enjoyment of the public. The Royal Commission reported in 1958⁵, and recommended legislation to promote:

- registration of common land and town and village greens,
- public access, and
- improved management.

⁴ However, the last inclosure order, made under the Commons Act 1876, was not confirmed by Parliament until 1914, in relation to Elmstone Hardwicke (Cheltenham). An analysis of orders made under the 1876 Act can be found on the Defra website at: www.defra.gov.uk/wildlife-countryside/issues/common/manage/acts.htm

⁵ Command 462, 1957, HMSO.

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15. It was not until the Commons Registration Act 1965 ('the 1965 Act') that some of the recommendations of the Royal Commission were implemented, and then only to deliver short-term measures to ensure the registration of common land and greens.

16. The 1965 Act was intended to establish definitive registers of common land and town and village greens in England and Wales and to record details of rights of common. Commons registration authorities (generally county councils) were appointed to draw up the registers. Applications were invited between 2 January 1967 and 2 January 1970⁶ for the provisional registration of common land, greens, and rights of common, and registration authorities were also able to register land on their own initiative. The registers remained open for objection until 31 July 1972⁷. Disputed provisional registrations were referred to a Commons Commissioner (appointed under the 1965 Act) for determination, but unopposed provisional registrations became final automatically. The 1965 Act provided that, where land was eligible for registration under the Act (whether as common land or a town or village green), a failure to register it resulted in the land being deemed not to be common land or a green (as the case may be) after 31 July 1970⁸. Similarly, a failure to register rights of common which were eligible for registration caused the rights to cease to be exercisable⁹ after the same date.

17. In practice the task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, some land provisionally registered under the Act was wrongly struck out, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Furthermore, regulations made under the Act did not provide for sufficient notification of applications made for provisional registration of common land and rights of common, so that many provisional registrations became final without any objections and thus without independent appraisal of the claim made in the application. The Court of Appeal held that even where land had clearly been wrongly registered as common land, the Act provided no mechanism to enable such land to be removed from the register once the registration had become final¹⁰.

⁶ Commons Registration (Time Limits) Order 1966 (SI 1966/1470) (a later date of 31 July 1970 applied in relation to land registered on the initiative of the registration authority).

⁷ Article 4(2) of the Commons Registration (Objections and Maps) Regulations 1968 (SI 1968/989), as amended by the Commons Registration (Objections and Maps) (Amendment) Regulations 1970 (SI 1970/384).

⁸ Section 1(2) of the 1965 Act, as prescribed by the Commons Registration (Time Limits) Order 1966 (SI 1966/1470), as amended.

⁹ 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 *Corpus Christi College, Oxford v. Gloucestershire County Council* [1982] 3 All ER 995

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18. Moreover, although the 1965 Act made provision for amendments to be made to the registers consequent on events which occurred after 1970, there was no obligation on persons interested in any entry in the register to seek such an amendment. Many events which in principle affected entries in the registers have not been registered, and the registers have become significantly out-of-date since 1970.

19. The 1965 Act also explicitly postponed action on the Royal Commission's recommendations to improve management of common land and introduce public access in the wake of registration.

20. Several initiatives were promoted over the intervening period in support of further legislation. An inter-Departmental working party reported in 1977 with recommendations for reform to commons legislation¹¹. The (then) Countryside Commission set up the Common Land Forum which reported in 1986¹², reflecting a broad consensus between landowning, farming, nature conservation and recreational interests as the basis for legislation. Comprehensive legislation was later ruled out by the 1995 White Paper 'Rural England', and instead research was proposed to develop guidance for the management of common land (the conclusions of the research were subsequently published in 1998¹³). However, the Rural White Paper in 2000¹⁴ included a commitment to legislate on common land as soon as parliamentary time allowed. Part I of the Countryside and Rights of Way Act 2000 provided for a public right of access (on foot) to all registered common land, which was fully implemented across England and Wales by October 2005.

21. The Government published a consultation paper in February 2000¹⁵, to coincide with the introduction of the Countryside and Rights of Way Bill, on proposed reforms to legislation relating to common land and town and village greens. Two years later, building on responses to the consultation, the Common Land Policy Statement 2002¹⁶ set out in broad terms the Government's intentions for future legislation relating to common land and town and village greens. A Stakeholder Working Group was set up in 2002 to seek a consensus on more

¹¹ *Common Land: preparations for comprehensive legislation — report of an inter-departmental working party*, Department of the Environment (September 1978), unpublished.

¹² *Report of the Common Land Forum*, Countryside Commission (now the Countryside Agency), 1986, CCP215. Available on the internet at:
www.countryside.gov.uk/Publications/articles/Publication_tcm2-29827.asp.

¹³ *Good Practice Guide on Managing the Use of Common Land*, DETR, June 1998. Available from Defra: see www.defra.gov.uk/wildlife-countryside/issues/common/manage/guides.htm for how to obtain a copy.

¹⁴ *Rural White Paper*, Defra, November 2000. Available on the internet at:
www.defra.gov.uk/rural/ruralwp/.

¹⁵ *Greater Protection and Better Management of Common Land in England and Wales*. DETR, February 2000. Available on the internet at: www.defra.gov.uk/wildlife-countryside/consult/common/index.htm.

¹⁶ Defra, July 2002. Available on the internet at: www.defra.gov.uk/wildlife-countryside/issues/common/policy.htm.

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detailed proposals on agricultural use and management of common land¹⁷, on which there was further public consultation in 2003¹⁸.

22. The Commons Act gives effect to the recommendations set out in the Common Land Policy Statement with respect to the registration of common land and town or village greens, works and fencing on common land, and the agricultural use and management of common land (sections 2, 3 and 5 of the Policy Statement). It also makes more limited changes to the law with regard to town or village greens (section 4), principally in relation to the registration of greens, and the criteria for registering new greens.

TERRITORIAL EXTENT

23. The Act extends only to England and Wales. Common land in Scotland and Northern Ireland is of a different character and subject to different legislation.

TERRITORIAL APPLICATION: WALES

24. Generally, all Parts of the Act apply equally to Wales and England, but where powers are conferred on the ‘appropriate national authority’, those powers are exercisable by the Secretary of State in England, and the National Assembly in Wales (see the definition of ‘appropriate national authority’ in section 61(1)).

25. Where provisions of the Act relating to Wales are commenced by order, it falls to the National Assembly for Wales to commence them — see section 56(1).

OVERVIEW

26. The Act is arranged in five Parts:

- Registration
- Management
- Works
- Miscellaneous
- Supplementary and General.

¹⁷ The report and proceedings of the Stakeholder Working Group are available on the internet at: www.defra.gov.uk/wildlife-countryside/issues/common/manage/workgroup.htm.

¹⁸ *Consultation on agricultural use and management of common land*. Defra, August 2003. Available on the internet at: www.defra.gov.uk/corporate/consult/common-land/.

Part 1: Registration

27. Part 1 of the Act provides for commons registration authorities to continue to keep registers of common land and town or village greens ('the commons registers'), and to permit amendments to be made to the registers in accordance with the provisions in that Part. This replaces and improves the registration system under the 1965 Act, but using the same registers prepared under that Act.

28. In particular, Part 1 includes provisions for:

- the amendment of the registers upon the occurrence of registrable events, such as the disposition of rights of common, statutory dispositions of common land (*e.g.* under compulsory purchase legislation) and the creation of new town or village greens;
- the prohibition of the severance of a registered right of common from any land to which it is attached, subject to certain exceptions;
- the deregistration of common land and registration of other land as common land in exchange, subject to the consent of the appropriate national authority;
- the correction of errors in the registers by commons registration authorities;
- the establishment of electronic registers;
- transitional powers to rectify mistakes made in registers under the 1965 Act, and to register events which occurred while the 1965 Act was in force; and
- ensuring that only registered rights of common may be exercised over land to which Part 1 applies.

Part 2: Management

29. Part 2 enables the appropriate national authority to establish commons councils with functions related to the management of agricultural activities, vegetation and the exercise of rights of common on common land (or on town or village greens where rights of common exist over such land).

30. There has been a lack of effective mechanisms for managing agricultural activity, in particular grazing, on common land. This resulted in poor management of agricultural activity on many commons leading to deterioration of the resource base and, in some cases, to severe over-grazing and consequent damage to the soil and vegetation. This was exacerbated in the past by production subsidies under the Common Agricultural Policy, which increased over-grazing pressures. Over-grazing is undesirable from a nature conservation perspective, affecting the Government's ability to meet its international obligations (*e.g.* under the European Habitats Directive) and its national objectives (*e.g.* improving the condition of SSSIs).

31. Previously, the establishment of a body with powers to manage and regulate common land has required an Act of Parliament. In the late nineteenth and early twentieth centuries, a number of boards of conservators were established by provisional order confirmed by Acts

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made under the Commons Act 1876¹⁹ or by local Act²⁰. More recently, the Dartmoor Commoners' Council was established by the Dartmoor Commons Act 1985, and the Greenham and Crookham Common Commission by the Greenham and Crookham Commons Act 2002.

32. Part 2 of the Act will enable the appropriate national authority to establish commons councils without the requirement for primary legislation. By establishing commons councils, commoners, owners of common land and other interests will be able to work together to manage agricultural activities and the vegetation to meet the varied demands made on common land across the country. Commons councils will also be able to enter into agri-environment agreements — that is, government-funded schemes under which farmers sign long-term agreements to manage the land in particular ways in order to protect, enhance or restore biodiversity and particular features of the landscape, or to protect the environment (e.g. through decreased use of agricultural chemicals) in return for annual payments which help to offset the additional costs of changed farming practices. They will also be able to secure compliance with the conditions of such agreements through their rule-making function. This enables a commons council to make legally binding rules on all those using a common for agricultural purposes, which may be enforced through the courts where non-compliance occurs.

33. Part 2 also provides power for the appropriate national authority to modify or remove existing statutory schemes of management where they might conflict with functions given to a new commons council. This enables a commons council to be established where there are existing management bodies that no longer operate effectively, or where there are bodies that may wish to take advantage of the range of functions which can be given to councils.

Part 3: Works

34. Part 3 contains provision to prohibit the carrying out of works on certain common land without the consent of the appropriate national authority and makes provision about how consent may be obtained. It replaces section 194 of the Law of Property Act 1925, the main existing statutory control on works on common land (see paragraph 13), which is repealed.

35. The controls on works in section 194 apply to common land subject to rights of common on 1 January 1926. This gives rise to some considerable problems of application, since, as that date recedes into the past, it has become increasingly unclear whether the controls apply to particular common land. The problem is especially acute in relation to common land not subject to any rights of common at the date of registration, and in relation to town or village greens. Part 3 instead provides that the controls apply to all registered common land.

36. Certain enactments which make specific provision about works on particular classes of common land are amended to ensure consistency with the new regime.

¹⁹ For details of boards of conservators established under provisional orders, see the Defra website at: www.defra.gov.uk/wildlife-countryside/issues/common/manage/acts.htm

²⁰ For example, the Conservators of Wimbledon and Putney Commons established under the Wimbledon and Putney Commons Act 1871.

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Part 4: Miscellaneous

37. Part 4 contains provisions conferring powers of intervention on the appropriate national authority to deal with situations where unauthorised agricultural activities are taking place and damaging the common (for example, through over-grazing where grazing is occurring by those without rights of common or by those grazing more livestock than their rights allow), and no person is otherwise able to act to control it. The powers can be used to stop activities that are detrimental either those with rights in the common or to the public interest.

38. Part 4 also preserves powers to enable local authorities to step in to protect unclaimed common land and town or village greens from unlawful interference. And it includes amendments to the Commons Act 1899, which confers power on local authorities to make schemes for the regulation of commons.

Part 5: Supplementary and General

39. Part 5 contains powers to amend the application of other enactments to common land and town or village greens, and to amend local and personal enactments which confer functions on the Secretary of State or the National Assembly for Wales in relation to common land and greens.

40. It also contains Schedules of minor and consequential amendments and repeals, and general provisions about commencement, orders and regulations, Crown application, interpretation, the title of the Act and its extent.

COMMENTARY ON SECTIONS

PART 1: REGISTRATION

Introductory

Section 1 Registers of common land and greens

41. Section 1 requires commons registration authorities to continue to keep the commons registers first established under the 1965 Act.

Section 2 Purpose of registers

42. *Subsection (1)* explains that the purpose of the register of common land is to register land as common land and rights of common exercisable over such land. Similarly, *subsection (2)* applies the same principles in relation to the register of town or village greens. In practice, the form of the register of common land and the form of the register of town or village greens prepared under the 1965 Act were identical in all material respects.

Section 3 Content of registers

43. *Subsection (1)* provides that the land registered under section 2(1) is to be the same land as was registered as common land under the 1965 Act, together with any other land registered under Part 1 of the Act. In other words, the register of common land will contain all the entries that were previously registered in it under the 1965 Act, together with further entries that may be registered in the future in accordance with the new provisions in the Act. Similar principles are applied to land registered under section 2(2) in the register of town or village greens (*subsection (2)*).

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44. *Subsection (3)* provides that the rights of common registered are to be the same rights as were registered under the 1965 Act, together with any other rights registered under Part 1. *Subsection (4)* identifies the information about a right of common which must appear in the commons registers, and *subsection (5)* enables regulations to be made requiring or permitting other information to be included in the registers, including matters to be noted in the registers. For example, regulations made under the 1965 Act enabled applications to be made to the commons registration authority to note in the register a claim to certain private rights and interests in respect of registered land (such as easements and mineral rights), and enabled the commons registration authority itself to note the existence of certain matters affecting the public interest in common land (such as limitations on a right of public access imposed under section 193(1)(b) of the Law of Property Act 1925).

45. *Subsection (6)* states that neither land, nor any right of common, that has been registered is to be removed from the commons registers, except as provided by or under Part 1 of the Act or any other enactment. There is provision for land to be removed from the registers in section 16 (deregistration and exchange) and Schedule 2 (Non-registration or mistaken registration of land under the 1965 Act), for corrections to the registers under section 19 which may in certain circumstances result in land being removed from the registers, and power to make provision for land to be removed from the registers in consequence of some other statutory instrument by means of regulations under section 14 (statutory dispositions).

46. Under *subsection (7)*, rights of common registered or eligible for registration under Part 1 are not to be registered in the register of title to land kept by the Land Registry. The register of title is maintained under the Land Registration Act 2002, and the rules made under that Act. This provision does not affect the small number of rights of common which are believed to have been registered in the register of title before the commencement of the 1965 Act.

Section 4 Commons registration authorities

47. Section 4 provides for the continued appointment of certain local authorities as commons registration authorities for the purposes of Part 1. In England, commons registration authorities are county councils, district councils (in areas without a county council) and London borough councils. In Wales, the commons registration authority is the county or county borough council. There is no common land and there are no greens in the Isles of Scilly or in the City of London, and so the councils for these areas are not appointed as commons registration authorities.

48. *Subsection (3)* provides that commons registration authorities may agree between themselves for one to exercise the registration functions of the other in relation to land straddling their common boundary. It is intended that agreements already in existence for this purpose under section 2(2) of the 1965 Act will continue to have effect.

Section 5 Land to which Part 1 applies

49. Section 5 applies Part 1 to land in England and Wales, other than the land specified in *subsections (2) and (3)*. Those subsections reproduce the effect of exemptions set out in section 11 of the 1965 Act, with the exception of land exempted by orders made under that section. Consequently, none of the provisions in Part 1 apply to the New Forest, Epping Forest or the Forest of Dean, and these notes must be read in that light.

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50. The New Forest was excluded from registration under the 1965 Act because it has its own registers of rights of common drawn up under the New Forest Acts 1877–1970. Similar arrangements apply in relation to Epping Forest. Open land in the Forest of Dean is owned by the Crown, which asserts that the land is not subject to rights of common — *subsection (3)*, which repeats a similarly-worded provision in the 1965 Act, is therefore for the avoidance of doubt.

51. Certain other urban commons were exempted from registration by order under section 11 of the 1965 Act because they were already regulated under local Acts or schemes, rights of common were no longer being exercised, and the extent of the common land was already well-defined. Those commons are not excluded from the operation of Part 1, and may qualify for registration under paragraph 2 of Schedule 2. A list of such commons is set out in annex B.

Registration of rights of common

52. Sections 6 to 13 and Schedule 1 make provision about dispositions such as the creation, variation or surrender of rights of common. Sections 6, 7, 12 and 13 and paragraphs 1 and 3 of Schedule 1 include provisions that a registrable disposition of rights of common (*i.e.* a disposition requiring an entry in a commons register to be made or amended) shall operate at law only where the disposition complies with such requirements as to form and content as regulations may prescribe, and where the disposition is registered. It is intended under these provisions to make regulations requiring each type of registrable disposition of a right of common to be made in a prescribed form. There are further powers in section 24 to make regulations about applications to a commons registration authority under these sections, the determination of such applications, and the consequential amendments required to the register.

Section 6 Creation

53. It was not possible under the 1965 Act to register the creation of new rights of common over registered land. Section 6 makes it impossible, apart from by statute, to create a new right other than by express grant and then only if the newly created right is attached to land (*i.e.* there must be a dominant tenement in relation to such a right). It will not be possible to create new rights of common over an existing registered town or village green. The section therefore makes it impossible to create a right by reservation or prescription, or to create a new right in gross. The effect of creating a right of common over unregistered land will be to cause the land to become registrable as common land.

54. *Subsection (6)* provides that the creation of a new right of common consisting of a right to graze animals is not to be registered if in the opinion of the commons registration authority the land over which the right is exercisable would be unable to sustain the exercise of that right taken with any other rights exercisable over that land.

Section 7 Variation

55. *Subsection (1)* provides that a right of common is to be regarded as varied if it is altered as specified in paragraphs (a) to (c). A variation includes an alteration in the quantification of the right (for example, the number of animals that may be grazed by virtue of a right), as well as an alteration in respect of the land over which the right is exercisable so as to introduce new land in addition to or in substitution for all or part of the land over which it was formerly

exercisable. But *subsection (2)* provides that the right may be varied so as to become exercisable over new land only if that land is not already registered as a town or village green. *Subsection (5)* places a restriction on the power to vary a right of common consisting of the right to graze animals, similar to the restriction contained in section 6(6). A variation does not include a reduction in the land over which a right is exercisable (other than in the circumstances described in *subsection (1)(a)*) — it may be possible to effect such an alteration by means of surrender under section 13.

Section 8 Apportionment

56. Section 8 enables regulations to be made regarding the amendment of the commons registers where rights of common are to be apportioned. Apportionment occurs where land to which rights of common are attached (the dominant tenement) is divided into two or more parcels in separate ownership (*e.g.* where the owner sells only part of the land and retains the remainder). Generally, it is not intended that the apportionment of rights of common should be registered. Instead, rights will be shown as attached to the dominant tenement with which they were associated when an entry in respect of those rights was last made in the register. Subsequent changes to the dominant tenement will not be recorded (but see *subsection (5)* of section 9 for provision with regard to *pro rata* apportionment).

57. This is best illustrated by an example. Assume a common subject to rights to graze 100 sheep, where the register shows that the rights are divided equally between farms A and B, each dominant tenement having the right to graze 50 sheep attached to it. The owner of Farm A dies and the farm is divided equally between that owner's two children. Two new dominant tenements A1 and A2 come into being and the operation of Part 1 of the Act will ensure that to each is attached the right to graze 25 sheep. Farm B is sold to a developer who in turn sells it off in 50 plots of equal size, each with a house built on it. Each of those plots will have the right to graze one sheep. The register will show a common subject to two separate rights to graze sheep attached to the two 'historic' dominant tenements, A and B. The register would in each case identify the rights and identify the land to which they were attached. At the conclusion of the events described above, the owners of the new dominant tenements formerly comprised in farms A and B will be able to trace their entitlement to exercise their rights of common by reference to the historic dominant tenements subsisting in the register. For example, each owner of a house built on farm B will be able to show that they occupy 1/50th part of the area of the historic dominant tenement B, and (applying the rules of *pro rata* apportionment) therefore each has attached to it 1/50th of the rights recorded as attached to historic dominant tenement B. It will be possible to show that each owner is entitled to exercise the rights by virtue of the attachment of the rights to their house (the attachment will be shown in the commons register), and ownership of the house (which may be registered in the register of title to land kept by the Land Registry). The common law principle is that a right of common attached to land belongs to the owner for the time being of that land.

58. Any principle by which a right of common may be extinguished owing to the development of the dominant tenement so that it is incapable of benefiting from the right is abolished by section 13(3). In Defra's view, any fractional right which may arise in consequence of the rules of *pro rata* apportionment would be unexercisable, but (by virtue of section 13(3)) would not cease to exist.

59. However, where the rights attached to land which forms part of a historic dominant tenement are to be surrendered, varied or severed in accordance with the provisions in Part 1, it will be necessary to amend the register to record the previous apportionment of the rights. *Subsection (2)* enables regulations under *subsection (1)* to require the register to be amended in these circumstances.

60. *Subsection (3)* provides that, where the commons register has not been amended to reflect an apportionment of rights, the rights which arise as a result of that apportionment are to be treated as if they were separately registered. This provision is intended to ensure that each of the rights arising as a result of the apportionment is treated for the purposes of Part 1 of the Act as if it were registered, so that, for example, application may be made under section 12 to surrender and extinguish the right notwithstanding that the right is not itself reflected in an individual entry in the register at the time of the application.

Section 9 and Schedule 1: Severance

61. Section 9 effects a prohibition on the severance of rights of common. Before the passing of the 1965 Act, most rights of common were attached to the land farmed by the commoner (the dominant tenement). The reason was that, at common law, the numbers of animals which could be grazed on the common by the commoner was determined by the capacity of the dominant tenement to accommodate animals over the winter (known as rules of 'levancy and couchancy'). Typically the common was not grazed in winter and dates were established when animals were allowed on to the common and when they had to be removed. Livestock usually had to be over-wintered on commoners' own farms which imposed a natural ceiling on their grazing rights. Such rights, while not explicitly quantified, were thus subject to a theoretically measurable constraint. It was therefore not possible to trade in a right of common separately from the land owned by the commoner, as the right could not exist independently of the dominant tenement because it was defined by reference to the dominant tenement. The courts adopted a rule that any purported severance of unquantified rights from the holding to which they were attached would extinguish the rights.

62. Section 15 of the 1965 Act required that, for the purposes of registration, all commoners register the actual number of animals in respect of which they claimed rights of grazing. This meant that, once rights of grazing had been quantified and registered, the capacity of the commoner's own holding to over-winter stock ceased to be relevant. In *Bettison v. Langton*²¹, the House of Lords determined that a consequence of the quantification of grazing rights as required by section 15 of the 1965 Act was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached (or, alternatively, to sell the land and retain the rights). This is known as 'severance'. Rights which have been severed become 'rights held in gross' and may be freely bought and sold as an incorporeal asset.

63. The problem with grazing rights which have been severed is that the local link between the commoners and the land over which the grazing rights are exercised may be lost since the

²¹ *Bettison and another v. Langton and others* [2001] 1 AC 27.

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

owner of the rights can sell them to anyone, including farmers who live far away from the common. This can cause management difficulties for common land where some right holders have no close contact with the common and those who manage it.

64. Section 9 prohibits further severance of rights of common, subject to the exceptions specified in Schedule 1 or in any other Act²². Section 9, and therefore the exceptions in Schedule 1, apply only to registered rights of common which would otherwise (apart from section 9) be capable of being severed. They do not, therefore, apply to rights of common which remain unquantified (such as a right to gather firewood or to dig peat for the hearth), nor are they likely to apply to ‘appendant rights’ (which the courts have held not to be severable, regardless of whether the right is quantified).

65. *Subsections (3) and (4)* make provision about any disposition of rights of common attached to land or any disposition of land to which rights of common are attached by which rights are purported to be severed, so that the severance is of no effect. *Subsections (3) and (4)* only apply to dispositions made after the commencement of section 9. *Subsection (3)* provides that an instrument (such as a conveyance) which purports to effect the severance of a right of common from the dominant tenement, is to be void to the extent that it would effect severance. So where a conveyance provides that the rights attached to a dominant tenement are to be conveyed from X to Y (but X remains the owner of the dominant tenement), the conveyance will be void to the extent to which it conveys the rights, and the rights will remain attached to X’s dominant tenement. *Subsection (4)* also provides that a disposition of the dominant tenement by which the rights are purported to be reserved to the vendor has effect so that the rights are conveyed with the land, notwithstanding the terms of the conveyance.

66. *Subsection (5)* provides that the apportionment of rights of common must be *pro rata*. To the extent that any instrument purports to apportion otherwise than *pro rata*, it will be void. This means that, where a dominant tenement is divided into two or more parcels in separate ownership (for example, on a sale of a farm in two separate lots), the rights attached to the original dominant tenement are assigned proportionately to the separate parcels according to the area of each parcel relative to the area of the original dominant tenement. The reason for this is that non-*pro rata* apportionment is a form of severance. For example, a commoner might own land to which 100 rights to graze cattle are attached. That commoner sells half that land to X and half the land to Y, but purports to assign 75 of the rights as attached to X’s land and 25 as attached to Y’s land. In that case the instrument of sale will be void to the extent that it purports to convey more (or for that matter less) than half the rights of common with each of the two parcels of land.

67. *Subsection (6)* provides that this section does not affect rights of common which were permanently severed by an instrument made before, or pursuant to a contract in writing made before, 28 June 2005, the day following the date of introduction of the Commons Bill into Parliament, and *subsection (7)* specifies that the section is deemed to have come into force on

²² The only enactment known to permit severance in certain circumstances is contained in section 33 of the Greenham and Crookham Commons Act 2002.

*These notes refer to the Commons Act 2006 (c.26)
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that date. The purpose of this is to prevent commoners from severing rights of common after the date of introduction but before the Bill received Royal Assent. *Subsection (7)* also enables orders under paragraph 2 of Schedule 1 (which permits temporary severance by way of the letting or licensing of rights of common) to have effect from the same date. Such an order cannot be made until after Royal Assent, but a draft statutory instrument intended to have retrospective effect was published in draft soon after the date of introduction.

68. Schedule 1 sets out the exceptions to the prohibition on severance contained in section 9. Paragraph 1 contains a limited exception to the prohibition in relation to rights acquired by a commons council (established under Part 2), Natural England and the Countryside Council for Wales, provided that the transfer of the severed rights to any such body is duly registered in accordance with sub-paragraph (6) (see also the transitional provision in section 57). This exception will enable the continued acquisition of rights of common in furtherance of nature conservation. (Natural England is a new integrated agency created under the Natural Environment and Rural Communities Act 2006 which is expected to assume the functions of English Nature, part of the Countryside Agency and the Rural Development Service of Defra.)

69. Where rights are to be acquired by either Natural England or the Countryside Council for Wales, sub-paragraph (2) provides that notice must be given of its intention to the owner of the land and (where there is no commons council established under Part 2 of the Act) any voluntary commoners' association or other body representing the commoners in accordance with sub-paragraph (3). Sub-paragraph (4) provides that if a commons council has been established under Part 2, that council must consent to the acquisition of the rights.

70. The exception to the prohibition on severance in paragraph 2 permits the temporary severance of rights in accordance with an order made by the appropriate national authority or, where a commons council has been established in relation to a common, any rules which may have been made by the council. An order (or rules) may, for example, enable a commoner to lease or license rights of common for a maximum period specified in the order, so that the rights are severed from the land only for so long as the lease or licence endures. Sub-paragraph (2) explains that such an order (or rules) may relate to particular commons or particular classes of persons, and sub-paragraph (4) enables an order to prescribe the form or content of any instrument of letting or licensing. Rules made by a commons council about the leasing or licensing of attached rights of common are to take precedence over provision in an order (sub-paragraph (3)).

71. Paragraph 3 permits the permanent severance of rights in accordance with an order made by the appropriate national authority. Sub-paragraph (2) provides that an order may be made only in relation to particular land or descriptions of land (such as all commons within a defined locality), and may restrict the transfer of rights to particular persons or descriptions of persons (such as persons who are already entitled to exercise rights of common over the same common).

72. Sub-paragraph (3) provides that the appropriate national authority, before making an order under paragraph 3, must consult bodies representing owners and commoners affected by the order. For example, the appropriate national authority would need to consult any (voluntary) commoners' association, any statutory commons council, and any common owners' association.

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which received Royal Assent on 19 July 2006*

73. Sub-paragraph (4) enables an order under paragraph 3 to provide that, in any particular case, a right is not to be severed unless the owner of the common (over which the right is exercisable) has been notified, and has given his consent. However, sub-paragraph (5) enables the order to provide for notice and consent to be deemed to have been given in certain circumstances: for example, the order may provide that notice may be posted on the land if the owner cannot be identified, or that the consent of the owner may be deemed if he does not object to the proposed severance within a specified period. Sub-paragraph (6) enables the order to also provide that the consent of the owner may be deemed if consent is unreasonably withheld, and that the order may provide in what circumstances consent is to be regarded as unreasonably withheld and for the resolution of any dispute arising.

74. Where the right is transferred to a person who is already entitled to rights of common over the same land (or substantially the same land) as the right to be severed, by virtue of his ownership of a dominant tenement to which those rights of common are attached, the order may by virtue of sub-paragraph (8) require the transferee to apply for the severed right to be registered as attached to the same dominant tenement in order for the severance to be effective.

75. Section 9 and Schedule 1 must be read with section 57 which makes transitional provision in relation to the early commencement of section 9 and Schedule 1.

76. Part 1 of Schedule 6 repeals two provisions contained in local enactments which prohibit the severance of rights of common (section 8 of the Dartmoor Commons Act 1985 and section 33(1) of the Greenham and Crookham Commons Act 2002), and section 9 replaces those local provisions with a nationally consistent measure.

Section 10 Attachment

77. The existence of rights in gross can render the management of a common more difficult. At common law, it is impossible to convert a right in gross into an attached right. Section 10 enables rights of common held in gross to be attached to land. It is immaterial whether a right has previously been severed from a dominant tenement, or has always existed in gross. The right may be attached to a new dominant tenement on an application to the commons registration authority. An application for the attachment of a right of common to land must be made by the owner of the right, and the person entitled to occupy the land, if different, must consent to the application (*subsection (2)*).

Section 11 Re-allocation of attached rights

78. Section 11 enables a right of common attached to a dominant tenement to be concentrated on part of the dominant tenement where another part is to be developed for non-agricultural use. For example, suppose a commoner owns land (the dominant tenement) to which a right to graze 100 sheep is attached. If one tenth of the land is developed for a new road, the effect of the *pro rata* rules of apportionment (see paragraph 66 above) would be that a right to graze 10 sheep would attach to the owner of the road. The effect of a successful application under section 11 will be that the developed land will cease to have any rights attached to it, and the land which remains undeveloped will enjoy all of the rights which formerly attached to the whole of the dominant tenement.

79. The section provides that the owner of the dominant tenement to which rights are attached may apply to the commons registration authority to exclude part of the dominant tenement

from the register. An application may be made where the relevant part is not used for agricultural purposes, or has planning permission for non-agricultural use. An application may also be made where the land is subject to a compulsory purchase order which has been confirmed, but before the land is vested in the acquiring authority.

80. It will be possible for the appropriate national authority to make regulations under *subsection (5)* which provide what is and is not to be regarded as use of the land for agricultural purposes. It is expected, for example, that regulations will provide that land maintained in Good Agricultural and Environmental Condition in accordance with the cross-compliance conditions of the Single Payment Scheme²³ is to be regarded as in agricultural use, regardless of whether the land is actually in productive use.

81. It is intended that applications should be made under this section while the commoner remains in control of the entire dominant tenement. So, for example, he may apply after the grant of planning permission for development of part of the dominant tenement, but before he disposes of that land to a developer. However, regulations made under section 24(2)(n) could enable an amendment to be made to the register in consequence of an application under the new section even where the application land has ceased to be owned by the applicant since the date of the application.

Section 12 Transfer of rights in gross

82. Section 12 requires the transfer of any right of common held in gross (that is, a change in the ownership of a right which is not attached to any land) to comply with such requirements as to form and content as regulations may provide, and the transfer shall not operate at law until it has been registered.

Section 13 Surrender and extinguishment

83. At common law, a right of common could cease to exist by being surrendered by its owner (usually by a deed of release) or by being extinguished by operation of law. Section 13 requires the surrender of any right of common to be effected in a prescribed form, and delays the effect of the surrender until the right has been deleted from the commons registers. *Subsection (3)* provides that any other common law mechanism by which registered rights of common may cease to exist is abolished. These mechanisms are believed to comprise:

- Unity of ownership (or unity of seisin): where the common land and the right come into the same ownership (typically, where the dominant tenement to which a right is attached is acquired by the owner of the common), then the right is extinguished. The effect of *subsection (3)* is that rights acquired by the owner of the common will be exercisable by that person in the same way as the rights were exercisable by their former owner.

²³ The Single Payment Scheme is a simplified Common Agricultural Policy subsidy system which provides payments generally in proportion to the area of eligible land farmed by the claimant, who must undertake to maintain that land in accordance with the standards of Good Agricultural and Environmental Condition: see Council Regulation (EC) No. 1782/2003.

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- Abandonment: where the owner of the rights can be shown to have irrevocably turned away from the use of the rights.
- Implied release: where a collective release of rights can be inferred over part of the common, typically where that part is inclosed by encroachment and the commoners acquiesce in the loss.
- Alteration to the common, comprising destruction of the common land (such as where the land is reclaimed by the sea) or exhaustion of the product (such as peat which is subject to rights of turbary).
- Alteration to the dominant tenement, comprising the demolition (without replacement) of a building to which rights (particularly rights of turbary) are attached, or the conversion of land to which rights (such as grazing) are attached to a use incapable of benefiting from the right (such as a reservoir).

84. These mechanisms are considered to be either redundant or of doubtful relevance where the existence of common land, and rights of common, is recorded in statutory registers. The powers in section 13 will provide a mechanism to extinguish rights of common.

Registration, deregistration and exchange of land

Section 14 Statutory dispositions

85. Section 14 enables the appropriate national authority to make regulations to provide for amendment of the commons registers consequent on a disposition arising under statute. There are a number of statutes under which common land or greens may be acquired (generally compulsorily) and removed from the commons register, sometimes in exchange for other land being added to the register. Similarly, rights of common may be acquired and extinguished, sometimes becoming exercisable over land given in exchange. *Subsection (3)* sets out those instruments which are ‘relevant instruments’ for the purposes of *subsection (1)*, such as orders by which common land is acquired compulsorily, and (usually) other land is given in exchange, on a compulsory purchase under the Acquisition of Land Act 1981.

86. It is expected that regulations made under the powers conferred by *subsection (1)* will place a duty on the persons making or confirming a relevant instrument to notify the appropriate commons registration authority of, or direct it to make, amendments to the commons registers consequent on the disposition made by the relevant instrument. Regulations may also provide, under *subsection (2)*, that on an exchange of land, any land given in exchange is to be registered, and under *subsection (5)*, that the disposition is not to have effect until its effect is registered. For example, where common land is acquired under section 13 of the New Parishes Measure 1943²⁴ for building a church or similar purposes, regulations may provide that the land is not to cease to be common land until the land and any rights of common are removed from the commons register in accordance with notice

²⁴ Under section 15 of the Measure, common land may be acquired free of rights of common, subject to the consent of the Secretary of State. The provision applies only to the Church of England.

given by the Church Commissioners, notwithstanding the effect of section 15(1) of the Measure.

Section 15 Registration of greens

87. Section 15 sets out the circumstances in which land may be newly registered as a town or village green. It is derived from, but varies in certain respects from, the definition of a town or village green in section 22(1), (1A) and (1B) of the 1965 Act. (There is no substantive distinction in law between a ‘town’ and a ‘village’ green: these terms merely reflect the physical setting of a green.) *Subsection (1)* provides that in qualifying circumstances, any person may apply to the commons registration authority to register land as a green. *Subsections (2), (3) and (4)* set out the three alternative qualifying circumstances.

88. The first case (*subsection (2)*) is where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years, and continue to do so at the time of the application. ‘As of right’ has been defined in case law as meaning openly, without force, and without permission²⁵. The reference to “a locality” does not necessarily connote a defined area for administrative purposes, such as a parish, and the phrase “any neighbourhood within a locality” means in effect ‘any neighbourhood within one or more administrative areas’, in line with the judgment of the House of Lords in the *Trap Grounds* case²⁶.

89. The second case (*subsection (3)*) is where a significant number of such inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years which ceased after commencement of section 15, and the application is made within two years of this cessation.

90. The third case (*subsection (4)*) is where a significant number of such inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years which ceased before commencement of section 15, and the application is made within five years of this cessation. Land is not covered by this third case (because of *subsection (5)*) if three conditions are all met:

- planning permission was granted in respect of the land before 23 June 2006;
- before that date, construction works were commenced in accordance with the permission on that land, or on any other land covered by the permission; and
- the land either has become, or will become, permanently unusable by the public for lawful sports and pastimes as a result of works carried out in accordance with that planning permission.

²⁵ See the judgment of the House of Lords in *R v. Oxfordshire County Council and others, ex parte Sunningwell Parish Council* [2000] AC 335 per Lord Hoffman at paragraph 27.

²⁶ *Oxfordshire County Council v. Oxford City Council and another* [2006] UKHL 25.

91. *Subsections (6) and (7)* amplify how *subsections (2) to (4)* are to work. *Subsection (6)* provides that any period during which access to the land was prohibited by reason of any enactment is to be disregarded in the calculation of the 20 year period. *Subsection (7)* makes provision about when use is to be regarded as continuing for the purpose of subsection (2)(b).

92. *Subsection (8)* enables the owner of any land to apply voluntarily for its registration as a green, without having to show that there has first been 20 years' qualifying use of it by local inhabitants. *Subsection (9)* requires the consent to such an application of any 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land, thereby protecting these parties' interests in the land. Both of these terms are defined in *subsection (10)*.

Section 16 Deregistration and exchange: applications

93. Section 147 of the Inclosure Act 1845 provides for the 'exchange' of land. In recent years, the only use which has been made of this power has been to exchange common land or a town or village green for other land, so that the land given in exchange is substituted for the former common land or green. The Secretary of State (in Wales, the National Assembly) is required to confirm orders of exchange. In deciding whether to confirm the order, the Secretary of State must take account of the interests of the parties to the exchange. Sections 16 and 17 provide a replacement mechanism for the exchange of land which is registered under Part 1. Section 147 of the Inclosure Act 1845, and certain ancillary provisions in the Inclosure Acts 1847 and 1857, are repealed by Part 3 of Schedule 6.

94. *Subsection (1)* enables the owner of land registered as common land or a town or village green to apply to the appropriate national authority for the land or part of the land to be released from registration. If the 'release land' is more than 200 square metres in area, an application must be made at the same time to register 'replacement land' as common land or a green in its stead (*subsections (2) and (3)*). If the release land is smaller than 200 square metres, a proposal for replacement land may (but need not) be included (*subsection (4)*) — but the appropriate national authority must pay particular regard to the extent to which the omission of any proposal for replacement land is prejudicial to the interests specified in subsection (6)(a)–(c) (*subsection (7)*). Any replacement land may not be land already registered as common land or a green, and must be land to which Part 1 applies (see paragraph 49). Its owner must join in the application, if not also the owner of the release land (*subsection (5)*).

95. *Subsections (6) to (8)* set out the matters that the appropriate national authority must consider in deciding whether or not to consent to an application.

96. *Subsection (9)* ensures that an application under this section may be made only with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the release land and any replacement land.

Section 17 Deregistration and exchange: orders

97. *Subsection (1)* requires the appropriate national authority, if it grants an application under section 16, to make a 'release order' to direct the commons registration authority to remove the release land from the register. *Subsection (2)* requires, where appropriate, the registration of the replacement land and of any rights of common previously registered as exercisable over the release land, which are now exercisable over the replacement land.

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

98. *Subsection (3)* provides for a power to require a commons registration authority to take such other steps on receiving a release order as may be prescribed in regulations.

99. *Subsections (4) and (5)* provide for the extinguishment over the release land of rights of common and any rights exercisable by virtue of the land being a town or village green on its removal from the register. Such rights will generally transfer to the replacement land. Unlike an order under section 147 of the 1845 Act, an order under section 17 has no effect on the title (*i.e.* the ownership) of the release land or of any replacement land, nor on any easement or proprietary rights in the land (other than rights of common).

100. *Subsection (6)* provides that if any relevant provision applied to release land before the relevant date (defined in *subsection (9)* as the date on which the register is amended), it ceases to apply to the release land and applies instead to the replacement land. *Subsection (8)* lists the various enactments and measures which are relevant provisions for the purposes of *subsection (6)*. For example, where the release land is subject to a right of access under section 193 of the Law of Property Act 1925, and limitations (similar to byelaws) have been imposed on the right under that section, both the right and the limitations will cease to apply to the release land, and will normally transfer to the replacement land.

101. There may however be specific circumstances where it would not make sense for recreational rights that apply over an existing green, or specific statutory provisions that apply on an existing common, automatically to transfer to any replacement land. For this reason, *subsection (7)* enables an order to make special provision disapplying or varying these rights or provisions in relation to the replacement land.

102. An order may also vary the effect of any local or personal Act in relation to the release land, the replacement land, or both. For example, where the release land is subject to a local Act regulating the management of the release land and adjoining common land, and the replacement land would not otherwise be subject to that Act, the order may provide that the replacement land is to be deemed to be subject to the Act.

Conclusiveness and Correction of the Registers

Section 18 Conclusiveness

103. Section 10 of the 1965 Act provides that “the registration ... of any land as common land or as a town or village green, or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration”. Section 18 makes similar provision as to the extent to which information in the registers can be relied on. It is immaterial for the purposes of this section whether an entry in the register was made after commencement of the Act or under the 1965 Act — see *subsection (6)*.

104. Under *subsection (2)*, where land is registered as subject to a right, it is deemed to have become subject to the right on its registration if it would not otherwise have been so subject. It can therefore be assumed that, in law, the land is subject to the right. *Subsection (2)* does not in itself guarantee that the land continues to be subject to the right. But, given the preceding provisions of the Act, it is in most cases impossible for the situation to have changed, since the right cannot be extinguished by common law, and cannot be surrendered or varied without the surrender or variation being registered. One possible exception is an extinguishment or variation of the right by virtue of another enactment which may have effect before the necessary amendment is made to the register (for example, by a compulsory

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purchase order made under the Acquisition of Land Act 1981). But section 14(5) enables regulations to be made which cause the effect of such an enactment to be delayed until the register is amended.

105. *Subsection (3)* provides that, where the register shows that a right of common is attached to land, the right is deemed to be attached to that land upon registration. *Subsection (3)* does not in itself guarantee that the right continues to be attached to that land. But again, given the provisions of the Act, it is in most cases impossible for the situation to have changed, since the effect of *subsection (6)*, and the prohibition on severance contained in section 9, is generally that any right of common registered as attached to land²⁷ will continue to be attached to land. The exceptions are either that an application is made under paragraphs 1 or 3 of Schedule 1 to sever the right, or that an application is made during the transitional period (see Schedule 3 and the notes to that Schedule) for an amendment to the register to show that the right had been severed after the register entry was made but before the commencement of Schedule 3²⁸, and the commons registration authority is satisfied that the register should be amended to give effect to the severance. In either case, the severance of the right will then be registered.

106. *Subsection (4)* provides that, where the register shows that a person is the owner of a right of common in gross, that person is to be taken as the owner upon registration, even if he or she would not otherwise be the owner. Section 12 provides that a transfer of a right held in gross cannot be effective in law unless the transfer is registered under that section, thereby ensuring that the register remains an accurate record of ownership of such rights.

107. *Subsection (5)* preserves what is believed to be the present position under the 1965 Act, which is that, where a right of common is subject to any customary constraint not mentioned in the register (for example, that the rights may be exercised only at certain times of the year, that stock should be hefted in accordance with local custom, or that the times at which stock may be turned out are to be determined by a manorial or other ancient court²⁹), those constraints are preserved notwithstanding that they are not mentioned in the commons registers.

Section 19 Correction

108. Section 19 enables commons registration authorities to correct certain errors in the commons registers. *Subsection (4)* provides that a correction may be made on the authority's own initiative or on an application by any person. *Subsection (2)* sets out the purposes for which a correction may be made. These comprise:

²⁷ The rights section of the commons registers prepared under the 1965 Act is prescribed in Form 3 of Schedule 1 to the Commons Registration (General) Regulations 1966 (SI 1966/1471). Column 5 of the prescribed form provides for entries describing "Particulars of the land (if any) to which the right is attached".

²⁸ Subject to regulations made under paragraph 5 of Schedule 3.

²⁹ The jurisdiction of certain ancient courts to transact customary business was preserved by section 23 of the Administration of Justice Act 1977.

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- In paragraph (a), a mistake in making or amending an entry in the register (including, by virtue of *subsection (3)*, an ambiguous description of, for example, rights of common), but only where the mistake was made by the authority. Such a mistake may arise, for example, where an error was made by the authority in transposing onto the register map a map supplied by an applicant for provisional registration of common land, or where in amending an entry in the register (for example, on an apportionment under the 1965 Act), the authority erroneously added a zero to (or deleted a zero from) the number of rights registered. An error made in a map supplied by an applicant defining the area of common land, which was faithfully reproduced in the register entry, could not be corrected under this provision (but it may be possible to correct such an error under the provisions in Schedule 2).
- In paragraph (b), any other mistake, whether made by the authority or another person, provided that the amendment would not affect the extent of land registered as common land or as a town or village green, nor the quantification of any right of common. For example, a mistake may have been made by an applicant for registration of a right of common attached to land by which the dominant tenement was wrongly defined. The authority would be able to correct such a mistake.
- In paragraph (c), removing a duplicate entry in the register (whether caused by the error of the authority or another person). Duplicate entries typically arose where application was made for provisional registration of a right of common under the 1965 Act, both by the tenant of a farm entitled to exercise the right, and the landlord of the farm³⁰, and no objection was made to either registration, so that they both became final.
- In paragraph (d), updating any details of name or address, such as those which relate to the registered owner of a right held in gross.
- In paragraph (e), updating an entry in the register to take account of the common law principles of accretion and diluvion. The principles apply to all land where the boundary of ownership follows a body of water — whether river, lake or sea shore. They provide that, if by gradual and imperceptible accretions in the ordinary course of nature, land is added on one side, it falls into the ownership of the person owning the rest of the land on the same side, and the boundary line correspondingly advances, and (in the case of diluvion) *vice versa*. If one side of the body of water is also subject to rights of common, then the rights of the commoners will adjust along with the rights of the owners.

109. Corrections may be made to the registers for the purposes set out above, whether the error originates from a registration made under this Act or under the 1965 Act (*subsection (3)*). In some cases, an error may meet the criteria for correction both under this section and under Schedule 2.

110. *Subsection (5)* provides that the commons registration authority may not correct mistakes in the register if it would be unfair to do so. For example, if land had been acquired

³⁰ See regulation 7(1) of the Commons Registration (General) Regulations 1966 (SI 1966/1471).

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by a person reliant on an inspection of the register which showed it not to be registered common land, but the commons registration authority had mistakenly excluded that land from the register, it would not be able to correct the mistake if it would, in all the circumstances, be unfair to do so (having regard, for example, to the interests of the person acquiring the land, as well as the interests of others interested in correcting the error).

111. *Subsection (7)* provides a limited power, derived from section 14(a) of the 1965 Act, for the High Court to order the register to be amended where an entry, or any information in an entry, has been secured by fraud and it would be just to amend it. The High Court will also be able to judicially review the actions of a commons registration authority, but it is not necessary to include provision in the Act for this purpose.

Information etc

Section 20 Inspection

112. Section 20 provides for a right of public access to the commons registers, and to records held in connection with applications for registration under Part 1 or under the 1965 Act. Regulations may be made under *subsection (2)* which provide for exceptions to the right, or which place conditions on the exercise of the right, including, as under *subsection (3)*, the payment of fees.

Section 21 Official copies

113. Section 21 provides for the admissibility in evidence, and the issue, of official copies. There is no provision in section 21 or elsewhere in Part 1 for official searches of the register (for which purpose regulations were made under the 1965 Act): it is expected that instead, non-statutory provision will be made for searches in an amendment to form CON29 Part II published by the Law Society.

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

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common land by or under any other enactment³¹. 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”³². Consequently, land which is otherwise eligible for registration 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)).

³¹ 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. xlvii).

³² *Attorney General v. Hanmer* (1858) 2 LJ Ch 837. The effect of the *Hazeley Heath* case (see footnote 34) 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.

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

120. The Court of Appeal decided in 1978 in the *Box Hill* case³³ 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* case³⁴. 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 consent³⁵, 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.³⁶

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.

³³ *Box Parish Council v. Lacey* [1979] 1 All ER 113.

³⁴ *Hampshire County Council and others v. Milburn* [1990] 2 All ER 257.

³⁵ See the provision for decisions by consent in regulation 31 of the Commons Commissioners Regulations 1971 (SI 1971/1727).

³⁶ See the judgement of Lord Denning MR in the *Corpus Christi* case (footnote 10): “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 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.”

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

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 9).

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 1857³⁷ and section 29 of the Commons Act 1876³⁸) extends to such land³⁹. 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.

³⁷ Prevents damage and interruption to enjoyment of the green.

³⁸ Prevents encroachment or disturbance other than to improve enjoyment of the green.

³⁹ In the *Trap Grounds* case (see footnote 26), 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.

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

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 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 registration⁴⁰.

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

⁴⁰ 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.

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

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.

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:

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which received Royal Assent on 19 July 2006*

- 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 Act⁴¹) 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. 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.

⁴¹ See footnote 9.

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

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 period⁴².

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.

Supplementary

Section 24 Applications etc

149. Section 24 enables the appropriate national authority to make regulations regarding the making and determination of applications for the amendment of the registers under Part 1. Regulations may, among other things, make provision as to any of the matters set out in *subsections (2) to (3) and (5) to (8)*. In particular, subsection (2)(d) permits regulations to require a fee to be paid in connection with any application, and enables regulations to provide (if required) that the fee is to be determined by the person to whom the application is made. *Subsection (4)* makes clear that an application made under sections 6, 7, 10, 11, 12, 13 and 15, and paragraphs 1 and 3 of Schedule 1 (but not Schedule 2, for which separate provision is

⁴² See footnote 9.

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which received Royal Assent on 19 July 2006*

made in that Schedule) must be granted if properly made, subject to the relevant provisions. *Subsection (5)* enables regulations to provide for a person to be appointed to discharge any or all of the functions of the appropriate national authority in relation to an application under section 16.

150. *Subsection (8)* enables regulations to provide for the appropriate national authority to make appointments to a panel of persons who will be eligible to discharge the functions of a commons registration authority, and for a person to be selected from the panel in relation to any particular application or proposal. Such a person may be appointed to inquire into an application or proposal and make recommendations to the commons registration authority, leaving the authority to make the determination, or they may be appointed to determine the matter instead of the authority.

151. *Subsection (9)* permits regulations to enable the Church Commissioners to act with respect to land or rights vested in an ecclesiastical benefice of the Church of England (*i.e.* generally, parsonage land or rights belonging to the parsonage): this is because, where there is no incumbent appointed to a benefice, no person would be able to act on behalf of that benefice without special provision.

Section 25 Electronic registers

152. Section 25 enables the appropriate national authority to make regulations permitting or requiring commons registration authorities to maintain commons registers in an electronic form. *Subsection (1)* provides that the regulations may relate to part of a register: for example, regulations may provide only for maps contained in a register to be kept in an electronic form. *Subsection (3)* enables regulations to make provision as to the process of conversion of a register to an electronic form: regulations may require authorities to consult on a provisional version of the register, which will enable persons to comment in particular on the accuracy of the authority's digitisation of maps contained in the registers.

PART 2: MANAGEMENT

Commons councils

Section 26 Establishment

153. Section 26 provides a power for the appropriate national authority, by order, to establish commons councils in relation to land registered as common land. The power can also be exercised in relation to land registered as a town or village green where the land is subject to rights of common, although it is expected that the power is likely to be exercised where such land is contiguous with neighbouring registered common land. A commons council is a body corporate: that is, the council has its own corporate status apart from its members and officers.

Section 27 Procedure for establishment

154. Section 27 sets out the procedural requirements to be followed by the appropriate national authority when seeking to establish a commons council. *Subsection (2)* provides that the appropriate national authority must publish a draft of the proposed order under section 26 and invite representations on it, which must be taken into consideration in deciding whether to establish the council and, if so, whether to amend the draft order. The appropriate national

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which received Royal Assent on 19 July 2006*

authority may not make an order establishing a commons council unless it is satisfied, after having regard to any representations made to it, that there is substantial support for the making of the order.

155. *Subsection (3)* enables a local inquiry to be held if, for example, there is particular controversy over whether a council should be established and what form it should take.

156. *Subsection (5)* requires the appropriate national authority to have particular regard to representations made by those persons described in the subsection. When taking account of representations made by commoners, paragraph (b) requires the appropriate national authority to pay particular attention to those exercising their rights of common.

Status and constitution of commons councils

Section 28 Status

157. Section 28 contains provision about the status of commons councils. *Subsection (3)* provides that a commons council is not to be regarded as an authority to which section 28G of the Wildlife and Countryside Act 1981 applies. Section 28G bodies have a duty to further the conservation and enhancement of particular features of land by reason of which the land is designated as a Site of Special Scientific Interest (SSSI). Imposing such a duty on a commons council could discourage their establishment. However, *subsections (6) and (7)* of section 31 require commons councils to have regard to the public interest, including nature conservation, in discharging their functions. In addition, paragraph 3 of Schedule 5 amends the Wildlife and Countryside Act 1981 so that for the purposes of that Act a commons council falls within the definition of an occupier of land which is designated a SSSI.

158. As the functions of a commons council will include functions of a public nature, it is the opinion of Defra that a commons council will be a public authority within the meaning of section 6 of the Human Rights Act 1998, and will therefore be subject to the duty in section 6(1) of that Act not to act in a way which is incompatible with the rights conferred under the European Convention on Human Rights.

Section 29 Constitution

159. Section 29 requires the appropriate national authority to prescribe by regulations standard terms for use in the constitution of a commons council. The standard terms will apply to all commons councils (subject to subsections (3) and (4)). It is intended the terms will include provision about, for example, the terms for which council members are appointed, and financial reporting requirements.

160. Under *subsections (3) and (4)* the appropriate national authority may, in an order made under section 26, specify additional constitutional terms for a council and, if necessary, disapply any terms of the standard constitution, or replace them with alternatives more suited to local circumstances. This ensures that an order made under section 26 has the flexibility to take account of differences in local circumstances. It is expected that certain elements contained in the standard terms will vary between individual commons councils, for example, those relating to whose interests will be represented on the council and the frequency of meetings.

Section 30 Constitution: supplementary

161. Section 30 provides an illustrative list of matters which may appear in either the standard constitution or the order under section 26 establishing the council. *Subsections (2) to (6)* identify some of the terms which may be included in the constitution of a commons council, such as the procedures for the appointment of members and voting, and requirements for meetings and financial accounting.

162. Under *subsection (2)*, terms can determine both membership of the council and participation in the council by persons who are not members. A commons council will appoint or elect persons to be members of the council. The members will represent the different interests in the common or group of commons for which the council is established. The size and form of the membership will vary depending on the number or size of the commons covered by the council and the number and range of different interests represented. A small council for just one or two commons may have fewer than ten members to represent the different interests. A larger council comprising several commons with active and inactive graziers, landowners and sporting interests may require a membership body of twenty to thirty elected or appointed persons in order to represent all the interests in a fair and equitable manner. The appropriate national authority will consider what representation and voting arrangements would be appropriate for each commons council on a case-by-case basis, following representations from the commoners and other interested parties.

163. In many cases it is likely that the majority of persons with interests in a common will not be members of the council but will be eligible to participate to some degree in the council. In particular, they will appoint or elect persons to membership of the council to represent their interests, and be eligible to vote at general meetings of the council. The form and nature of participation will vary depending on local circumstances. The order establishing the council will identify which persons are entitled to appoint or elect members, and who is entitled to attend meetings of the council.

164. *Subsection (7)* ensures that a commons council may regulate its own proceedings, subject to anything in the standard constitution or the order establishing the council.

Functions of commons councils

Section 31 Functions

165. Section 31 sets out the functions that may be conferred on a commons council in an order made under section 26. *Subsection (1)* limits the functions to those which relate to the management of agricultural activities, the management of vegetation and the management of rights of common. *Subsection (2)* requires the appropriate national authority to confer only those functions which it considers appropriate for each council.

166. *Subsection (3)* contains an illustrative list of the sort of functions which may be conferred. It is envisaged that the principal function of a commons council will be to make rules relating to the agricultural use of the land, the management of the vegetation, and the management of rights of common. A council might make rules, for example, regarding the numbers of animals and the times when animals may be turned out on a common, the marking of animals grazing on the common, letting of rights of common, and requirements for managing animals while they are on the common (*e.g.* hefting requirements).

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

167. There is no requirement for a commons council to be given functions relating to all the matters referred to in *subsection (1)* or all the functions set out in *subsection (3)*. Equally, the list of functions in *subsection (3)* is not exhaustive and other functions may be conferred where appropriate. For example, on an upland common where agricultural activity is taking place, it may be appropriate to confer functions on the council relating to management of grazing which are wider in scope than the specific matters referred to in *subsection (3)*.

168. It is envisaged that an order establishing a commons council will normally either permit or, where appropriate, require it to prepare and maintain a register to record which commoners are exercising their rights of common. Similar registers of the exercise of grazing rights already operate on some commons and have been found to be useful in managing the numbers and movements of animals. For example, the Dartmoor Commons Act 1985 requires the maintenance of such a register by the Dartmoor Commoners' Council, with requirements for commoners to provide up-to-date information on a continuing basis.

169. A council might be given the function of making rules relating to the leasing and licensing of rights of common. This would permit the council to control the use of rights of common by persons other than the commoner entitled to the rights. For example, controls might be imposed where holders of common rights wish to lease out their rights to others on the common, or, if they are active graziers, to take on more rights for significant periods of time. Any local rules made by a council would take precedence over any regulations made under paragraph 2 of Schedule 1 to regulate the leasing or licensing of rights of common generally (see paragraph 70), but could not apply to any arrangements made by the owner of a common to lease or licence any part of the surplus grazing to a third party, since the owner's right to use the surplus grazing is not a right of common.

170. *Subsection (4)* enables a commons council to make rules which have the effect of limiting or imposing conditions on the exercise of rights of common or on the exercise of the rights of an owner to use the surplus of a common. The intention is that all those exercising rights, whether through rights of common or to the surplus, should be subject to the same rules. For example, a commons council might enter into an agri-environment agreement that might require a period where no grazing takes place on the common. In such a case all those grazing animals on the common would be required to remove them for the specified period.

171. *Subsection (6)* requires a commons council in discharging its functions to have regard to the public interest (as defined in *subsection (7)*), as well as to any guidance issued by the appropriate national authority.

Section 32 Ancillary powers

172. Section 32 gives a commons council ancillary powers to enable it to carry out its functions. *Subsection (2)* provides a non-exhaustive list of such powers, which include powers to enter into agreements and to raise money. The power to enter into agreements will enable commons councils to enter into funding arrangements such as agri-environment agreements which would be binding on all those using the common for agricultural purposes. A council will also be able to raise money by applying for funds from any other source, for example, Heritage Lottery funding or European Union funding programmes. Funding schemes and programmes change over time and these ancillary powers will allow a council to apply for funding from a wide range of sources to assist it in carrying out its functions.

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

173. *Subsection (3)* makes it clear that the power to raise money includes the power for a commons council to require the payment of fees in connection with participation in the council, for example, through payment of an annual subscription, and for the exercise of rights of common or rights to use the surplus of a common. It is expected that such fees will relate in most cases to the exercise of grazing rights.

Section 33 Consent

174. *Subsection (1)* makes it clear that where the consent of a person with an interest in the land is required for the commons council to do anything on the land for which it is established, nothing in Part 2 authorises a commons council to do anything on the land without that consent. For example, if commoners acting collectively would require the consent of the landowner to undertake works to improve the drainage on a common, then a commons council would also require the landowner's consent to undertake the same activity. However, by virtue of *subsections (2) and (3)*, a council does not need the consent of a person with a right of common before doing anything on the land, and it does not need consent for any activity which commoners could themselves undertake without consent.

175. *Subsections (4) to (6)* make provision about how a commons council can obtain consent, and includes provision that a failure on the part of the owner to respond in a timely manner to a notice served on him by the council, may be taken as the giving of his consent.

176. Where a person whose consent is required cannot be identified, *subsection (7)* enables a council to serve notice by posting a notice on the land, and again, where the owner fails to respond to such a notice in a timely manner, the council may take it that his consent has been given.

Section 34 Enforcement of rules

177. Section 34 sets out the consequences of not complying with rules made by a commons council. Rules made by a council will be similar in effect to bye-laws made by a local authority. Breach of a rule can constitute a criminal offence if the appropriate national authority has approved the rule and if the rule itself specifies that breach of the rule is to constitute an offence. A commons council has a discretion to decide whether breach of a particular rule will constitute a criminal offence. Breach of the rule renders the offender liable on summary conviction to a fine (or daily fine) as specified in *subsection (3)*.

178. Under *subsection (5)*, a commons council may apply to a county court for an order requiring any person to comply with any of its rules. This provides an alternative approach to enforcement of rules where it is likely that imposition of a fine is unlikely to have the desired effect. Under *subsection (6)*, a council may only apply to the county court to ensure compliance with a rule the breach of which constitutes a criminal offence if, in its opinion, proceedings against the person in the criminal court would not provide an effective remedy.

Section 35 Rules: supplementary

179. Section 35 makes further provision in relation to the making of rules by a commons council. *Subsection (2)* enables an order under section 26 establishing a commons council to make provision for the procedure to be adopted in the exercise of the power to make rules. It is expected that orders under section 26 which confer a power to make rules will require draft rules to be approved by the appropriate national authority before coming into force, and will also include requirements about the publication by commons councils of draft rules for

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consultation, publicising rules which have been made, and ensuring they are available for inspection.

180. The power given to the appropriate national authority in *subsection (3)* to revoke any rule made by a commons council is subject to *subsections (4) and (5)*, which require the appropriate national authority to give reasons for revoking a rule, and to consult with the commons council (and other persons as appropriate) before doing so.

Commons councils: supplementary

Section 36 Consequential provision

181. Section 36 addresses potential problems where the functions given to a council might overlap with those of some other body. One example might be a manorial court (*e.g.* a court leet) which still exists in relation to some commons. For example, if a council were to be established encompassing several commons and one of those commons was governed by a manorial court, the section enables the appropriate national authority to alter or abolish that court's jurisdiction in order to remove any conflict of functions. Similarly, an order might make provision for the abolition or curtailment of the functions of a board of conservators in relation to common land.

182. The power enables the appropriate national body to vary or revoke specific legislation, including any scheme or arrangement in or under a local or personal Act, which relates to the management or maintenance of common land or the exercise of rights over common land.

183. The fact that provision under this section is by order under section 26 means that the procedures in section 27 will apply (and so the appropriate national authority must be satisfied that there is substantial support for the making of the order).

184. *Subsection (3)* ensures that the powers in *subsection (2)(c) to (e)* may not be exercised where their exercise would have the effect of prohibiting or restricting any public right of access. For example, schemes of management under Part 1 of the Commons Act 1899 (see *subsection (2)(c)*) generally confer rights of access in accordance with the prescribed scheme, but an order in pursuance of section 36 could not revoke that part of the scheme relating to such rights.

Section 37 Variation and revocation of establishment orders

185. Section 37 describes the procedure to be followed where the appropriate national authority wishes to wind up a commons council because it is no longer operating effectively. *Subsection (1)* identifies three different situations which could lead to a commons council being wound up. *Subsection (2)* clarifies that a council may only be wound up through making an order under section 26. This requires the same procedure to be followed by the appropriate national authority as applies to establishing a council, to ensure that there is consultation with local interests and substantial support for the order to wind up a council. Such an order must also make provision for dealing with any liabilities and assets of the council, and provision for amending enactments that may have been amended previously as a result of the establishment of the council.

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

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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

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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 authority⁴³, *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

⁴³ 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.

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which received Royal Assent on 19 July 2006*

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:

- under subsection (3)(a) of that section, because the rights of common had been extinguished under any statutory provision⁴⁴, 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 disappplied 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

⁴⁴ 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.

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which received Royal Assent on 19 July 2006*

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 London⁴⁵, 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.

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.

PART 4: MISCELLANEOUS

Intervention powers

Section 45 Powers of local authorities over unclaimed land

211. Section 45 substantially re-enacts section 9 of the 1965 Act. It confers powers on a local authority (defined in *subsection (3)* to include a parish or community council) to protect land registered as common land or a town or village green where the land has no owner recorded in the register of title at the Land Registry, and the local authority cannot identify the owner of the land. In some cases these powers may be exercisable even though an owner is noted in the ownership section of the commons register, because the ownership section of the commons register is not usually updated when ownership of the land changes, and may be out of date.

212. *Subsection (2)* enables a local authority to take any steps to protect the land against unlawful interference that could be taken by the owner of the land, and to institute

⁴⁵ 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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which received Royal Assent on 19 July 2006*

proceedings for any offence committed by a person in respect of the land. The powers in section 45 are exercisable by National Park authorities by virtue of paragraph 1(2)(d) of Schedule 9 to the Environment Act 1995 (and consequential amendment is made to that provision by paragraph 6(a) of Schedule 5).

Section 46 Powers relating to unauthorised agricultural activities

213. Section 46 enables the appropriate national authority to stop unauthorised agricultural activities on registered common land or certain greens, which are detrimental to the interests of persons with rights over the land or those who own or occupy the land, or to the public interest (as defined in *subsection (9)*).

214. The power may be exercised in relation to any common land, or any town or village green where there are registered rights of common — even where a commons council exists, if that council is failing to prevent such activity from occurring. The intention is to enable the appropriate national authority to deal with problems where other persons who could have taken action (such as the owner or the commoners) have not done so. The power may be used, for example, where one or more persons has been grazing animals on the common without any right to do so, the owner or the commoners have failed to take action, and the public interest in the common is threatened (for example, by over-grazing leading to deterioration of nature conservation, or because animals unlawfully present on the common present a threat to lawful recreational activity).

215. *Subsection (2)* enables the appropriate national authority to serve a notice either on the person actually carrying out the unauthorised activity or on a person who has caused him to do so (for example, on a person who has hired a contractor). The notice may require that person to stop carrying out the activity, not to carry out any other unauthorised agricultural activities, and to provide any information requested.

216. *Subsections (3) to (5)* require that before using this power, the appropriate national authority must, where appropriate and practicable, notify certain persons with interests in the common of its intention to act.

217. *Subsection (6)* requires the appropriate national authority first to have regard to any court proceedings that have been initiated or proposed, and any actions a commons council might have taken to deal with the unauthorised activity, before deciding to exercise the power available to it under this section.

218. Where a person fails to comply with a notice served under *subsection (2)*, the appropriate national authority may apply to a county court for an order requiring the person to comply with the notice (*subsection (7)*).

Abolition of powers of approvement and inclosure

Section 47 Approvement

219. The Commons Act 1285 conferred statutory powers on landowners to inclose land surplus to the needs of commoners (a process known as approvement). This power is thought to be obsolete and *subsection (1)* repeals the Act. *Subsection (2)* abolishes any power of approvement at common law which may subsist alongside the 1285 Act.

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Section 48 Inclosure

220. Section 48 repeals various powers to inclose land. There are sufficient modern powers, including sections 16 and 17, to enable the inclosure of land to render these old provisions unnecessary. The provisions repealed in *subsection (2)* were formerly generally exercisable only with the consent of the Secretary of State or National Assembly for Wales under section 22 of, and Schedule 1 to, the Commons Act 1899 (and consequential amendment is made to Schedule 1 of that Act by Part 3 of Schedule 6).

Section 49 Notice of inclosure

221. Section 49 repeals section 31 of the Commons Act 1876 and amends section 3 of the Metropolitan Commons Act 1878, which require notice to be advertised of the improvement or inclosure of common land subject to rights of common. The repeal and amendment are consequential on sections 47 and 48.

Commons Act 1899

Section 50 Schemes under the Commons Act 1899

222. Part 1 of the Commons Act 1899 enables a district council⁴⁶ or a National Park authority⁴⁷ to make a scheme for the regulation and management of a common⁴⁸ in its area. A scheme must be made substantially in the form prescribed by the Secretary of State or National Assembly for Wales⁴⁹. A scheme, once made, vests the management of the common in the authority. Under section 2 of the 1899 Act, a draft scheme made in accordance with that section may be approved by the authority unless either the owner of the common or one-third in value of those having interests in the common object.

223. Section 50 amends Part I of the 1899 Act so as to update and broaden the purpose for which a scheme may be made (*subsection (2)*), to confer additional powers in prescribing model schemes (*subsections (4) and (5)*), to enable regulations to clarify the circumstances in which a scheme may be amended or revoked (*subsection (6)*), and to update the power conferred on the authority to make byelaws in relation to a scheme (*subsection (7)*).

Vehicular access

Section 51 Vehicular access

224. Section 51 repeals section 68 of the Countryside and Rights of Way Act 2000. Section 68 was enacted to deal with a problem that had arisen as a result of the judgment of the Court of Appeal in *Hanning v. Top Deck Travel*⁵⁰, affecting householders who access

⁴⁶ A district council includes in England, a unitary authority; and in Wales, it includes a county or county borough council, see section 17 of the Local Government (Wales) Act 1994.

⁴⁷ See paragraph 1 of Schedule 9 to the Environment Act 1995.

⁴⁸ Including any town or village green (see section 15 of the 1899 Act).

⁴⁹ For the current prescribed schemes, see the Commons (Schemes) Regulations 1982 (SI 1982/209) and the Commons (Schemes) (Welsh Forms) Regulations 1982 (SI 1982/667).

⁵⁰ [1993] 68 P & CR 14.

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which received Royal Assent on 19 July 2006*

their homes by vehicle over typically unenclosed land such as commons or greens. In Defra's view section 68, and the regulations made under that section⁵¹, have now become redundant following the judgment of the House of Lords in *Bakewell Management Ltd v. Brandwood*⁵².

PART 5: SUPPLEMENTARY AND GENERAL

Amendments and repeals

Section 52 Minor and consequential amendments

225. Section 52 gives effect to the minor and consequential amendments set out in Schedule 5. These change specific existing references to the 1965 Act, or expressions defined in that Act, contained in other enactments so that they relate correctly to the position once the Act comes into force and the 1965 Act is repealed.

226. In paragraph 7 of Schedule 5, sub-paragraphs (2) and (3) repeal section 1(3)(b) and 1(4) of the Countryside and Rights of Way Act 2000. Part I of that Act confers public rights of access to land shown on a conclusive map as registered common land. Section 1(3)(b) and 1(4) ensure that in some cases where land is removed from a register of common land, the statutory public rights of access over that land would nevertheless continue. Given the circumstances in which land may be deregistered under the Act (see section 16) this provision is no longer thought to be necessary.

Section 53 Repeals

227. Section 53 gives effect to the repeals set out in Schedule 6. Many of the provisions repealed by Schedule 6 have become obsolete because of the provisions in this Act.

228. Section 46(1) of the Countryside and Rights of Way Act 2000, which is repealed by Part 1 of the Schedule, included a provision repealing section 193(2) of the Law of Property Act 1925, which confers power on an owner of common land to establish a public right of access to that land by a deed of dedication. That provision (and therefore the repeal) has already been brought into force in Wales, but not in England. The repeal of section 46(1) of the 2000 Act does not revive the effect of section 193(2) of the 1925 Act in Wales, so section 193(2) will therefore remain in force in England only.

229. Part 2 of Schedule 6 repeals section 21 of the Commons Act 1899 and section 21 of the Metropolitan Commons Act 1866. The effect is to abolish the duty on the Secretary of State to include in an annual report to Parliament a statement of proceedings under Part 1 of the 1899 Act and under the Metropolitan Commons Acts 1866 to 1898. This duty is now

⁵¹ The Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002/1711), and The Vehicular Access Across Common and Other Land (Wales) Regulations 2004 (SI 2004/248).

⁵² [2004] 2 AC 519.

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which received Royal Assent on 19 July 2006*

obsolete as the Secretary of State no longer has any involvement in proceedings under the 1899 Act, and no scheme has been made under the Metropolitan Commons Acts since 1909.

230. The repeal of part of section 30 of the Commons Act 1876 abolishes certain procedural requirements in relation to applications to the county court for orders to deal with unlawful inclosures and encroachments on common land. These matters are now dealt with in rules of court.

Section 54 Power to amend enactments relating to common land or greens

231. Section 54 enables the appropriate national authority to amend by order public Acts enacted before the Commons Act for the purposes of modifying their application to common land or town or village greens. In particular, an order may provide that an Act is no longer to apply to certain types of land, and is instead to apply to other land defined in the order. By way of illustration, some Acts are expressed to apply to any ‘common land’ (for example, section 82(4) of the Highways Act 1980 enables a highway authority to construct cattle-grids on “common or waste land...adjoining the highway”). An order might provide that the Act is instead to apply to registered common land, together with land excluded from registration under section 11 of the 1965 Act. The power may not be used to amend a local or personal Act. The section must be read with section 59(3), which provides that the Secretary of State may not make an order under section 54 unless a draft has been laid before and approved by a resolution of each House of Parliament.

Section 55 Power to amend enactments conferring functions on national authorities

232. This section confers a power to amend local or personal Acts, and provisional order confirmation Acts, where they confer functions on the ‘national authority’ in relation to common land, or require consultation of, or the consent of, the national authority in respect of activities relating to common land. The ‘national authority’ is the Secretary of State in relation to England, and the National Assembly for Wales in relation to Wales. Sometimes these functions or requirements prove an unnecessary burden on the national authority. Section 55 enables such Acts to be amended so that a function can be removed or transferred to another person, and a requirement for the consultation or consent of the national authority can be repealed or converted into a requirement for the consultation or consent of some other person. An order under this section will be subject to the affirmative resolution procedure (section 59(3)).

Commencement and transitional provision

Section 56 Commencement

233. Section 56 governs commencement of the various elements of the Act.

Section 57 Severance: transitional

234. Section 57 makes transitional provision in relation to the commencement of section 9 (severance) and Schedule 1 from 28 June 2005. This is because section 9 will have retrospective effect before other provisions in the Act are brought into force. In particular, it provides that the commons registers, which are otherwise defined in section 61(2), are taken to be the registers kept under the 1965 Act until section 1 is brought into force; and that a right of common severed and transferred to a commons council, Natural England or the Countryside Council for Wales under paragraph 1 of Schedule 1 is also not required to be registered in accordance with paragraph 1(6) until section 1 is brought into force.

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COMMENCEMENT DATE

235. Sections 1-8 and 10-53 of, and Schedules 2-6 to, the Act are to be brought into force by order made by the Secretary of State in relation to England, or by the National Assembly for Wales in relation to Wales. Sections 54 and 55 will commence automatically two months after the Act is passed, so that the powers conferred by those sections will be exercisable after that date. Sections 9 and 57 and Schedule 1 (severance) are deemed to have come into force on 28 June 2005. The remaining provisions of the Act come into force on Royal Assent.

236. Provisions which are to be commenced by order may, by virtue of section 59(1)(b), be commenced at different times for different areas. In England, the requirements to update and improve the commons registers are expected to be phased in, so that not all local authorities will be required to update and improve their registers at the same time.

HANSARD REFERENCES

237. The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament:

| <u>Stage</u> | <u>Date</u> | <u>Hansard Reference</u> |
|---|--------------------------------|------------------------------|
| <i>House of Lords</i> | | |
| Introduction | 27 June 2005 | Vol. 673 Col 12 |
| Second Reading | 20 July 2005 | Vol. 673 Col 1487 |
| Grand Committee | 25 October 2005 | Vol. 674 Col GC 265 |
| | 1 November 2005 | Vol. 675 Col GC 1 |
| | 2 November 2005 | Vol. 675 Col GC 67 |
| | 9 November 2005 | Vol. 675 Col GC 181 |
| | 14 November 2005 | Vol. 675 Col GC 241 |
| Report | 28 November 2005 | Vol. 676 Col 9 |
| | 30 November 2005 | Vol. 676 Col 233 |
| Third Reading | 18 January 2006 | Vol. 677 Col 666 |
| Lords consideration of Commons amendments | 17 July 2006 | Vol. 684 Col 1003 |
| <i>House of Commons</i> | | |
| Brought from the Lords | 19 January 2006 | |
| Second Reading | 18 April 2006 | Vol. 445 Col 39 |
| Standing Committee | 25 April 2006 (first sitting) | Standing Committee D, Col 3 |
| | 25 April 2006 (second sitting) | Standing Committee D, Col 45 |

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

| | | |
|---------------|--------------------------------|-------------------------------|
| | 27 April 2006 (third sitting) | Standing Committee D, Col 91 |
| | 27 April 2006 (fourth sitting) | Standing Committee D, Col 115 |
| Report | 29 June 2006 | Vol. 448 Col 412 |
| Third Reading | 29 June 2006 | Vol. 448 Col 480 |

Royal Assent – 19 July 2006

House of Lords Hansard Vol. 684 Col 1277

House of Commons Hansard Vol. 449 Col 364

ANNEX A

GLOSSARY OF TERMS

The 1965 Act: the Commons Registration Act 1965, which (generally) required common land, town or village greens, and rights of common over such land, to be registered by commons registration authorities.

Appropriate national authority: the Secretary of State (in relation to England) or the National Assembly for Wales (in relation to Wales).

Approvement: the right of an owner to inclose any part of the common which is not required to meet the needs of the commoners.

Attachment (of rights): Rights of common are sometimes described as being ‘attached’ to land. The land to which they are attached is known as the ‘dominant tenement’ (the common over which the rights may be exercised is sometimes referred to as the ‘servient tenement’). Such rights belong to (and may be exercised by) the owner of the dominant tenement. Historically, rights which are attached to land were known as either ‘appurtenant’ or ‘appendant’ to land, but the distinction is for most purposes obsolete. Rights which are not attached to land are ‘in gross’ (*q.v.*).

Common land: In general terms, common land is land owned by one person over which another person is entitled to exercise rights of common (such as grazing his animals), and these rights are generally exercisable in common with others. However, in legal terms, the situation is inevitably more complex. There is no single definition of the term ‘common land’, or indeed of ‘common’ or ‘common rights’. The 1965 Act introduced a statutory definition of ‘common land’, but this is strictly relevant only for the purpose of deciding whether land was or was not eligible for registration under that Act. The 1965 Act stated that common land was “land subject to rights of common (as defined in that Act) whether those rights are exercisable at all times or only during limited periods; and waste land of a manor not subject to rights of common”. Definitions of ‘common’ can also be found in various nineteenth century Acts of Parliament, such as section 3 of the Metropolitan Commons Act 1866, section 37 of the Commons Act 1876, and section 15 of the Commons Act 1899, but each of these was drawn up with a particular purpose in mind, and the definitions must be treated with caution when applied in a different context.

Commoners: persons with the benefit of a right of common, because they own land to which a right of common is attached, because they are the owner of a right of common held in gross, or because they have acquired entitlement to such rights through a lease or letting.

Commons Commissioners: solicitors or barristers appointed under the 1965 Act to determine disputed provisional registrations of common land, town or village greens and rights of common registered under section 4, and to determine (for the purposes of the 1965 Act) the ownership of common land and greens registered under section 4 where the ownership of the land was disputed or unclaimed. A small number of such registrations remain outstanding at the date of Royal Assent.

Dominant tenement: the land to which rights of common may be attached (*q.v.*). The owner of the dominant tenement is the commoner and is entitled to exercise the rights.

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Estovers (right of): to cut wood, gorse or furze for domestic fuel. Also to collect bracken and other plants for use as animal bedding, or to collect (or sometimes lop) wood for use in repairing fences *etc.*

Inclosure (inclosure): the act of removing rights of common from land. In the case of land registered as common land, the removal of rights of common from the land will not cause the land to cease to be registered common land.

In gross: a right which is held personally and is not attached (*q.v.*) to land.

Pannage/Mast (right of): to graze pigs on beech mast or acorns, generally in the autumn. Pannage is an ancient practice to fatten pigs before slaughter and salting for the winter. It can also be useful to others — the pigs turned out eat green acorns and beech mast that are poisonous to cattle and ponies.

Pasture (right of): to graze, generally cattle, sheep, goats or horses.

Piscary (right of): to fish. Rights of piscary are invariably for domestic rather than commercial profit.

Prescription: the acquisition of a right to use land or take the produce of land by reason of long use. Prescription may be attributed to the common law, the Prescription Act 1832, or lost modern grant.

Provisional order confirmation Act: an Act which confirms a provisional order, which is generally submitted to Parliament for confirmation after scrutiny by a Government department. The powers to prepare a provisional order, and the procedure for its scrutiny by the relevant department, are contained in specific enabling legislation. A Bill confirming a provisional order is usually subject to a shorter Parliamentary process than Bills in general. In relation to common land, the Commons Act 1876 enabled orders to be submitted to Parliament by the Inclosure Commissioners for the regulation or inclosure of common land. It is believed that 36 orders for regulation and 27 orders for inclosure were confirmed by Parliament⁵³ (some orders provide for both regulation and inclosure, and are therefore double counted).

Register of title: the register held by the Land Registry (and under the custody of the Chief Land Registrar), which shows the proprietorship of land. Generally, an entry in the register as to the owner of land is guaranteed by the Land Registry. Provision as to the register of title is contained in the Land Registration Act 2002, and the rules made under that Act.

Right of common: a right usually shared with an owner of land to take certain produce of the land. There are many such rights of which pasturage (the right to put animals onto the land to graze) is the most important today. Other rights include pannage (right to put pigs onto the land to eat acorns and beechmast), turbary (the right to cut peat or turf for fuel), estovers (the right to take wood or bracken for fuel, animal bedding and so on) and piscary (the right to fish). Most rights are attached (*q.v.*) to land but see 'in gross'.

⁵³ See footnote 19.

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

Soil (right of common in the): to take sand, gravel, stone and minerals. For example, marl is a lime-rich clay used to fertilise land; it was also used for building. The right was to dig marl from common pits. It is not now exercised: modern fertilisers have made the practice unnecessary and exercise of the right generally died out in the last century.

Turbary (right of): to cut turf or peat for fuel. The turf must be burned in the hearth of the dwelling to which the right is attached (not sold for profit).

Waste land of the manor: In the case of *Attorney General v. Hammer*⁵⁴, waste land of the manor was defined as “the open, uncultivated and unoccupied lands parcel of the manor...other than the demesne lands of the manor”. ‘Of the manor’ was held by the court in the *Hazeley Heath* case⁵⁵ to mean land which is or was formerly connected to the manor.

⁵⁴ See footnote 32

⁵⁵ See footnote 34

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

ANNEX B

COMMONS EXEMPTED UNDER SECTION 11(1) OF THE COMMONS REGISTRATION ACT 1965

| Name | Area (ha) |
|---|----------------|
| West End Road Recreation Ground (Southampton) | 0.6 |
| Cassiobury Common (Watford) | 0.7 |
| Victoria Gardens (Portland) | 1.7 |
| Cippenham Village Green Common (Slough) | 3.9 |
| Otterbourne Hill Common (Hampshire) | 8.5 |
| The Links Common (Whitley Bay) | 13.4 |
| Shenfield Common (Brentwood) | 13.4 |
| Thorpe Green (Egham) | 14.6 |
| West Wickham Common, Spring Park (Bromley) | 31.2 |
| Downside Common, Old Common, Little Heath Common, Upper and Lower Tilt Commons, Brooks Hill Common, Leigh Hill Common (Esher) | 35.8 |
| Ley Hill Common, Coleshill Common, Austenwood Common, Gold Hill Common, Hyde Heath (Amersham) | 67.0 |
| The Stray (Harrogate) | 87.0 |
| Oxshott Heath (Esher) | 92.3 |
| Whitley Common, Hearsall Common, Keresley Common, Stoke Commons, Top Green, Greyfriars Green (Coventry) | 144.5 |
| Kenley Common, Coulsdon Common, Farthing Downs Common, Riddlesdown Common (Croydon) | 161.5 |
| Micklegate Stray (York) | 170.0 |
| Mitcham Common (Merton) | 174.0 |
| Total | 1,019.9 |

Source: *Gadsden, G D, The Law of Commons, 1988*

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

ANNEX C

SECTION 11 OF THE INCLOSURE ACT 1845 (AS AMENDED) [SEE PARAGRAPH 131]

Descriptions of land subject to be inclosed under this Act

XI. ...all such Lands as are herein-after mentioned, (that is to say,) all Lands subject to any Rights of Common whatsoever, and whether such Rights may be exercised or enjoyed at all Times, or may be exercised or enjoyed only during limited Times, Seasons, or Periods, or be subject to any Suspension or Restriction whatsoever in respect of the Time of the Enjoyment thereof; all Gated and Stinted Pastures in which the Property of the Soil or of some Part thereof is in the Owners of the Cattle Gates or other Gates or Stints, or any of them; and also all Gated and Stinted Pastures in which no Part of the Property of the Soil is in the Owners of the Cattle Gates or other Gates or Stints, or any of them; all Land held, occupied, or used in common, either at all Times or during any Time or Season, or periodically, and either for all Purposes or for any limited Purpose, and whether the separate Parcels of the several Owners of the Soil shall or shall not be known by Metes or Bounds or otherwise distinguishable; all Land in which the Property or Right of or to the Vesture or Herbage, or any Part thereof, during the whole or any Part of the Year, or the Property or Right of or to the Wood or Underwood growing and to grow thereon, is separated from the Property of the Soil; and all Lot Meadows and other Lands the Occupation or Enjoyment of the separate Lots or Parcels of which is subject to Interchange among the respective Owners in any known Course of Rotation or otherwise, shall be Land subject to be inclosed under this Act.

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