Lancashire County Council

Commons and Town Greens Sub-Committee

Thursday, 22nd September, 2011 at 10.00 am in Cabinet Room 'D' - County Hall, Preston

Agenda

Part 1 (Open to Press and Public)

No.	Item	
1.	**Apologies**	
2.	**Constitution: Chair and Deputy Chair; Membership; Terms of Reference of the Commons and Town Greens Sub-Committee**	(Pages 1 - 4)
3.	**Disclosure of Personal and Prejudicial Interests** Members are asked to consider any Personal/Prejudicial Interests they may have to disclose to the meeting in relation to matters under consideration on the Agenda.	
4.	**Minutes of the Meeting held on 7 February 2011**	(Pages 5 - 8)
5.	**Commons Act 2006** **Schedule 3** **Commons Registration (England) (Amendment) Regulations 2009** **Application for the Amendment of a Register in relation to Rights of Common being grazing rights registered as Entry 3 in the Rights section of Register Unit CL123, Black fell, Blanch Fell and Haylot Fell Littledale, Lancaster**	(Pages 9 - 16)
6.	**Section 16 Commons Act 2006** **Application to de-register common land CL165 at Crook Hill, Whitworth, Lancashire and to provide replacement land**	(Pages 17 - 50)
7.	**Consultation by the Department for Environment Food and Rural Affairs (DEFRA) on the Registration of New Town or Village Greens**	(Pages 51 - 112)

Lancashire County Council

8. Urgent Business

An item of urgent business may only be considered under this heading where, by reason of special circumstances to be recorded in the Minutes, the Chair of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency. Wherever possible, the Chief Executive should be given advance warning of any Member's intention to raise a matter under this heading.

9. Date of Next Meeting

The next meeting of the Commons and Town Greens Sub-Committee will be held on Tuesday and Wednesday, 8 and 9 November 2011 at 10am at the County Hall, Preston.

I M Fisher
County Secretary and Solicitor

County Hall
Preston

Commons and Town Greens Sub-Committee
Meeting to be held on 22 September 2011

Electoral Division affected: All

Commons and Town Greens Sub-Committee
Constitution: Chair and Deputy Chair; Membership; Terms of Reference
(Appendix 'A' refers)

Contact for further information:
Gary Halsall, 01772 533419, Office of the Chief Executive
gary.halsall@lancashire.gov.uk

Executive Summary and Recommendation

The Sub-Committee is asked: to note:

i. The appointment of County Councillor A Thornton and County Councillor S Leadbetter as Chair and Deputy Chair of the Sub-Committee for the remainder of the 2011/12 municipal year;
ii. The membership of the Sub-Committee following the County Council's annual meeting; and
iii. The Terms of Reference of the Sub-Committee.

Background and Advice

The County Council at its annual meeting on 26 May 2011 agreed that the Sub-Committee shall comprise 11 County Councillors (on the basis of 6 Conservative members, 2 Labour members, 1 Liberal Democrat member, 1 Green member and 1 Idle Toad member). It was also agreed that nominations of County Councillors to serve on the Sub-Committee should be submitted to the County Secretary and Solicitor by the respective political groups.

The following County Councillors have subsequently been nominated to serve on the Sub- Committee for the following year:

County Councillors (11):

T Brown	M Parkinson
C Coates	P Rigby
J Jackson	T Sharratt
T Jones	P Steen
S Leadbetter	J Sumner
A Thornton	

The Full Council also appointed County Councillor A Thornton and County Councillor S Leadbetter as Chair and Deputy Chair of the Sub-Committee for the remainder of the 2011/12 municipal year.

Lancashire County Council

A copy of the Sub-Committee's Terms of Reference is attached at Appendix 'A'.

Consultations

N/A

Implications:

This item has the following implications, as indicated:

Risk management

There are no risk management implications arising from this item.

Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Tel
Full Council papers	26 May 2011	Janet Mulligan, Office of the Chief Executive, 01772 533361

Reason for inclusion in Part II, if appropriate

N/A

Appendix 'A'

Commons and Town Greens Sub-Committee

Composition and role

The Sub-Committee shall be established by the Regulatory Committee and comprise eleven County Councillors to authorise appropriate alterations to the Registers of Common land and Town Greens.

Meetings are open to the public but they may be excluded where information of an exempt or confidential nature is being discussed – see Access to Information Procedure Rules set out at Appendix 'H' to the Constitution.

Terms of Reference

The Committee shall carry out the following functions:

1. To exercise the Council's powers under the Commons Registration (New Land) Regulations 1969 to register common land or town or village greens (except where the power is to be exercised solely for the purpose of giving effect to an exchange of land by an order under Section 19(3) or Schedule 3 of the Acquisition of Land Act 1981, or an order under Section 147 of the Inclosure Act 1845).

2. To make recommendations to the Cabinet Member for Economic Development, Environment and Planning on matters under the Commons Registration Act 1965 as amended and Regulations thereunder where responsibility lies with the Cabinet.

3. To amend the register in respect of rights of common under Regulation 29 of the Commons Registration (General) Regulations 1966, namely to apportion, vary, extinguish, release or transfer a right of common.

4. To exercise the duties powers and functions of the County Council as Registration Authority under Part 1 Commons Act 2006.

Lancashire County Council

Commons and Town Greens Sub-Committee

Minutes of the Meeting held on Monday, 7th February, 2011 at 10.00 am in Cabinet Room 'C' - County Hall, Preston

Present:

County Councillor Albert Thornton (Chair)

County Councillors

T Brown	S Leadbetter
J Jackson	P Rigby
A Jones	

1. Apologies

Apologies were received from County Councillors C Coates, B Mutch and J Sumner.

2. Disclosure of Personal and Prejudicial Interests

There were no disclosures of personal or prejudicial interests.

3. Minutes of the Meeting held on 24 September 2010

Resolved: That, the Minutes of the meeting held on the 24 September 2010 be confirmed and signed by the Chairman.

4. Commons Act 2006
Commons Registration (England) Regulations 2008

Requirement to Amend a Register following the Registration of Ownership of part of CL184 Salt Marsh at Hambleton, under Land Registration Act 2002

It was reported that a Notification from the Land Registrar that certain land had been registered under the Land Registration Acts which said land was registered Common Land being part of Common Land unit CL184.

It was reported that the Registration Authority had received Notification from the Land Registrar of the registration of land under the title number LAN71315 shown on the plan referred to in the report as Appendix 'A' under the Land Registration Act 2002. The said land was part of CL184 as shown on the plan referred to as Appendix 'B'.

The Sub-Committee was advised that the Register should be altered as prescribed to reflect that ownership of a further part of CL184 was now registered at the Land Registry.

Resolved: That the Ownership Section of the Common Land Register relating to common land unit CL184 be amended. There was an ownership of part noted as being registered at the Land Registry; therefore the amendment should be by noting in accordance with Model Entry 23 that another part of the land had been registered under the Land Registration Act 2002.

5. Commons Act 2006
Commons Registration (England) Regulations 2008

Application VG101 under section 15(8) of the Commons Act 2006 for registration of land at Barnoldswick, Pendle Borough, as a town or village green

A report was presented on an Application by the owner of land at Barnoldswick, to be registered as a town or village green.

The Sub-Committee was informed that in June 2010 an application to register two areas of open ground at Barnoldswick, Pendle Borough as a town or village green was accepted and duly made under S15(8) of the Commons Act 2006. In this case the Applicant was Pendle Borough Council and they had provided a plan of the area sought to be registered referred to in the report as Appendix 'B' along with evidence of them being freehold owners of the land under title LAN84048 at the Land Registry (Appendix 'C' to the report).

The Sub-Committee was advised that the determination of applications by a registration authority was a quasi-judicial function and that there was a duty to act reasonably. If ownership was clearly proved but registration of the land would be incompatible with some other rights or status of the land it was suggested that consideration would need to be had to such information.

The Sub-Committee was advised that Pendle Borough Council had registered freehold title of the application land. However, in respect of the north western section of the application land abutting Skipton Road, the mines and minerals and powers to work them were excepted from the freehold title and belonged to an unknown owner.

The Sub-Committee was also advised that the applicant was the owner of a legal estate in fee simple in the application land although the unknown owner had some right to the minerals under the surface and also some right to working to extract those minerals.

The Sub-Committee was informed that the procedure under the 2008 Regulations required the Applicant to serve owners (Schedule 6) but the requirement to serve notice on an owner would not apply if that person could not reasonably be identified (Reg 22 (3)). The rights to mines and minerals were not registered as a separate title.

It was reported that there was no recorded public rights of way across the land. However, there was a surfaced path across it. It was also reported that in respect

of the land South East of Cravenside, a Mr Bracewell and his heirs and assigns had the right of way from his land over so much of the land used to be the part of the Station yard laid open to Fernlea Avenue. The line of this right of way was not now clear and might be across the application land. The location of the old station yard and Mr Bracewell's original land was not known.

The Sub-Committee was informed that Notices about the application to register the land as a town green were placed on site and at other locations but no representations had been received by the owner of neither the mineral rights nor the successors to Mr Bracewell.

The Sub-Committee was also informed that the title also referred to the land in the Registered title being subject to wayleaves for utilities and a private right of way from Fernlea Avenue to the County Council land where Cravenside was built but the areas of land affected were not part of the application land.

The Regulations provide for the Applicant to serve Notice of the Application on all occupiers of the land. However, Pendle Borough Council was not aware of anyone to serve as occupier.

It was reported that the County Council had received one representation from a Mr Fielding. His objection letter was dated 4th November and was followed by two further letters dated 11th and 19th November referred to in the report as Appendix 'D'. The Sub-Committee was advised that the representation be taken into account and also the response to same from the Applicant referred to as Appendix 'E' in the report. However, it was suggested that the land would be better protected as a town green than not and that use would likely remain as it has done in the past and for the foreseeable future.

The Sub-Committee was advised that the existence of the mines and minerals rights did not prevent Pendle Borough Council from being sufficient owner to apply for registration of the land as a town green and further that having no evidence as to how incompatible the rights would be if the land was a town green the Sub-Committee was advised that the excepted rights were not sufficient on balance for the application not to be accepted. The only objection received might be considered not sufficient to defeat the application.

It was then moved and seconded that the Sub-Committee, having considered all the guidance and the information, agreed on balance that the application be accepted and the application land be added to the Register of Town Greens.

Resolved: That the Application be accepted and the land shown on the plan with the application referred to in the report as Appendix 'B' be added to the Register of Town Greens and that appropriate Notice be given pursuant to the Statutory Regulations.

6. Date of Next Meeting

The Sub-Committee was informed that it had been necessary to cancel the next scheduled meeting which was due to take place on Wednesday and Thursday, 27 and 28 April 2011.

The Chairman had agreed that the next meeting would now take place on Tuesday 19 April 2011 at 10am for a half day only.

I M Fisher
County Secretary and Solicitor

County Hall
Preston

Commons and Greens Sub-Committee
Meeting to be held on 22 September 2011

Electoral Division affected:
Lancaster Rural East

Commons Act 2006
Schedule 3
Commons Registration (England) (Amendment) Regulations 2009

Application for the Amendment of a Register in relation to Rights of Common being grazing rights registered as Entry 3 in the Rights section of Register Unit CL123, Black fell, Blanch Fell and Haylot Fell Littledale, Lancaster
(Appendices 'A' 'B' and 'C' refer)

Contact for further information:
Jane Turner, (01772) 532 813, Office of the Chief Executive
jane.turner@lancashire.gov.uk

Executive Summary

An Application from William Alan Huddleston, Margaret Elizabeth Atkin, Christine Mary Sayer and Barbara Ruth Huddleston to register severance of the rights away from land at Bell Hill Farm and then subsequent transfer of rights to the Applicants which are rights in gross.

Recommendation

That the application to register the severance of rights and transfer in gross to the applicants jointly of the rights registered in Entry 3 of the Rights Section of CL123 namely the right to graze sheep to a limit of 79 and a half sheepgates (one ewe together with followers and a hog counting as the sheepgate) over the whole of CL123 be accepted and the register be amended in accordance with the Commons Registration (England) Regulations 2008 as amended to register said severance and transfer.

Background and Advice

The Commons Act 2006 (the 2006 Act) makes provision for the registration of common land and of town and village greens. Registration Authorities were created to maintain two registers, one for common land and the other for village greens. The County Council is the Registration Authority for the County of Lancashire and has previously delegated powers and functions concerning alteration of the registers to the Commons and Town Greens Sub-Committee.

Lancashire County Council

The 2006 Act makes provision in Schedule 3 and by Regulations for commons registration authorities to amend their registers of common land and town or village greens in consequence of qualifying events which have happened since the Registers were closed under the 1965 Act. A severance and then transfer of rights in gross since 1970 not yet registered are such qualifying events and the application in this matter is that this has happened and should now be registered.

It is apparent that the rights at present are registered as being the right to graze sheep to a limit of 79 and a half sheepgates (one ewe together with followers and a hog counting as the sheepgate) over the whole of CL123 (Appendix 'A' refers) and these rights are at the moment shown as attached to land at Bell Hill Farm Littledale as shown on the supplemental map with the Registers (Appendix 'B' refers).

Copies of various Deeds have been provided.

These show that the farm as shown on the supplemental map, along with its grazing rights, was purchased in 1951 by Edward and Mary Huddleston as shown on the Deed plan (Appendix 'C' which will be available at the meeting). Parts of the land have since been transferred. The first transfer was in 1985 and the grazing rights were expressly reserved to Edward and Mary Huddleston. It was a Deed of Gift of a small part of the farm and it was agreed and declared that it "does not include (and there are expressly reserved to the Donors) all those rights of common sheep and cattle gaits on Black Fell Blanche Fell and Haylot Fell appurtenant to Bell Hill Farm". It is arguable that this is when all the rights became severed but it is suggested that on balance it is not clear enough and it may be considered that only those rights attached to the small section being transferred were severed at this time. It is advised that these few rights were then held in gross by Edward and Mary Huddleston.

There were further transfers in 1991 with rights retained by Mary Huddleston and a trustee, as Mr Huddleston had died. The Solicitors confirm the rights in gross passed to Mary Huddleston and Mr Gillibrand on the death of Mr Edward Huddleston. There was then a transfer of part of the farm in January 2002 but the rights were not mentioned and in August 2002 there was the transfer of most of the remainder of the land together with all the commons rights as per the 1951 purchase to the applicants.

Notice of the application has been duly served according to the Regulations and no response has been received save for further details being requested by a neighbouring landowner but no objection raised and a visit to inspect the file by a rights holder.

It is advised that if the application is well founded the appropriate amendment to the register shall be made. The Statutory provisions specifically provide for amendment of the register in cases of severance and transfer of rights which are then rights in gross.

It is advised that some rights were expressly reserved and thereby were not transferred with the land but became severed in 1985 and 1991.The small piece of land at the farm which has not been the subject of any transfer had any rights which

were attached to it sold separately in 2002 when all the rights were stated to be transferred to the applicants.

The main difficulty would appear to be the sale of several fields in January 2002 with no mention of the rights. Usually this would mean that the rights attached to the land went with the land. Documentary evidence is usually required when considering an application for severance under Regulation 42 of the 2008 Regulations. Regulation 42 provides that unless the instrument or other contemporary evidence showed an intention that the rights should be severed, the authority should not grant an application to register a severance. Guidance from DEFRA (para 10.5.10) says that a right of common may nevertheless be treated as having been severed even in the absence of contemporary written evidence, if the application shows that the right was subsequently treated as severed and there is no other explanation for that treatment but that the right must have been severed at that time.

In this matter the Solicitors who acted for the purchasers in 2002 confirm that there was no intention to transfer any grazing rights and confirm that the purchaser makes no claim to any grazing rights nor believe that they ever held any. They are not aware of them exercising any rights. A letter direct from the purchasers confirm their belief that their Solicitors can provide the information about the grazing rights. Only a few months after the sale, the rights were transferred to the applicants separately from the land.

It is therefore advised that, on balance there would appear to be sufficient evidence of the rights being severed at various times to end up held in gross by Mr and Mrs Huddleston and then Mrs Huddleston and Mr Gillibrand as trustee. They transferred the rights to the Applicants in 2002. It may be considered that the severance and transfer should now be shown on the Register and the rights shown as jointly held in gross by the Applicants.

Consultations

Notice of the application was given to persons appearing in the register to be interested in the rights of common as above and also to all parties who have requested to be notified of applications under the 2006 Act.

Implications:

This item has the following implications, as indicated:

Risk management

Consideration has been given to the risk management implications associated with this proposal. The Sub-Committee is advised that, provided the decision is taken in accordance with the advice and guidance given, and is based upon relevant information contained in the report, there are no significant risks associated with the decision-making process.

Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Tel
File 3.571		Jane Turner, Office of Chief Executive, 01772 532813

Reason for inclusion in Part II, if appropriate

N/A

C.R.
Form 3

COMMONS REGISTRATION ACT 1965

NOTE: This section contains the registration of every right of common registered under the Act as exercisable over the whole or any part of the land described in the land section of this register unit.

Registration authority

LANCASHIRE COUNTY COUNCIL

Appendix A

Register of COMMON LAND

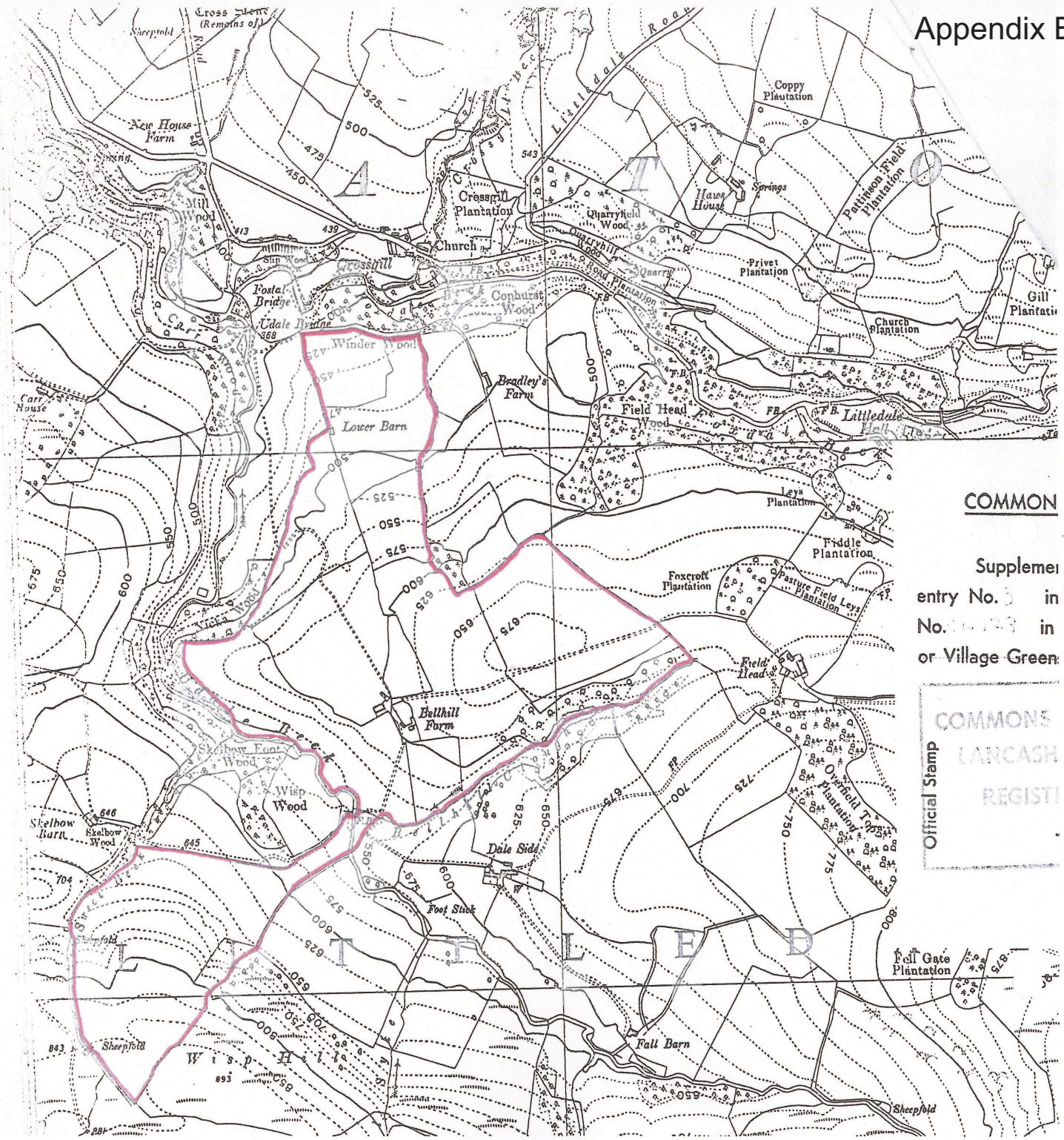
Register unit No. CL 123

Edition No.

See Overleaf for Notes

RIGHTS SECTION—Sheet No.

1 *No. and date of entry*	2 *No. and date of application*	3 *Name and address of every applicant for registration, and the capacity in which he applied*	4 *Particulars of the right of common, and of the land over which it is exercisable*	5 *Particulars of the land (if any) to which the right is attached*
3 3rd April 1970	946 10th December, 1969	Edward Huddleston, Mary Huddleston, Bell Hill Farm, Littledale, Caton, near Lancaster. Owner.	To graze 250 sheep over the whole of the land comprised in this and register units Nod. CL 194 and CL 210. ~~(Registration provisional)~~ amendment: To graze sheep to a limit of 79½ sheepgates (one ewe together with followers and a hog counting as one sheepgate) over the whole of the land comprised in this register unit	Bell Hill Farm, Littledale, Caton, near Lancaster, as shown edged red on the supplement map bearing the number of this registration.
4th March 1983				
4th March 1983		The entry in column 4 above was amended on the direction of Commons Commissioner Mr. L.J. Morris Smith on 25th September 1981.		


Cross Head (Remains of)
Sheepfold
New House Farm
Mill Wood
Slip Wood
Crossgill
Postal Bridge
Udale Bridge
Carr House
Winder Wood
Lower Barn
Bradley's Farm
Cressgill Plantation
Church
Littledale Road
Coppy Plantation
Haver House
Springs
Pattinson Field Plantation
Quarryfield Wood
Quarryhill Wood
Road Plantation
Quarry
Privet Plantation
Church Plantation
Gill Plantation
Conhurst Wood
Field Head Wood
Littledale Hall
Leys Plantation
Fiddle Plantation
Foxcroft Plantation
Pasture Field Leys Plantation
Field Head
Bellhill Farm
Skelbow East Wood
Skelbow Barn
Skelbow Wood
Wisp Wood
Overfield Top Plantation
Dale Side
Foot Stick
Fell Gate Plantation
Fall Barn
Sheepfold
Wisp Hill
COMMON
Supplemer
entry No. 3 in
No. [illegible] in
or Village Green
Official Stamp
COMMONS
LANCASH
REGISTI

Commons and Town Greens Sub-Committee
Meeting to be held on 22 September 2011

Electoral Division affected:
Whitworth

Section 16 Commons Act 2006
Application to de-register common land CL165 at Crook Hill, Whitworth, Lancashire and to provide replacement land
(Appendices 'A', 'B', and 'C' refer)

Contact for further information:
Jane Turner, 01772 532813, Office of the Chief executive,
jane.turner@lancashire.gov.uk
Daniel Herbert, 01254 770960, Environment Directorate,
daniel.herbert@lancashire.gov.uk

Executive Summary

To consider whether the County Council joins in as applicant with an application to de-register a corridor of Common Land on CL165 in connection with that part of the application land which is a publicly maintainable highway.

Recommendation

That the Sub-Committee agrees to Lancashire County Council becoming a joint applicant in an application already submitted to the Secretary of State under section 16 of the Commons Registration Act 2006 for the de-registration of a corridor of common land on CL165 to allow the construction of a wind farm at Crook Hill and for the designation of replacement land making it clear that it is as an owner in respect of the highway land only and noting concern as to the sufficiency of exchange land and that the Secretary of State should ensure that the agreement to re-register sufficiently binds the land, that the affect on public access is not understated and that there is still a requirement for an agreement to be entered into with the developer as to the works being done on highways within and near the application land.

Background and Advice

Coronation Power Ltd is proposing to develop a wind farm at Crook Hill which is situated on the edge of the County of Lancashire. The proposed development site covers registered common land within the boundaries of Lancashire County Council, Calderdale Metropolitan Borough Council and Rochdale Metropolitan Borough Council.

Lancashire County Council

A number of planning applications have been submitted to each of the authorities in relation to the development within their respective administrative boundaries. For Lancashire the Planning Authority is Rossendale Borough Council.

Coronation Power Ltd submitted an appeal to the Secretary of State in 2009 regarding non-determination and refusal of planning applications submitted to Calderdale, Rochdale and Rossendale. The Secretary of State allowed the appeals and granted planning permission.

Coronation Power Ltd has subsequently submitted planning applications to revise the approved schemes to the three planning authorities. Rochdale MBC granted permission and issued a decision notice on 23rd June 2011. Calderdale MBC resolved to approve the application in July subject to a number of conditions. Negotiations on those conditions are continuing with United Utilities and a formal decision notice has not yet been issued (as at 1st September 2011). Rossendale have not yet determined the application they have received, having deferred a decision until the outcome of an application regarding rock extraction at Middle Hill Quarry has been determined by Rochdale MBC.

As planning permission for the wind farm development has been granted by the Secretary of State, Coronation Power Ltd now need to resolve the issues surrounding the carrying out of construction works. Section 38 of the Commons Act 2006 prohibits 'restricted works' on Common Land without consent from the Secretary of State.

The common land affected by the development within Lancashire is unit CL165. The main construction work required on CL165 relates to the construction of an access route to the turbines on Crook Hill. Instead of applying for consent to carry out such works on Common Land, the owner of CL165, Mr Dearden, Lord of the Manor has applied for a corridor of land to be de-registered and no longer recorded as Common Land. The corridor to be de-registered accommodates the route of the proposed access road but also includes existing lengths of public highway (Appendix 'C' refers). The corridor initially follows the line of the highway called Landgate and is also crossed by a number of public footpaths and bridleways as it continues to the County boundary. The area of highway affected is 4,260.2 square metres (0.426 ha) and Coronation Power Ltd have included the land with highway rights on the surface in the application to remove it from the area of registered Common Land (Appendix 'A' refers).

Under s16 Commons Act 2006 the owner of any land registered as common land is the person who can apply to the Secretary of State for the land to cease to be so registered. If the release land is more than 200 square metres the application must include a proposal that some replacement land be registered as common land in place of the release land. In determining the application the Secretary of State shall have regard to interests of those having rights on or occupying the release land; the interests of the neighbourhood; the public interest (including nature conservation, conservation of landscape, protection of public rights of access and protection of archaeological remains and features of historic interest); and any other relevant matter. Consents of any leaseholders or charge holders of the land are required and owners of replacement land have to join in the application.

Under S61 an "owner" is the holder of the legal estate in fee simple.

It is advised that although the surface of publicly maintainable highways is vested in the County Council, the title is not a pure fee simple but is a determinable fee simple. It is considered that this is sufficient title to be an "owner" under the Commons Act.

The Application, which is already submitted, applies for common land to be de-registered (release land) and offers exchange land to be new common land (replacement land). The application affecting a corridor of land on CL165 in Lancashire may result in the release of 6.98ha of land (which includes the 0.462ha of highway). An area of 1.6ha is being offered as replacement land immediately adjacent to CL165 and within the County boundary. The application also seeks to de-register common land on CL166, CL172 and CL168 being about 22.82ha. A further area of 2.397ha is being offered as replacement land but this is outside the Lancashire boundary and within the boundary of Rochdale MBC at Long Clough Farm, Littleborough to the south of CL168.

The Applicant realises that the replacement land is a lot less than the release land and following completion of the construction work it is planned to re-register the released land that is not required for the day to day operation of the wind farm. Within CL165 the area of land to be re-registered is 4.98ha. 2.0ha of land is to be removed from the register as it will not be available for use as common land as a result of the wind farm operational requirements. It is stated that all land will be re-registered once the wind farm is de-commissioned.

Summary of land position

- Area to be de-registered (released) 6.98ha
- Area to be removed (deregistered until the wind farm is de-commissioned) (includes the access tracks) 2.00ha
- Area to be re-registered on completion of construction work 4.98ha
- Area to of replacement land within Lancashire (although shown as 1.68ha on plan) 1.60ha
- Shortfall of 0.40ha

Attached at Appendix 'A' is a plan of the proposed wind farm site and layout of turbines and access roads and showing the area of CL165 and the area of replacement land within Lancashire.

The Application which has been submitted is attached at Appendix 'B'.

Highways within the corridor of release land are shown on a plan at Appendix 'C'.

The fact that some of the land within the corridor of release land is highway raises a particular issue.

The surface of all highways (whatever sort, vehicular, footpath or bridleway) which are publicly maintainable is vested in the Highway Authority by virtue of S263

Highways Act 1980. This is advised to be sufficient interest to mean that it is the Highway Authority who is the owner in respect of the highway land. For the highway land to be considered for de-registration it is therefore suggested that the highway authority be also an applicant.

If the Highway Authority does not join the application it is possible that the Secretary of State will have to leave the highway land out of the application and it would remain as part of the Common Land. The Sub-Committee will note that there is a suggestion that there may be a need even for a Highway authority to apply for consent for works where the highway is on Common Land. This would need to be investigated and clarified but by joining in the application to de-register seeking de-registration of highway this possible need for consent is removed if the application was successful.

The Sub-Committee are asked to consider the view below of the developer and DEFRA and to note that Lancashire County Council has not objected to the planning application.

In a similar application earlier this year Calderdale MBC was asked as highway authority to join in an application under S16 and agreed to do so.

It is advised that it is the County Council's discretion as to whether to join in the application but it is the case that the authority must exercise its discretion reasonably. In this matter its decision is not to be based on whether a wind farm is thought to be appropriate.

If the view is taken that it would be appropriate to join in the application it is suggested that the Sub-Committee should take the opportunity to state any concerns it has about the S16 application itself given the criteria to be considered by the Secretary of State and to remind the Secretary of State about various matters. Officers have noted some matters in the recommendation but the Sub-Committee may consider others or alternative points to be better made.

Consultations

Coronation Power Ltd have been asked to state why the County Council should be a joint applicant with Mr Dearden in respect of the corridor on CL165 and say as follows –

> The applicant still wishes the highway authority to enter into the application and feels it is imperative to do so.
> We have carefully considered the law in this area and there is some argument to be made that the authority does need to enter into the application. We believe this is also the stance of DEFRA.

On this basis, the Sub-Committee is advised that it is better to take a careful approach to avoid an important infrastructure project being jeopardised by being at the risk of facing a legal challenge into the validity of its consents in the high court. It is important to ensure that all areas needed for works for the wind farm are de-registered so that we do not fall foul of the s38 of the Commons Act. De-registering all land needed, ensures that there can be no argument that works are prohibited.

This does not of course undermine any future agreements that will need to be agreed with the authority for works to Landgate. Works are likely to be improvement of roads and laying of cables but may be more.

On this basis as the authority has not objected to the scheme and that the de-registration can only be neutral or positive for the authority, we request the authority enter into the scheme.

DEFRA have also made the following statement –

In relation to an application for de-registration and exchange of registered common land under s.16 of the Commons Act 2006, the Secretary of State would expect to see the highway authority join in the application insofar as the release land, or the replacement land, is also publicly maintainable highway. I am assuming that there is no dispute as to whether, in the circumstances contemplated, the highway is indeed publicly maintainable (the position is a little more abstruse in relation to public paths). Here is our analysis:

- S.16 provides in subsection (1): "The owner of any land registered as common land or as town or village green may apply to the appropriate national authority for the land ('the release land') to cease to be so registered."
- 'Owner' is interpreted in s.61 as "references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate."
- Under s.263(1) of the Highways Act 1980, highway maintainable at the public expense, together with the materials and scrapings of it, vest in the authority who are for the time being the highway authority for the highway.
- According to *Halsbury's Laws of England* paragraph 227, the interest vested in the authority under s.263(1) is a legal estate in fee simple determinable in the event of the street or road ceasing to be a public highway and, according to footnote 7 of that paragraph, the Law of Property Act 1925 s.7(1) treats this interest as a fee simple absolute for the purposes of that Act.
- Therefore, the interest of the highways authority does fall within the definition of 'owner' in s.61(3) of the 2006 Act, being the holder of the legal estate in fee simple in the release or replacement land.

It's worth referring to the judgment of the Court of Appeal in *Tithe Redemption Commission v Runcorn UDC* (1954) especially as it was quoted with approval in another very recent Court of Appeal case — *R (oao) Smith v Land Registry* [2010] EWCA Civ 200. Admittedly the Court of Appeal in *Smith* did not examine the argument as to whether or not the court in *Runcorn* was correct to rule that the Local Government Act 1929 was a "similar statute" within the meaning of section 7 of the Law of Property Act 1925 and hence was operational in vesting the fee simple absolute in the highways authority. However, Lady Justice Arden in *Smith* did quote paragraphs from Evershed MR's judgment in *Runcorn* with approval, and herself state "…this court held in Tithe Redemption that the statutory vesting of a highway in the highway authority operated to vest in the highway authority a determinable fee simple in the surface of the land."

The extract from Halsbury's is a little confusing, because paragraph 227 begins: "The effect of the statutory provisions vesting highways in highway authorities is not to transfer the fee simple absolute in the land to the authority…but merely to vest in the authority the property in the surface of the street or road." But what the passage (and its footnotes) is in fact emphasising, is that section 236 does not directly transfer the fee simple, but rather the effect of section 7 of the Law of Property Act 1925, as interpreted by the Court of Appeal in the *Runcorn* case, is to vest the fee simple absolute in the authority.

While I have acknowledged that the position may seem odd, it is also relevant to the functions of the highway authority. Should land become common land (if it is replacement land, and the owner must therefore join in the application under subsection (5)(c)), then the effect of the change of status would mean that the highway authority would have to apply to the appropriate authority for resurfacing and possibly other maintenance works under s.38. Similarly if highway land is released from its status as common land, the authority will no longer be under such an obligation.

Implications:

This item has the following implications, as indicated:

Risk management

Legal

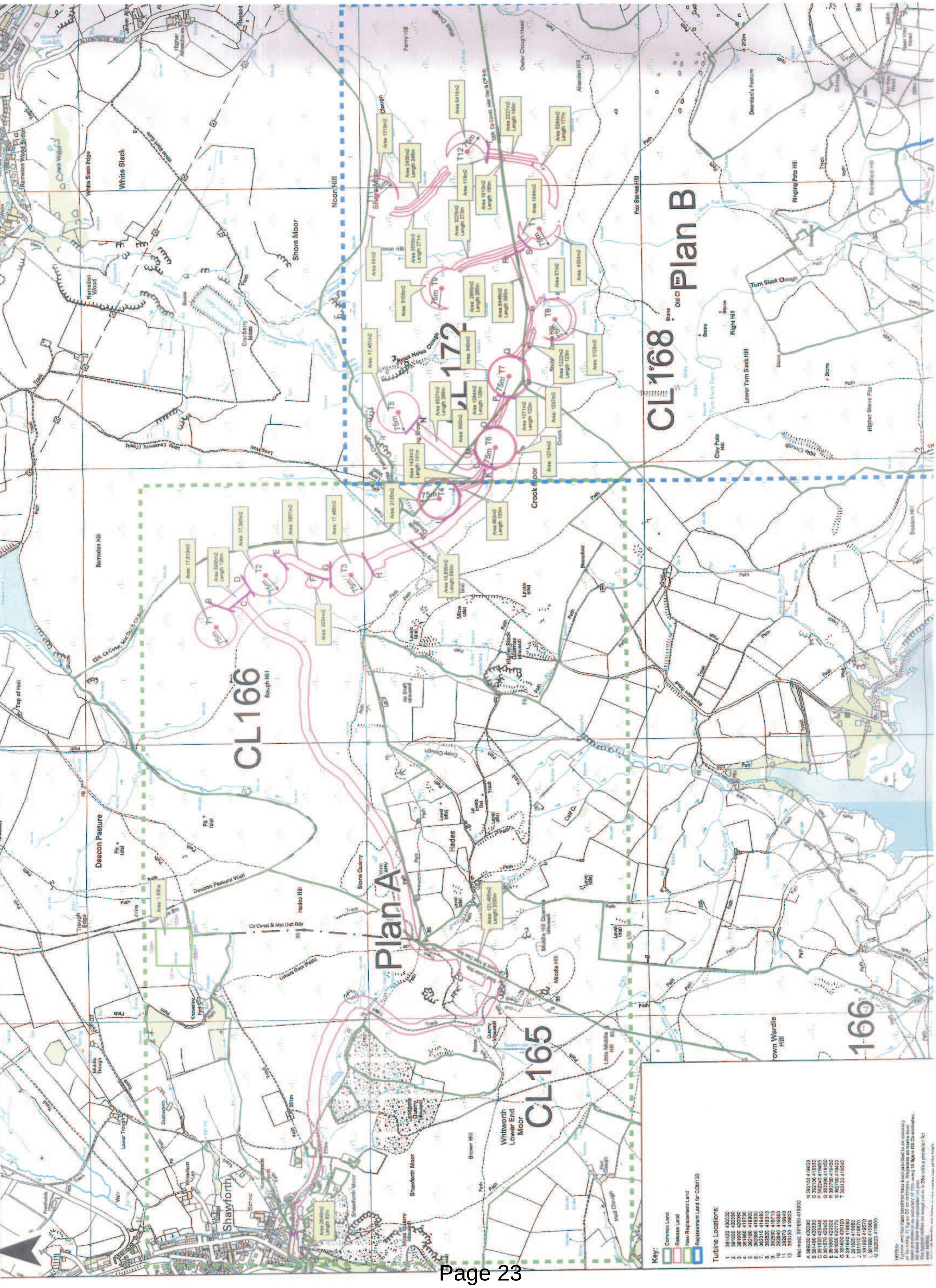
The section 16 application is required to allow the construction of a wind farm for which there is planning approval in place from the Secretary of State. Should a decision be taken to not join the application with Coronation Power Ltd then Lancashire County Council could be seen to be frustrating the planning process and preventing approved development leading to legal challenges and possible financial penalties along with damage to Lancashire County Council's reputation.

Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Tel
File 3.643		Jane Turner, Office of Chief Executive, 01772 532813

Reason for inclusion in Part II, if appropriate

N/A



Appendix A

The Planning Inspectorate

Application to deregister or to deregister and exchange common land or town or village greens

Commons Act 2006: Section 16

Return completed application to:

The Planning Inspectorate
Zone 4/05 Kite Wing
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Tel: 0117 372 8956, 0117 372 8768 or 0117 372 6387

Fax: 0117 372 6241

E-mail: commonlandcasework@pins.gsi.gov.uk

Application to deregister or to deregister and exchange common land

- Answer all the questions on this form in full and only use a separate sheet where there is insufficient space for your answer.
- Refer to the separate "**Note on completing this form**" (the "Notes) when applying
- Consult informally and widely about your ideas before developing a formal proposal
- References throughout this form to 'Common Land' apply equally to 'town or village green'

SECTION A – The common land (or village green) – to be deregistered - the "release land" (see Notes 1, 2, 3, 4, and 5)

Section A1 – The common:

1. Name of common: Ramsden and White Slack Common, Shore Moor, Wardle Common — CL/VG No.: CL172, CL168, CL166
2. Located in the:
   (a) Parish/Town of: Todmorden, Wardle and Littleborough
   (b) Borough/District/City of: Rochdale and Calderdale
3. Commons Registration Authority: Lancashire County Council

Section A2 – The owner (see Note 1):

4. Title (e.g Mr/Mrs/Miss/Ms/Dr): Mr
   (a) Forename (s): Jeremy James
   (b) Surname: Dearden
   (c) Position/Organisation (if appropriate):

5. Full Postal Address

c/o Andrew Crossley
G Crossley & Son
104 Yorkshire Street
Rochdale

Postcode: OL16 1JY

Telephone number: (incl national dialling code)

Mobile No:

Fax number: (incl national dialling code)

E-mail address:

I prefer to be contacted by ☐ Email ☑ Post

Please note that unless you tell us otherwise, we will send all correspondence to the person named above – not to the owner of the replacement land shown in Section B2.

Please tick as appropriate:
Please send all correspondence to the owner above in question 4..... ☐
Please copy all correspondence to the person named in question 15..... ☐

Application to deregister or to deregister and exchange common land

- Answer all the questions on this form in full and only use a separate sheet where there is insufficient space for your answer.
- Refer to the separate "**Note on completing this form**" (the "Notes) when applying
- Consult informally and widely about your ideas before developing a formal proposal
- References throughout this form to 'Common Land' apply equally to 'town or village green'

SECTION A – The common land (or village green) – to be deregistered - the "release land" (see Notes 1, 2, 3, 4, and 5)

Section A1 – The common:

1. Name of common: Whitworth and Trough Common CL/VG No. CL165

2. Located in the:
   (a) Parish/Town of: Whitworth
   (b) Borough/District/City of: Rossendale

3. Commons Registration Authority: Lancashire County Council

Section A2 – The owner (see Note 1):

4. Title (e.g Mr/Mrs/Miss/Ms/Dr): Mr
   (a) Forename (s): Jeremy James
   (b) Surname: Dearden
   (c) Position/Organisation (if appropriate):

5. Full Postal Address

c/o Andrew Crossley
G Crossley & Son
104 Yorkshire Street
Rochdale

Postcode: OL16 1JY

Telephone number: (incl national dialling code)

Mobile No:

Fax number: (incl national dialling code)

E-mail address:

I prefer to be contacted by ☐ Email ☑ Post

Please note that unless you tell us otherwise, we will send all correspondence to the person named above – not to the owner of the replacement land shown in Section B2.

Please tick as appropriate:
Please send all correspondence to the owner above in question 4..... ☐
Please copy all correspondence to the person named in question 15..... ☐

Section A3 – Area of common and common rights:

6. What is the total area of common as registered? 123.755 ha, 169.486 ha, 172.561 ha, 192.068 ha **(see Note 2)**

7. What common rights, if any, are registered (e.g number and type)? If the land is a town or village green, to what recreational use is it put?

Please see Appendix 1

8. If common rights are registered, are they ever exercised?.....Yes ☑ No ☐

9. If **Yes**, to what extent (e.g which commoners are active, which rights are exercised, and how frequently)?

The Commoners utilise their grazing rights on all four of the areas. It is understood from discussions with the commoners association for CL165, CL166 and CL164 that eight commoners exercise their rights on CL165 and CL166 this was given verbally and not documented. On CL172 and CL168 grazing rights are exercised but the frequency is unknown although site visits would indicate it is low. Pre-application consultation has not revealed further insight.

Section A4 – Other rights over the common:

10. Give details of any relevant leaseholders, other occupiers, or those holding any relevant charges over the release land (**see Note 4**) and enclose copies of their written consent to this application (**see Note 3**).

There are no relevant lease holders, other occupiers or those holding any relevant charges over the release land.

Section A5 – Description of the release land:

11. Area of release land 29.8 ha (m² or hectares)

12. Description (including location) of release land (**see Note 5**).

Land on north, north west and north east of the Watergrove Reservoir, adjacent to the village of Shawforth and Landgate quarry and north of the City of Rochdale in the Metropolitan Boroughs of Rossendale, Rochdale and Calderdale including several minor hills including Birching Brow, Long Hill, Moorhey Clough, Stubley Cross Hill, Crook Hill, Middle Hill and Rough Hill as shown on the plan accompanying this application edged in red. The grid reference for the centre of the site is 3925 4195.

SECTION B – The land to be given in exchange – the "replacement land" (see Notes 6, 7, 8, and 9)

13. Are you proposing to provide replacement land in exchange for the release land?.....Yes ☑ No ☐

If **Yes**, go to Question 14. If **No**, please explain here why you are not providing replacement land **(see Note 6)** and then go to Question 22.

Section B1 - Location of the replacement land:

14. Name, if any, of the replacement land: Land at Long Clough Farm
The replacement land is located in the:

(a) Parish/Town of Littleborough

(b) Borough/District/City of Metropolitan Borough of Rochdale

(c) County of Lancashire

Section B2 – The owner of the replacement land (see Note 1):

15. Title (e.g Mr/Mrs/Miss/Dr) Mr

(a) Forename (s) John Frank

(b) Surname Bialk

(c) Position/Organisation (if appropriate)

16. Full Postal Address

161 Featherstall Road, Littleborough

Postcode OL15 8PH

Telephone No (incl national dialling code)

Mobile No

Fax No (incl national dialling code)

E-mail address

I prefer to be contacted by ☐ Email ☑ Post

Please note that unless you tell us otherwise, we will send all correspondence to the person shown in Section A2.

SECTION B – The land to be given in exchange – the "replacement land" (see Notes 6, 7, 8, and 9)

13. Are you proposing to provide replacement land in exchange for the release land?.....Yes ☑ No ☐

If **Yes**, go to Question 14. If **No**, please explain here why you are not providing replacement land **(see Note 6)** and then go to Question 22.

Section B1 - Location of the replacement land:

14. Name, if any, of the replacement land: Land at Duckworth Farm, Shawforth
The replacement land is located in the:

(a) Parish/Town of Whitworth

(b) Borough/District/City of Rossendale

(c) County of Lancashire

Section B2 – The owner of the replacement land (see Note 1):

15. Title (e.g Mr/Mrs/Miss/Dr) Mr

(a) Forename (s) William Gamaliel

(b) Surname Lloyd

(c) Position/Organisation (if appropriate)

16. Full Postal Address

Slough Farm, Docker, Kendal, Cumbria

Postcode LA8 0DB

Telephone No (incl national dialling code)

Mobile No

Fax No (incl national dialling code)

E-mail address

I prefer to be contacted by ☐ Email ☑ Post

Please note that unless you tell us otherwise, we will send all correspondence to the person shown in Section A2.

Section B3 – Description of replacement land:

17. Area of land proposed as replacement land 3.997 ha (m^2 or hectares)

18. Description (including location) of land proposed as replacement land **(see Note 5)**.

Long Clough: Land is located to east of Long Clough and to the south of Stansfield Hill and is shown on the plan accompanying this application edged light green

Duckworth Farm: The land is located to the east of Shawforth and Knowlsey Farm and near to the Limers Gate path and is shown on the plan accompanying this application edged light green.

19. Please confirm that the proposed replacement land is not already registered as common land or town or village green **(See Note 7)**..... ✓

20. Is the proposed replacement land subject to any other formal designation (for example, as public open space)? **(See Note 8)**.....Yes ☐ No ✓

If **Yes**, give full details:

21. Give details of any relevant leaseholders, or other occupiers, or those holding any relevant charges over the replacement land: **(see Note 9)**.

Long Clough:

There are no relevant charges that apply to this land

Duckworth Farm:

There are no relevant charges which apply to this land.

SECTION C - Access arrangements and current features of the lands (see Notes 10, 11 and 12)

For questions 22 to 28 complete both parts of each question if replacement land is being provided. If no replacement land is being provided, complete part (a) of each question.

Section C1 – Access to the lands:

22. To what extent is there public access over the lands to be exchanged?

(a) The release land

Please see Appendix 1

(b) The replacement land

Please see Appendix 1

23. What will the access arrangements be after the exchange?

(a) The release land

During construction, the release land is likely to be fenced off temporarily for safety purposes. Land alongside the access tracks, which is being used to place peat, shall remain fenced off until re-vegetation has taken place. Again this is temporary. After construction and re-vegetation fencing shall be removed. Land deregistered from the common and not required for the wind farm will be re-registered for use by riders, public and graziers. A licence will be granted so access will be as it was prior to the application being made. Only the physical imprint of the turbine towers and substation will impede access. Please see the extension to this question in Appendix 1 to this form.

(b) The replacement land

This land will become common land and therefore be subject to the corresponding rights. If there are boundary markings separating this land from the common then access points by gate or stile will be put into these boundary markings to allow public and commoner animal access.

Section C2 - Current condition of the lands:

24. Describe the current condition and use of the:

(a) release land

Please see Appendix 1

(b) replacement land

Long Clough land is improved agricultural land.

The Duckworth Farm Land is semi- improved agricultural land.

Please see photos at Appendix 2.

25. What structures, (e.g buildings, roads, bridleways, footpaths, walls, fences or other constructions currently exist on the:

(a) release land

At the start of CL165 there is a well maintained access. This then turns into a less well maintained track private highway that leads through Crey Farm and up to Middle Hill quarry. This track then carries on to Hades quarry on CL166 and gradually deteriorates. Middle Hill quarry has a current planning permission in the Rochdale half of the site but is not currently being quarried. Hades quarry is sited on CL166 where CL166 and CL165 meet. Walls and fences delineate the edge of the commons where they are not owned by the Lord of the Manor but there is no boundary features between CL165, CL166, CL168 and CL172. Apart from these walls and fences there are no structures on CL166, CL172 and CL168 except public rights of way and boundary stones.

(b) replacement land

Long Clough: There are borders on the north, south and south west of the replacement land. Currently where the replacement land adjoins the replacement land given as part of COM133 there is no boundary feature.
Duckworth Farm: there are dry stone borders to the south and east of the land.

26. What boundary features e.g. fences, hedges, walls (and access points such as stiles and gates) currently exist on (or on land immediately adjoining) the:

(a) release land

The land is common land with open access so there are no boundary features.

(b) replacement land

Long Clough: Currently where the replacement land adjoins the replacement land given as part of COM133 there is no boundary feature.
Duckworth farm: Dry stone boarders to the south and west. Fencing to the south.

27. What, if any, boundary features are proposed to be removed or erected as part of the exchange?

(a) release land

No permanent boundary features. Temporary fencing may be required for safety purposes during construction. Temporary fencing may be required for up to 3 years for the re-vegetation of peat areas disturbed during construction. This temporary fencing will not follow the complete boundary area of the land deregistered from the common. Only the bare minimum will be used and gaps will be left in the fencing to allow the free movement of stock and the public. The placing of fencing will be strictly controlled by the conditions attached to the planning permission associated with the wind farm. The fencing will be placed in accordance with the approval of the Local Planning Authority.

(b) replacement land

Long Clough: The eastern edge of the replacement land will be fenced or dry stonewalled to create a new boundary indicating what is now common land and what is not. Where necessary parts of the boundary to the north separating CL168 and the release land will be removed and replaced with gate and stile to allow ease of access for the public and animals.
Duckworth Farm: it is proposed to place a gate and stile in the southern dry stone wall to allow public and stock access.

28. Are any works or other things to be done by any party as part of the exchange?.....Yes ☑ No ☐

If **Yes**, give details:

(a) release land

Currently no works save construction are proposed for the release land. However applications have also been submitted under s38 Commons Act 2006 for restoration works to Hades Quarry and Landscaping works adjacent to Landgate quarry.

(b) replacement land

Works required are the placing of gates and stiles to allow access to the common.

29. Are any of the lands subject to any other rights or easements not already mentioned on this form?..... Yes ☑ No ☐

If **Yes**, give full details:

- Rights granted to Fred Temperly and Sons Limited to work areas of CL165 for Fireclay, ironstone, ganister and shale. Fred Temperly and Sons Limited was dissolved in December 1960 and the rights have not been exercised for many years.
- Rights in favour of the Mayor Aldermen and Burgess of Rochdale in respect of an aqueduct. Note that this right now resides in United Utilies Plc.
- A right of way has been given to Lancashire County Council from the entrance to land gate to Crey farm (CL165)
- Charge in favour of Crook Hill Properties Ltd in respect of CL166, CL168 and CL172 for an option to enable construction of a wind farm. This is the wind farm that this application relates to.
- Charge in favour of Fortis Clean Energy Fund GP limited in respect of CL166, CL168 and CL172.
- National Grid Plc have a grant of rights over the Long Clough Release land. See pre-application consultation response attached with this application.
- Frodine Limited have an option to buy the land belonging to Long Clough Farm. Consent is attached.

SECTION D – Details of the exchange or deregistration, and any informal consultations (see Notes 13, 14 and 15)

30. What are the reasons for the exchange or deregistration and the circumstances surrounding it?

See appendix 1

31. It is strongly recommended that you consult informally on your proposals at an early stage in their development **(see Annex A of the Notes)**. What **informal** consultation (e.g with local inhabitants) have you carried out? Give details below and provide written evidence.

- This application is to allow the Crook Hill wind farm to access the plateau from another access point that creates less impacts. A planning application for this was submitted in January 2011
- This application follows on from a previous application (COM133) concerning the deregistration and exchange of land for the Crook Hill 8 Wind farm. This application went to public inquiry where the issues that will arise here were discussed in great detail and evidence was brought by the applicant, the LPAs and the rule 6 parties.
- As part of this application a pre-application consultation has been carried out and the replies received are included with this application.

SECTION E – Designations (see Notes 16 and 17)

32. Are any of the lands subject to this application in or near a Site of Special Scientific Interest (SSSI), a Special Area of Conservation (SAC), a Special Protection Area (SPA), or Wetland listed in accordance with the Ramsar Convention?..... Yes ☐ No ☑

If **Yes**, please give details, identify on the map **(see section J)**, and provide evidence of any consultation you have consulted Natural England **(see Note 16)**.

33. Do any of the lands contain a Scheduled Ancient Monument?.....Yes ☐ No ☑

If **Yes**, give details, identify on the map **(see section J)**, and provide evidence of any consultation you have carried out with English Heritage **(see Note 17)**.

34. Are any of the lands subject to this application in a National Park or Area of Outstanding Natural Beauty?.....Yes ☐ No ☑

SECTION F – Adjacent Common Land (see Note 18)

35. Does any area of common land or village green, of a different registration number, adjoin the common land or green subject to this application?.....Yes ☑ No ☐

If **Yes,** give details and identify them on the map **(see Section J)**:

CL165 adjoins CL164. Please see the plan accompanying the register for CL165.

SECTION G – Public Access (see Notes 19, 20 and 21)

36. Do the public have a right of access to the release land for air and exercise under section 193 of the Law of Property Act 1925?.....Yes ☑ No ☐

37. Is the release land subject to an Order of Limitation made under section 193?.....Yes ☐ No ☑

If **Yes**, give its date and other details, and send us a copy:

(

SECTION H – Scheme of management and local Acts (see Note 22)

38. Is there a Scheme of Management for the release land, made under the Metropolitan Commons Act 1866 or the Commons Act 1899?.....Yes ☐ No ☑

39. Is the release land subject to any other regulatory Scheme or Act (e.g a Provisional Order Confirmation Act made under the Commons Act 1876) ?.....Yes ☐ No ☑

If **Yes,** to either question, give its date and other details below, and send us a copy of the Scheme or Act. Do you wish to seek any special arrangements to be made in relation to any of these provisions?

SECTION I – Advertisement and Consultation (see Notes 23, 24 and 25)

You must advertise your proposal in one main local newspaper and at the main points of entry to the lands **within 7 days** of making your application. Use the draft notice at **Annex B** of the **Notes**.

You must also send a copy of the notice (using the letter at **Annex D** of the **Notes**) to the following:

- the commons council or association (if there is one)
- all active commoners
- others with an interest in the lands e.g tenants, those with easements or other rights over the lands
- any relevant parish, district, city or county council
- Natural England (if applicable)
- English Heritage (if applicable)
- National Park Authority (if the lands are in a National Park)
- AONB Conservation Board or Joint Advisory Committee (if the lands are in an AONB)
- Open Spaces Society **(see Note 25)**

40. Which newspaper will the advertisement appear in, and on what date?

Rochdale Observer
Todmorden News
Rossendale Free Press

SECTION J – Maps (see Note 26)

You **must** include with your application **two copies** of a map which fully meets the requirements set out in **Note 26**.

41. Two copies of the map that meets the requirements set out in **Note 26** are enclosed..... ✓

SECTION K – Public inquiry or hearing (see Note 27)

42. Give the name and address of a suitable place in the locality for holding a public local inquiry or hearing, should this be needed:

Rochdale RUFC, Banford, Rochdale.

Contact name/Telephone number:

Checklist (tick to confirm)

I have read the **Notes** in full..... ✓

I have:

- answered all the questions on this form in full,..... ✓
- enclosed two copies of the map that meets the requirements of Section J,..... ✓
- enclosed a copy of the commons register in respect of this common (i.e details of the land, rights, and ownership, and the register map),..... ✓
- enclosed a copy of any document mentioned in answering the questions on this form (e.g scheme of management, written permission of any relevant leaseholders, letters from informal committees etc)..... ✓
- understood that any of the application papers may be copied to interested parties on request, and have informed people as necessary..... ✓
- enclosed my application fee of £4,900.00..... ✓

I will, within 7 days:

- advertise the proposal in one local newspaper..... ✓
- post a copy of the notice at the main entry points to the lands..... ✓
- send a copy of the notice to all those listed in Section I..... ✓
- place a copy of the notice, map and application at the inspection point..... ✓

I will write to you as soon as possible, using the letter at **Annex E** of the **Notes**, to confirm that the advertising requirements have been met..... ✓

Appendix 1

Extensions to various questions

Question 7

CL172

Right to graze sheep: 5
Right to graze cattle: 5
Right to turbary: 1

CL168

Right to graze sheep: 19
Right to graze cattle: 18
Right to turbary: 1
Right to graze horses: 3
Right to cut and take bracken: 1

CL166

Right to graze sheep: 31
Right to graze cattle: 26
Right to turbary: 3
Right to graze horses: 8
Right to take stone: 1
Right to graze pigs: 2
Right to graze goats: 2
Right to graze hens: 1

CL165

Right to graze sheep: 25
Right to graze cattle: 24
Right to turbary: 11
Right to graze horses:15
Right to take stone: 11
Right to graze goats: 2
Right to graze poultry and hens: 2
Right to graze geese: 7

as defined in the registers.

Please note that some commoners have rights that apply equally to CL172, CL168 and CL166. Commoners on 165 sometimes have rights to CL166 and CL164. Various combinations apply and are defined in the registers. The figures above do not distinguish between these duplicated rights.

Commoners on CL165:	25
Rights over CL165 only:	12
Rights over CL165 and CL164:	8
Rights over CL165, CL166 and CL164:	5
Rights over 165 and 166:	9

It should be noted that the restriction of grazing rights on CL165 mean that 3 commoners will not be affected by the application (entry 21, entry 26 and entry 27)

Commoners on CL172:	6
Rights over CL172 only:	2
Rights over CL172 and CL166:	2
Rights over CL172 and CL168:	4
Rights over CL172, CL166 and CL168:	2

Commoners on CL168:	19
Rights over CL168 only:	11
Rights over CL168 and CL166:	5
Rights over CL168 and CL172:	2
Rights over CL172, CL166 and CL168:	2
Rights over CL164, CL166 and CL168:	1

Commoners on CL166:	32
Rights over CL166 only:	12
Rights over CL168 and CL166:	5
Rights over CL166 and CL172:	2
Rights over CL172, CL166 and CL168:	2
Rights over CL165, CL166 and CL164:	6
Rights over CL165 and CL166:	4
Rights over CL164, CL166 and CL168:	1
Rights over CL166 and CL164:	3
Rights over CL166, CL162, CL163 and CL164:	1

Question 22 a)

The following footpaths cross the release land:

- Rochdale:
    - WarFp226: beginning of footpath as it leaves WarFp225 is in the release land area
    - WarBp224: crosses perpendicular to the release land area as the area moves down of Rough Hill and the footpath travels around Rough Hill
    - WarBp219: also known as the Long Causeway crosses perpendicular to the release land area between turbines 3 and 4.
- Calderdale:
    - No footpaths in Calderdale cross the release land area
- Rossendale:
    - The release land area covers an adopted highway known as Landgate. Landgate extends to a cross roads where it departs from the release land area and travels northwest. The track that is then covered by the release land area is a private road.
    - Ftp25 follows the route of Landgate and is therefore within the release land area for the same length.
    - Ftp26 follows the release land area as it heads towards Middle Hill quarry
    - BW30 is crossed as the Bridleway travels through Middle Hill quarry.
    - Ftp30a is crossed as it travels through Middle Hill quarry
    - BW27 is followed until it reaches the Rochdale border
    - Ftp28 is followed until it reaches the Rochdale border
    - Ftp27b is crossed just before the Rochdale border

Question 22(b)

Footpath LitFp44 crosses the Long Clough replacement land from west to east and is indicated on the plan.

Footpath FP 14 crosses the southern area of the Duckworth Farm land close to the dry stone wall on the southern boundary.

Extension to Question 23

(a) The applicant is aware that when the common land is deregistered the publics' rights to access the release land that is (unless a PROW is in place) will cease. To deal with this and to ensure that so far as is possible the public's access to this area of land does not cease, the following is proposed:

Granting of a licence

The applicant will grant an irrevocable licence for the life of the wind farm (25 years) for the public to cross, re-cross and use the land that is deregistered from the common and used for the operation and maintenance of the wind farm either on foot or on horseback. Commoners and their animals will also be able to cross, re-cross and use the land for movements of their animals and grazing. However the applicant or his agents will be able to temporarily restrict the licence to enable construction, operations or maintenance to be carried out as and when necessary.

The applicant will enter into an obligation under s106 of the Town and Country Planning Act 1990 to confirm that it will grant a licence as described above.

Re- Registration

Please see details in the extension to Question 30 below regarding the re-registration of land back to the common. Once re- registered, the public's right to access this land will continue as it had in the past. The re- registration will also ensure that the commoners' rights to graze live stock over the original common land are restored to this rededicated common land.

The overall outcome of the application being that the public will be able to access all areas of the release land even though it has been deregistered. The exception being the physical impediments of the turbine towers, the substation and the base of the met mast.

Non Grazable area

This is the area of the release land that is not currently grazable given the existence of access tracks. Stock cannot graze it and therefore this must be considered in any calculation regarding a loss or gain of areas that can currently be grazed.

The Figures

Of the areas described above the following figures arise:

Table 1

Landowner	Ha	Ha	Ha	Ha	Ha
Crook Hill 12 Hades	**Release Land Area**	**Removed Land Area**	**Loss of Grazing Area**	**Non Grazable Area**	**Replacement land Area**
Jeremy James Dearden	29.8	7.97	6.81	0.81	
Bialk					2.397
Lloyd					1.6
Total	29.8	7.97	6.81	0.81	3.997

The release land area can be broken down over the common units:

Table 2

	Ha	Ha	Ha	Ha	Total
Common Land Unit	**CL165**	**CL166**	**CL168**	**CL172**	
Release land Area	6.98	14.84	2.55	5.45	29.8

Under application COM133 the following replacement land and release land was created:

Table 3

Landowner	Ha	Ha
Crook Hill 12 Hades	**Release Land Area**	**Replacement land Area**
Jeremy James Dearden	17.52	
Bialk and McGregor		3.35 3.34 = 6.67

Thus if this application is granted the following figures for the land deregistered from the common (CL165, CL166, CL168 and CL172) (Release Land) and land added to the commons (Replacement Land) will be in place:

Table 4

Landowner	Ha	Ha
Crook Hill 12 Hades	**Release Land Area**	**Replacement Land Area**
Jeremy James Dearden	17.52 + 29.8 = 47.32	
COM133 plus Bialk and Lloyd		6.67 + 3.997 = 10.667

The removed land, loss of grazing and non-grazable area can also be broken down by common unit. Table 5 below works on the basis of COM133 and this application being granted and therefore the wind farm constructed using the Hades Access. The order granting COM133 is included with this application.

Table 5

Common unit	Removed Land Area	Loss of Grazing Area	Non Grazable Area
CL165	2.00	1.34	0.66
CL166	3.17	2.87	0.15
CL168	0.97	0.91	n/a
CL172	1.83	1.69	n/a
Total	**7.97**	**6.81**	**0.81**

Once the wind farm is built and the deregistered land that is not needed for the operation and maintenance of the wind farm (including land to be deregistered under COM133) is re-registered with the commons registration authority there will be a net gain to the common of 2.697 ha. This is demonstrated by the following calculation:

Table 6

	Hectares
Existing Commons Area of all 4 units (a) (123.755 ha + 169.486 ha + 172.561 ha + 192.068 = 657.87)	657.87
Release Land from Table 4 **(b)**	47.32
[a-b]	610.55
Replacement land Area from table 4 **(c)**	10.667
[a-b+c]	621.217
Land permanently removed (from table 5) **(d)**	7.97
Land to be Re-registered **(e) [b-d]**	39.35
New commons Area (f) [a-b+c+e]	660.567
Increase in commons area [f-a]	2.697

Conclusions

The Release Land Area for this application and COM133 equates to 7.19% of the total existing area of CL165, CL166, CL168 and CL172.

The Removed Land Area equates to 1.21% of the total current area of CL165, CL166, CL168 and CL172.

The Loss of Grazing Area equates to 1.04% of the total current area of CL165, CL166, CL168 and CL172.

As a result of the application there will be a net increase in the combined area of the four commons of CL165, CL166, CL168 and CL172 of at least 2.697 ha

There will be a net gain in grazing land to the common land at CL165, CL166, CL168 and CL172 of 3.86ha (10.667 minus 6.81 = 3.86ha).

The loss of grazing land for CL165 equates to 0.7 % of the total existing area of CL165 (see page 3 of application form or commons register).

The loss of grazing land for CL166 equates to 1.32% of the total existing area of CL166 (see page 3 of application form or commons register).

There will be a net gain in grazing land to the common land at CL165 of 0.26ha (Lloyd replacement land (table 1) (1.6) minus loss of grazing area (table 5) (1.34) = 0.26).

Further relevant information

Matters to be considered when determining the Application

Under section 16(6) Commons Act 2006 the appropriate national authority needs to have regard to:

(a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);

(b)the interests of the neighbourhood;

(c)the public interest;

(d)any other matter considered to be relevant.

The public interest is further defined at section 16(8) as including:

(a)nature conservation;

(b)the conservation of the landscape;

(c)the protection of public rights of access to any area of land; and

(d)the protection of archaeological remains and features of historic interest.

The applicant thinks that it is worth discussing these aspects to give greater clarity to the decision maker.

Planning permission for the development is required from 3 LPAs. Rochdale MBC, Calderdale MBC and Rossendale BC. Rochdale have granted planning permission and the decision notice is attached with this application. Calderdale has resolved to grant permission subject to a legal agreement. This resolution is included with the application. Rossendale are yet to determine their application but a decision should be made late August/early September 2011.

The SoS decision (and it accompanying Inspector's report) of 12 October 2009 and the decision on Mr Elliot dated 12 April 2011 are both material considerations of significant weight for this application and are included with this application. Further the conclusions (so far as relevant) should be adopted when determining this application unless new evidence causes them to be doubted. No"new" evidence has been presented on these "crossover" issues ie peat, ecology, hydrology, geology, archaeology, mining hazard, rights of the commoners and users of the common.

Also of relevance is the decision dated 13 July 2011 to grant application COM216 (Todmorden and Lower Moor). The application followed the same approach as was made for COM135 and COM133 and again relates to a wind farm. This is included with the application for reference.

Whilst any determination will have to be carried out in line with s16(6), parts of the criteria can be broken down into specific issues and for the sake of clarity this section focuses on those issues. In terms of an assessment of the issues, the topics that will need to be considered for this application will be the same as those considered by the Mr Baird and Mr Elliot. These are:

1. The need for Renewable Energy supplies
2. The effects on those with common rights
3. The effects on access by the public
4. Effect on ecology
5. Effects on Landscape
6. Effects on water supplies and water quality
7. Mining Hazard
8. The acceptability of the Long Clough replacement land.
9. The use of a planning obligation to ensure the re-registration of common land not needed for the operation and maintenance of the development
10. Interests of the Neigbourhood
11. Restoration of the eroding southern peat boundary on Crook Hill

The only issues that were not assessed by Mr Baird or Mr Elliot that are relevant to this application are:

As a result of this application there will be a loss of vegetation under the access tracks, turbine bases and substation. There will be a need to excavate peat but this can be stored on site and used in the restoration work that will take place under the planning permission and the consent to erect fencing applied for under COM131. Best practice will be employed to ensure that the wind farm construction and operation has minimal impact on peat.

As a direct result of this application, other than the peat and vegetation, there will be no other effects on ecology. By reference to the 2009 DEFRA guidance nature conservation arises in particular ie. peat and ecology generally. Inspector Baird's conclusions are to be found at 11.98 - 11.104 and 11.106 -11.115.

5. Landscape

Impacts upon landscape and visual amenity and residents' amenities were considered by Inspector Baird at 11.125- 11.134. This application does not seek to go behind these conclusions namely localised landscape impact; no unacceptable harm to residents but a diminution of sense of remoteness and wilderness. However a large part of the conclusions of Mr Baird concerns the effect of the new access track from Higher Calderbrook Road to the plateau top. The effects will not arise because the access from Shawforth is not in a prominent position and travels through an area of already disturbed ground until it reaches Hades Quarry.

6. Water supplies and water quality

This was addressed by Mr Baird at 11.92 -11.97. These findings are equally applicable for this access route. No evidence has been brought forward to show that the findings of the ES that supports the planning application are incorrect or in doubt. At 11.84 of Inspector Baird's report he noted the work done "... provides a sufficient level of understanding to acceptably identify the levels of risk. The studies conclude that the risks to private water supplies is low and which could be acceptably managed ..." A condition to protect private water supplies plus the requirement for a sediment control plan as part of the Construction Method Statement condition will be enough to protect private water supplies and water quality.

7. Potential Mining Hazard

The ES recognises the release land area which makes up the main access track from Shawforth is undermined. At the 2009 inquiry the mining hazard risk assessment was recognised to be good (11. 90) for the Todmorden Moor wind farm and the same procedures have been followed here. There has been no objection from the Coal Authority. Risk to the access track is low and using the Construction Method Statement Condition engineering solutions can be provided if necessary.

8. The acceptability of the Long Clough replacement land

It is recognised that the Long Clough land is only reachable to all commoners by vehicle or if they hold rights over CL168. Page 1 and 2 of this appendix gives this break down. Mr Elliot's approach in his decision was that for those commoners who only have rights over CL166 or CL172 the actual loss of grazing would not be significant. On top of this the Replacement land would provide a gain in both grazing land and the area of common. The Long Clough land is therefore acceptable to use as replacement land.

9. The use of a planning obligation to ensure the re-registration of common land not needed for the operation and maintenance of the development

The s106 is a necessary tool to give guarantees that land will be reregistered as common land. Mr Elliot at para 34 recognised that it should be taken into account as material consideration and this applies equally in this case. Mr Woolcock (COM216) also came to the same conclusion at para 12 of his decision.

10. Interests of the Neighbourhood

The interests of the neighbourhood are diverse and dependent on what the neighbourhood entails. Mr Elliot addresses what the effects are likely to be at para 102 to para 123 (excepting para 106) of his report into COM133. The findings of this report apply directly to this application including to any application affecting CL165. There is also the chance to reduce the fly tipping that is carried out at Middle hill and Hades quarry by putting in gates. Nothing has changed since the last inquiry so the findings of Mr Elliot at para 123 still apply.

Findings on residential amenity, water supplies and public access as discussed above are relevant here.

11. Restoration of the eroding southern peat boundary on Crook Hill

An application under s38 of the Commons Act 2006 for temporary fencing was made (COM131) and was granted 12 April 2011.

Issues not already assessed by previous inspectors

1. The Duckworth Farm replacement land

This land has been put forward for those with rights of Common over CL165. It is described in this application and photos have been provided.

2. The effects on the commoners of CL165

The only commoner who has given any information on likely impact is Mr Thorpe who in his response to the planning application (but included with this application at the pre-application consultation response tab) stated that this will affect his fell ponies who graze around Rough Hill.

The access track will cause some minor temporary disturbance whilst it is being constructed. However, traffic of this access track will become light after 6 months of construction with the full construction timetable being 12 months. After that traffic will be limited to service vehicles which will be the equivalent of around 1 vehicle per week. After construction those animals will be free to move over the track and graze around it. This will be much as presently takes place on CL165 where animals can be seen using the tracks. Thus disturbance will be minimal and temporary.

The findings of Mr Elliot apply equally to CL165 because:

a) The figures in terms of percentages of the Loss of Grazing Land are very similar.
b) There will be a net gain in grazing land as a result of this application of 3.86ha
c) They will be getting full access to the replacement land which they can use for grazing
d) The access track passes through areas of ground which are either already an access track or is disturbed ground and because of this there will be large gain in grazing land.

In addition to this:

I. Not all commoners on CL165 will be affected by the works because their rights do not extend to the release land.
II. Whilst the applicant believes disturbance to be minimal, the commoners on CL165 with rights on CL166, CL172, and Cl168 will be entitled to compensation under the fund to be set up as required by the 2010 S106 obligation.

3. An Alternative Access

This application is to allow the facilitation of a new access to a wind farm that already has planning permission and the remaining 4 turbines that were not part of COM133. COM133 deregistered the original access from Higher Calderbrook Road and the area to allow the construction of 8 turbines. This new access route has a number of advantages over the Higher Calderbrook Road access and this must be an important consideration when determining this application. These factors are:

1. It removes the need to deliver abnormal roads and HGVs through Littleborough and as such construction and component delivery vehicles will be kept on A roads through to the site entrance point at Shawforth.
2. The need for the highly engineered site entrance at Higher Calderbrook Road is removed. This reduces the impacts on the St James' Church and on Higher Calderbrook Road itself.
3. The need to create a new and complex access up Long Hill is removed.
4. The new access route will utilise an existing site entrance and existing track (used for quarrying and access to some local properties) for part of its route up to Rough Hill quarry roads, thereby reducing the land take requirements of the access arrangements and reducing the overall level of impact in terms of landscape and ecology.
5. Stone for use on site could be sourced from Middle Hill quarry. The ability to exploit this resource would reduce the volume of vehicle movements overall.

This would be a factor to consider under s16(6)(d).

4. Restoration of Hades Quarry

The planning permission will be subject to a condition that Hades Quarry needs to be restored. A separate application under s38 of the Commons Act 2006 has been made to accompany this application.

Overall balance

As this application will allow the construction of a wind farm the need for the development must be considered in the balance. Nationally the UK government is signed up to producing 20% of all energy through renewables by 2020. The wind farm that will be built if this application is successful will go towards meeting this target.

The need for such developments and the reason for the national targets stems from the need to reduce the release of carbon from fossil fuel sources and delivering energy security. Support for these policy objectives is still on going as is the support for the development of onshore wind farms.

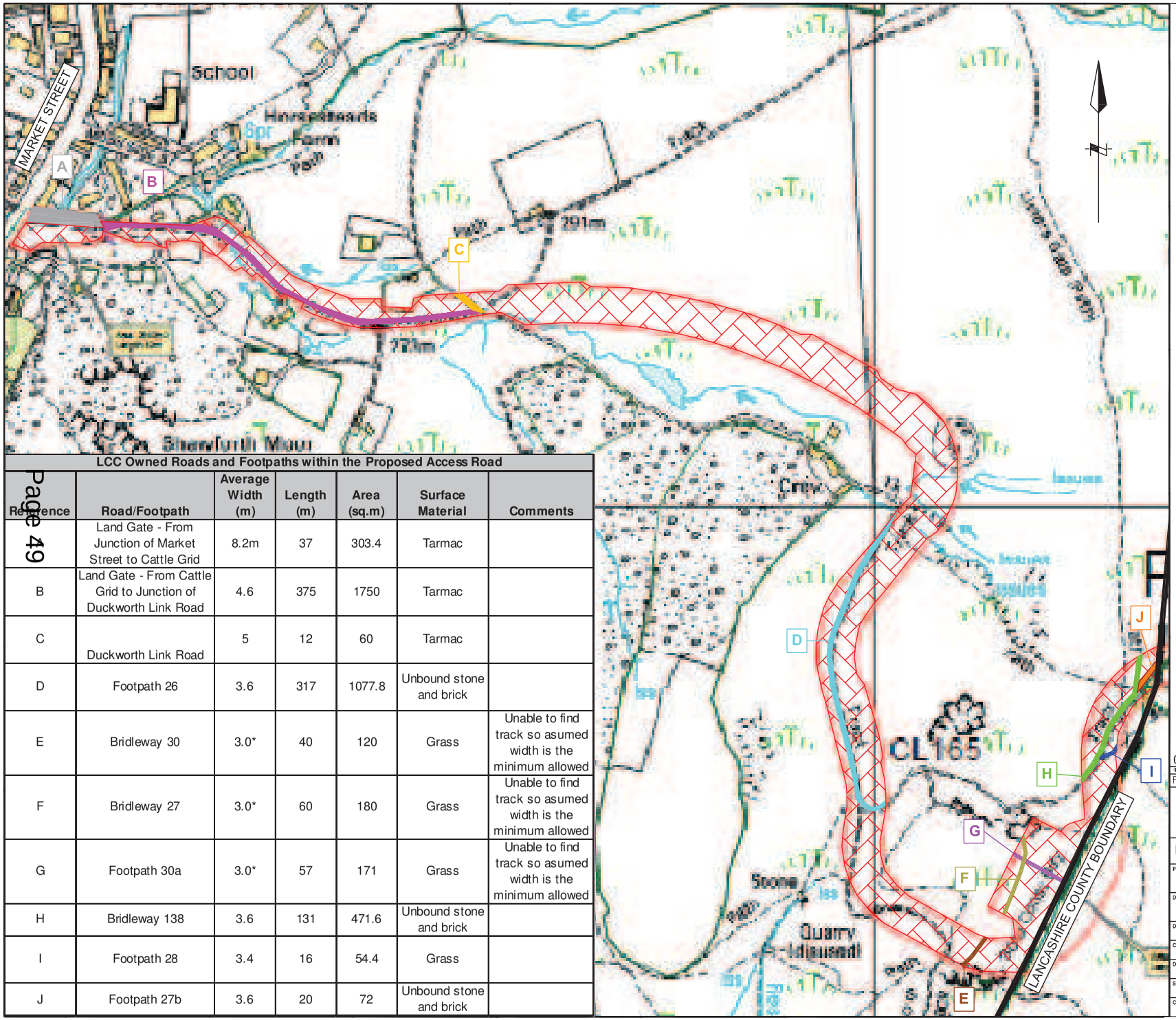
When this application is considered the importance of government policy on climate change and renewables must be considered.

There will be some harm to ecology and peat within the release land area. By reference to the 2009 DEFRA guidance nature conservation arises in particular ie. peat and ecology generally.

Set against this concluded modest degree of harm are two particular matters:

- The wider benefits of CO_2 reductions;
- The more local benefits which will undoubtedly arise from the habitat restoration and management proposals which the scheme will enable. These are of necessity non-specific at the present time but there are significant opportunities for enhancement and restoration with both COM131 and the hades quarry restoration and the landscaping.

The need/benefits issues arise under "any other matters considered to be relevant". As noted these issues must carry very significant weight - given that the commoners under the present proposals will receive more grazing than they currently have; that the common will increase in size and the common will benefit from restoration work the applicant asks that this application is allowed.



KEY

Proposed release land

Appendix C

LCC Owned Roads and Footpaths within the Proposed Access Road

Reference	Road/Footpath	Average Width (m)	Length (m)	Area (sq.m)	Surface Material	Comments
A	Land Gate - From Junction of Market Street to Cattle Grid	8.2m	37	303.4	Tarmac	
B	Land Gate - From Cattle Grid to Junction of Duckworth Link Road	4.6	375	1750	Tarmac	
C	Duckworth Link Road	5	12	60	Tarmac	
D	Footpath 26	3.6	317	1077.8	Unbound stone and brick	
E	Bridleway 30	3.0*	40	120	Grass	Unable to find track so asumed width is the minimum allowed
F	Bridleway 27	3.0*	60	180	Grass	Unable to find track so asumed width is the minimum allowed
G	Footpath 30a	3.0*	57	171	Grass	Unable to find track so asumed width is the minimum allowed
H	Bridleway 138	3.6	131	471.6	Unbound stone and brick	
I	Footpath 28	3.4	16	54.4	Grass	
J	Footpath 27b	3.6	20	72	Unbound stone and brick	

No.	DATE	AMENDMENT DETAILS	CHECKED BY	DRAWN BY
0	AUG 2011	ORIGINAL	AC	RT

REVISIONS

Lancashire County Council

Environment Directorate

Highways And Environmental Management

PROJECT TITLE: CROOK HILL WIND FARM
APPLICATION TO DE-REGISTER COMMON LAND

DRAWING TITLE: ADOPTED ROAD AND FOOTPATH
LOCATION PLAN

DRAWN BY: RT	PROJECT No.
CHECKED BY: AC	DRAWING No.
DATE: AUG 2011	
SCALE: NTS @ A3	SHEET No. 1 OF 1
CLIENT No.	

Commons and Town Greens Sub-Committee
Meeting to be held on 22 September 2011

Electoral Division affected: None

Consultation by the Department for Environment Food and Rural Affairs (DEFRA) on the Registration of New Town or Village Greens
(Appendices 'A' and 'B' refer)

Contact for further information:
Jane Turner, 01772 532813, Office of the Chief Executive,
Jane.turner@lancashire.gov.uk

Executive Summary

This report sets out the proposals and questions by DEFRA from their consultation on the registration of new town or village greens. The consultation ends on 17 October 2011.

Recommendation

The Sub-Committee is asked to:

i. Consider the proposals and questions raised in the consultation;
ii. Agree responses to all questions raised in the consultation in order for the County Council to provide its response to DEFRA before the consultation closes on 17 October 2011.

Background and Advice

On 25 July 2011, DEFRA issued a consultation seeking views on proposals to reform the system for the registration of new town or village greens. The full consultation document is attached at Appendix 'A'. However, this report sets out the proposals which are suggested and the questions DEFRA want a response to along with some matters the Sub-Committee may wish to consider and comment on.

It is understood that around 185 applications for the registration of new town or village greens were made in 2009. As a result of this, DEFRA felt that the volume of applications, the character of the application land, the controversy the applications attracted, the cost of the determination process on all parties and the impact of registration on a landowner had given rise for increased concern.

The Government has already announced its intention to introduce a Local Green Spaces designation through the planning system and this Consultation now presents other proposals of reform to achieve an improved regulatory balance between protecting high quality green space valued by local communities and enabling

Lancashire County Council

development to occur at the right place at the right time. There is also a desire to reduce the burden on authorities and landowners. There is the option to leave the present system as is. DEFRA ask Question 1 (see Appendix 'A').

The proposals are as follows:

- Proposal 1
  To stream line the sifting of applications to ensure that weak or vexatious applications are filtered out at early stage by introducing an initial stage for applications having invited comments from owners. The authority would be empowered to reject. Given that applicants can have up to 2 years to put their application together, it is expected that applications will be as good as they can be and this would enable rejection because evidence is insufficient.

  It is advised however that some Greens have successfully been registered on very little user evidence and so using this power may be difficult to justify using in reality.
  DEFRA ask Q2 and Q3 (see Appendix 'A').

- Proposal 2
  Enabling an owner to make a declaration and deposit a map with the authority for a fee, (having to renew it every 10 years) that any use for sports and pastimes cannot be treated "as of right" and will be an interruption and will counter town green user evidence. DEFRA think local communities will need to be aware of this challenge.

  This may lead to a flurry of claims on learning about these declarations being made but in the long run will mean that land cannot be claimed.
  DEFRA ask Q4 and Q5 (see Appendix 'A').

- Proposal 3
  DEFRA think that there is a popular perception of a "green" but there is not a test that the land has to be of a particular "character" at the moment. The proposal is that land cannot be registered unless open, unenclosed and uncultivated possibly also looking at how central it is to a community, commemorative structures, functional community structures, historic characteristics or evidence of former grazing.

  DEFRA consider that land can be "unenclosed" when it is bounded by highways or by dwellings built to overlook it whereas land enclosed by fencing or where dwellings do not overlook but are divided by tall fencing would not and feels that fields, public parks and playing fields would be likely to fail the character test.
  DEFRA ask Q6 and Q7 (see Appendix 'A').

- Proposal 4
  That land proposed for development - having full or outline planning permission or protected by Local Greens designation in an adopted or published neighbourhood or local plan- should not be able to be registered.

It is noted that Landowners would not be able to protect land by getting planning permission but then letting it expire without an application then being able to be made.
DEFRA ask Q8 and Q9 (see Appendix 'A').

- Proposal 5
  The cost to an authority can be many thousands to adjudicate an application. It is proposed that applicants pay a fee, possibly refundable if their application succeeds.

  This may preclude vexatious applications. There may have to be only a partial refund if only some land is registrable.
  DEFRA ask Q10, Q11 and Q12 (see Appendix 'A').

- Proposal 6
  The package of proposals all affect the number or type of applications.
  DEFRA discuss the cumulative effect and ask if all should be made
  DEFRA ask Q13 (see Appendix 'A').

- Proposal 7
  At the moment an owner can "dedicate" a green. The proposal is that a "character" test also apply to such land.
  DEFRA ask Q14 (see Appendix 'A').

- Further questions asked by DEFRA Q15, Q16 and Q17 (see Appendix 'A') invite further suggestions to help deliver the objectives and ask if the reforms should go further.

It is hoped that a response to each question can be decided on by the Sub-Committee at the meeting. DEFRA is seeking responses from Consultees by 17 October 2011.

Consultations

DEFRA has sought responses from the Consultees listed in Appendix 'B' attached.

Implications:

This item has the following implications, as indicated:

Risk management

It is not thought that by replying to a consultation the authority is placed at risk.

Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Tel
DEFRA Consultation on the Registration of new town or village Greens	July 2011	Jane Turner, Office of Chief Executive, 01772 532813

Reason for inclusion in Part II, if appropriate

N/A

www.defra.gov.uk

Consultation on the registration of new town or village greens

July 2011

defra

Department for Environment Food and Rural Affairs

Department for Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London SW1P 3JR
Telephone 08459 335577
Website: www.defra.gov.uk

Information about this publication is available from the address specified in Chapter 2.

This document is also available on the Defra website.

Published by the Department for Environment, Food and Rural Affairs

PB13617

July 2011

Cover page (clockwise from top left):

1. Buddleia Fields, near Frankland Road, Croxley Green, Hertfordshire (application granted)
2. The Common, Brindle Lane, Forty Green, Beaconsfield, Buckinghamshire (application granted)
3. Land to the east of Fordlands Road and south of Germany Lane, Fulford, York (application rejected)
4. The Field, Seatoller Close, Morton, Carlisle (application granted)

All photos in this consultation paper (except where credited)—source: CCRI

Scope of the consultation

Topic of consultation	Reform of the arrangements for registering new town or village greens.
Scope of consultation	The aim of this consultation is to seek the views of consultees on a proposed package of reforms to the new greens registration system, most of which would require primary legislation.
Geographical scope	England (but see paragraph 1.6.2 for relevance to Wales).
Impact assessment	A consultation stage initial impact assessment on the proposals for reform has been prepared — this is published alongside this consultation paper.

Basic information

To	This consultation is primarily aimed at: landowners and developers, local authorities, planning professionals, civic amenity, recreation and conservation bodies.
Body responsible for the consultation	This consultation is being managed by the Commons and Access Implementation Team within the Department for Environment, Food and Rural Affairs
Duration	This consultation will run for 12 weeks. It begins on 25 July 2011 and ends on 17 October 2011.
Enquiries	Please contact the Commons and Access Implementation Team in Defra: Tel: 020 7238 6326 commonsandgreens@defra.gsi.gov.uk
How to respond	Please send your response to: ELM/ASU Department for Environment, Food and Rural Affairs 3/C Nobel House 17 Smith Square LONDON SW1P 3JR E-mail : commonsact.consultation@defra.gsi.gov.uk
Additional ways to become involved	This will be a largely written exercise, though we do intend to hold informal meetings with interested groups.
After the consultation	A summary of responses to the consultation will be made available by the Department within three months of the end of the consultation period (see chapter 2.2 for further information).
Compliance with the code of practice on consultation	This consultation complies with the Government's code of practice on consultations.

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Contents

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Ministerial Foreword

We all value the open spaces where we live. Places where we can walk the dog and the children can play, or just somewhere to get away from the hustle and bustle of everyday living and enjoy some peace and quiet. The difference open spaces make to people's quality of life means that they are essential to the well-being of any community.

Town and village greens have played an important part in our communities since time immemorial. From their earliest use greens have been a place where communities come together, celebrate fairs and festivals and take part in sporting and social activities. The essential functions greens provide were recognised in the Commons Registration Act 1965, which allowed greens to be registered and to secure permanent protection. The protection of registered greens remains assured today.

But successful, vibrant communities also need a range of services to function properly. People need decent homes that are affordable. They need local schools, health care facilities and other amenities. They need jobs and so places to work. This often means new development, which sometimes can be controversial. Getting the balance right — between providing high quality open space where people want it and allowing legitimate development to go ahead where it is serving the interests of the community — is not always easy. But for our communities to continue to be vibrant, thriving and sustainable places to live and work we must strive to achieve this balance. This Government is returning the power to shape their neighbourhood to local people.

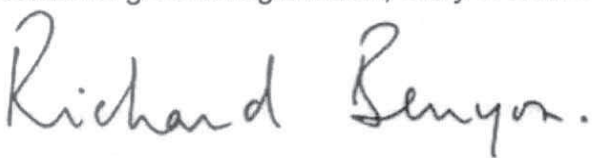
Over recent years we have seen a substantial increase in the number of applications for new pieces of land to be awarded the status of a green. This often reflects the real desire of local people to try and protect land which they value. But there are concerns that some are using it to undermine the planning process, so as to prevent or delay development which is badly needed and wanted in the community. Resolving these issues at a local level can often be difficult and costly for local authorities and landowners, and can be frustrating for local people awaiting the outcome of an application.

The time is therefore right to review the new greens registration system, to see whether we can strike a better balance between protecting high quality green space valued by local communities and enabling the right development to occur in the right place at the right time. I also want to see whether we can reduce the burden on local authorities which are responsible for implementing it, and on landowners who are affected by applications.

The publication of this consultation is the first step in such a review. Your input will be vital in establishing whether we can improve the current system within the objectives we have set. At the same time, the Government has announced that

it will introduce a new Local Green Spaces Designation in the planning system, to protect green spaces of particular importance to local communities. This designation would be used in local and neighbourhood planning and would be backed by strong planning policy in the new National Planning Policy Framework.

We plan to announce our conclusions on how we intend to take forward any reforms to greens registration, early in 2012.



Richard Benyon
Minister for the Natural Environment
and Fisheries

Chapter 1 : Introduction, objectives and summary

1.1 Introduction

> 'Village green' — the very words are evocative of great age and tranquillity, of turf as rich in hue as it is trim in a setting untouched by time.[1]

1.1.1 These words, from the Royal Commission on Common Land reporting in 1958, are as appropriate today as they were half a century ago. Town or village greens are an intrinsic part of the English community. Many villages and market towns are clustered around a green[2] at their heart: often a remnant of the once extensive wastes of the manor in mediæval times. They are instantly recognisable as such, whether to the lifelong resident, or the passing visitor.

Photo 1: A 'traditional' green: Comberton, Cambs
© Andrew Dunn, 29 August 2005

1.1.2 The passing visitor would be unsurprised to learn that such greens were, for the most part, registered as part of a statutory exercise to record all common land and greens in the late 1960s. But our visitor might be astonished to learn that greens may still come into being, and be registered under the same system, some forty years later. And whereas the majority of greens recorded and protected in the late 1960s were open and unenclosed land (much of it lacking any known owner), some of those sought to be registered today are very different in character — public parks, playing fields, grazing meadows and golf courses.

1.1.3 An estimated 185 applications were made in 2009 to register new greens[3]. While some applications are uncontroversial, and may, even today, relate to land whose owner remains unknown, others are strongly contested by landowners and even local communities, particularly where an application affects plans to develop the land for commercial, residential or community use. The cost to the applicant and supporters, the local authority, and the

Photo 2: A new green: the Trap Grounds, Oxford (source: Natural England)

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[1] *Royal Commission on Common Land 1955–58*, Cmnd 462: paragraph 18.

[2] We refer in this consultation paper only to 'greens': there is no legal distinction between a town and a village green.

[3] See chapter 4.1, figure derived from 2009 survey and scaled up for non-responding commons registration authorities and for the fourth quarter 2009. We refer in this consultation paper to greens registered after 1970 as 'new' greens.

landowner and other objectors, in determining the application, may be very high and perhaps exceed £100,000; the cost to the landowner of an application which is granted may be higher still.

1.1.4 The greens registration system ensures that some land in long-term informal use by the community for recreation is given permanent protection. But such protection can bring about unintended consequences: landowners may well want to exclude all public use of their land, wary of their land becoming a green — even though any such use might fall well short of the criteria for registration. Back in 1891 in *Blount v Layard*[4], Lord Justice Bowen said:

> nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood.

Any such system must therefore seek a compromise between the desirability of protecting sites in long-standing public use for recreation, and encouraging landowners to tolerate informal recreational use without fear of the consequences.

1.1.5 But the greens registration system does not operate to protect all valued sites equally. It is founded in principles of customary law (the law of local custom which was upheld in mediæval England), and even today, can confer protection only where long use can be shown in accordance with the statutory criteria. It does not take account of local need, either for open space, or for alternative uses of the land, nor of the costs of registration to the landowner. Nor does it have regard to the value which local people place on the land, either as a place for recreation or as a green space in the community. The system is focused on a narrow set of criteria without regard to wider legitimate interests.

1.2 New Local Green Space designation

1.2.1 To help address the lack of a more flexible mechanism to protect valued open spaces, the Coalition programme for government includes a commitment to:

> ...create a new designation — similar to SSSIs — to protect green areas of particular importance to local communities.[5]

1.2.2 Delivery of the new designation is set out in the Business Plans of the Department for Communities and Local Government[6] and Defra[7].

1.2.3 The Natural Environment White Paper announced that the new Local Green Space designation will give local people an opportunity to protect green spaces that

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[4] Layard was sued for fishing on a stretch of the River Thames owned by Blount: [1891] 2 Ch. 681n., 691.

[5] www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf.

[6] http://www.communities.gov.uk/publications/corporate/businessplan2011.

[7] www.defra.gov.uk/corporate/about/what/business-planning/.

have significant importance to their local communities, because of, for example, their landscape, historic, recreational or nature conservation value.

1.2.4 The new Local Green Space designation will be backed by strong planning policy in the National Planning Policy Framework, now published for consultation, which sets out the details of how the policy will work. We are consulting on the basis of giving the Local Green Space designation the same level of protection as green belt land. The Local Green Space designation will be introduced by April 2012.

1.2.5 The Government's plans for neighbourhood planning set out in the Localism Bill, and its commitment to introduce a new Local Green Spaces designation through the planning system, give communities new, powerful tools to shape their future development, and to ensure the continuing protection of valued green spaces.

1.3 Why a review?

1.3.1 The volume of applications to register new greens, the character of application sites, the controversy which such applications often attract, the cost of the determination process on the parties affected, and the impact of a successful registration on the landowner: all these aspects are generally very different from what was envisaged by the Royal Commission in 1958.

1.3.2 While applications for registration of new greens have greatly increased over the last 20 years, the process for determining greens applications is less than satisfactory and undermines credibility in the registration system because:

- applications may lack substance or merit, but registration authorities cannot easily reject them without disproportionate effort;
- applications may be submitted at any time up to, or even after, development has begun and so can act as a 'last ditch' attempt to stop authorised development;
- applications stand outside the planning system, and must be determined on legal criteria without consideration of need, impact or hardship affecting any of the parties;
- the increasing number of applications is raising costs to registration authorities, and leading to delays in applications being determined;
- making an application is free to the applicant and so there is no mechanism for discouraging vexatious or speculative applications, notwithstanding the costs imposed on landowners, developers and registration authorities; and
- application sites may bear little relationship to traditional concepts of a green, so that the physical setting of a green (*e.g.* whether it is open to the road, whether it is grassland or woodland) is generally immaterial to the application's success.

Many of these impacts occur irrespective of whether an application is granted: although a successful application is likely to impose greater costs, particularly on the landowner, any application is capable of incurring substantial expenditure by the landowner, the registration authority, the applicant, and other supporters and objectors.

1.3.3 In light of this, and the Government's commitment to introduce the Local Green Spaces designation through the planning system, we believe that there is a case to reform the registration system so as to achieve an improved regulatory balance.

1.3.4 This consultation paper explains the background to the current statutory system for registering new greens, and sets out measures which we propose to adopt to reform the system. The purpose of the consultation is to test whether the proposed reforms are appropriate and proportionate. Given the increasing level of applications over the last few years, and the consequential impact on development proposals, this review is a timely response.

1.3.5 The objectives of the proposed reforms are to:

- strike a better balance between protecting high quality green space, valued by local communities, and enabling legitimate development to occur where it is most appropriate, and
- ensure that when land is registered as a green, because of the exceptional protection afforded to new greens, the land concerned really does deserve the level of protection it will get.

1.3.6 We also wish to improve the operation of the registration system where applications to register land as a green are made so as to reduce the burden on local authorities which are responsible for implementing the registration system, and on landowners.

1.4 Summary of proposals

1.4.1 Each of the proposals identified in this consultation has been briefly summarised here. A more detailed description of each proposal is available in Chapter 5 below.

Do nothing

- No change (chapter 5.2): The existing registration system would remain unchanged.

Refining the registration system

- Streamline sifting of applications (chapter 5.3): This proposal would enable registration authorities to reject applications at an early stage where insufficient evidence had been submitted or where there was strong evidence that the application could not meet the criteria for registration.
- Declarations by landowners (chapter 5.4): Landowners would be given the opportunity to make a statutory declaration to negate any evidence of use of a claimed green during the period while the declaration remained in effect.
- Character (chapter 5.5): New legislation would add a 'character' test to the existing criteria for the registration as a green. Only land which is unenclosed, open and uncultivated would be eligible for registration.

Taking account of the planning system in shaping local places

- Integration with local and neighbourhood planning (chapter 5.6): This proposal would take decisions on the future of sites into the planning system. It would prevent registration of land which was subject to a planning application or permission for development of the site, or which was designated for development or as a green space in a local or neighbourhood plan.

Contributing to costs

- Charging fees (chapter 5.7): An applicant would be required to pay a fee when making an application. Legislation would allow each registration authority to set its own fee subject to a prescribed ceiling. It is not intended that the fee would allow for full cost recovery. Fees could be refundable if the application were granted.

1.4.2 We also seek views on Alternative options (chapter 5.10) and on Other greens issues (chapter 5.11).

1.4.3 We believe that the measures set out under the last three themes will each contribute to the achievement of the objectives for the review, but that only reform containing a comprehensive package of measures, together with the Government's proposals for a new Local Green Spaces designation, and for neighbourhood planning set out in the Localism Bill, will fully deliver the objectives sought.

1.4.4 This consultation does not consider any proposals to relax the criteria for registration of new greens, as a relaxation would not be consistent with the Government's objectives for the consultation. Nor have we included any proposals to diminish the level of protection afforded to greens, because this would affect all greens, both those registered in the 1960s and those subsequently registered. While it would be possible to assign a different, lower, level of protection to new greens, such an approach would be confusing, and would do nothing to tackle the defects inherent in the present registration system.

1.4.5 Responses to the consultation will be used to help shape changes to the greens registration system, by identifying and refining those proposals which are most likely to secure the Government's objectives. We expect to announce our conclusions early in 2012.

1.5 Impact assessment

1.5.1 An impact assessment is published to accompany the proposals in this consultation paper. We explain in paragraphs 109–111 of the impact assessment that we welcome evidence from persons and organisations that have been a party to a greens registration application, and that can supply further evidence of the costs and benefits of their involvement in the process. We would particularly welcome feedback from:

- Applicants: can you tell us about the time spent gathering evidence from potential users of the application site, or of the extent of use made of the green following registration?

- Landowners: do you have information about the costs of opposing an application, and the impact of a successful registration on land values?
- Local authorities: can you provide further information on the costs of processing applications, including the costs of officers' time?

1.5.2 We are also seeking information about the impact of the proposals (individually or as a package) on applications to register new greens — particularly the effect which they would have had on past applications. For example:

- Applicants: would the proposed fee have deterred your application, and would a refundable fee have made a difference? (It would be helpful to know whether your views are associated with an application which was granted or unsuccessful.)
- Landowners: if your land has been the subject of an application, had you made a declaration for that land in relation to public rights of way (so that one might assume that you would have made a similar declaration in relation to greens had the opportunity been available at the time)? Would such a declaration have affected the outcome of the application?
- Local authorities: how would applications granted in the past have fared had the proposals for additional character and planning tests been in place at that time?

1.5.3 If you are able to supply evidence of this kind, please say whether you are willing to have your evidence quoted, and if so, whether you wish it to be attributed to you[8]. Such evidence will improve our assessment of the costs and benefits of the proposals set out in this consultation paper, and help inform the Government's decision on how to proceed in the light of the consultation.

1.6 Territorial extent

1.6.1 We are inviting views on this consultation only in relation to England.

1.6.2 Any changes to primary legislation arising from this consultation would apply to England only. This is because no consultation on the need for, or appropriateness of, any change has been carried out in Wales. Any new legislation would, however, be worded to give the Welsh Ministers the power to apply any or all of the changes should they wish to implement them in Wales. This 'power to apply' would give the Welsh Ministers a discretionary ability to bring forward any changes if, after a full consideration of, and public consultation on, those changes, they are considered to be appropriate for Wales.

[8] Please note that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Environmental Information Regulations 2004.

Chapter 2 : How to respond

2.1 Responses

2.1.1 This is your chance to contribute to a consultation on the system for registering new greens. There are a number of specific questions in Chapter 5 below and these are listed in Annexe A at page 49. Don't feel that you have to respond to all the questions if you do not wish to do so, but we encourage all respondents to consider ***Question 1.*** on page 30.

2.1.2 Please send your response, by **17 October 2011**, to:

ELM/ASU
Department for Environment, Food and Rural Affairs
3/C Nobel House
17 Smith Square
LONDON
SW1P 3JR

E-mail : commonsact.consultation@defra.gsi.gov.uk

Please send your response using only one of these options.

2.1.3 To facilitate subsequent analysis, please ensure your comments clearly refer to question numbers, or paragraph numbers where applicable. If you are commenting on a proposal, please indicate (where possible) whether you support or oppose it (subject to any comments), as this will assist in compiling a statistical summary. If you are responding as a representative organisation, please include in your response a summary of the people and organisations which you represent.

2.2 Copies of responses

2.2.1 When this consultation ends, we intend to put a copy of the responses in the Defra library. This is so that the public can see them. Also, members of the public may ask for a copy of responses under freedom of information legislation. If you do not want your response — including your name, contact details and any other personal information — to be publicly available, please say so clearly in writing when you send your response to the consultation. Please note, if your IT system automatically includes a confidentiality disclaimer, that won't count as a confidentiality request. Please explain why you need to keep details confidential. We will take your reasons into account if someone asks for this information under freedom of information legislation. But, because of the law, we cannot promise that we will always be able to keep those details confidential.

2.2.2 We will summarise all responses and place this summary on our website. This summary will include a list of names of organisations that responded but not people's personal names, addresses or other contact details. To see consultation responses and summaries, please contact the library at: tel: 020 7238 6575, e-mail: defra.library@defra.gsi.gov.uk. Please give the library 24 hours' notice. There is a charge for photocopying and postage.

Chapter 2: How to respond

2.3 Enquiries

2.3.1 Enquiries about the content of this consultation paper should be made to:

Commons and Access Implementation Team
Department for Environment, Food and Rural Affairs
3/B Nobel House
17 Smith Square
LONDON
SW1P 3JR

Tel: 020 7238 6326
E-mail: commonsandgreens@defra.gsi.gov.uk

Please do not use this address for responses to the consultation.

2.3.2 The consultation paper, together with a list of the organisations whose attention we have drawn to this consultation paper, is also available on the Defra website: www.defra.gov.uk/consult/open/ . If you think any other organisation should see the consultation paper, please let us know.

2.4 Complaints or comments about this consultation paper

2.4.1 The consultation document has been drafted in accordance with the Government's code of practice on consultations. The code aims to increase the involvement of people and groups in public consultations, minimising the burden it imposes on them, and giving them a proper time to respond. Consultations are expected to adhere to seven headline criteria:

- Criterion 1: When to consult
- Criterion 2: Duration of consultation exercises
- Criterion 3: Clarity of scope and impact
- Criterion 4: Accessibility of consultation exercises
- Criterion 5: The burden of consultation
- Criterion 6: Responsiveness of consultation exercises
- Criterion 7: Capacity to consult

The code may be viewed on the Department for Business Innovation & Skills' website at: www.bis.gov.uk/policies/better-regulation/consultation-guidance.

2.4.2 If you have any comments or complaints about this consultation process, other than comments on the consultation document itself, you may wish to contact Defra's consultation co-ordinator at the address below:

Chapter 2: How to respond

Consultation Co-ordinator
Department for Environment, Food and Rural Affairs
Area 7C
Nobel House
17 Smith Square
LONDON
SW1P 3JR

Tel: 020 7238 1205
Fax: 020 7238 6447
E-mail: Consultation.Coordinator@defra.gsi.gov.uk

Please do not use this address for responses to, or enquiries about, the consultation itself.

Photo 3: Little Milton village green, Oxon (application granted)

Chapter 2: How to respond

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Chapter 3 : An introduction to greens

3.1 The origins of greens

3.1.1 Greens have a long history in England. However, their origin is unclear. Some probably developed from places in Anglo-Saxon settlements where livestock were housed or common grazing occurred: this land was often waste land of the manor[9], subject to rights of common to graze animals, which over time and because of its location at the centre of the community, was isolated from the more extensive manorial wastes outside the village, and became less and less important for grazing[10]. There is also evidence that a number of greens were created through the establishment of settlements following the Norman Conquest in the 11th Century. These so-called 'green villages' were planned and laid out, comprising a row of properties either side of a green, which could be easily defended.

3.1.2 Such land, in or close to the settlements, soon evolved into an essential community space serving a variety of the needs of the village: for recreation, sports and fairs. Ponds provided watering holes for livestock and greens often contained wells supplying the community with water. The village stocks were sometimes located on the green providing a public deterrent to potential law breakers. Greens have traditionally been used for cricket but in the past they have also been used to practise archery. Various festivals throughout the year were also celebrated on the green, with the tradition of maypole dancing lasting right up until modern times.

3.1.3 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 green with protection from interference. The legal basis for greens is within our common law (of which customary law governing the use of greens is a part) and there are records of legal cases relating to customary rights dating back to at least 1665[11]. The first time that the term 'village green' was used in an Act of Parliament was in the Inclosure Act 1845[12]. This Act, along with the Commons Act 1876, provides the legal protection which registered greens enjoy to this day (see chapter 3.4 below).

3.1.4 The Inclosure Act 1845 also enabled the Inclosure Commissioners, in authorising the inclosure of common land, to

Photo 4: An inclosure allotment dating from 1867: East Clandon, Surrey

[9] The waste of the manor is the part of the lands owned by the mediæval lord of the manor which was not occupied by the lord himself, nor tenanted, but grazed in common by the manorial tenants.

[10] Some greens are registered subject to rights of common, and such rights (although seldom exercised) may often have originated as rights to graze on the green and other commons in the manor. In some areas, such as the New Forest, greens continue to be grazed by animals which are depastured on neighbouring commons.

[11] *Abbot v Weekly* (1665) 1 Lev 176, 83 E.R. 357.

[12] Section 15: "No town green or village green shall be subject to be inclosed under this Act".

require the provision of an "Allotment for the Purposes of Exercise and Recreation for the Inhabitants of the Neighbourhood"[13]. Although not specifically described as greens, many such pieces of allotted land were made under inclosure awards both before and after 1845.

3.2 The registration system

3.2.1 Although the right for local inhabitants to use certain land had long been established, no definitive record of that land existed until the late 1960s. This lack of clarity had been of increasing concern and in 1958 the *Royal Commission on Common Land* observed that some greens were beset by various dangers, including 'the effect over-all of indifference and general neglect'[14]. The Commission concluded that it was in the public interest to preserve greens and, in order to achieve this, recommended that they should be formally recorded on a conclusive register. Their recommendation was that, in order to be recognised as a green, land should be:

> in a rural parish any uninclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants [for lawful sports and pastimes] during a period of at least twenty years without protest or permission from the owner…or the lord of the manor.[15]

3.2.2 Many of the Royal Commission's recommendations, and particularly those in relation to registration, were adopted by the Commons Registration Act 1965 ('the 1965 Act'). The 1965 Act appointed what are now county councils, metropolitan borough councils and London borough councils as commons registration authorities[16] and required them to establish registers of greens for their areas. Greens were defined in much the same way as the Royal Commission had proposed, as:

> …land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.[17]

But the 1965 Act departed from the Royal Commission's view that land should be in a rural parish, uninclosed and surrounded by houses, and made no such stipulation.

3.2.3 Applications for the registration of existing greens were invited to be made to registration authorities between 1967 and 1970 (we refer to this initial opportunity for registration as the 'first wave'). Every application, if properly made, caused the land

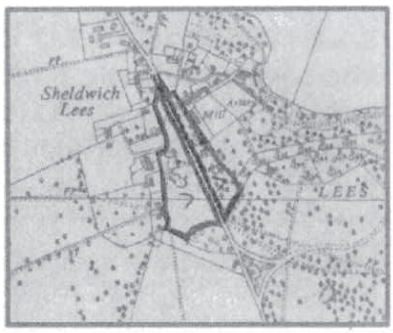

Photo 5: Register of town or village greens: Sheldwich, Kent (source: Kent CC)

[13] Section 30.

[14] Paragraph 27: see footnote 1.

[15] Paragraph 403: see footnote 1.

[16] Referred to in the 1965 Act and here as 'registration authorities'.

[17] Section 22(1) of the 1965 Act.

to be provisionally registered as a green. Where there was no objection to a provisional registration, the green became finally registered. However, where an objection was made, the provisional registration was referred to a Commons Commissioner who, having undertaken an inquiry into the objection, could confirm the registration as final (either with or without modification) or refuse it. The 1965 Act provided that "no land capable of being registered under [the 1965] Act shall be deemed to be...a town or village green" unless it had been registered by 31 July 1970[18].

3.2.4 The 1965 Act also provided for the ownership of greens to be recorded in the registers of greens. Where no-one, or two or more persons, claimed ownership of any part of a green, the Commons Commissioner was required to inquire into the ownership. If the Commissioner was not satisfied that any person was the owner, he directed that the local authority (generally the parish council) should be recorded as the owner, and the land became vested in that authority.

3.2.5 In addition to allowing for the registration of greens during the first wave in the late 1960s, the 1965 Act also made provision for new land to be registered where it had become a green after 2 January 1970[19]. Provided it could be demonstrated that after this date a piece of land has been used as of right[20] by the inhabitants for lawful sports and pastimes, for at least 20 years, it could be newly recorded in the greens register as a green.

3.2.6 Some minor amendments to the greens registration system were made in the Countryside and Rights of Way Act 2000 (which allowed a claim for registration on the basis of use by a 'neighbourhood', a potentially smaller part of the community than hitherto) and the Commons Act 2006 ('the 2006 Act', which enabled for the first time voluntary registration of a green by a landowner, and specifically provided for registration of a green up to two years after use had ceased[21]) but in essence the current greens registration system is based on that set out in 1965 Act.

3.3 The role of the commons registration authority

3.3.1 Since 1970, any application to register a new green has been dealt with by the registration authority[22]. Registration authorities are required to fulfil a quasi-judicial function in determining whether the criteria set out in the legislation have

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[18] Section 1(2)(a) of the 1965 Act. The effect of this deeming provision has been a matter of considerable uncertainty.

[19] It seems that a green which was capable of being registered under the 1965 Act during the 'first wave', but which was not so registered, ceased to be a green thereafter, and could not be registered after 1970 except where a further 20 years use could be shown. So such greens were not eligible for registration after 1970, until 1990. However, new greens could be registered from 1970 onwards, on the basis of 20 years' use dating from no earlier than 1950.

[20] 'As of right' means that the land was used without force (*e.g.* breaking down a fence to gain entry), without secrecy (*e.g.* only at night or when the owner is known to be absent), and without permission (*e.g.* under a licence to occupy the land, or where a revocable consent has been given to use the land).

[21] Five years was allowed as a transitional provision.

[22] For guidance and legislation on applications to register a new green, see: www.defra.gov.uk/rural/protected/greens/.

been met and whether the application for registration can be granted: accordingly, a decision must be taken by the council or a committee of the council[23].

3.3.2 The initial steps to be taken by the authority on receipt of an application are set out in regulations[24], but there is no prescribed process for resolving the complex questions of fact and law which often arise in such cases. In practice, some decisions have been taken after investigations or hearings held by officers or local authority committees, others (usually the more contentious ones) have involved hearings or inquiries which may be presided over by a barrister or independent inspector. Where an inquiry has been held, it remains for the registration authority to grant or reject an application, and its decision can be challenged only on application to the High Court. The law relating to greens is notoriously complex, blending customary law, statute law and common law, and there has been considerable recent litigation arising from registration authorities' decisions, with twelve high profile cases in the superior courts, of which four in the House of Lords or Supreme Court, in the past decade, and further challenges in the pipeline.

3.4 The effect of registration as a green

3.4.1 Under customary law, land became a green in consequence of long use[25] — although in practice, it seems likely that it acquired that status only where it was widely acknowledged as a green or awarded as such under an Inclosure Act (prior to registration under the 1965 Act, few could have afforded to take uncertain action through the courts to prove status and resist encroachment).

3.4.2 Since the 1965 Act, and notwithstanding that land may theoretically satisfy the criteria for registration as a green (because it has been used for lawful sports and pastimes as of right for upwards of twenty years), land does not acquire the status of a green unless and until it is registered. The House of Lords in the *Trap Grounds* concluded that: "there is no legal basis for treating … land as having acquired village green status by virtue of an earlier period of qualifying use [preceding registration]."[26] Only the process of registration under an Act of Parliament has afforded the same comprehensive protection to all land registered as green.

3.4.3 Once a green is registered, registration provides it with the highest degree of protection afforded to any land in England. It becomes a criminal offence to cause any damage to the green or to undertake any act which interrupts the use or enjoyment of a green as a place of exercise and recreation. It is also a public nuisance to

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[23] Or by delegation to an officer. A decision may not be taken by an executive of a local authority: paragraphs 37 and 72 of Part B of Schedule 1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2000/2853) as amended.

[24] The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (SI 2007/457) or, in the registration authority areas pioneering the implementation of Part 1 of the 2006 Act, the Commons Registration (England) Regulations 2008 (SI 2008/1961).

[25] Strictly speaking, since 'time immemorial', the date for which was fixed as 1189.

[26] *Oxfordshire County Council v Oxford City Council and Robinson* (also referred to as *The Trap Grounds*), at: www.bailii.org/ew/cases/EWCA/Civ/2005/175.html, paragraph 43, Lord Hoffmann quoting with approval the words of Carnwath LJ in the Court of Appeal, in relation to the effect of registration of land as a green under the 1965 Act.

encroach onto a green (for example, by enclosing part of the green into a garden) or to fence it in[27].

3.4.4 These requirements ought to preserve a green in the state it was in at the time it was registered. They prevent any development on a green or any activities being undertaken which may affect how it is used, other than for its better enjoyment. Work which interferes with a registered green may be done only using powers of compulsory purchase, which usually requires equally advantageous land to be given in substitution for the taken land.

3.4.5 Local inhabitants are entitled to use a registered green for all lawful sports and pastimes[28]. The owner of a green may in theory exclude the wider public from a green. But in practice, the owner may experience insuperable difficulties in identifying who qualifies as a 'local inhabitant'[29].

3.4.6 There is no legal distinction between greens registered in the first wave under the 1965 Act, and new greens which have been subsequently registered since 1970. All registered greens are subject to the same protection and rights.

Photo 6: The boat basin, Outwell, Norfolk (application granted)

[27] See Defra's guidance note on *Management and protection of registered town and village greens*: www.defra.gov.uk/rural/protected/greens/.

[28] The *Trap Grounds*, see footnote 26.

[29] In *Wisborough Green Parish Council v Fegan*, *The Times*, 6 June 1898, the High Court appeared to accept that the parish council could refuse to allow boys on holiday at a nearby camp to use the green. But most first wave registrations of greens are entirely silent as to the localities associated with them.

Chapter 3: An introduction to greens

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Chapter 4 : Use of the current system

4.1 Level of activity

4.1.1 Registration authorities have determined all applications to register new greens made from 1970 onwards. But no information was systematically collected by Government about successful applications until 2007.

4.1.2 The University of Wales Rural Surveys Research Unit undertook a survey of registration authorities' registers of greens between 1984 and 1989. The database records 4,332 greens in England, but does not identify those which were registered after 1970[30]. However, very few new greens are thought to have been registered between 1970 and 1988.

4.1.3 Defra commissioned a report in April 2005 from ADAS to review and update existing data on greens, to identify and analyse conflicts of interest occurring in relation to the registration of new greens, and to analyse the problems arising over the use and management of greens including vehicular access and parking[31]. The report noted that, since 1993, the 114 authorities which responded to the survey in England and Wales had received 380 green applications. Of these, 89 applications had been granted. Assuming that the authorities surveyed are representative of those nationally, the survey suggested around 116 new greens were registered in England between 1993 and 2004[32].

4.1.4 Defra undertook surveys of all registration authorities in England in October 2007 and October 2009 to gauge the level of registration activity[33]. The surveys sought information about the numbers of recent applications and determinations. The surveys also asked for information about the cost of public inquiries to determine disputed applications, and for comments on the registration system under the 2006 Act. Approximately two-fifths of authorities responded to each survey, and the results were considered to be reasonably representative of all authorities in England. The survey results were therefore used to estimate activity data for England as a whole, based on an analysis of responses classed by London borough, metropolitan district, non-metropolitan counties, and unitary authorities. The following table shows estimates of activity for England:

[30] A database containing some of the survey data is available from the Defra website, at: www.defra.gov.uk/rural/protected/greens/.

[31] www.defra.gov.uk/rural/protected/greens/.

[32] Approximately one-third of applications that had been received since 1993 were still being processed at the time of the survey, which could well increase the total number of greens registered in consequence of applications made during that period. The figures here must be treated with caution, since the local authorities surveyed may not be representative.

[33] A summary of the 2009 survey is available on the Defra website, at: www.defra.gov.uk/rural/protected/greens/.

Table 1: Estimated numbers of greens applications in England, 2003–September 2009

Year	Number of green applications…			
	applications in year	applications **determined**§ in year	applications **granted** in year	applications **rejected** in year
2009 (to end Sep)	**139**	**77**	**17**	**79**
2008	**196**	**73**	**26**	**52**
2007[34]	**143**	**44**	**18**	**35**
2006	**103**	**24**	**8**	**16**
2005	**69**	**48**	**30**	**22**
2004	**56**	**33**	**9**	**29**
2003	**56**	**42**	**10**	**30**

Values relate to the number of applications received or determined (as the case may be) in the specified year, and do not indicate the outcome relating to applications received in a particular year. Many applications are determined in a later year than the one in which they are received.

§ Values in this column should equal the sum of the following two columns. However, there are various discrepancies, probably owing to applications considered over several years being assigned to the wrong year.

4.1.5 The data, taken together, suggest that the total number of registered greens in England is likely be around 4,547[35], but this figure can only be a rough estimate.

4.1.6 It can be seen that the volume of applications appeared to have significantly risen from around 50–70 per annum in the period 2003–05, to some 100–200 per annum in the period 2006–09, but the volume of applications granted has fluctuated greatly from year to year, between 30 in 2005 and just 8 in 2006. However, the data also show that the number of determinations has, since 2006, generally been well below the level of applications, which in our view reflects increasing congestion within some registration authorities dealing with applications, and a likelihood that the determination of many applications is being deferred as resources permit.

4.1.7 Indeed, there is some specific evidence of clustering of applications: for example, both Kent County Council and Derbyshire County Council had 25 applications awaiting determination at the end of 2010[36]. A continuing high level of applications is likely to worsen the backlog in those authorities already affected, and increase the likelihood of a backlog forming in other authorities.

4.1.8 The survey also sought information about the costs and frequency of public inquiries held by registration authorities:

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[34] The criteria for application were amended with effect from April 2007, by the implementation of section 15 of the 2006 Act. These data include applications under both the 1965 and 2006 Acts.

[35] Comprising 4,332 on greens database, 89 from ADAS report, and total number of greens registered between 2004 and end of Q3 2009 (99).

[36] Information supplied by local authorities, December 2010 and on website: https://shareweb.kent.gov.uk/Documents/environment-and-planning/public-rights-of-way/website-register-of-apps.pdf.

Table 2: Estimated volume and cost of greens application inquiries in England, 2007–2009

	Public inquiries		
	public inquiries	inspectors' fees	average barrister's fee§
2009 (until 30 Sept)	**40**	**419,000**	**£13,000**
2008	**48**	**1,093,000**	**£21,000**
2007	**26**	**358,000**	**£15,000**

§ average (mean) fee for barristers presiding over public inquiry (some inquiries are presided over by inspectors or local authority solicitors, and the costs are not included in this calculation).

4.2 Study of determined town and village green applications

4.2.1 Defra commissioned research[37] from the Countryside and Community Research Institute[38] in 2009 to examine a representative sample of applications to register greens which had been either rejected or granted since January 2004. The project examined the character of application sites, and explored whether the sites were earmarked for development in local development plans or subject to planning applications. The research concluded that:

- There was no characteristic of land which was typical to either successful or unsuccessful applications, though applications relating to smaller pieces of land were more likely to be granted.
- There was a wide variety of motivations behind applications and many were triggered by some sort of perceived threat to the site, such as plans for housing or other development, or simply concerns over management of the land. Just under half of applications were directly related in some way to planning applications or allocation of sites for development in the local authority's local plan — but in the other half, there was no apparent causal link.
- The main reason why applications were rejected was because applicants failed to show that use of the land by the local inhabitants had been 'as of right' (*i.e.* without permission), typically because the use was actually 'by right' (*i.e.* with permission or lawful authority). For example, some applications failed because the land was a park which the public was entitled to use by law.

4.2.2 The application sites in the sample varied widely in size (from 0.1 ha to 114 ha) and types, including: open land on housing estates; playgrounds and parks; unplanned urban, suburban or rural open spaces; brownfield ex-industrial sites; and, agricultural or former agricultural land. There was no dominant pattern of registration of any particular type of land. Broadly speaking, many of the successful applications secured the registration of sites which would fit a popular conception of a green, but

[37] A summary of the research, together with the final report, is available at: http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=16581.

[38] The CCRI is a partnership between the University of the West of England, Hartpury College, Royal Agricultural College and the University of Gloucestershire: see www.ccri.ac.uk.

equally, some of those registered — or indeed rejected — could not be more remote from that concept.

4.3 ACRA survey

4.3.1 In parallel to the CCRI research, the Association of Commons Registration Authorities (ACRA)[39] undertook a survey of the experience of member registration authorities with greens applications. The results of this survey supported the CCRI research and also concluded that some applications were submitted because of planning applications or the development of local plans.

4.3.2 Just over half of applications considered in the survey failed, and again the most common reason was because use of the land by the local inhabitants was not 'as of right'. Nearly two-thirds of respondents did not think that the reasons for an application failing could have been identified earlier in the process (so that it could have been sifted out sooner and at less expense).

4.4 Land registered as a green

4.4.1 In the opening words to the judgment of the Court of Appeal in the *Trap Grounds* case, Lord Justice Carnwath said[40]:

> The traditional village green needs no introduction:
> "'Village green' — the very words are evocative of great age and tranquillity, of turf as rich in hue as it is trim in a setting untouched by time"[41]
> "the traditional village green with its memories of maypole dancing, cricket and warm beer."[42]
> ...
> "In popular language, the village green ... is a small area of open land in the middle of a village where the inhabitants can rest or play, the children run round and, archetypally, the village cricket team holds its matches."[43]

4.4.2 No comprehensive survey has been undertaken of the character or nature of greens since the Rural Surveys Research Unit project in the late 1980s (see paragraph 4.1.2 above), and the connected National Survey of Town and Village Greens — a joint venture between the Unit, the (then) Countryside Commission and the National Federation of Women's Institutes[44]. The nature of the registration system under the 1965 Act meant that much land became registered as a green on the initiative of applicants without any mechanism for external scrutiny (provided no objection was made to the provisional registration). Consequently, some such land is

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[39] ACRA represents the interests of commons registration authorities: see www.acraew.org.uk.

[40] Paragraph 1: see footnote 26.

[41] Quoted from the report of the Royal Commission: see footnote 1.

[42] Quoted from the speech of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council*, at: www.bailii.org/uk/cases/UKHL/1999/28.html.

[43] Quoted from *The Law of Commons* (1988), page 37, paragraph 13.01.

[44] Defra commissioned a study of a sample of the Survey returns in 2011: http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=17706.

very far from the popular perception of the 'traditional village green': land registered as green includes for example roadside verges, town squares and car parks. However, it seems that the majority of registrations under the 1965 Act can broadly be classed either as land within a community which has long served the role of unenclosed open space (and generally might be recognised as traditional greens), or as land which was allotted, generally under an inclosure award, as a recreation ground for local use (but which is not always conveniently located[45]).

4.4.3 The research undertaken by CCRI (see chapter 4.2 above) demonstrates the variety of lands which are the subject of applications to register new greens under the 2006 Act. The research report explains that:

> For the purpose of analysis, the determined [green] application sites were categorised as follows:
> - Small sites within housing estates, mostly owned by local councils or developers (9 sites, 7 successful and 2 unsuccessful);
> - Playgrounds and parks (12 sites, 5 successful and 7 unsuccessful);
> - Unplanned urban or suburban open spaces, including brownfield ex-industrial sites (7 sites, 3 successful and 4 unsuccessful);
> - Agricultural (or ex-agricultural) sites which may be owned by farmers or developers (6 sites, all unsuccessful);
> - Rural 'open spaces' including woods (14 sites, 10 successful and 4 unsuccessful).[46]

4.4.4 The survey suggests an evolution of the character of greens since the first wave of registration in the 1960s. For example, a number of the sites surveyed related to small parcels within modern housing estates, which had been intentionally left as amenity open space, and which may fulfil the same role in relation to a housing estate as a traditional green fulfils in relation to an older settlement. The survey also recorded a number of sites, classed as rural open spaces, some of which were wholly consistent with the character of sites registered as green in the first wave: *e.g.* small unenclosed parcels of land, often lacking a known owner, providing both open space and a visual feature within the community.

4.4.5 In contrast, some applications related to unplanned urban open spaces or to green field sites (some of which remained in agricultural use) which lacked the character of traditional greens as being open and unenclosed: while such sites may sometimes be similar in character to greens allotted under inclosure awards and registered during the first wave, they lack the statutory origin in formally granted rights.

4.4.6 Registration does not, in itself, bring with it any certainty of maintenance of the green as suitable for recreation. Registration does not affect ownership of the green, and where the land remains in private ownership, and particularly if the registration has prevented planned development of the site, the owner may be

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[45] It seems that many allotted greens were never convenient to those who might have wished to use them, and s.149 of the Inclosure Act 1845 provides for allotments to be exchanged for a more convenient site on application to (now) the Secretary of State.

[46] See footnote 37: paragraph 4.11.

disinclined to incur costly expenditure on maintenance for purely public benefit. However, there is some anecdotal evidence that, in such cases, a private owner may subsequently be willing to sell the land to a local authority (such as the parish council) or other public or community organisation in order to relieve the former owner of any responsibilities or liabilities associated with continuing ownership, and in order to allow the new owner to manage the green in the public interest. In such cases, the land may be sold at a price much reduced from its value before the application was made for registration.

4.5 Registration benefits

4.5.1 An application for registration of a green which is granted brings about the following benefits:

- preservation as a green space;
- protection from development;
- protection of nature conservation and cultural heritage interest;
- protection from other uses inconsistent with recreational activity (*e.g.* intensive grazing, parking);
- a right of access, and right of use, for lawful sports and pastimes (in both cases, nominally restricted to the local inhabitants).

These benefits are largely non-monetary in character, but they may be realised in, for example, an increase in local property prices, reflecting the value of the green to the community.

4.5.2 These benefits potentially accrue to the local community, rather than only to the applicant for registration and those supporting the application. This does not mean that an application for registration will necessarily be supported by all of the local community[47], but if the application is granted and the green is registered, then the community may benefit. It is not necessary that a particular individual wishes (or is able) to enjoy the green for recreational purposes: for example, a local homeowner may benefit from maintaining the value of that home, without any intention to use or even visit the green. However, a proportion of the community may have no interest or intention to use the green — for example, because there is alternative recreational space, which is nearer than or preferred to the green.

4.5.3 As we have seen (see paragraph 4.4.6 above), registration in itself does not bring with it any obligation of maintenance, but it appears that in most cases, registered greens are maintained in a sufficient state consistent with public use, either by the owner, a local authority, or by a local community organisation. In some cases, the owner of land may lose interest in its management following registration, and the same community engagement which inspired the application for registration may also be capable of delivering continuing informal management, at no cost to the owner nor to the local authority.

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[47] But an application, to be successful, must contain evidence that the claimed land was in use by a 'significant number' of local inhabitants.

4.5.4 In some cases, applications are made to register as a green land which has no known owner: such applications may be made by parish councils or others with a view to long-term protection, not attract objections (or objections may be received only from third parties), and may very often be granted (although the registration authority must still be satisfied that the criteria for registration are met). The effect of registration may be that the parish council, or others, acquire increased confidence to manage the land (notwithstanding the uncertain ownership).[48]

4.5.5 Even where an application for registration is ultimately unsuccessful, an application (while its determination is pending) may be seen as generating benefits for some people (such as the applicant and supporters of the application), because of:

- temporary protection from development and continuing use for recreation[49];
- delay to any development;
- possible withdrawal of development proposals (*i.e.* the developer 'throws in the towel');
- community engagement to secure registration of a green and oppose development (which may deliver an enduring capacity for community involvement).

It is conceivable that the temporary benefits delivered by an ultimately unsuccessful pending application for registration may sometimes be sufficient in themselves to make the application worthwhile — even if the applicant (and those supporting the applicant) have no real expectation of the application being granted, and applications which are perceived to have been made in these circumstances may be seen as vexatious or speculative. However, some landowners respond to applications by excluding access to the land pending determination, and in such cases, the land itself will cease to be available for recreation (although the other benefits described above may endure).

4.5.6 Benefits will seldom accrue to the landowner from registration (but note that landowners wishing to achieve the benefits of registration for the local community can apply to register land as a green voluntarily[50]).

4.6 Registration costs

4.6.1 The owner of the land will be affected most obviously where an application for registration is granted and the owner had intended changing the use of the land at some stage in the future: the effect of registration of land as a green is likely to constrain future use to the same low-level activities consistent with recreational use

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[48] Alternatively, a district council or a National Park authority may make a scheme of regulation for the land under Part I of the Commons Act 1899, so as to vest management in that authority. In the absence of a known owner, no person would be able to wield the potential veto over the scheme for which the 1899 Act provides.

[49] There is no specific protection for land which is the subject of a pending application for registration as a green, but few landowners appear willing to proceed with plans for development while the application remains undetermined, if there remains a risk that the development might have been undertaken on land subsequently registered.

[50] Under section 15(8) of the 2006 Act. An application under section 15(8) is relatively simple and inexpensive: see guidance on *Voluntary dedication of land as a town or village green*: www.defra.gov.uk/rural/protected/greens/.

— for example, for extensive or rough grazing, for crops of hay or silage, for golf, or as playing fields — which are consistent with the use (if any) to which the land was put prior to registration (any more intensive use is likely to be incompatible with use of the land for lawful sports and pastimes 'as of right'). But where the landowner has the necessary permissions to enable development, or reasonable prospects of securing such permissions (*e.g.* because the land is allocated for housing in the local development framework), or plans to intensify use of the land (*e.g.* by cultivating land previously used for extensive grazing), registration will present an insuperable impediment.

4.6.2 Even low level use, such as extensive grazing, may become impracticable following registration: for example, a green which frequently is used for walking dogs may be incompatible with the grazing of sheep. Similarly, significant recreational use of the whole area of a green may render it impracticable for cutting hay or silage making, because of disturbance to the grass[51]. However, as a rule, use of a green by local inhabitants is expected to be compatible with low level use by the owner, and their use must accommodate the owner's where necessary (for example, by not disturbing grass cut for hay, and by not interfering with sports played with the landowner's permission).

4.6.3 Where registration of a green prevents the owner's plans for development of the site, the cost to the owner may be very considerable (in some cases, the owner's interest in development may have been sold to a developer, in which case, the cost may be borne by both the owner and the developer). Land that has the potential to be subject to an application for registration as a green may be priced at a discount to similar land elsewhere to take account of the possibility of a successful application for registration having an impact on the potential for development. An existing undeveloped plot of land may have 'development value' which is the value above existing current use value associated with the potential for planning permission being granted for development. This may vary from site to site but will be insignificant if the plot becomes registered as a green.

4.6.4 The owner is also likely to incur costs in opposing an application for registration of the land as a green, whether or not the application is likely to succeed. In addition to the owner's own time, and that of his employees, the owner may well employ legal and other professional advisers to advise on the case against registration, and if the application is referred to a public inquiry, to present the case to the inquiry.

> **Case study.** An application was made in 2007 to register land at Oulton St Michael in Suffolk. A three day inquiry was held to consider the evidence. In due course, the inspector recommended that the application

[51] In *Fitch v Fitch* (1797) 2 Esp. 543, 170 E.R. 449, the court held that the rights of both owner and local inhabitants existed together, and the right to lawful sports and pastimes must be exercised fairly and not improperly. The jury found that the defendants had trespassed, because they had entered the green, "trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it of no value." It is not apparent from the case whether the damage was intentionally caused by the defendants, or simply a consequence of ordinary use of the land for sports and pastimes.

> be refused, and the registration authority accepted the inspector's recommendation.
>
> One of the two owners of the land, the Norwich Diocesan Board of Finance, incurred legal costs of £49,445 in opposing the application, together with other professional fees of approximately £3,000. Had the application been granted, the Board estimated that the loss of development value would have been around £300,000.

4.6.5 The courts have concluded that registration of land as a green is not contrary to the Human Rights Act 1998. In *Whitmey*, the court ruled that the greens registration system was no more than a "control [on] the use of property in accordance with the general interest"[52], while in the *Trap Grounds*, the House of Lords found that the system was justified in human rights terms because: "first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration in the 1965 Act was introduced to preserve open spaces in the public interest."[53]

4.6.6 An application for registration also imposes costs on the registration authority which is responsible for determining the application. The 2009 survey (see chapter 4.1 above) recorded 17 public inquiries in 2009 presided over by a barrister, at an average cost of about £13,000. The total legal fees incurred in the first three quarters of 2009 by responding authorities solely in relation to the 21 public inquiries commissioned by them were approximately £¼ million; total legal fees in 2008 for public inquiries held by all authorities in England are estimated at over £1 million. These figures do not include the cost to the registration authority itself, in officers' and members' time, in processing the application.

4.6.7 An application for registration may also impose costs on third parties, including:

- those who support or oppose the development or the registration application — such as supporters of the application, who may be required to attend a public inquiry during working hours to give evidence of use;
- those who have an interest in development of the land — for example, a body which is interested in acquiring part of a completed development (such as a business proposing to lease office space, or a housing association proposing to acquire new homes), and which must make alternative arrangements (which may be less satisfactory);
- the local community, where a registration application causes previously tolerated use of the land to be withdrawn by the owner — particularly if the application is rejected but public access is not subsequently restored;
- the wider community — especially where an application which is granted, or which causes significant delay, affects a development undertaken in the public

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[52] *R (on the application of Whitmey) v Commons Commissioners*: www.bailii.org/ew/cases/EWCA/Civ/2004/951.html.

[53] Paragraph 59, *per* Lord Hoffmann: see footnote 26.

interest, such as a health centre or affordable housing, so that alternative arrangements must be made (which may be less satisfactory).

4.6.8 Finally, the applicant for registration may incur costs in pursuing the application, measured in terms of the applicant's own time and that of any advisers, the applicant's out-of-pocket expenses, and the costs of any legal advice which is sought. It is perhaps unwise to assume that the applicant's costs are willingly incurred: few applicants are likely to have previous direct experience of an application, and the commitment of time and money to an application may prove to be very much higher than originally expected. Moreover, if the application is unsuccessful, the rewards may be minimal.

Case study. An application was made by Keep Croxley Green Group to register Long Valley Wood and the Buddleia Walk at Croxley Green as a green in 2004. Much time was spent gathering information to support the application: "We obtained an extra 500 evidence forms. ...This entailed door to door knocking, explanation and correlation over a 3 week period." A five day public inquiry in March 2007 involved 1,200 pages of evidence. Preparation for the inquiry required "2 weeks (evenings) of advertising event around the locality, preparing witness providers and organising order of attendance". Financial costs to the Group were "relatively small. £8,000 for barrister on fixed term basis. Solicitor was a local person who provided services at no charge. ...many hours in chasing up registration authority clerks and their solicitors, dealing with enquiries from local people (immeasurable), responding to local and national press, radio interviews and even a slot on the ITV 6 O'clock Show.".[54]

Photo 7: Land at Vicarage Rough, Clun Glebe, Shropshire (application rejected)

[54] Source: Keep Croxley Green Group.

Chapter 5 : Proposals for change

5.1 Introduction to the proposals

5.1.1 Taking account of the plans for the new Local Green Spaces Designation, we have proposed a range of measures for reforms to the greens registration system. This chapter presents these proposals, grouped into four themes:

- **Do nothing —** make no changes to the current system.
- **Refining the registration system** — revising key parts of the system, by strengthening qualifying criteria to give greater protection to landowners and ensuring applications for traditional sites stand the best chance of being approved.
- **Taking account of the planning system in shaping local places** — increasing coherence between the greens registration and planning systems to reduce the ability for green applications to disrupt the planning process.
- **Contributing to costs —** introducing fees to help with the costs falling on local authorities.

5.1.2 For each proposal, we have set out the context, described how the proposal would work, and looked at the likely impacts. We have also stated whether each proposal would require any change to primary legislation (*i.e.* a new Act of Parliament), or can be achieved through just secondary legislation (*i.e.* new regulations made under the 2006 Act).

5.1.3 We have analysed the proposals in isolation — that is, we have looked at the impact of each proposal as if it was adopted on its own — and taken together, as a package in accordance with our plans for implementation: see chapter 5.8 below.

Do nothing

5.2 No change

Context

5.2.1 If the Government takes no action to promote changes to the existing greens registration system, applications may continue to be made and determined on the present criteria. In this context, 'no change' means no changes in either primary or secondary legislation (*i.e.* no amending Act of Parliament or regulations).

About the option

5.2.2 This option — no change — assumes that the existing registration system remains unchanged. Other proposals set out in this chapter are measured against the 'do nothing' option as the baseline position. As we have explained in chapter 1.3 above, the Government does not believe that 'no change' is an appropriate response to the problems which have been identified. But it is right that proposals are measured against a baseline position.

5.2.3 This option would not require any change to primary or secondary legislation.

How it would work

5.2.4 This option leaves the existing registration system unchanged (see Chapter 4 above for an explanation of the present system).

Impact

5.2.5 For the benefits and costs associated with the present greens registration system, see Chapter 4 above.

No change	
Advantages	***Disadvantages***
• see chapter 4.5 • wealth of guidance and case law available to authorities and other parties, who are familiar with existing system	• see chapter 4.6

Questions

Question 1. Taking account of the Government's plans for the new Local Green Spaces designation, do you agree that the problems identified with the present greens registration system are sufficient to justify reform — so that the 'no change' option should be rejected?

Refining the registration system

5.3 Streamline sifting of applications

Context

5.3.1 An application for registration of a green is initially considered by an officer of the registration authority, who considers whether the application is properly made[55]. Evidence suggests that few applications are rejected outright at this early stage. The authority may conclude that the applicant's case is weak (*e.g.* lacking in evidence of use, or doubt whether the use was 'as of right'), but consider that the applicant's case must be properly tested, and the applicant given an opportunity to strengthen that case, before a determination is made. That may often entail holding a hearing or inquiry into the evidence and receiving legal submissions, at substantial cost to all the parties involved, and incurring significant delay.

About the proposal

5.3.2 The purpose of this proposal is to ensure that weak or vexatious applications may be sifted out by the registration authority at an early stage: this will minimise the

[55] In the seven local authority areas pioneering implementation of Part 1 of the 2006 Act, the registration authority is required to consider whether the application is duly made. Elsewhere, the authority must consider, after 'preliminary consideration', whether the application is duly made (but must first give the applicant an opportunity to put the application in order, if practicable).

delay to all parties affected by a pending application, and will also minimise the costs to the authority and others in dealing with it.

5.3.3 This proposal would introduce an initial sifting stage for applications. It would impose a duty on the registration authority, on receiving a duly made application, to invite initial comments from the landowner before considering whether the application is capable of being granted. The authority would be able to ask the applicant to put right manifest defects in the application before reaching a decision, but would then be empowered to reject the application, or accept it for full consideration, on the basis of the information supplied.

5.3.4 Registration authorities already have a power to reject applications which are not properly made, but (except in certain circumstances) have a duty to give the applicant an opportunity to put right defects in the application. The proposal assumes that, while it is right that an applicant should be given an opportunity to correct an application which is obviously defective (*e.g.* because it has not been signed), the onus should be on the applicant to submit an application which contains all the necessary supporting evidence to make the case speak for itself. This is because applicants have two years to submit an application for registration after a challenge to the use of the land by local people, and this period of time is sufficient to allow potential applicants to assemble a robust application. There is, therefore, no need for applicants to submit a 'holding' application, and it is fair for the authority to be able to assess each application, at an early stage, on its merits.

5.3.5 This proposal would require new secondary legislation, by amending existing regulations (but see paragraph 5.3.7 below). In addition, in order to assist registration authorities in reviewing applications at an early stage, irrespective of changes to legislation, we have recently improved guidance to authorities on the interpretation of the registration criteria in the 2006 Act[56].

How it would work

5.3.6 If, having received an application, the registration authority considers (having regard to the application itself and the landowner's comments) that there is sufficient relevant evidence in support of the application then it should be properly scrutinised in the usual way. If, however, the application lacks sufficient evidence, or it is clear that the application cannot meet the criteria for registration, then the authority may reject the application. As now, there would be no appeal from the authority's decision, but either party could seek judicial review of the authority's decision. We would not expect the authority to reject an application at this stage where there was merely doubt that the application could be granted, but only where it were incapable of being granted owing to insufficient evidence or failure to adhere to the criteria for registration.

5.3.7 Although an improved application could be submitted at a later date, it may be necessary to confer a power on registration authorities to refuse repeated applications to avoid applicants reapplying continually to register the same land — but this

[56] *Guidance to Commons Registration Authorities and the Planning Inspectorate for the pioneer implementation*: www.defra.gov.uk/rural/protected/commons/registration/.

may require new primary legislation, and the introduction of application fees may act as a deterrent (see chapter 5.7 below).

Impact

5.3.8 This proposal would improve the efficiency of the application process, allowing the earlier rejection of applications which are incapable of being granted.

Streamline sifting of applications	
Advantages	***Disadvantages***
• reduced costs to all parties in dealing with poor quality applications • greater efficiency in the process — fewer delays from poor quality applications enabling authorities to focus on those which remain • determination delivered sooner	• applications may be rejected for insufficient evidence even though capable of being put right • may fail to discourage applications being repeated at a later date leading to further delays

Questions

Question 2. Do you support this proposal to streamline the initial sifting of applications?

Question 3. Do you agree that an initial determination should be made by the registration authority after inviting initial comments from the owner of the land affected by the application?

5.4 Declarations by landowners

Context

5.4.1 The *Common Land Policy Statement 2002* set out the Government's plans for legislation in relation to common land and greens. It proposed: "introducing a formal mechanism by which landowners could clearly indicate that, although use of the land may continue for the time being, the nature of the use has ceased to meet the criteria for registration as a town or village green." However, it was not possible to address these issues in the 2006 Act.

5.4.2 Under section 31(6) of the Highways Act 1980, a landowner may deposit a map and statement with the highway authority, showing admitted public paths, and may then make a declaration that the landowner has no intention to allow any other part of the land to become subject to a public right of way. Such a declaration, renewed every ten years, is generally effective in rebutting any claim to a right of way on the landowner's land acquired by long use during the period when the declaration is in effect.

About the proposal

5.4.3 This proposal would make similar provision in relation to greens. A landowner would be able to deposit a map of the land, and make a declaration, to be renewed every ten years, that any use of that land for the purposes of sports and pastimes is with the landowner's permission and is therefore not to be treated as done 'as of right'. Legislation would provide that such a declaration would counter any evidence of use of a claimed green, as of right, during the period while the declaration remained in effect.

5.4.4 This proposal would require new primary legislation.

How it would work

5.4.5 A deposit and declaration made by a landowner in relation to land would be treated as an interruption to any use of the land for lawful sports and pastimes as of right. No claim to register land as a green could relate to any period of time during which a declaration was in force.

5.4.6 A declaration might be made in relation to land which had already been used, or was alleged to have been used, for 20 years for lawful sports and pastimes. In such a case, a claim to register the land as a green, on the basis of use over a period of at least 20 years prior to the date of the declaration, would have to be brought within two years of that date.

> **Example**: Eastwell Civic Society makes an application in 2036 to register Church Field as a green, on the basis of 24 years' use as of right since 2012, continuing up until the date of the application. However, the landowner, Glebe Investments Ltd, deposited with the registration authority a map, and a declaration, in relation to the land, in 2035, in accordance with legislation giving effect to this proposal. The application is nevertheless granted, because the registration authority concluded that use of the land for 20 years between 2012 and 2035 (when the deposit and declaration was made) was as of right, and the application had been made within two years of the date of the deposit and declaration.

5.4.7 Local communities should be made aware that landowners have made a deposit and declaration in relation to land within their area, so that they know that the declaration has triggered the two year period of grace within which an application for registration can be made[57]. Registration authorities would be required to keep a register of deposited maps, published on their websites, and to make declarations and maps available for inspection. Copies of declarations and maps would be sent to the parish council or chairman of the parish meeting, which would be expected to consider whether the declaration related to land in regular use for recreation.

5.4.8 Registration authorities would be able to charge a fee to landowners to cover the costs of administration.

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[57] Under section 15 of the 2006 Act, an application to register a green may be made while use is continuing (subsection (2)) or within two years of the cessation of use (subsection (3)). A transitional provision in subsection (4) enables application within five years of a cessation of use occurring before 6 April 2007.

Impact

5.4.9 We expect that the facility to make a deposit and declaration would be quickly adopted by many landowners, particularly where the land is professionally managed, or where landowners are members of representative organisations and follow the guidance which such organisations would be expected to offer their members. In some cases, deposits and declarations would relate to land where 20 years' use for lawful sports and pastimes had already been acquired, and landowners might (by making a declaration) stimulate a latent claim to register the land as a green: however, it is likely that any such claim would merely have been brought forward by the landowner's action.

5.4.10 In relation to land where there is no latent claim to registration as a green, we expect that increasing numbers of landowners, and particularly owners of potential development sites, would make a deposit and declaration to secure long term protection of their land from claims to registration. This proposal may also encourage landowners to permit or tolerate recreational use of their land (whether occasional dog walking or regular permissive use by the local community), confident that such use could not (while a deposit and declaration remained in force) give rise to a claim to registration as a green. Without such protection there is the potential for landowners deciding they have no option but to prevent access to land at all times in order to negate the risk of a greens application at some point in the future (unless the land were already subject to legal rights of access for recreation).

5.4.11 However, landowners' initial steps to take advantage of legislation giving effect to this proposal, by making deposits and declarations, could trigger a wave of new greens applications by persons who see the landowners' actions as a challenge to existing use of the land, and an impetus to secure registration of the land within the period of grace of two years. Registration authorities may initially need to deal with a temporary increase in the number of greens applications while also receiving deposits and declarations from landowners: however, their costs in respect of the latter would be covered by the fee payable with a declaration (expected to be £20–100).

Declarations by landowners	
Advantages	***Disadvantages***
• shield available to any landowner • affected land identifiable from publicly available registers • landowners and some access interests already familiar with similar mechanism available to shield against rights of way claims • straightforward test whether land subject to deposit • landowners likely to be more willing to allow continued recreational use of land	• delayed impact: deposit has no effect on potential greens applications for at least two years • could trigger new greens applications in response to perceived 'challenge' • users of land may be unaware of deposit, and that application must be brought within two years • primarily benefits well-informed or professionally advised landowners • excludes land from registration regardless of quality of use • small administrative burden on registra-

	tion authority, recovered from landowner • fee must be paid by landowner to protect interests

Questions

Question 4. Do you support this proposal to enable landowners to make a deposit of a map and a declaration to secure protection against future applications to register land as a green?

Question 5. Should landowners or registration authorities be required to take additional steps to publicise a declaration, to ensure that potential users know that they have limited time to make an application to register the land as a green? If so, what steps do you propose?

5.5 Character

Context

5.5.1 In popular perception (see paragraph 4.4.1 above), a green is found at the core of towns and villages: comprising some green space (invariably mainly down to grass) crossed or bounded by roads (often including the main street), furnished with benches, litter bins, perhaps a letter box and telephone kiosk, and a few venerable trees, and on to which face the church, the pub and perhaps a shop. The green is surrounded by houses, many of them of some considerable age, which either face onto the green (and perhaps can be reached only by crossing over part of the green) or onto roads which bound the perimeter of the green.

5.5.2 Most such greens were registered in the first wave of registration under the 1965 Act. Yet many applications to register greens today feature land which bears little relation to the popular perception: sites surveyed by the CCRI included former railway sidings, woodland, scrub, fields and rough grazing, but also public parks and playing fields. Other sites included in registration applications include a disused railway line, a beach, a churchyard, part of a golf course, former council offices, and seafront public gardens.

5.5.3 The report of the Royal Commission on Common Land, which paved the way for the 1965 Act, proposed that provision should be made for the registration of "any uninclosed open space which is wholly or mainly surrounded by houses or their curtilages" located in a rural parish[58]. But the 1965 Act omitted any definition of the character of a green, nor has one been adopted since.

About the proposal

5.5.4 Some assert that the purpose of registration is to enable protection to be conferred on any valued open space on the basis of long use, and that a test of character would be inappropriate. They would allow for the registration and protection of land whatever its character, solely on the basis of 20 years' use as of right. In

[58] Paragraph 403: see footnote 1.

the *Trap Grounds* case, the House of Lords, in a majority opinion, declined to rule that land could be registered as a green only if it passed some test of character. But Lord Scott, in a dissenting opinion, proposed that 'something more' was needed than a customary right of recreation:

> 'something more' would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities.[59]

5.5.5 We have considered whether land which is registered as a green should be subject to a test of character such as that proposed by the Royal Commission. If the purpose of registration is simply to protect traditional greens, then such a test could properly be adopted.

5.5.6 Registration of land as a green confers permanent rights of use for recreation by the local inhabitants. It also confers considerable statutory protection from development or interference (see chapter 3.4 above). It is arguable that such attributes should attach to land only in the most exceptional circumstances, where it is plain that not only are the existing statutory criteria for registration satisfied by virtue of long use as of right, but the character of the land is such that it is an intrinsic part of the fabric of the community: a centrepiece, which merits special recognition and special protection in its own right.

5.5.7 This proposal adopts a test of character: it would mean that a green could not be registered unless it can be shown that the land is open and unenclosed in character, and recognisably similar to the popular perception of a traditional green. Although most (but not all) traditional greens are thought to have been registered under the 1965 Act, many open spaces having essentially the same character as traditional greens — including play areas and open spaces in post-war housing estates — would also be likely to pass a character test.

5.5.8 This proposal would require new primary legislation.

How it would work

5.5.9 A test of character could be added to the existing tests in the 2006 Act. Registration would be afforded only to land which was:

- unenclosed: meaning both that the land is not substantially bounded by fences or other physical features erected with the purpose of discouraging or deterring access to and egress from the land from or to surrounding land;
- open: meaning that the land is not substantially covered by scrub, trees or other dense vegetation which would interfere with the use of the land (as opposed to particular paths) for most sports and pastimes;
- uncultivated: whether at the time of application for registration or at any time in the 20 years preceding the application.

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[59] Paragraph 77: see footnote 26.

Where land contained in an application clearly failed the test, the registration authority would be able to reject the application at the initial sift proposed in chapter 5.3 above.

5.5.10 Land which is bounded by public roads, or by dwellings which are built to overlook the land (so that the principal means of access is to and from the land) would qualify as unenclosed, whereas land which is enclosed by fencing, or where tall fencing divides the land from neighbouring properties, would not. Land would not be disqualified merely because it was bounded on one side by, for example, a railway line or major road, and separated from it by a fence, provided that the character test were met in respect of the substantial part of the boundary.

5.5.11 The test proposed in paragraph 5.5.9 above might be regarded as appropriate but not sufficient: for example, a test could also consider some of the following additional factors as underpinning traditional character:

- location (central to the heart of a settlement or community);
- commemorative structures important to the community (*e.g.* war memorial, jubilee or millennium structures);
- functional structures relevant to community (*e.g.* bus shelter, notice board, water fountain, drinking trough, signposts);
- shape (traditional greens tend to be irregular rather than rectilinear);
- evidence of former use for grazing (*e.g.* pond, animal pound);
- historic characteristics (*e.g.* evidence of old use, old trees).

We ask in ***Question 7.*** below whether the character test should include additional elements such as these.

Impact

5.5.12 A character test would restrict the registration of new greens to sites which are popularly perceived to be traditional in character, or which, although modern in character (such as play areas on post-war housing estates) are of a similar, open nature to traditional greens. Such a test might increase general public support for new greens, because they would be popularly perceived to be greens in character, and therefore worthy of special protection. Moreover, the test would ensure that sites which achieved registration would generally be the focal point of the community — open to local roads, easily accessible, free of encroaching scrub, and visibly the pride of that community.

5.5.13 A character test would prevent the registration of sites which were enclosed or otherwise not the focal point of their community: for example, fields, post-industrial land, public parks and playing fields would be likely to fail the character test (although each claim would need to be assessed on its merits).

5.5.14 However, a character test could be difficult to apply: Lord Hoffmann said, in *The Trap Grounds*, that "To say that the registration authority will recognise a village green when it sees one seems inadequate."[60] A character test should be reasonably

[60] Paragraph 39: see footnote 26.

certain in its application to land. Guidance would need to explain how the test should be applied.

Character	
Advantages	***Disadvantages***
• restores registration to traditional perception of greens, so as to maintain public support • confines protection to open, easily accessible sites, typically focal point of community • reduces non-conforming applications, so freeing up registration authorities to determine applications for sites which meet test • clearly non-conforming applications (*e.g.* public parks) can be quickly rejected	• introduces further technical test • excludes all non-conforming land from registration regardless of other factors

Questions

Question 6. Do you support a proposal to introduce a character test to ensure that greens accord with the popularly held traditional character of such areas?

Question 7. Do you agree with the character test in paragraph 5.5.9 above *i.e.* that land must be open and unenclosed in character? Do you support the adoption of additional criteria such as those in paragraph 5.5.11 above?

Taking account of the planning system in shaping local places

5.6 Integration with local and neighbourhood planning

Context

5.6.1 The greens registration system works entirely independently of the planning system. There is increasing concern that it is being used in some parts of the country as a mechanism to prevent development proposed and approved through the planning system.

5.6.2 If a green registration application is successful, the land becomes permanently protected, and cannot be developed, even if there is existing planning permission for development. However, in practice development will not normally begin on the land from the time that the registration application is made until it is decided — even if it is ultimately unsuccessful. An application can take a long time to reach a determination (in some cases, several years), particularly if the registration authority has several applications in train at the same time. Some applications are

submitted after planning permission for development has been granted, as a 'last ditch' effort to override the planning authority's decision: in such cases, the application may substantially delay development even if there is little chance of the land being successfully registered.

About the proposal

5.6.3 This proposal would exclude any land proposed for development through a planning application, or for which there were an extant planning permission in place, from being included in an application to register the land as a green. It would also exclude land proposed or designated for development or protected by the Local Green Spaces designation (see chapter 1.2 above) in a neighbourhood or local plan[61], which had been adopted or published for consultation. And it would apply in the same way to an order granting development consent made by the Secretary of State, in relation to major infrastructure projects[62].

5.6.4 The local community is fully involved in these decisions about the use of land. Planning applications are widely publicised by local planning authorities in line with statutory requirements[63] in order to enable the community to participate in the decision whether the development should be granted planning permission.

5.6.5 Similarly, local plans are prepared in consultation with the local community[64], while neighbourhood plans will be the subject of local referendums. Local planning authorities are required to prepare a statement of community involvement which explains the process for community involvement in both the determination of planning applications, and the preparation of the plan for the area.

5.6.6 This proposal would require new primary legislation.

How it would work

5.6.7 An application to register a green could not be made in relation to any land in respect of which there was an application for full or outline planning permission, which had been received and validated or on which there was statutory pre-application consultation[65]. However, where the green application had been submitted before any of these steps had begun, then it would proceed to determination in the usual way. Furthermore, no application to register a green could be made during the determination of any appeal against the refusal of planning permission. However, an application could be made where the period for lodging an appeal against the refusal of permission had lapsed and no appeal had been made or on expiry of the period allowed for legal challenge.

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[61] By 'neighbourhood plan', we mean either a 'neighbourhood development plan' or a 'neighbourhood development order', which are proposed new neighbourhood planning tools, included in the Localism Bill. And by 'local plan', we mean any development plan document produced by a local planning authority.

[62] The Localism Bill proposes to transfer the functions of the Infrastructure Planning Commission to the Planning Inspectorate acting on behalf of the Secretary of State, in relation to major infrastructure projects.

[63] See, generally, Part 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184).

[64] The Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2004/2204), as amended.

[65] By 'statutory pre-application consultation', we mean the planned new requirement for certain developers to consult communities prior to publishing a planning application, which is included in the Localism Bill.

5.6.8 In the same way, an application to register a green could not be made in relation to any land in respect of which a planning permission had been granted, until either the development was complete (in which case, the application could seek the registration only of any remaining undeveloped land in respect of which the statutory criteria were met), or the planning permission had expired.

5.6.9 Nor could an application to register a green be made in relation to any land designated for development or protected by the Local Green Spaces Designation in a local plan which had been adopted by the local planning authority, or which was in a draft local plan which had been published for consultation. The same principles would apply to land designated for development or protected by the Local Green Spaces designation in a neighbourhood plan envisaged by the Localism Bill, either at consultation stage or after formal adoption.

5.6.10 Where a proposal for development were made under the planned Community Right to Build[66], the same principles would apply and the land would be protected from an application for registration in the same way.

5.6.11 Where land becomes protected in this way from an application to register a green, provision would be required so that an application could be made after the protection ceases (*e.g.* when the planning permission expires) notwithstanding that the claimed use may have ceased more than two years before the date of the application. This is because the landowner may also have taken steps to prevent use of the land after having sought planning permission, without the possibility of any person being empowered to make a greens application within two years after cessation of use (as required by section 15(3) of the 2006 Act).

Impact

5.6.12 This proposal places emphasis on the local planning authority and communities to consider a site's future through the development planning process. It would help reconcile conflict between the development of land, and applications to register the land as a green, particularly where such applications are made once the planning process is already underway.

5.6.13 This proposal means that action could not be taken to bypass the planning process by seeking to register land as a green and is consistent with localism: some pieces of land which are highly valued by some local people and which would currently meet the test for greens registration would not be eligible for registration, but their future use — for development or green space — would be determined by the community in 'the round'.

Integration with local and neighbourhood planning	
Advantages	***Disadvantages***
• ensures proposals in local or neighbourhood plans are not de-	• may encourage landowners to submit speculative application for planning

[66] The Community Right to Build is proposed under the Localism Bill, and will give certain groups of local people the power to deliver small scale development that their local community wants under a more streamlined arrangement.

railed • puts the consideration of a site's future in the hands of local people and their council • allows the future needs of a neighbourhood and wider community to be considered in the round • protects proposed development once an application for planning permission or statutory pre-application consultation has begun in advance of any green application • helps protect developers from potentially considerable costs associated with having to abandon worked up schemes • supports delivery of housing, other sustainable development and Community Right to Build • applications merely to delay development could not be made	permission • may encourage speculative greens application to avoid being pipped to the post by a planning application • limited risk that a landowner might move straight to the formal stages of a planning application and not engage early with local communities — so as to avoid inspiring a blocking greens application • some sites, which otherwise meet the criteria for registration, may be ineligible for registration because of preferred alternative uses approved by the planning system

Question 8. Do you support the proposal which would rule out making a greens registration application where a site was designated for development in a proposed or adopted local or neighbourhood plan?

Question 9. Do you support the proposal that a greens registration application could not be made after an application for planning permission had been submitted in respect of a site, or on which there was statutory pre-application consultation, until planning permission had itself been refused or implemented, or had expired?

Contributing to costs

5.7 Charging fees

Context

5.7.1 At present there is no fee for applications to register land as a green. The role of the registration authority in determining applications is quasi-judicial. It acts as a tribunal in order to determine whether the application and its supporting evidence meet the criteria for registration set out in the 2006 Act and in regulations. In order to fulfil this function the registration authority must devote a substantial amount of time and resources to process the application to completion.

5.7.2 It is not uncommon for registration authorities to hold a public inquiry in order to reach a decision on a contentious or complex application. The average cost of a

public inquiry presided over by a barrister has been estimated at £13,000[67], which is borne by the registration authority, but this does not take into account the cost of officers' time in considering the application. The high cost of determining applications and the backlog of applications it has created within some registration authorities is one of the chief concerns arising from the present registration system.

5.7.3 In implementing Part 1 of the 2006 Act: applications which are expected to promote the public interest are free of charge, whereas those which promote a private interest are subject to a charge set by the registration authority[68]. However, the exceptional nature of applications to register greens demands that recognition is given to the very high costs associated with determining an application. We suggest that this can best be done by expecting applicants to demonstrate their commitment to the application by contributing a small part of the total costs of the application.

About the proposal

5.7.4 In order to address this problem, this proposal provides that the applicant for registration of a green should pay a fee, where the fee is set by the registration authority subject to a ceiling prescribed in regulations. It is not intended that the fee should allow for full cost recovery; to do so would effectively deter most applications. However the fee should represent a sufficient demonstration of commitment to the application, realistically achievable by the users contributing jointly, and it is suggested that the ceiling be set at £1,000.

5.7.5 We recognise that fees would in some cases prevent worthwhile applications coming forward. In order to mitigate such concerns an alternative would require the payment of a fee which is refundable if the application were granted.

5.7.6 This proposal would require new secondary legislation, by amending regulations. Provision for a refundable fee may require new primary legislation.

How it would work

5.7.7 Submission of an application to the registration authority would require to be accompanied by a fee which is set by the registration authority. The registration authority would refuse to consider any application which did not include a fee, and would have no discretion to dispense with the payment of a fee in any particular case (although it could decide to set a fee lower than £1,000 for all applications).

5.7.8 In the case of a refundable fee, the fee would be refunded to the applicant were the application granted.

5.7.9 Fees would be retained by the registration authority.

Impact

5.7.10 This proposal is principally intended to discourage an applicant from submitting a speculative application which stands little chance of success. This would reduce the number of applications thereby enabling registration authorities to concen-

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[67] Survey of town or village green registration activity: see Chapter 4.2.

[68] Part 1 is at present implemented only in seven pioneer registration authority areas: see www.defra.gov.uk/rural/protected/commons/registration/. For the fees in relation to Part 1 applications, see Schedule 5 to the Commons Registration (England) Regulations 2008 (SI 2008/1961), available via the website.

trate on speeding up decision making on fewer, better quality applications. This would also avoid the potential for delay to development, or perhaps from discouraging the developer from proceeding with the application, given the length of time taken to reach decisions.

Charging fees	
Advantages	***Disadvantages***
• enables authorities to recoup some of their costs • likely to deter spurious applications which have little chance of success	• likely to deter some worthwhile applications • fees could not realistically be set at a level which would enable full cost recovery • does not contribute to other parties' costs

Charging fees, refunded if application is granted	
Advantages	***Disadvantages***
• enables authorities to recoup some of their costs where applications rejected • likely to deter spurious applications which have little chance of success • encourages applications in accordance with criteria • less likely to deter worthwhile applications with reasonable chance of success	• no known precedent, so approach is untested and uncertain (but similar to principle for costs of court action) • makes no contribution to costs of registration authority where application is granted • perception that registration authority predisposed to refuse application in order to retain fee

Questions

Question 10. Do you support this proposal to charge a fee for applications?

Question 11. If so, do you support the proposal for refunding the fee where an application is granted?

Question 12. Do you agree that the fee should be determined by the registration authority and that a ceiling should be set at £1,000?

5.8 Cumulative impact

5.8.1 Our analysis in this chapter focuses on the impact which each proposal would have if it were implemented in isolation. But, as we explain (in paragraph 1.4.3 above), we intend that all these proposals should be adopted as a package, because they will all, individually and collectively, help deliver our objectives for the review. What would be the impact of implementing this package?

5.8.2 Each proposal, implemented in isolation, would be likely to affect both the number and type of applications made to register greens. But the impact of the proposals implemented as a package will be more complex than simply the sum of the impacts of each proposal in isolation.

> **Example**: consider an application which (in the absence of any reform) might be made in relation to a development site which has the benefit of a planning permission: the application meets the current criteria, and is granted, and the development cannot go ahead.
>
> Now consider the possible position after the reforms are implemented: the application is forestalled by a declaration previously made by the landowner relating to the development site (so that part of the 20 years' use claimed in the application is discounted because of the declaration): the landowner is particularly likely to make such a declaration, in an effort to protect the development value of the site. But the application would also fail because of the precedence of a planning permission already granted.

5.8.3 We consider the likely impact of proposals to enable declarations, to adopt a test of character, and to improve integration with local and neighbourhood planning, in reducing the number of registration applications (and the number of applications which are granted): this effect will enable local authorities to focus limited resources on determining those applications which remain, and which are more likely to be successful. But it can be seen that each application may be affected by two or more proposals, so any assessment of overall impact must avoid double counting.

5.8.4 Table 3 on page 45 shows the inter-relationship of the impacts of the proposals in this consultation paper. Further explanation of the impacts is available in the impact assessment published with this consultation.

Table 3: Collective impacts of proposals

Extent of overlap ↘	Streamline sifting of applications	Declarations by landowners	Character	Integration with local and neighbourhood planning	Charging fees
Streamline sifting of applications					
Declarations by landowners	Low overlap: some applications may be deterred by likelihood of early rejection, which would otherwise fail one or more of these tests				
Character		Moderate overlap: some declarations may relate to sites which would fail character test			
Integration with local and neighbourhood planning		Low overlap: few declarations likely where planning process is underway	Moderate overlap: some sites protected by planning precedence would anyway fail character test		
Charging fees	High overlap: many applications may be deterred by fees, which would otherwise be deterred by likelihood of early rejection	Moderate overlap: some applications will be deterred by fees, which would otherwise fail one or more of these tests			

5.8.5 The collective impact of these proposals will be to focus applications on sites which are most likely to be successful, to increase landowners' powers to safeguard their land from registration (particularly where development is already in train), to ensure that sites that remain eligible for registration are likely to conform to popular perception of a green, and to increase the efficiency of the registration process by both discouraging speculative applications and swiftly rejecting those which persist (thereby helping to unblock the log jam for those applications which have the potential to be granted). Only a package of measures will help deliver all our objectives for reform: each proposal may have some effect on one or more of those objectives, but is unlikely to be effective in securing improvements against all three — indeed, some proposals may have a negative impact against an objective, but, implemented as part of a package, deliver significant and worthwhile gains against the remaining objectives.

5.8.6 Taking the proposals as a package, we expect the proposal for a character test to be most effective in enabling high quality green space to be registered; we expect the integration with local and neighbourhood planning proposal to be most effective in enabling legitimate development to occur where it is most appropriate; and we expect that all the proposals will lower local authorities' costs in dealing with applications, through a lower volume of activity, and enable them to focus on providing a better service to the fewer, higher quality applications which remain. Further analysis of these relationships is given in the impact assessment (see Table 1 on page 15 of the impact assessment).

5.8.7 We also expect that the Government's commitment to introduce a new designation for green space through the planning system, outlined in chapter 1.2 above, will ensure that communities can continue to protect valued green spaces through the planning system, even where registration as a green is no longer possible.

Cumulative impact	
Advantages	***Disadvantages***
• see chapter 4.6	• see chapter 4.5

Question 13. Do you support the adoption of all of the proposals set out in chapter 5.3 to 5.7 above?

5.9 Voluntary registration under section 15(8)

5.9.1 The owner of land may voluntarily apply to the registration authority to register that land as a green, under section 15(8) of the 2006 Act. A landowner may wish, for example, to voluntarily register land where it is already used in the same way as a green, and the intention is to formalise the position, or an organisation promoting the provision of an open space may wish to require registration as a condition of support to the landowner for improvements to public access to the land.

5.9.2 There is no restriction on the voluntary registration of land under section 15(8), provided that the consent is obtained of the necessary interests in the land (such as any leaseholder). Recent data suggest that about 20 applications are made each year under section 15(8), of which the majority are granted. Given the special protection which is afforded to registered greens, we have considered whether any of the proposals in this chapter should be applied to applications made under section 15(8). We see no reason why it should be possible to confer special protection on voluntarily registered land which does not meet the requirements of the Character test, where such land would be incapable of registration on an application under section 15(1). Adopting the same test in relation to voluntarily registered land would ensure that all new greens, however registered, would adhere to the same standards in terms of character.

Question 14. Do you support the adoption of the Character test in relation to the voluntary registration of land as a green, under section 15(8) of the 2006 Act?

5.10 Alternative options

5.10.1 This consultation paper sets out those proposals which we believe are best able to deliver the objectives set out in paragraph 1.3.5 above. However, it is by no means exhaustive of the possible options. The criteria for greens registration in section 15 of the 2006 Act are complicated, and provide a number of opportunities for reform — in the section of this chapter dealing with technical options, we have examined only those we consider most practicable. However, we would welcome from respondents proposals for other changes to the registration system which would help achieve our objectives.

Views invited 15. Do you have other proposals for reform to the greens system which would help deliver the objectives set out in paragraph 1.3.5 above? It would be helpful if your response sets out how the proposal would work, your assessment of the impact on all parties to an affected application (including the applicant, landowner and registration authority), and so far as is possible, the costs and benefits. Please note that the Government has no plans to relax the criteria for registration of new greens (see paragraph 1.4.4 above).

5.11 Other greens issues

5.11.1 If the Government were minded to legislate to enact reforms relating to the greens registration system, it could also look at reforms to the management of greens. In the *Common Land Policy Statement 2002*, the Government and the National Assembly for Wales set out a package of reforms relating to common land and greens. Most of these reforms were given effect by the Commons Act 2006, but the management options for greens in section 4 of the white paper were not adopted owing to lack of Parliamentary time. The proposed reforms (other than those addressed in the 2006 Act) dealt with:

- reassigning title to greens wrongly vested in the local authority;

- enabling facilities to be built on a green which would add comfort or convenience to public enjoyment;
- enabling the managers of greens to grant consent for temporary parking;
- resolving questions of vehicular access over greens (including the regularisation of driving over existing access ways, and regulating the grant of new vehicular easements).

Views invited 16. Do you wish to see any of the reforms set out in paragraph 5.11.1 above addressed in new legislation on greens?

Views invited 17. If so, which of these reforms are a priority for action, and what outcome do you seek to achieve?

Photo 8: Land off Onslow Road, Newent, Glos (application rejected)

Annexe A: List of questions

Question 1. Taking account of the Government's plans for the new Local Green Spaces designation, do you agree that the problems identified with the present greens registration system are sufficient to justify reform — so that the 'no change' option should be rejected?

Question 2. Do you support this proposal to streamline the initial sifting of applications?

Question 3. Do you agree that an initial determination should be made by the registration authority after inviting initial comments from the owner of the land affected by the application?

Question 4. Do you support this proposal to enable landowners to make a deposit of a map and a declaration to secure protection against future applications to register land as a green?

Question 5. Should landowners or registration authorities be required to take additional steps to publicise a declaration, to ensure that potential users know that they have limited time to make an application to register the land as a green? If so, what steps do you propose?

Question 6. Do you support a proposal to introduce a character test to ensure that greens accord with the popularly held traditional character of such areas?

Question 7. Do you agree with the character test in paragraph 5.5.9 above *i.e.* that land must be open and unenclosed in character? Do you support the adoption of additional criteria such as those in paragraph 5.5.11 above?

Question 8. Do you support the proposal which would rule out making a greens registration application where a site was designated for development in a proposed or adopted local or neighbourhood plan?

Question ***9.*** Do you support the proposal that a greens registration application could not be made after an application for planning permission had been submitted in respect of a site, or on which there was statutory pre-application consultation, until planning permission had itself been refused or implemented, or had expired?

Question 10. Do you support this proposal to charge a fee for applications?

Question 11. If so, do you support the proposal for refunding the fee where an application is granted?

Question 12. Do you agree that the fee should be determined by the registration authority and that a ceiling should be set at £1,000?

Question 13. Do you support the adoption of all of the proposals set out in chapter 5.3 to 5.7 above?

Question 14. Do you support the adoption of the Character test in relation to the voluntary registration of land as a green, under section 15(8) of the 2006 Act?

Views invited 15. Do you have other proposals for reform to the greens system which would help deliver the objectives set out in paragraph 1.3.5 above?

It would be helpful if your response sets out how the proposal would work, your assessment of the impact on all parties to an affected application (including the applicant, landowner and registration authority), and so far as is possible, the costs and benefits. Please note that the Government has no plans to relax the criteria for registration of new greens (see paragraph 1.4.4 above).

Views invited 16. Do you wish to see any of the reforms set out in paragraph 5.11.1 above addressed in new legislation on greens?

Views invited 17. If so, which of these reforms are a priority for action, and what outcome do you seek to achieve?

Photo 9: The Fields, Patchway, Glos. (application rejected)

Department for Environment, Food and Rural Affairs

July 2011

Consultation: the registration of new town or village greens

List of Consultees

All commons registration authorities in England
2hb Law
Association of Commons Registration Authorities
British Horse Society
British Property Federation
Campaign to Protect Rural England
Central Association of Agricultural Valuers (CAAV)
Chartered Institute of Housing
Community Composting Network
Confederation for British Industry
Country Land & Business Association
Countryside and Community Research Institute
Countryside Council for Wales
Crown Estate
Dartmoor Commoners Council
Edward Harris Solicitors
English National Park Authorities Association
English Ranger Association
Eversheds LLP
Federation of Cumbria Commoners
Federation of Master Builders
Federation of Small Businesses
Federation of Yorkshire Commoners and Moorland Graziers
Forestry Commission
Foundation for Common Land
Friends of the Lake District
Frindsbury & Wainscott Community Association
Home Builders Federation
House Builders Association
Institute of Public Rights of Way and Access Management
Land Registry
Local Government Association
Moorland Association
National Association for Areas of Outstanding Natural Beauty
National Association of Estate Agents

National Association of Local Councils
National Farmers' Union
National Federation of Builders
National House Building Council
National Housing Federation
National Landlords Association
National Trust
Natural England
New Square Chambers
Open Spaces Society
Pastoral Alliance
Planning Inspectorate
Royal Institution of Chartered Surveyors
Royal Society for Protection of Birds
Rural Payments Agency
Surrey County Council
Welsh Assembly Government
Wildlife and Countryside Link
Wildlife Trusts