

COMMON LAND GUIDANCE SHEET 12

Enforcement against unlawful works on common land

Introduction

If you are considering taking enforcement action against works on common land that you consider to be unlawful, we strongly advise you to purchase the **Open Spaces Society** information sheet, "**Encroachments and unlawful works on commons.**" This is available direct from the Open Spaces Society (price £5.00). Contact details for the Society are:

Open Spaces Society
25a Bell Street
Henley-on-Thames
Oxfordshire
RG9 2BA
Tel: 01491 573535
Fax: 01491 573051
Email: hq@oss.org.uk
www.oss.org.uk/publications

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

This guidance is designed to be read in conjunction with the Society's information sheet.

ENFORCEMENT POWERS AND UNLAWFUL WORKS

What power of enforcement is there?

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

(a) to remove the works and restore the land to the condition it was in before the works were carried out, or

(b) where our consent has been given, but the works have not been carried out in accordance with its terms, to specify how they are to be carried out.

Any order is at the discretion of the judge, who does not have to order removal.

When did this power come into effect?

The new power commenced on 1 October 2007, and action can be taken under section 41 against any restricted works that have been constructed, since that date, without consent.

It was previously possible, under section 194(2) of the Law of Property Act 1925, for local authorities, owners of common land, and others with an interest in the land to take action through the courts. Under a transitional provision in the Act, this section 194(2) power was extended to any person with effect from 1 October 2006, in respect of works carried out on or after 28 June 2005.

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

Under section 38 of the Commons Act 2006, people need our consent to carry out any “restricted works” on registered common land, and other land to which the section applies.

Restricted works are any which have the effect of preventing or impeding access to or over the land. They might include fencing, buildings and other structures, ditches, trenches, and embankments. Restricted works also include resurfacing an area of common land to create, for example, a new car park or access road. **Guidance Sheet 1a** gives procedural information about section 38 applications to carry out works. **Guidance Sheet 4** gives further advice on “Car parks, access roads, tracks and footpaths,” and **Guidance Sheet 5** on “Maintaining and Extending Existing Works.”

Section 38 applies to **all** registered common land. It also applies occasionally to unregistered land and to town and village greens – but **only** if they are regulated by a Provisional Order Confirmation Act under the Commons Act 1876, or by a scheme of management under the Metropolitan Commons Act 1866 or Commons Act 1899. The section applies, in certain circumstances, to unregistered land in the New Forest which is subject to rights of common.

Who decides whether works are unlawful under section 38?

Anyone proposing to carry out works on a common must make a judgment as to whether those proposals fall within the scope of “restricted works”. This is not a precise science, but we have produced guidance to help people in making this decision (see **Guidance Sheets 1a, 1b and 1c**).

Guidance Sheet 1b lists those works which, in our view, are so minor or insignificant as not to require our consent under section 38.

Guidance Sheet 1c lists works that are exempt from the need for consent under section 43.

Any other works carried out on land to which section 38 applies would, in our view, need our consent. The only exception to this would be where works are carried out under the provisions of section 38(6). **Guidance Note 9** explains about these.

Where any restricted works are carried out without our consent, anyone with enforcing powers can apply to the court to have those works removed. It is also possible to apply to the court where consent has been obtained under section 38, but where you are not satisfied that the terms of the consent have been properly complied with.

Whilst this guidance may help you in deciding whether or not to take action against unlawful works, only a court can ultimately determine whether works have been constructed unlawfully, and the decision to take action rests entirely with the person taking it.

Does the section 41 enforcement power only apply to section 38 land?

No. It is also open to any person to take action against unlawful works on National Trust land, and on London commons, where the works contravene either section 23 of the National Trust Act 1971 or article 12 of the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967. Guidance on these provisions, and on the special arrangements for schemes of management and town or village greens, is in **Guidance Sheets 2a and 2b**.

MEDIATION

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

The **Open Spaces Society** information sheet, ***"Encroachments and Unlawful Works on Commons,"*** gives comprehensive advice on the options open to you.

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

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

For this reason, and because court action is costly, we strongly advise you to seek the removal of any works that you consider to be unlawful through negotiation and dialogue before you resort to action through the courts.

We do not encourage people to construct works without consent, but we do recognise that this may occasionally arise – for example, where the works are constructed in ignorance of the controls. When this happens, we consider

that the section 38 consent process is usually the best mechanism to begin to put things right. Wherever this situation arises, we are therefore prepared to accept a retrospective application, and we encourage anyone concerned about unlawful works to put pressure on those carrying out the works to make such an application before they consider pursuing a court action. This is **not** a soft option for applicants. There is no guarantee that a retrospective application will be successful, and applicants may find themselves needing to dismantle works or face court action if they fail to do so.

If no application is made, or if it is rejected, you should still consider alternative resolution procedures, including mediation through an independent party, before pursuing court action. Such pre-action procedures are recommended by the Department for Constitutional Affairs, which has responsibility for courts procedures. Failure to seek a resolution through such means can result in costs being awarded against you in court, even if you bring a successful action.

Information and advice on pre-action behaviour can be found at www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm. There is a useful summary of this advice in the **Open Spaces Society** information sheet, "***Encroachments and Unlawful Works on Commons.***"

What is the process for taking action?

Taking legal action is usually a long and expensive process. It is essential to have strong evidence to support your case, including witnesses, documents, and photographs. You will be personally liable for the costs of the action, and any award of costs is always at the discretion of the court. A court may order you to pay the defendant's costs as well as your own.

The court has various guidance notes that you should read carefully – see www.hmcourts-service.gov.uk. You, or your solicitor (if you have one), will need to complete a Part 7 claim form (N1), which is available on-line or from your local county court. An example of the form and an illustration of the particulars of a claim are included at Appendix A of the Open Spaces Society information sheet: *Encroachments and Unlawful Works on Commons*.

You should send the form to the court, together with one copy for each defendant. A court fee is payable, which is likely to be £150, unless you are eligible for an exemption (EX160A *Court Fees, do I have to pay them?*). There may also be further costs to pay, such as £100 for allocation to a particular process, and the trial fee.

OTHERS WHO MIGHT TAKE ACTION

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

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

This power was extended by the 2006 Act so that any person can take action; but you may still prefer to draw the attention of some other body, such as a local authority, to your concerns, and ask them to act in the public interest. The following bodies may be among the most likely to pursue, or bring pressure for, an action, but none is under a statutory obligation to do so.

(i) Owners

No works are allowed on a common without the owner's consent, regardless of whether section 38 consent is obtained. Owners may be in the best position to act against an infringement, as they can take action under the normal laws of trespass, as well as under section 41. But they may choose not to, or they may be the perpetrator.

(ii) Local Authorities

Local authorities have always held a central role in ensuring that commons are properly protected, and will continue to do so. We have taken steps to strengthen that role by providing a new level of certainty, and expect to see a new readiness to challenge among local authorities. Looking at these areas in turn:

A new level of certainty

In the past, enforcement action could only be taken (under section 194 of the Law of Property Act 1925) in respect of land that was subject to rights of common in 1926. The "rights" position in 1926 was often hard to establish with certainty. This may have acted as a significant disincentive to local authorities who were considering taking enforcement action against unlawful works. This uncertainty has been removed by applying section 38 clearly to all registered common land (and to the other types of land clearly defined in section 38, and described in the earlier section above).

A new readiness to challenge

Through raising awareness of local authorities' powers and responsibilities on common land, in this guidance, we are confident that authorities will be equipped with a new readiness to challenge unlawful works.

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

- they viewed such matters as too low a priority;
- duality of powers may have resulted in neither district nor county council taking the responsibility;

- a conflict of interest arose (eg where the development was promoted by the local authority, or there was a related planning application).

On the question of priority, it is right, in our view, for local authorities to continue to have discretion on whether and when to act, and to decide where their own local priorities lie. But a key purpose of this guidance is to ensure that local authorities are fully aware of their responsibilities and powers with regard to common land. This will help to inform them on what options are open to them if they are notified by someone, or otherwise suspect, that unlawful works have been carried out.

On the question of duality of powers, we strongly encourage local authorities to liaise with one another where there is an encroachment on common land, and to ensure between them that the public interest is properly protected. They may want to come to an agreement, or draw up a protocol on the particular circumstances in which each authority will act. At the very least, they should consider writing to anyone who they suspect of carrying out unlawful works, explaining the legislative position to them (see **Annex A** attached). This might arise from a suspicion raised by a local person or organisation, or from their own investigations.

Authorities may prefer, as a preliminary step, to write to the owners of the common to ascertain whether the consent of the owner has been given, who the perpetrator is, and whether or not the owner or any other person intends to take an action (see **Annex B**). Where an authority has firm evidence about an infringement, or is concerned that an encroachment is or may be particularly serious, it may choose to write in stronger terms.

In the event of conflicts of interest arising, we strongly encourage local authorities always to have regard to the public interest in common land and to seek to protect and promote this interest. Authorities should always consider the need to protect the integrity of common land, and never allow their other interests to affect their judgment with regard to any infringement, or potential infringement, of section 38. Other parties are encouraged to ensure that they bring their own interests and perspectives to local authorities, but authorities should always be major players in upholding the legislative position, whatever their other interests may be.

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

(iii) Local Councillors and MPs

Lobbying your local political representatives, urging them to take action, can be an effective way of promoting your concerns.

(iv) Open Spaces Society

The Open Spaces Society (see Introduction to this guidance sheet) has considerable experience in taking action against unlawful works. In its information sheet, the Society recommends setting up an action group to protect your common.

(v) Commons Councils/Associations

You may want to consider whether there is a commons council, or other commons association, which may be minded to take action.

(vi) Local Access Forums

In Defra's 2007 "Guidance on Local Access Forums in England," forums are asked to consider advising local authorities (or parish councils) in their area on the best way to prioritise their powers under section 41. The forum's objective should be to help safeguard and promote freedom of access over common land that may otherwise be significantly impeded by actions taken unlawfully on the land.

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

- section 45, Commons Act 2006
 - under section 45, any common in unknown ownership is subject to protection by the local authority. This means that the local authority may (i) take any steps to protect the land from unlawful interference that could be taken by an owner in possession of the land, and (ii) institute proceedings against any person for any offence committed in respect of the land;
- section 12, Inclosure Act 1857 and section 29, Commons Act 1876
 - these powers enable parish councils and meetings (or district councils where there is no parish) to enforce against encroachments on or damage to town or village greens.

ACTION BY COMMONERS

What can commoners do to protect their rights?

Common Law

Under common law, commoners are entitled to the peaceful enjoyment of their rights of common. Where those rights are wholly excluded, for example by a hedge or fence, a commoner is entitled by law to pull down as much of the hedge or fence as necessary to enable him to exercise his rights.

In almost all circumstances where the rights of a commoner are interfered with, including where the exclusion of rights is only partial, the solution is an application to the courts for an injunction or order.

Section 38

Where “restricted works” are involved (see earlier definition), but no consent has been obtained under section 38, then an action can be brought under section 38.

Where consent has been obtained under section 38, it remains open to commoners to take an action against the works under section 30 of the Commons Act 1876 if they consider that their rights are being interfered with. But it seems unlikely that such an action would succeed, given that section 38 decisions will take full account of the interests of commoners.

Section 30, Commons Act 1876

An action can be brought under section 30 against a “nuisance” that impedes a commoners’ rights (as well as against inclosures or encroachments). This may therefore give slightly wider scope for a commoner to take action than against the “restricted works” of section 38. In practice, this power may now prove to be obsolete.

Further Information

Department for Environment, Food and Rural Affairs
<http://www.defra.gov.uk/wildlife-countryside/issues/common/index.htm>

Open Spaces Society
www.oss.org.uk
Information leaflet: *Encroachments and unlawful works on commons*

Office of Public Sector Information
Copy of Commons Act 2006
<http://www.opsi.gov.uk/acts/acts2006/20060026.htm>
Copy of Commencement Order 1 2006
<http://www.opsi.gov.uk/si/si2006/20062504.htm>

Citizens’ Advice Bureau, or
Community Legal Services Direct
Free legal advice
www.clsdirect.org.uk – tel: 0845 345 4345

Department for Constitutional Affairs
Pre-action behaviour information
www.dca.gov.uk

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

From the county court or online:

- EX 301 *Making a claim, some questions to ask yourself*
- EX 302 *How to make a claim*
- EX 160A *Court fees, do I have to pay them?*
- EX 50 *County court fees*
- EX 342 *Coming to a court hearing, some things you should know*
- N1A *Notes for claimant on completing a claim form*
- N119A *Notes for guidance to complete particulars of claim*
- EX 370 *Your first time at court, what can you expect?*

Suspected Unlawful Works on (Name of) Common, (County), Registered Common Land Unit (Number)

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

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

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

Section 38 applies to all registered common land. It also applies to unregistered (and town or village green) land that is regulated by a Provisional Order Confirmation Act under the Commons Act 1876, or by a scheme under the Metropolitan Commons Act 1866 or Commons Act 1899.

Enforcement Power

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

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

Who decides whether works are unlawful?

Only a court can ultimately determine whether works have been constructed unlawfully. Anyone proposing to carry out works on a common must therefore make a judgment as to whether those proposals fall within the scope of “restricted works”. This is not a precise science, but Defra has produced guidance to help people in making this decision (see <http://defraweb/wildlife-countryside/issues/index.htm>). A list of this guidance is attached at I.

Guidance Sheet 1b includes a list of works which, in Defra's view, are so minor or insignificant as not to require their consent under section 38.

Guidance Sheet 1c lists works that are exempt from the need for consent under section 43.

Any other works carried out on land to which section 38 applies (except for those carried out under section 38(6) – see **Guidance Sheet 9**) would generally need consent.

In our view, the works on (Name of) Common fall within the category of works that need consent. Whilst Defra does not encourage works to be constructed before its consent is obtained, it is prepared to accept retrospective applications. The forms for making an application can be obtained at <http://defraweb/wildlife-countryside/issues/index.htm>

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

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

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

If you do not return the form, or pursue either of these actions within the next 28 days, we will have no option but to consider taking enforcement action through the courts.

Defra's guidance on enforcement is in **Guidance Sheet 12**.

Application forms and Guidance Sheets available from the Defra website

<http://defraweb/wildlife-countryside/issues/index.htm>

CLP2 *Application form to construct works on common land (under section 38)*

Notes on completing an application for consent to construct works on common land

CLP1 *Application form to deregister and/or exchange common land or town or village greens (under section 16)*

Notes on completing an application to deregister and/or exchange common land or town or village greens.

Guidance Sheet 1a	Works on common land: Procedural Issues
Guidance sheet 1b	Works and processes that do not need section 38 consent
Guidance sheet 1c	Works exempt from section 38 consent process
Guidance sheet 2a	Special consent provisions: National Trust commons
Guidance sheet 2b	Special consent provisions (other than National Trust land)
Guidance sheet 3	Public inquiry or hearing
Guidance sheet 4	Car Parks, Access Roads, Tracks and Footpaths
Guidance sheet 5	Maintaining and Extending Existing Works
Guidance sheet 6	Possible modifications and conditions (attaching to a section 38 consent)
Guidance sheet 7	Applications to vary or revoke a modification or condition, or to change the terms of a section 38 consent
Guidance sheet 8	Sites of Special Scientific Interest (SSSIs) and other European conservation sites
Guidance sheet 9	Works that are exempt from the section 38 controls under section 38(6)
Guidance sheet 10	Highways and cattle grids
Guidance sheet 11	Rights of Way
Guidance sheet 12	Enforcement against unlawful works on common land

Please delete the option or options that do not apply

I confirm that:

A. I am not the person responsible for the works on (Name of) Common

B. I am the person responsible for the works on (Name of) Common

I confirm that, within 28 days, I will

(i) remove the works and restore the land to its former condition, or

(ii) make a retrospective section 38 application to Defra.

Suspected Unlawful Works on (Name of) Common, (County), Registered Common Land Unit (Number)

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

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

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

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

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

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make a judgment as to whether those proposals fall within the scope of “restricted works”. This is not a precise science, but Defra has produced guidance to help people in making this decision (see <http://defraweb/wildlife-countryside/issues/index.htm>). A list of this guidance is attached at I.

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Any other works carried out on land to which section 38 applies (except for those carried out under section 38(6) – see **Guidance Sheet 9**) would generally need consent.

In our view, the works on (Name of) Common fall within the category of works that need consent. Whilst Defra does not encourage works to be constructed before its consent is obtained, it is prepared to accept retrospective applications. The forms for making an application can be obtained at <http://defraweb/wildlife-countryside/issues/index.htm>

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

Defra’s guidance on enforcement is in **Guidance Sheet 12**.

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Guidance sheet 12	Enforcement against unlawful works on common land

Please delete the option or options that do not apply

I confirm that:

- A. I am / am not the owner of (Name of) Common
- B. I am / am not the person responsible for the works on (Name of) Common
- C. The works were constructed by/ I do not know who constructed the works
- D. My consent was / was not obtained for the works
- E. I am / am not intending to take action to have them removed.
- F. I understand that is intending to take action to have the works removed / I am not aware of any (other) person intending to take action