Llywodraeth Cymru
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Guide to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017

Guidance for Commons Registration Authorities

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Guidance

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Guidance for Commons Registration Authorities

This guidance has been prepared by the Welsh Government and applies to Wales only.

The guidance is produced to accompany the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 (the 2017 Regulations). It is intended to assist Commons Registration Authorities (CRAs) in considering and determining applications and proposals under sections 19, 22 and Schedule 2 to the Commons Act 2006 (the 2006 Act) to amend commons registers. It is not a substitute for legislation and can only reflect the Welsh Government's understanding of the law at the time of issue. In case of doubt, please refer to the Commons Act 2006 and the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017.

The interpretation of the 2017 Regulations and the 2006 Act is ultimately a matter for the courts. Where matters of statutory interpretation arise CRAs are advised to seek their own independent legal advice as necessary.

Background

The Commons Registration Act 1965 (the 1965 Act) established definitive registers of common land and town and village greens in England and Wales in order to record details of rights of common. Commons Registration Authorities (Local Authorities) were appointed to draw up commons registers (the registers).

The task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, some land was mistakenly registered as common land. Other land was overlooked and never registered. The Court of Appeal held that even where land had been wrongly registered as common land, the 1965 Act provided no mechanism to enable such land to be removed from the register once the registration had become final[1].

This guidance sets out how anomalies and mistakes relating to existing entries in the registers may now be amended. CRAs will be able to receive applications under section 19 of the 2006 Act, which provides for correction of the registers in prescribed circumstances, and under Schedule 2 to the 2006 Act, which allows land which fulfils relevant criteria to be added to the register if it is not registered, or removed from the register if it was wrongly registered.

[1] Corpus Christi College v Gloucestershire CC [1983] 1 Q.B. 360

For a detailed definition of the provisions (sections 19, 22 and Schedule 2 of the 2006 Act) please see the 'Guidance for Applicants'

Applications and Proposals

Anyone may make an application to amend the registers under section 19, 22 and Schedule 2.

A proposal is the term used for an application the CRA makes to itself under section 19 or 22 of, or Schedule 2 to, the 2006 Act.

A CRA can make proposals in the public interest where the CRA has no direct interest in the land or rights affected, however a CRA should not bring forward a proposal on behalf of a person (s) who could have otherwise made an application for that purpose. In particular a CRA should not bring forward a proposal in order that a person need not pay a fee for an application, or because there is a mistaken entry in the register for which the registration authority was not itself responsible.

The CRA may apply to itself where it has a direct interest in the matter, it does this by way of a proposal. For example where land is owned by the CRA; the CRA is entitled to a right of common by virtue of ownership of a dominant tenement to which the right is attached; or the CRA owns a right of common in gross.

CRAs should consider bringing forward proposals for amendment of the register where:

- there is a public interest in the amendment being made (e.g. the amendment would secure the registration of additional land as common land, to which public access would be secured); or

- the CRA (or any predecessor of the CRA) was responsible for a mistaken entry in the register, and no person has a personal interest in correcting the mistaken entry, or any person with such an interest cannot be identified (e.g. because the ownership of the land is unclaimed).

In determining responsibility for a mistaken entry in a register, the CRA should not assume responsibility for the identification of mistakes in anything done by another party to a registration, unless the CRA was under a duty at that time to identify and correct such mistakes.

When a CRA decides to make a proposal it must prepare a statement describing the proposal and explaining the justification for it (regulation 7 of the 2017 Regulations). A proposal is subject to the same requirements as an application in terms of the standard of evidence provided.

In specified cases, a CRA must refer both an application and a proposal to the Planning Inspectorate (PINS) for determination (regulation 15(2) and (3) of the 2017 Regulations), namely where:

- the CRA has an interest in the outcome of the application or proposal so that it is unlikely that there would be confidence in its impartiality; or

- the CRA has received objections to the application or proposal from those with a legal interest in the land;

and in either case:

the application or proposal seeks under section 19(4) of the 2006 Act to:
- add or remove land from the register; or
- correct an error in the number of rights of common in the register;

or

the application or proposal is made under any of paragraphs 2 to 9 of Schedule 2 to the 2006 Act.

Regulation 16(2) provides that the CRA may decide that a public inquiry is to be held in relation to any application or proposal.

Where a CRA makes a proposal, it is to be assumed that the CRA has 'an interest in the outcome' of the application (and probably an expectation that it will be granted). The CRA must decide whether that interest is "such that there is unlikely to be confidence in the authority's ability impartially to determine" the proposal (regulation 15(3) of the 2017 Regulations). Where this is the case, and the proposal is for one of the purposes mentioned above, the CRA must refer the proposal to PINS who may hold either a Hearing (regulation 16(3) of the 2017 Regulations) or a Public Inquiry regulation 16(2) of the 2017 Regulations).

Applying to make changes to the commons registers

The registers of common land and of town and village greens record information about where common land is located and the rights of common present over that land. The Commons Act 2006 (the 2006 Act) is the legislation that provides the power for applicants to apply to change the registers. The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 (the 2017 Regulations) set out the legal requirements that must be complied with when making and processing applications and proposals.

The following guidance sets out the process CRAs need to follow in order to determine applications and proposals to make changes to the commons registers. A series of frequently asked questions (FAQs) is included at page 19 of this document to assist you in the determination process.

Pre application

If advice is sought by applicants on making applications under sections 19 or 22 of, or Schedule 2 to, the 2006 Act, CRAs may find it helpful to refer applicants to the Welsh Government guidance document – Guide to the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 – Guidance for Applicants.

http://gov.wales/topics/environmentcountryside/farmingandcountryside/common/commonsact2006/?lang=en

Applicants may also ask to view the existing registers. Where an applicant asks the CRA to provide them with official copies of documents you may make a charge for such a service. It will be a matter for individual local authorities to set their own reasonable fees for providing such a service based on actual costs.

Application Forms

Applications may be submitted by anyone, including individuals, an organisation or a business. When someone is applying on behalf of an organisation or a business they will need to make this clear on the application form. An application may only be accepted if it is submitted, in writing, on the correct form. A fee may also be required, along with evidence and any maps requested by the form (at the correct scale).

The application must be signed by every applicant or the applicant's representative. The application forms by type of provision are as follows:

Type of Application	Form
Section 19 – Correction of the Register	CA10 WG – E (English) CA10 WG – W (Welsh)
Schedule 2, paragraphs 2 to 9 – registration of common land and removal of common land from the registers of common land and town or village greens	CA13 WG – E (English) CA13 WG – W (Welsh)

Forms may be downloaded from individual CRA (Local Authority) websites or via the Welsh Government website at:

http://gov.wales/topics/environmentcountryside/farmingandcountryside/common/commonsact2006/?lang=en

Setting Fees

It will be a matter for individual local authorities to set their own reasonable fees based on actual costs. You need to ensure that such charges are reasonable for the work performed or to be performed.

The cost of making an application

Applicants may, depending on the application they are making, be required to pay an application fee. CRAs must publish details of their fees on their website. In the event that the CRA wishes to revise its application fees it will need to publish these revised figures on its website for at least 14 days before the new fees take effect (regulation 6).

Applications made under section 19(2)(a) (correcting a mistake made by the registration authority) and 19(2)(c) (removal of a duplicate entry from the register) do not attract a fee as these are viewed as mistakes having been made historically by the CRA. Similarly, applications under Schedule 2 paragraphs 2 – 5 (inclusive) are also free as their determination is seen as being in the public interest as a whole. The Welsh Government has given a commitment to reimburse the costs incurred by the CRA in respect of public interest provisions.

In more complicated cases, it will generally be the case that the application is forwarded to PINS for further consideration. However, it may be the case that the CRA determines the application and if the facts merit it, the CRA may decide that a public inquiry is necessary. The CRA may seek further written representations if it thinks it is necessary to enable an application to be determined. The CRA may seek reimbursement from applicants for the additional costs, for example, the holding of a public inquiry. CRAs must publish additional fees on their website, for example in addition to the initial applications fees the hourly / daily rates of officer time should be clearly set out so that those applying are aware of the likely cost to them of determining the application.

If the applicant fails to pay the relevant fee there is no requirement for the CRA to process the application.

Evidence required

On receipt of an application CRAs will need to ensure that all of the required evidence has been included, including a copy of every document that is asked for on the application form. Applicants are advised not to forward original documents, but rather are expected to send copies that are certified, for example by a solicitor or other professional person, to say that they have been checked against the original and are a true copy. However, the CRA may require an applicant to provide original documents, for example if there are doubts about the validity of a particular document.

Applicants are not required to forward copies of documents that were issued by the CRA or are held by the CRA.

Maps

Applicants will, in most cases, need to include an up to date Ordnance Survey map with their application. CRAs will need to ensure that the maps provided have the relevant area of the land hatched in a distinctive colour (for example red) and are of a scale of:

- 1:2,500 (if this scale is available); or
- 1:10,000.

You may accept a larger scale map showing the land in more detail if it is considered to be appropriate. The map should accurately show the area of land comprised in the application, so that there is no doubt about the purpose of the application, and its effect if granted.

Checking the application

On receipt of an application the CRA should check to see whether the applicant has supplied all of the requisite information and documents and has signed the application.

As a guide applications will need to include the following:

1. A completed application form – CA10 WG (for applications under section 19) or CA13 WG (for applications under Schedule 2);
2. A description of the land to be registered/deregistered as appropriate (Question 6 on form CA13 WG);
3. The application fee (see below);
4. An Ordnance Survey map of the land to the correct scale (1:2,500 if available or 1:10,000 if not) with the relevant area hatched in a distinctive colour (for example red);
5. For applications under sections 19(2)(a) – (e) of the 2006 Act, a statement setting out the purpose of the application, the mistake in the register the applicant is seeking to correct and details of the amendment required (Question 5 form CA10 WG);
6. For applications under section 19(2) (a) and (c) evidence the mistake was made by the CRA;
7. For applications under section 19(4)(b) (amendment of a register of common land or town or village green), a statement of the purpose for which the application is made, the number of the register unit (and, if relevant, the number of the rights section entry), evidence of the mistake or other matter and a description of the amendment required;
8. For applications under Schedule 2:

    - **Schedule 2 (2) – (3)** - evidence that the land in question is land which falls within the scope of the legislation listed in paragraphs

2(2) and 3(2) of Schedule 2 to the 2006 Act and evidence of consent from the owner if the application includes land that is covered by a building or is within the curtilage of a building (if all necessary building consents have been obtained).

- **Schedule 2 (4)** – evidence of the provisional registration of the land, evidence that the land is still waste in character, evidence that the land is or was formerly of a manor, and evidence that the provisional registration was cancelled or withdrawn (including where relevant the Commons Commissioner's determination).
- **Schedule 2 (5)** – evidence of the provisional registration of the land as common land; the circumstances in which the provisional registration became final (e.g. a Commons Commissioner's decision) and the status of the land as a town or village green immediately before it was provisionally registered as common land (this can be formal evidence, such as an inclosure award or order or exchange, or it could be 20 years' use as of right, or was in customary use as a village green).
- **Schedule 2 (6) and (8)** - evidence of the provisional registration of the land as common land or as a town or village green; the circumstances in which the provisional registration became final (e.g. a Commons Commissioner's decision) and evidence that the land has been at all times and still is covered by a building or is within the curtilage of a building.
- **Schedule 2 (7)** - evidence of the provisional registration of the land as common land; the circumstances in which the provisional registration became final (e.g. without reference to the Commons Commissioner's for a determination) and that before its provisional registration the land was not subject to rights of common, waste land of the manor, was not a town or village green, or land of a description specified in section 11 of the Inclosure Act 1845.
- **Schedule 2 (9)** - evidence of the provisional registration of the land as a town or village green; the circumstances in which the provisional registration became final (e.g. without reference to the Commons Commissioner's for determination) and that the status of the land immediately before its provisional registration was not common land or a town or village green.

Additional guidance on applications made under Section 19(2)(a): mistakes made by the registration authority

A CRA should not consider itself responsible for any error in the register, solely because it failed to identify and resolve a mistake by another party to a registration, unless the registration authority had a duty at that time to identify and correct such mistakes. Generally, a registration authority was required under the 1965 Act to give effect to any duly made application for registration made to it at the proper time, regardless of its merits.

A mistake may arise, for example, where an error was made by the CRA in transposing onto the register map a plan supplied by an applicant or where in amending an entry in the register the CRA erroneously added a zero to (or deleted a zero from) the number of rights registered. An error made in a map supplied by an applicant which was faithfully reproduced in the register could not be corrected under this provision, because the CRA did not make the mistake (it may be possible to correct it under Schedule 2).

CRAs need to be aware of this distinction as it is likely that some applicants will inappropriately attempt to apply under Section 19(2)(a) either because they assume that all entries in the registers equate to mistakes made by the CRA or because they wish to avoid paying a fee. Applicants will be expected to provide supporting evidence where they believe the mistake was made by the CRA.

Ownership

Once a CRA has received an application that it believes to be complete it is under an obligation to publicise the application (regulation 10). One of the obligations under regulation 10 requires the CRA to serve a notice of the application on the owner of any land affected by the application, or to which the application relates. This obligation applies in connection with any application under section 19 of, or Schedule 2 to, the 2006 Act. In relation to application under Schedule 2, the CRA must also serve a notice of the application on any occupier or lessee of the land. If it is not reasonably practicable to identify such a person then this removes the CRA's obligation to serve a notice on an owner of land.

Furthermore, the 2017 Regulations set out that an application under paragraph 2 of Schedule 2 to the 2006 Act may not include land which is covered by a building, or within the curtilage of a building, if all the necessary building consents have been obtained (and evidence is provided), unless the owner of the land consents to the land being registered as common land.

Acknowledgement

If the application has been duly made (the requisite information and documents are included, the application has been signed and the fee, where relevant, has been enclosed) the CRA is required to send an acknowledgement to the applicant confirming receipt of the application. The acknowledgement letter needs to include:

- the unique reference number assigned to the application;
- a postal and email address through which applicants may contact you;
- a copy of the public notice that you intend to publish on your website and in certain circumstances, post at a location at or near the site;
- details of any further documents or information that you require the applicant to supply and a deadline for complying with this request; and

- details of the process you intend to follow in determining the application, including your obligations to forward applications to PINS for determination in certain circumstances. This will need to include information about the referral process and the fact that any such referral will attract further application fees.

Power to specify directions

CRAs have the power to direct applicants to supply further information or documents that are required in order for the case to be determined. In the event that an applicant fails to comply with such a direction, or fails to do so within the set deadline, the application may be abandoned (regulation 9).

There is no legal requirement to notify the applicant that the CRA considers the application abandoned, however as a matter of best practice CRAs may consider forwarding a letter to applicants notifying them that this is the case (Regulation 9(4)).

Advertising the application or proposal

Once the application is complete and has been acknowledged, the CRA has a duty to publicise the application. CRAs also have a duty to publicise proposals. The following list sets out how CRAs can comply with the requirement:

- publish a notice of the application or proposal on the CRA (LA) website;
- email a notice of the application or proposal to anyone who has asked to be informed of such applications or proposals (and who has provided an email address);
- serve a notice of the application or proposal on various people. This will depend on the specific application or proposal but may include:

    - owners of any land affected by the application or proposal (if reasonably identifiable);
    - anyone who has registered a declaration to use a registered right of common over any land which comprises the whole or part of the register unit connected to the application or proposal (when implemented);
    - any owners of rights of common in gross (rights which are not attached to land, but are held personally and can be bought or sold as assets) unless there are so many it would be impractical;
    - any Commons Council (when in place) responsible for the land which forms part of the application or proposal;
    - any occupier or lessee of the land in question; and
    - other Local Authorities with an interest

As set out above, the CRA is required to serve a notice of the application or proposal on the owner of any land affected by the application or proposal, or

to which the application or proposal relates. This obligation applies in connection with any application or proposal under section 19 of, or Schedule 2 to, the 2006 Act. In relation to application or proposal under Schedule 2, the CRA must also serve notice of the application or proposal on any occupier or lessee of the land. If it is not reasonably practicable to identify such a person then this removes the CRA's obligation to serve a notice on an owner of land.

CRAs would also be expected to inform NRW if the site is protected under habitat legislation and/or is designated as a SSSI, SAC or SPA. If this is the case, you will be required to comply with the relevant habitats legislation in addition to your duties under the 2006 Act and 2017 Regulations.

In addition, it is a matter of good practice for CRAs to send a copy of the notice of the application or proposal by post to anyone who has asked to be informed of such applications or proposals but who has not provided an email address.

As set out above, the CRA is not expected to serve notice on a landowner where it is not reasonably practicable to identify that person, in other words if the Land Registry search draws a blank and there is no other source of information locally.

Nor is the CRA expected to serve notice on the registered owners of rights of common in gross if they are so numerous it would not be reasonably practicable to serve notice on them all.

Adding or removing land from the register – and duty to publicise application or proposal

In the case where an application or proposal that would either add land to, or remove land from, the register, the CRA must post a site notice for not less than 42 days at, or near, a minimum of one obvious place of entry to the land. If there are no such places then the notice can be posted at a conspicuous place on the boundary of the land. In Welsh Government's view, one notice would suffice for contiguous areas of land. In order to keep costs down, multiple notices should be the exception, not the rule. Where the site notice is removed, obscured or defaced prior to the expiry of the 42 day period through no fault of the CRA it will be treated as having complied with the site notice requirement.

The CRA is responsible for drafting the notice. It is important that the notice complies with regulation 12 of the 2017 Regulations, is sufficiently descriptive, and explains fully the details associated with the application including, for example, giving sufficient explanation of the effect of the application or proposal.

Regulation 12 prescribes the details which must be included in a notice of an application or proposal. Failure to draft the notice correctly could leave a CRA's determination open to legal challenge. The notice must contain the following details:

- a reference to ‘the Commons Act 2006’ and the provision of the 2006 Act under which or pursuant to which the application or proposal is made;
- the name of the applicant and of the CRA;
- the name and location of the land affected by the application or proposal;
- a summary of the effect of the application or proposal;
- both a postal address and an email address for the CRA to which any representations concerning the application or proposal may be sent;
- an explanation that such representations will not be treated as confidential;
- the date on which the period for making representations expires, which must not be less than 42 days after the date of the service, publishing or posting of the notice; and
- the address of the CRA at which the application or proposal and any documents accompanying it are available for inspection.

Inspecting applications or proposals made

Copies of applications or proposals and any accompanying documents must be made available for inspection at the address specified in the notice. These documents need to be available for inspection during normal office hours and within the deadline (at least the 42 working days) for representations to be made.

Representations/Objections

Anyone can make a representation/objection regarding an application or proposal within the deadline (at least the 42 statutory days) specified in the notice of application. Those making representations/objections must state their name and address, the nature of their interest (i.e. do they have a legal interest in the land?), the grounds on which it has been made and be signed by the person making the representation/objection. Written representations are permitted to be made by way of email (regulation 26) – if this is the case no signature is required. The CRA may disregard objections where no name and address is supplied.

Any representation received after the deadline for representations has elapsed may be excluded from the process, although there may be (exceptional) circumstances where the CRA considers it reasonable to accept representations after this date – this would need to be considered on a case by case basis.

Once the deadline for representations has passed the CRA is required to write to the applicant to inform them that either:

- no representations have been received; or
- the authority has received representations.

Where representations have been received copies will need to be forwarded to the applicant. Applicants have the opportunity to respond to these representations – the 2017 Regulations set out that they must be given a minimum period of 21 days to write to the CRA with a response. Any such response must be in writing and signed by the person responding, although if this is done by email, no signature is required. A longer timeframe for comment may be given, for example, in the event that substantial correspondence on the application is received. There is also a duty on CRAs to provide the applicant's response to those who have made representations (regulation 14).

Depending on the type of application and the representations received it may be necessary for the application to be referred to PINS (see below).

Applications (or proposals) to which there is no objection

Even if no objections are received, CRAs must nevertheless consider the application or proposal on its merits. An application or proposal should only be granted if it is made in accordance with the criteria in the legislation, and the absence of opposition to its being granted must not be taken as suggestive that those criteria are met and need not be considered.

It is particularly important that an application or proposal is fully examined where, if granted, it would have some effect on the public interest, such as land being deregistered. For example, an application to deregister land under Schedule 2 paragraph 6 of the 2006 Act may not attract representations from third parties, but the CRA should nevertheless satisfy itself that the application contains sufficient evidence to merit granting the application. The applicant would be expected to provide convincing evidence that all of the land referred to in the application was and remained covered by a building, or the curtilage of a building, during the relevant period of time. If such evidence is unavailable then the application must not be granted.

Please note CRAs should be particularly cautious in accepting the applicant's assertion as to the facts, without supporting evidence, particularly in the absence of any third party who may wish to comment on or test such assertion.

Electronic communication

The use of email can speed up the application process, and is generally less costly and burdensome for all parties. Regulation 26 permits the use of email where it would result in the recipient receiving the information in substantially the same form as if it had been sent in printed form, provided that the recipient has consented to receive communications in this way. However, any person may communicate with the CRA by email, without the authority's prior consent. CRAs are therefore advised to establish and advertise email accounts which may be used in relation to sections 19 and 22 of, and Schedule 2 to, the 2006 Act.

An email need not be signed, but in case of any doubt, CRAs should take steps to establish the authenticity of any correspondent. Applications **must** be in hard copy and signed by the applicant; there is currently no mechanism that will allow for such applications to be submitted electronically.

Hearings and public inquiries

It is believed that many of the applications will be routine and will not attract significant interest. In routine cases, where there is no opposition, and the CRA intends to grant the application there will be no need to hold an inquiry. In cases where the CRA is minded to refuse an application you must afford the applicant the opportunity to be heard before you reach a final decision (regulation 16(7)). An opportunity to be heard means that the applicant is given the option of making oral representations so as to present their case to the decision maker, to explain orally the key aspects of the application, and to address any points of contention (but not necessarily to question any other person). This could be face to face or via a telephone call – in deciding this the CRA will need to have regard to the circumstances of the individual case.

When reaching a decision as to whether to grant or refuse an application or proposal, the CRA is required to consider the civil rights of any third party that may be affected by the application. The registration authority has to afford a similar opportunity to be heard to that person (regulation 16(7)).

Public inquiries are governed by regulations 17 to 20, 22 and 23 of the 2017 Regulations. An independent inspector (such as a barrister) can conduct public inquiries on behalf of your CRA. In cases where the application is referred to PINS they will be responsible for appointing an inspector to hear the case. Both you as the CRA and PINS (where cases are referred) will need to publish a notice of inquiries and hearings on respective websites and serve a notice of the inquiry or hearing on various parties (regulation 17). Whilst the 2017 Regulations do not prescribe a specific timeframe for publishing a notice of inquiries or hearings the Welsh Government expects both CRAs and PINS to allow an appropriate amount of time between the notice being published and the hearing or inquiry commencing. This will depend on the facts of the specific case. The appointed inspector may hold a pre-inquiry meeting – this will determine the matters to be addressed at the inquiry and the procedure which will be followed. If a pre-inquiry meeting is not considered necessary, the inspector can give written directions. An inspector, but not the CRA, can hold hearings under regulation 21. A hearing takes the form of a discussion led by the inspector.

Regulation 18 addresses general provisions in connection with a public inquiry. This sets out that, if the inspector considers evidence not to be relevant, or to be repetitious, the inspector has powers to prevent someone from giving evidence, cross-examining or presenting, as may be the case.

Site Visits

The CRA and PINS each have the power to conduct a site visit to help them understand an application or proposal (regulation 22(2)). In the event that a public inquiry is to be held the inspector overseeing the inquiry must organise a site visit before determining the application, unless the landowner refuses entry.

In advance of undertaking a site visit in relation to an application, the applicant must be asked whether they would like to be present or be represented (regulation 22(3)). If an applicant indicates a wish to attend the site visit but subsequently isn't present when it takes place, the inspection can still go ahead.

The 2006 Act does not provide powers of entry to land, and we would not expect a CRA to enter land without the permission of the landowner. In many cases, particularly where an application is made by the landowner, such permission will be willingly given. If permission is refused, it may be possible to inspect the land from public highways (including public rights of way) which pass across or near to the land.

CRAs should be cautious of exercising any right of access to land under Part I of the Countryside and Rights of Way Act 2000, under Section 193 of the Law of Property Act 1925, under any other legislation which confers a public right of access to common land, or any common law right to use of a town or village green. Such rights are invariably conferred for the purposes of recreation (or for similar purposes), and in Welsh Government's view, a landowner would be entitled to require an officer of the CRA to leave such land if that officer were present for the purposes of a site survey. Accordingly, where a CRA wishes to inspect such land, it should seek permission from the landowner notwithstanding any public right of access, and should respect any refusal.

Where land is unclaimed, no permission to enter can be obtained because no-one is known to have the authority to give such permission. In such a case, Welsh Government is of the view that a CRA may reasonably enter the land to inspect it. For the purposes of deciding whether land is unclaimed, the CRA is advised to adopt the criteria in section 45 of the 2006 Act (powers of local authorities over unclaimed land), that is that no person is registered as proprietor in the register of title maintained by the Land Registry and the CRA cannot otherwise identify the owner. The CRA should not assume that land is unclaimed merely because no person is recorded as owner of the land in the ownership section of the commons register.

Official Stamp

CRAs need to keep a stamp with an impression containing the information prescribed in regulation 30(1) of the 2017 Regulations. Following the determination of an application or proposal, the CRA is required to stamp every sheet that forms part of the determination (regulation 3(3)).

Determination by the Commons Registration Authority

The CRA must take all of the evidence and advice received into account, and be satisfied that all parties have been given sufficient opportunity to make their views known. The CRA must, in determining an application or proposal, take into account the matters set out in regulation 16(1) of the 2017 Regulations.

In addition, a CRA must be aware of and act in accordance with the following:

- its duty to take steps to maintain and enhance biodiversity under section 7 of the Environment (Wales) Act 2016;
- its duty (in relation to any land designated as a site of special scientific interest), to take reasonable steps, consistent with the proper exercise of its functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest (section 28G of the Wildlife and Countryside Act 1981);
- its duty to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions;
- its duty (in relation to National Parks) to have regard to the purposes for which the National Parks are designated, and if it appears that there is a conflict between those purposes, it shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park (section 11A of the National Parks and Access to the Countryside Act 1949); and
- its duty (in relation to an Area of Outstanding Natural Beauty) to have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty (section 85 of the Countryside and Rights of Way Act 2000).

If an application or proposal is made where it may have a significant practical effect on any land designated as a SSSI, the CRA should consider consulting Natural Resources Wales.

Once a CRA has granted an application or taken a decision to give effect to a proposal, it must amend the register.

Once the application or proposal has been determined, the CRA must inform (in writing) the applicant. Written notice of the determination must also be given to everyone who made representations concerning the application or proposal, and everyone who gave evidence at a public inquiry or hearing (where the contact details are known). The notice needs to include reasons for the decision and details of any changes that will be made to the register so as to give effect to the decision. The CRA must also publish a copy of the decision and reasons for it on its website (regulation 24).

Following the determination of an application or proposal the CRA must stamp every sheet forming part of the determination, through the application of the official CRA stamp as described in regulation 30(1) of the 2017 Regulations.

Check lists for CRAs to use in determining applications and proposals are attached at Annex 1. These are intended as helpful reference documents, and are not intended to be an exhaustive list of your legal obligations. CRAs should ensure that they comply with the requirements contained within the 2006 Act and the 2017 Regulations.

Referral to the Planning Inspectorate

The Planning Inspectorate's role

An application or proposal must be determined by the CRA with responsibility for the register in which the land to which the application or proposal relates is recorded. However, in certain cases the CRA must refer the case to an 'appointed person'.

The 2017 Regulations refer to an appointed person. Currently the Planning inspectorate (PINS) is appointed by Welsh Ministers as the appointed person to undertake the administrative work associated with the making of decisions in connection with an application made under section 19, 22 and Schedule 2 of the 2006 Act (regulation 4 of the 2017 Regulations).

PINS generally has the same powers as a CRA in determining an application or proposal, for example, PINS can direct the applicant to supply further information or evidence in order to enable the application or proposal to be determined, and the deadline for doing so, and can treat the application as abandoned if the applicant does not comply with a direction (regulation 15(4)(c), (5) and (6) of the 2017 Regulations).

Deciding whether to refer

The following applications should be referred to PINS:

- where the CRA has an interest in the outcome of the application or proposal so that it is unlikely that there would be confidence in its impartiality; or
- the CRA has received objections to the application or proposal from those with a legal interest in the land;

and in either case:

the application or proposal seeks under section 19(4) of the 2006 Act to:

- add or remove land from the register; or
- correct an error in the number of rights of common in the register;

or

the application or proposal is made under any of paragraphs 2 to 9 of Schedule 2 to the 2006 Act.

Regulation 16(2) provides that the CRA may decide that a public inquiry is to be held in relation to any application or proposal.

The registration authority's role prior to referral

The CRA must first process the application or proposal in the specified manner (including publishing a notice of the application), and invite representations/objections to be sent to the CRA within the specified period of time (as set out above).

After the deadline for representations/objections, and after seeking the applicant's views on the representations/objections, if the above-mentioned criteria are met, the CRA should then refer the case to PINS, enclosing any documents which are relevant to the case. This includes the application or proposal, supporting documents, other relevant documents possessed by the registration authority, including extracts from the relevant registers, and any representations/objections received (regulation 15(4) of the 2017 Regulations). Where the CRA makes a representation/objection, it should include it with the other documents. At the same time, you must inform the applicant that the application has been referred to PINS for determination (regulation 15(4)(a)).

It is likely that PINS will ask the CRA to complete a 'referral letter', which confirms certain details, including the reason for referral. If PINS thinks that the criteria for referral do not apply, it will return the application or proposal to the CRA for determination. The CRA will be expected to provide a clear reason as to its interest in the matter and why there is unlikely to be any confidence in its ability to impartially determine the application.

The address for referred applications is:

The Planning Inspectorate / Yr Arolygiaeth Gynllunio
Crown Building / Adeilad y Goron
Cathays Park / Parc Cathays
Cardiff / Caerdydd
CF10 3NQ

The registration authority's role after referral

Once a case has been referred to PINS the role of the CRA will be of a practical nature, for example involvement in the setting up of a site visit or the provision of a venue for any hearing or public inquiry.

The registration authority's role after determination

When PINS has determined the referred case, it will notify the CRA of its decision. The CRA must give written notification of the decision to the applicant, anyone who made representations concerning the application or proposal and those who gave evidence as part of an inquiry (where the name and contact details of such a person are known). The notice must include the reasons for the decision and details of any changes made to the register to give effect to the decision. In addition the CRA is required to publish the decision and the reasons for it on its website. (regulation 24 of the 2017 Regulations)

Where an application is granted or a decision is made to give effect to a proposal (in whole or in part), the CRA must give effect to the determination in the register as appropriate – by addition, deletion, correction or otherwise. An amendment of the register has to be made in the appropriate section of the register unit relating to the land. CRAs must follow the format of the current register as closely as possible, noting that the Regulations allow for such variations and adaptations as the circumstances of the application or proposal require. We would expect this to be done as soon as practicable after the decision has been taken.

Whilst any amendment to the register will be dependent on both the specific circumstances of the case, and the form of the register to be amended, example Model Forms are included at Annex 2. It is for the CRA to decide which may be appropriate, and the types of applications that may relate to a specific form are noted on each form for guidance only.

Frequently asked questions

Q. **What or who is an appointed person?**

A. The 2017 Regulations refer to an appointed person. Currently the Planning Inspectorate (PINS) is appointed by Welsh Ministers as the appointed person to make decisions in connection with an application made under section 19 or 22 of, and Schedule 2 to, the 2006 Act.

Q. **Who can make an application?**

A. Anyone. The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 state that anyone may apply: however in reality it is believed that only those with a legal interest in registered land will be likely to seek to apply.

Q**. How does a CRA access information on cases previously considered by the Commons Commissioners**

A. Information about Commons Commissioners and decisions made are published on the Association of Commons Registration Authorities England and Wales website at the following link:

http://www.acraew.org.uk/commissioners-decisions

However, the collection of decision letters published on this website is not comprehensive, and the CRAs should rely on their own records and archives in cases of doubt. The register will usually make clear whether a provisional registration was referred to the Commons Commissioners.

Q. **Can applicants view the existing registers?**

A. Yes. If the CRA is asked to provide official copies of documents you may charge for such copies. It will be a matter for individual local authorities to set their own reasonable fees for providing such a service based on actual costs.

Q. **Is there a time limit for making an application or a proposal?**

A. There is no time limit for making an application or proposal under section 19 of the 2006 Act.

All applications and proposals made under Schedule 2 to the 2006 Act must be made within 15 years of the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 coming into force – 4 May 2032.

Q. **How much will applicants be expected to pay for the determination of their application?**

A. This will depend on the nature of the application; CRAs must publish fees on their website by type of application (regulation 6(2) of the 2017 Regulations). A CRA can amend its fees, but any revised fees must be published on its website at least 14 days before such fee takes effect (regulation 6).

If the application needs to be referred to the Planning Inspectorate (PINS) additional charges will be payable. The expectation is that PINS will recover its fees on a full cost recovery basis. PINS publish the daily rates charged for an Inspector and administrative work on their website. PINS will provide applicants with an estimated cost of the likely determination of their application before commencing work.

Any fee charged must be reasonable for the work performed or to be performed. No steps need to be taken by either the CRA or PINS before the specified fee has been received (regulation 6).

Q. **Can applications be made electronically?**

A. Not currently. Applicants are required to physically sign their application. Applicants are advised to either hand deliver the signed application form or send it via recorded post.

Q. **Can other correspondence be sent electronically?**

A. Yes, providing the applicant has agreed to this form of communication. Anyone providing an email address to the CRA is considered to have consented to a document being sent via email. The information contained in the email must be in substantially the same form as if it had been sent in printed form. If the information is in substantially the same form, the applicant is entitled to send the document (which includes a notice, document, information or evidence) electronically to the CRA (without express prior agreement). (regulation 26)

Q. **Does the CRA have to advertise applications or proposals in the press?**

A. No. There is no requirement for applications or proposals made under section 19 or 22 of, or Schedule 2 to, the 2006 Act to be published in the press.

Q. Schedule 2 (paragraphs 6 or 8) refers to curtilage, what does this mean?

A: For the purposes of Schedule 2 of the 2006 Act the definition of curtilage will depend on the circumstances of the particular property. A curtilage is generally understood to be the area of ground used for the enjoyment of a

house or building – so, for example, a house may have a physical barrier around it (e.g. a wall, hedge or fence) and the area within that enclosure (except the house) could, depending on the facts, be the curtilage.

Q. **What sort of evidence should the CRA expect to see to demonstrate that land had 20 years' use as of right, or was in customary use as a village green?**

A. This will depend on the individual circumstances of the land in question. Applicants have been advised to check to see if there are any Parish, Community or Town Council Records indicating that the land has been used by local inhabitants for lawful sports and pastimes as of right.

Please also see the guidance notes issued to accompany Section 15 of the Commons Act 2006 for the completion of an application for the registration of land as a Town or Village Green as this provides additional detail on the 'use as of right'. The guidance may be found at the following link:

http://gov.wales/docs/drah/publications/140807-section-15-commons-act-2006-en.pdf

Q. What is meant by applications duly made?

A. Applications are duly made when they comply with the requirements of the 2006 Act and the 2017 Regulations. CRAs are not required to proceed with applications which do not comply with the requirements of the 2006 Act or the 2017 Regulations.

Q: What happens if a mistake was made by the CRA but it is something that has no practical consequence?

A: Even where an error was made by the CRA in making an entry in the register, the error may have been made nugatory by a subsequent entry in or amendment of the register. For example, the CRA may have mistakenly included a parcel of land in the registration of a common, but a subsequent application for registration of rights over the common included that parcel as the land over which the rights were exercisable. In such a case, although an application may prove the original mistake made by the CRA, the mistake had no substantive impact, and the CRA will need to consider whether it would be unfair to make the correction sought by the application having regard to the test in section 19(5).

Q. **Can anyone inspect applications or proposals made?**

A. Yes, copies of the application or proposal and any accompanying documents (evidence) must be made available for inspection at the address published in the notice of the application or proposal. This inspection may take place during normal office hours and within the 42

working days (or longer period specified in the notice of the application or proposal) ending with the deadline for making representations / objections.

Q. **Can anyone make representations/objections to an application or proposal?**

A. Yes, anyone can make written representations/objections regarding an application or proposal. Representations/objections must be made to the CRA and must be made within the deadline specified in the notice of application or proposal.

The person making the representation/objection must state his or her name and address, the nature of their interest if they have such an interest (e.g. do they have a legal interest in the land?) and the grounds for making the representation/objection. The representation/objection must be signed by the person who has made it. Representations/objections may be made by email – if so, no signature is required.

Q. **Can the Commons Registration Authority object to an application?**

A. Yes, a CRA may object to an application made to them, however, an objection would normally only be appropriate if the CRA itself has some interest in the matter under consideration. If the CRA is aware of an impediment to granting an application, other than one in which it has an interest, that is a ground for refusal (or for concluding that the application is not duly made), rather than a ground for making an objection – in such cases, the CRA should ensure that details of the impediment are disclosed to the applicant and those making representations so that they may comment on them.

Where a CRA objects to an application it must consider whether the application should be referred to PINS. In a case where the CRA is objecting to an application it would seem to be clear that the CRA could be considered to have 'an interest in the outcome' of the application. In such cases there is unlikely to be confidence in the CRA's ability to determine it with impartiality. If this is the case, the application must be referred to PINS.

Q. **Can an application be withdrawn or changed?**

A. Neither the 2006 Act nor the 2017 Regulations contain provisions for the amendment or withdrawal of an application. If an application has been made, it is for the CRA to determine whether to proceed with the application. The CRA does not have to agree to withdraw or change an application if the withdrawal or change would affect the interests of others.

The Welsh Government would expect a CRA to be cautious in accepting the withdrawal of an application that has been made in the public interest, particularly if other people wish to see the application proceed to a determination. The CRA may agree to let the applicant correct something

that is clearly wrong (such as an incorrect map). You will need to act reasonably in the circumstances of the particular application and judge each case on its merits.

Q. Can a CRA refuse repeat applications?

A. The Welsh Government takes the view that an identical, or near identical, application to one previously made and refused would entitle the CRA to refuse to accept it on common law grounds of res judicata (A matter already judged).

If a repeat application was similar, but not the same, as that made previously, the CRA may need to consider the new evidence or material, and consider whether its earlier decision remains appropriate. Depending on the circumstances of the case, it may be relatively straightforward to isolate the new information and its potential impact on the previous decision. However, this could potentially be costly (not least because of the cost of publicising repeated applications), and could be relevant only where the application is sufficiently novel that it merits some element of fresh consideration.

Q. Can an application be granted in part only?

A. CRAs may conclude that an application should be granted only in part, because the criteria are met only in relation to that part.

Before granting an application in part only, the CRA should consider whether, had the application been submitted in relation only to that part, the application would have satisfied the requirements of the 2006 Act and the 2017 Regulations.

Q. Can a CRA reject what it considers to be a spurious application?

A. If the application is spurious in the sense that it does not fulfil the statutory criteria to be successful, this will constitute grounds for the CRA to refuse the application. If the application is made without sufficient evidence to be capable of being granted, then the CRA may conclude that the application is not duly made. For example, an application made under paragraph 7 of Schedule 2, which contains no supporting evidence, is unlikely to be duly made.

Q. Can costs be awarded to any party?

A. Costs may only awarded by an inspector where a Public Inquiry has been held in relation to an application or proposal under Schedule 2 to the 2006 Act. The person against whom costs are awarded must have, in the inspector's opinion, acted unreasonably.

The inspector may make an order for costs in favour of the applicant, any person who participated in the public inquiry or the CRA taking part in the public inquiry.

Costs may be ordered against the applicant, any person who participated in the public inquiry or the CRA taking part in the public inquiry.

Q. **Can a decision by the CRA be challenged?**

A. There is no specific appeals mechanism, however decisions by the CRA or PINS may be challenged in the High Court by way of judicial review.

Q. **Can anyone else order a CRA to amend its register under section 19, 22 and Schedule 2?**

A. Yes, a High Court may order an authority to amend the register if it is satisfied that:

- an entry, or information in an entry, was included due to fraud; and
- it would be just to amend the register.

Contacts

For further enquiries and comments please contact:
For enquiries relating to applications that have been referred to the Planning Inspectorate:

The Planning Inspectorate
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Cathays Park
Cardiff
CF10 3NQ

e-mail: wales@pins.gsi.gov.uk

The Commons Act Team
Agriculture – Sustainability and Development Division
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

e-mail: CommonsAct2006@wales.gsi.gov.uk

Annex 1 – Check Lists
Annex 2 – Model Forms