

**CYNGOR SIR POWYS COUNTY COUNCIL**

**PLANNING, TAXI LICENSING AND RIGHTS OF WAY COMMITTEE**

**24<sup>th</sup> May 2018**

**REPORT BY: HEAD OF LEISURE AND RECREATION**

**SUBJECT: Applications to correct the Registers of Common Land and Town or Village Greens – method of determining applications**

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**REPORT FOR: DECISION**

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**Applications to correct the Registers of Common Land and Town or Village Greens, sections 19, 22 and Schedule 2 of the Commons Act 2006 – method of determining applications**

**Background:**

1. In May 2017, the Welsh Government brought into force provisions that allow for applications to be made to correct the Registers of Common Land and Town or Village Greens. The applications are made under the provisions of sections 19, 22 and Schedule 2 of the Commons Act 2006.
2. 'Corrective applications' can be made where there are alleged errors or omissions in the Registers. Applications must be supported by evidence and determination of cases is a quasi-judicial process. In some instances, applications or proposals must be referred to the Planning Inspectorate for determination; other cases are determined by the Council.
3. On 20<sup>th</sup> June 2017, the Cabinet formally delegated the responsibility for determining these cases to the Planning, Taxi Licensing and Rights of Way Committee, if they are not referred to the Planning Inspectorate.
4. The Committee is asked to consider how the determination procedure should be carried out, when cases are presented to them.

**Legislative requirements:**

5. The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 set out the steps to be taken when receiving, publicising and determining these applications (see Appendix A).
6. Under the Regulations, the Commons Registration Authority must refer certain applications and proposals to the Planning Inspectorate for determination. These are those made under:
  - a. Section 19(4) of the Commons Act 2006: These relate to correction of a variety of errors. Cases must be referred to the Planning Inspectorate only

if the effect of the application or proposal would be to add land to, or remove it from the Register, or would affect the quantification of rights of common in the Register;

- b. Paragraphs 2 to 9 of Schedule 2 to the Commons Act 2006: These relate to land that is either wrongly registered as common land or Town or Village Green, or that has been omitted from the Registers in error. The effect of all of these applications would be to add land to, or remove it from the Registers.

7. However, these cases can only be referred to the Planning Inspectorate if:
  - a. The Commons Registration Authority has an interest in the outcome of the application or proposal such that there is unlikely to be confidence in the authority's ability to impartially determine it; OR
  - b. A person with a legal interest in the land affected by the application or proposal has made an objection in respect of it.
8. In the context of these applications, a legal interest does not include members of the public with access rights over the affected land, by virtue of the Countryside and Rights of Way Act 2000.
9. As such, the Council will be required to determine both opposed and unopposed cases. A flowchart can be found at Appendix B; this shows which cases must be referred to the Planning Inspectorate, and which must be determined by the Council, as the Commons Registration Authority.
10. When determining applications and proposals, the Council:
  - a. May not refuse it without first offering the applicant an opportunity to make oral representations;
  - b. May not grant or refuse it without first offering opportunity to make oral representations to any third party, if the grant or refusal of the application would affect their civil rights.
11. The Council is not required to allow opportunity for cross-examination of oral evidence for these cases; it must simply allow for it to be presented and taken into consideration. The Council is entitled to hold a public inquiry in relation to a 'Corrective' application, but is not required to do so.
12. The Committee is asked to consider when cases might be determined via a public inquiry, and when they might be determined at a Committee meeting based on documents, an officer report and oral evidence. Where a case is determined at Committee meeting, the Committee is asked to consider how opportunity can be provided to present oral representations.

### **Options:**

13. The evidence accompanying the majority of 'Corrective' applications and proposals will be historic documents, including evidence from Tithe Maps, Inclosure Awards, Finance Act 1910 records, photographs, conveyances, deeds and maps. The

content of these records is a matter of fact; any consideration will need to be focussed around interpreting them, in relation to the legal criteria.

14. For some applications and proposals, witnesses may provide evidence of use or non-use of land and this may be key to meeting the legal criteria. To interpret this type of evidence, cross-examination via a public inquiry can be of benefit, especially if the evidence is contested. If witness evidence is not contested, then it may be appropriate to accept it without cross-examination.
15. Applications or proposals may not be opposed at all, but the Committee must still assess the evidence against the legal criteria. Unopposed cases may be refused, if it is considered that the legal criteria has not been met.
16. Given the above, the Committee could decide to do one of the following:
  - a. Decide all cases at a Committee meeting, without a public inquiry. That could place the Council at risk of legal challenge, if witness evidence is key to meeting the legal criteria and there is any level of dispute about the content of the evidence. Following this course of action would still require that opportunity be provided for presentation of oral representations.
  - b. Hold a public inquiry for all applications. That would ensure that there is opportunity for oral representations to be presented and for cross-examination, but would be very resource intensive. This type of determination may not be necessary for cases where no-one wishes to exercise a right to speak, or where cross-examination of witnesses is not needed.
  - c. Refer some cases to a public inquiry, where there are witnesses whose evidence is disputed and that evidence is key to meeting the legal criteria. Where that is not the case, applications could be determined at a Committee meeting, without a public inquiry, based on the documents provided and oral representations.
17. When deciding cases without a public inquiry, the Committee will need to decide how to give opportunity for oral representations to be made. The options are to:
  - a. Hold meeting(s) with the applicant and anyone else who wishes to give oral representations, prior to the date of the Committee meeting when the application or proposal is to be formally determined; or
  - b. To allow opportunity for oral representations to be made at the same time as the Committee meet to determine the case.
18. Holding meeting(s) prior to formal determination could be quite complex, as it may be necessary to hold separate meetings with each person who wishes to speak. The Committee would need a background knowledge of the case, to be able to understand the context of any evidence presented. They would need to document information received at the meeting(s), to be able to make a formal decision about the case at a later date.
19. Alternatively, a process similar to the current protocol for determining planning applications could be followed. An introduction to the case could be presented to

the Committee, then the applicant and other interested parties could be invited to speak and make representations. This would be followed by a presentation of the full officer report, Committee debate and a formal decision. That approach is established, requires only one meeting date and is fully public, which allows for transparency in decision making.

**Proposals:**

20. These proposals relate only to cases that are not referred to the Planning Inspectorate for determination.
21. It is proposed that the following cases be determined by the Committee, without a public inquiry:
  - a. Unopposed cases;
  - b. Opposed cases based primarily on documentary evidence, where witness evidence is not key to meeting the legal criteria;
  - c. Opposed cases where the content of witness evidence is key to meeting the legal criteria, but no-one wishes to present oral evidence. Witnesses cannot be compelled to attend a public inquiry to present evidence in person; if they are not willing to do so, a decision based on written statements may be the only option.
22. It is proposed that cases be referred to a public inquiry if they are opposed and involve witness evidence that is key to meeting the legal criteria, where cross-examination would be of benefit and witnesses are willing to present evidence in person.
23. When cases are determined without a public inquiry, it is proposed that a determination process similar to the planning protocol be adopted. Those wishing to make oral representations would be invited to do so at the meeting when the Committee determines the case. That would allow the Committee to be presented with, and consider all of the documentary and oral evidence at the same time; it would place all of the evidence in the public domain for transparency.
24. This approach would allow the Council to meet its legal responsibilities to determine these cases, in a way that is transparent to the public and that uses procedures and resources that are appropriate to the nature of the evidence to be considered.

**RECOMMENDATION:**

That the proposals detailed under points 20, 21(a) to (c), 22 and 23 above be adopted to determine applications and proposals made under sections 19 and 22 and Schedule 2 of the Commons Act 2006, where they are not referred to the Planning Inspectorate.

**Appendices:**

Appendix A: The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration)(Wales) Regulations 2017

Appendix B: Flowchart, Determination of 'Corrective' applications and proposals