Appendix D
Supplementary report of the Registration Sub-Committee to the Common Land Forum concerning village greens

Definitions

S1. The Act refers to 'town and village greens', but there is no difference in law between them. They are here referred to as 'village greens'.

S2. 'Local Council' means a parish, town or (in Wales) a community council.

S3. The 'Act' means the Commons Registration Act 1965.

Origins

S4. Village greens were originally small areas, usually forming part of the waste land of a manor, over which local inhabitants had a customary right to indulge in 'lawful sports and pastimes'. The nature and extent of such sports and pastimes was usually not defined, except by the custom of the particular manor,but could have included team games such as cricket or football, other communal activities such as archery, maypole dancing and fairs, as well as less organised pastimes such as riding. In the 19th Century, Inclosure Awards (usually made in accordance with Section 30 of the Inclosure Act 1845) frequently set aside areas for local recreation, commonly called recreation allotments, which were in effect, if not in law, 'statutory' village greens. Sometimes the areas allotted in this way were quite unsuitable for the purpose.

Registration

Introduction

S5. The Act provided for the registration of greens, and for rights of common over greens (of which there are very few instances). The process was in most respects identical to that for registering common land; the difference concerns the ownership of greens (see paras 18-19 below).

S6. Land qualified for registration under one or other of the following heads (set out in Section 22 of the Act);

1. land allotted by or under any Act for the exercise or recreation of the inhabitants of any locality (recreation allotments);

2. land over which the inhabitants of a locality have a customary right to indulge in lawful sports and pastimes ('traditional' village greens); or

3. land on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years.

Problems and Possible Solutions

20 Years' Use

S7. Use of land for recreational purposes for 20 years as of right does

not, under the common law, create a customary right to indulge in lawful sports and pastimes (per Lord Denning in New Windsor Corporation v. Mellor (1975) 3 All ER 44). Such use may well be evidence that a customary right exists but it does not establish that right. It is thus not clear what legal right (if any) local inhabitants have over greens which have been registered by virtue of 20 years' use.

S8. It is also relevant that, in the case of any registration of a green which became final without a determination by a Commons Commissioner, the basis of the registration may be unclear; in particular, whether the green comes under head 2. or head 3. in Section 22 of the Act.

S9. A straightforward and just solution to these two problems would be for the inhabitants of the locality to be granted a statutory right to indulge in lawful sports and pastimes on every registered green in that locality. Such a right already exists over recreation allotments by virtue of the relevant Inclosure Act or Award, but we see no virtue in perpetuating any distinction between recreation allotments and greens which come under heads 2. and 3. in Section 22 of the Act.

The Meaning of 'Locality'

S10. There is some uncertainty about the meaning of the work 'locality'. The view taken by the Commons Commissioners (following decided cases) seems to be that a locality must be a parish or some other limited administrative area; traditionally, this area was the ancient ecclesiastical parish and would now normally be the nearest equivalent civil parish. A wider interpretation of the word has, however, been put forward, successfully, to secure the registration of a new green. In that particular instance the locality consisted of a small housing estate in West Sussex developed in the late 1930's.

S11. The problem of the correct locality is now likely to arise only where registration of a new green is sought. We suggest that a 'locality' may nowadays properly be identified with a physical or social community without having to be fitted within a known administrative unit. This is particularly true in relation to housing estates built without regard to administrative boundaries. In the great majority of Inclosure Awards allotting land for recreation, the allotment is to 'the inhabitants of the (said) parish and neighbourhood', the word 'neighbourhood' being used in Section 30 of the Inclosure Act 1845. It also occurs in the Commons (Schemes) Regulations 1982 (which prescribe the scheme for regulating commons and greens under the Commons Act 1899). The word is thus precedented in recent legislation and should be the starting point for defining a locality in any case of uncertainty as to the area of benefit of a village green.

Incorrect Registration

S12. There have been cases of incorrect registration of land as a village green. We can see no satisfactory method of securing the removal of such registrations from the register under current procedures. A traditional village green can only cease to be if it is abolished by Act of Parliament (New Windsor Corporation v. Mellor (1975) 3 All ER 44). Since a village green registration, once final, is conclusive, (Section 10 of the Act) any area of land so registered must be deemed to be a true village green. De-registration under Section 13 of the

Act can only succeed, therefore, if the land has ceased since registration to fall within the definition in Section 22. This can only occur if the land is compulsorily acquired for another purpose or where a local authority, being the owner, and having relevant compulsory powers appropriates the land to another use.

S13. 'Incorrect registrations' are those which in our view ought not to have appeared on the register as final registrations. They consist of instances in which land has been registered as a village green although at the date of provisional registration it fell within none of the heads set out in the definition in Section 22 of the Act. Applications for such registrations could have been made for various reasons such as:-

i. a misunderstanding or misconception of the nature of the legal definition of a village green;

ii. a reckless or deliberate disregard of such definition;

iii. through an administrative or clerical error by the applicant or registration authority;

iv. from the use of obsolete or badly drawn maps.

Examples are known to have occurred in Avon, Lincolnshire, Northumberland, Oxfordshire and Somerset.

S14. The arguments against a general re-opening of the registers are put in paragraphs 010 and 011 in Chapter 1 of the main report, and apply equally to village green registrations. Nevertheless, we feel that, as in the case of common land and rights of common, some limited amendment of the registers is desirable in the interests of justice, for the same reasons as set out in paragraphs 011 to 013 of the main report.

S15. A suitable definition of 'incorrect registration' for the purpose of enabling registrations to be reconsidered might be as follows:-

'incorrect registration' means that land, whether or not containing a building, is incorrectly registered as village green if:

i. it forms and formed at the date of provisional registration the land on which a private dwelling house stands or a part or the whole of the garden or other land enjoyed with a private dwelling house, OR

ii. it is land which is used and which was in use at the date of provisional registration for a purpose incompatible with, or to the exclusion of, the use of the land as a town or village green.

Note: 'town or village green' is intended to bear the same meaning as in Section 22.

S16. In the case of common land, we have recommended that applications to amend the register should go to the Agricultural Land Tribunal. We feel that, in relation to a village green application the Agricultural Land Tribunal would not be the appropriate forum, save perhaps in the case of a clerical or administrative error. The reason is that the considerations relevant to deciding whether or not land is a village

green are usually legal (save perhaps in the case of clerical error). They would therefore be more appropriately considered by a court. In our view, the county court would be the appropriate court because it is local, relatively inexpensive and because cases come on for hearing relatively quickly. It would be logical and convenient for the county court also to deal with applications based on clerical and similar errors, rather than to have two bodies concerned with village green registration matters. We think that new procedural rules would inevitably be required.

Highways

S17. An analogous problem involves highways. Although the definition of village green (unlike that of common land) in Section 22 of the Act does not deny the possibility of their including land forming part of a highway (which can be a footpath or bridleway as well as a vehicular road) the purpose of a village green as specified in Section 22 and the purpose of highway are mutually incompatible and therefore legislation would be desirable to exclude highways (especially vehicular highways) from village greens. Some greens so registered appear really to be highway verge and little or nothing more and their status as village green must be questionable. In any case, where a village green does include a highway, those responsible for the green are obliged not to obstruct the right of passage on the highway, and should allow the highway authority to carry out its functions in its usual, proper manner. These functions can include cutting back vegetation on or adjacent to the highway and taking other action in the interests of highway safety. We consider that it should also be possible to apply to the court to rectify anomalies involving highways, provided that in any case the definition of 'incorrect registration', set out in paragraph S13. above, applies.

Ownership

S18. The procedure under the Act whereby a Commons Commissioner must inquire into the ownership of common land of which no person claims to be the owner also applies to greens. Where the Commissioner is unable to discover an owner, common land becomes subject to Section 9 of the Act and falls under the protection of the local authorities. In the case of a green of which the owner cannot be discovered, the Commissioner must vest it in the parish or community council, or, if there is none, in the district council: Section 8.

S19. The problem which arises from vesting of unclaimed greens in the local authority is that the true owner may thereby be deprived of his ownership. The word 'vest' is apt to describe the transfer of ownership of a freehold estate in land, and is clearly used in this sense in Section 9 in the phrase ".....until the land is vested under any provision hereafter made by Parliament....." Furthermore, Section 22 (1) provides that references in the 1965 Act to ownership are to the ownership of a legal estate in fee simple (ie a freehold). Thus the effect of failing to claim ownership under the 1965 Act procedure may be to deprive the owner of a green of his title without compensation and without regard to the Limitation Act 1980. It is trust that the registration of ownership of a green (as with common land) is not conclusive under Section 10, but this does not affect the statutory vesting in the local authority.

S20. We think that an appropriate solution to the problem should be to enable an aggrieved claimant to apply to the court, as is proposed in the case of 'wrongly' owned common land (para 019 of the main report), for a divesting and re-vesting order. For the reasons given in paragraph 16 above, we consider the county court to be the proper court.

Management of Greens

S21. If local inhabitants have a statutory right of recreation on village greens (as recommended in paragraph 9 above), there may be potential for conflicts between different forms of recreational activity (for example between team games and more informal recreation). To enable conflicts to be resolved, it would be appropriate for the local council to be given statutory powers of management, to be exercised in agreement with the landowner where the council was not that person. Should a landowner (not being a local council) actively manage the land so that it cannot be used for appropriate lawful sports and pastimes, the local inhabitants may enforce their rights at common law through the courts. We consider, however, that local councils should have a power to acquire a village green compulsorily where that green cannot be used for its proper purposes by reason of the act or default of the landowner. At present, local councils have power to acquire land for use as an open space (into which category a village green falls) only by agreement.

S22. The powers of management conferred on local councils should be wide enough to enable them to place reasonable restrictions on recreational activities on part or parts of a village green where there would be conflicts with other uses. Whilst local councils already have powers under the Open Spaces Act 1906 to make byelaws over a green which they own or control it is not clear whether these powers can be used to restrict otherwise lawful recreational activities indulged in as of right.

Damage and Encroachment

S23. Section 12 of the Inclosure Act 1857 and Section 29 of the Commons Act 1876 make it an offence to damage or encroach upon a village green, or to interrupt its use or enjoyment for recreation. We think that the wording of the sections (set out in full in the appendix hereto) is wide enough to include damage and encroachment by motor vehicles as well as permanent encroachments such as are caused by buildings or other structures.

S24. Whilst it is desirable to retain criminal sanctions against damage etc the wording of Section 12 of the 1857 Act is inappropriate for the late twentieth century. We suggest that the section should be re-drafted in contemporary language and in more general terms and merged with Section 29 of the 1876 Act.

Vehicles and Greens

S25. Village greens often suffer from encroachment and damage by vehicles. In the following cases however, temporary or permanent vehicular access to or over a green may be desirable, which at present is unlawful:-

1. Car-parking - it is a breach of Section 12 of the 1857 Act and Section 29 of the 1876 Act (and probably the common law) to park a car on a green because to do so interferes with the inhabitants' rights of recreation; it may also damage the green. However, such parking may be desirable, eg for those playing in or watching a cricket match. Enactment of a power to allow informal temporary parking on a green (perhaps in a specifically defined and limited area and within appropriate time limits) in connection with its recreational use would not seem unreasonable.

2. Access for Vehicles - there appears to be no means whereby a vehicular right of way can effectively be granted or acquired over a village green. Such a grant or acquisition would involve interference with the inhabitants' rights of recreation and would involve breaches of Section 12 of the 1857 Act Section 29 of the 1876 Act and Section 36 of the Road Traffic Act 1972 (which makes it an offence without lawful authority to drive on land not forming part of a road). Where a green is a recreational allotment, Section 19 of the 1876 Act also outlaws any non-recreational use.

Again there may be occasions when a power to grant access (whether permissive or as of right) is desirable. The fact is that many accesses, whether lawful or not, do exist on the ground and it would seem sensible, at least, that their status should be settled. We think it would be undesirable to give an unfettered power to permit driveways over greens, but how the power might be limited is not easy to determine. Where the landowner was willing to permit access, we recommend a procedure which enables all the merits and demerits of such proposals to be assessed, by an application akin to one for works on common land under Section 194 of the Law of Property Act 1925.

Building and Other Works on Greens

S26. The construction of buildings and works of a recreational nature (pavilions, seats, playground equipment, cricket nets etc) is not prohibited on village greens. Other desirable facilities (for example, bus shelters, public lavatories and village halls) are caught by Section 29 of the 1876 Act. Some procedure for relaxing the rigour of the section seems appropriate to cover these cases, for which we recommend that provided by Section 194 of the Law of Property Act 1925.

To Which Village Greens do the Penal Provisions of the 1857 and 1876 Acts Apply?

S27. Section 12 of the 1857 Act and Section 29 of the 1876 Act (and, indeed, the common law restraints on the use of village greens for non-recreational purposes) apply to 'village greens'. Neither section defines the terms, but in our view they apply only to 'traditional' greens and recreation allotments but not to greens which achieved their status solely by virtue of registration under the 1965 Act, whether under the third head of the definition in Section 22 (20 years' use: see para 6 above) or as a mistake (see paras 12 to 16 above). We consider it desirable to settle any doubts which may exist, and this can appropriately be done by extending Section 12 of the 1857 Act and Section 29 of the 1876 Act (as re-enacted) to all registered village greens.

Charitable Recreation Allotments

S28. Recreation allotments are held and used for purposes which are charitable in law and are thus subject to the general jurisdiction of the Charity Commissioners. The Commissioners maintain that under Section 18 of the Commons Act 1899 they have power, on the application of any district or local council interested in an allotment, to make a scheme in relation to any provision with respect to the allotment. This power has been used to authorise a local council, as trustee of a recreation allotment registered as a village green, to sell or lease the allotment, wholly or in part. Once a sale or lease has taken place, the allotment is discharged from the trust created by the relevant Inclosure Award; it thus ceases to be a village green and an application may be made under Section 13 of the Act to remove it from the register.

S29. The Department of the Environment maintains, however, that the powers in Section 18 of the 1899 Act are subject to the restrictions of Section 19 of the 1876 Act, the relevant parts of which read ".....notwithstanding anything in any other Act contained, it shall not be lawful.....to authorise the use of or to use any.....allotment, or any part thereof, for any other purpose than those declared concerning the same by the Act of Parliament, or award,.....under which the same has been set out....." The Department's view is that these provisions debar the Charity Commissioners from making a scheme to authorise the diversion of a recreation allotment to other purposes.

S30. We are not aware of any judicial ruling on the point, so that the legal position remains unclear. We consider that all three categories of village green (ie the three heads of the definition in Section 22 of the Act - see paragraph S6 above) should, so far as possible, be treated in an identical fashion by the law. It is anomalous that greens which are recreation allotments are, or may be, regarded simply as if they are impressed with a charitable trust, the possible consequences of which are described in paragraph 28 above. We are thus of the view that laws regulating the disposal of recreation allotments, or their appropriation for other purposes by a local council or other local authority owner, should be the same as for the other categories of village green. (Broadly speaking, such transactions are only possible where exchange land of equivalent suitability is provided). We recommend that it would be appropriate in consequence to remove from the Charity Commissioners their powers in relation to village greens.

Summary of Recommendations

S31. The inhabitants of the locality should be granted a statutory right to indulge in lawful sports and pastimes on every registered green in that locality (para S9).

S32. The test for identifying a 'locality' should be 'neighbourhood' rather than 'parish' based (para S11).

S33. There should be a procedure for removing mistaken registration of greens from the register (para S13-16.)

S34. A person who claims ownership of a green which has been vested in a local authority under Section 8(3) of the Act should be able to apply to the county court for rectification of the register (para S20).

S35. Local councils should be given comprehensive powers to manage or acquire greens where irreconcilable disputes have arisen (para S21-22).

S36. Section 12 of the Inclosure Act 1857 and Section 29 of the Commons Act 1876 should be suitably re-enacted (para S24).

S37. Temporary use of a limited area of a green for informal car parking in connection with recreational activities should be allowed (para S25).

S38. Subject to the consent of the Secretary of State for the Environment or for Wales, there should be a limited power conferred on the owner of a village green to grant vehicular access over it (para S25).

S39. Subject to the consent of the Secretary of State for the Environment or for Wales, there should be power for the owner of a village green to permit the erection of limited public facilities on the green (para S26).

S40. It should not be possible for village greens which are recreation allotments to be disposed of, or appropriated for, other purposes by means of a Charity Commissioner's scheme (para S30).

INCLOSURE ACT 1857

12. Proceedings for prevention of nuisances in town and village greens and allotments for exercise and recreation.

And whereas it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any inclosure under the said Acts as a place for exercise and recreation: If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof before two justices, upon the information of any churchwarden or overseer of the parish in which such town or village green or land is situate, or of the person in whom the soil of such town or village green or land may be vested, forfeit and pay, in any of the cases aforesaid, and for each and every such offence, over and above the damages occasioned thereby, any sum not exceeding (level 1 on the standard scale) and it shall be lawful for any such churchwarden or overseer or other person as aforesaid to sell and dispose of any such manure, soil, ashes, and rubbish, or other matter or thing as aforesaid; and the proceeds arising from the sale thereof, and every such penalty as aforesaid, shall, as regards any such town, or village green not awarded under the said Acts or any of them to be used as a place for exercise and recreation, be applied in aid of the rates for the repair of the public highways in the parish, and shall, as regards the land so awarded, be applied by the persons or person in whom the soil thereof may be vested in the due maintenance of such land as a place for exercise and recreation: and if any manure, soil, ashes, or rubbish be not of sufficient value to defray the expense of removing the same, the person who laid or deposited such manure, soil, ashes, or rubbish shall repay to such churchwarden or overseer or other person as aforesaid the money necessarily expended in the removal thereof; and every such penalty as aforesaid shall be recovered in manner provided by the Summary Jurisdiction Act 1848; and the amount of damage occasioned by any such offence as aforesaid shall, in case of dispute, be determined by the justices by whom the offender is convicted; and the payment of the amount of such damage, and the repayments of the money necessarily expended in the removal of any manure, soil, ashes, or rubbish, shall be enforced in like manner as any such penalty.

COMMONS ACT 1876

29. Town and village greens.

... An enroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned.

This section shall apply only in cases where a town or village green or recreation ground has a known and defined boundary.

Appendix E
The Commons (Schemes) Regulations 1982

STATUTORY INSTRUMENTS

1982 No. 209

COMMON

The Commons (Schemes) Regulations 1982

Made - - - - 17*th February* 1982

Coming into Operation 25*th March* 1982

The Secretary of State for the Environment, as respects England, and the Secretary of State for Wales, as respects Wales, in exercise of the powers conferred by sections 1, 2 and 15 of the Commons Act 1899(a) and now vested in them (b), and of all other powers enabling them in that behalf, hereby make the following regulations:—

1. These regulations may be cited as the Commons (Schemes) Regulations 1982, and shall come into operation on 25th March 1982.

2. In these regulations, "council" means the council of a district, and "scheme" means a scheme made under the Commons Act 1899 for the regulation and management of a common.

3. A scheme made by a council shall be in the form set out in the Schedule to these regulations, subject to such modifications as appear to the council to be necessary or expedient.

4. Notice of the intention to make a scheme shall be given by—

(*a*) inserting a notice in the form set out in the Schedule to these regulations, or a form to the like effect, in at least one newspaper circulating in the neighbourhood of the common to which the proposed scheme relates, the notice to be inserted twice with an interval of not less than one week between the insertions;

(*b*) displaying copies of the notice at two or more places on the common;

(*c*) serving a copy of the notice upon the council of every county and of every parish and, in Wales, of every community in which the common, or any part of the common, to which the proposed scheme relates is situate;

(*d*) sending a copy of the notice to every person entitled to the soil of the common, whether as Lord of the Manor or otherwise;

(*e*) sending a copy of the notice to every commoner:

Provided that, where a copy of the notice is required to be sent,—

(i) it shall be sent by pre-paid registered letter, or by the recorded delivery service;

(ii) in a case where Her Majesty is entitled to the soil of the common, the copy of the notice shall be sent to the Crown Estate Commissioners or, where Her Majesty is entitled as Duke of Lancaster, to the Chancellor of the Duchy of Lancaster;

(a) 1899 c. 30, as amended by section 272 of, and Schedule 30 to, the Local Government Act 1972 (c. 70), and by section 1 of, and Schedule 3 to, the Local Government, Planning and Land Act 1980 (c. 65).

(b) 1903 c. 31, 1919 c. 91, S.I. 1955/554, 1965/1143, 1967/156, 1970/1681.

[DET 0218]

(iii) in a case where the Duke of Cornwall is entitled to the soil of the common, the copy of the notice shall be sent to the Lord Warden of the Stannaries.

(iv) in a case where the council is satisfied after reasonable inquiry that it is not practicable to ascertain the name or address of any person or commoner, it may dispense with the requirement to send a copy of the notice to that person or, as the case may be, to that commoner;

(v) in a case where the council considers that the commoners are too numerous, it may dispense with the requirement to send a copy of the notice to the commoners.

5. Copies of a draft scheme shall be placed on sale at the offices of the council which intends to make the scheme for such reasonable price as the council may determine.

6. The plan referred to in a draft scheme shall be deposited at the offices of the council which intends to make the scheme, and shall be available for inspection during office hours.

7. The Commons Regulations 1935(a) are hereby revoked.

(a) S.R. & O.1935/840.

SCHEDULE

FORM I

FORM OF SCHEME

1. The piece of land with ponds, streams, paths and roads thereon, commonly known as , situate in the [parish] [community] of in the County of and hereinafter referred to as "the common", as shown on a plan sealed by, and deposited at the offices of the District Council of hereinafter called "the Council" and thereon coloured green, being a common within the meaning of the Commons Act 1899, shall henceforth be regulated by this Scheme, and the management thereof shall be vested in the Council.

2. The Council may execute any necessary works of drainage, raising, levelling or other works for the protection and improvement of the common, and may, for the prevention of accidents, fence any quarry, pit, pond, stream or other like place on the common, and shall preserve the turf, shrubs, trees, plants and grass thereon, and for this purpose may, for short periods, enclose by fences such portions as may require rest to revive the same, and may plant trees and shrubs for shelter or ornament and may place seats upon and light the common, and otherwise improve the common as a place for exercise and recreation. Save as hereinafter provided, the Council shall do nothing that may otherwise vary or alter the natural features or aspects of the common or interfere with free access to any part thereof, and shall not erect upon the common any shelter, pavilion, drinking fountain or other building without the consent of the person or persons entitled to the soil of the common and of the Secretary of State [for the Environment] [for Wales]. The Secretary of State, in giving or withholding his consent, shall have regard to the same considerations and shall, if necessary, hold the same enquiries as are directed by the Commons Act 1876(a) to be taken into consideration and held by the Secretary of State before forming an opinion whether an application under the Inclosure Acts 1845 to 1882 shall be acceded to or not.

3. The Council shall maintain the common free from all encroachments and shall not permit any trespass on or partial enclosure thereof or of any part thereof.

4. The inhabitants of the neighbourhood shall have a right of free access to every part of the common and a privilege of playing games and of enjoying other kinds of recreation thereon, subject to any byelaws made by the Council under this Scheme.

5. The [here insert description of any particular trees or objects of historical, scientific or antiquarian interest] are, so far as possible, to be conserved by the Council.

6. The Council may set apart for games any portion or portions of the common as it may consider expedient and may form grounds thereon for cricket, football, tennis, bowls and other similar games, and may allow such grounds to be temporarily enclosed with any open fence, so as to prevent cattle and horses from straying thereon; but such grounds shall not be so numerous or extensive as to affect prejudicially the enjoyment of the common as an open space or the lawful exercise of any right of common, and shall not be so near to any dwelling-house or road as to create a nuisance or be an annoyance to the inhabitants of the house or to persons using the road.

7. The Council may, with the consent of the person or persons entitled to the soil of the common, and of the Secretary of State, temporarily set apart and fence such portion or portions of the common as it may consider expedient for the parking of motor and other vehicles, and may make such charges for the use of such part as it may deem necessary and reasonable: provided that any area so set apart shall not be so near to any dwelling-house as to create a nuisance or be an annoyance to the inhabitants of the house. The Secretary of State, in giving or withholding his consent, shall have regard to the same considerations and shall, if necessary, hold the same enquiries as are directed by the Commons Act 1876 to be taken into consideration and held by the Secretary of State before forming an opinion whether an application under the Inclosure Acts 1845 to 1882 shall be acceded to or not.

(a) 1876 c. 56.

8. The Council may, for the prevention of nuisances and the preservation of order on the common, and subject to the provisions of section 10 of the Commons Act 1899, make, revoke or alter byelaws for any of the following purposes, namely—

(*a*) prohibiting any person without lawful authority from digging or taking turf, sods, gravel, sand, clay or other substance on or from the common, and from cutting, felling or injuring any gorse, heather, timber, or other tree, shrub, brushwood or other plant growing on the common;

(*b*) regulating the place and mode of digging and taking turf, sods, gravel, sand, clay, or other substance, and cutting, felling and taking trees or underwood on or from the common in exercise of any right of common or other right over the common;

(*c*) prohibiting the removal or displacement of seats, shelters, pavilions, drinking fountains, fences, notice-boards, or any works erected or maintained by the Council on the common;

(*d*) prohibiting any person without lawful authority from killing, molesting or intentionally disturbing any animal, bird or fish or engaging in hunting, shooting or fishing or the setting of traps or nets or the laying of snares;

(*e*) prohibiting the driving, drawing or placing upon the common or any part thereof without lawful authority of any motor vehicle, motor cycle, carriage, cart, caravan, truck or other vehicle (including any aircraft), except in the case of accident or other sufficient cause;

(*f*) prohibiting—

(i) the flying of any model aircraft driven by the combustion of petrol vapour or other combustible substances;

(ii) the taking off or (except in the case of accident or other sufficient cause) landing of any glider or any other aircraft;

(ii) the flying of any glider or aircraft in such a manner as to be likely to cause undue interference with the enjoyment of the common by persons lawfully on it;

(*g*) prohibiting or, in the case of a fair lawfully held, regulating the placing on the common of any show, exhibition, swing, roundabout or other like thing;

(*h*) regulating games to be played and other means of recreation to be exercised on the common;

(*i*) regulating assemblies of persons on the common;

(*j*) regulating the use of any portion of the common temporarily enclosed or set apart under this Scheme for any purpose;

(*k*) prohibiting or regulating the riding, driving, exercising or breaking in of horses without lawful authority on any part of the common;

(*l*) prohibiting any person without lawful authority from turning out or permitting to remain on the common any cattle, sheep or other animals;

(*m*) prohibiting any person from bathing in any pond or stream on the common, save in accordance with the byelaws;

(*n*) prohibiting camping or the lighting of any fire;

(*o*) prohibiting or regulating any act or thing which may injure or disfigure the common, or interfere with the use thereof by the public for the purposes of exercise and recreation;

(*p*) authorising any officer of the Council, after due warning, to remove from the common any vehicle or animal drawn, driven or placed, or any structure erected or placed thereon in contravention of this Scheme or of any byelaw made under this Scheme;

(*q*) prohibiting any person on the common from selling or offering or exposing for sale or letting to hire or offering or exposing for letting to hire, any commodity or article, unless in pursuance of an agreement with the Council or otherwise in the exercise of any lawful right or privilege;

(*r*) prohibiting the fixing of bills, placards or notices on trees, fences, erections or notice boards on the common;

(*s*) prohibiting the hindrance or obstruction of an officer of the Council in the exercise of his powers or duties under this Scheme or under any byelaw made thereunder.

9. Copies of all byelaws made under this Scheme shall be displayed on notice boards placed on such parts of the common as the Council think fit.

10. Nothing in this Scheme or any byelaw made under it shall prejudice or affect any right of the person entitled as Lord of the Manor or otherwise to the soil of the common, or of any person claiming under him, which is lawfully exercisable in, over, under or on the soil or surface of the common in connection with game, or with mines, minerals, or other substrata or otherwise, or prejudice or affect any right of the commoners in or over the common, or the lawful use of any highway or thoroughfare on the common, or affect any power or obligation to repair any such highway or thoroughfare.

11. Printed copies of this Scheme shall be available for sale at the offices of the Council for such reasonable price as the Council may determine.

FORM II

FORM OF NOTICE

Commons Act 1899

Notice is hereby given that the Council intend to make a Scheme under the above Act for the regulation and management of in their district with a view to the expenditure of money on the drainage, levelling and improvement of the Common, and to the making of byelaws for the prevention of nuisances and the preservation of order.

Copies of the draft Scheme may be purchased and the plan therein referred to may be inspected at the offices of the Council.

Any objection or representation with respect to the Scheme or plan shall be sent to the offices of the District Council of within three months from the date of this notice.

If, at any time before the Council have approved the Scheme, they receive a written notice of dissent, which is not subsequently withdrawn, from either a person entitled to the soil of the common or from persons representing at least one third in value of such interests in the common as are affected by the Scheme, then the Scheme cannot be made.

(Date) (Signature of Officer authorised to sign)

11th February 1982. *Michael R. D. Heseltine,*
Secretary of State for the Environment.

17th February 1982. *Nicholas Edwards,*
Secretary of State for Wales.

5

Appendix F
Management associations for grazing commons: Rules for the conduct of business

General Meetings

1 The creation of a management association shall be undertaken at a properly convened meeting, held at a place convenient to the common, so that all rights holders may easily attend. All owners, lessees of sporting and mineral rights for terms exceeding one year, persons having registered rights in the common, and representatives of the appropriate local authorities (county, district and local) shall be entitled to attend and to vote. These owners, lessees, rights holders and representatives shall be members of the association.

2 The notice convening the initial general meeting could follow the pattern prescribed in regulations made under the Commons Act 1908, suitably amended to comprise the powers set out in paragraph 4.16 of the Report.

3 A so convened general meeting, which all members of the association shall be entitled to attend, to speak and to vote, shall be held. That meeting shall have the power:

(i) by resolution, to set the policy of the association;
(ii) to elect a committee of commoners;
(iii) to elect an executive committee with the duty and responsibility of carrying out the policies of the association and exercising its powers during the following year;
(iv) by resolution, to raise revenue by annual stint levy or special levy;
(v) to receive and approve the audited accounts of the association;
(vi) to appoint the auditors for the following year.

4 Voting at a general meeting shall be by show of hands or recorded vote if demanded by three or more members.

5 Votes on financial resolutions shall be by value of interest, if so demanded by any member.

6 In accordance with the precedent established in the Commons Act 1908, proxy voting shall be permitted. The form of authority for proxies shall be specified in the constitution.

Committee of Commoners

7 A committee of commoners shall be elected by and from those members of the association having rights of common. The committee shall have as many members as is necessary to provide adequate representation of all commons rights interests. It shall be the special province of the

committee to regulate the turning out of animals on the common and the maintenance of proper standards of husbandry. If rights other than those of grazing or pasture are registered, the committee of commoners shall be responsible for seeing that they are exercised in a fair and equitable manner.

8 The committee of commoners shall report to the executive committee (see below). The committee of commoners shall choose one or more of its members to serve on the executive committee.

9 Members of the committee of commoners shall serve for one year at a time but shall be eligible for re-election.

Executive Committee

10 The executive committee shall be composed of a balanced representation of the interests involved in the common. To that end there shall be reserved seats for:

(i) the owners of the soil, together with the owner or owners of the minerals if different from the owner of the soil;
(ii) the commoners appointed by the committee of commoners;
(iii) the nominees of the local authorities, representing the public interest.

11 Vacancies occurring during the year may be filled by the committee, so as to ensure a continuation of the balanced representation. The committee shall have power to co-opt members with special knowledge.

12 The committee shall be empowered to appoint a clerk, who shall act as clerk to the association.

Conduct of Meetings

13 The constitution of the association shall include rules for the conduct of meetings, covering the following matters:

(i) the notice required for convening a meeting, whether general or committee;
(ii) procedure for appointing a chairman;
(iii) chairman to have a casting vote;
(iv) requirement to take minutes of proceedings and resolutions;
(v) confirmation and signing of minutes;
(vi) minutes of the committee to be available for inspection by any member of the association at general meetings and on notice;
(vii) procedure for voting by show of hands and by recorded vote.

Finance

14 It shall be the duty of the executive committee to see that proper books of account are kept, that annual accounts are prepared and that they are audited by a qualified person.

15 It shall be the duty of the executive committee to present the audited accounts of the association to the annual general meeting.

16 The methods by which revenue is raised, whether by licence fee, stint levy, special levy or grant from a local authority shall be approved by specific resolution at a general meeting.

17 Voting on financial resolutions which would apply to all or some stint holders shall be by value of interest, if so demanded by any member.

18 A stint holder who does not pay a levy properly authorised at a general meeting shall lose his voting and grazing rights until such time as his share of the levy has been paid.

Appendix G
Dartmoor Commons Act 1985 - Section 5(1)

5.—(1) For the purpose of fulfilling their functions under section 4 of this Act, the Commoners' Council—

(*a*) shall make regulations for the following purposes:—

(i) to ensure the good husbandry and maintenance of the health of all animals depastured on the commons;

(ii) to ensure that the commons are not overstocked and, for that purpose, may fix or provide for the fixing of the number of animals or animals of any description which from time to time may be depastured on the commons by virtue of a right of common or of any other right or privilege;

(iii) to ensure that all animals depastured on the commons are from their introduction duly hefted or flocked and permanently marked for the purpose of identifying their ownership;

(iv) to control stallions, rams or other male entire commonable animals and to prescribe or provide for prescribing conditions (as to time, or as to the class, description, age or characteristics of animals) under which male entire commonable animals may be depastured on the commons;

(v) to ensure that any dead commonable animal is, whenever reasonably practicable, removed from the commons as soon as possible after its death has occurred;

(vi) to exclude from grazing on the commons bulls exceeding the age of 6 months, shod horses, shod ponies and other animals not entitled to be on the commons or any animal which, in the opinion of the Commoners' Council, either has become unthrifty, or is in such a condition that to allow it to remain depastured on the commons would be likely to cause it unnecessary suffering;

(vii) to regulate or prohibit the burning of heather, gorse, grass and bracken on the commons;

(*b*) may make such other regulations, in relation to the whole or any part of the commons, as they think fit and without prejudice to the generality of the foregoing, regulations may be made for all or any of the following purposes:—

(i) to exclude from grazing on the commons, for such periods as appear reasonably necessary, all animals or animals of a particular description where the Commoners' Council are satisfied that those exclusions are necessary for the maintenance of the commons or for the promotion of proper standards of livestock husbandry;

(ii) generally to regulate the exercise of rights of common of all kinds and rights or privileges having a similar subject matter as rights of common (including rights of grazing deriving otherwise than from rights of common) over the commons and to prohibit the use of the commons for similar purposes by persons purporting to exercise rights in excess of their entitlement or by persons not entitled to such rights either as commoners or otherwise.

Appendix H
National Parks and Access to the Countryside Act 1949 - second schedule

GENERAL RESTRICTIONS TO BE OBSERVED BY PERSONS HAVING ACCESS TO OPEN COUNTRY OR WATERWAYS BY VIRTUE OF PART V OF ACT

1. Subsection (1) of section sixty of this Act shall not apply to a person who, in or upon the land in question,—

(*a*) drives or rides any vehicle;

(*b*) lights any fire or does any act which is likely to cause a fire;

(*c*) takes, or allows to enter or remain, any dog not under proper control;

(*d*) wilfully kills, takes, molests or disturbs any animal, bird or fish or takes or injures any eggs or nests;

(*e*) bathes in any non-tidal water in contravention of a notice displayed near the water prohibiting bathing, being a notice displayed, and purporting to be displayed, with the approval of the local planning authority;

(*f*) engages in any operations of or connected with hunting, shooting, fishing, snaring, taking or destroying of animals, birds or fish, or brings or has any engine, instrument or apparatus used for hunting, shooting, fishing, snaring, taking or destroying animals, birds or fish;

(*g*) wilfully damages the land or anything thereon or therein;

(*h*) wilfully injures, removes or destroys any plant, shrub, tree or root or any part thereof;

(*i*) obstructs the flow of any drain or watercourse, opens, shuts or otherwise interferes with any sluice-gate or other apparatus, breaks through any hedge, fence or wall, or neglects to shut any gate or to fasten it if any means of so doing is provided;

(*j*) affixes or writes any advertisement, bill, placard or notice;

(*k*) deposits any rubbish or leaves any litter;

(*l*) engages in riotous, disorderly or indecent conduct;

(*m*) wantonly disturbs, annoys or obstructs any person engaged in any lawful occupation;

(*n*) holds any political meeting or delivers any political address; or

(*o*) hinders or obstructs any person interested in the land, or any person acting under his authority, in the exercise of any right or power vested in him.

2. In the application of the foregoing provisions of this Schedule to waterways,—

(*a*) for references to land there shall be substituted references to a waterway;

(*b*) sub-paragraphs (*a*) and (*b*) of paragraph 1 of this Schedule shall not apply; and

(*c*) sub-paragraph (*f*) of the said paragraph 1 shall have effect as if the words from "or brings" to the end of the sub-paragraph were omitted.

Appendix I
The Forestry Commission Byelaws 1982

STATUTORY INSTRUMENTS

1982 No. 648

FORESTRY

The Forestry Commission Byelaws 1982

Laid before Parliament in draft

Made - - - -	*5th May* 1982
Coming into Operation	*1st June* 1982

The Forestry Commissioners, in exercise of the powers conferred on them by section 46(1) of the Forestry Act 1967(a) and of all other powers enabling them in that behalf, after consultation with the Verderers of the New Forest and of the Forest of Dean in accordance with section 47(1) of that Act, hereby make the following byelaws, a draft of which has been laid before Parliament:—

Title and Commencement

1. These byelaws may be cited as the Forestry Commission Byelaws 1982 and shall come into operation on 1st June 1982.

Interpretation

2. In these byelaws:—

"the Arboretum" means those lands of the Commissioners known as the Westonbirt Arboretum, Silk Wood, The Downs and Westonbirt Arboretum Car Park in the County of Gloucestershire;

"the Commissioners" means the Forestry Commissioners;

"the Forest of Dean" means the lands of the Commissioners which are situated in the parishes and community specified in Schedule 1;

"lands of the Commissioners" means lands which are under the management or control of the Commissioners and to which the public have, or may be permitted to have, access;

"the New Forest" means the lands of the Commissioners for the time being constituting the area commonly known as the New Forest in the County of Hampshire;

(a) 1967 c. 10; section 46(1) should be read with section 58(3) of the Countryside (Scotland) Act 1967 (c. 86) and section 23(4) of the Countryside Act 1968 (1968 c.41).

"the Pinetum" means those lands of the Commissioners known as the Bedgebury Pinetum, Bedgebury Pinetum Car Park and Forest Plots in the County of Kent.

Application

3.—(1) Byelaws 5, 6 and 7 shall apply to all lands of the Commissioners except that byelaw 5(xi) shall not apply to the New Forest or to the Forest of Dean.

(2) Byelaws 8 and 9 shall apply only to the Arboretum and the Pinetum, byelaws 10 and 11 shall apply only to the New Forest and byelaw 12 shall apply only to the Forest of Dean.

(3) Nothing in these byelaws shall make unlawful anything done with the written authority of the Commissioners.

(4) Nothing in these byelaws shall prejudice or be in derogation of any right, power or duty vested in, or imposed on, the Verderers of the New Forest or of the Forest of Dean by virtue of any enactment or otherwise.

Revocation of byelaws

4. The byelaws mentioned in Schedule 2 are hereby revoked.

Acts prohibited on the lands of the Commissioners

5. No person shall in or on the lands of the Commissioners:—

(i) enter any area on or near which there is displayed by the Commissioners a notice prohibiting entry thereon;

(ii) enter any building, structure or mine unless there is a notice displayed thereon by the Commissioners permitting or implying access thereto;

(iii) leave open or obstruct any gate or moveable barrier giving access to any enclosed plantation or other enclosed area;

(iv) light any fire or stove or leave any lighted match, tobacco, cigar or cigarette;

(v) remove or damage any building, wall, gate, stile, fence, railing, post, chain, seat, drain, pipe-line, notice-board, receptable for rubbish or any other thing belonging to the Commissioners;

(vi) display any notice, placard or bill;

(vii) dig up, remove, cut or injure any tree, shrub or plant, whether living or not, or remove the seeds therefrom, or dig up or remove any soil, turf, leafmould, moss, peat, gravel, slag, sands or minerals of any kind;

(viii) disturb or remove archaeological or historical remains;

(ix) operate a metal detector;

(x) set up or place any caravan, tent, booth, stall or erection of any kind, including equestrian equipment;

(xi) turn out to graze or feed or allow to remain thereon any animal or fowl;

(xii) permit any animal in his charge to be out of control;

(xiii) except in the New Forest or on bridleways, which are public bridleways or bridleways specified by the Commissioners, ride or lead any horse;

(xiv) permit a dog for which he is responsible to disturb, worry or chase any bird or animal or, on being requested by an officer of the Commissioners, fail to keep the dog of a leash;

(xv) ply for hire with, or let out for hire, any mechanically-propelled or other vehicle or any horse or other animal;

(xvi) sell or distribute anything or offer or expose anything for sale;

(xvii) set up beehives;

(xviii) wilfully disturb, injure, catch, net, destroy or take any bird, fish, reptile or animal, or attempt to do so, or take the eggs of any bird;

(xix) catch or net for the purposes of any collection any butterfly, moth or dragonfly;

(xx) wilfully disturb; damage or destroy the burrow, den, set or lair of any wild animal;

(xxi) carry or use any firearm, shotgun, bow or other missile weapon, or any ammunition or missile for use therewith;

(xxii) dam or obstruct or restrain the flow of water in any watercourse or break the banks thereof, or open or close any sluice belonging to the Commissioners;

(xxiii) operate any aircraft, glider, hot-air balloon, boat, raft or craft of any kind, or any model aircraft, boat or car;

(xxiv) play or practice any game or sport in such a manner as to disturb the peaceful use of such lands or endanger the public or animals;

(xxv) play any musical instrument or operate any radio receiving set or any other apparatus for the production or emission by electrical or mechanical means of sound, speech or images in such a manner as to cause annoyance to any person lawfully in or on such lands;

(xxvi) wilfully obstruct, disturb or annoy in any manner any person lawfully in or on such lands;

(xxvii) wilfully break any bottle or glass object;

(xxviii) place or leave on such lands (except in receptacles provided for the purpose by the Commissioners or by any other competent authority) any litter, rubbish, filth or refuse of any kind;

(xxix) direct or discharge or cause to be directed or discharged, whether by means of a pipe, stream or excavation or in any other manner, any sewage or other noxious substance or any dangerous chemicals in such a manner as to constitute a nuisance;

(xxx) deliver any public speech, lecture, sermon or address, or hold or take part in any public meeting, procession, exhibition or festival of any kind;

(xxxi) wilfully evade payment of any charges or tolls levied by the Commissioners for the use of car parks or forest roads.

6.—(1) Subject to paragraph (2) of this byelaw no person shall bring or cause to be brought on to the lands of the Commissioners any vehicle other than a perambulator or wheelchair drawn or propelled by hand or by electrical power and used solely for the conveyance of a child or children or an invalid.

(2)(a) Paragraph (1) of this byelaw shall not apply:—

(i) to the parking of any vehicle by the side of a highway;

(ii) where the Commissioners provide an area for use for the parking or stopping thereon of vehicles of any specified class or classes, to the bringing into such an area by any person of a vehicle of the specified class or classes, or to the use of any such vehicle on a route or way specified by the Commissioners for obtaining access to such an area.

(b) If any such area or access route or way referred to in paragraph (2)(a)(ii) of this byelaw is provided by the Commissioners for use only during a specified period of the day, the provisions of that paragraph shall not have effect in relation to the bringing by any person of any vehicle into that area or on to that access route or way at any other time.

7. No person shall on the lands of the Commissioners:—

(i) drive a motor vehicle as a learner driver;

(ii) use or operate a motor vehicle without an efficient silencer;

(iii) park or leave unattended a motor vehicle between the hours of sunset and sunrise except by the side of a highway for a stop of reasonable duration for refreshment or other reasonable cause.

Additional acts prohibited in the Arboretum and the Pinetum

8. No person shall in the Arboretum or the Pinetum:—

(i) picnic otherwise than where the Commissioners set apart a space described in a notice displayed there;

(ii) play any ball game;

(iii) bathe or wade in any pond or stream;

(iv) climb any tree, wall or fence;

(v) fly any kite.

9. No person shall:—

(i) enter or leave the Arboretum or the Pinetum otherwise than by an entrance or exit authorised by the Commissioners;

(ii) bring into the Arboretum or the Pinetum any plant or any living part of a plant.

Additional acts prohibited in the New Forest

10. No person shall in the New Forest drive any vehicle at a speed greater than 20 miles per hour.

11. No person shall in the New Forest:—

(i) turn out in any area of plantations enclosed by the Commissioners to graze or feed or allow to remain therein any animal or fowl;

(ii) without lawful authority, turn out in any area of the Forest (not being an area of plantations enclosed by the Commissioners) to graze or feed or allow to remain therein any animal or fowl.

Additional acts prohibited in the Forest of Dean

12. No person shall in the Forest of Dean:—

(i) turn out in any area of plantations enclosed by the Commissioners to graze or feed or allow to remain therein any animal or fowl;

(ii) without lawful authority, turn out in any area of the Forest (not being an area of plantations enclosed by the Commissioners) to graze or feed or allow to remain therein any animal or fowl except such sheep as the Commissioners suffer to graze therein;

(iii) turn out in any area of the Forest (not being an area of plantations enclosed by the Commissioners) to graze or feed or allow to remain therein any sheep, other than a lamb, which is not clearly marked with the owner's identification marks being identification marks registered with the Deputy Surveyor of the Forest of Dean as the owner's.

In Witness whereof the Official Seal of the Forestry Commissioners is hereunto affixed on 5th May 1982.

L.S.

P. J. Clarke,
Secretary to the Forestry Commissioners

SCHEDULE 1

Byelaw 2

The Forest of Dean
Parishes and Community

In the County of Gloucestershire, the parishes of Alvington, Awre, Blaisdon, Cinderford, Coleford, Drybrook, English Bicknor, Hewelsfield, Littledean, Longhope, Lydbrook, Lydney, Mitcheldean, Newland, Newnham, Ruardean, Ruspidge, St. Briavels, Staunton, Tidenham, West Dean and Woolaston.

In the County of Hereford and Worcester, the parishes of Goodrich, Hope Mansell, Ross Rural, Walford and Whitchurch.

In the County of Gwent, the part of Monmouth Community which is situated east of the River Wye.

SCHEDULE 2

Byelaw 4

Byelaws revoked	Reference
The Bedgebury Pinetum Byelaws 1969	S.I. 1969/ 312
The New Forest Byelaws 1970	S.I. 1970/1068
The Forestry Commission Byelaws 1971	S.I. 1971/ 997
The Westonbirt Arboretum Byelaws 1972	S.I. 1972/ 303
The Forest of Dean Byelaws 1975	S.I. 1975/ 918
The Forestry Commission Byelaws 1975	S.I. 1975/ 919

Appendix J
Fencing of, and on common land (Paper by E K Harris and J P Taylor)

This paper was prepared at the request of the Forum and draws on the experience of the authors and commoners in South Wales in the problems associated with fencing of and on common land in that region.

It would appear that there are several types of fencing or problems relating to the fencing of commons and we have listed these as follows:-

1. Perimeter fencing - this means fencing around the perimeter of the common to divide the common from the enclosed inby land surrounding the common.

2. Perimeter fencing which has recently been constructed or needs to be constructed to fence off the common from a road or highway passing through the edge of the common or where a road exits from the common.

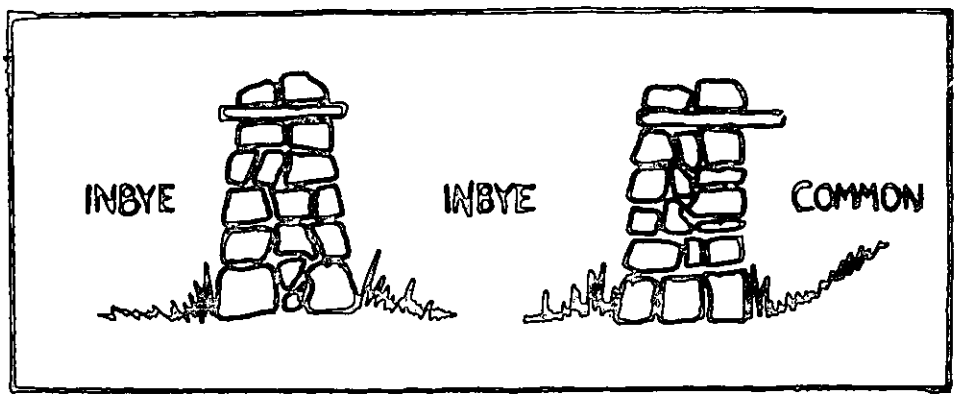
3. Internal fencing - again needed to protect the common and users of the road from animals wandering from the common onto a road which crosses through the middle of a common.

4. Other internal fencing for forestry, nature conservancy or agricultural purposes whether of a permanent or temporary nature.

1) Perimeter fencing

Here the word "fencing" is used in its widest sense as generally speaking most perimeter fences are of well established thorn hedges or of stone walls, or of banks with walls on top, or banks with some sort of fencing on top. This will depend very much on the area of the common and the availability or otherwise of stone. In most of the upland areas in years gone-by stone and manpower was plentiful and nearly all the perimeter fences are stone walls. Generally speaking it was the duty of the owner of the inbye land to fence against the common - it was not the duty of the Commoner to fence to keep his animals in but that of the inbye owner to keep the common animals out.

In many of the South Wales commons walls against the common are built differently from those of other internal walls with the Farm. For example, coping stones normally placed on the top of a wall to shed water are usually placed with their overhanging edge protruding towards the common where it is a boundary fence with the common, not only to shed water but to ensure that sheep cannot clamber up the wall over the top (our forebears knew what they were doing!) - see illustration:



In areas where stone was available but there were no stones large or flat enough to overhang onto the common, smaller coping stones would be used but gorse or furze would be cut and laid hanging out towards the common on top of the coping but held in place by the capping stone. Commoners tell us that this used to have to be renewed every five or so years. The capping stone was loose, it would be taken off, new furze would be inserted underneath and the capping stone put back on the coping stone.

These "fences" are still maintained by Farmers against the common. One of the problems that arises is that over the years in the Welsh Valleys many of the farms in the Valleys have been taken over by private industry, coal, tinplate, steel, etc., or by Local Authorities for housing or, indeed, by the Forestry Commission. The old private Industrial Works or even the private Railway Companies kept linesmen whose duty was to inspect the fences and keep them in good repair. Since nationalisation of these various industries there has been a general lack of maintenance. Now many of the industries have left the area leaving large areas of disused railway line or Marshalling Yards, derelict Factories or Steel Works, or large areas of land where these have been removed. Some of these areas are used for other purposes such as housing, Parks, or even refuse tipping but either the nationalised industries if they still maintain them, or the Local Authorities if they have nowacquired them, either deny that there is any liability on them to fence against the common, or simply refuse to carry out their obligations.

There is no obligation imposed by Statute but over the past few years the Courts have held that if it can be proved that there is a local custom to fence against the common, the Law will uphold that custom as good Law within the confines of that common. (Crow V Wood AER (1970) 3 425, CA) (Egerton v Harding (1974) 3 689). As time goes by, with the collapse of the old Manorial system or the absence of the Lord of the Manor, it becomes more and more difficult to prove the custom to fence against the common other than farmers have always carried this out and are still carrying it out. Farmers find it difficult, however, at the present time, to group together to commence Court Actions against Nationalised Industries or Local Authorities who simply deny the existence of such custom and refuse to take any action.

Several of the Local Authorities in the Welsh Valleys (Blaenau Gwent District Council in particular) carry out stringent impounding policies of any sheep that stray off the commons. The Local Authorities employ permanent Pound Officers who have the facility of one or more stock lorries, one of more Pounds in which animals can be impounded. Pounding is carried out under the Animals Act 1971 or the Town Police Clauses Act 1837.

The pound fees can be up to £10 per impounding and £10 or more per day per animal for keep. It is on some commons becoming totally uneconomic for Commoners to graze their animals simply because as soon as the animals are on the common they will stray through the dilapidated fences into the townships where they are impounded and the fee for release is far more than the value of the animal.

Housing Estates have now been built by Local Authorities up against the common and the fences of these are generally not maintained by the Council or by their Council tenants and, again, cause a constant source of escape. The Forestry Commission have bought many farms abutting the common and, whilst by and large the Forestry Commission try to maintain their fences, there are many areas in South Wales where the fences against the common simply are not maintained or have been vandalised to such an extent that the Forestry Commission refuse to renew them with the result that sheep get into the Forestry Plantations and from there escape into the townships.

What the Commoners would like to see is:-

(a) A statement similar to that contained in Clause 9 of the Dartmoor Commons Bill - ideally one would like to see the duty to fence against the common imposed throughout rather than merely being by way of a re-confirmation of an existing custom - this means that one has to prove the custom on each and every individual common - a sometimes expensive occupation.

(b) Where it is impossible to obtain the repair of fencing against the common, then the Commoners would like to have it included in Management Agreements that in such circumstances a levy could be made on the Commoners grazing the common for monies to be raised for carrying out fencing works around the perimeter of the common but it to be understood however that these entitlements would not usurp the duties or obligations of the adjoining owner.

No Consent is needed under Section 194 of the Law of Property Act for perimeter fencing because this fencing is not "on the common".

In 1970 the then Minister of State, David Gibson-Watt, convened a Working Party on straying animals in the region recommending that local authorities should act to reduce the problems of straying animals including from common land. A Welsh Office "coordinator" was appointed to liaise with various parties (a Mr Ernest Richards).

Also research into Cost-Benefit of fencing, grids etc as part of urban renewal work along Groundwork Trust lines was conducted by Beaman and Thomas of Cardiff University. Two study areas, Merthyr Borough, and Ogmore and Garw, participated in general urban fringe improvement schemes for which centrally funded grants of approx £27000 used in fencing and grids were available.

However, local authorities which were unable to adopt general improvement schemes were told to use rate precepts.

In 1979 the coordinator post was terminated and Welsh Development Agency took on a wider role in urban renewal work. To date WDA have been willing to assist local authorities with 50% funding for these works.

We understand that reclamation of former tipping sites is assisted at up to 85% and many farmers wonder whether a useful exercise associated with this could not be the "sealing-off" of the agricultural and reclaimed land jointly.

Interestingly in the Merthyr and Ogmore schemes liability for fence maintenance has never been established. Farmers and commoners in the area would hope that a formula could be found whereby liability for "day to day" repairs would rest reasonably on occupiers while periodic renewals of fences would rest again with the original builders of the fence ie the local authorities.

2) Perimeter fencing where there are roadways along the perimeterof commons or exit points from the commons

In the old days many of the rural or upland commons even in the urban industrial areas were served by fairly narrow lanes between high banks or hedges or walls. The entrance or exit points onto the common were gated. Sheep straying off the common was not, therefore, a problem because there was adequate fencing all against the common and there were gates at the exit points. Over the years the Commoners have suffered from the widening of these access roads, the straightening of the roads, leading to faster speeds, as well as the construction of new roads.

(a) Old or existing exit points

The Cost-Benefit study referred to above also included reference to fencing of commons and roads. Where construction of grids took place this often involved grids sited several yards away from actual exit points. Section 194 consents were given for many such grids, nevertheless there remain many areas where exit points allow sheep access to roads and townships.

(b) The commons have been looked upon greedily by the Ministry of Transport and County Councils for the making of new roads whether merely local roads, trunk roads or motorways. The Heads of the Valley road, Abergavenny to Neath, and the M4 Motorway are but two examples. When the roads are constructed the land is first of all compulsorily acquired by the County Council/Welsh Office/Ministry of Transport. Conditions are imposed that fences will be erected by the Authority parallel to the road system to keep animals from obtaining access from the commons onto the roads. However, nothing is ever said about who maintains these fences.

For example the Compulsory Purchase order over Coity Wallia which preceeded the M4 construction refers to initial fencing work but not to subsequent maintenance. The Welsh Office appears to maintain the fences without there being any legal necessity to do so.

The Heads of the Valley Road was built some 20 years ago and it is now becoming a serious problem as the fences are falling into disrepair and all the relevant Authorities are denying that they are responsible for maintenance. If sheep get onto the trunk roads it is impossible to work dogs on those trunk roads to recover the sheep. The shepherds have no alternative, therefore, but to leave their sheep on the roads where either they find their way down into the Valleys or are impounded or recovered by the farmers or are killed on the road; but it is a fear that they could have caused death to the drivers as a result of the collisions.

For both the M4 and Heads of the Valleys Road local authorities/Welsh office appear to accept responsibility for maintenance, if only after several years of dispute. The problem reported to us is that maintenance is only carried out, if at all, on an infrequent and largely inadequate basis.

We suspect that the problem is universal where such new roads cross and adjoin other common areas in England and Wales and thought should be given to the imposition of obligations not only to the carrying out of the fencing initially but to the maintenance of the fencing. This is clearly not the responsibility of the Commoners or the adjoining land owners, but is a responsibility of the Authority who constructed the roads in the first instance or are the present Highway Authority.

(c) A further problem indirectly associated with old exits on existing roads is the ability of sheep having strayed onto other roads, to be channelled by buildings and fences to major road intersections. Often large roundabouts have grassed areas which in themselves attract stock but there are several such sites in South Wales from which sheep can and occasionally do, have access onto motorway slip roads and the motorway itself.

Clearly the answer lies at the original point of escape, but in the absence of such a solution there is a strong case for the provision of cattle grids of a suitable design, on slip roads to motorways in South Wales.

3) New Internal fencing against roads with the increase of traffic, and of traffic speeds

(a) There is considerable slaughter of animals on existing roads which cross common land. Many County Councils now put up road signs and whilst these help to some extent they clearly are not the answer. It is felt that there is a need and, indeed, it is desirable for there to be internal fencing abutting against highways crossing common land - not in all circumstances but where individual commons have their own problems. These fences are not to keep the public out but are merely to keep the animals within the common and thus off the road. They are usually liberally spread with gates, stiles or kissing gates. This fencing is usually of a post and wire type (Ministry of Ag. specification) and is carried out by the Commoners themselves, sometimes with the aid of assistance from the Highway Authority where the slaughter problem is particularly bad and the Highway Authority are worried about the hazards to users of the road. The Secretary of State's Consent is first sought under Section 194.

The maintenance of this fence remains with the Commoners. There have been many examples of this type of fencing in South Wales already approved by the Welsh office and carried out by the Commoners. The Commoners have to seek the consent of the owner of the land first. This is usually forthcoming and, in some cases, the land owner had made a small contribution. There are many commons where fencing of this sort is not practicable simply because of the size of the commons and, in one case, it was found that the construction of a "bridge" across a stream and boggy area allowed animals to cross from one part of the common to another without resorting to the roadway bridge thus cutting down the instance of animals on the highway and avoiding actually fencing the road.

From experience, we would consider that this sort of fencing is not obtrusive and is acceptable if there is no other practical way to deal with the danger of animals on the highway. We know of certain schemes which should go ahead on commons in South Wales but simply have not because of disagreement between the Commoners as to who was to contribute towards the cost. This problem would presumably be 'got round' by management powers where there could be mandatory provision and the imposing of a levy towards the cost from Commoners using the common. In other commons the cost has been voluntarily met by the Commoners between themselves on a self-help and sensible basis.

Fencing is however not always the best solution. Many South Wales commons crossed by roads of this type are notoriously prone to receive extremely ferocious winter conditions (those on the Brecon Beacons in particular).

We are aware that in several cases, proposals to fence for road safety reasons would, while at first sight appearing sensible, have led in the 1984/85 winter to the loss of whole flocks. Sheep are able to survive extreme conditions only by "escaping" to sheltered but drift-free areas and any "internal" fence along a road can act as a potential death trap for sheep following their directional instincts in a blizzard. Drifts associated with such fences further add to the problem.

(b) We understand that there are now problems with regard to National Trust Commons. Section 29 of the National Trust Act 1907 provides that common or commonable lands shall be at all times kept unenclosed and unbuilt on as open spaces for the recreation and enjoyment of the public.

Section 23 of the 1971 Act gives further powers to provide or arrange for the provision of facilities and services for the enjoyment or convenience of the public, parking places for vehicles, shelters and lavatory accommodation and to erect buildings and carry out works. Sub-section 2 says that the construction of any other work whereby access by the public to any Trust property to which the said Section 29 applies is prevented or impeded shall not be lawful unless the Consent of the Secretary of State is obtained and in giving or withholding his Consent the Secretary of State shall have regard to the same considerations, etc., as are directed by the Commons Act 1876.

The Solicitor to the National Trust has intimated that he considers that these Sections do not give the Trust powers to fence National Trust land and, apparently, has had Counsel's Opinion to that effect.

We have not seen that Opinion nor have we considered the detailed arguments which the Trust's Solicitor puts forward. The problem seems to be that the Trust finds itself unable to agree that they can fence commons in their ownership even if those fences are needed for the prevention of animals straying onto roads running through commons, thus being for the safety of the animals as well as for the safety of the users of the road. It may be that further consultation should be considered with the National Trust as to whether there should be included in any second stage legislation now to be contemplated, powers for the National Trust to fence their commons where necessary or for an interpretation of their existing powers.

As a matter of comment, we would mention that fencing has already been carried out against roads crossing through or abutting onto National Trust commons in South Wales but we understand that further works are needed in Pembrokeshire where certain of the commons are incapable of being grazed at the moment until possible fencing and gridding of exit roads can be carried out. Under the present interpretation put forward by the National Trust it appears that they are not in a position even to contemplate such fencing. This, we feel, cannot be right but we await further advice or information from the National Trust.

4) Other internal fencing

We believe that Paper CLF 42 deals, under paragraphs 4 and 5, with the other sorts of internal fencing where they are for forestry or agricultural purposes. For example, where the NCB Opencast Executive carry out opencast schemes on common land, it is necessary for there to be fencing around the workings and, more importantly, there is a need for there to be fencing against the reclamation lands during the restoration period. This can go on for anything up to 10 years to be properly restored. The fence is removed at the end of that time. During any other period of "improvement", ie bracken eradication, etc., it may be that there are causes for temporary internal fencing but it would be agreed that this would be of a temporary nature only.

By and large the authors of this Paper accept that there is often no call for internal fencing to divide the common into parcels purely for agricultural purposes of a permanent nature and, indeed, there are two examples where the Welsh office have refused to give Consent for such a fencing scheme (Buckland Manor & Gwaun-Cae-Gurwen). We appreciate that there is a contentious issue on Plumstone Mountain, Pembrokeshire with which the OSS are dealing but it is submitted that this fencing was done without the authority of the Welsh office. The writers have no direct knowledge about the background behind such fencing and they cannot, therefore, make a more detailed comment but it is believed that possibly registration of part of Plumstone Mountain, subject to the fencing, is provisional only at the present time. Be that as it may, the Secretary of State's Consent has not been obtained and, therefore, if it is common land, the fencing is unlawful.

The authors would not wish to alter the authority given to the D of E/ Welsh Office. It is considered that the present Welsh Office interpretation of their duties and considerations in the giving or withholding of consent for fencing is being adequately interpreted to cope with modern conditions and the Commoners would only hope that such considerations continue to be updated as and where appropriate.

An example has been brought to our attention of a situation in which internal fencing may be required for strictly agricultural purposes.

The Sheep Scab (Eradication) 1977 Order (amended) prescribes two statutory periods in each year during which all sheep must be dipped. (In 1985 the periods will be 29 June to 9 August and 27 September to 1 November). Article 28 requires that sheep cleared from common grazings in infected areas are not to be returned unless consent is given by a local inspector. Even in uninfected areas most commons devise procedures for clearing stock for dipping.

The Blaenau Mountain common constitutes three parts but is all part of the same physical mass. The three parts have always been grazed separately. The Mountain has been registered as three CL Numbers, CL14, CL15 and CL16, these running very much along the sheep grazing patterns. Basically, CL14 and CL15 are very similar and graze together and there is a certain amount of inter-grazing. CL16, although attached to CL15, has its own grazing patterns. We understand that there are no Commoners of CL16 registered over CL15 or CL14 and vice-versa. CL14 and CL15 undertake their dipping under the Dipping Regulations and as agreed with the Ministry of Agriculture/WOAD on a particular date. However, CL16 dip some four weeks later.

It will be appreciated that there should be no contact of dipped and undipped flocks and it is suggested that the most practical method would be for CL15 to be physically divided off from CL16 by stock proof fence. This would be an internal fence. We do not think that there is any serious proposal that the Commoners will carry out such fencing but it is an example where fencing would be for agricultural purposes. Why CL16 dips some four weeks later is not clear but we understand that there is an "agricultural" reason for this.

There may be many other reasons why internal fencing is needed over and above those outlined, ie for the protection of SSSI's or other nature conservation areas, or possibly for other agricultural purposes but these would be subject to particular regard by the Welsh Office/D of E when giving or withholding their Consent. We would not wish that there be an absolute prohibition on internal fencing because this would be wrong and would tend to "fossilize" the commons but such applications should be subject to stringent review. Our experience is, however that such applications are in the minority and, unless there is very good reason for them, are turned down by the Welsh Office/D of E.

5) Conclusions

The experience of the authors of the problems found on commons in South Wales and associated with fencing leads us to regard the matter as one of particular significance among the range of issues facing the Common Land Forum. For several significant areas of common in the South Wales valleys, and we suspect elsewhere, no attempt to improve the management of the commons for agricultural on any other purpose can hope to have a meaningful impact on those areas if the issues pointed to in this paper are neglected.

ED HARRIS
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