Law Commission consultation on compulsory purchase

Response of Open Spaces Society

Open Spaces Society

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1 Introduction

1.1 The Open Spaces Society (OSS) was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and people's rights to enjoy them. The society's earliest endeavours sought to protect common land from both development and compulsory purchase, and that remains at the heart of the society's work today.

1.2 We respond only on those matters which are within the competence of the society having regard to its objects. Accordingly, the headings below refer only to those questions in the consultation in which the society has an interest and views to express.

1.3 We refer to the Minister in relation to the role of the Secretary of State or Ministers in England and the Welsh Ministers in Wales.

2 Question 6: terminology of orders

2.1 The Society agrees that the terminology for describing the stages in the authorisation process for a compulsory-purchase order are unhelpful to general understanding. But we also recognise that the terminology fits within a wider corpus of legislation and practice which relies on the same or similar terminology, and can give rise to similar confusion. In the context of this society's work, we observe that local planning authorities may make orders for the stopping up etc. of public rights of way[1] which then are subject to confirmation by the authority, or by the Minister where there are objections; whereas the Minister may propose a draft order for the stopping up etc. of highways (including public rights of way) which then may be made after considering any representations.[2] Moreover, in consequence of subsequent amendment of the legislation,[3] a London borough council may adopt either

[1] Under s.257 of the Town and Country Planning Act 1990.

[2] Under s.247 of the Town and Country Planning Act 1990, the procedure being set out in s.252.

[3] By the Greater London Authority Act 1999, Sch.22.

procedure, and therefore it may on occasion propose a draft order before making it, or make an order which must then be confirmed.

2.2 The Society therefore suggests it may be unhelpful to adopt changes in terminology solely in the context of compulsory purchase within the scope of its terms of reference, leaving unchanged similar terminological challenges in comparable legislation. Moreover, we suggest that there is a risk that, on occasion, a compulsory-purchase order will be submitted to the Minister for confirmation alongside another (draft) order where the terminology remains unchanged, so that one order has been made and awaits confirmation, while the other order has been proposed in draft and awaits being made.

2.3 A better way to proceed might be for the government to confer powers to be exercised in secondary legislation to amend all such legislative provisions so as to adopt a common form of terminology.

2.4 Further, while we recognise the uncertainty which can arise from the existing use of inconsistent terminology, we also suggest that the terminology has its roots in a traditional perspective of the respective powers of the crown and of other bodies exercising compulsory-purchase powers. That is to say, that the crown is exercising prerogative powers now codified in legislation to acquire land compulsorily, which is done when the Minister makes an order (having consulted on a draft), whereas another body makes an order, but cannot proceed until it has the confirmation of the Minister.[4]

2.5 That said, we think that overall, if a consistent approach is to be adopted, it is preferable if an order is published as a *proposal* in draft, and then confirmed or rejected.[5] however, as noted above, we would prefer to see such terminology more widely adopted than solely in relation to compulsory-purchase orders.

3 Question 8: publicising orders

Retention of site notices

3.1 We agree that there should be an express obligation upon compulsory-purchase authorities (so far as reasonably practicable) to keep a notice in place for the duration of the objection period.

3.2 However, we have some concern that legislating for such endurance will be taken, in other legislative contexts demanding the display of site notices, to show that (without any express words) the requirement to display a site notice does not convey any obligation to

[4] Leaving aside those cases where it is empowered to confirm without objections.

[5] C.f. 'proposals' made by commons registration authorities under Part 1 of the Commons Act 2006 for amendment to the registers of common land and town or village greens, which then are 'determined': see s.24.

maintain it for the duration of the objection (whereas otherwise it might be implied). We do not think that there is any straightforward way to avoid this risk.

Notice of compulsory-purchase orders

3.3 The consultation correctly observes that notice of an order must be published on an 'appropriate website'.[6] 'Appropriate website' is defined to mean[7]:

> a website which members of the public could reasonably be expected to find on searching on the internet for information about the scheme or project that underlies the proposed purchase[.]

3.4 There remains a requirement to publish the notice also in local newspapers. But local newspapers are in decline, and in some areas there is very poor or no coverage at all. Moreover, few people today are likely to read the public notices in local newspapers, especially if they are not expecting a notice to be published or are reading the newspaper online.

3.5 Publication of notices on a website is not a substitute for notices in local newspapers. The original purpose of such notices was to bring notice of a project to the attention of readers, who would be numerous (perhaps, in much earlier times, within a certain stratum of society), and likely to see such notices whether or not they expected a notice to be published. Time has moved on, and this is no longer a credible proposition. But neither is publication on a website as a substitute for advertising in local newspapers. If a person is aware of a project, he or she will be able to find out information about it on the internet regardless of whether a notice is published there; if not, it is unlikely that the person will come across the information. Even site notices seldom are seen or read by the public, and if they are read, they, and the import of what they describe, may not be understood.

3.6 What is now lacking is any mechanism to bring to the attention of the wider public information about the project, whether in the form of a notice or otherwise. This hardly is a defect unique to compulsory purchase under the 1981 Act, but it is a widespread problem with public projects large and small.

3.7 We believe that this problem needs to be addressed by Government on a more comprehensive basis than in relation to the 1981 Act. But we invite the Commission to consider what steps could be taken within its terms of reference to achieve better publicity for orders.

3.8 We suggest that a duty should be placed on the order-making authority to use its best endeavours to publicise the notice in social media. Every order-making authority should maintain accounts in social media, and it should be obliged to use them for this purpose.

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[6] S.11(1)(b) of the 1981 Act.

[7] S.7(1) of the 1981 Act.

Moreover, the obligation should be to describe the effect of the project in terms that the public is likely to be able to understand, and to encourage it to find out more, so that while the public notice would be available through a link, it would not form the content of the initial post on social media. A public notice given in social media *verbatim* is no more likely to attract attention then if it were mounted on a lamp post.

3.9 We recognise that such an approach would pose difficulties in terms of the content of a social media post, and whether it offered a fair and accurate view of what was being proposed, and if not whether this might give rise to liability to challenge downstream. Nevertheless, to continue to rely merely on notice given only to those who are likely to be looking for it, is now completely unacceptable. The Commission should use this opportunity to pioneer new mechanisms.

3.10 We also suggest that notice should be given to those living in the locality of a common or open space, or at least those adjoining it.[8] It is axiomatic that the owner or occupier of such land will receive direct notice, but there is invariably a wider community interest in the land, and a requirement to serve notice on those living nearby, or adjacent, will reach those who might otherwise be unaware of it.

3.11 Finally, we suggest a further mechanism which may seem on first blush to be turning back the clock. That is that notice also should be required to be published in the *London Gazette*. We make this suggestion, not because the *Gazette* is widely read, but because it is, and always has been, a journal of record. It still is possible to find out about projects, such as railway schemes, proposed in the nineteenth century, by searching the *Gazette*. Publishing notices in the *Gazette* ensures that there is one place where any person who wishes to find out about a project can be sure that information will be available, and almost as importantly, if no information is disclosed, that person confidently may conclude that the project has not reached the critical stage of notice being published (or indeed, there is no such project). This would be far more reliable than reading the public notices section of a newspaper which may or may not be selected as the local newspaper for a project, or searching the web for information where search engines may or may not prioritise authoritative sources, and where historical information may cease to be available — indeed, a local authority may be assiduous to remove a public notice the day after the objection closes. We add our understanding that the publication of notices in the *Gazette* is low cost or free, provided that the submission is mandatory and made digitally,[9] and so publication in this journal would impose trivial costs on compulsory-purchase authorities.

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[8] *C.f.* the requirement to publicise certain planning application by serving notice on 'any adjoining owner or occupier': The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595), art.15. This expression is defined, unhelpfully, in art.15(10).

[9] See *Gazette* price list 2025.

4 Question 12: special-category land

4.1 We respond below to the Commission's question in relation to special-category land, addressing, first, the *Background and activity data* in relation to common land, then we set out the *Case for the retention of common land as special-category land*, and then comment in particular in relation to:

- *Giving of notice of a certificate*
- *Discharge and vesting of public rights and regulatory schemes*
- *Definition of 'common'*
- *Vesting of substitute land*
- *Open space*
- *National Trust land*

Background and activity data

4.2 The Commission may find helpful some background to the protection for special-category land, and particularly common land, in s.19.

4.3 The Land Clauses Consolidation Act 1845 contained, in ss.99–107, dedicated powers for the compulsory acquisition of common land and rights of common exercisable over it. (We refer here to common land and commons, but this should be taken also to include town or village greens, which typically are common land subject also to recreational rights held by the local inhabitants.) The powers in the 1845 Act included provision for a committee of commoners to be established to treat with the acquiring authority, and to be able to give a good discharge for compensation paid to the commoners. But the 1845 Act did not place any obstacles in the way of compulsory acquisition of common land other than the requirement to operate the machinery of the common-land provisions. Private acts passed prior to the 1845 Act conferring compulsory-purchase powers contained similar provisions where necessary.

4.4 Accordingly, both before and after the 1845 Act, many projects for public or quasi-public infrastructure were built across common land, most notably canals, railways and turnpike improvements. At a local level, legislation also made it possible to provide facilities on common land of benefit to the neighbourhood, such as libraries and schools.[10]

4.5 During the second half of the nineteenth century, there was increasing concern about the loss of common land, both to development, but also because of the buying out or abandonment of rights of common, or oppression of those entitled to exercise them. This society was active and pre-eminent in campaigning for the protection of common land, and

[10] For example, under the Gifts for Churches Act 1811, the Schools Sites Act 1841 and the Literary and Scientific Institutions Act 1854.

was influential in securing legislative improvements including the Metropolitan Commons Acts 1866–1898 and the Commons Act 1876. The Light Railways Act 1896 was the first national legislation to contain protective provisions to regulate the acquisition of common land,[11] and the Commons Act 1899 then imposed a ministerial consent regime to regulate the acquisition of common land under existing legislation, including the 1845 Act.[12] A general consent regime for works on common land was enacted in s.194 of the Law of Property Act 1925, now re-enacted in Part 3 of the Commons Act 2006.

4.6 Prior to the Statutory Orders (Special Procedure) Act 1945, the provisional order procedure was mandated by various Acts as applicable to Departmental orders authorising the acquisition of commons for public purposes. The 1945 Act adopted a more streamlined parliamentary procedure. The 1946 Act applied that (new) procedure to the compulsory purchase of commons (in line with previous legislation affecting such land). S.19 of the 1981 Act therefore continues a long line of legislative precedent for the protection of common land.

4.7 We have analysed available data on the use of s.19. Defra publishes a casework database of consents issued by it, and predecessor departments, in relation to common land in England.[13] The database extends backwards to the late nineteenth century, although few consents were granted before the Commons Act 1899. We believe it to be reasonably comprehensive. We have analysed data solely relating to s.19 consents, and those under the 1946 Act. There are limitations on what can be achieved owing to the sometimes-inconsistent presentation of the data. However, our analysis suggests that, since the 1946 Act, there have been in England 694 applications for a certificate (*i.e.* in relation to common land), of which 109 were refused or withdrawn.[14] Some 46 applications have been determined in the present century, and just 16 since 2010. This last datum confirms our own experience: that applications under the 1981 Act have greatly declined since the Planning Act 2008.

Case for the retention of common land as special-category land

4.8 The extent of commons in England and Wales has been reduced from perhaps one third or one quarter of its land area in the late Middle Ages, to around 3% in England and 8% in Wales now, through private inclosure and public development. The Royal Commission on Common Land described it as the 'last reserve of uncommitted land in England and Wales

[11] See s.21.

[12] See s.22.

[13] Available from www.gov.uk/government/publications/commons-and-greens-casework-database. The electronic database was compiled, in relation to twentieth-century records, from a card index and from ledgers recording decisions in that century.

[14] Some applications will relate to projects which required the taking of both common land and other special-category land, most often open space. It is not possible to identify such applications within the database.

[which] ought to be preserved in the public interest.'[15] Yet what remains is vital to recreation, biodiversity, landscape character, archaeology, and critical to the sustainability of upland farming. One-half of all common land is designated a site of special scientific interest. There is a public right of access to nearly all of it. Commons are the sole significant remaining areas of unenclosed land.

4.9 The society is adamant that the existing protection for common land in s.19 should be retained, because:

- Common land is intrinsically cheap (in purely financial terms) to acquire: it would be a lure to a developer otherwise unconstrained (nineteenth-century railways could most cheaply be constructed across commons), yet the purchase value does not begin to reflect value to society.
- Decision-makers (whether compulsory-purchase or confirming authorities) seldom have an understanding or knowledge of common land, and may see it merely as a private matter of complexity which can be disregarded for public purposes. This perspective commonly is observed in local planning authorities.
- The s.19 process gives cause to compulsory-purchase authorities to consider more carefully whether a project should take place on common land, and provide some counterbalance to the financial inducement of low purchase price noted above.
- The s.19 process is not a bar to the compulsory acquisition of common land, but a regulatory process. A well-planned project should have no difficulty in obtaining a Ministerial certificate.
- The s.19 process replicates, in a different but comparable form, the protection afforded to common land generally by part three of the Commons Act 2006, and the regime for the exchange of common land in ss.16–17 of that Act. Under s.16 of the 2006 Act, it is not possible for a developer to deregister common land which it owns without the provision of replacement land (other than in *de minimis* cases). The effect of s.19 (of the 1981 Act) is in effect to replicate that regime for the purposes of compulsory purchase, but to allow an opt out subject to special parliamentary procedure.
- The s.19 process ensures that, as a matter of practice if not law, the decision whether to grant a certificate is taken by or on behalf of the department responsible for the special-category land (in relation to common land, Defra), whereas the decision whether to confirm the compulsory-purchase order is taken by or on behalf of the department responsible for that order. Even where both decisions are effectively delegated to the Planning Inspectorate, there remains a separation of functions, and this ensures that the special nature of common land is understood by the decision maker in relation to the certificate.

[15] Cmnd.462, para.404 (1955–58).

- Resort to special parliamentary procedure is vanishingly rare: the society is unable to recall in living memory the use of this procedure in relation to the acquisition of common land (although the society has in recent times been involved in the use of the procedure in relation to open space).

4.10 In our view, the function of special parliamentary procedure is not to subject the proposal to bureaucratic red tape and delay, but to encourage the developer to adopt a pragmatic approach to the use of common land, and where necessary, to ensure that the developer is open to negotiation and problem-solving: that it is disposed to 'get round the table'. For example, if a development unavoidably requires the use of common land, the developer is encouraged to provide substitute land which is 'equally advantageous'.[16] it is only if the developer either fails to provide substitute land, or the Minister is unable to certify that the land is equally advantageous, and if neither of the alternative mechanisms is available to the developer,[17] then the compulsory-purchase order can be confirmed only by special parliamentary procedure. This seldom is an unreasonable obligation to impose on the developer, but the removal of the long-stop requirement for special parliamentary procedure in s.19 would enable the developer to 'chance its luck' by proposing instead to develop on the common without offering any land in replacement. That, as we already have noted, would actively encourage a developer to focus its development on common land as the cheapest option.

4.11 Thus the resort to special parliamentary procedure should be seen not as 'an unnecessary complication',[18] but as an occasionally-beneficial option which is available to developers in exceptional cases, where they are unable to provide equally-advantageous substitute land.[19]

4.12 We accept that it is open to the Government to adopt a policy which in theory could achieve the same outcome: that is, that orders involving the compulsory acquisition of common land would not be confirmed unless equally advantageous land were offered in substitution. But in reality, that approach would suffer from three disabling defects:

- The policy might not be instituted in the first place, could be weakened by subsequent policy changes without any requirement for parliamentary oversight, and could be departed from by Ministers where they thought it justified.

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[16] S.19(1)(a) of the 1981 Act.

[17] See s.19(1)(aa) and (b).

[18] See consultation paper at 2.80. The description appears to be attributed to M Barnes, *The Law of Compulsory Purchase and Compensation* (2014), p.503.

[19] The alleged unavailability of substitute land in compensation for open space taken for the Thames Tideway Tunnel is believed to account for the amendments made to s.131 of the Planning Act 2008 by s.24(2) of the Growth and Infrastructure Act 2013, thus avoiding the need for special parliamentary procedure in those cases..

- The policy inevitably would be subsumed by or subservient to other policies, so that for example the desirability of effecting a major infrastructure project would cause Ministers to depart from their policy on the protection of common land.
- Developers would observe that there were no effective legal constraint on what could be done with common land, and always seek the lowest-cost solution. And in our experience, every consent regime tends over time to tilt in favour of the applicant over the objector ('regulatory capture'), so far as (and sometimes further than) the legislation permits.

4.13 We therefore commend the retention of s.19 in its present form.

4.14 However, the Commission asks whether this provision causes any problems in practice, and we identify four such problems following.

4.15 We add that, shortly before completing this response, we learned from the National Trust's response that s.19(4) and 19(5) of the Neighbourhood Planning Act 2017 disapplies the requirement for special parliamentary procedure where the compulsory-purchase authority takes temporary possession of land compulsorily. This provision (and Chapter 1 of Part 2 of the 2017 Act generally) has not yet been brought into force, and the society previously was unaware of it. It is not entirely clear how this provision would interact with s.19 of the 1981 Act, but the society deprecates it, especially as, unless a counter-notice is served under s.21, 'temporary' for the purposes of Chapter 1 appears to be open-ended.

Giving of notice of a certificate

4.16 The first problem is that, where the Minister proposes to grant a certificate under s.19, notice must be given in the form directed under subs.(2). It appears that no general direction has been made for this purpose in England nor in Wales, and in practice, a 'direction' is given on a case-by-case basis. We think that the notice given under s.19 should be brought into line with the notice required under s.11 (including the modifications which we seek under item 3 above). Alternatively, the Minister should be required to make regulations prescribing the form of notice required.

Discharge and vesting of public rights and regulatory schemes

4.17 Secondly, it is not clear, even if a compulsory-purchase order certified under s.19 contains the vesting provisions mentioned in subs.(3), how or whether it works in relation to public rights of access over the land, such as might arise under s.193 of the Law of Property Act 1925 or Part I of the Countryside and Rights of Way Act 2000,[20] nor whether it is effective to discharge and assign regulatory schemes affecting common land, such as a scheme of regulation and management under Part I of the Commons Act 1899, or a provisional order of

[20] In relation to the 2000 Act, we assume that the order cannot assign rights under that Act to the replacement land, as that would be to override the function of maps prepared under s.8, and reviewed under s.10, of the Act.

regulation confirmed under Part I of the Commons Act 1876. We should like to see an express power in the legislation to address such matters in the order.

Definition of 'common'

4.18 Thirdly, 'common', as used in subs.(1), is 'defined' in subs.(4) to:

> include… any land subject to be enclosed under the Inclosure Acts 1845 to 1882, and any town or village green[.]

4.19 Land subject to be enclosed under the Inclosure Acts 1845 to 1882 is addressed in s.11 of the Inclosure Act 1845, which is too long to be reproduced here (the length and impenetrability of the definition is problematic in itself), but suffice to say that it includes 'all lands subject to any rights of common whatsoever'.

4.20 The definition in the 1981 Act re-enacts the same definition in the 1946 Act.[21] In 1946, that approach was consistent with commons legislation and legislation affecting commons, which was that a common was defined on a statutory case-by-case basis, according to the purpose and intent of the statute, and it might be said, according to the preference of the draughtsman. The consistent element was that it includes land subject to rights of common, but it might include other land not subject to rights of common, such as some town or village greens, or subject to other kinds of rights, such as sole rights.

4.21 But all this became (or ought to have become) largely redundant after 1965, following the enactment of the Commons Registration Act 1965, and the registration of common land (and, separately, town or village greens) under that Act. Land which was not registered in time under that Act was deemed not to be common land (nor a town or village green).[22] Accordingly, one would expect a post-1965 enactment to refer, not to a common-law definition of common land (however expressed), but to land which was registered under the 1965 Act. That this was not done presumably reflects on the 1981 Act being a consolidation of the 1946 Act.

4.22 The Commons Act 2006 was intended to bring consistency to such enactments. The intention was that the function of commons registration would, under Part 1, be applied to all commons registration authorities in England and Wales, and the registers of common land would be brought up to date with an opportunity to deregister wrongly-registered land. S.54 enabled Ministers then to use a power in secondary legislation to amend other primary legislation to refer consistently to registered common land.[23] An illustration of how that power

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[21] S.8(1) of the Acquisition of Land (Authorisation Procedure) Act 1946.

[22] S.1(2)(a) of the 1965 Act.

[23] And to other classes of common land which had been excluded from registration, particularly land exempted from registration under s.11 of the 1965 Act.

might be exercised, in terms of drafting, can be seen in para.5 of Sch.5 to the 2006 Act (amendment to s.61(9) of the Criminal Justice and Public Order Act 1994).

4.23 But owing to indifference and budgetary constraints in Defra, Part 1 has been implemented only in nine commons registration authorities' areas, meaning that the vast majority of such authorities still labour under the inadequacies of the 1965 Act, and Part 1 of the 2006 Act is not yet generally in force. The effect can be seen in the commencement order giving effect to the amendment made by paragraph 5 referred to above, which has to make 'transitional' provision.[24] The position in Wales is comparable, but somewhat different in legislative measures.

4.24 Nonetheless, provision for persons to apply to deregister wrongly registered land have been brought into force throughout England and Wales, and in the view of the society, it would be appropriate to act in accordance with the intention of s.54 of the 2006 Act, by amending the definition of common in s.19 (of the 1981 Act), in line with the provision made under para.5 referred to above.

4.25 We therefore propose that the definition of common is amended to mean any land registered (whether as common land or town or village green) under Part 1 of the 2006 Act or under the 1965 Act, and to land exempted from registration under the 1965 Act or to which Part 1 of the 2006 Act does not apply[25] (as may be the case).

4.26 Much land was registered under the 1965 Act as 'waste land of a manor not subject to rights of common'.[26] Arguably, such land is not within the definition of common in the 1981 Act. It may be said that amending the definition of common as proposed would be to increase the scope of s.19 in its application to special-category land. However, firstly, we think that caution and uncertainty have in any case caused compulsory-purchase authorities to treat registered common land which was registered without any rights of common as special-category land. We know of no case where a compulsory-purchase authority has, where the 1981 Act applies, knowingly compulsorily purchased registered common land without following the s.19 procedure. And secondly, much of the land registered as 'waste land…not subject to rights of common' may well have been subject to rights of common which were not the subject of any application to register. We therefore think there can be no reasonable objection to proceeding on this basis, so as to clarify the scope of the definition and to codify existing practice.

4.27 Amending the definition of common in the 1981 Act would bring the advantage that the meaning in the Planning Act 2008 would be amended consistently (assuming that the

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[24] See, in relation to England, art.3 of the Commons Act 2006 (Commencement No. 6) (England) Order 2011, SI 2011/2460.

[25] See s.11 of the 1965 Act and s.5 of the 2006 Act.

[26] See limb (b) of the definition of 'common land' in s.22(1) of the 1965 Act.

reference in s.131(12) of the 2008 were merely updated to refer to the enactment replacing the 1981 Act). We would support that outcome. It would offer comparable benefits.

Vesting of substitute land

4.28 Fourthly, subs.(1)(a) enables the Minister to certify in a case where:

> …there has been or will be given in exchange for such land, other land, … [and] the land given in exchange has been or will be vested in the persons in whom the land purchased was vested… [.]

4.29 This provision appears to us to be unnecessarily restrictive, in that it requires the substitute land to be vested in the person who owned the taken land. In relation to, say, an upland common still used for agricultural grazing, this provision makes sense, and ensures that the owner of the common comes to own the substitute land as part of the overall common, and commoners have access to it as they have access to the rest of the common.

4.30 In a different context, particularly where a common is used for recreation, it may make more sense for the substitute land to be vested in another person, perhaps a local authority or the compulsory-purchase authority itself, so that it can be rendered fit for public use and subsequently managed for that purpose. Otherwise, there is a risk that the substitute land will be designated common-land-in-name-only, that the person in whom it is vested takes no action to render it fit, or maintain it, for public or even graziers' use, and does not remove any existing fencing or other obstruction which is a barrier to such use.

Open space

4.31 We support the retention of s.19 also in relation to the compulsory acquisition of open space. Many of the reasons why s.19 is appropriate in relation to common land apply also to open space.

National Trust land

4.32 In relation to National Trust land, we agree, for the reasons given, with the Commission's preliminary conclusion (at para.2.81) that:

> …we think it is only proper for there to be Parliamentary oversight of the compulsory purchase of [National Trust] land. We are therefore not proposing any changes to the protection afforded by section 18 of the 1981 Act.

4.33 We also support the Trust's own analysis of the regime contained in its response to this consultation.

5 Chapter 4: effect of compulsory purchase on registered common land

5.1 We wish to raise one matter which is not addressed in the consultation, which is the effect of a compulsory purchase of common land on what is registered as common land.[27] This applies regardless of whether the Commission adopts the reform suggested in item 4 above so that s.19 would be applied to any registered common land (or town or village green).

5.2 Where land is acquired under a compulsory-purchase order and a certificate is given under s.19, the order may be expected to contain provisions in accordance with subs.(3)(b),

> discharging the land purchased from all rights, trusts and incidents to which it was previously subject

and the substitute land may expect to be vested to opposite effect.[28]

5.3 It may be presumed that the effect of the order is to cause the taken land to cease to be registered common land, and the substitute land to become registered common land. Certainly, in those areas where Part 1 of the Commons Act 2006 is in force, provision is made in s.14 of the 2006 Act requiring the effect of the exchange to be registered — see para.8(2) of Sch.4 to the Commons Registration (England) Regulations 2014.[29] Indeed, the effect of r.44 of the 2014 Regulations is that the order does not operate (so far as is relevant to the order applying to common land) until the effect of the order on the common land is registered.[30]

5.4 In those areas where Part 1 of the 2006 Act is not in force and the taken land is subject to rights of common, those rights will be vested as exercisable over the substitute land, and as such, the substitute land will become eligible for registration under s.13(b) of the Commons Registration Act 1965.[31] However, where the taken land was registered as common land but not subject to rights of common, it is not entirely clear how the effect of the order gives cause to amend the register, there being no obvious trigger for deregistration and registration.

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[27] Again, we intend here to refer equally to the compulsory purchase of town or village green.

[28] Other than in a case where the certificate is granted in accordance with subs.(1)(aa). It is not necessary for substitute land to be provided in a case where a certificate is granted in accordance with subs.(1)(b).

[29] SI 2014/3038. See also the entry in the table following para.8(9) of Sch.4 to the 2014 Regulations. This provision relies on the power conferred by s.14(4) of the Commons Act 2006.

[30] Relying on the power conferred by s.14(5) of the Commons Act 2006.

[31] Application can be made for this purpose one of two ways: for further explanation, see *Gadsden and Cousins on Commons and Greens*, 3rd ed, paras.3–91 to 3–94. The author is one of the co-editors of *Gadsden*, 3rd ed., and the other co-editors are Edward Cousins and Richard Honey KC.

5.5 In any case, whether or not there is a cause to amend the register, we suggest it should be put beyond doubt that the effect of an order and certificate (other than a certificate given under s.19(1)(aa)) in relation to registered land is (when the relevant provisions of the order are fully effective) to cause the taken land to cease to be eligible for registration, and the substitute land to become eligible for registration, and that there is a duty on the compulsory-purchase authority to pursue registration of those effects, whether under the 1965 Act or Part 1 of the 2006 Act, as the case may be.

5.6 This will help ensure that projects involving compulsory purchase of common land are consistently documented for their impact on the commons registers. By way of example, the society currently is working with National Highways to secure the effect of the construction of the M6 in relation to certain commons in Cumbria, where the land remains registered as common land to this day. This part of the M6 opened in 1970.

Open Spaces Society
31 March 2025