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INFORMATION SHEET C2 W

How to take action against unlawful encroachments and works on commons in Wales

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Introduction

1. This information sheet tells you how to protect your common from unlawful encroachments and works, and explains how, in Wales, the public can use a new power of court action against certain unlawful works.
2. We often receive letters from members concerned about unlawful fencing or works on a common, whether on a relatively minor scale, where a local inhabitant has incorporated a small part of the common into his/her garden, or on a major scale, such as a car park covering a significant area, or fencing.
3. Our information sheet C1W explains that, under section 38 of the Commons Act 2006, the consent of the National Assembly for Wales is required for certain works on common land (restricted works). These include fencing, buildings, ditches, trenches, embankments and resurfacing.
4. Under present general legislation, no one has a *duty* to take legal action in the event of unauthorised works.

Power to take action

5. The Commons Act 2006 received Royal Assent on 19 July 2006. Under section 41, brought into force on 1 April 2012, any person may apply to the county court for the removal of unlawful works erected since 1 April 2012 on land registered as common land.

6. Any person may also take action against any unlawful work erected after 28 June 2005 (when the Commons Bill was introduced into parliament) and before 1 April 2012, on any common which had common rights on 1 January 1926, by virtue of section 194 of the Law of Property Act 1925, as amended by paragraph 6 of schedule 4 to the Commons Act 2006.
7. Previously (under s194 of the Law of Property Act 1925) only those with a legal interest in the land could take action, namely the owner and commoners, and the community and unitary council within whose area the common lies.
8. An application can be made to ask the court for an order for the removal of unauthorised buildings, fences or other works on common land and restoration of the land. Any order is at the discretion of the judge, who does not necessarily have to order removal, even if the works do not have section 38 consent.
9. Taking legal action is generally an expensive and lengthy procedure. It is essential that you obtain evidence to support your case, including witnesses, photographs and documents. You will be personally liable for the costs of the action and, if you are unsuccessful, the court may order that you pay the defendant's costs in addition to your own.
10. Costs are always at the discretion of the court and an adverse costs order may be made against a winning party if the court feels a claim has been pursued in an unreasonable way.

11. Other steps you can take will usually be campaigning and lobbying. We set out below different courses of action that aggrieved inhabitants and commoners can take against an unlawful work.

Background research

12. In order to build up a good, substantive case against the unlawful work, some thorough, initial background research is necessary.
 - a. Ensure the work was erected since 1 April 2012 or, for land with common rights at 1 January 1926, since 28 June 2005; the work is unlawful and that no s194 application has been made prior to 1 April 2012 or 28 June 2005. In Wales contact the

National Assembly for Wales
Planning Division
Department for Environment and Sustainable
Development
2nd Floor, CP2
Welsh Government
Cathays Park
Cardiff CF10 3NQ
Tel 02920823883
Email
<http://wales.gov.uk/topics/environmentcountryside/armingandcountryside/common/usefulcontacts/?lang=en>

- b. Find out who owns the land, and find out if the owners's permission for the work was obtained.
 - c. Find out what commoners's rights exist and whether the unlawful work interferes with the exercise of common right.

- d. Check to see if there are any special rules and procedures for the common such as:
 - (i) on commons whose scheme for regulation is made under the **1899 Commons Act**, the managers of the common (usually a local authority) have a duty to preserve the natural aspect of the common and keep it free of encroachments;
 - (ii) on National Trust (NT) commons, the NT has a duty to resist and abate all enclosures and encroachments on the land;
 - (iii) other local acts giving powers to conservators and local authorities to defend commons.
- e. Check to see whether there are any by-laws affecting the common.
- f. Find out if the common is subject to section 193 of the Law of Property Act 1925, which gives the public a legal right to walk and ride over the common. This right is additional to the general right to walk on all commons under the Countryside and Rights of Way Act 2000.

Taking action

Owner's permission

13. Any work on a common requires the permission of the owner of the common. The owner can take action under the normal laws of trespass against a work for which his permission has not been sought. Persuading the owner to take action is probably the easiest course, whether it is legal action or practical action, such as abating the nuisance. However, the

owner may be the perpetrator.

14. Caution is advised before taking physical action to remove other than very small obstructions or encroachments. If damage is done to the object being removed, that in itself could result in you being liable for some form of legal action. In relation to objects with a high value, it is better to apply to the courts than risk being sued.

'Ownerless' commons

15. Under section 45 of the 2006 Commons Act, any ownerless common is in the care of the local authority. Any local authority (unitary authority, national park authority or community council) may take all necessary steps to protect it, as if it were the owner in possession, and to institute proceedings for any offence.

Commoners' rights

16. Under common law, where the rights of a commoner are interfered with (whether by the owner of the common, a stranger to the common or another commoner) the remedy is an action for damages and/or a claim for an injunction. Except in a few cases, the commoner is not allowed to take the law into his own hands.
17. He may abate a nuisance which *wholly* excludes him from exercising his rights of common, but if the nuisance amounts only to a partial exclusion, a commoner should not initiate such action. The proper remedy is to apply to the court for a declaration of his rights and an injunction. Where a fence interferes with the rights of a commoner, he is entitled by law to pull down as much fence as is

necessary to enable him to exercise his rights.

Commons Act 1876, section 30

18. Under s30 of the Commons Act 1876, an illegal inclosure of, or encroachment on, any part of a common not covered by the last paragraph may be made the subject of a removal order by the county court. This power is not subject to the limitation of s194 which only applies to commons where rights of common were exercised on 1 January 1926, but it is not clear whether anyone without a legal interest in the common (as owner or commoner) can initiate the necessary action.

Section 38 applications

19. Another step could be to press those responsible to make an application under s38 to legalise the construction. In making a decision the National Assembly for Wales must consider, in the context of the enjoyment of the common as an open space, the ~~interests~~ of the neighbourhood and the ~~public interest~~ under s39 and you will have the opportunity to object. This is explained in more detail in our information sheet C1(W).
20. An application can be worth pressing for and, if consent is withheld, it may be easier for the county court to make an order for the removal of an unlawful work and restoration of the land to its original condition.

County court action

21. This section explains how any member of the public, including a charity, may take action in the county court against any unlawful building, fence or other work erected on common land after 1 April 2012, or for commons subject to common rights on 1 January 1926, after 28 June 2005.

Pre-action behaviour

22. In cases not covered by any approved protocol, the court will expect the parties (in accordance with civil procedure rules) to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for proceedings.
23. Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include:
 - a. the claimant writing to give details of the claim;
 - b. the defendant acknowledging the claim letter promptly;
 - c. within a reasonable time, the defendant giving a detailed written response; and
 - d. the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

24. The claimant's letter should:
- a. give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;
 - b. enclose copies of the essential documents which the claimant relies on;
 - c. ask for a prompt acknowledgment of the letter, followed by a full written response within a reasonable stated period;

(For many claims, a normal reasonable period for a full response may be one month.)
 - d. state whether court proceedings will be issued if the full response is not received within the stated period;
 - e. identify and ask for copies of any essential documents, not in his possession, which the claimant wishes to see;
 - f. state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and
 - g. draw attention to the court's powers to impose sanctions for failure to comply with the practice direction (CPR 1.1 (2)(a), (b) and (c)) and, if the recipient is likely to be unrepresented, enclose a copy of this practice direction.
25. The defendant should acknowledge the claimant's letter in writing within 21 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is

longer than the period stated by the claimant, the defendant should give reasons why a longer period is needed.

26. The defendant's full written response should, as appropriate:
 - a. accept the claim in whole or in part and make proposals for settlement; or
 - b. state that the claim is not accepted.
27. If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.
28. If the defendant does not accept the claim or part of it, the response should:
 - a. give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are in dispute;
 - b. enclose copies of the essential documents on which the defendant relies;
 - c. enclose copies of documents asked for by the claimant, or explain why they are not enclosed;
 - d. identify and ask for copies of any further essential documents, not in his possession, which the defendant wishes to see;
(The claimant should provide these within a reasonably short time or explain in writing why he is not doing so.)
 - e. state whether the defendant is prepared to enter into mediation or another alternative method of

dispute resolution.

29. The parties should consider whether some form of alternative dispute-resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. The courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that, if the protocol is not followed (including this paragraph), the court must have regard to such conduct when determining costs.
30. This information can be found at <http://www.justice.gov.uk/courts/procedure-rules/civil>

Court procedure

31. A useful guidance note is *Notes for claimant on completing a claim for N1A and N119Aq*. You will need to complete a Part 7 claim form (N1) which you can obtain from your local county court or online (www.hmcourts-service.gov.uk), or instruct a solicitor to do so. An example of the form and an illustration of suggested draft particulars of claim are shown in Appendix 1.
32. Once you have completed the form, you should photocopy it and the defendant's guidance notes (which the court will give you). You must send to the court one copy for each defendant and one copy for the court.
33. For free legal information, help and advice, contact

Community Legal Services Direct on 0845 345 4345 or
http://www.legalservices.gov.uk/aboutus/contact_us.asp

The Open Spaces Society has a list of solicitors who can be instructed privately for a fee.

34. You will need to pay a fee to the court, unless you can apply for an exemption (EX 160A *Court fees, do I have to pay them?*). The fee is likely to be £150. If the matter proceeds you will also have to pay £100 for allocation to a particular track (process), and further fees may be required, such as the trial fee.
35. The court has various guidance notes about the court process which should be read carefully (see below).
36. A defendant under s41 of the Commons Act 2006, or under s30 of the Commons Act 1876, aggrieved by an injunction or order of the county court, or a complainant aggrieved by a refusal to grant such an injunction or order, may (on giving security for costs) appeal to the Court of Appeal.

React quickly

37. It is vital that you take action as soon as possible. Remember that a court may refuse an order where a person has stood by and watched work being done, without bringing action until after it is completed.

Other action

38. Where legal action is not appropriate, or you feel it

is too risky there are other useful things you can do.

39. Form an action group to do the following.
 - a. **Create adverse publicity:**
once you have thoroughly researched the problem, we recommend that you give it adverse publicity through local radio, papers and TV, and by holding a local public meeting to voice your concern and get support.
 - b. **Lobby councillors, AMs and MPs:** lobby your local councillors Assembly Members and MPs and urge them to take action. If the common is subject to a specific management scheme, press the council to follow the duties of the scheme if it is relevant.

Lobbying by the Open Spaces Society and others has led to the following action on common land.

Having been alerted by our local correspondent in 2008 that the unlawful fencing at Bramblemead, Lower Common, Gilwern remained in place, the society lobbied Brecon Beacon National Park Authority and they agreed to take action and serve an enforcement notice. In 2012 the fencing, gates and posts have been removed and BBNPA have agreed to monitor on a regular basis.

In May 2004, the City and County of Swansea issued proceedings for the removal of unlawful gates, planting and fencing and for the breach of a 1996 temporary consent to erect gates which expired in September 1999, on Mynydd Lliw Common, Grovesend, north-west of Swansea.

In July 2006, Hertfordshire City Council issued

proceedings under section 194 of the Law of Property Act 1925, for the removal of unlawful fencing at Well Green Common, Brickendon.

Shropshire County Council threatened legal action against the owner of Llynclys Common near Oswestry for an unlawful fence. The owner applied for retrospective consent under section 194 of the Law of Property Act, which was refused. After further pressure from the council the owner removed the fence (2003).

After being urged by the Open Spaces Society and others, Rochdale Metropolitan Borough Council threatened legal action against a commoner who had erected unlawful fencing on Blackstone Edge Common. The threat worked and the fencing was removed (July 2001).

Norfolk County Council agreed to take action (March 1990) against unlawful fencing on Etling Green Common, East Dereham, after much lobbying by a local residents group and the Open Spaces Society.

Threat of unlawful works

40. Where there is threat of an unlawful work, in addition to the above points we recommend the following.

Action group

41. In order to ensure that your common is well protected and managed you can set up a group to prepare a management plan, monitor the common, and carry out practical conservation work. You will

show that people are caring for the common and keeping a watchful eye on it, and you may ward off any potential encroachments. Make sure you have a good map with the boundaries of the common marked.

42. As part of your activities you may like to ~~u~~Beat the Bounds of your common. This is an ancient custom which is carried out on Rogation Sunday (the fifth Sunday after Easter) every year. The event will remind local people just where the boundaries of their commons and greens are, and may discourage those all-too-frequent encroachments (see information sheet A3).

Permanent visual records

43. Taking photographs from a known point with a record of the date can be useful as evidence to prevent encroachment in the future.

Websites

Department for Constitutional Affairs, for pre-action behaviour information

<http://www.justice.gov.uk>

Open Spaces Society

www.oss.org.uk

National Assembly for Wales

<http://wales.gov.uk/topics/environmentcountryside/farmingandcountryside/common/usefulcontacs/?lang=en>

Office of Public Sector Information, to obtain a copy of the Commons Act 2006.

http://www.legislation.gov.uk/ukpga/2006/26/pdfs/ukpga_20060026_en.pdf

To obtain a copy of the Commencement Order 2006
http://www.legislation.gov.uk/uksi/2006/2504/pdfs/uksi_20062504_en.pdf

HM Courts Service
<http://www.justice.gov.uk/about/hmcts/>

Further information

Available from the county court or online.

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

The Open Spaces Society is unable to accept liability for any misinterpretation of the law or any other error or omission in the advice in this paper.

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Appendix 1

IN THE (insert) COUNTY COURT

CLAIM No. _____

IN THE MATTER OF THE COMMONS ACT 2006

B E T W E E N:

(insert name)

Claimant

-and-

(insert name)

Defendant

PARTICULARS OF CLAIM
Works on a common without section 38 consent

1. The land the subject of this action is situated at (insert address) and forms part of land commonly known as (insert) Common (the Common). It is approximately delineated in Plan A annexed to these Particulars of Claim edged green. The full extent of the Common is delineated in Plan B annexed to these Particulars of Claim and coloured green.
2. The Claimant has is entitled to bring this action pursuant to section 41 of the Commons Act 2006.
3. The claimant confirms that the unlawful works have been undertaken by the Defendant since 1 April 2012.

[if applicable, include number 4:]

4. The Defendant is the registered owner of that part of the Common approximately edged in red on Plan A under title number (insert title number if registered).
5. On (insert date) the Common was finally registered under the Commons Registration Act 1965 as a common with registration number (insert commons registration number) by the (insert) County Council.
6. The Defendant has unlawfully and without consent of the Secretary of State as required by section 38 of the Commons Act 2006 erected or constructed or caused to be erected or constructed on the Common (insert nature of encroachment or obstruction eg. Fencing, gates, buildings, etc), and detailed on the afore-mentioned plan by black crosses, and as a result access to the Common is impeded.
7. The Defendant has wrongfully refused and continues to wrongfully refuse to remove any of the said (insert nature of encroachment or obstruction) from the Common.

AND the Claimant claims:

- a. an order under the Commons Act 2006, section 41 that the Defendant removes all of the said (insert nature of encroachment or obstruction) and restores the Common to a reasonable condition;
- b. (damages, however only include if loss can be established)

Statement of Truth

The Claimant believes that the facts stated in these Particulars of Claim are true.

Claimant

(insert Claimant's address for service)

To: The District Judge of the (insert) County Court
and the Defendant.

IN THE (insert) COUNTY

COURT

CLAIM NO:

IN THE MATTER OF THE

COMMONS ACT 2006

BETWEEN

(insert)

Claimant

and

(insert)

Defendant

PARTICULARS OF CLAIM

(insert Claimant's name)

(insert Claimant's address
for service)