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Registered common land and highways

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1 Summary

1.1 Registered common land may also be part of a public highway, and evidence that land is registered common land or part of a highway is of little or no value in demonstrating that the land is not the other. Similar principles apply to registered town or village greens, although the statutory background is different.

1.2 In the Society's view, the registration of highway land as common land cannot be assailed or set aside on the grounds of wrongful registration. The functions of a highway authority in relation to highway land registered as common land are subject to the controls on works contained in Part 3 of the Commons Act 2006: these controls will seldom interfere with maintenance, but may require the consent of the Secretary of State in relation to improvements or fencing.

1.3 Whereas, where any highway land is included in the registration of a town or village green, the registration is not in breach of any express requirement in legislation, but the registration may theoretically constrain the maintenance of the highway, particularly if it is a tarred road used by motor traffic.

2 Background

Common land and highway

2.1 Nearly all registered common land was registered on an application under the Commons Registration Act 1965 ('the 1965 Act'), or on the initiative of the commons registration authority¹ under the 1965 Act. An applicant for registration² of common land, or of a right of common over common land, was required to complete a form³, and submit it with a plan of the common⁴. The 1965 Act provided that common land meant "land subject to rights of common...[or] waste land of a manor not subject to rights of common"⁵.

2.2 Where common land comprised in an application included public roads or other highways unfenced from the common, an applicant had no reason to exclude such highways from

¹ *i.e.* the local authority tasked with preparing and maintaining the registers: at the time, county councils and the Greater London Council.

² Strictly, the 1965 Act enabled the 'provisional' registration of land: a provisional registration became final in the absence of any objection, or on its confirmation by a Commons Commissioner.

³ Forms 7 (application for the registration of land as common land) and 9 (application for the registration of a right of common), prescribed in Schedule 1 to the Commons Registration (General) Regulations 1966, [SI 1966/1471](#), as amended by paragraphs 6 and 8 of the Schedule to the Commons Registration (General) (Amendment) Regulations 1968, [SI 1968/658](#).

⁴ No plan was required if the application related to an area of common land already registered in one or more register units: see note 4 to form 7 and note 4(a) to form 9.

⁵ [Section 22\(1\)](#) of the 1965 Act. For further explanation of the process under the 1965 Act, see the archived Defra guidance on the 1965 Act, [How the commons registers were prepared](#) (June 2010, not updated).

the common land identified in the plan. The notes to the form contained no guidance on whether highways should be excluded from the plan. Applicants who wished to register a right of common grazing over common land knew that grazing animals were at liberty to wander over the entire common, including any highway across the common. If they had been challenged on a question of precedence, they, and their challenger, would have been hard pressed to identify which came first: the acquisition of a right of common, or the dedication of the highway; in most cases, both events would have occurred well beyond living memory.

2.3 But the 1965 Act also provides that, for the purposes of registration, “‘common land’...does not include...any land which forms part of a highway”⁶. ‘Highway’ is not defined in the 1965 Act, but the term invariably means any way over which there is a public right to pass on foot, with or without a right of way for cycles, horses or vehicles. It follows that no land comprised in a highway qualified for registration under the 1965 Act.

2.4 The exclusion of highway land from registration under the 1965 Act was inserted at the behest of the then Ministry of Transport, which foresaw undesirable conflicts arising where land was both registered common land and highway⁷. The exclusion did not reflect the reality of commoning on unenclosed land, which does not allow for a distinction between the two; nor the origins of commoning, which very often cannot assign precedence to one nor the other.

2.5 Still less did the provision take account of the many unsurfaced highways (such as public footpaths and bridleways) across common land, which may have been unidentifiable on the ground, but were still technically required to be excluded from registration. Or the many highway verges, often of uncertain highway status, which were sometimes included in applications to register common land because they were also considered to be waste land of a manor.

2.6 Many commons registration authorities received large numbers of applications for registration of common land which included highways, and responded in at least one of several ways:

- the authority registered the whole of the land identified in the application plan as common land, including any highway land;
- the authority excluded any public roads from the land registered as common land;
- the authority excluded all highways (including public rights of way) from the land registered as common land.

2.7 It follows that practice varies between commons registration authorities. In some authorities, the highways department of the authority assiduously objected to any registration of public roads (but rarely, it seems, to registration of public rights of way), and such objections were given effect by the commons registration department. In some cases, perhaps where there was uncertainty about the status of land as highway verge, the highway department maintained an objection before the Commons Commissioners, who made a final decision.

⁶ See the proviso to the definition of common land in [section 22](#)(1) of the 1965 Act.

⁷ Commons Registration Bill, notes on clauses, clause 20(2) (as at introduction).

2.8 Accordingly, the registers of common land reflect these different practices. For example, the registers for Dartmoor in Devon include public roads across the moor; the registers in Surrey invariably exclude public roads. The register extract for Studham in Bedfordshire reproduced below illustrates the practice of one commons registration authority to exclude all highways across the common (and possibly tracks which were not public highways).

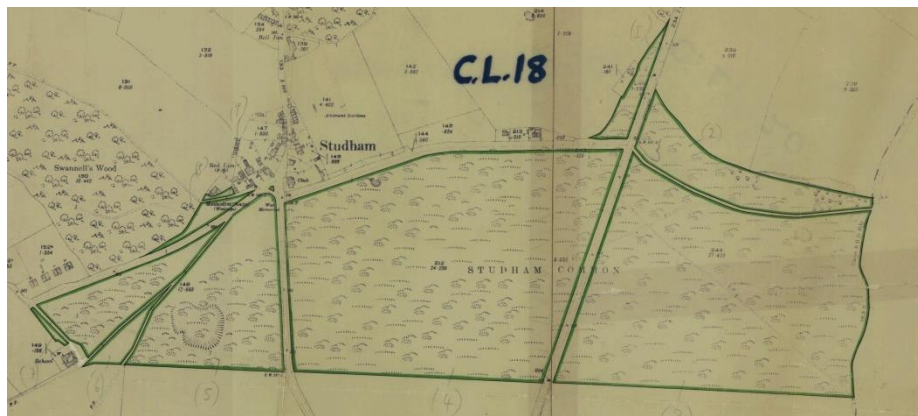


Figure 1: Bedfordshire register unit CL18 Studham: excludes all public highways across the common, including public footpaths

Town and village greens and highway

2.9 Town and village greens were registered under the 1965 Act in exactly the same ways as common land⁸.

2.10 The 1965 Act makes no provision for the exclusion of highway land from any land registered as a town or village green. It follows, therefore, that many registered town or village greens do include, within the register units, highways which intersect the green.

2.11 In much the same way that the origin of land as both common land and highway may lie beyond living memory, so it may be that land may be both green and highway. While today, it may seem unlikely that local inhabitants will choose to play lawful sports and pastimes on roads across a green, in the past, when traffic was slight and its pace was slower, there was no reason why such activities should have yielded to highway use, and many minor highways across a green (such as footpaths and unsurfaced roads) may have been barely distinguishable.

2.12 Leaving aside the origin of highway and recreational rights on the same land, there is no practical or legal reason why land should not be both a highway and registered as a town or village green: a highway may be dedicated to the public, subject to the exercise of market

⁸ Application to register a green was made in form 8 (application for the registration of land as a town or village green), prescribed in Schedule 1 to the Commons Registration (General) Regulations 1966, [SI 1966/1471](#), as amended by paragraph 7 of the Schedule to the Commons Registration (General) (Amendment) Regulations 1968, [SI 1968/658](#). Application for registration of a right of common over a town or village green was made in form 9: it appears that if an application in relation to land was first made in form 9, the land would, by default, be registered as common land.

rights⁹, and there seems to be no reason why a highway might not also be subject to customary recreational rights.

2.13 Different considerations arise in relation to the question of whether land which is comprised in a highway can now be registered under the 2006 Act¹⁰ as a town or village green. It may be difficult to show that lawful sports and pastimes undertaken on land comprised in a highway go beyond the statutory rights of user of the highway¹¹. Where an application to register land includes land where the character of use could be attributable to the dedication of that land as a highway, it seems that such use must be discounted (and may instead be sufficient to support an application to record a public right of way)¹².

3 The position today

Common land

3.1 Today, the register unit for a particular common may or may not include roads and public paths across the common within the register unit.

3.2 Section 10 of the 1965 Act provides that: “The registration under this Act of any land as common land..., shall be conclusive evidence of the matters registered, as at the date of registration... .” In the Society’s view, the registration of land as common land is therefore conclusive of that status, even if any part of the land is comprised in a public highway.

3.3 It may be suggested that, because the 1965 Act required highway land to be excluded from registration, the registration of any highway land must be a nullity. However, the courts have ruled that the registration of land is final, and cannot be undone except in accordance with statute¹³.

3.4 Section 21(2) of the 1965 Act provides that “Section 10 of this Act shall not apply for the purpose of deciding whether any land forms part of a highway.” This provision ensures that the registration of land as common land cannot be used as evidence that the land is not also highway land (thus stifling any argument that, given the requirement to exclude highway land from registration, any registered land cannot be both common land and highway land). But it also signals that Parliament, in enacting the 1965 Act, anticipated that some highway land would become registered as common land, and wished to provide for such an outcome. The 1965 Act does not however go further (but could have done), and provide that land registered as common land which can be proved to be highway land is not to be treated as conclusive of registration as common land.

⁹ *Attorney-General v Horner* (1885) 11 App Cas 66, *Goldsmid v Great Eastern Railway Co.* (1883) 25 Ch D 511

¹⁰ Sections 15–15C.

¹¹ *Director of Public Prosecutions v. Jones and Another* [1999] UKHL 5. In *Somerford Parish Council v Cheshire East Borough Council & Anor* [2016] EWHC 619 (Admin), the case proceeded on the assumption that if the application land were found to be highway, the application would fail.

¹² *Oxfordshire County Council v Oxford City Council & Anor* [2004] EWHC 12 (Ch), paragraphs 96–105, endorsed by Lord Hoffmann on appeal (*Oxfordshire County Council v. Oxford City Council & Ors* UKHL 25) paragraphs 65–68.

¹³ *Corpus Christi College, Oxford v Gloucestershire County Council* [1982] 3 All ER 995: *per* Kerr LJ, “The clear prima facie effect of s 10...must be that it is not now open to anyone to dispute the fact that Temple Ham meadow is common land...”

3.5 Where Part 1 of the Commons Act 2006 ('the 2006 Act') has been brought fully into force¹⁴, the 1965 Act is repealed. However, section 3(6) of the 2006 Act states that: "Except as provided under this Part or any other enactment— (a) no land registered as common land...is to be removed from the register in which it is so registered". The 2006 Act confers the same assurance as to the status of registered common land as the courts have found in relation to the 1965 Act: once registered, land cannot be removed from the register in consequence of some purported error in registration, but only in accordance with a provision in the 2006 Act itself, or some other statutory provision.

3.6 Paragraphs 6 and 7 of Schedule 2 to the 2006 Act enable an application for the de-registration of registered common land, or a proposal by the commons registration authority to the same effect, in certain circumstances. However, in the Society's view, no case can be made under either paragraph to secure the deregistration of highway land.

Town or village greens

3.7 Some registered town or village greens do include highways across the green, although it is more usual that significant highways are excluded.

3.8 There can be no question about the registration of highway land as town or village green: the 1965 Act does not exclude such registration. And the same protection is afforded to the registration of greens as to common land: see paragraph 3.5 above.

3.9 Paragraphs 8 and 9 of Schedule 2 to the 2006 Act enable an application for the de-registration of registered town or village green, or a proposal by the commons registration authority to the same effect, in certain circumstances. However, in the Society's view, no case can be made under either paragraph to secure the deregistration of town or village green.

4 Outcome

Registered common land

4.1 In the Society's view, the registration of some highway land as common land should seldom give rise to problems. As we have seen in the Background above, the existence of a highway is not incompatible with the exercise of common rights over it: many (if not most) commons are traversed by unfenced roads and public paths, and it will frequently be unclear what are the precise boundaries of the road and the common. This is already recognised in law: for example, the Highways Act 1980 provides for penalties in connection with straying animals on a highway, but excludes the operation of the section from any common¹⁵.

4.2 Highway authorities may have concerns about the exercise of their functions in relation to highways (and particularly metalled roads) on registered common land. This is because Part 3 of the 2006 Act requires the consent of the Secretary of State to 'restricted

¹⁴ Currently, in only nine pioneer commons registration authority areas: Blackburn with Darwen Borough Council, Cornwall Council, Cumbria County Council, Devon County Council, County of Herefordshire District Council, Hertfordshire County Council, Kent County Council, Lancashire County Council, North Yorkshire County Council.

¹⁵ [Section 155\(1\)](#).

works' on registered common land. Restricted works are “works which have the effect of preventing or impeding access to or over the land”, or works “for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material)”¹⁶. Accordingly, general works of maintenance, such as resurfacing the carriageway, will not require consent.

4.3 Some works of improvement, such as widening the carriageway, may require consent. In the Society's view, the requirement for consent for improvements to highways across commons strikes a fair balance.

4.4 Exceptionally, works of improvement which “are carried out under a power conferred by or under any enactment applying to common land” do not require consent¹⁷. The only known such power available to all highway authorities is one which authorises the installation of cattle grids, cattle grid bypasses and associated fencing works on an area of common land adjoining a road¹⁸.

4.5 Fencing of highways on common land will normally require consent (unless they fall within the exception mentioned in paragraph 4.4 above). Even where a highway is excluded from registration as common land, the presumption on open commons must be that only the metalled carriageway is excluded. Typically, the land on either side of the carriageway will be indistinguishable from the rest of the common, and the Society's view is that, in a typical exclusion from registration, there is unlikely to be any basis on which one might conclude that the exclusion extends further than the metalled carriageway. So, unless the register map clearly excludes a larger area, consent will still be required for fencing.

Registered town or village green

4.6 There is no question over the registration of highway land as town or village green. Where minor unsealed roads or other public rights of way are included in the registration, this is unlikely to give rise to serious problems, as registration does not constrain the use of the highway as such.

¹⁶ [Section 38\(2\)–\(4\)](#) of the 2006 Act.

¹⁷ [Section 38\(6\)\(b\)](#) of the 2006 Act.

¹⁸ [Section 82\(4\)](#) of the Highways Act 1980.

4.7 However, the registration of roads across a green may give rise to greater problems than in relation to registered common land. A green is subject to protection under the Inclosure Act 1857¹⁹ and the Commons Act 1876²⁰. Under the 1857 Act, it is (*inter alia*) a criminal offence to undertake any act which interrupts the use or enjoyment of a green as a place of exercise and recreation, and under the 1876 Act, it is a public nuisance to erect any structure other than for the purpose of the better enjoyment of the green, or to disturb, occupy or interfere with the soil of the green (e.g. camping) other than for the purpose of the better enjoyment of that green.

4.8 The usual management of a road across a town or village green (where the road is comprised in the registration) may give rise to a theoretical conflict with these provisions, although the Society knows of no case arising from them in such circumstances. However, highway authorities should be very cautious of undertaking any works which would widen the highway across a registered town or village green or otherwise encroach further on the green, as this may give rise to criminal liability.

¹⁹ [Section 12.](#)

²⁰ [Section 29.](#)

Further reading:

Our Common Land: the law and history of commons and village greens by Paul Clayden (Open Spaces Society, 2007 (6th edition) £20 to non-members, £19 to members, including postage and packing).

Gadsden on Commons and Greens by Edward F Cousins and Richard Honey, 2nd edition (Sweet & Maxwell, 2012) ISBN 9780421851009

Halsbury's statutes will also be found in principal reference libraries.

A Common Purpose: a guide to community engagement, revised 2012
<http://www.foundationforcommonland.org.uk/commons/a-common-purpose-guide>

Finding Common Ground by Kate Ashbrook and Nicola Hodgson (Open Spaces Society, 2010)
<http://www.oss.org.uk/finding-common-ground/>

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