Open Space

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Open Spaces Society

Campaigning since 1865

Open Space

Cover story

Local people celebrate at Moorside Fields, Lancaster. The court of appeal has ruled that the land should be registered as a town or village green (see page 7). The society gave financial support from its legal fund to the Moorside Fields community group for its battles in the high court and court of appeal. Photo: Janine Bebbington.

Opinion "..."

Why no bid, NE?

A House of Lords Select Committee has proposed that Natural England (NE) should have more resources and more independence of central government. That is just what we said in our evidence to the committee (page 9).

On the other hand, we have the Secretary of State for Environment, Food and Rural Affairs, Michael Gove, announcing a new environmental body to hold government to account after Brexit.

Bizarrely, these two organisations are to remain separate, and NE shows no ambition to become the new environmental watchdog. In evidence to a Commons committee in March NE backed 'the creation of a new body to ensure effective environmental governance'. Why not make your own bid, NE?

Attack

The plans for the new body (contained in a government consultation) are under attack because there is no intention to give it the necessary teeth. The House of Lords has already passed an amendment to the Brexit bill to bolster the new environmental body.

NE could easily be sidelined by the creation of this separate body. It is therefore vital to implement the Lords Committee's recommendation that, as a minimum requirement, the government should allow NE 'to re-establish its own, independent press and communications function'. Currently NE has no media presence.

The Lords also called for NE to have greater resources to prioritise public access. They argued, just as we have done, that government should include payments for maintenance and enhancement of public access within the new system of public funding after Brexit. Government should act on this.

Precautionary

NE currently prioritises nature conservation over public access, relying on the precautionary principle. But conflict between the two is more imagined than real and, where access is well managed, people and wildlife thrive together. The case for protecting habitats is strengthened when the public can enjoy them. NE should promote and demonstrate good access management rather than treating people as a problem.

In January the NE board discussed access and recreation; it appears from the minutes that it did not talk about the unique post-Brexit opportunity for agricultural payments to be made for public paths and access, or about NE's role in implementing this. If NE were doing its job this would have been top of the agenda.

With more money and independence, NE would be able to invest in public access. But why not position itself to become the new environmental body, with teeth? Then it could do even more. **KJA**

What tragedy?

This year is the fiftieth anniversary of an influential article which, wrongly, gave commons a bad name.

In 1968 *Science* magazine published a paper called 'The tragedy of the commons' by biologist Garrett Hardin.

Our general secretary, Kate Ashbrook, explains. This paper was about the global population problem, in part inspired by an 1833 pamphlet by mathematician William Forster Lloyd. Hardin repeats Lloyd's analogy of uncontrolled population growth as a type of common, averring that herdsmen will maximise cattle numbers on a common because the negative effect is shared among all the graziers, leading to over-exploitation and 'tragedy'.

Open

Hardin accuses the north American national parks of being 'another instance of the working out of the tragedy of the commons' because, he claims, they are open to all without limit. In fact, their use is strictly regulated.

Hardin made a fundamental mistake in using the term 'commons' to apply to a resource whose use is uncontrolled. As we know from our commons in England and Wales, the use is regulated, historically by the commoner's capacity to overwinter livestock, now by the registers which record who has rights there and, in many cases, by a commons management regime.

Led by the renowned Elinor Ostrom, many scholars have since shown that Hardin was wrong to confuse commons, which are regulated, with free-for-all regimes.

Discipline

Misleading though this mantra is, the 'tragedy of the commons' has led to a discipline of commons studies and subsequently the formation of the International Association for the Study of the Commons (IASC), of which the society is a member.

To mark the fiftieth anniversary of this movement, the IASC is holding World Commons Week, 4-12 October, with events throughout the world. These culminate at noon on 12 October with global 'webinars' on commons research and practice. The British contribution will be delivered from the Greenwich meridian—we shall be there. More details can be found at *https://bit.ly/2Kbd5mh.* ❐

Cattle on Bridestowe Common, Devon.

Taking action

Checking deregistration

The society has asked commons registration authorities in England and Wales to notify us of any applications which they receive to deregister common land or town or village green under part 1 of the Commons Act 2006.

The Department for Environment, Food and Rural Affairs and the Welsh Government introduced provisions, in 2014 and 2017 respectively, which enable deregistration. Whereas Wales has also brought into force corresponding provisions to enable registration of certain land, we are still waiting for freedom to apply for registration in England outside the pioneer areas*.

Notice

Since 2017, we have received notice of more than 40 deregistration applications (we have no detailed records for pre-2017 cases). The majority of these (22) have been to deregister common land.

Of these, 13 were under the easier criteria of paragraph 6 of schedule 2 to the act, which requires the applicant to show that the land has been covered by a building, or curtilage of a building, since provisional registration in the late 1960s.

Fewer, nine, have applied under para 7, which requires the applicant to prove that the land was not common or waste at the time of provisional registration. Not only are the para 7 criteria tougher, but some applicants fail to understand what is required of them and assume that it is sufficient merely to make assertions that the criteria are met. Invariably, a para 7 application demands careful archival research.

We have also criticised many para 6 applications because they assume that 'curtilage', as used in the act, should be interpreted in the same way as under listed-building legislation, where the courts have recognised as curtilage the extensive grounds of listed country houses. We have refined our detailed submissions on the meaning of curtilage and were pleased that counsel for one authority has already agreed with us.

Six applications relate to deregistration of town or village greens, of which four are under para 8 and relate to buildings and curtilage, and just two have attempted para 9, which requires the application to show the land was physically unusable for sports and pastimes for 20 years prior to provisional registration.

Correct a mistake

Thirteen applications have been made under section 19, to correct a mistake made by the authority. Typically, these applications seek to show an error in transposing a map, supplied by the original applicant, onto the register to effect provisional registration of the land or of a right of common.

But, unlike applications under paras 6 to 9, there is no fee under section 19, and a few such applications appear to show more enthusiasm for avoiding a fee than evidence of a mistake made by the authority.

Some assume that evidence of a wrongful

* The pioneer areas are Blackburn with Darwen, Cornwall, Cumbria, Devon, Herefordshire, Hertfordshire, Kent, Lancashire, and North Yorkshire.

Part of the hardstanding on Yateley Common, at Blackbushe airfield in Hampshire; this is alleged to be the curtilage of the control tower but we are contesting the application for deregistration of the common. Photo: © Mike Smith, Creative Commons Licence.

registration inevitably implies a mistake by the authority, but the authority's role was as a statutory guardian of the register, and it had no discretion to refuse a request for provisional registration, however odd or misguided it seemed at the time—it was up to others to object, and for the commons commissioner to rule on the provisional registration.

Unfortunately, owing to the lamentably weak requirements for publicity, some unsatisfactory provisional registrations went unnoticed until it was too late to object.

Warcop

Finally, we have also objected to an application by the Secretary of State for Defence to deregister extensive areas of common land at Warcop training area, made under schedule 3 to the act (see *OS* summer 2017 page 7). We think that the application is wrong in law and have urged Cumbria County Council to reject it.

Our policy is to object to applications where there is insufficient evidence that the legal criteria are satisfied, even where there is evidence of a past mistake in registration. Parliament did not intend the act to reopen all registrations to review and challenge, and, clearly, an application should succeed only where the evidence is convincing.

Conversely, we do not object if the case is properly made out, even where there will be loss to the public if the application is granted, as may happen at Pendarves Woods in Cornwall. We have opposed 24 of the 40-plus applications.

Determinations can take months or years. Of those notified since 2017, we have so far received notice that five have been granted, and one rejected (at Quellwood Common in West Sussex). We objected to three of these.

Direction applications

In the recent editions of *Open Space*, our vice-chairman Phil Wadey has explained how to complain to the secretary of state if a council is failing to progress your modification order applications, and why (for England) this action needs to be taken promptly.

This has become more urgent with the government's announcement, on 26 April 2018, that it plans to implement the rights-of-way provisions in the Deregulation Act 2015 (for England) in the first half of 2019.

This will change the process for modification orders if the council has made no decision within 12 months of the date of service of the certificate that landowners and occupiers have been notified.

The present process is that the applicant for the order can ask the secretary of state (via the Planning Inspectorate) to direct the council to determine the application by a set date. There are no fees involved.

Complaint

The new system will be that a complaint has to be made to the local magistrates' court. There will be a fee, and of course, the risk of costs to the losing party.

There is a clear benefit in applying for directions during 2018 before the law changes.

For the specific case complained about, it avoids fees and provides a good likelihood of setting a date by which the council must make a decision—which can be sent to the ombudsman if the council fails to comply.

It also has the general benefit that any direction granted will be able to be cited by other applicants should they end up going to the magistrates' court. It could be helpful to be able to show the secretary of state's past practice for a case that is in the same county or district, to encourage the magistrates to act similarly.

Featherbed Lane, Hertfordshire, now recorded as a byway thanks to the efforts of Phil Wadey.

Any members wishing to apply for their first direction from the secretary of state should get in touch with the office, so that help can be given.

Success

Phil reports that the direction he wrote about in *Open Space* spring 2017 (page 7), for Featherbed Lane in St Stephen's parish in Hertfordshire, was made by the due date (ie within a year). The order was made and confirmed unopposed, so adding a byway to the definitive map. ❐

Our strategic plan, 2019-2024

Led by the trustees and general secretary, we continue to develop our strategic plan for the period 2019 to 2024. We sought information from staff, trustees, local correspondents and others in January, and held a workshop in March where we had energetic discussions about what we should do to maximise our impact. We shall increase our campaigning clout and target our resources and efforts to champion everyone's right to public open spaces and paths in England and Wales. We must take account of the changing environment in which we work, and the new challenges and opportunities. Effective campaigning and communication are essential.

There will be opportunities for members to comment as we develop the plan, at the AGM on 5 July and afterwards. In the meantime, if you have suggestions about what we should, or should not, be doing, please let us know (*office1@oss.org.uk*).

Opportunity for access

We argue for more and better access in our response to the government's consultation on the future of farming.

The Department for Environment, Food and Rural Affairs (Defra) has consulted on proposals for agricultural policy, in its paper *Health and Harmony: the future for food, farming and the environment in a Green Brexit.*

In our response we have expressed concern that Defra is considering retaining the current scheme requirements while 'simplifying' cross-compliance. We fear that this could mean elimination of the requirement to keep public paths in order, for instance, and we argue that 'it would be a raw deal for taxpayers to continue funding subsidy at the present level, while getting even less in return'.

Cross-compliance is currently an inadequate means of policing compliance with grant conditions. The Rural Payments Agency inspects less than one per cent of all claimant holdings each year to identify cross-compliance breaches. We want something which is much more thorough and robust.

We have argued strongly that agricultural payments should be directed to maintaining and supporting those who work on the commons, since commons are important for biodiversity, landscape, recreation, archaeology, and cultural heritage. And it is not only the upland commons which need support; commoning in the New Forest for instance has endured for at least a millennium and is vital in delivering a rich landscape and biodiversity.

Well-maintained public footpath near Swallowfield, Wokingham.

We have proposed that Defra takes powers in the forthcoming Agriculture Bill to provide for agreements to be made on common land, with details of how such agreements would work, the powers to be conferred in regulations.

Thrust

But the main thrust of our response is on public access. We are disappointed that the paper does not commit to the creation of new or better access as a public good which merits the payment of public money.

We advocate that additional access should be funded where there is a demand for it. The access should be permanent and well publicised, linking existing routes, improving safety, or providing entry points to access land.

Farmers and land managers with public paths on their land should be able to elect to enhance that access for better public enjoyment, in return for relatively small payments. This might include leaving a path across an arable field undisturbed or mown, cutting a headland path, improving waymarking and gates, and removing stiles.

This is a rare and important opportunity to win better access, and we shall lobby to achieve it. ❐

Case File

Two greens saved

(1) R (on the application of Lancashire County Council) v *Secretary of State for Environment, Food and Rural Affairs and Janine Bebbington; (2) R (on the application of NHS Property Services Ltd)* v *Surrey County Council and Timothy Jones* [2018] EWCA Civ 721.

Two town or village green cases were heard together in the court of appeal. One was an appeal from Lancashire County Council, as the local education authority, against the decision to register 13 hectares of land known as Moorside Fields in Lancaster as green (see front cover).

The respondent was the Secretary of State for Environment, Food and Rural Affairs whose inspector, Alison Lea, had approved the application following a public inquiry. Our member Janine Bebbington, who had applied for the registration, appeared as an interested party. Ouseley J had dismissed an appeal from Lancashire County Council in the high court in an order dated 27 May 2016, and the county council had appealed.

Dismissed

The second case concerned an application for registration of 2.9 hectares of Leach Grove Wood at Leatherhead in Surrey. The land adjoins Leatherhead Hospital and is in the same freehold title. The application for registration was made by local people. Although the public-inquiry inspector, barrister William Webster, recommended Surrey County Council to refuse the application (on the grounds that the claimed locality and neighbourhood were not a locality or a neighbourhood within the meaning of section 15 of the Commons Act 2006), the planning and regulatory committee of Surrey County Council decided to register the land. The NHS as landowner appealed to the high court and its claim for judicial review was upheld by Gilbart J on the grounds that the county council had failed properly to consider the question of 'statutory incompatibility'. Timothy Jones, one of those involved in the original application, then appealed to the court of appeal.

Statutory incompatibility

Common to both cases was the question of whether the concept of 'statutory incompatibility' (ie that the purposes for which the land was held were incompatible with recreational use) defeated an application for the registration of the land as a town or village green under section 15 of the Commons Act 2006. In the court of appeal Lord Justice Lindblom gave the lead judgment and Lord Justice Rupert Jackson and Lady Justice Thirlwall concurred.

The judge compared the circumstances of the current cases with those of Newhaven Port where the supreme court* held that it was not possible to obtain rights by prescription against a public authority which had acquired and used land for specific statutory purposes when the exercise of those rights would be incompatible with the statutory purposes.

* *R (on the application of Newhaven Port and Properties Ltd)* v *East Sussex County Council* [2015] UKSC 7 (*OS* summer 2015 page 9.

The judge held that the circumstances in the Lancaster and Leatherhead cases were different. 'Our task, in each case, is to apply them [the legal principles in the Newhaven case] to the relationship between the provisions of the 2006 act concerning the registration of town and village greens and the statutory powers and duties relating to the land in question' (judgment para 35). 'There is no blanket exemption for land held by public bodies for the purposes of their performance of statutory powers and duties. Section 15 of the 2006 act contains no limitation, or exception, for public body landowners'. He also pointed out that parliament had had several opportunities to enact such a provision but had not done so (para 36).

Purposes

In the Lancaster case 'there were no specific statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible' (para 40). The judge went on to explain that there was no statutory obligation to maintain or use the land in a particular way, to carry out particular activities on it, to provide a school there or otherwise develop it. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a 'statutory incompatibility'.

Similarly, at Leach Grove Wood, he could not see why the court should be compelled to find an incompatibility between the statutory provisions under which the land was held and its registration as a village green. The statutory functions on which NHS Property Services relied were general in character and content and the registration of the land as a green would not have any material effect on the services' function under the National Health Service Act 2006 to hold land.

The judges therefore dismissed the argument that there was statutory incompatibility. They also dismissed the further four grounds in the Lancaster case.

They held as follows. (1) Ouseley J was right to endorse the inspector's findings that the county council had not demonstrated that it had held Moorside Fields for educational purposes. (2) The public-inquiry inspector had not erred in finding there existed a 'locality' for the purposes of section 15 of the Commons Act 2006 (despite there having been boundary changes for the claimed locality of Scotforth East ward in 2001, during the 20-year period of claimed use). (3) It was not necessary to prove that the 'significant number of inhabitants' of a locality must be geographically spread across that locality. (4) The inspector was correct in finding that the land was used 'as of right'.

Rejected

In the Leatherhead case the judges rejected the second ground of appeal, that Surrey County Council, in deciding to register the green, had not given adequate reasons for departing from the inspector's finding that there did not exist a relevant neighbourhood.

The judgment shows that it is important, in considering whether the rules of 'statutory incompatibility' apply, to investigate the particular circumstances in which the land is held and to decide whether the public is capable of establishing rights for lawful sports and pastimes on the land.

The judgment also includes helpful discussion on the definition of 'locality' and 'neighbourhood within a locality' which are important to get right when applying for a green.

The judgment is at *https://tinyurl.com/ya59dde3*. ❐

Boost for Natural England

A House of Lords Select Committee has recommended greater independence and resources for Natural England.

Last year we put in evidence to the House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006. Among other things, the act set up Natural England (NE), the government's adviser on conservation, landscape and access.

We expressed concern at NE's lack of independence and argued that 'NE has regrettably been sucked in to the Department for Environment, Food and Rural Affairs (Defra). It no longer has its own website, nor does it issue its own press releases. It has no independent voice as the government's advisor… This lack of independence causes us deep concern; government needs a critical friend.'

Urged

Other organisations and individuals expressed similar views. Accordingly, the committee has urged government 'to take steps to enable NE to operate with the appropriate degree of independence. As a minimum requirement, we recommend that government should allow Natural England to re-establish its own, independent press and communications function.'

The committee was also concerned that, while NE has done a splendid job in developing and creating the England Coast Path, Defra has not allocated funding for the long-term maintenance of this path, nor of the 13 national trails in England.

It recommends that the government should include payments for maintenance and enhancement of public access within the new system of public funding post-Brexit.

The committee advocates that NE should have sufficient resources to deliver all the elements of its general purpose, which include the promotion of public access, and that, with greater resources, NE should prioritise public access.

Integration

This chimes with our evidence. We said: 'We do not feel that, 11 years on, access and wildlife have been integrated throughout NE—instead, access appears to have been side-lined'. We called for greater integration of access, wildlife and landscape conservation, throughout NE.

We pointed out that, while NE's conservation strategy for the 21st century, *Conservation 21*, has as one of its three guiding principles 'putting people at the heart of the environment', we have seen no evidence that this is being achieved.

We hope that government will act on this recommendation. More than ever in these times of austerity we need NE to champion the cause of the countryside—and it cannot do this while embedded in Defra. It must have its own voice and sufficient resources for the job. ❐

England Coast Path in Cumbria.

Far & Wide

Hannah to the rescue

In March the Welsh Government's Minister for the Environment, Hannah Blythyn, confirmed unequivocally 'that all the existing designated landscapes will be retained and their purpose of conserving and enhancing natural beauty will not be weakened'. It should not have needed saying—but over the last few years the future of Wales's designated landscapes, its national parks and areas of outstanding natural beauty (AONBs), has been uncertain.

In 2015 a review of the designated landscapes, led by Professor Terry Marsden, resulted in an excellent report with recommendations for strengthening their role and the protection they offer. But the Welsh Government did not act on this and instead instigated a further review by Lord Elis-Thomas. This group threatened to recommend removing the Sandford Principle, whereby primacy is given to conservation in the event of irreconcilable conflict with public enjoyment. We joined the Alliance for Welsh Designated Landscapes in calling for stronger protection, and retention of Sandford.

Foel Grach in the Carneddau, Snowdonia National Park. Photo: © Peter, Creative Commons Licence.

Now the environment minister has confirmed that the Sandford Principle will be retained. She wants to see 'a more diverse and wide-ranging cross-section of Welsh society feeling that they have a stake in these nationally important landscapes and recognising the benefits we derive from them.' She is 'minded to introduce legislation at a future opportunity to require the park authorities and AONBs to apply the principles of sustainable management of natural resources, in particular when preparing their statutory management plans'. *Diolch yn fawr*, Hannah.

New green for Lambston

The Lambston Parish Residents' Association has registered a village green in Sutton, near Haverfordwest, in Pembrokeshire.

The one-acre site has been enjoyed by local people for informal recreation, including social events, for decades. Since the owner is unknown, the Lambston residents organised volunteer days to clear the scrub and remove dumped rubbish from the land.

With advice from the society, the group decided to register the land as a village green. It gathered evidence from local people who had enjoyed the land for 20 years, without challenge or permission, and sent it to Pembrokeshire County Council. After advertisement, there being no objections, the council confirmed the green in March.

Says Charles Mathieson, who led the

New green. Photo: Charles Mathieson.

campaign to register the land: 'This is a nice example of a small community organisation being able to make a long-term improvement in village facilities without the need for capital funding. We did it with volunteer involvement, local support and a good deal of persistence. We are grateful for the advice and help from the Open Spaces Society, the county council and Camrose Community Council.'

Works on Welsh commons

We were delighted when Western Power Distribution (WPD) withdrew its proposal to place 15 electricity poles with an overhead line across Gwaun Cae Gurwen common, three miles north of Pontadawe in Neath Port Talbot. WPD sought consent from Welsh ministers for works on common land under section 38 of the Commons Act 2006.

We objected to the effect on the open common where walkers and riders enjoy rights of access.

Less good news was the approval of two lengths of fencing, totalling 1,857 metres, on Betws Common near Ammanford in Carmarthenshire: the inspector conceded that the fences would restrict access but did not consider that they would have a significant adverse impact on access to and enjoyment of the land.

We are also fighting plans to industrialise Mynydd Llanhilleth Common, near Abertillery in Torfaen. Here, quarrying company Peakman wants to build a new haul road, widen an existing road over the common and erect fences, so as to extract aggregates from the nearby quarry.

Says our local correspondent, Maggie Thomas: 'This is pleasant countryside, close to built-up areas, which is enjoyed by many walkers and riders. Known as the Canyons, it is a much-loved local spot. It is unacceptable to tear up the common for short-term gain.'

Freshwater shows the way

Freshwater Parish Council, on the western side of the Isle of Wight, has designated 15 areas as local green space (LGS) in its neighbourhood plan.

These LGSs meet the government's criteria as set out in the National Planning Policy Framework. The council created a checklist against which to test the potential LGSs. For instance, they must not have extant planning permission, nor be allocated for development in the local plan; they must not be extensive and must be local in character, close to the communities they serve and demonstrably special to that community.

Once designated in the plan, the land is

Pound Green local green space, Freshwater. Photo: David Howarth.


Honister slate mine (left) and the valley from Dale Head (right). Photos: Chris France.

normally safe from development.

There was a parish referendum on 8 March on the question 'Do you want Isle of Wight Council to use the neighbourhood plan for Freshwater parish to help it decide planning applications in the neighbourhood area?' The turnout was 16.23 per cent and the results were: yes 707 (90.11 per cent) and no 65 (8.38 per cent). Accordingly, Isle of Wight Council brought the plan into force as part of the county's development plan, on 12 March 2018.

The LGSs include Pound, Middleton and Black Hut greens, various fields and Fort Victoria country park.

This compares favourably with events in Croydon where the council put forward 89 LGSs, all of which were rejected by the planning inspector because he was not convinced that the methods used by the council to identify LGS were sound. Freshwater went to great trouble to ensure its spaces met the criteria—and it paid off.

Zipping on

Just as, mercifully, Treetop Trek withdrew its application for zip-wires across Thirlmere in the Lake District National Park, Honister Slate Mine applied for an aerial zip-wire over the Honister Pass. This application is similar to one which the national park authority refused in 2012. Again we objected.

We are not against fun, but this development would be visible and audible from the adjoining fells and would be an eyesore. It is also contrary to national park purposes and the Sandford Principle (see page 10). The Friends of the Lake District, Cumbria Wildlife Trust and many others have objected and we await the outcome.

A Poors proposal

The Planning Inspectorate (PINS) gave notice earlier this year of a hearing into a proposal by Salford City Council to deregister Poors Lane allotments at Cadishead—one of three commons registered within the council's area.

We discovered that the council had made a proposal to deregister the land under paragraph 7 of schedule 2 to the Commons Act 2006, on the grounds that it was not common, nor waste, at the time of provisional registration. It had referred this to PINS for determination because of a conflict of interest as the council was making the proposal.

We pointed out to PINS that the legislation which brought into force the powers to deregister land throughout England enabled only applications for that purpose, and not proposals made by the commons registration authority itself. We said the proposal was therefore unlawful, and incapable of being determined by PINS or anyone else.

After ten weeks of deliberation, PINS wrote to us in late April to say that the

council had no power to make the proposal, the hearing had been cancelled, and no further action would be taken. We are glad that PINS acted on our representations in this case, but we worry that other councils may make proposals which they think they can determine without referral to PINS. If they do, we shall cite the Poors precedent.

Victory on Knutsford Heath

We supported local residents who were opposed to the use of Knutsford Heath in Cheshire East for a 'Pub in the Park' (posh-food festival) event (*OS* spring 2018 page 11).

As a result of our explanation that the heath is a common subject to access rights under section 193 of the Law of Property Act 1925 and that the organisers would need ministerial consent, the organisers decided to move to a venue elsewhere in the town. A good outcome.

Wortham Ling

The society has helped the Friends of Wortham Ling in Suffolk to bring back council management to the common.

The friends, a member of the society, approached us for help in 2016 to secure better management for Wortham Ling, a common of about 47 hectares on the border with Norfolk. The common, designated a site of special scientific interest, had previously been leased to Suffolk Wildlife Trust, but the land had reverted to the owner, and the friends were concerned about the habitat and the deterioration of the car park.

We pointed out that Wortham Ling is subject to a scheme of management and regulation under part I of the Commons Act 1899, made by the former Hartismere Rural District Council in 1933, and confirmed by the Minister in 1934. The effect of such a scheme is to vest the management and regulation of the common in the district council (now Mid Suffolk District Council). There is no legal provision for a council to withdraw from its duties under the scheme.

The friends brought our comments to the council's attention. The council initially responded that, while it accepted some specific duties imposed by the scheme, it did 'not have a general management responsibility'. We said that ignored the broader effect of section 3 of the 1899 Act, which vests 'the management of any common regulated by a scheme … in the district council'.

In further correspondence with the friends, the council did not shift from its

Frosty morning on Wortham Ling common. Photo: Peter Finnie.

position that it 'has no duty to adopt a general management role'. But it did accept that it should use its powers under the scheme to improve the car park; it has now agreed to seek a quote for improvement works.

Many commons, particularly in the south-east and east of England, are subject to 1899 act schemes. Where a scheme subsists, it fundamentally changes the nature of management of the common, giving the district council powers which greatly diminish the role of the owner. One can usually find out whether a scheme applies to a common by searching *magic.defra.gov.uk* and selecting the layer within 'Access' called 'Countryside and Rights of Way Act, Section 15 Land'.❐

Path Issues

Camber Dock path progress

Our members Kenneth Bailey and Anna Koor of the Camber Action Group have made a big stride towards getting a path around Camber Dock, at the mouth of Portsmouth Harbour, recognised as a public right of way.

In 2014 they applied to Portsmouth City Council to add a 575-metre route to the definitive map of rights of way. They initially submitted 11 user-evidence forms, and subsequently provided evidence from over 90 people.

Refused

The council refused the application, in part because it considered the right of way would interfere with the use of Camber dock for statutory port duty, despite the applicants and witnesses attesting that their public rights over this route had co-existed with port activities without historical evidence of conflict.

In recent decades the Camber basin's uses have been largely for recreational and sporting activities, including Ben Ainslie Racing.

Looking south from the Spinnaker Tower, Portsmouth Harbour, to Camber Dock. The claimed route is marked in red.

The applicants appealed against the council's decision, however their appeal was dismissed owing to rights in respect of a byway open to all traffic being extinguished by the Natural Environment and Rural Communities Act 2006. They reapplied in 2016 for the route to be recorded either as a restricted byway (for use by walkers, riders and cyclists) or as a footpath.

Again the council refused, so in 2017 they appealed to the Secretary of State for Environment, Food and Rural Affairs to direct the council to make an order.

Planning inspector Mark Yates, acting for the minister, was required to determine whether the route 'was reasonably alleged to subsist'. He agreed that there is a reasonable case and has directed the council to raise an order for a restricted byway (see *https://bit.ly/2JRiMVJ*). We await publication of the order.

Somerset levels

The society objected to an order made by Sedgemoor District Council, under section 257 of the Town and Country Planning Act 1990, to stop up part of the width of footpath AX1/12 at the entrance to Axbridge church.

The parochial church council wants to build a disabled-access ramp on the stopped-up land. We said that the footpath could be raised by the highway authority without the need to stop up and, anyway, the order and notice were flawed because they referred to a diversion rather than a stopping up.

The council agreed the order was flawed but insisted the path must be stopped up. It then drafted a stopping-up order which

provided for the date of stopping up to be certified, which is appropriate only where another highway is to be created or improved in place of the one stopped up.

We pointed out the error, but the council only relented after it had taken advice from the Somerset County Council rights-of-way team. Somerset agreed that the order remained flawed but declined to exercise its powers to raise the highway, for fear of being held liable for future maintenance costs. Sedgemoor has now drafted an order which appears to be legally satisfactory.

The British Standard for Gaps, Gates and Stiles, BS5709, has been updated. You can read about it at *https://bit.ly/2lmfqNf.* We are grateful to our local correspondent and former trustee Chris Beney for his work on this as our representative on the group which made the revisions.

It is always worth looking closely at orders made by district planning authorities in two-tier areas because they do not necessarily have the in-house skills or experience to draft sound orders.

Make way for walkers

We have objected to plans from Highways England for the M42 junction 6 improvement scheme in Solihull, south of Birmingham. The junction is between the M42 and the A45 and it serves Birmingham International station.

We are concerned about the threat to public footpaths. The proposed new two-kilometre stretch of main road running to the west of the M42 would sever six public footpaths, forcing walkers onto lengthy diversions along roads dense with vehicles and pollution.

The scheme falls within Solihull Metropolitan Borough and is contrary to policy 18 in the council's local plan which is to promote, support and enhance physical and mental health and well-being and to develop a high-quality safe and convenient walking and cycling network.

Bickenhill Clock Junction overbridge, the footway would become a third carriageway. Photo: Richard Lloyd.

We are seeking pedestrian footbridges wherever the new road would sever public footpaths, and wide footways at any point where people are forced to share a vehicular route. Ideally the paths would be kept where they are and the new roads would accommodate them.

Mind the gap

Warwickshire County Council consulted us about diverting footpath AL180 at Coldcomfort Farm just west of Alcester.

The proposed diversion was to follow an existing farm road, to which we had no objection. But where the farm road was closed by double gates, the council planned to take the footpath through a one-metre gap at the side. We pointed out that, if the gates were removed or left open, the footpath would continue to take an unnecessary detour through the now pointless gap.

We suggested that the footpath be widened to include both gates and gap, and that the order should contain a limitation that the gates could be closed and locked. That way there would always be a gap, but if the gates are left open, or removed, the public lawfully can walk straight through. Happily, the council agreed, and the order has now been made (*tinyurl.com/y895vomx*). Full marks to Warwickshire for consulting on a draft of the order and being prepared to listen. ❐

Jerry Pearlman, 1933-2018

Our world of paths and commons would be very different but for the work of Jerry Pearlman who died aged 84 on 9 March 2018.

Jerry was honorary solicitor for the Ramblers for more than 30 years; he took on countless path battles and campaigned for freedom to roam on open country.

Born in 1933 in Redcar in the then North Riding of Yorkshire, Jerry spent his childhood in Keighley and Bishop Auckland where he walked in the countryside with his father, Sam. At that time, he decided he wanted to be a lawyer; he took the London University bachelor of laws degree and for 60 years practised as a solicitor. His great joy was using his legal expertise to save paths, commons and national parks.

Generous

Jerry was generous with his time, both to the Ramblers and the society. He was involved in hundreds of cases, in court and at public inquiries, which confirmed our rights and clarified the law on paths.

Probably his greatest victory was in the House of Lords, the landmark Godmanchester and Drain case (2007), which set an important precedent for those claiming public paths. The case involving the most paths must have been the Ombersley 'rationalisation' scheme in the then Hereford and Worcester; this threatened more than one hundred paths and was defeated by Jerry in 1994.

Jerry was a leader in the campaign for the right to roam and drafted the bill which later formed the basis for the Countryside and Rights of Way Act 2000. He was active in defending commons too. In 1988 he helped to save the 2,000-acre Grassington Moor in the Yorkshire Dales National Park from deregistration at a hearing where he was up against Sheila Cameron QC. Jerry won and solicitor Richard Harland, who wrote about the case in *Open Space* (autumn 1988), concluded 'Jerry Pearlman deserves warm congratulations; his marshalling of tomes of evidence and brilliant advocacy won the day over a top common-land QC'. Jerry also helped the society to clarify the responsibilities of the National Trust on its commons, in a friendly action in the high court (1997).

Advocate

Jerry was a powerful advocate for national parks and especially his beloved Yorkshire Dales. For 18 years (1983-92 and 1998-2007) he served as a secretary of state appointee on the Yorkshire Dales National Park Authority. He was briefly chairman of the OSS when Guy Somerset unexpectedly resigned in 1988. He was also a vice-president of the Ramblers (2005) and president of its West Riding Area (2004), among many other roles.

In semi-retirement Jerry took up a new career as a cruise-ship lecturer. He offered a choice of five talks. Number one was advertised as 'Some Environmental Legal Nutcases' and described as 'the story of three unusual individuals who used the law and history to win environmental victories'.

Jerry was a great figure in our movement; he will be remembered with affection and admiration, as an inspiration to all who campaign for our rights and freedoms to enjoy the land. **KA**

Jerry (centre) with his family on Pen-y-Ghent, Yorkshire Dales.

Legacies matter to us

Our treasurer, Steve Warr, writes: Protecting common land, town and village greens and public rights of way is a struggle that requires persistence and long-term commitment. Relaxing our guard for a short time can mean losing rights that may never be recovered, or landscapes and access that may never be regained. The Open Spaces Society has been consistently maintaining this fight for over 150 years.

We are a membership-funded organisation, able to continue this work only through the generosity and support of our members and other donors—we have no government funding. Subscriptions, donations and appeals from members generally cover about half our annual running costs. The remainder are met from reserves. These reserves are built up over time from legacies and can be draw upon when needed.

Not just the big ones

In the last three years we have—exceptionally—received 20 legacies totalling more than £1.5 million, including three of over £300,000. These have enabled us to invest in what one might call the society's long-term infrastucture.

For instance, the estate of Jack Candy (a long-time friend and campaigner for commons and greens, see *OS* autumn 2017 page 13) brought us £550,000 which has gone into a fund in memory of Jack and his wife, Irene, to finance special new projects over and above our normal spending. With gifts like these we have been able to appoint a much-needed new case officer with knowledge and experience in commons and rights-of-way legislation, and a researcher for our lost commons project.

But put this in perspective: the Candy legacy is the biggest we have received, we can't count on anything like that even once a decade. What we do count on—to run the office, pay the rent, cover existing staff salaries, get legal advice and train our local volunteers, etc—are the modest legacies and donations of members who, though far from rich, understand the value of what we do.

Of course, if you are reading this you are probably already a member of the society and your subscription during your lifetime already supports its work—and

Re-registered common at Carn Kenidjack, near St Just in Cornwall. Photo: Ian McNeil Cooke.

probably you respond to our regular appeals too. But leaving a gift to boost our work afterwards will really help.

A large proportion of people in the UK have not written a will and, if someone dies without one, his or her estate is divided according to statutory rules and any charities that they wished to support will miss out. If you have a will and want to add a gift to a charity you do not have to write a whole new will; you can add an attachment (a codicil) to your existing will. And a gift can be for a fixed amount or for a proportion of the residue of your estate after taking account of any specific gifts.

Reviewing your will regularly is a good thing, as it ensures that your wishes are followed. Please remember the Open Spaces Society when doing so. ❐

The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. We campaign to protect common land, village greens, open spaces and public paths, and your right to enjoy them. We advise local authorities and the public. As a registered charity we rely on voluntary support from subscriptions, donations and legacies.

Subscription rates

Individuals: ordinary £33 or £3 per month / joint ordinary £50 / life £660.

Local organisations; parish, community and town councils: £45.

National organisations; district and borough councils: £165.

County councils and unitary authorities: £385.

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