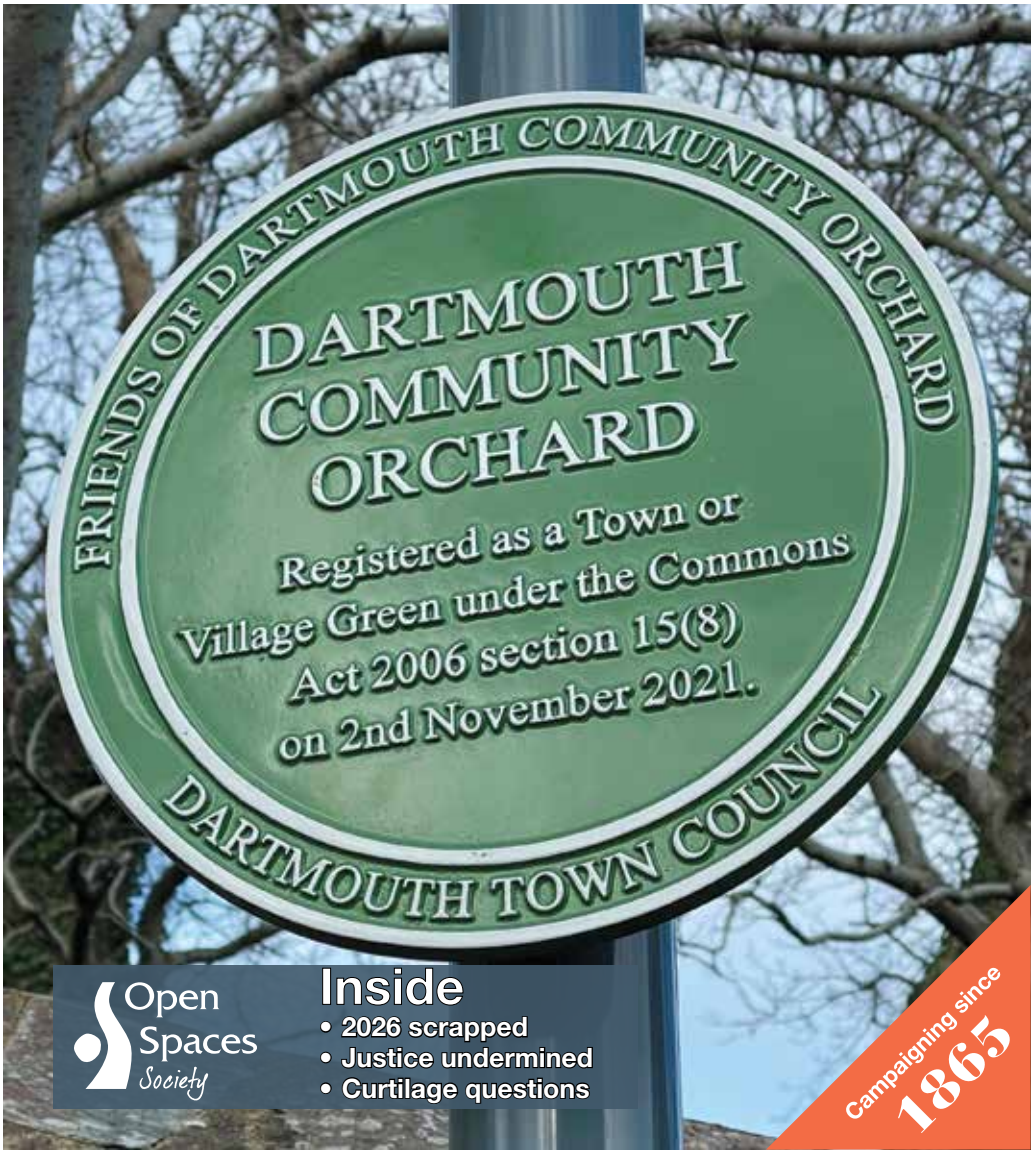
Open Space

Spring 2022 Vol 33 No 3



Open Spaces Society

Inside

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Campaigning since 1865

Open Space

Cover story

The plaque to celebrate the voluntary registration of Dartmouth's community orchard as a village green. The green was registered by Dartmouth Town Council. The society helped the Friends of Dartmouth Community Orchard to achieve this, and was present at the official opening on 2 February 2022 (see page 7). Photo: Peter Goldstraw.

Happy returns?

Anniversaries are opportunities. Ninety years ago this April, the trespassers on Kinder Scout in the Peak District made a brave bid for freedom. It is sad that government has not marked this event with a strong statement on access in its long-awaited response to the Glover review of protected landscapes (see page 12).

Instead, the words from the Department for Environment, Food and Rural Affairs (Defra) are hesitant and woolly.

Expansion

Glover called for the expansion of open-access rights in national parks and areas of outstanding natural beauty. Defra limply refers to the access-map review which is due to happen anyway.

What about offering new access, such as to woodland and water? Or making the agricultural funding schemes pay for more, better, and permanent access on a much larger scale than the current, limited and short-term Farming in Protected Landscapes grants?

Defra talks of ‘a stronger mission for connecting people and places’, removing barriers to access for all parts of society, and taking a more active role in supporting access. Fine words—but how will it happen? How about action to remove the gross inequalities among those who visit protected landscapes?

Our designated landscapes should be truly welcoming, and encourage exploration. We need many more rangers on the ground, and good, affordable public transport to enable people to visit sustainably.

Funding is crucial. Government must recognise the need to invest in protected landscapes, for our health and well-being, climate-crisis mitigation, nature, and rural communities.

But Defra admits that its core grant cannot fund its vision, and expects protected landscapes to ‘develop and harness … commercial and sponsorship opportunities’. So, the parks will become fund-raisers, threatening Disneyfication of our wild areas, and in competition with the voluntary sector. What has happened to ‘public funding for public goods’?

Coast path

The Welsh government *is* taking advantage of an anniversary. This May we celebrate ten years since the opening of the splendid Wales Coast Path, the first route to embrace an entire country (though still not a national trail—we are calling for this).

Led by Huw Irranca-Davies, Senedd member for Ogmore, the review will determine practical actions, thus enabling Welsh government to maximise the route’s potential to generate all-round benefits for the next ten years.

In the footsteps of the Kinder trespassers we must mount a renewed campaign for better, funded access throughout England and Wales. The protected landscapes and national trails must lead the way. **KJA**

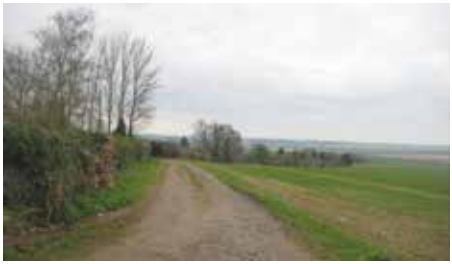
Guillotine abolished

The government is to repeal the 2026 deadline for recording paths—a victory, but there are consequences.

On 16 February the Department for Environment, Food and Rural Affairs (Defra) told the stakeholder working group (SWG) on rights of way that it would scrap the 2026 deadline for recording historic paths in England.

This is significant. For more than 20 years, this deadline has threatened our path network.

On 1 January 2026, public rights over thousands of paths, which are public highways but not yet recorded as such, or not yet recorded correctly, would have been extinguished; the paths would have been lost for ever. With the guillotine abolished the volunteers who are researching lost paths against the clock will be able to save many more.



An unrecorded track in Wallington, north Hertfordshire (grid reference TL 2942 3368), claimed by Phil Wadey but not yet on the definitive map.

Defra's decision was a pragmatic one; the implementation of the cut-off (which was included in the Countryside and Rights of Way Act 2000) was to be part of the package of reforms in the Deregulation Act 2015. In 2010 these had been agreed by the SWG which is made up of representatives of users, landowners and farmers, and local authorities.

Defra has never had the capacity to do the work required to bring these changes into effect. The additional work and reduced resources due to Brexit and Covid have made things worse.

Expedite

However, there are consequences. Defra intends to expedite the introduction, by the year's end, of the landowner's right to apply for path changes—which we abhor.

Under the new rules, when a landowner proposes a diversion (which may be purely in his or her own interests), and pays a fee, the highway authority must process it to a tight timetable. There is no guarantee that it will go ahead, but the measures are likely to result in more 'privacy and security' diversions against the public interest, and will divert local authorities' precious time and resources to assisting landowners—and not the public.

Another downside to the Defra announcement is that we may lose the many proposals in the SWG package which all parties agree would speed up the processing and determination of path claims. It will be difficult to separate these measures to bring them into effect—but we shall work with other organisations and with Defra to try to achieve a beneficial result.

We must also ensure the authorities do not reduce funding for definitive-map work, in the absence of the 2026 deadline, and that volunteers keep up their impressive pace in claiming routes. ❐

Case File

Curtilage on the racecourse

Last year we challenged North Yorkshire County Council's decision to deregister common land at the old racecourse on Richmond Low Moor.

The landowner, the Richmond Burgage Pastures Committee, applied for deregistration under paragraph 6 of schedule 2 to the Commons Act 2006. This permits the deregistration of common land which has been covered by a building, or the curtilage of a building, since the date of provisional registration (in this case 17 June 1968).

Grandstand

The application included not only the historic, listed, grade 2* grandstand, the Zetland stand, and the isolated judge's box, but parts of the common surrounding the buildings. The applicant said that these buildings, once integral to racing on the downs, had significant curtilage which should also be deregistered.

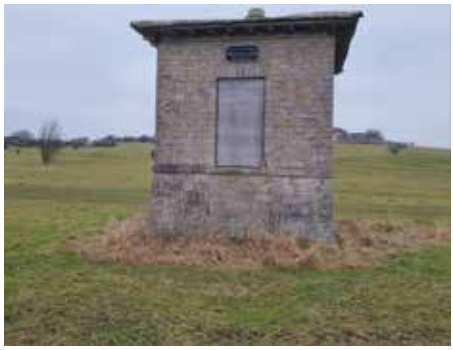
The society objected: the buildings had not been used for racing since this activity ended in 1891, and any curtilage they had in racing days had long since ceased to exist. While deregistration of the buildings was acceptable (since they should not have been registered in the first place), removal of additional land, on historical speculation of its use on nineteenth-century race days, was not.

Nevertheless, in June 2021 the council granted the application, saying that 'the historic use of the buildings provides the only reasonable means of considering the extent of any curtilage'. After taking counsel's opinion, the society challenged the outcome and the council agreed to its decision being quashed by order of the high court.

The council conceded that it had failed: (a) to recognise that a building need not have a curtilage; (b) to address the fact that the claimed curtilage had no physical manifestation by which its boundaries were defined, and (c) to consider that the buildings have not been in their historic use for over 100 years, and that the grandstand and Zetland stand were partly demolished many years ago.

The council has reimbursed the society the sum of £13,100, the bulk of our costs.

This case, and that of Blackbushe aerodrome in which we are an intervener (*OS* summer 2020 page 2), shows that the rules on deregistration of 'curtilage of a building' must be strictly applied. They are not a licence to take common land into private control just because there happens to be a building somewhere in the vicinity. Landowners should take notice and curb their ambition in applications affecting common land. ❐



The council agreed (wrongly) to deregister a five-yard perimeter around the judge's box. Photo: Paul Rummery.

Taking action

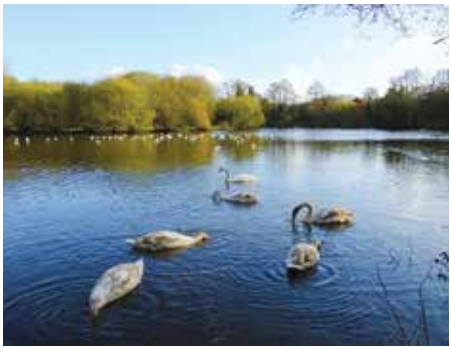
A juggling act

Tywardreath and Par Parish Council (between Fowey and St Austell in Cornwall) set up a neighbourhood development plan (NDP) steering group. It has created a plan which protects open spaces (land and water) in the parish, setting an example to other communities. Alison White, the group's secretary and a member of the society, provides tips on how this was done.

Everyone in the NDP group must be open-minded and willing to listen, because the NDP is about what development the community wants. In our case, the community wanted the NDP to protect green spaces and water bodies, while providing truly affordable housing for local people—a juggling act.

It is never too soon to start gathering and recording the evidence to put in the consultation statement. So a well-organised secretary is essential, as is a calm and diplomatic chair.

A quick survey at the start of the process is a good way to find out what is important for your community, and to identify likely themes for the NDP.



Par duck pond: local green space. Photo: John Page.

You should hold community events to follow up and confirm the findings. Keep a record of events and outcomes. We ran a workshop of activities which gave us plenty of evidence for the NDP and led to a more detailed questionnaire. This allowed us to consolidate our ideas before drafting the NDP. We engaged a marketing agency with a successful track-record of working with NDP groups, and it proved to be money well spent.

It is important to wait until you have all the above information and results before drafting the NDP. Compile the summary of evidence as you go along. You will give yourself much more work if you do not do this simultaneously.

Template

If your local-authority development officers offer help, accept it. Ours asked us to use a template which the council had formulated. This was useful, and can be found on the Cornwall Council website.

Someone else may have written the policy statements you are trying to formulate. The internet is your friend, you can copy somebody else's wording. It is especially useful to find a recent NDP which has been 'made' or 'adopted' in your local-authority area.

Development officers are well versed in planning law, but there is more latitude with NDPs which are about the local context and what it is that makes your area special. If you can supply an evidence-based rationale for a particular policy which your community wants, put it in

Cemetery playing field: local green space. Photo: David Quoroll.

and see what the inspector says. For instance, we have a 'tranquil areas' policy—a first for Cornwall.

The turnout for the referendum for our NDP was good: 21.6 per cent, with 90.6 per cent voting in favour and only 8.78 per cent against. Thus, our NDP now has equal weight in statutory terms with the Cornwall Local Plan when it comes to making planning decisions.

An example of our objectives is found under environment and heritage: 'providing green spaces for recreation and enjoyment, and maintaining and enhancing blue and green spaces and corridors, providing access to all wherever feasible and appropriate, so supporting blue green tourism and securing positive health and wellbeing outcomes for all'.

The NDP has enabled 16 areas in the parish to be designated as local green spaces, offering them increased protection from development.

The NDP is at *https://bit.ly/3r5cFp0*.

Parking rules in Woldingham

Our member Nicky Hodgetts lives adjacent to bridleway 29 in Woldingham, in Surrey. It was a footpath which had been diverted to run between farm buildings. The buildings were converted to dwellings, the footpath became a bridleway through long use, and part of the width was stopped up in 2001 leaving a residual width of 4.0–6.7m.

Residents habitually park on part of the bridleway, without recorded objection (see photo on page 6). They sought, and the council agreed to make, a further stopping-up of partial width, under section 118 of the Highways Act 1980.

Nicky objected to the order, on the basis of further erosion of public rights, and the likelihood that, since part of the width had been taken over for private purposes, parking might then occur on what was left of the bridleway. The order was determined by Martin Small, a planning inspector.

Confirmed

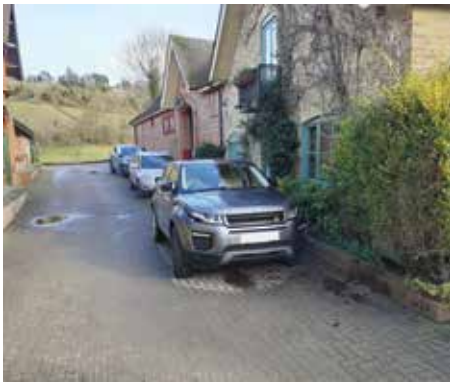
The inspector confirmed the order. In his decision, he said that:

> … whilst I consider it is possible that the part of the bridleway to be extinguished would, apart from the order, be used, the evidence does not support a demand for it. Accordingly, I find that likely use by the public is not such that the order should not be confirmed, and I conclude that it is expedient that this part of the bridleway be stopped up.

The correct test in section 118(2) is that confirmation is:

> … expedient … having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public …

The inspector found that it is possible that the part of the bridleway to be stopped up 'would … be used', but that 'the evidence did not support a demand for it'. The inspector appears to measure this question of 'demand' by the absence of any objection to the regular parking on it. But he also appears to accept that, if



Parking on bridleway 29. Photo: Nicky Hodgetts.

there were no parking, the additional width would be used. And he is required, by section118(6), to disregard the parking as 'temporary circumstances'.

Discretion

It appears that there is some discretion afforded to the secretary of state, in deciding whether to confirm the order, to have regard to other considerations. At Woldingham, the inspector seems to have thought it of considerable benefit to the neighbouring owners to take possession of the width unencumbered by designation as a public right of way. One could see this the other way round: given that there was no objection to the parking, how does the stopping up confer any new benefit?

But if the council thinks it right to stop up part of the bridleway width here, why should it not support an application from any Surrey resident to stop up part of the road outside the resident's home which corresponds to the habitual parking place, giving exclusive use and control?

Neighbour

Perhaps Surrey residents should continually voice to the council their objection to their neighbours' parking in the road so that, should a neighbour seek a stopping-up order, the council has it on record that the use for parking was contested.

So, if you see a vehicle parked on a Surrey right of way, complain to the council, or at least part of the right of way may be extinguished. ❐

Come to our AGM

on Thursday 7 July 2022

at Friends House, 173 Euston Road, London NW1 2BJ

We hope to see you at our AGM on 7 July. We are exploring the option to join us online. Details will be given in the next *Open Space*.

If you would like to submit a motion to the AGM, it must reach us, bearing your signature, by midnight on Wednesday 25 May.

If you wish to stand for election as a trustee, we need your nomination, proposed and seconded in writing by members of the society and bearing your written consent, by midnight on Wednesday 25 May. Candidates must have been individual members of the society since 25 May 2021. In the past trustees have met in London four times a year. Now they normally hold shorter meetings every month by video-conference.

Please contact our office manager, Sarah Hacking (office1@oss.org.uk), if you have any queries.

Community orchard saved

Local people have saved Dartmouth's community orchard: the town council has voluntarily registered it as a green.

On 2 February the plaque on the new green (see cover) was unveiled by the deputy mayor of Dartmouth, Devon, Graham Evans, in a joint event organised by the Friends of Dartmouth Community Orchard and the town council, supported by the society.

The 1.3-hectare community orchard is the remnant of 19 orchards, shown on the Dartmouth tithe map of 1840.

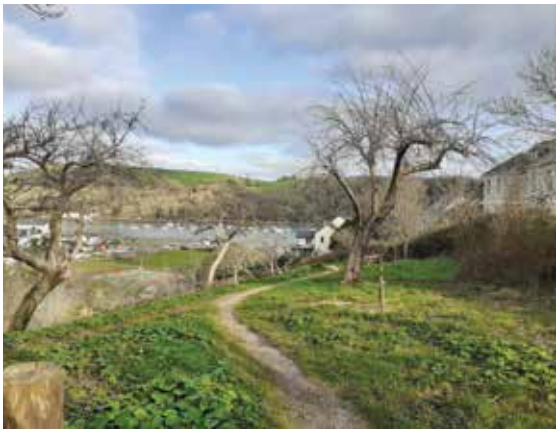
It was owned by Raleigh Estate then purchased compulsorily by the Ministry of Defence in 1898 to build a shore base for the Britannia Royal Naval College. In 1993, when it was no longer needed for naval training, it was bought by Dartmouth Town Council.

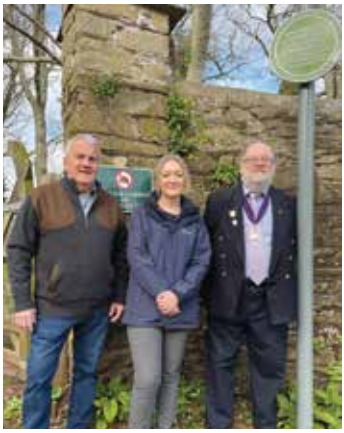
There were various threats of development. In 2014, concerned local people formed the friends' group and decided, with our advice, that the best protection would be to register the land as a village green. However, the friends recognised that, in the face of opposition by the landowner, this is a long and contentious process. The town council elections in May 2019 delivered new, sympathetic councillors who agreed to register the land voluntarily.

Guidance

Says Peter Goldstraw of the friends: 'We are extremely grateful to the OSS for the advice and guidance we received in the early years of this long campaign, and especially for its comprehensive publication *Getting Greens Registered*.'

The friends and the town council have set a splendid example. This lovely open space is now safe for ever. We urge communities throughout England and Wales to explore possible registration of their open spaces as greens to protect them from development. ❐





Left: the green with the Dart estuary beyond. Right: the plaque unveiled, with Peter Goldstraw, our case officer Helen Clayton, and Councillor Graham Evans.

Justice undermined

The society is fighting a new law which would constrain our opportunity for judicial review of injurious decisions.

Over the last 157 years, the Open Spaces Society has effectively used the courts to rectify wrongs affecting open spaces and public paths. We also back our members in their legal actions. But the Westminster government's Judicial Review and Courts Bill will have a profoundly detrimental effect on our justice system.

These changes to judicial review could make it impossible for claimants to secure effective remedies for unlawful decisions. At present, the court can issue a quashing order to revoke an unlawful action or decision so as to nullify its legal effect.

Clause 1 introduces two new remedies: suspended quashing orders, which only take effect at a certain point in the future, and prospective quashing orders, which validate the past implementation of an unlawful decision.

Damage

These new 'remedies' would not necessarily put right legal wrongs. They could allow unlawful decisions to stand for an unknown length of time, with continuing damage, and they would not guarantee redress to claimants—contrary to the Aarhus Convention, the international agreement governing environmental decisions, which confirms a right to timely and effective remedies.

The clause directs the court, in reaching a decision, to take account of: whether the judgment would cause inconvenience to decision-makers; the interests and expectations of those who would benefit from the quashing, and of those who have relied on the impugned act; and any action proposed to be taken by the defendant. It must consider whether 'adequate redress in relation to the relevant defect' would be provided by a suspended or prospective order, having regard to any action taken or proposed to be taken by the defendant in connection with the impugned act. If such an order would 'appear' to provide adequate remedy, the court must then grant it.

This means that the court must give legal weight to extra-legal, and possibly political, factors, and such weight would clearly benefit the defendants.

Suspend

The new position would mean that where a court issues a quashing order it must suspend it, or limit any retrospective effect, unless there is good reason not to. This would be a severe deterrent to those wanting to use the courts to put wrongs right. Our interests, and those of other amenity groups, could be severely undermined. It will embolden defendants to go to court rather than submit to judgment.

For instance, with this act in place, a court might agree with a claimant that regulations were unlawful, but decide that they should not be quashed until the minister had been given time to make replacement regulations, and that things done under the impugned regulations should be treated as valid.

As a member of Wildlife and Countryside Link's legal strategy group we are lobbying for this clause to be deleted, and for other amendments to reduce the potential harm of this worrying legislation. ❐

Far & Wide

Like a railway depot

The environment secretary has granted consent for Network Rail (NR) to retain ugly fencing in the shadow of St Catherine's chapel in Guildford. NR applied for consent, under section 38 of the Commons Act 2006, to retain fencing which it had erected last year, following the partial collapse of the cutting beneath the common on which the chapel sits.

St Catherine's Hill is a pleasing open space, with fine views, just to the south of the city centre. It is crossed by the North Downs Way and located within the Surrey Hills Area of Outstanding Natural Beauty (AONB).

In his decision letter, the Planning Inspectorate's case officer Richard Holland said the fencing was merely an extension to the existing fencing—but, if so, it either was not previously on the common, or it lacked any earlier consent from the secretary of state. In a concession offered by NR, following opposition from Historic England, it will be painted green and reduced in height to 1.8 metres.

The permanent fencing (right): it will be painted green and lowered. The chapel is on the left. Photo: Colin Sandford.

Under section 85(1) of the Countryside and Rights of Way Act 2000, the secretary of state, in exercising his functions, must 'have regard to the purpose of conserving and enhancing the natural beauty' of the AONB. Mr Holland said that the fencing would 'do little to conserve the natural beauty'—but on the contrary, it will positively degrade it. He added that 'safeguarding public safety outweighs this concern'.

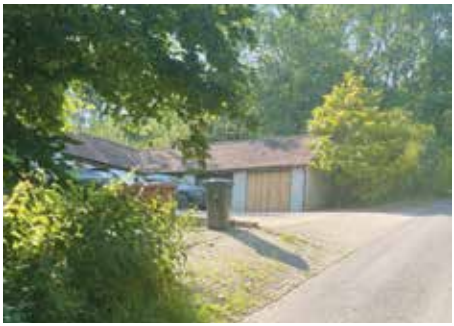
No one had disputed that fencing was needed. But St Catherine's Village Association and the Guildford Society, along with the society, had disputed whether what is required is a 1.8-metre-high palisade fence. St Catherine's Hill has been fitted out with NR's standard railway-fencing, appropriate to a railway depot. A location of this sensitivity requires special measures. If the Planning Inspectorate cannot understand that, where are we?

Trust quells unlawful walls

We are pleased to learn that the National Trust has apparently secured the removal of unlawful walls on Quellwood Common, CL32, three kilometres east of Fernhurst in West Sussex.

We spotted the encroachment in 2017 when investigating another matter there, and reported it to the trust. The trust's assistant rural surveyor responded that the trust had, in 1989, granted the owners of the property called The Quell a right of way over a section of trust land, but with no permission for any works. He agreed to write to the owners.

Four years later we reminded the trust. Presumably it then pursued the matter as the encroachments have gone.



Left: The Quell with surrounding wall, 2010 (Google street view). Right: the wall has gone, 2021. Photo: Chris Harrison.

Chris Harrison, chairman of the Haslemere Society (an OSS member), kindly photographed the site, to confirm that it was now clear of obstructions.

Unlevelled

We have criticised the levelling-up white paper, from the Department for Levelling Up, Housing and Communities, for its failure to recognise the significance of green spaces close to people's homes in creating a fairer society.

These have always been important, and never more so than during the pandemic, but the white paper makes little mention of them. We have said repeatedly that we need an improved and strengthened process in the national planning policy framework (NPPF) for the designation of land as local green space (LGS).

Government must provide sufficient funding, and overhaul neighbourhood planning, to ensure that the LGS designation is simplified, thus encouraging people to get involved.

Says our case officer Nicola Hodgson: 'The government cannot seriously run a levelling-up programme while neglecting the glaring inequalities of access to green space. Where this is not available on people's doorsteps, government must make the necessary provision to ensure the LGS process is fit for purpose, and to encourage voluntary registration of land as a green when public spaces are created in new developments.

The Sands sacrificed

Durham County Council applied to deregister 0.17 hectares of common land, part of register unit CL29 known as The Sands, in the centre of Durham City adjacent to the new county council headquarters. The council wished to use the common as a members' car park.

It applied under the Commons Act 2006 section 16, and offered in exchange 1.84 hectares of land which is 1.8 kms walking distance to the north, on the other side of the River Wear and railway.

We objected, with the City of Durham Parish Council, the Freemen of the City of Durham (who have grazing rights over the common), and others. The Planning Inspectorate, which determines such applications on behalf of the environment secretary, called a public inquiry.

Our commons bible

We have published the seventh edition of our book, *Our Common Land*. We were fortunate that the author, our vice-president Paul Clayden, had completed the draft of the text before his untimely death on 1 January 2020. The previous edition was published in 2006 so there are many changes.

We enclose a flyer. The cost is £25 including postage.

Consultant Alan Kind represented us.

Although the replacement land was much larger than the release land, we argued that it did not satisfy the environment secretary's requirement to 'have regard to

Getting Greens Registered

The fourth edition of our book *Getting Greens Registered* is now available to download from our website (cost £12). It takes you, step by step, through the process of deciding whether the land is eligible and then applying to register it. The manual is updated to include trigger events, landowner statements, and the latest legislation in Wales.

… the interests of the neighbourhood' because it served a different neighbourhood. The housing closest to the replacement land is not even in the City of Durham parish.

Unfortunately, the inspector, barrister Edward Cousins, sidestepped our argument that the exchange did not benefit the neighbourhood of the release land. Instead, he said that it would 'have a limited or minimal adverse effect on the interests of some local inhabitants to the release land, but this will be offset by the benefit to others in the City of Durham by the inclusion of the replacement land'.

We also said that the public already enjoyed informal access to the

The Sands release land: it has had various uses, most recently as a municipal coach-park. Photo: Janet George.

replacement land so there was no advantage in it. Indeed, the county council had scheduled it as 'accessible natural green space'.

Sadly, the inspector rejected our arguments and allowed the exchange. The city's residents will be the poorer. (*Ref COM/3236108, 11 Oct 2021*)

Water Orton oughtn't

We opposed an application (from Star Pubs and Bars Ltd, the landowner) to exchange part of Market Green, a registered village green in Water Orton, Warwickshire. The applicant had planning

Fenced off: Market Green, Water Orton. Photo: Jack Jennings.

permission to build houses on part of the green. North Warwickshire Borough Council also opposed the scheme.

The applicant had already erected fencing around Market Green, allegedly to exclude fly-tipping, but it also kept people out, contrary to the law.

We said that the proposed replacement land was not suitable, being half a kilometre away from the existing green. The parish council argued that the replacement land 'was more beneficial to the community', but it also said that Market Green had never been available for the community. It seems to have acquiesced in the unlawful fencing.

We complained too that the public notice

was misleading, because it alleged that the purpose of the application was 'to enable the development of family homes on the release land, currently an area of disused land prone to fly-tipping and anti-social behaviour'. As our case officer, Hugh Craddock, said: 'The notice ought instead to have explained that the intention is to remove the rights of local people to enjoy the land for recreation.'

We asked the Planning Inspectorate to require the applicant to readvertise the application in objective terms. Instead, the inspectorate granted the application.

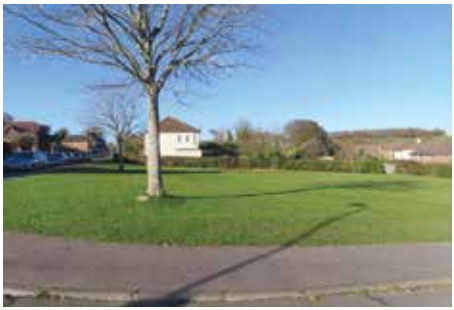
Battle battles

Our member. Bev Marks, is lobbying Battle Town Council in East Sussex to persuade the owners of four green spaces voluntarily to register them as greens.

The spaces have been earmarked in the Battle Civil Neighbourhood Plan as local green space. Two of the sites have been at risk of sale over the past three years. However, the council does not accept Bev's arguments.

Unfortunately, it was advised by the East Sussex Association of Local Councils' solicitor to be wary of green dedications because of the constraints on use.

We are following this up. The council should treat such constraints as an advantage, since they protect the land from development.



Darvel Down Green, owned by developer Optivo. The land needs to be registered as a green to secure its protection.

Government on Glover

The government has, at last, published its response to the Landscapes Review in England. This review, led by the journalist Julian Glover, was published in September 2019 and made recommendations for the future of our national parks and areas of outstanding natural beauty (AONBs).

Government proposes to adopt 'a transformational approach to AONB leadership and management', possibly

In the Hope Valley, Peak District National Park. Photo: YHA.

renaming AONBs as 'national landscapes' to reflect their national significance. It advocates a new 'national landscapes partnership' for national parks and AONBs (a confusing title if AONBs are renamed as suggested).

Government says that Natural England should have a 'reinvigorated' role, and the second statutory purpose for national parks, relating to public understanding and enjoyment, should be strengthened. It also mentions greater public access and an extension of access to land and water.

These are fine ambitions, but government also acknowledges that there is insufficient funding in the core grant to deliver the vision. It advocates use of private funding which is, of course, deeply offensive. National assets need national funding.

We are also concerned at the suggested

Spirit of Kinder 90

Royal Hotel, Hayfield
Saturday 23 April 2022 at 2pm

Join us for an afternoon of celebration and song marking the ninetieth anniversary of the Kinder Scout Mass Trespass.

Speakers include Kate Ashbrook of the Open Spaces Society, Craig Best of the National Trust, Stuart Maconie, president of the Ramblers, and Yvonne Witter of Mosaic. Keith Warrender will launch his comprehensive new book on the trespass, *Forbidden Kinder*, (Willow Publishing, £17.95).

Trespassers leaving Hayfield quarry, 24 April 1932.

For further information contact: Roly Smith, roly.smith@btconnect.com, 01629 812034

enforcement measures to 'help manage visitor pressure'; these are excessive, oppressive and probably unworkable.

The public consultation on the government's response closes on 9 April.

Wrong road at Dunsfold

We are pleased with the decision of inspector Helen O'Connor to reject an application from Kitewood Investment for an access road across Dunsfold Common, near Godalming in Surrey. The application, under section 38 of the Commons Act 2006, was to provide access to a housing development.

In objecting, we argued that the developer should instead have applied for an exchange, under section 16 of the Commons Act 2006, dedicating part of the development site as common in compensation. We also proposed an alternative access not on the common.

The inspector agreed with us that 'no robust exploration of potential alternatives has been undertaken'. She described the works as a 'suburban encroachment', damaging to the common's woodland character, biodiversity and landscape. (*Ref COM/3272496, 21 Dec 2021*)

Hello and goodbye

Our office assistant Christine Hunter, and digital marketing and content manager Nichola Finan have recently left us. We thank them, and wish them both well.

We welcome Lucy McKean, our new administrative assistant. Lucy recently came back to England after living in Los Angeles for the last 24 years where she worked in advertising. After putting her career on hold to raise her three children, she returned to work in a new field of interior design.

Lucy loves to play tennis, hike in the countryside with her dog, and roller-disco skate with her daughter. She has a son on the autistic spectrum which makes her particularly aware of the value of access to open spaces and paths, free from the distractions which make life on the spectrum so difficult. ❐

Path Issues

Oyster Wharf stays public

Oyster Wharf, part of the seafront at Mumbles, Swansea, will remain a public place, due to our intervention.

We objected to a draft order, under section 247 of the Town and Country Planning Act 1990, to stop up a public highway at Oyster Wharf (*os* autumn 2020 page 14).

The grounds for such an order must be to enable development to be carried out, but in this case the development was to create a new access-road and car-parking spaces, with the stopped-up area to be 'used as public realm/piazza'. The effect of the order would be that the public would lose its right of access to the wharf.

Intention

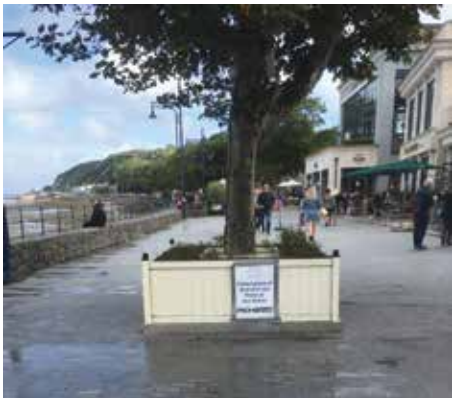
We said that the stopping up was contrary to the intention of the planning permission to retain the order land in the public realm. We suggested instead that rights for motor vehicles should be stopped up, so that pedestrians and cyclists could continue to use the wharf by right.

The council and the developer, Nextcolour Ltd, argued that stopping up all rights was necessary to exclude vehicles, to permit the lease of the land, and to facilitate use for outdoor tables etc—but the society responded that none of this required the extinguishment of public rights over the wharf, which could not be done under section 247 because it was not 'necessary … in order to enable development to be carried out in accordance with planning permission'.

To our relief, Nextcolour has now withdrawn its application for stopping up. This was really about transforming a public place into privatised space, enabling the owner to exclude people from sitting down other than at restaurant tables, for instance.

The Welsh government's approach to drafting the section 247 order differs from the Department for Transport's. An article in the order provided for it to cease to have effect if the planning permission expired unimplemented. Officials explained that the article relied on subsection 4, viz to: 'contain such incidental and consequential provisions as appear … to be necessary or expedient'; and we shall ask the Department for Transport to adopt the same practice.

Unfortunately, the same power is not available to a planning authority under section 257 of the 1990 act. We suggest that all section 257 orders should be drafted so as not to come into effect until the new path has been certified as fit (even if the new path is available on the



Oyster Wharf, saved for the public.

ground). Thus, certification need never be given if the development is not commenced.

Whither agri-access?

We were dismayed that there was no mention of public access when the new farm-funding scheme, the sustainable farming incentive, was launched in December. Indeed, the Secretary of State for Environment, Food and Rural Affairs claimed that it was never the government's intention to fund access in this scheme.

Defra has subsequently backtracked and said that access will be funded later on—but when? Ministers are flouting the numerous pledges made during the passage of the Agriculture Bill through parliament, and subsequently.

New and better

With other user groups we have long argued that the new funding regime should pay for new and better paths where people need them.

Access is mentioned, though in vague terms, as part of the payments for the local nature recovery tier, but that scheme is more limited in extent.

In January we met two Defra ministers, Richard Benyon and Victoria Prentis, to press our case. They were sympathetic, but we want action.

Ministers in Wales seem more open to paying for access from agricultural funding, but there too we have yet to see it happen. In both nations we also need a commitment to penalise those farmers and landowners who abuse paths, by withdrawing their funding.

Path to the sea

A public path has been added to the Norfolk definitive map, thanks our local correspondent, Ian Witham.

The mile-long route runs from the B1145 road (between North Walsham and Mundesley) to the sea just south of Mundesley. It has been used for centuries, and now it is recorded as a restricted byway, confirming the rights of walkers, horse-riders, cyclists, and carriage-drivers to use it.

The newly-recorded route.

Says Ian: 'This is an attractive and popular route in the Norfolk Coast Area of Outstanding Natural Beauty. It gives access to the coastal cliff top which was hailed by author David Yaxley, in *Portrait of Norfolk* (Robert Hale, 1977), as "certainly the finest open stretch of raised coastline in the east of England". That was before construction of the Bacton gas terminal in 1967.

'Unfortunately, Natural England has chosen to align the new coastal path and access land at the bottom of the cliffs.'

Part of the route will require clearance works in order to restore it to a fit state for carriage use. Ian will keep Norfolk County Council up to the mark.

Trees and highways

Our case officer Hugh Craddock comments on the implications of section 115 of the Environment Act 2021 for trees and highways.

Section 115 inserts in the Highways Act 1980 a new section 96A, 'Duty of local highway authorities in England to consult before felling street trees'. This imposes a duty on a highway authority to consult 'members of the public before felling a tree on an urban road (a "street tree")'.

The River Dee and canal at Llangollen, Denbighshire, from the society's lantern-slide collection. You can buy a set of ten postcards from this collection for £8 including postage. Visit our website to order them.

The government has got itself caught up in the complexities of definition. For a start, one has to recognise that a street tree would be an obstruction if planted without lawful authority, or if it grows to such an extent that it interferes with free passage. Yet there is no direct exception to allow the felling of a tree which creates an obstruction—but there is an exception where the obstruction would interfere with duties under the Equality Act 2010 (new subsection 3(d)).

Planning permission

There is also an exception where felling 'is required for the purpose of carrying out development' authorised by planning permission. This presumably applies if, for example, the permission authorises the widening of an entrance off the highway which requires tree felling.

But it is the definition of 'urban road' in subsection 4 which repays attention. First, it must be a highway. But it does not include any 'trunk road or classified road', which removes from protection many of the big roads in urban areas which will boast the most important street trees.

Secondly, it must be a road with a 30-mph speed limit, or a 40-mph speed limit, or which 'is otherwise a street in an urban area'.

So far as the first element is concerned, that would appear to apply to any urban path with street lighting (road is not defined in the 1980 Act, but is defined in the Road Traffic Regulation Act 1984 to include any highway). So far as the third element is concerned, 'street' for the purposes of the 1980 act is defined in the New Roads and Street Works Act 1991 as 'any highway, road, lane, footway, alley or passage'. Thus, it seems to include any public path in an 'urban area'.

So, beware highway authorities: you must consult the public before felling a tree on a public path or byway, if it is illuminated, or otherwise in an urban area. Unfortunately, there is no penalty for breach of the duty.

Comings and goings

Dave Howerski has become our local correspondent for south Herefordshire. Dave has had many careers, among them parachute instructor and professional sky-diver. He is taking on the area covered for many years by Owen Morgan.

We also welcome Steve Lindsay for Rhondda Cynon Taf, who replaces Jay Kynch. We are sad to say goodbye to Jay, and also to Gordon Sencicle who covered the Isle of Thanet in Kent for 11 years. Thanks to both. ❐

Dave Howerski.

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.

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