EXPLANATORY MEMORANDUM TO

THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) AND DEDICATED HIGHWAYS (LANDOWNER STATEMENTS AND DECLARATIONS) (ENGLAND) REGULATIONS 2013

2013 No. 1774

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013 (the Regulations) prescribe the form and procedural requirements (including application fees) relating to applications to deposit both landowner statements under section 15A(1) of the Commons Act 2006[1] (the 2006 Act), which protect against the registration of land as a town or village green[2] and statements and declarations under section 31(6) of the Highways Act 1980 (the 1980 Act), which prevent the deemed dedication of land as highway[3]. The Regulations implement reforms introduced by sections 13 and 15 of the Growth and Infrastructure Act 2013 (the 2013 Act), which aim to provide a clear and unambiguous mechanism for landowners to protect their land from registration as a town or village green and to align the procedural requirements for that mechanism with those applicable to the existing regime under section 31(6) of the 1980 Act, so as to minimise the administrative burden and cost on landowners making applications and the local authorities who receive and process the same.

2.2 The Regulations also prescribe the steps an appropriate authority[4] must take upon receipt of an application (which include publishing notice of the application) and provide for the recording of prescribed details relating to the deposit of a statement under section 15A(1) of the 2006 Act in a public register, which may be part of the existing register already maintained by authorities for highways statements and declarations deposited under section 31(6) of the 1980 Act[5].

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[1] Section 15A of the 2006 Act is inserted by section 15 of the Growth and Infrastructure Act 2013 (c. 27). Section 15 came into force on 25 June 2013 for the limited purpose of making regulations (see the Growth and Infrastructure Act 2013 (Commencement No. 2 and Transitional and Saving Provisions) Order 2013 (SI 2013/1488).

[2] Please refer to paragraph 4.4 for an explanation of how the mechanism in section 15A operates.

[3] Please refer to paragraph 4.5 for an explanation of this regime.

[4] An appropriate authority is defined in the Regulations as the appropriate council (in relation to deposits under section 31(6) of the 1980 Act) and the commons registration authority (in relation to deposits under section 15A(1) of the 2006 Act). The terms "appropriate council" and "commons registration authority" are defined in section 31(7) of the 1980 Act and section 4 of the 2006 Act respectively, and include a county, district and London borough council.

[5] Section 31A of the 1980 Act (inserted by section 57 of, and paragraph 4 of Part 1 of Schedule 6 to, the Countryside and Rights of Way Act 2000 (c. 37)) requires the maintenance of a public register containing information relating to

2.3 The regulations also amend the Dedicated Highways (Registers under Section 31A of the Highways Act 1980) (England) Regulations 2007[6] to reflect changes made by section 13 of the 2013 Act to align the mechanism for making deposits in section 31(6) of the 1980 Act with that for making deposits under section 15A of the 2006 Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Anyone can apply to the commons registration authority to register a new town or village green under section 15(1) of the 2006 Act where the statutory criteria are met and provided the right to apply has not been excluded under section 15C of that Act. Broadly, the key criteria for registration are that the land has been used 'as of right' by a significant number of local inhabitants for lawful sports and pastimes for at least 20 years. 'As of right' means without permission, without force and without secrecy. Such use must either continue at the time of the application or, where such use has ceased before the time of the application, the application must be made within two years of the cessation of use[7].

4.2 Town and village greens are subject to a high level of protection under section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 which effectively protect town and village greens from development or interference with the recreational use of the land.

4.3 In July 2011 Defra published a consultation paper on proposals to reform the town and village green registration system with the key aims of: (i) achieving an improved regulatory balance between protecting high quality green space valued by local communities and enabling the right development to occur at the right place and time; and (ii) improving the operation of the registration system so as to reduce the burden on local authorities responsible for implementing it and on landowners affected by applications[8]. The 2013 Act, which received Royal Assent on 25 April this year, contains several amendments to the law on the registration of new town and village greens for the purpose of implementing most of the reform proposals outlined in the consultation paper.

4.4 Section 15 of the 2013 Act inserts new sections 15A and 15B into the 2006 Act, which introduce, respectively, landowner statements to protect against the registration of land as a town or village green and the registers in which information relating to such

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statements and declarations deposited under section 31(6) of that Act and is implemented by the Dedicated Highways (Registers under Section 31A of the Highways Act 1980) (England) Regulations 2007 (SI 2007/2334).

[6] SI 2007/2334.

[7] Section 14 of the 2013 Act reduces the grace period for making applications where use as of right has ceased in relation to land in England from two years to one year. Section 14 will commence on 1 October 2013 (see SI 2013/1488).

[8] Please refer to sections 7 and 8 of this memorandum for further details about this consultation.

statements are to be recorded[9]. Landowner statements deposited in accordance with section 15A of the 2006 Act bring to end any accumulated years of 'as of right' use of the land for lawful sports and pastimes – this essentially restarts the clock on the 20 years' use required by the registration criteria[10]. A new period of use 'as of right' can start to accumulate provided such use continues after the deposit of a landowner statement[11]. The Regulations provide for when a statement under section 15A(1) is treated as having been deposited with a commons registration authority.

4.5 This mechanism is similar to the existing regime for making highways deposits under section 31(6) of the 1980 Act, for the purpose of protecting land from being deemed to have been dedicated as highway. Section 31(1) of the 1980 Act provides for the deemed dedication of land as a highway broadly where the public have used the land 'as of right' and without interruption for at least 20 years, unless there is sufficient evidence of the landowner's intention not to dedicate it as such during that period. The mechanism in section 31(6) is one means to provide sufficient evidence of the landowner's intention not to dedicate ways over their land as highways. Under that provision a landowner can deposit a statement and map, which indicates what highways (if any) the landowner admits to having been dedicated over his land, followed by subsequent formal declarations each to be lodged within 10 years[12] from the previous deposit that no additional ways (other than any specified in the declaration) have been dedicated since such deposit.

4.6 Section 13 of the 2013 Act amends the form and procedure in England for making deposits under section 31(6) of the 1980 Act, which allows for the Regulations to align this existing regime with the new mechanism for making statements to protect against town or village green registration[13]. The Growth and Infrastructure Act 2013 (Commencement No. 3 and Savings) Order 2013[14] brings sections 13 and 15 into full effect on 1 October 2013, to coincide with the coming into force of the Regulations.

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[9] Section 15 of the 2013 Act was commenced for the limited purpose of making regulations on 25 June 2013 (see SI 2013/1488): www.legislation.gov.uk/uksi/2013/1488/contents/made.

[10] A statement must be made by the owner of the land (as defined in section 61(3) of the 2006 Act) and must be accompanied by a map showing the extent of the land to which the application relates, although the Regulations allow landowners to refer back to a previously deposited map in certain circumstances (see regulation 2(2)(c)).

[11] If users have already acquired the requisite 20 year user before a statement is deposited under section 15A, the effect of depositing a statement under that provision will be to trigger the grace period for submitting an application for registration of the land as a town or village green under section 15(3)(c) of the 2006 Act.

[12] This period is extended to 20 years in respect of land in England by section 13 of the 2013 Act. Section 13 was commenced on 25 June 2013 for the limited purpose of making regulations (see web link to SI 2013/1488 at footnote 9 above).

[13] Currently there is no prescribed form for depositing statements under section 31(6) of the 1980 Act and declarations made under that provision must be in the form of a formal statutory declaration. Section 13 allows regulations to make provision in England for prescribing the form of statements, maps and declarations deposited under section 31(6) as well as application fees relating to such deposits. Section 13 also extends the period for making declarations from 10 years to 20 years to enable landowners to align the deposit of statements under section 15A of the 2006 Act with deposits under section 31(6) of the 1980 Act. In addition to amending the law as it applies in England, section 13 contains a restatement of the existing law as it applies to land in Wales.

[14] SI 2013/1766 (C. 72).

4.7 The Regulations provide for a combined application form which can be used by landowners to make deposits for both purposes, with the aim of minimising the administrative burden on landowners who wish to make statements to protect against registration of their land as a town or village green at the same time as protecting the land from deemed dedication as highway. The Regulations provide for circumstances in which landowners can refer back to maps previously deposited with an appropriate authority, to avoid the provision of additional maps. The Regulations also enable the recording of prescribed information relating to statements deposited under section 15A(1) of the 2006 Act to be incorporated into a new part of the existing register maintained by authorities for highways purposes under section 31A of the 1980 Act. This is with a view to minimising the administrative burden and cost on local authorities. The Regulations will commence on 1 October 2013.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Since the early 2000s there has been a significant rise in applications to register town and village greens across England, from 60 to 200 per year. In recent years there have been many reports in the local and national media about planned developments, from small scale to very large, on land which has become the subject of town and village greens applications. Evidence commissioned by Defra in 2009 indicated that a significant number of the sample applications reviewed were directly related in some way to planning applications or allocation of sites for development in the local authority's local plan[15].

7.2 The rise in application numbers has rendered the planning system less efficient and reliable and has led to three cost-related problems. Firstly, the increased costs incurred by commons registration authorities (collectively) through processing applications in years 2012-22 are estimated to be between £1.08 and £4.64 million annually[16]. In order to counter the high costs some authorities ration the number of applications they process in a year and this often leads to a backlog of applications, which can slow down development because developers tend to wait until town and village greens applications are determined as unsuccessful before commencing building work.

[15] Defra commissioned research from the Countryside and Community Research Institute. A summary of the research, together with the final report, is available at: http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=16581.

[16] Quoted from paragraph 60 and table 5 of the Impact Assessment prepared for the Growth and Infrastructure Bill (see web link to the assessment in paragraph 10.4 below).

7.3 Secondly, landowners are also affected by increased costs resulting from disputing applications to register their land (i.e. the cost of preparing objections and legal representation, which can include action in the higher courts) as well as costs incurred through delays or the abandonment of building projects, even where the land has planning permission. It is estimated that this would cost developers between £1.9 and £15.8 million between 2012-22[17].

7.4 Thirdly, land loses its potential development value when it is registered as a town or village green. For example land at Warneford Meadow in Oxford was valued by the owner at £11 million which later fell to £0.5 million following its registration as a green[18].

7.5 The Common Land Policy Statement 2002[19] set out the-then Government's intention to take forward certain consultation proposals to improve the law on common land and town and village greens. This included the introduction of a formal mechanism by which landowners could clearly indicate that use of their land was incompatible with the criteria for registration as a town or village green. There was support for a clear and unambiguous mechanism for making the public aware of its use. However, it was not possible to make provision for this in the 2006 Act.

7.6 The Penfold review[20] (2011) into the effect of the non-planning consents regime on investment in development specifically recommended: "reviewing the operation of registration of town and village greens in order to reduce the impact of the current arrangements on developments that have received planning permission." The Government response[21] said that "The Government recognises that a balance needs to be struck between providing high quality open space and allowing legitimate development to go ahead in the community interest." Consequently in July 2011 the National Planning Policy Framework was amended and now contains a presumption in favour of sustainable development. Development is a key plank of the Government's plan to encourage sustainable economic growth. The NPPF also provides an alternative means of protecting land through the Local Green Space designation which offers the same level of protection as that provided to green belt land.

7.7 Also in July 2011, the Government published a consultation paper which contained five main proposals for reforming the law on the registration of town and village greens, including: (i) introducing an initial sifting stage for applications to facilitate the rejection of those which clearly have no chance of succeeding; (ii) introducing a mechanism by which landowners make a declaration to protect their land

[17] See paragraph 60 and table 5 of the Impact Assessment prepared for the Growth and Infrastructure Bill (see web link to the document in paragraph 10.4 below).
[18] Quoted from paragraph 42 of the Impact Assessment for the Growth and Infrastructure Bill (see web link in paragraph 10.4 below).
[19] http://webarchive.nationalarchives.gov.uk/+/http:/www.defra.gov.uk/wildlife-countryside/issues/common/pdf/clps.pdf
[20] http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/penfold
[21] www.bis.gov.uk/assets/biscore/enterprise/docs/g/10-1216-government-response-penfold-non-planning-consents.pdf

from being registered as a town or village green; (iii) introducing a character test so as to ensure that land could not be registered unless it can be shown that it is open and unenclosed in character, and is recognisably similar to the popular perception of a traditional green; (iv) providing for integration between the planning system and the system for registering town and village greens by excluding from town or village green applications land which is earmarked for development; and (v) the introduction of fees for applications. The outcome of the consultation is set out under Section 8 Consultation outcome below. All of the proposals which require primary legislation were carried forward in the 2013 Act except the character test which was not pursued on the basis that it would penalise communities whose recreational land was not open, unenclosed and uncultivated[22].

7.8 Section 15 of the 2013 Act and the Regulations implement proposal (ii) above by introducing a mechanism for landowners to deposit a statement which has the effect of interrupting any recreational use as of right of the land to which the statement (and accompanying map) relates. The policy aim is to provide a clear and unambiguous mechanism for landowners to protect their land from registration as a town or village green, thereby reducing the cost incurred by landowners (and local authorities) in disputing town or village green registrations and avoiding the loss of value of land registered as a town or village green. It is hoped that this proposal will also encourage landowners to permit or tolerate recreational use of their land (whether occasional dog walking or regular permissive use by the local community), confident that by depositing a landowner statement under section 15A(1) of the 2006 Act and in accordance with the Regulations, such use could not give rise to a claim to registration as a green. Without such protection there is the potential for landowners deciding they have no option but to prevent access to land at all times (by fencing and/or physical challenge) in order to negate the risk of a town or village green application at some point in the future (unless the land were already subject to legal rights of access for recreation).

7.9 Section 13 of the 2013 Act amends section 31 of the 1980 Act to allow for alignment of that system with landowner statements provided for in section 15A of the 2006 Act. In prescribing the form and procedural requirements relating to applications to make deposits under both of the above provisions, the Regulations implement section 13 of the 2013 Act and aim to minimise the administrative burden and cost on landowners in making such applications and the administrative burden on the local authorities processing the same.

7.10 The other town or village green reforms contained in the 2013 Act are explained below. Section 14, which was an amendment made to the Bill at Lords report, reduces the period of grace in section 15(3)(c) of the 2006 Act (from two years to one) for applications to register land in England as a town or village green where use ‘as of right’ of the land has ceased. Section 16 excludes the right to make a new town or village green application under section 15(1) of the 2006 Act where a trigger event has occurred in relation to land. The right to apply remains excluded until a terminating event occurs in relation to the same land. Trigger and terminating events, which are prescribed by

[22] See footnote 24 for a web link to the consultation and its conclusions.

Schedule 1A to 2006 Act (as inserted by Schedule 4 to the 2013 Act), relate to the development of land through the planning system[23]. Section 17, which came into effect on 25 June[24], broadens the power under section 24 of the 2006 Act to make regulations prescribing fees for applications to amend the registers of common land and town and village greens.

8. Consultation outcome

8.1 The public consultation on the registration of new town or village greens was published in July 2011 and ran for 12 weeks until 17 October 2011. A summary of responses was published in November 2012 which showed that a majority of respondents to the consultation supported both the case for reform (68%) and the introduction of landowner statements specifically (71%)[25].

8.2 Defra policy officials have been working informally with a small group of expert stakeholders, including highways and greens practitioners, in developing the draft Regulations over the course of several months.

9. Guidance

9.1 Guidance for local authorities will be published on the www.gov.uk website. The application form prescribed in Schedule 1 to the Regulations contains notes on how to complete the form and separate supplemental guidance for applicants will be published on the same website. Applicants without access to the internet can obtain a copy of the guidance from Defra or the local authority. Local authorities will receive a letter explaining that the regulations will commence in October and that they should familiarise themselves with the regulations and the guidance.

10. Impact

10.1 The impact on business is a cost saving. The cost of the fee for submitting an application will be more than offset by the benefit of retaining the resale value of land following its protection from registration as a town or village green or a highway. Moreover, the deposit of landowner statements and declarations is entirely voluntary. An Impact Assessment prepared for the 2013 Act estimated that the annual saving to business would be £3.4 million.

10.2 The impact on charities and voluntary bodies which are landowners is a cost saving (see paragraph 7.3 above), but otherwise the impact is neutral.

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[23] Section 16 of the 2013 Act came into force on Royal Assent (25 April 2013). The Government has published a consultation paper on additional trigger and terminating events: www.gov.uk/government/consultations/registration-of-new-town-or-village-greens-proposed-amendments-to-the-commons-act-2006.

[24] See section 35(3) of the 2013 Act.

[25] A copy of both the consultation and the consultation conclusions was published at: www.gov.uk/government/consultations/the-registration-of-new-town-or-village-greens

10.3 The impact on the public sector is a cost saving. The existing function to process highways deposits under section 31(6) of the 1980 Act and manage the register for recording them is to be expanded to incorporate landowner statements with respect to town and village greens, but the costs of this expansion are reimbursed to local authorities through fees paid by applicants. Though this is cost-neutral, the saving emanates from the reduction in costs due to fewer applications for town and village green owing to the deposit of landowner statements. The Impact Assessment prepared for the 2013 Act estimated that the reforms would allow local authorities to save £2.64 million annually.

10.4 A copy of the Impact Assessment prepared for the Growth and Infrastructure Bill has been published at: www.parliament.uk/documents/impact-assessments/IA12-037.pdf. Figures quoted in this section from the Impact Assessment remain accurate.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken in the Regulations is to keep to a minimum the procedural requirements of processing the applications because the costs incurred by the local authority in adhering to the procedure would ultimately be passed on to the applicant. The regulations also aim to minimise the administrative burden and cost on landowners including small businesses such as farmers and other landowners by allowing for a combined application form to be used for deposits under the 1980 Act and the 2006 Act.

11.3 The basis for the final decision on what action to take to assist small business is set out in detail in the Impact Assessment which concluded that the reforms to the law on registering town and village greens would help promote sustainable economic growth.

12. Monitoring & review

12.1 The effect of this instrument will be monitored through a bi-annual survey sent to local authorities.

12.2 There are several success criteria. Firstly, a reduction in the costs currently incurred by landowners when opposing applications to register their land as a town or village green or as highway. In this respect, success would mean many fewer applications are opposed by landowners because sections 15A and 15B, together with the Regulations, provide landowners with a legally certain and cheaper means of protecting their land from its registration as a town or village green or highway. The second criterion is to increase knowledge among landowners, users and the general public as regards to what land is subject to a statement or declaration. Thirdly, the registers should also help local authorities to better manage their functions for rights of way and town and village greens. For example, they could use the register to establish whether there are any rights of way over land, or whether to accept an application to register land as a town or village green.

13. Contact

13.1 Grant McPhee at the Department for Environment, Food and Rural Affairs, Tel: 0207 238 6326, or email: grant.mcphee@defra.gsi.gov.uk can answer any queries regarding the instrument.