EXPLANATORY MEMORANDUM TO

THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND) REGULATIONS 2007

2007 No. 457

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. Description

2.1 These Regulations deal with applications to local authorities for the registration of land as a new town or village green, and the determination of such applications by the authority. The Regulations prescribe a form which must be used for the purposes of any application, and will be accompanied by detailed non-statutory guidance notes on the registration process.

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

3.1 None.

4. Legislative Background

4.1 Section 15 of the Commons Act 2006 replaces with modifications previous legislation for the registration of new greens contained in sections 13 and 22 of the Commons Registration Act 1965. The 1965 Act requires town or village greens to be formally registered, in registers held by the commons registration authority (usually the county council or unitary authority). Land may be registered under the 1965 Act if it has been used by local people for lawful sports and pastimes, as of right, for at least 20 years.

4.2 Amendments were made to the criteria for registration by section 98 of the Countryside and Rights of Way Act 2000, with the intention of removing certain impediments to registration, but the amendments did not have the effect intended. The judgment of the Court of Appeal in the *Trap Grounds* case in February 2005[1], caused a number of disputed applications for registration to fail. In May 2006 the House of Lords overturned[2] parts of the judgment but ruled that an application for registration of a green must be made before, or immediately following, any challenge to use of the land by the landowner.

4.3 These rulings were taken into consideration in the drafting of the new modified criteria for registration in section 15, which adopts broadly the same registration criteria as the 1965 Act but confers greater clarity and most significantly provides a

[1] *Oxfordshire County Council v. Oxford City Council and Robinson* [2005] EWCA Civ 175
[2] *Oxfordshire County Council v. Oxford City Council and another and others* [2006] UKHL 25.

period of grace, if use of the land is challenged by the landowner, during which an application to register can still be made.

4.4 In Parliament, Ministers gave a commitment to bring (what is now) section 15 into force as a priority[3]. The Commons Act 2006 (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/456) brings into force section 15 of the 2006 Act, together with certain ancillary provisions. The Regulations are made on an interim basis (see paragraph 7.6 below) to enable applications for the registration of new greens to be brought under section 15. Early introduction of section 15 will bring clear benefits for potential applicants for registration of new greens, by commencing the new, more favourable, criteria in that section at the earliest possible date.

4.5 The Commons Registration (New Land) Regulations 1969 (SI 1969/1843), made under the 1965 Act, set out procedural arrangements for applications for registration of new greens under that Act. The Commencement Order referred to above also gives effect to the repeal (by the 2006 Act) of the provisions of the 1965 Act which enable the registration of new greens, and the relevant provisions of the 1969 Regulations therefore cease to have effect for this purpose.

4.6 In Defra's view, once registered, town and village greens will be subject to statutory protection under section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. Section 12 protects greens from injury or damage and interruption to their use or enjoyment as a place for exercise and recreation. Section 29 makes encroachment or inclosure of a green, and interference with or occupation of the soil, unlawful unless it is with the aim of improving the enjoyment of the green.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 Town and village greens originally developed under customary law as areas of land where local people indulged in lawful sports and pastimes and in so doing established recognised recreational rights. These rights typically included organised or *ad-hoc* games, picnics, fêtes and similar activities. The customary right was established by long usage that was deemed to date back to the year 1189 — the limit of legal memory. The Commons Registration Act 1965 made provision for the registration of these historic greens, and also enabled 'new' greens to be registered on the basis of 20 years' use 'as of right' (*i.e.* without permission, force or secrecy).

7.2 Following earlier public consultation on a range of measures, the *Common Land Policy Statement 2002* set out the Government's commitments to legislate to reform

[3] Lords *Hansard,* 18 Jan 2006 col. 688

the law relating to common land and greens. The Commons Act 2006 gives effect to many of the commitments in the *Policy Statement.*

7.3 The Commons Act 2006 received Royal Assent on 19 July 2006. It repeals the 1965 Act, and re-enacts (with modifications) in section 15 provision in the 1965 Act for the registration of new greens. Section 15 makes the following changes to the existing law:

- It provides a period of grace after use as of right has been ended by the landowner, during which an application to register land as a green can still be made. This will normally be two years but as a transitional measure, five years will be allowed where the use ended before 6 April 2007 (the date on which section 15 is brought into force).

- It ensures that, where a landowner grants permission for use of his land when there has already been 20 years' use of the land as of right, then use continues to be regarded as of right (so there is no time limit for making an application for registration, unless the landowners takes other steps to challenge use).

- It requires any period of statutory closure (*e.g.* during an outbreak of foot-and-mouth disease) to be disregarded when deciding whether there has been 20 years' use as of right.

- For the first time, it enables the owner of land to register it voluntarily as a green.

7.4 The registration of greens was the subject of much debate in both Houses during the Parliamentary stages of the Commons Bill. In response to a number of points made by members of both Houses, the relevant clause of the Bill was substantially amended during its passage through Parliament to provide greater certainty, so that crucial elements of the criteria for registration were included in the clause itself, rather than left to secondary legislation.

7.5 One significant change effected by section 15 is the new power which for the first time enables the owner of land to apply to register it voluntarily as a green. This can be done only if the landowner has first obtained the consent of any lease or charge holder of the land, such as a tenant, or a mortgagee. A green that has been dedicated voluntarily will be subject to the same statutory protections as all other registered greens and local inhabitants will have the legal right to indulge in sports and pastimes on the green.

7.6 Part 1 of the 2006 Act includes a number of other changes to the registration arrangements for common land and greens. Defra's intention is to introduce these provisions on a phased basis, beginning with a pilot scheme in 2008, followed by commencement on a region-by-region basis between 2010 and 2014. The full implementation of Part 1 will include new arrangements for the determination of applications under that Part, including applications for the registration of greens, which may include provision for disputed applications to be referred by the registration authority to a person appointed from an independent panel. As an interim arrangement, these Regulations enable applications to register land using the new criteria under section 15, but adopting procedures similar to those which apply in relation to applications currently brought under the 1965 Act. These Regulations will

be replaced when Part 1 is fully brought into force in relation to any particular area or region.

8. Impact

8.1 A Regulatory Impact Assessment (RIA) was prepared for the Commons Bill. Copies of the RIA were deposited in the House libraries and the RIA may be seen on the Defra website at: www.defra.gov.uk/wildlife-countryside/issues/common/commonbill/pdf/full-ria.pdf.

8.2 A separate RIA has not been produced for the Regulations as they have no discernable impact on the costs of business. Defra has undertaken an analysis of the comparative advantages and disadvantages arising from early implementation of section 15 and concluded that there should be no significant impact on local authorities or business: the analysis is at annex A.

8.3 No public consultation exercise has been conducted in relation to these Regulations, because they replicate the procedures contained in existing regulations, and the Regulations are required solely to enable the commencement of section 15 of the Commons Act 2006. The relevant provisions in the Act were fully debated during the passage of the Commons Bill through Parliament, and consultation on implementation is unnecessary. We have consulted key stakeholders including representatives from registration authorities and are keeping them fully informed about the introduction of these measures. A new more modern application form and clearer guidance on the new criteria for registration will accompany the Regulations, which will assist the public in bringing new applications.

9. Contact

9.1 Heather Gates at the Department for Environment, Food and Rural Affairs, Tel: 0117 372 6266 or e-mail: heather.gates@defra.gsi.gov.uk can answer any queries regarding the instrument. Further information about the registration of town and village greens and the Commons Act 2006 generally, is also available on the Defra website, at: www.defra.gov.uk/wildlife-countryside/issues/common/index.htm.

February 2007

Annex A — Section 15 of the Commons Act 2006: Defra Analysis of early implementation

1. Section 15 of part 1 of the Commons Act 2006 introduces modified criteria for the registration of new town or village greens. It updates the criteria contained in the Commons Registration Act 1965, and takes account of the judgement of the House of Lords given in the *Trap Grounds*[4] case (see paragraph 8 below) in 2006.

2. Part 1 of the 2006 Act is expected to be implemented over a period of time, beginning with a pilot scheme in early 2008, and moving to a region-by-region roll-out. So, without more, section 15 would not be brought into force throughout England for several years.

3. Section 15 contains transitional provisions which require promptness in certain applications to register greens. Where recreational use of a claimed green was challenged before the date of commencement of the section, then an application to register must be brought within five years of the date of challenge. That means that some (claimed) greens may be lost if section 15 is not commenced soon (in some cases, the challenge took place several years ago, and time is running out). The then Minister in charge of the Commons Bill in the House of Lords said that Defra was committed to giving "high priority to ensuring early commencement…we need to bring [section 15] into effect at the earliest opportunity"[5].

4. This analysis considers the comparative advantages and disadvantages arising from implementation of section 15 at the earliest opportunity set against implementation as an element of part 1 generally at a later date.

Summary

5. Early introduction of section 15 will bring clear benefits for potential applicants for registration of new greens, by commencing the new, more favourable, criteria at the earliest possible date. Early introduction will have little impact on registration authorities' procedures, except that they will need to apply the new criteria in place of the old. Developers do not specifically resist early commencement (although they continue to argue against the principal of section 15), and they will not be inconvenienced by any significant changes in procedures; some may benefit from ensuring that the status of land may be determined at the earliest possible opportunity.

6. Early introduction may also cause a spike in applications, which registration authorities will need to prepare for. Most such applications will be known to the authority, because they will be in abeyance as a result of failed applications under the 1965 Act, or held over pending the introduction of the new criteria — these are applications which would have come forward sooner were it not for the intervention of the court in *Trap Grounds.* Our intention to announce the commencement of section 15 (on 6 April 2007) with three months' notice will enable authorities to plan ahead. Moreover, any substantial delay to commencement can reduce the spike only by causing applications to be lost altogether because they fall outside the period of grace allowed for in the Act.

[4] www.bailii.org/uk/cases/UKHL/2006/25.html
[5] Lords *Hansard,* 18 Jan 2006 col. 688

Background

7. The criteria for registering greens were originally laid down in the Commons Registration Act 1965. They were modified by section 98 of the Countryside and Rights of Way Act 2000 (CROW), but this amendment has proven to be defective.

8. In February 2005, the Court of Appeal decided in the *Trap Grounds* case that applications for registration of greens could not succeed if the use of the land for recreation was challenged before the date on which the application was determined by the registration authority (*i.e.* the owner of the land was able to negate an application by putting a stop to use of the land between the date of application and the date of the application's determination by the authority). That judgement caused most pending disputed applications for registration of greens either to be withdrawn or to fail. In its judgement in the *Trap Grounds* in May 2006, the House of Lords said that the Court of Appeal was wrong in permitting a successful challenge to use between application and determination, but decided that an application must nevertheless be made immediately after the date of challenge.

9. The Commons Bill at introduction re-enacted the provision in the 1965 Act (as amended by CROW), but it was amended in Parliament to address calls from all sides of the Lords to promote clearer, more reliable criteria, and to address the *Trap Grounds* judgement. The outcome is that the criteria for registration of new greens revert (in general) to the position which was thought to prevail before *Trap Grounds*, but with modifications so that it is clear that an application must be brought within two years of any challenge to recreational use, or five years where the challenge occurred before the date of commencement of section 15.

10. A research project into new town or village greens published in April 2006[6] concluded from a survey of registration authorities that, between 1993 and 2005, 380 applications for registration of greens had been received by the two-thirds of authorities responding. Some 89 applications had been successful. Around one-third (115) of all applications remained outstanding. Some authorities with several applications in train operate a 'one-at-a-time' rationing policy.

11. Although the figures do not allow for registration authorities which did not respond, we believe that non-responding authorities are biased towards those which have little registration activity, because officers had no experience of such work to justify completing the questionnaire. Therefore, the figures given above may be reasonably representative of the total level of activity.

Implementation of section 15 and part 1

12. Section 15 is one of a number of provisions in part 1 of the Act relating to the registration of common land and town or village greens generally. The timetable for introduction of part 1 envisages a staged implementation, beginning with consultation in spring 2007, commencement in one or more pilot areas in early 2008, and region-by-region commencement from 2010 or later. This approach would mean that (without specific early commencement of section 15), the new criteria for registration of greens would not come into force throughout England until about 2014.

13. We therefore propose an interim implementation of section 15. This would give effect to the new criteria for registration of greens, throughout England, from 6 April 2007, but applying (with minimal modifications) the existing procedures for

[6] *Town and Village Green Research Project,* Defra, 2006.

registration. This would be done by making new regulations which repeat (with minor modifications) the content of the existing regulations[7].

14. However, there remains a choice between early implementation, and implementation within the routine of part 1 at a later date. The following section analyses the case for and against early implementation.

The case for early implementation in April 2007

15. Early implementation addresses the following concerns:

- Applications are failing because they are out of time under the present legislation. Applications for registration under the 1965 Act (in the light of the *Trap Grounds* judgement) cannot succeed unless made immediately following a challenge to use. In practice, applications are frequently only inspired by a challenge to use[8], and in such cases, the process of drawing a community together to make an application and provide supporting evidence invariably makes this requirement impossible to achieve[9]. **Early introduction of section 15 will re-enable applications for registration of greens after use has been challenged.**
- Land will be blighted until an application can be made under section 15. Potential claims for registration of greens, which could not succeed under the 1965 Act, are being deferred until section 15 is brought into force. And rejected applications under the 1965 Act may be revived and brought forward for a second try under section 15. In either case, the land affected will be blighted until its status can be determined by application under section 15, or until the expiry of the period of grace for application under section 15 (which may be several years). **Early introduction of section 15 will minimise the duration of any period during which land may be blighted by potential applications for registration of a green.**
- The existing criteria for the registration of greens are notoriously uncertain, and are constantly reviewed by the courts[10]. **Early introduction of section 15 will minimise uncertainty for everyone as to the criteria for registration of greens, and reduce the likelihood of registrations being judicially reviewed by the courts.**

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[7] The existing regulations are contained in the Commons Registration (New Land) Regulations 1969 [SI 1969/1843].

[8] Local people using an open space for recreation generally see no reason to take steps to protect their continued use of the land, unless and until the use comes under threat (*e.g.* because of a planning application).

[9] See research report (*ibid*), section 10.3.2: "Periods of 6 weeks, 3 months, 6 months, 14 months and18 months were cited as the time taken to collect the supporting information. … The applicant who only spent 6 weeks collecting the information now feels she should have spent more time collecting even more information to support her case."

[10] The criteria for registration of greens have been considered since 2003 in the higher courts in *The Trap Grounds* (three hearings); *R (on the application of Whitmey) v Commons Commissioners*; *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire District Council*; *R (on the application of Laing Homes Ltd) v Buckinghamshire County Council and the Secretary of State for the Environment, Food and Rural Affairs*; *R v City of Sunderland* ex parte *Beresford*. Defra is aware that other cases have been heard by the courts but not reported.

The case for later implementation with part 1 generally (between 2008 and 2014)

16. Early implementation can be criticised on the grounds set out below, favouring later implementation. But in each case, the criticism is misguided or mitigated:

- Registration authorities will be required to operate a two-stage transition, first to adopt the new criteria, and at a later date, to implement the new procedures under part 1 generally. However, in practice, the first stage will involve minimal adaptation, because the procedures to be followed by authorities in making and processing an application will remain almost entirely unchanged. **DCLG agrees that early introduction of section 15 will not impose new administrative burdens on registration authorities.**
- Applicants for registration will face a two-stage transition. But the new criteria are more favourable to applicants, and the first stage transition will be noticeable only in adopting a modified, more user-friendly application form and guidance notes (the information sought in the form will generally remain the same). We are also sponsoring the Open Spaces Society to revise its guidance for applicants, *Getting Greens Registered*, to coincide with early implementation. **Early introduction of section 15 will assist rather than hinder applicants in making new applications.**
- Landowners and other interests will face a two-stage transition. But again, the procedures to be followed in responding or objecting to an application will remain almost entirely unchanged. The House Builders' Federation has confirmed it has no wish to oppose early commencement, and recognises the uncertainty surrounding the present system. Some developers, and their representatives, have lobbied (and continue to lobby) against section 15. But the merits of the criteria for registration of greens under section 15 are now beyond debate: the Commons Act 2006 has received Royal Assent, and awaits implementation. **Early introduction of section 15 will not affect landowners, except in commencing the new statutory criteria (which have been agreed by Parliament).**
- Registration authorities will face a spike in applications. We expect a spike to be caused by applications held over until the implementation of section 15. A later implementation date would affect the size of the spike: delay of a few months would be likely to increase the size of the spike (with more applications held in abeyance), but prolonged delay could diminish it (because old applications would begin to fall foul of the five year period of grace). We are already aware of two applications which are out-of-time and cannot now succeed. **Substantial delay in introduction of section 15 may reduce the spike in applications on commencement, but at the cost of losing otherwise meritorious applications for registration of new greens.**
- Early implementation makes no mention of long-awaited new procedures for the determination of disputed applications. Many registration authorities feel obliged to appoint barristers to inquire into and report on disputed applications, and would like to see clearer guidance. Part 1 provides for Defra to appoint a panel of inspectors to hear such cases. But it will take time to establish a panel, and it cannot coincide with early introduction of section 15. **Neither early introduction of section 15, nor leaving the existing procedures unchanged, will resolve difficulties with non-statutory inquiries: this must await the implementation of part 1 at a later date. So nothing would be gained by delay.**