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## SCRUTINY BOARD (REGENERATION)

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Meeting to be held in the Civic Hall, Leeds on  
Tuesday, 28th February, 2012 at 10.00 am

A pre-meeting will take place for ALL Members of the Board  
in a Committee Room at 9.30 am

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### MEMBERSHIP

#### Councillors

B Atha	-	Kirkstall;
D Collins	-	Horsforth;
P Ewens	-	Hyde Park and Woodhouse;
P Grahame	-	Cross Gates and Whinmoor;
J Harper	-	Armley;
G Hussain	-	Roundhay;
M Iqbal	-	City and Hunslet;
T Murray	-	Garforth and Swillington;
J Procter (Chair)	-	Wetherby;
R Pryke	-	Burmantofts and Richmond Hill;
G Wilkinson	-	Wetherby;
Mr G Hall	-	Co-optee (Non-voting)

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*Please note: Certain or all items on this agenda may be recorded*

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# AGENDA

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8			<b>TOWN AND VILLAGE GREENS</b>  Appendix 1 appertaining to the Joint report of the City Solicitor and Director of City Development	1 - 10

# Management and protection of registered town and village greens

## Frequently asked questions

January 2010

## Management and protection of registered town and village greens Frequently asked questions

This guidance note explains Defra's view on a number of issues relating to the management and protection of town and village greens which have been recorded in a register of town or village greens. These registers are held by commons registration authorities (i.e. county councils, unitary authorities, metropolitan borough councils and London borough councils) and are available for public inspection. Guidance on how to apply to register 'new' town or village greens can be found on Defra's website<sup>1</sup>.

Please note that this guidance is non-statutory and has no legal effect. It should not be regarded as a definitive statement of the law. Furthermore it does not provide a comprehensive explanation of every issue. Defra cannot provide advice on individual circumstances and anyone needing this should consider taking independent expert advice. Please also note that references in this guidance to 'a green' refer to a registered town or village green.

### 1. How are greens protected?

Greens receive considerable statutory protection under the following two Victorian statutes<sup>2</sup>.

Section 12 of the Inclosure Act 1857 makes it a criminal offence to:

- wilfully cause injury or damage to any fence on a green;
- wilfully take any cattle or other animals onto a green without lawful authority<sup>3</sup>;
- wilfully lay any manure, soil, ashes, rubbish or other material on a green;
- undertake any act which causes injury to the green (e.g. digging turf); or
- undertake any act which interrupts the use or enjoyment of a green as a place of exercise and recreation (e.g. fencing a green so as to prevent access).<sup>4</sup>

Section 29 of the Commons Act 1876 makes it a public nuisance to:

- encroach on a green (e.g. extending the boundary of an abutting property so as to exclude people from that area);
- inclose a green (i.e. by fencing it in, whether or not the effect is to exclude public access);

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<sup>1</sup> [www.defra.gov.uk/rural/protected/commonland/tvg.htm](http://www.defra.gov.uk/rural/protected/commonland/tvg.htm).

<sup>2</sup> In *Trap Grounds* (Oxfordshire County Council v. Oxford City Council & another - [www.bailii.org/uk/cases/UKHL/2006/25.html](http://www.bailii.org/uk/cases/UKHL/2006/25.html)) the House of Lords ruled that all land registered as town or village green is subject to the protection afforded by these two statutes.

<sup>3</sup> In Defra's view a local inhabitant who takes an animal onto a green in exercise of their right to enjoy lawful sports and pastimes does not commit a criminal offence under section 12. In this context a lawful pastime would include dog walking and might include horse-riding. Lawful authority would also include grazing cattle or other animals in exercise of a registered right of common exercisable over the green.

<sup>4</sup> It is not clear whether '*mens rea*' (a guilty mind) is required for all of the offences in section 12, although in the Chancery division judgment of *Trap Grounds* (<http://www.bailii.org/ew/cases/EWHC/Ch/2004/12.html>) Lightman J appears to suggest (albeit *obiter dicta*) that there is no exposure to prosecution under the Victorian statutes unless the existence of the green is established and known. As far as we are aware, this issue has not been considered in subsequent case law.

- erect any structure other than for the purpose of the better enjoyment of the green; or
- disturb, occupy or interfere with the soil of the green (e.g. camping) other than for the purpose of the better enjoyment of that green.

If the above provisions were to be interpreted strictly, an act which causes any injury to a green would appear to be an offence under section 12 of the 1857 Act and any disturbance or interference with the soil of the green (other than for the purpose of better enjoyment of the green) would technically be deemed a public nuisance under section 29 of the 1876 Act. However, in Defra's view, in considering whether or not any given development or action contravenes either or both of these statutes a court is likely to be concerned with whether material harm has been caused to a green and whether there has been interference with the public's recreational enjoyment. Other issues that might be relevant include the proportion of a green affected by the development or activity and the duration of the interference.

## **2. What happens if an offence has been committed?**

Where an offence has occurred under section 12 of the 1857 Act criminal proceedings can be instigated by the owner of the green, any inhabitant of the parish, the parish council or, where there is no parish council, the district council<sup>5</sup>. An offence under this section of the Act can be prosecuted in the Magistrates' Court.

An offence under Section 29 of the 1876 Act is deemed to be a public nuisance at common law and as such can be the subject of criminal proceedings as well as, in limited cases, civil actions.

It may be possible for an individual to commence private criminal proceedings for an offence under section 29 of the 1876 Act. A public nuisance can be prosecuted in either the Magistrates' Court or the Crown Court<sup>6</sup>.

Alternatively, civil proceedings for a public nuisance may be brought by an individual or a local authority in their own name provided they have suffered special damage. A local authority may also bring civil proceedings for public nuisance where they consider it expedient for the promotion or protection of the interests of the inhabitants of their area<sup>7</sup>. All other civil proceedings in respect of a public nuisance should be brought with the sanction of and in the name of the Attorney-General.

In addition to the powers to prosecute described above, local authorities<sup>8</sup> also have powers under section 45 of the Commons Act 2006 to protect land which is registered as

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<sup>5</sup> The 1857 Act provides that only the churchwarden or overseer of the parish or the owner of a green may prosecute an offence under section 12. However, under Section 189(3) of the Local Government Act 1972 reference to a churchwarden or overseer of the parish made in section 12 of the 1857 Act is to be construed as reference to: (a) with respect to a green in a parish, the parish council or, where there is no parish council, the parish meeting; and (b) with respect to any other green, the district council. Section 29 of the Commons Act 1876 added 'any inhabitant of the parish' to the list of those who could prosecute an offence under Section 12.

<sup>6</sup> Section 17 and Schedule 1 (Offences Triable on Indictment or Summarily) of the Magistrates Court Act 1980.

<sup>7</sup> Section 222 of the Local Government Act 1972.

<sup>8</sup> In the context of section 45 'local authority' means a county, district, parish or London borough council, and a National Park authority (see paragraph 1(2) (d) of Schedule 9 to the Environment Act 1995).

a town or village green where that land has no owner recorded in the register of title at the Land Registry and the authority cannot otherwise identify the owner. In such cases, the local authority is able to take any steps to protect the land against unlawful interference that could have been taken by the owner of the land.

Court action can be costly and generally the burden of proof lies with the claimant (in civil proceedings) and the prosecution (in criminal proceedings). Therefore, before taking action through the courts it may be helpful to seek the removal of the works, or the termination of the activity which you consider to be unlawful, through correspondence or negotiation. If you decide to take action through the courts you would be well advised to seek independent legal advice. If you consider court action to be necessary but too burdensome, you may wish to contact your local authority which may be willing to take action in the interests of the community.

### 3. Can vehicles drive over or park on greens?

Section 34 of the Road Traffic Act 1988 makes it a criminal offence to drive over, or park on land (including a green<sup>9</sup>) not forming part of a road without lawful authority to do so. In this context 'lawful authority' includes either the lawful permission of the owner of the land or a private vehicular right<sup>10</sup>. Those who have lawful permission, a private right or some other form of lawful authority may drive over, or park on, a green without committing an offence under the 1988 Act. Furthermore it is not an offence under the 1988 Act to drive on a green within 15 yards of a public road solely for the purposes of parking on the green<sup>11</sup>.

However, irrespective of whether an offence has been committed under the 1988 Act, driving over or parking on a green may still be an offence under section 12 of the 1857 Act or section 29 of the 1876 Act (see question 1). For example, if a court adopted a strict interpretation of section 12 of the 1857 Act, any interruption of the use or enjoyment of a green would be an offence under that provision. However, in Defra's view, occasional driving of private vehicles over a green in exercise of a private right of way, for the purposes of parking on private land beyond the boundary of the green, is unlikely to be viewed by a court as giving rise to an offence under the 1857 and 1876 Acts, if the interference with recreational enjoyment is very brief. In our view, a court is more likely to find that vehicular use contravenes section 12 or section 29:

- if the use is very frequent;
- if the use is by very large or slow moving vehicles;
- if the vehicle is parked on the green; or
- if damage is caused to the green by the vehicular use.

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<sup>9</sup> In *Massey and Drew v Boulden* [2003] (<http://www.bailii.org/ew/cases/EWCA/Civ/2002/1634.html>), the Court of Appeal held that the phrase 'land of any other description' in section 34(1)(a) of the 1988 Act applied to greens.

<sup>10</sup> The House of Lords in *Bakewell Management Ltd v Brandwood and Others* (<http://www.bailii.org/uk/cases/UKHL/2004/14.html>) established circumstances in which it is possible to claim a prescriptive right (right of long-user) of vehicular access over common land notwithstanding the prohibition in section 34, although the issue of establishing prescriptive rights for vehicular access over greens was not specifically addressed in this case. For further information on this issue please refer to Defra's non-statutory guidance note entitled 'Vehicular access across Common Land and Town or Village Greens' ([www.defra.gov.uk/rural/countryside/crow/vehaccess.htm](http://www.defra.gov.uk/rural/countryside/crow/vehaccess.htm).)

<sup>11</sup> This provision does not confer a right on any person to drive on a green for this purpose, or to park there: it merely provides that an offence is not committed under the 1988 Act.

A court would need to consider each case on its merits in order to decide whether the vehicular use was an offence, but in one case decided in the Court of Appeal, it was observed that there was 'no sufficient reason to regard the existence and use of [an access track] as injuring the green or interrupting its use or enjoyment by others'<sup>12</sup>.

Further information regarding vehicular access over greens can be found in Defra's non-statutory guidance note entitled 'Vehicular access across Common Land and Town or Village Greens'<sup>13</sup>.

#### **4. Who owns our green?**

Like other types of land, greens can be owned by private individuals and organisations as well as by public bodies. There are two sources of information which you may find particularly helpful in ascertaining who owns a green.

The first of these sources is the register of title, which is maintained by the Land Registry. Much, but not all, land in England is registered in the register of title. You can find out more information about this register on the Land Registry's website<sup>14</sup>. The title to (*i.e.* ownership of) this registered land is guaranteed by the state. Broadly, the guarantee means that if a mistake occurs in the register and the owner suffers loss, the Land Registry may have to pay indemnity (*i.e.* compensation).

The second source of information regarding ownership is the register of town or village greens. These registers not only describe the extent of each green but they also give details of claims to ownership of those greens which were recorded during the first wave of registrations in the late 1960s. Unlike the register of title, the ownership information in the registers of town and village greens is not guaranteed, nor is it conclusive. The reliance which can be placed on the accuracy of this part of the register is dependent upon how that information came to be recorded:

- Where the claim to ownership was unopposed, the registration was confirmed without any further scrutiny. In such cases the information in the registers is only a statement of the claim made to ownership at that time.
- Where the claim to ownership was either opposed or no claim was registered, the matter was referred to the Commons Commissioners. If, following a hearing, the Commissioner was able to determine the owner of the green, that information was recorded in the register. However the Commissioner's decision only gave rise to a presumption of the ownership at the time of that decision: it was not conclusive.
- If no claim to ownership was registered, but on referral to the Commissioner, a local authority successfully demonstrated ownership of the land, it became vested in that local authority (reinforcing the authority's ownership of the land). Again, in such cases the registers are good evidence of the ownership of a green at the time of the Commissioner's decision.
- If the Commissioner had insufficient evidence before him to determine the ownership of the land, it became vested in the parish council, or where there was

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<sup>12</sup> Paragraph 31 of *Massey and Drew v. Boulden* - [www.bailii.org/ew/cases/EWCA/Civ/2002/1634.html](http://www.bailii.org/ew/cases/EWCA/Civ/2002/1634.html).

<sup>13</sup> [www.defra.gov.uk/rural/countryside/crow/vehaccess.htm](http://www.defra.gov.uk/rural/countryside/crow/vehaccess.htm).

<sup>14</sup> [www.landreg.gov.uk](http://www.landreg.gov.uk)

no parish council, in the district or borough council<sup>15</sup>. In such cases the registers are good evidence of the ownership of a green at the time of the Commissioner's decision.

It should be noted that, however ownership details came to be recorded on the commons registers, they can only be used as evidence of ownership at the time of the registration. Since the initial wave of registrations in the late 1960s, registration authorities have been able to update the ownership section of the registers only where they have been informed by the Land Registry that the ownership of the green has been recorded in the register of title. On receipt of this information a registration authority is required to delete any details of ownership in the register of town or village greens<sup>16</sup>. Where the ownership information has been deleted in this way, you should inspect the register of title, but it is a good idea to check the register of title even if there is a subsisting entry as to ownership in the register of town or village greens.

## **5. Who has the right to enjoy lawful sports and pastimes on a green?**

The right to enjoy lawful sports and pastimes on a green does not extend to the public at large, but is only exercisable by inhabitants of the locality in which the green is situated<sup>17</sup>. The courts have held that the term 'locality' includes a legally recognised unit of land, such as a parish<sup>18</sup>. Unfortunately, identifying the relevant locality can, in practice, be difficult.

Where a green has been added to the registers since 1970, the commons registration authority should hold records of the application for registration and these may indicate what the locality was claimed to have been for the purposes of registration. When determining whether or not to register a parcel of land the registration authority will have considered the extent of the locality, and in some cases details of their conclusions may also have been included in a report or decision<sup>19</sup>. Furthermore, since 6<sup>th</sup> April 2007 all applications to register new greens must have been supported by a description or plan of the relevant locality or neighbourhood<sup>20</sup>. These descriptions and plans should also be held by the registration authority.

Similar records are unlikely to exist for the majority of greens which were registered in the first wave of registrations in the late 1960s. Where such a registration was disputed, it would have been inquired into by a Commons Commissioner. The decision of the

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<sup>15</sup> The vesting of land in the local authority was provided for by Section 8(4) of the Commons Registration Act 1965. This section was repealed by the Commons Act 2006, but the effect of any vesting is preserved by paragraph 9(1) of Schedule 3 to the 2006 Act.

<sup>16</sup> Section 12 of the Commons Registration Act 1965 or paragraph 8(2) of Schedule 3 to the Commons Act 2006 and Regulation 48 of the Commons Registration (England) Regulations 2008.

<sup>17</sup> It was ruled in *Earl of Coventry v Willes* [1863] 9 LT 384 that 'A customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist and cannot be claimed in respect of the public at large'.

<sup>18</sup> *Edward v Jenkins* [1896] 1 Ch 308.

<sup>19</sup> In determining the application for registration, the registration authority may have adopted a definition of the locality which is different to that proposed by the applicant.

<sup>20</sup> Regulation 3(2) of The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 and paragraph 9 of Schedule 4 to The Commons Registration (England) Regulations 2008. This requirement does not apply to land which has been voluntarily dedicated as a town or village green under section 15(8) of the Commons Act 2006.



Commissioner may in some cases make reference to the locality<sup>21</sup>. In practice, the majority of greens registered during the first wave were either not inquired into (and became final without objection), or the Commissioner did not make clear the precise locality which he adopted for the purposes of determining the registration. If the green is located in a village, then it may reasonably be assumed that the right to enjoy lawful sports and pastimes on the green is exercisable by the inhabitants of that village. But if the green is located in a suburb or on the edge of a town, the locality may be much less certain.

The position is further complicated by amendments made to the criteria for registration of a green by the Countryside and Rights of Way Act 2000<sup>22</sup>, and now contained in section 15 of the Commons Act 2006, which enable a green to be registered on the basis of long-term use (at least 20 years) by “the inhabitants of any locality, or of any neighbourhood within a locality”. In effect, it seems that, where a green was registered on the basis of long-term use by the inhabitants of a neighbourhood within a locality, the right to enjoy lawful sports and pastimes on that green will be confined to the inhabitants of that neighbourhood, and not to the inhabitants of the locality as a whole. In such cases, the extent of the neighbourhood should be apparent from the application for registration of the green, or any subsequent report or decision on the application.

Ultimately, where an issue cannot be resolved by other means, it will be for the courts to determine the extent of a locality or neighbourhood. Their decision will be based on the evidence available to them (this may include evidence of use, any relevant documentation and the physical characteristics of the surrounding area *etc.*).

## **6. Can the owner of a green charge people for using it?**

Inhabitants of the locality within which a green is situated have the right to use that green for lawful sports and pastimes<sup>23</sup>. By definition any right can be exercised free of charge. Therefore, although the owner of a green may ask a local inhabitant to pay a donation for their use of a green, that person would be under no obligation to pay. This principle would apply equally to a request for a contribution to maintain a green as it would to a request for a payment to enter an organised event such as a fête or sports match which was being held on the green. A local inhabitant cannot be required to pay a fee to exercise a right.

The right to take part in lawful sports and pastimes on a green extends only to local inhabitants, not the public at large. Those who are not inhabitants of the locality can be restricted from, or charged for, using a green unless they have some other right to be there (*e.g.* if they are crossing a green using a public right of way). However a landowner is likely to face considerable practical difficulties in preventing the general public from using a green owing to the difficulty of distinguishing local inhabitants from the general public.

## **7. What are lawful sports and pastimes?**

Local inhabitants have a right to take part in any lawful sport or pastime on a green. Lawful sports and pastimes are not restricted to those activities which were

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<sup>21</sup> Most decisions of the Commons Commissioners are available at: <http://www.acraew.org.uk/index.php?page=commissioners-decisions>.

<sup>22</sup> Section 98 (now repealed).

<sup>23</sup> Earl of Coventry v. Willes [1863] 9 LT 384.

enjoyed during the period of use which led to the green being registered<sup>24</sup>. Ultimately it is for the courts to decide whether or not an activity is 'lawful'. However in Defra's view where an activity is so inappropriate for an area that it is deemed to be a public nuisance by virtue of section 29 of the Commons Act 1876, it is unlikely to be treated as lawful. So, for example, in Defra's view horse riding on a small, vulnerable green in wet conditions might be a public nuisance and therefore unlawful.

#### **8. Do I need permission to carry out works on a green and to whom do I need to apply?**

If the intended works do not contravene either section 12 of the Inclosure Act 1857 or section 29 of the Commons Act 1876 (e.g. if they were for the better enjoyment of the green) then no special permission is required. That is to say that no application is needed solely because the land is a town or village green. However, other consents may still be required. For example, if works were for the better enjoyment of a green then they may not be in contravention of either of the 19<sup>th</sup> century statutes but depending on their nature may still require planning permission.

However, it is a criminal offence to undertake any works on a green which contravene the 1857 Act and works in breach of the 1876 Act will be deemed to be a public nuisance. Neither Defra nor any other body is able to give consent for illegal works to be undertaken on a town or village green.

Some greens are regulated by a scheme of regulation made under either the Metropolitan Commons Acts 1866–1898 or the Commons Act 1899. Your commons registration authority or district or borough council should be able to let you know whether a green is regulated under a scheme. The scheme may confer powers on the local authority to carry out improvements to the green, although in some cases the local authority may be required to obtain the consent of the Secretary of State before undertaking the works. You will need to inspect the terms of the scheme to see what, if any, improvements are permitted.

On a green managed under a scheme of regulation, section 38 of the Commons Act 2006 enables the Secretary of State to consent to other works, not permitted by the scheme. It is unclear whether a local authority may carry out works on a green managed under a scheme, where the works are either permitted by the scheme or consented to under section 38, but would contravene either the 1857 or the 1876 Act. However, in Defra's view, works proposed by a local authority on a green will generally be for the better enjoyment of the green, and the conflict will seldom arise. Guidance on how to make an application under section 38 can be found on the website of the Planning Inspectorate<sup>25</sup>.

If the planned works do contravene either the 1857 or the 1876 Act, then it may be possible to seek consent to deregister the land (please see below).

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<sup>24</sup> Paragraph 50 of *Oxfordshire County Council v Oxford City Council & another* ([www.bailii.org/uk/cases/UKHL/2006/25.html](http://www.bailii.org/uk/cases/UKHL/2006/25.html)). It should however be noted that, in the same judgement Lord Scott suggests that the rights acquired should reflect the user (paragraphs 84 and 85).

<sup>25</sup> [www.planning-inspectorate.gov.uk/pins/common\\_land/guidance/index.htm](http://www.planning-inspectorate.gov.uk/pins/common_land/guidance/index.htm).

## **9. Can I deregister a green?**

Under section 16 of the Commons Act 2006 an owner of a green may apply to the Secretary of State for land to be released from registration. If successful, such an application would result in the land no longer being subject to protection as a green.

If the 'release land' is more than 200 square metres in area, an application must be made to register 'replacement land' as a green in its place. If the release land is smaller than 200 square metres, a proposal for replacement land may be included, but there is no absolute requirement<sup>26</sup>. However, it is the policy of the Secretary of State to avoid the net loss of town and village greens. Therefore the Secretary of State generally expects that land will be offered in exchange even where the release land is less than 200 square metres<sup>27</sup>.

A proposed exchange under section 16 will be considered by the Secretary of State and will not be approved automatically. The Secretary of State will wish to take into account the impact of the exchange having regard (amongst other things) to the public interest. Further guidance on applications to deregister town and village greens is available on the website of the Planning Inspectorate<sup>28</sup>. Please note that there is a fee of £4,900 for an application to deregister land under section 16.

It may also be possible to apply to deregister land under section 149 of the Inclosure Act 1845 where such land is unsuitable or inconvenient for the purpose for which it was allotted. Applications must be made to the Secretary of State and can only be made in relation to land which was allotted under an inclosure award. No fee is charged for an application under section 149 but it must include exchange land which would be registered in place of the release land. The exchange land must be more convenient or beneficial than the release land.

## **10. Who is responsible for maintaining greens?**

Greens in local authority ownership are often managed by the authority under the Open Spaces Act 1906 or by a scheme of regulation under the Commons Act 1899. Some greens which are not owned by a local authority are also managed by a local authority under the 1899 Act. In such cases, the local authority is under a duty to maintain the green.

The law makes no provision regarding the maintenance of privately owned greens. Therefore, unless it is specifically provided for by some other form of regulatory instrument or legal agreement (such as a scheme of regulation or inclosure award), there is no obligation on a landowner, or any other party, to actively maintain a town or village green. However the landowner, or any person licensed by the landowner, does have the power to maintain a green as they see fit so long as they do nothing to interfere with the lawful recreational activities of the local inhabitants.

A district council, unitary authority or National Park authority may make a scheme of regulation for a green under the Commons Act 1899. The effect of the scheme, if confirmed, is to place management of the green in the hands of the council or authority.

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<sup>26</sup> Section 16 of the Commons Act 2006.

<sup>27</sup> A full copy of the Secretary of State's policy guidance on statutory consents can be found on our website: [www.defra.gov.uk/rural/protected/commonland/guidance.htm](http://www.defra.gov.uk/rural/protected/commonland/guidance.htm).

<sup>28</sup> [www.planning-inspectorate.gov.uk/pins/common\\_land/guidance/index.htm](http://www.planning-inspectorate.gov.uk/pins/common_land/guidance/index.htm).

The owner of the green may veto a scheme before it is confirmed. But if the owner is content to see the management of the green transferred to the local authority, or if there is no known owner, making a scheme may help resolve uncertainty over management.

#### **11. Can a neighbouring landowner acquire part of a green by adverse possession?**

Defra has produced a separate non-statutory guidance note on adverse possession in relation to common land and town and village greens. This guidance note is available on our website<sup>29</sup>.

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<sup>29</sup> [www.defra.gov.uk/rural/protected/commonland/guidance.htm#5](http://www.defra.gov.uk/rural/protected/commonland/guidance.htm#5).