

## **REGULATORY APPRAISAL**

### **COMMONS, WALES**

#### **THE COMMONS (SEVERANCE OF RIGHTS) (WALES) ORDER 2007**

##### **Background**

1. A right of common is, in essence, a right to use the product of someone else's land - this can include grazing animals, fishing, or collecting bracken or firewood. These rights are enjoyed by specific commoners, usually by virtue of the rights being attached to the property they occupy, often adjoining a common. Severance is the term used when specific rights of common have been sold, leased or licensed away from the land to which they were attached.
2. Section 9 of the Commons Act 2006 prohibits any further severance of rights from the land to which they are attached except in certain circumstances specified in Schedule 1 to the Act and in any Order made under that Schedule. This Order specifies the circumstances that will allow for temporary severance.

##### **Purpose and intended effect of the measure**

3. This Order prescribes certain exceptions to the prohibition imposed by the Commons Act 2006 on the severance of commons rights from the land to which they are attached. The Order will allow the temporary severance of rights from the commencement date where:
  - (a) the owner of the rights wishes to lease or let their rights for a period of 3 years; and
  - (b) where the owner of the land with rights attached wishes to retain his/her rights but lease or let the land/or part of the land.

##### **Risk Assessment**

4. Implementation of this Order will allow farmers and land owners to enter into agreements to temporarily sever commons rights from the land to which they are attached. If this Order is not made a number of farmers who, until the enactment of the Commons Act 2006, legitimately leased or let their rights, or their land without the rights, would be unable to do so in the future. There are, for example, situations where local farmers lease rights from land owners who themselves choose not to use their rights to graze animals on commons. This could lead to under-grazing and / or loss of subsidies for responsible farmers.

##### **Options**

###### Option 1: Do Nothing

5. The Commons Act 2006 commenced the prohibition on severance on enactment. Not proceeding to make this Order would mean that farmers relying on leasing agreements would now not legitimately be allowed to

graze their animals on the relevant commons. This could also lead to under-grazing and inadequate management of commons in some areas.

#### Option 2: Make the Legislation

6. This Order will prescribe the circumstances where temporary severance will be allowed in relation to commons in Wales. This should lead to the better management of certain commons where rights are not utilised, which has in turn lead to under-grazing.

#### **Benefits**

7. The main benefits in making the Order are that it will enable:

- legitimate short-term leasing or letting of rights from the land to which they are attached;
- the better management of common land where the owners of the rights choose not to utilise them; and
- local farmers to benefit from farm payments where they are in a legitimate agreement with the rights holders.

#### **Costs**

8. There will be no costs to the Assembly as a result of making this Order.

9. There will be no direct cost to the local authorities resulting from the implementation of this Order. However, some Commons Registration Officers will wish to make a note of the temporary severance of rights of common occurring within their area, which may take some additional officer time in adding the details to their copies of the commons registers. It is not envisaged to be a large number of severances in any one authority area.

10. Individuals and organisations wishing to let or lease rights, or the land without the attached rights, will incur costs relating to those transactions. These will primarily be legal costs and will not be as a direct result of the making of this Order.

#### **Competition Assessment**

11. This Order does not affect business, charities and/or the voluntary sector. The competition filter was applied to the Statutory Instrument and this revealed no detrimental effect for business competition.

#### **Consultation**

##### With Stakeholders

The Welsh Assembly Government consulted on the proposed content of this Order between 25 September 2006 and 24 November 2006. 37 very mixed responses were received to the paper. Responses were divided as to whether or not temporary severance should be permitted at all. There were also concerns over the impact of leasing rights to others who may not be local to

the common, which might lead to ineffective management of some commons. On the other hand, a number of the consultees acknowledged that temporary severance arrangements could be beneficial on some commons, for example those suffering through undergrazing. Responses were also very varied as to how long the period for temporary leasing of rights should be. Suggestions from respondents varied from one to five years. The consultation has reinforced the Assembly Government's view that this Order should be viewed as a temporary, interim measure pending further consideration of what temporary exceptions might be permitted to the general ban on severance contained in the Act and which would be the subject of a new Order in 2008/9. An amendment was made to the Order as a result of the consultation responses, which raised the period allowed for leasing rights from the proposed 2 years to 3 years. The summary of consultation responses has been published on the Welsh Assembly Government website and is attached at Annex A and a list of consultees is attached at Annex B.

#### With Subject Committee

12. The Order was notified to the Environment, Planning and Countryside Committee, via the list of forthcoming legislation, on 15 November 2006 (EPC(2)-15-06 (p.4), Annex 2, item no: 4) and has remained on the list ever since. However, the title at the time was Common Act (Temporary Severance) (Wales) Order 2007. The Order was not identified for detailed scrutiny.

#### **Review**

13. The Order will be kept under review in terms of its application and effectiveness.

#### **Summary**

14. This Order sets out the exceptions to the prohibition imposed by the Commons Act 2006 on the severance of commons rights from the land to which they are attached.

## **Annex A**

### **SYNOPSIS OF THE OUTCOME OF THE PUBLIC CONSULTATION**

#### **COMMONS ACT 2006**

#### **Legislation to allow for the temporary severance of rights from the land to which they are attached.**

##### **Background**

1. In September 2006 the Welsh Assembly Government published a consultation paper setting out proposals for an Order to allow for the temporary severance of commons rights from the land to which they are attached under the Commons Act 2006 ("the Act").
2. The consultation paper set out the Welsh Assembly Government's aims in making the Order and described the proposed circumstances and time period in which temporary severance may take place.
3. The consultation paper was distributed in Wales to all Unitary Authorities, Local Access Forums user groups and other organisations with an interest in access and mobility issues. 37 responses were received. A list of the organisations which responded is at annex 1.
4. An equivalent Order was brought into force in England in September 2006. No public consultation was undertaken by the Department for Environment, Food and Rural Affairs on the Order as it was temporary in nature and will be replaced by a more robust Order identifying specific circumstances where local temporary exceptions to the general prohibition on severance may apply.
5. The key issues for consultation and a summary of the main points made in response are as follows:

##### **Proposal 1. Exceptions to the prohibition of severance.**

6. The general purpose of this Order is to set out exceptions to the prohibition to the severance of commons rights from the land to which they are attached. It is intended that this Order be temporary and have effect while the Assembly Government investigates further specific circumstances which may be conducive to temporary severance in Wales.
7. The consultation paper proposed that severance be allowed (i) where the rights were to be leased to a third party for a period of no more than 2 years; and (ii) where the rights were kept by the title-holder and the land leased to a third party.
8. The majority of responses, including those from the Central Association of Agricultural Valuers and individual commoners, were in favour of proceeding with the temporary to severance Order based on the exceptions listed. Those

against the proposed exceptions were for the most part, concerned that allowing even temporary severance would lead to de-localisation of use – the issues raised in the consultation paper as the reason for ban on un-restricted severance. Given the responses received on the exceptions the Assembly Government has decided to implement its proposed exceptions.

9. On the question of how long the period for leasing rights should last, a number of very varied responses were received. Once again the majority of responses to this question agreed that 2 years was a reasonable period of time. However, other responses suggested periods from between 1-5 years. For example, Brightwells Surveyors suggested 5 years to enable farmers to heft flocks, thus preventing, as far as possible, animals from straying from unfenced common land. However, Mrs Murphy, a commoner in Pembrokeshire, stated a preferred 1 year limit that would fit in with the farming year (September to September).

10. There was also a suggestion from a few respondents, including the Powis Castle Estate and the Snowdonia Society, that the period should be set on a case by case basis to allow flexibility where required.

11. In order to balance the very valid arguments on this matter from all sides, the Welsh Assembly Government has decided to increase the proposed period from 2 years to 3 years, as suggested by Jenny Griffiths, Commons Registration Officer for Powys County Council. This would allow any temporary severance agreements (usually 5 years) that are currently in play to be lived out to their legitimate end while also allowing the Assembly Government time to draft a more permanent order identifying specific exceptions.

### **Proposal 2. Should the provisions be retrospective?**

12. The consultation paper asked for views on whether the provisions of the proposed Order should be retrospective. On this matter there were a fairly equal number of respondents for and against. However, having sought legal advice, we believe the provisions in the Order should be retrospective. This will legitimise any agreements already in place (perhaps unwitting of the new prohibition) and will sit more easily with the retrospective nature of the Act and the intention conveyed to the public and others during the passage of the Commons Bill through Parliament.

### **Proposal 3. Proposal for further legislation on temporary severance.**

13. There were a number of constructive suggestions as to specific circumstances which should be considered when drafting further legislation on this matter. Most recommended that nature conservation be the basis for any severance arrangements in the future. However, other circumstances such as where mineral extraction had been carried out on the land, or where it would be a benefit to cultural and archaeological heritage were also broached. More obvious suggestions included circumstances where severance would improve, or maintain, good agricultural practice.

14. All of the suggestions sent on this proposal will be taken into account by the Assembly Government in drafting further legislation on this matter. In addition, we intend to further discuss the matter with stakeholders including those commoners which have shown an interest in being involved in the process, and in particular the Commons Act – Wales stakeholder Group.

### **General points made**

15. A small number of respondents were concerned with the whole idea of severance, temporary and permanent. Though, for the reasons noted in the consultation paper, we do not believe that severance should be allowed to continue unchecked we do believe that there are certain areas which rely on temporary severance to maintain common land. It is vital that the Assembly Government fully understands this need and regulates accordingly which is why it has seen fit to introduce temporary provision in order to allow time for discussion and thorough consultation into the matter.

### **Conclusion**

16. The responses to the consultation exercise largely endorsed the principles behind the proposals made in the paper. In light of the comments made certain improvements will now be made to the draft Order, as noted above.

Countryside Access and Sponsorship Branch  
**December 2006**

## **Annex B**

### **List of consultees:**

Local Authority Chief Executives (Wales)  
Local Authority Legal Officers (Wales)  
Local Authority Commons Registration Officers (Wales)  
ADAS  
Arnold Davies Vincent Evans Solicitors  
Association of Larger Local Councils  
Association of Chief Estates Surveyors and Property Managers  
Association of National Park Authorities  
Auto Cycle Union Limited  
Brecon Beacons National Park Authority  
British Association for Shooting and Conservation  
British Driving Society  
British Horse Society  
Byways & Bridleways Trust  
Building Societies Association  
Campaign for the Protection of Rural Wales  
Central Association of Agricultural Valuers  
Chester Master Ltd (Land Agents)  
Citizens' Advice Bureaux  
Civic Trust for Wales  
CoalPro/ Miller Argent (South Wales) Ltd  
Commission for Local Administration in Wales  
Cooke and Arkwright Chartered Surveyors  
Council for National Parks  
Country Land and Business Association  
Countryside Agency  
Countryside Alliance (Wales)  
Countryside Council for Wales  
Countryside Rights Association  
County Surveyors Society Wales  
CPRW  
Crown Estate  
Cyclists' Touring Club  
Darwin Gray Solicitors  
Department for the Environment, Food and Rural Affairs  
Defence Estates  
Edward Harris and Son (Solicitors)  
Elan Valley Trust  
Environment Agency Wales  
Eversheds Solicitors  
Farmers Union of Wales  
Farming and Rural Conservation Agency  
Federation of Private Residents' Associations  
Federation of Rural Community Councils  
Federation of Welsh Commoners  
Friends of the Earth (Cymru)  
Friends of the Earth (Mon & Gwynedd)  
Forestry Commission  
Future Farmers of Wales  
Gower Commoners' Association

Gower Society  
Hugh James Solicitors  
Incorporated Society of Valuers and Auctioneers  
Institute of Chartered Foresters]  
John Collins & Partners  
J W Hughes and Co  
Knight Frank Rural Consultancy  
Land Registry Wales Office  
Law Society Wales  
Messrs Palsler Grossman  
Moorland Association  
Morgan Cole Solicitors  
National Association of Local Councils  
National Consumer Council  
National Federation of Young Farmers' Clubs  
National Home Improvement Council  
National Farmers' Union  
National Sheep Association  
National Trust Wales  
National Union of Residents' Associations  
North Wales Association of Agricultural Valuers  
One Voice Wales  
Open Spaces Society  
Pembrokeshire Coast National Park Authority  
Pitts-Tucker and Co Solicitors  
Portal Chambers  
Planning Inspectorate  
Powis Castle Estate Office  
Royal Institution of Chartered Surveyors  
Royal Society for the Protection of Birds  
Royal Welsh Agricultural Society  
Snowdonia National Park Authority  
Snowdonia National Park Society  
Strutton Parker Surveyors  
Swansea University  
Symmonds Hurford Solicitors  
Tenant Farmers Association  
Tracy Phillips Solicitors  
Wales and Marches Common Land Working Group  
Wales Association of Community and Town Councils  
Wales Association of Community Councils  
Wales Environment Link  
Ward Solicitors  
Welsh Association of National Park Authorities  
Welsh Local Government Association  
Welsh Trail Riders Association  
Wildlife Trusts Wales  
Woodland Trust / Coed Cadw