THE NATURE AND EXTENT OF SECTION 193 ACCESS RIGHTS

(1). This paper was produced at the request of Mark Weston, the Director of Access, Safety and Welfare for the British Horse Society. The writer was asked to comment on a discussion paper written by a BHS member, John Sugden (the *JS Paper*). This does not include any detailed citations, but it does refer a number of times to a legal opinion commissioned by the Countryside Agency as part of its work on section 15 of the Countryside and Rights of Way Act.[1] The latter is referred to here as the *NE Opinion*. Reference is also made below to G D Gadsden's book, *The Law of Commons*.[2] The book is now out-of-date, and is not without flaws, but it is probably the closest we have (along with the more recent edition) to an authoritative text on this area of the law. It offers, in particular, an insightful analysis of the 1965 Commons Registration Act. This analysis is signally ignored in the *NE Opinion*.

(2). The intention behind the *JS Paper* is to provide a correct interpretation of s193 of The Law of Property Act 1925 and to discuss, in this light, how s193 access rights have been affected by the more recent legislation, including:

- The Commons Registration Act 1965;
- The Local Government Act 1972;
- The Countryside and Rights of Way Act 2000; and
- The Commons Act 2006

The aim is to describe the land that is now subject to s193 and to consider how this land might be affected by the roll-out of Part 1 of the 2006 Act. These questions are clearly of considerable interest to BHS members.

(3). No attempt is made here to offer a detailed commentary on the *JS Paper* or the *NE Opinion*. This would involve a lengthy analysis of complicated arguments and multiple points of view. The result would be a substantial document that would almost certainly be unhelpful in clarifying the fundamental issues. It seems to the writer, however, that there are two major areas of interest: (i) the meaning of s193; and (ii) the effects of the 1965 Act on s193 access rights. It is the second of these that is found to be the crux of the matter.

Section 193

(4). It is clear that s193 and s194 of the 1925 Law of Property Act must be read together. However, given the political process from which they emerged, the relationship between the two sections should not be expected to be entirely coherent. As I understand it, the original proposal was that there should be changes in the law providing for public access to, and the protection of, all commons and wastes.[3] This was opposed by landowning interests and the debate that followed produced the provisions to be found in the Act. The initial proposal was straightforward: the public should have a right of access to all common or waste land; and this right should function as the primary means of protecting the land against further enclosure or development. The provisions in the Act are an imperfect compromise. It is apparent, however, that they must still be considered together.

(5). In this light, there is no good reason to accept the contention in the *NE Opinion* that s193 applies to land that was manorial waste or a common at the time of the introduction of the 1925 Act (1st January 1926). This date applies in the case of s194 because this is expressly stated in the Act. Had the same date applied to s193 this would also have been stated in the Act. In fact, no date is specified. Given the need to consider the two sections together, the conclusion must be that no such date was intended. Section 193 refers to land that 'is…manorial waste, or a common, which is wholly or partly situated' in an urban area. There is no need to offer any 'interpretation' of this. The meaning is clear.

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[1] G Laurence & R Crail, 2005, *In the Matter of Public Rights of Access; and In the Matter of The Countryside and Rights of Way Act 2000: Joint Opinion*, Countryside Agency.

[2] G D Gadsden, 1988, *The Law of Commons*, Sweet & Maxwell.

[3] See, for example: Tim Bonyhady, 1987, *The Law of the Countryside*, Professional Books, Ch 2, p 134ff.

(6). The *NE Opinion* is afforded a good deal more respect than it deserves in the *JS Paper*. It is suggested, for example, that the position adopted in the *Opinion* may be based on the notion that – if the (correct) 'is at any time' reading of s193 is adopted – the 'extinguishment' provisions at s193(d) appear, on the face of it, to be redundant. The *Paper* then goes on to examine and reject this notion. There is, however, no reason at all to believe that the s193(d) provisions are redundant. They provide a formal process for the extinguishment of common rights as a result of which 'the rights of access shall cease to apply'. The suggestion that the cessation of common rights would in any case result in the cessation of access rights may have a seductive simplicity; but it ignores the practical difficulties involved, in the absence of a formal process of extinguishment, in proving that all of the rights have ceased to exist.

(7). It seems to the writer that the only explanation for the interpretation of s193 that is to be found in the *NE Opinion* is that it is an attempt to force a retrospective reading of the 1925 Act that salvages as much s193 land as possible from the effects of a false reading (based on the *Clwyd* and *Oxfordshire* judgements) of the 1965 Act. Whatever the motive, the reasoning is perverse. It is not simply that the attempt to rewrite the earlier legislation is, in itself, logically flawed. It is also patently obvious, from the stated intentions of Parliament, that the 1965 Act should not be read in the way that is assumed; that this false interpretation was anticipated at the time; and that the Act was never meant to have any adverse effects on existing public rights.

The Commons Registration Act 1965

(8). The relevant provisions in the 1965 Act are to be found at section 1(2):

> 1.–(2) After the end of such period, not being less than three years from the commencement of this Act, as the Minister may by order determine–
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> (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
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> (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936.

Section 1(2) is in turn subject to a 'savings' provision at section 21(1) of the Act:

> 21.–(1) Section 1(2) of this Act shall not affect the application to any land registered under this Act of section 193 or section 194 of the Law of Property Act 1925 (rights of access to, and restriction on inclosure of, land over which rights of common are exercisable).

The focus in the *NE Opinion* and the *JS Paper* is on the effects of the savings provision on section 1(2)(b). The reference in section 21(1), however, is not to section 1(2)(b) but to section 1(2). What, then, are the implications for section 1(2)(a)?

(9). In this case, section 21(1) applies to land registered under the Act as 'waste land of a manor not subject to rights of common'; which is deemed, by virtue of its registration under the 1965 Act, not to be subject to common rights. As a result, any unregistered rights affecting the land are extinguished. However, because of the saving at 21(1), this has no implications in terms of s193 for the registered land. It cannot have any wider implications because it applies only to waste land that is registered under the Act.

(10). The broader question about section 1(2)(a) concerns the effects for land that is *not* registered. The suggestion is that land capable of being registered under the Act that was not so registered is deemed not to be a common (as defined by the Act) or a green; and that any s193 rights over this land are therefore lost. In fact, Section 1(2)(a) does not deem unregistered land to be anything at all. It states only that it shall *not* be deemed to be common land or a town or village green. Strictly, then, there is no 'deeming not to be' of the kind proposed in the *NE Opinion*. This point is not simply a matter of emphasis but is to do with the policy intentions underpinning the legislation. The question at issue is the scope and the broader implications (if any) of the 1965 Act provisions

(11). This view is supported by Gadsden who argues that, in the case of section 1(2)(a), any 'deeming not to be' that may be involved is solely for the purposes of the 1965 Act. The only implication this has, he suggests, is that 'such land may no longer be registered as common land under the Act'.[4] Turning to the Act itself, it will be seen at section 22(1) that town or village greens are similarly deemed not to be common land. This does not mean that where a green is also waste land or is subject to rights of common these facts are deemed not to be true. It simply means that it may not be registered under the 1965 Act as common land. As is suggested by Gadsden:

> [T]here must be considerable force in the argument that once Parliament had provided important public rights to certain land in 1925, subject only to highly restricted circumstances for cessation of those rights, of which non-registration of land for other purposes under a later statute were self-evidently not one, a clear intention from Parliament to terminate those rights is necessary. This is not evinced in the wording of the CRA 1965.[5]

If it is argued that there was a broader agenda underpinning the 1965 Act, of which registration was an essential part, it must also be admitted that there is no evidence of this broader agenda in the Act itself. The intention that the 1965 Act should serve as a 'first stage' for further reform did not materialise for another forty years; though it should be noted that, when public access was extended to all registered commons under the C&RoW Act 2000, it was seen as essential that the rights conferred by s193 should be preserved.

(12). The 1965 Act introduced a completely new definition of both common rights and common land; and the latter is, for this reason, defined by Gadsden as 'statutory common land'.[6] The Act also introduced the first statutory definition of town or village greens. There can be no objection, then, to the suggestion that land registered under the Act is 'deemed' to be a common or a green – a point that underlines the contention that the effects of the Act should be understood in the context of its (limited) purposes. It is in this context that the case presented in the *NE Opinion* on the effects of section 1(2)(a) must be understood.

(13). The argument in the *Opinion* is based on the *Oxfordshire* (Trap Grounds) case.[7] The case relates to town and village greens and confirms the view that a green that fails to be registered under the 1965 Act is deemed by section 1(2)(a) not to be a green. It is clear that what is meant by this is that the land loses its (pre-existing) status and that it 'ceases' to be a green. This would seem to provide strong support for the case presented in the *Opinion*. The problem is that it does not apply to 'waste land of a manor not subject to rights of common'.

(14). Waste land of this kind is a completely new (sub-) category of common land that was created by the 1965 Act. Prior to the Act, then, land in this category was not and would not have been considered to be 'common land'. If, because of its non-registration within the specified time limits, it is deemed under section 1(2)(a) not to be common land, the only effect this could possibly have is to place the land outwith the new definition for purposes of its registration under the 1965 Act. The 'deeming-not-to-be' cannot result in any loss of status of the kind described in the *Oxfordshire* case because there is no status to be lost; and because the land could not possess the relevant status unless it was, in fact, registered under the 1965 Act. In a nutshell, the land was not common land prior to the Act; and there can, therefore, be no effect in deeming it not to be common land now. There can certainly be no 'wider' effect in terms of s193 access rights. It follows that the case presented in the *NE Opinion* on section 1(2)(a) is invalid.

(15). Now, it may be objected that the preceding analysis does not encompass land subject to rights of common. It will be shown below that any non-registered rights that might have been registered under the 1965 Act must be assumed to have been abandoned. If this is accepted, it must also be true that none of the land that failed to be registered under the Act was subject to rights of common; and that the only land in this class that was *capable* of

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[4] Gadsden, op cit, 11.21, p 319.

[5] ibid, 11.22, p 319.

[6] ibid, 1.01 & 1.42, pp 1 & 17.

[7] The case citations for the Trap Grounds judgement are noted in the *Opinion* at p 28 (footnote 28).

registration was waste land of a manor not subject to rights. It follows, then, that the argument at para (14) stands; and that the case presented in the *NE Opinion* must be rejected.

(16). Turning to section 1(2)(b), the first thing to note is that it may be interpreted in two completely different ways. Thus, it is not clear whether the expression 'any such land' refers to (i) land that is capable of being registered under the 1965 Act; or (ii) land that is so registered. If meaning (ii) is accepted, the section states, straightforwardly, that rights shall only be exercisable over registered land if they too are appropriately registered. It is tempting to adopt this interpretation because it limits any effects there might be on s193 land to the land that is registered under the Act. However, it leaves open the possibility that (a) unregistered rights and (b) rights registered under the Land Registration Acts may be exercisable over land that is not deemed by section 1(2)(a) to be common land. Point (b) also holds for interpretation (i). In this case, however, there is no implication that unregistered rights may be exercised over unregistered land.

(17). Given that the purpose of the 1965 Act was to provide a definitive record of land and rights, meaning (i) must be accepted as the correct interpretation; so that section 1(2)(b) should be understood to apply to all land that was capable of registration under the Act. The question at issue then turns on the meaning of the word 'exercisable' in its application to unregistered rights. There are two alternatives. Either the rights continue to exist, but may not be exercised; or they are extinguished, because rights that cannot be exercised cannot be said to exist. The second interpretation is to be found in the *Clwyd* case (*CEGB v Clwyd County Council* ([1978] 1 WLR 151)) and is considered by DEFRA to be the position at law. As a consequence, any rights not registered under the 1965 Act over land capable of registration were extinguished. In cases where the land was registered, s193 access rights are protected by section 21(1) of the 1965 Act. Where the land was not registered, the access rights were lost. This position is underlined by the savings to be found at Schedule 3(6) & 3(7) of the Commons Act 2006:

> 6 The repeal by this Act of section 1(2)(b) of the 1965 Act does not affect the extinguishment of rights of common occurring by virtue of that provision.
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> 7 The repeal by this Act of section 21(1) of the 1965 Act does not affect the application of section 193 of the Law of Property Act 1925 (c. 20) in relation to any land.

(18). In the light of the preceding discussion this position is untenable. There was no intention on the part of Parliament that s193 rights should be lost as a result of the 'non-registration of land for other purposes under a later statute'. In particular, the saving at section 21(1) was not intended (as it is here) to provide a justification for the extinguishment of public rights over unregistered land:

> Section 21(1) of the CRA 1965 expressly provides that section 1(2)(b) of the Act (non-exercisability of unregistered rights) shall not affect the application of section 193 (and section 194) of the LPA 1925 to any registered common land. This seems to be a cautious inclusion to preserve public access (and the control of works on common land) in the event that non-exercisability is deemed to be equivalent to extinguishment.
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> Section 21 does not apply to land which did not achieve registration under the Act and, if non-exercisability can be equated with extinguishment, it might be possible to establish that the CRA 1965 has extinguished commonable rights under a statutory provision, with a resulting termination of the right of public access. This is, however, to fly in the face of the express words of the Act of 1965 that unregistered rights are merely not exercisable. In the alternative, however, if non-exercisability is equivalent to extinguishment it may be difficult in many cases to establish that rights have been extinguished for the inference drawn from non-registration might just as well be that the rights have been abandoned. In this event, no rights existed for the extinguishment provision to work on.[8]

The suggestion that unregistered rights must be considered to have been abandoned will be examined further below. First, though, there are a couple of related questions that need to be discussed. How extensive was the non-

[8] Gadsden, op cit, 11.18–19, p 318.

registration of rights? And is it true that there was a widespread lack of awareness of the 1965 Act amongst rights-holders? And that, as a result of this, a significant number of rights failed to achieve registration?

(19). This kind of question is more often raised in relation to landowners. It has, for example, been repeatedly asserted by DEFRA that many landowners were unaware of the effects of the 1965 Act; and that extensive areas of land were consequently mis-registered. There is no evidence to support this contention. Indeed, there are very good reasons to take the opposite view:

> It is often assumed that extensive areas of land were mis-registered under the 1965 Act because of a lack of awareness of the registration process on the part of private landowners. There is little or no evidence to support this view; and much that shows exactly the opposite. The fundamental problem with the land sections of the registers is not – as is suggested in both the DEFRA and the WAG Consultation Papers – to do with land in private ownership that was wrongly registered because the application was not challenged; but with a potential failure to preserve and protect as common the land that should have been registered under the 1965 Act but was not.
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> In the DEFRA Consultation Paper, the source of the assumption referred to above is claimed to be the Common Land Forum. According to the *Report* on the Commons Registers produced for the Forum by Aitchison et al (CLF 38), there are two major flaws in the land sections of the registers: (i) the multiple entries for waste land without rights that may not currently be 'of a manor'; and (ii) the many instances where the ownership of both land and rights is in the same hands ('unity of seisin'). In the light of the *Hazeley Heath* case, however, and of the view expressed by DEFRA on the status of waste land subject to leased or tenants' rights of grazing (*CRA Guidance*, 9.3.14), the suggestion in the Aitchison *Report* that these areas of land ought not to have been registered can no longer be supported. Nor is there any indication in the *Report* of the purported 'lack of awareness'.[9]

The amount of land wrongly registered under the 1965 Act, then, is not significant. Nor is there any reason to believe, as a general case, that landowners and rights-holders were not fully aware of what was happening. In fact, the problem is the opposite of this. Disputed cases were often handed over for decision to the private interests involved by both the registration authorities and the commons commissioners. As a result, the public interest in the registration of the land was frequently ignored; and extensive areas of land that ought to have been registered under the Act were not. Rights holders were just as involved in this process as landowners; and there is no reason to believe that the former were any less aware than the latter of the implications of the 1965 Act.

(20). There was, then, no 'lack of awareness'. In order, however, to understand exactly what happened it is necessary to take a closer look at the implementation of the Act. Consider, for example, the case of common rights that were provisionally but not finally registered under the Act. Often, claims were withdrawn or modified because of an objection. Alternatively, the rights might be surrendered to the landowner, usually for some kind of payment; or a deal might be struck whereby the common rights were exchanged for (unregistrable) leased rights. In none of these cases is there any implication that the rights were extinguished by the 1965 Act. Similarly, where a rights application was rejected by a commissioner, the implication is not that the rights were extinguished by the Act but that (in the view of the commissioner) the rights were not rights of common and could not, therefore, be registered.

(21). What then of the case where no rights were registered at all? As we have seen, it is very unlikely indeed that this was the result of a lack of awareness of the Act on the part of active rights-holders; and the assumption must be that they knew the consequences of non-registration (that the rights would no longer exist, or would be 'unexercisable'). In this case, there is no problem whatsoever in assuming that the rights were abandoned. Indeed, given the implications of non-registration, *there can be no more compelling circumstances to support such an assumption*. The only remaining case would seem to be where the rights had been forgotten, either because they had

[9] This extract is taken from a presentation made by the writer to the 2010 Common Land Seminar.

in fact long been abandoned or because the holder was unaware of their existence. In this last instance, it might be unfair in a few cases to assume that the rights had been abandoned. However, this is plainly less of an injustice than the assumption that, because such forgotten rights *might* exist, the effect is to work a disapplication of the s193 provisions.

(22). In short, there can be very few circumstances indeed in which it would be reasonable to assume that rights were rendered unexercisable (or extinguished) by virtue of their non-registration under the 1965 Act. In effect, the debate about the interpretation of sections 1(2)(b) and 21(1) of the Act is rendered meaningless. Once more, then, we are returned to the position suggested by Gadsden: that section 21(1) is 'a cautious inclusion' in the Act, and that the provisions related to the non-registration of rights at section 1(2)(b) were not intended to imply any effects beyond the Act itself – hence the reference to 'non-exercisability' rather than 'extinguishment'.

(23). To summarise:

- Section 1(2)(a) had no effect on manorial waste not subject to rights of common that was not registered under the Act. Where land of this description was finally registered, the Act effected a statutory extinguishment of any rights that might have existed prior to registration; but this cannot affect unregistered land.
- Section 1(2)(a) had no effect on land subject to rights of common (including manorial waste) that was not registered under the Act. Since non-registered rights must be assumed to have been abandoned, the only category of land capable of being registered that was not so registered was 'waste land of a manor not subject to rights of common'.
- Section 1(2)(b) had no effect on manorial waste that was not registered under the Act. Whichever interpretation of 'non-exercisability' is adopted, the section did not in fact cause any extinguishment of unregistered rights. There are no instances of the non-registration of registrable rights that should not be seen as cases of abandonment on the part of the rights-holder. If the rights were abandoned, it follows that they were not extinguished by statute and that the s193(1)(d) provisions do not apply.

In short, the non-registration of manorial waste under the 1965 Commons Registration Act had no effect on s193 access rights. Nor did it have any implications for s194.

(24). Paradoxically, perhaps, this position is furnished with considerable support by the *NE Opinion*. The passage in question is substantial, but it is worth quoting in full:

> 82. In all the circumstances we think it unlikely that it would be permissible to have recourse to what was said in Parliament during the course of the Commons Registration Bill, pursuant to the principles laid down in *Pepper v Hart*. We have nevertheless investigated the Parliamentary debates to see whether they throw any light on the matter.
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> 83. The Bill was debated first in the House of Lords. The Joint Parliamentary Secretary, Ministry of Land and Natural Resources, was Lord Mitchison. There were six occasions on which Lord Mitchison addressed himself to the consequences of non-registration of rights of common: one at second reading on 9 February 1965 (col 91); and five on 23 February 1965 i.e. the first of the two days on which the Bill was debated in Committee (cols 716, 726, 731, 732, 733). On each of these occasions Lord Mitchison said that the consequence of non-registration would be "lapse" of the rights. That is indistinguishable, in our view, from "extinguishment".
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> 84. In the House of Commons, Mr Frederick Willey, Minister of Land and Natural Resources, at second reading said this on 28 April 1965 as reported in Hansard col 457:
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> > "If common land or a green is not claimed it will lose its status, and similarly, if anyone does not claim his common rights, they will be lost, except for common rights already registered at the Land Registry."

85. On 25 May 1965, the first day of the Committee stage (which lasted five days in all), Mr Arthur Skeffington, Joint Parliamentary Secretary, Ministry of Land and Natural Resources, said this (col 8):

> "It is important at this stage to reiterate that the Bill does not in any way take away any rights of access. It leaves this completely undisturbed and such statutes as give the public rights at the present time will, of course, continue in force. I suppose that the principal one is Section 193 of the Law of Property Act 1925, which gives the public a general right of access to all commons in urban areas. That right will continue and is in no way affected by the Bill".

86. Later on the same day (at cols 47, 48) Mr Skeffington said:

> "I can put at rest the hon. Gentleman's fears that some legal right might be lost through failure to notify or register…The Bill does not affect any existing legal right…and failure to notify a legal interest in the land will not affect the right".

87. Finally, on 15 June 1965 (the fifth and final day of the Committee stage) Mr Skeffington explained (at col 240) why this would be so. Clause 20 of the Bill (the predecessor of section 21 of the Act) was under discussion. Mr Skeffington was explaining how *inter alia* rights of access to an urban common might be brought to an end under the 1965 Act but for the saving brought about by this clause:

> "These savings are necessary because as we have repeatedly said [presumably referring to what he had said on 25 May]…it would be wrong if we did anything in the Bill which limited the rights already enjoyed under section 193 of the 1925 Act…But there is a danger that this right could be restricted or brought to an end…That situation could arise under the Bill in the following way: *we could get the status of a common registered without someone having registered the common right* [NOTE: *italics added* in NE Opinion]. Therefore, after the prescribed period for registration ended, when no further registration of common rights was possible, those common rights, if they had ever existed, would be extinguished by statute. Consequently sections 193 and 194 would be extinguished *ipso facto*. This was obviously an effect which no one intended. Therefore it must be provided for in this way [i.e. prevented in the way section 21(1) does]".

(25). It may be thought that the final quotation somewhat undermines the case presented here – though it should be noted that it reasserts the principle that 'it would be wrong [to do] anything which limited the rights already enjoyed under section 193 of the 1925 Act'. The reference in Mr Skeffington's explanation, however, is not to section 1(2)(b) but to section 1(2)(a) (which should probably be dubbed 'the forgotten sub-section'). It therefore provides no support at all for the view that 'non-exercisability' is equivalent to 'extinguishment'. Indeed, if read in the context of the preceding quotations, the implications are exactly the opposite. If, in the example given, the land was registered without any rights ('without someone having registered *the common right*') it would be deemed, by virtue of its registration under the Act, to be 'waste land of a manor not subject to rights of common'. It is the effects of this 'deeming' that are under discussion and not the effects of section 1(2)(b); and this (positive) deeming can only operate on land that is registered under the 1965 Act as waste land not subject to rights of common (see analysis at paras (8)–(9) above). The purported general effects of section 1(2)(b) concern land that was not registered under the Act. As is apparent from the quotations above, no such general effects were intended by Parliament.

The Local Government Act 1972

(26). It is not obvious that the 1972 Act had any effects on s193 rights. In the original Act, the reference in s193 was to land 'wholly or partly situated within a borough or urban district'. This position (which may not be ideal) is preserved in the 1972 Act. The discussion in the *JS Paper* of the implications of the 'wholly or partly' provision is not especially helpful; and it may be that it is best to leave these issues to be decided in each individual case. There is one point, however: the *JS Paper* does not consider the effects of the 'CL units' created by the 1965 Act, whose boundaries may cut across the pre-existing boundaries of commons and wastes. This point needs to be borne in mind.

The Countryside and Rights of Way Act 2000

(27). The most important effect of the C&RoW Act lies in its recognition of the significance of s193 access rights and the classification of land that is subject to s193 as 'section 15' land. In addition, Schedule 4 of the Act introduced changes to the wording of s193(1)(b) so that the purposes of 'Orders of Limitations' made under the provision may now include the conservation of 'flora, fauna or geological or physiographical features of the land'.

The Commons Act 2006

(28). The 2006 Act retains s193 but repeals s194. The latter is replaced by s38 which provides protection to registered common land (and to some unregistered areas that are not relevant here). It is important for unregistered manorial waste to be registered under the Act so that the land and any s193 rights are protected for the future. This is made possible by Schedule 2(4) which enables 'waste land of a manor' that was provisionally but not finally registered under the 1965 Act to be 're-registered' now *in areas where Part 1 of the Act has been brought into effect*. Around 95% of the land in this category will qualify for re-registration provided that it can be shown that it is of manorial origin and is still waste land ('open, uncultivated and unoccupied'). As suggested below, most unregistered manorial waste in 'urban' areas will fall into this category.

Conclusion

(29). The preceding discussion is largely to do with the theory but the facts and the practicalities are of equal importance. There are around 1800 sq kms of land in England and Wales that will be eligible for re-registration under Schedule 2(4) of the 2006 Act, provided only that the land can be shown to be 'waste land of a manor'. If land in this category is re-registered its status will be confirmed; it will be mapped in the common land registers; and it will be protected for the future. This process offers a means of securing s193 rights whose assertion and protection may otherwise be problematic.

(30). The Schedule 2(4) provisions do not apply to land that was never registered under the 1965 Act. And it is apparent that some of this land might be subject to s193. It is unlikely, however, that the areas involved are significant; simply because it is improbable that land of this kind in or adjacent to a city or a town (or in 'unusual' urban districts such as South Wales or the central Lakes) was missed by both the local authorities and members of the public at the time of the 1965 Act implementation process.

(31). Given the option of re-registration, then, and the status conferred by a successful application, Schedule 2(4) must be the preferred route in securing s193 access rights over unregistered manorial waste. In the light of the foregoing analysis, there is no reason to believe that there are any 'hidden' obstacles to this process. If land that lies wholly or partly within an urban area is re-registered under Schedule 2(4), it will be confirmed and duly recognised as s193 land. The one significant danger that remains is the possibility of a failure in the further implementation, in its present form, of Part 1 of the 2006 Commons Act.

Steve Byrne

5th December 2012