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## Guidance

# Common land guidance sheet 2d

Updated 25 May 2021

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## 19 of or Schedule 3 to the Acquisition of Land Act 1981



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## London Borough Commons: (i) Facilities for public recreation and (ii) street movement

### (i) Facilities for public recreation

Under section 5 of the [Metropolitan Commons Act 1866](https://www.legislation.gov.uk/ukpga/Vict/29-30/122/contents) (the 1866 Act) (as amended by the [Commons Act 2006](https://www.legislation.gov.uk/ukpga/2006/26/contents)), no “inclosure” can be made on a metropolitan common which is controlled and managed by a London Borough council. Any structure which excludes the public from the common (e.g. a building, fence, or wall) amounts to an “inclosure” so consent cannot be given for such works.

However, Article 7 of the [Ministry of Housing and Local Government Provisional Order Confirmation \(Greater London Parks and Open Spaces\) Act 1967](https://www.legislation.gov.uk/ukla/1967/29/contents/enacted) (as amended by section 6 of the [GLC \(General Powers\) Act 1984](https://www.legislation.gov.uk/ukpga/1985/71/schedule/2/crossheading/greater-london-council-general-powers-act-1984-cxxvii)) and Section 53, Schedule 4 and Schedule 6 of the [Commons Act 2006](https://www.legislation.gov.uk/ukpga/2006/26/contents) (“the MHLGPOC”) qualifies this general prohibition as it says that specified facilities may be provided on a metropolitan common (which is controlled and managed by a London Borough council) if they are for public recreation. However, Article 12 says that if such facilities require a building or structure or permanent enclosure they cannot be provided without the consent of the Minister.

### Applications under Article 12 of the MHLGPOC

Article 7 lists the facilities for public recreation which a council may provide and maintain. The council must satisfy itself that the proposed works are within the scope of Article 7 before applying under Article 12. If the council is in any doubt, we will be happy to discuss your proposals with you before you apply.

Applications under Article 12 are subject to many of the procedures ([SI 2007 No. 2588](#)) as applications under section 38 of the Commons Act 2006 (the “2006 Act”). The same application form is used, but you must make clear that your application is made under Article 12.

When deciding an application under Article 12 we will have regard to the criteria in section 39 of the 2006 Act:-

- (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
- (b) the interests of the neighbourhood;
- (c) the public interest, which includes the public interest in nature conservation, the conservation of the landscape, the protection of public rights of access, and the protection of archaeological remains and features of historic interest;
- (d) any other matter considered to be relevant.

In determining Article 12 applications, the Article 7 provision for public recreation will be a relevant matter to be taken into account, under (d) above. For similar reasons, the public interest to be taken into account is likely to include the public interest in recreation as well as in the other interests listed in (c) above. The council should consider this carefully when answering the questions on the application form particularly questions 12 and 13 which ask for a description of the proposal and an explanation why the proposed works are needed on the common.

A section 38 application may only be made where the proposed works:-

- do not amount to an “inclosure” (so are not prohibited by section 5 of the 1866 Act),
- are not expressly permitted (with or without consent) by the MHLGPOC, and
- fall within the definition of “restricted works” under section 38 of the 2006 Act.

The circumstances in which a section 38 application would be appropriate are therefore very limited but, as an example, they may include proposals for underground utility works or resurfacing. However, if you are considering applying under section 38 you should first discuss your proposal with us.

## (ii) Street Improvements

### Applications under Article 17 of the MHLGPOC

There are 3 ways in which a London Borough may act under Article 17(1) with respect to common land in order to carry out street improvements:-

- to “exchange” land to replace the land to be lost;
- to “utilise” the land; or
- to “alienate” the land.

Under Article 17 the council must obtain consent from the Minister to use the common (or part of it) to facilitate the construction, widening or alteration of any street. Under Article 17(5), where the land is utilised, alienated or exchanged it ceases to be part of the common and, under Article 17(6), any exchange land is added to the common.

Many of the procedures set out in [SI 2007 No. 2588](https://www.legislation.gov.uk/ukSI/2007/2588/contents/made) (<https://www.legislation.gov.uk/ukSI/2007/2588/contents/made>) also apply to applications under Article 17 of the MHLGPOC.

Applications under Article 17 should be made using the Article 17 application form.

The MHLGPOC does not say what criteria are to be used when deciding an Article 17 application. However, if the application includes exchange land the Planning Inspectorate considers that the main issue to be decided is likely to be whether the land offered in exchange for the land to be lost is equally advantageous to any commoners and the wider public. Where there is no exchange land to replace the land to be lost the main issue to be decided is likely to be whether the benefits of the street improvements outweigh the disbenefits of the loss of common land to e.g. the London Borough or the public it serves.

Article 17 says that the council may provide exchange land which amounts to the whole or a proportion of the land proposed to be utilised. Although it is not therefore necessary for an equal amount of land to be provided in exchange, we expect exchange land which is at least as large and advantageous to the landowner, commoners and the wider public as the release land to be offered in almost all cases as this is consistent with Defra’s policy objective of preserving the overall stock of common land.

An application under Article 12 or Article 17 may only be made by a London Borough council. If a London Borough council proposes to provide facilities for public recreation, or intends to carry out street improvements, on a London common the flowchart in the **Annex** to this guidance will help it decide the correct application route. For Article 12 applications the council should read the advice in

[Guidance Sheet 1a \(/government/publications/common-land-guidance-sheet-1a-consent-to-construct-works-on-common-land\)](#) which explains the process involved. For both Article 12 and Article 17 applications the council is strongly urged to carry out informal consultation before applying.

The London Borough is responsible for maintaining the commons register in its capacity as CRA. Where an article 17 application involving the exchange of common land is granted consent it is for the London Borough to decide whether to utilise, alienate or exchange the common land in question further to its power under article 17. Where it decides to act under article 17 it will be responsible for giving effect to this by updating the register; the Inspector should not therefore make an order.

### **Applications for deregistration/exchange under section 16 of the Commons Act 2006 or Section 19 of or Schedule 3 to the Acquisition of Land Act 1981**

Applications for deregistration/exchange under section 16 of the 2006 Act or, in conjunction with a Compulsory Purchase or Appropriation Order, under section 19 of or Schedule 3 to the [Acquisition of Land Act 1981](#), are not considered to be an “inclosure” for the purposes of section 5 of the 1866 Act. Such applications can therefore be made in relation to London Borough commons.

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