

Explanatory Memorandum to:

The Town and Village Greens (Landowner Statements) (Wales) Regulations 2018

This Explanatory Memorandum has been prepared by the Department for Environment and Rural Affairs and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Town and Village Greens (Landowner Statements) (Wales) Regulations 2018.

I am satisfied the benefits justify the likely costs.

Lesley Griffiths AM
Cabinet Secretary for Energy, Planning and Rural Affairs

24 September 2018

Part 1 – Explanatory Memorandum

1. Description

1.1 The Town and Village Greens (Landowner Statements) (Wales) Regulations 2018 (“the Regulations”) provision to

- Enable landowners to deposit a statement to their commons registration authority, the effect of which brings to an end any period during which persons have indulged in lawful sports or pastimes on the land as of right, thereby restricting the ability for land to be registered as a town or village green; and
- Detail the processes and procedures required for landowner statements to be submitted.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 The Explanatory Memorandum covers the following statutory instrument:

- The Town and Village Greens (Landowner Statements) (Wales) Regulations 2018.

2.2 The Regulations are subject to the negative resolution procedure and is therefore subject to annulment by a resolution in accordance with Standing Order 27.2

3. Legislative background

3.1 The Welsh Ministers make the Regulations in exercise of the powers conferred on them by the following provisions off the Commons Act 2006 (“the 2006 Act”):

- Section 15A(1) (as amended by section 52(1) of the Planning (Wales) Act 2015), (3), (6), 7(3)(c) and (d), and (9);
- Section 15B(1), (4)(b) and (5); and
- Section 59(2).

3.2 In accordance with section 59(6) of the 2006 Act, the Regulations are subject to the negative procedure.

4. Purpose and intended effect of the legislation

Policy rationale

4.1 The general purpose of the legislation is to:

- Prevent the town and village green registration system being used to stop or delay planned development;
- Reduce the financial burden on local authorities in considering applications, as well as the costs to landowners whose land is affected by applications; and
- Remove the unnecessary uncertainty and delays, which are difficult for those affected in the community.

Effect of legislation

4.2 Section 15(1) of the 2006 Act provides that any person may apply to the commons registration authority to register land where, amongst other things, a significant number of inhabitants of any locality, or any neighbourhood within a locality have indulged in lawful sports or pastimes on the land for a period of at least 20 years.

4.3 In broad terms, section 29 of the Commons Act 1876 and section 12 of the Inclosure Act 1857 provide that development on town or village greens constitutes nuisance. It is therefore the case that development can be wilfully frustrated by registering the land in question as a town or village green.

4.4 However, section 15A(1) enables the owner of any such land to deposit with the authority a statement, the effect of which is to bring to an end any period during which persons have indulged in lawful sports or pastimes on the land to which the statement relates. Under section 15(3), the statement must be accompanied by a map identifying the land to which the statement relates.

4.5 The Regulations therefore provides for:

- Prescribing the form in which a statement and map must be deposited with the commons registration authority (regulation 3 and Schedule 1);
- enabling the authority to specify a reasonable fee for the deposit of a statement (regulation 4);
- a statement is to be regarded as having been deposited with the authority when a compliant statement, map and fee have been received by the authority (regulation 5);
- the manner in which the deposit of a statement is to be managed and publicised by the authority, including various notice requirements (regulation 6 and Schedule 2);

- the information that is to be contained in the register that is required to be kept by the authority under section 15B of the 2006 Act (regulation 7);
- the manner in which that register is to be kept by the authority (regulation 8); and
- removal of an entry (or any part of an entry) from the register by the authority if it is satisfied that the statement or map contains a material error, and notice requirements relevant to their removal (regulation 9).

5. Consultation

- 5.1 Proposals to reform the Town and Village regime in Wales were first consulted on in December 2013 as part of the ‘Positive Planning’ consultation paper, containing the draft Planning (Wales) Bill.
- 5.2 The ‘Positive Planning’ consultation paper proposed amending the Commons Act 2006, in relation to Wales, to:
- Prohibit applications being made to register land as a town or village green, where land has entered the planning system i.e. been identified for development in a development plan or has received planning permission; and
 - Enable landowners to submit declarations to Commons Registration Authorities, which would have the effect of rendering all use of land indicated inconsistent with the ‘as of right’ criterion required for town and village green registration.
- 5.3 The proposals put forward in the consultation paper were well received by respondents, with the majority agreeing with the proposals to reform the town and village green regime in Wales. The proposals were carried forward into the Planning (Wales) Act 2015.
- 5.4 The ‘Town and Village Greens’ consultation paper was launched on 23 October 2017 and was open for responses until 2 February 2018. The consultation paper proposed commencing the relevant sections from the Planning (Wales) Act 2015 relating to town and village greens, and set out detailed proposals for the processes and procedures for submitting landowner statements.
- 5.5 In considering those stakeholders most likely to be impacted by the proposals (both individuals and organisations), a list was drawn up which included all LPAs in Wales, public bodies and special interest groups. Consultees were asked to assign themselves to one of six broad categories indicated in the table below, which shows the breakdown of responses by category. The consultation generated 22 responses.

5.6 A summary of the consultation and government response will be published alongside this Explanatory Memorandum and Regulatory Impact Assessment and can be found here:

<https://beta.gov.wales/registration-town-and-village-greens>

5.7 Overall, there was clear support for the proposals set out in the consultation paper, with each of the 7 questions receiving positive responses (either “Yes” or “Yes, subject to comment”). These proposals included:

- The information contained within a landowner statement and how one should be deposited;
- The ability for Commons Registration Authorities (“CRAs”) to charge fees;
- How registers should be kept and what information they should contain; and
- Procedures when submitting incorrect or incomplete information.

REGULATORY IMPACT ASSESSMENT

Town and Village Greens

- 6.1 Information contained in this Regulatory Impact Assessment has been taken from the Explanatory Memorandum and Regulatory Impact Assessment which accompanied the Planning (Wales) Act 2015, to reflect more recent data.
- 6.2 Two options have been considered:
- Option 1 – Do nothing, retain the status quo and not commence relevant sections from the Planning (Wales) Act 2015.
 - Option 2 – Commence relevant sections from the Planning (Wales) Act 2015.

Option 1 – Do nothing, retain the status quo and not commence relevant sections from the Planning (Wales) Act 2015.

Description

- 6.3 Under this option there would be no changes to the town and village green system in Wales as set out in section 15 of the Commons Act 2006 (“the 2006 Act”).
- 6.4 Commons Registration Authorities (“CRAs”) are responsible for maintaining the registers of Common Land and Town or Village Greens (“TVGs”) in Wales. There are 22 CRAs in Wales, corresponding with each Unitary Authority. They undertake the determination process for applications to register land as a TVG.
- 6.5 At present, anyone can apply to a CRA for land to be registered as a TVG under section 15(1) of the 2006 Act if specific criteria apply, and there is no fee for doing so. The process is quasi-judicial in that applications require appraisal of both the facts and the law for a decision to be made. The criteria for determining TVG applications are that the local inhabitants have used the land ‘as of right’ for a period of at least 20 years. This assumes long, uninterrupted use, without permission, force or secrecy.
- 6.6 Where a site is registered as a TVG, it is granted protection by the Inclosure Act 1857 and the Commons Act 1876 from development or disturbance. The site may be de-registered under section 16 of the Commons Act 2006 in exchange for other land which will be registered as a TVG by order of the Welsh Ministers.

Cost

Welsh Government

- 6.7 There is no cost to the Welsh Government in relation to applications for TVG registration as they have no role to play in their determination. CRAs may engage a Planning Inspector to hold an inquiry into an application for registration, with the Inspector reporting to the CRA and not the Welsh Government or Planning Inspectorate. The CRA will reimburse the Planning Inspectorate directly for the Inspector's costs.

Local Planning Authorities

- 6.8 Although the CRA is normally within the same authority as the Local Planning Authority ("LPA"), they must both co-operate on applications where land is registered as a TVG. The cost of the LPA contacting the CRA where there is a planning proposal would form part of their administrative duties, this is anticipated to be a standardised notification memorandum or letter for a national park authority, and is estimated to cost local planning authorities £49 a year.
- 6.9 The estimated cost of an LPA producing a notification letter is based on 10 minutes for a planning officer to check if land has entered the planning system and 20 minutes to form a response. A planning officer has an average hourly rate of £17. Therefore, to respond to town and village green applications per year for LPAs would be:

$$£8 \times 6.1 \text{ (average number of applications per year)} = £49$$

Commons Registration Authorities

- 6.10 The 22 CRAs are responsible for maintaining the register of TVGs in Wales under section 1 of the Commons Act 2006. They bear the cost of the registration process, which can include administrative and management-level staff processing the application, internal and external legal advice, and the costs associated with a public inquiry and/or committee hearing, where applicable.
- 6.11 An application to register land as a TVG is often administered by a legal officer of a CRA and is decided by the authority. Some TVG applications are decided through a public inquiry, often in cases where the CRA owns the land or to demonstrate transparency in reaching a decision.
- 6.12 Evidence that we have received from 19 of the 22 CRAs suggests that there were 16 TVG applications between 2015 and 2016 in Wales. This equates to 5.3 applications per year. Assuming an equal distribution of applications and adjusting the figures to reflect the remaining 3 CRAs, suggests a total of 6.1 applications per year in Wales. Each application took an average of 2 years to consider.

- 6.13 The cost of administering an application for a TVG may vary on a case by case basis, depending on whether that application went to a public inquiry or otherwise. The cost to the Planning Inspectorate of undertaking a public inquiry has not been assessed as part of this impact assessment, as their costs are borne by the CRAs.

Table 1

| | | | |
|---|--|----------------|---|
| A | Number of TVG applications per year | 6.1 | Average number of applications received per year from 19 CRA returns (5.3), averaged to 22 CRAs. ((22 / 19) x 5.3) |
| B | Share of applications going to public inquiry | 49% | Average number of applications going to inquiry per year (2.6) divided by the 5.3 TVG applications per year |
| C | Estimated average cost of public inquiries | £29,000 | Based on the average of the case studies received from CRAs which went to public inquiry. |
| D | Basic CRA processing costs, excluding public inquiries | £1,400 | Based on CIPFA benchmarking survey of CRAs. |
| E | Estimated cost to CRA per application | £15,600 | (B x C) + D |
| F | Total annual cost to CRAs | £95,200 | A x E |

Development Industry

- 6.14 There are direct costs to landowners and developers arising from the current TVG registration system, irrespective of the outcome of an application. Such costs are incurred through activities such as objecting to a TVG application, legal costs, delays to development or even the total abandonment of a project.
- 6.15 Developers acquire land at a certain value, which reflects the potential of that land for development. The potential development value of land can reduce, in some cases significantly, upon registration as a TVG. This is perceived to be due to the difficulties in being able to develop land registered as a TVG because of the protection afforded to it. This can leave developers with a devalued area of land which can be difficult to dispose of. Whilst this cost is not quantified due to the commercially sensitive nature of land transactions, it is an issue that has been raised by developers when making observations on the TVG regime.

- 6.16 The most frequent direct costs to landowners or developers arise from professional fees paid to address objections to TVG applications. This may involve the instruction of a solicitor, Counsel, a surveyor and providing evidence to prove that the land has not been in uninterrupted recreational use, without permission, force or secrecy for 20 years. Those costs will increase further where the application is heard at a public inquiry.
- 6.17 Other costs to landowners or developers relate to the abandonment or delaying of plans to develop land. Such costs are difficult to quantify and vary depending on the development type and financial model of each proposal, as well as the length of delay or whether the development must be restricted or abandoned altogether. Losses to developers resulting from delays may include contracting costs, the loss of potential rental or investment income, extra finance costs and project management fees. Abandonment of a development where building work is completed, or partially completed may result in further costs, including the total loss of investment and depreciation in land value.
- 6.18 Evidence submitted by developers in England to DEFRA's consultation on the registration of new town or village greens indicated that the average cost of a TVG application to the developer is £48,588. This cost does not include the loss of development land value. There is no reason to assume that this figure would be substantially different for applications in Wales given that the procedure for the determination of TVG applications follows a similar process.

Table 2

| | | | |
|----------|---|-----------------|--|
| A | Number of TVG applications per year | 6.1 | Average number of applications received per year from 19 CRA returns (5.8), averaged to 22 CRAs ((22 / 19) x 5.3) |
| B | Estimates cost to developer per TVG application | £48,588 | Based on consultation responses to DEFRA's consultation on the registration of new TVG (July 2011) |
| C | Costs to the developer | £296,400 | A x B |

Applicants for TVG registration

- 6.19 Responses to DEFRA's consultation on the registration of town and village greens (TVGs) indicated that the time taken to produce a TVG application ranges from 9 days to 22 days, based on three responses. It is assumed that a similar figure applies to Wales, given the similar requirements to put together an application. However, this range and amount of responses is not considered sufficient to provide quantified estimates of applicants' costs.

Further, it is difficult to estimate the cost of a person's time, given that little is known of their background, skills, qualifications and availability.

- 6.20 Whilst there is no application fee for the production of a TVG application, it is expected that an applicant collects evidence forms from residents, generates support, prepares an application, gives evidence at a public inquiry and incurs legal costs.

Third Parties

- 6.21 There are costs to third parties for engaging in the process in terms of time spent and any donation that they make towards a campaign for the registration of a TVG.
- 6.22 It is difficult to quantify the cost of third party participation in the process as there is no evidence available as to the average amount of time that a member of the public would spend contesting or supporting a TVG application. Much is dependent on whether third parties share similar characteristics to either the applicant or the developer.

Benefits

Welsh Government

- 6.23 There are no identifiable benefits to the Welsh Government.

Local Planning Authorities

- 6.24 The existing TVG registration system impacts on LPAs by introducing delays where an application to register a TVG is made where land has entered the planning system.

Commons Registration Authorities

- 6.25 There are no known benefits to CRAs.

Development Industry

- 6.26 Unless a landowner voluntarily registers their land as a TVG, there are very few benefits that the landowner may accrue from the registration of a TVG. Aside from the recreational benefit that registration as a TVG may bring the development value of that land may decrease.
- 6.27 Whilst our evidence suggests that the determination of an application to register a TVG may be costly and time-consuming, the determination of such an application will resolve any uncertainty about the status of the land, be it a

successful or unsuccessful application. This will provide the landowners with certainty and confidence in any future plans for their sites.

- 6.28 For those developers who are looking to gain consent for development on their land, a disadvantage will arise through the increased difficulty in gaining permission for development on that land and through the time spent objecting to applications to register a TVG.

Applicants for TVG registration

- 6.29 Whilst there are no evident financial benefits to the present system, benefits to the applicant arise in situations where the land is registered as a TVG, and is protected from development and interference. This may promote health and wellbeing locally, or may be motivated by a desire to maintain the value of existing property in the area.
- 6.30 Where an application is unsuccessful, any delay caused by the period for determination of the TVG application may be seen as generating short-term benefits. Any delay allows for continued use for recreation, and the potential for the abandonment of development proposals, should the delay cause a scheme to be unviable. Any delay caused may also allow time for publicity and for local support to be generated to secure the land for future recreational use.
- 6.31 There is presently no fee for TVG applications, allowing any potential applicant to register a TVG at no cost.
- 6.32 Whilst there is a cost to the applicant (reflecting the time spent completing the application and gathering evidence), the perceived benefit to them far outweighs the costs incurred to register a TVG.

Third Parties

- 6.33 Depending on the stance of the third party, they will share similar assessed benefits to either the landowner or to the applicant for a TVG registration.

Option 2 – Commence relevant sections from the Planning (Wales) Act 2015.

Description

- 6.34 This option would see the commencement of sections 52 and 53 of, and Schedule 6 to the 2015 Act, together with relevant subordinate legislation.
- 6.35 Section 52 of the 2015 Act amends section 15A of the 2006 Act so the ability to deposit landowner statements applies in Wales. The deposit of a landowner statement brings an end to any period during which persons have undertaken

sports and pastimes on the land in question as of right and limits the time period in which an application to register land as a TVG can be submitted.

- 6.36 Section 53 of the 2015 Act amends section 15C of the 2006 Act and introduces Schedule 6 to the 2015 Act into the 2006 Act. Section 15C of the 2006 Act excludes the right of a person to apply for the registration of a TVG, in certain circumstances (trigger events), unless a corresponding terminating event is applied.
- 6.37 Regulations will provide the necessary detail for deposit of landowner statements under section 15A of the 2006 Act.

Cost

Welsh Government

- 6.38 This option will result in a one-off cost to the Welsh Government by providing guidance on the reforms this option proposes for CRAs.
- 6.39 Based on the average daily salary for a HEO grade officer and the time taken to produce guidance, it is estimated to cost the Welsh Government will be approximately £1200¹.

Local Planning Authorities

- 6.40 LPAs would incur similar costs as those identified in Option 1, however, we would expect to see a reduction in the number of applications submitted to register land as a town or village green under this option. Therefore, we would anticipate the £49 cost to LPAs in Option 1 to be reduced.

Commons Registration Authorities

- 6.41 CRAs would expect to incur similar costs to those identified in Option 1, however, as with LPAs, these cost would be expected to reduce based on the anticipated reduction of applications submitted to register land as a town or village green. However, as we are unable to calculate a projected reduction in application numbers, we cannot put a monetary figure to these costs.
- 6.42 Similarly, there will no additional costs to CRAs for undertaking the work which would arise from this option, as they would have the ability to charge a relevant fee to applicants which would recover their costs for providing this service.

¹ Based on the average weekly salary of an HEO employee, multiplied by 2 weeks to produce guidance

Development Industry

- 6.43 Where a landowner wishes to deposit a statement to a CRA under this option, they will also be required to submit a relevant fee to offset the costs incurred by the CRA.
- 6.44 However, it is not possible to quantify these costs to applicants as our evidence indicates CRAs have different people in different roles undertaking work relating to commons land, which results in different costs. For example, there may be solicitors, rights of way officers and dedicated commons land officers doing the same work and setting standard fees would not achieve true cost recovery.
- 6.45 Therefore, any fee set by CRAs to achieve cost recovery will vary from authority to authority. For example, a sample of CRAs in England sees fees ranging from £220 to £504, however, these costs are discretionary and will only apply if landowners deposit a statement.

Applicants for TVG registration

- 6.46 The costs to applicants to register land as a TVG will be the same as option 1. However, because this option seeks to prevent applications being submitted to register land as a TVG solely as a means to prevent lawful development, we would anticipate there being a reduction in the number of these applications being submitted due to the implementation of trigger events.

Third parties

- 6.47 There are no identifiable costs to third parties under this option.

Benefits

Welsh Government

- 6.48 This option will have a positive impact to the Welsh Government as the overlap between the commons registration system and the planning regime will be removed.
- 6.49 Furthermore, it also provides greater certainty for proposed developments which may be put before the Welsh Ministers. For example, if a large housing development was proposed, the Welsh Government can have greater certainty this development will go ahead, without the threat of a TVG application being put forward to prevent development.

Local Planning Authorities

- 6.50 The main benefit to LPAs is land allocated for development in their Local Development Plans will no longer be subject to potential TVG applications.
- 6.51 This allows Local Development Plans to be implemented as adopted and would reduce the amount of abortive work carried out by LPAs where proposed development, as allocated in a development plan, is subsequently restricted or abandoned because the land becomes registered as a TVG.

Commons Registration Authorities

- 6.52 This option will result in a reduction of applications submitted to register land as a TVG. However, although CRAs would now have to process landowner statements deposited under section 15A of the Commons Act 2006, they would require far less time and resource, when compared to TVG applications.

Development Industry

- 6.53 Where an application is submitted to register land as a TVG, this creates uncertainty among the development industry as to the future of the land, particularly where it has entered the planning process. This option will therefore provide more certainty for developers.
- 6.54 Furthermore, the submission of landowner statements under section 15A of the Commons Act 2006 will be entirely at the discretion of landowners. They would be able to protect their land from TVG registration and retain the development value of the land, which would be lost as a result of TVG registration.

Applicants for TVG registration

- 6.55 Although this option seeks to prevent the submission of applications to register land as a TVG solely to prevent lawful development, there will continue to be opportunities for these applications to be submitted within a prescribed timeframe.
- 6.56 Similarly, landowners may also allow continued recreational use of their land by the public if they wish, which is a benefit to the community.

Justification for two options

- 6.57 The principle for reforming the TVG system in Wales has already been established through the implementation of the 2015 Act².
- 6.58 Therefore, the only potential options available would be to retain the current system for TVG, or bring into force those relevant provisions contained within the 2015 Act which seek to address the issues surround the registration of TVGs creating barriers to development.

Summary and preferred option

- 6.59 The current TVG registration system provides legal protection to land from development and interference on sites which have been used for recreational purposes by local or nearby residents for the preceding 20 years, or over.
- 6.60 Registered TVGs can have positive impacts on people and communities, though promoting health and wellbeing, as well as providing a public good.
- 6.61 There is however, evidence that the TVG registration system is being used as a method for preventing the development of land. TVGs can be registered on sites which have deemed planning permission, on which building work may have commenced or have been completed. The system may also be used to undermine land which is subject to a Local Development Order or a Development Consent Order. The Commons Act 2006 and planning legislation are at cross purposes. Development which is considered acceptable under planning legislation can be subject to delays and abandonment with associated economic benefits. It also places a burden of substantial costs on developers and landowners.
- 6.62 Landowners can also suffer a significant loss in the value of their land following registration as a TVG, given that it would be extremely difficult to develop that land thereafter. In those circumstances, a TVG can be proven to be a barrier to development.
- 6.63 Option 2 is the preferred option as it will allow for continued recreational use of land by the public while giving landowners a proactive mechanism for working constructively with the community. Option 2 is considered to be a less restrictive approach to the community and those who engage in the planning system. Whilst it does not address all issues of overlap between the TVG registration system and the planning system, additional protection to development from such applications would be added compared with the existing situation.
- 6.64 Option 2 also draws a clear line that an application to register a TVG cannot be made where relevant trigger events have occurred.

² Sections 52 and 53 of, and Schedule 6 to the Planning (Wales) Act 2015.