CA10/45 – APPLICATION TO CORRECT UNIT CL20 OF THE REGISTER OF COMMON LAND – CALDBECK COMMON.

1.0 EXECUTIVE SUMMARY

1.1 Cumbria County Council is the registration authority for Common Land and Town and Village Greens under the Commons Act 2006.

1.2 An application has been received from Thomas Alan Benn to correct unit No. CL20 of the register of Common Land – Caldbec Common.

1.3 The application relates to a dispute between two parties over the effect of two conveyances made in 1987 and signed two months apart. The conveyances promised more grazing rights between them than the vendor had to sell. For the reasons contained within this report the applicant claims that a reduction in the grazing rights transferred, caused by the overselling of the rights, should be borne solely by the second of those conveyances. The objector contends that the required reduction should be proportionally split between the two conveyances.

1.4 The purpose of this report is to request Members to make a decision as to whether the application should be granted, and a correction made to the Council’s register of common land.

2.0 POLICY POSITION, BUDGETARY AND EQUALITY IMPLICATIONS, AND LINKS TO COUNCIL PLAN

2.1 The relevant corporate theme is that people in Cumbria are healthy and safe.

2.2 This matter is a decision-making process of a quasi-judicial nature. There should be no policy or political consideration given and any potential financial implication should be ignored.
3.0 **RECOMMENDATION**

3.1 *It is recommended that the Committee accepts the application and corrects the Register of Common Land for the reasons contained within this report and on the specific ground that Cumbria County Council as Commons Registration Authority made a mistake when updating the commons register on 25th July 2018 under the Commons Act 2006.*

4.0 **BACKGROUND**

The Application:

4.1 On 13th December 2019 Cumbria County Council, as registration authority for Common Land, received an application on Form CA10 (“the Application”) under Section 19(2)(a) of the Commons Act 2006 (“the 2006 Act”) from Thomas Alan Benn (“the Applicant”) for the correction of register unit CL20 Caldbeck Common. The Application related to the grazing rights currently recorded at entries 417 and 418. Copies of these entries are included as Appendix 1.

4.2 A copy of the Application is attached to the report at Appendix 2, along with the supporting statement provided by the Applicant.

4.3 The right to graze 250 sheep (adult), 12 cattle and 4 ponies on Caldbeck Common was provisionally registered as attached to land at entry 46 of register unit CL20 on 12th November 1968, and subsequently at entry 101 on 10th May 1972. On the agreed basis of 1 sheep equalling 1 unit, 1 beast (cattle) equalling 4 units and 1 pony equalling 8 units this equated to 330 units in total.

4.4 As a result of an objection, a Commons Commissioner’s decision dated 26th July 1982 (Appendix 3) reduced the number of rights to 308 units in total. This was recorded in the register and the entries became final on 7th October 1982.

4.5 A conveyance dated 16th October 1987 sought to transfer the grazing rights for 250 sheep and 12 cattle (298 units) to Colin William Bell, whilst a conveyance dated 15th December 1987 sought to transfer the grazing rights for 4 ponies (32 units) to Michael John Fearn and Linda Clare Fearn (Appendix 4), not taking into account the Commons Commissioner’s legally-binding decision which had already reduced the total grazing units from 330 to 308.

4.6 Corrective application CA10/36 submitted in 2017 by Mr Anthony Philip Vaux (“the 2017 Application”) sought to correct a grazing unit conversion error made in 2004 in which 250 sheep and 12 cattle were listed as equating to 308 units, as opposed to 298 units. The 2017 Application also sought to proportionally reduce the numbers of grazing units transferred in both 1987 conveyances to account for the Commissioner’s decision. The 298 grazing units which were intended to be transferred in the 16th October 1987
conveyance were reduced to 278.13 units, whilst the 32 intended grazing units in the 15th December 1987 conveyance were reduced to 29.87 units. No objections were received against Mr Vaux’s application from anyone with a legal interest in the land and the register was updated accordingly (as shown by the register entries included as Appendix 1).

4.7 The Applicant agrees with the 2017 Application in so far as the 250 sheep and 12 cattle rights transferred on 16th October 1987 equate to 298 units; as opposed to the 308 units recorded in 2004.

4.8 The Applicant also agrees with the 2017 Application in respect of the 1982 Commons Commissioner’s decision effectively being ignored within the wording of the two 1987 conveyances. The Applicant recognises that following that decision the total number of rights reduced from 330 units to 308 units. However, the Applicant disagrees with how this reduction was borne out between the two parties and does not consider it to be correct at law.

4.9 The Applicant contends that, legally, 298 units were transferred on 16th October 1987, and, therefore, when the second transfer was made two months later, legally, the transferor only had 10 units left to convey. The Applicant believes that it was wrong of the 2017 Application to apportion the reduction between the two parties (and two register entries), and that the reduction should be borne solely by the second transferee.

4.10 The Applicant therefore requests that register entries 417 and 418 be corrected and replaced to show the Applicant as the owner of 298 grazing units held in gross (an increase from the 278.13 units recorded currently), with the remaining 10 units to be shown as still attached to land (a decrease from the 29.87 units shown recorded currently).

4.11 The Application was deemed to be duly made and on 20th December 2019 a notice of application was advertised on Cumbria County Council’s website and sent to all relevant parties in accordance with Schedule 7 of the Commons Registration (England) Regulations 2014 (“the 2014 Regulations”). Anyone wishing to object to the Application had until 7th February 2020 to do so in writing.

4.12 One objection was received from Mr Anthony Philip Vaux, who was the initiator of the 2017 Application and who has a legal interest in the grazing rights. The objection was duly served on the Applicant in accordance with the 2014 Regulations and the Applicant responded in turn. A copy of the objection and the subsequent response from the Applicant are attached at Appendix 5.

4.13 In the simplest of terms Mr Vaux claims that the Applicant should have objected against the 2017 Application and is in effect using this application to do so outside the proper time period allowed for objections. Mr Vaux also questions the validity of the 1987 conveyances in respect of the grazing rights they transferred, in terms of them referring to ‘units’ and not ‘rights’, ignoring the reduction of rights as a result of the Commons Commissioner’s decision and also ignoring the inbye ratio of 4 animals per acre that the Commissioner’s decision had set to impose. Mr Vaux believes that both
1987 conveyances were both equally at fault in ignoring the 1982 Commissioner’s decision, and that the result of the 2017 Application, in which both entries were proportionally reduced, represents a rational and valid attempt to settle the matter based upon the intentions of the parties at the time. Furthermore, Mr Vaux states that the two 1987 conveyances were part of a single farm-sale process and that the 2017 Application (and subsequent register amendment) was right to treat the 1987 conveyances as part of a single process.

4.14 After an initial review Mr Vaux was offered the chance to make oral representations under 27(7)(b) of the 2014 Regulations. Considering the current situation these representations were accepted in written form. Mr Vaux duly responded to this request and his written representations are included as Appendix 6.

4.15 The Law:

4.16 Part 1 of the 2006 Act was implemented in Cumbria on 15th December 2014 and allows applications to be made to amend the Register of Common Land and Town or Village Greens.

4.17 The Application is made under Section 19(2)(a) of the 2006 Act which states:

“19 Correction

(1) A commons registration authority may amend its register of common land and town or village greens for any purpose referred to in subsection (2).

(2) those purposes are –
(a) correcting a mistake made by the commons registration authority in making or amending an entry in the register.”

The application of the law to the facts and evidence of the Application:

4.18 The application complies with the formal requirements as to form and content as stipulated in the 2014 Regulations.

4.19 It is agreed by all parties that the 1982 Commons Commissioner’s decision reduced the total number of grazing rights to 308 units. It is therefore not disputed that by 1987, prior to the conveyances in question being completed, there were 308 units available. It seems clear that, despite the transferor (Mr Geoffrey Heron Cole) being seemingly unaware of the previous Commons Commissioner’s decision, it was his intention to sell the entirety of the rights, and this is effectively what the conveyances dated 16th October 1987 and 15th December 1987 did.

4.20 Nevertheless, 330 grazing units were listed between the two 1987 conveyances; with the 16th October 1987 conveyance stating the transfer of the equivalent of 298 grazing units, and the 15th December 1987 conveyance stating the transfer of the equivalent of 32 grazing units. With only 308 units available in total legal opinion was sought on the exact effect of the two 1987 conveyances.
4.21 The legal position is that the effect of each conveyance is a matter of timing. Unless there is a reason to consider it not effective, a contract takes effect on the day it is expressed to take effect.

4.22 I can find no reason why the conveyance of 16th October 1987 would be considered ineffective. Whilst it may appear that there was some mistake as to the number of units, this is not a matter that the Registration Authority can decide upon, this is a private law matter. The conveyance sought to transfer 298 grazing units, and at the time of the conveyance (16th October 1987) the transferor had [at least] 298 grazing units to transfer. I am therefore satisfied that the 16th October 1987 conveyance was effective at transferring 298 grazing units.

4.23 I will now deal specifically with the points raised within the objection made by Mr Vaux.

The two conveyances being part of the same farm-sale process

4.24 Mr Vaux contends that both 1987 conveyances, despite being signed two months apart, were part of the same single farm-sale process. Whilst this is entirely probable this is not a matter of one conveyance taking legal precedence over another, it is simply a matter of timing. By the time the second conveyance took effect on the 15th December 1987 the transferor only had 10 units left to convey.

The validity of the conveyances

4.25 Mr Vaux questions the validity of the 1987 conveyances themselves as they refer to ‘units’ and not ‘rights’. I have considered this point, and it seems apparent that there is a clear conversion between units and rights which can be applied with regards to this particular common. The Commons Commissioner’s decision itself states that the objections which resulted in this reduction of grazing rights “are based upon the acreage of the inbye land and its capacity to winter animals, this being the yardstick applied by the Caldbeck Commons Committee. It is expressed as so many units per acre, one unit being equivalent to one sheep of any age, four units to one beast and eight units to one horse”. By these given ratios I am satisfied that the 250 sheep and 12 cattle listed on the October 1987 conveyance equates to 298 units, whilst the 4 ponies listed on the December 1987 conveyance equates to 32 units.

The inbye ratio

4.26 Mr Vaux, as part of his representations, refers to the “inbye ratio issue”, which the Applicant in his response considers to be “irrelevant”. I have considered this point accordingly.

Regulation 18(4) to Schedule 4 of the 2014 Regulations states that:

“If the applicant claims that the right of common is apportioned otherwise than rateably between the constituent parts of the land to which it was attached, the applicant must –

(a) Explain the basis for that claim; and
Paragraph 2(2)(b) of Schedule 3 to the Commons Act 2006 states that a relevant disposition (in this case an apportionment or severance) can be made by a relevant instrument (in this case the 1987 conveyances) for these purposes, providing that it was made after the registration of the right under the Act and before the commencement of this paragraph.

The above references provide a useful insight as to how the 1987 conveyances could, and in my opinion did, transfer the common rights non-proportionally, without having to take into account the inbye ratio.

4.27 Finally, Mr Vaux questions the validity of the Application itself. It is true that the Applicant (Mr Benn) was specifically written to as part of the notification process for Mr Vaux’s 2017 corrective application; a period in which he had 6 weeks to object to the proposals outlined by Mr Vaux. Whilst it is regrettable that Mr Benn did not respond or raise any objections at the time, this does not preclude him from making any subsequent applications such as this. Mr Vaux believes that allowing such an application would open the way for an endless process of applications and representations.

4.28 Part 1 of the 2006 Act was implemented in Cumbria in 2014. It retains but updates the registration system established by the 1965 Act, and importantly it allows the registers to be amended to reflect anomalies and mistakes. Any individual is free to submit a corrective application under Section 19 of the Commons Act 2006, and in the interest of making the registers as accurate and credible as possible it is the Registration Authorities’ duty to assess it. An initial assessment would be used to determine if the application itself was duly made. This assessment includes looking for a statement of the purpose of the application and looking at the mistake in the register which is sought to be corrected. In the case of this application it was felt that the Applicant made a valid point regarding the effect of the 1987 conveyances, a point which had not been explored previously. Therefore, the Application was accepted as being duly made and the notice was issued accordingly. If the Application failed to raise an issue which had not been considered previously and/or had not presented any new material evidence, then the application would not have been considered to have been duly made. As such, I do not accept that accepting the Application would open the way to an endless process of applications and representations. If an application was deemed to be not duly made then it would be rejected, no notice would be issued, and no representations would be invited.

4.29 Section 19 (5) of the Commons Act 2006 states:

“A mistake in the register may not be corrected in this section if the authority considers that, by reason of reliance reasonably placed on the register by
any person or for any other reason, it would in all the circumstances be unfair to do so.”

4.30 Based upon the differing understandings of the effect of the 1987 conveyances, the party for whom the decision goes against will likely feel that the decision has been unfair. I contend that the register must be kept accurate and that it would not be unfair to make a correction which reflects the true legal effect of the 1987 conveyances.

4.31 In any event, prior to the 2017 Application all rights were attributed to the Applicant and had been for 14 years. The changes made as a result of the 2017 Application left 29.87 grazing units attached to land and therefore potentially claimable. If the current Application were to be successful there’d still be 10 grazing units left recorded as attached to land. I am not aware of any reliance being placed reasonably on the register between the 25th July 2018 and present; particularly as Mr Vaux is not currently recorded as the owner of those remaining rights.

Conclusions to the application of the law

4.32 In view of the reasons outlined in 4.19 to 4.31 I find that the application was duly made, that the Applicant’s assertions regarding the effect of the 1987 conveyances are correct and that it would not be unfair to correct the register to accurately reflect those assertions.

5.0 Legal Implications

5.1 The Council has a statutory duty to keep a register of Common Land and since the implementation of Part 1 of the 2006 Act, has the power to amend the register. The Council’s Constitution at Part 2G 2.1) f) i) delegates this responsibility to the Development Control and Regulation Committee.

5.2 In considering the Application, Members must consider all of the evidence available to them, and must be satisfied that the evidence shows that each aspect of the statutory conditions set out at Section 19(2)(a) of the 2006 Act have been met. The burden of proof in this regard is firmly upon the Applicant to provide the required evidence. The standard of proof to be applied is the usual civil standard “on the balance of probabilities”, i.e. it must be more likely than not.

5.3 The role of this Committee is to reach its own determination on the matters of fact and law arising as a result of the Application. It is for Members to determine the Application fairly, putting aside any considerations of the desirability of the land being registered as Common Land or being put to other use.

5.4 Although the recommendation is for the Committee to proceed with determination and acceptance of the Application, the Committee is not bound to follow the Recommendation; providing that in reaching its decision it applies the correct legal principles and duly considers the evidence.
Therefore, Members are free to accept or reject any of the Recommendations in the report. If the members reject the Officer findings and decide either not to determine the Application or to reject the Application, the Committee should set out their reasons at the meeting.

4.1 It should be noted that the Council may not refuse an application without first offering the Applicant an opportunity to make oral representations. Accordingly, if Members reject the recommendation, such an offer will be made before a further report to Committee is made.

4.2 All other legal considerations, issues and implications have been addressed within the detail of the report.

6.0 Options

6.1 The Committee may accept or reject the Recommendation.

6.2 If the Recommendation is accepted the Registration Authority will give effect to the determination by amending register unit CL20, resulting in the 278.13 grazing units currently assigned to the Applicant being increased to 298 units, and the remaining (as yet unclaimed) 29.87 units being reduced to 10 grazing units.

6.3 If the Recommendation is rejected the Applicant will be offered the chance to make oral representations based upon the reasons for such a rejection and the register will remain unchanged in the meantime.

6.4 Members should note that the decision of the Committee in relation to an application to correct the common land or village green register is a legal decision and is not a matter of policy or discretion.

7.0 Conclusion

7.1 I am of the opinion that the Application has been validly made. The evidence submitted by the Applicant and my own research support the claim that an error was made by the registration authority. Under Section 19(2)(a) of the 2006 Act this error can be corrected.

7.2 One objection was received, which was carefully considered, but I am of the opinion that the Applicant’s interpretation of the effect of the 1987 conveyances is correct. That is to say that 298 grazing units were transferred with the first conveyance on 16th October 1987, and therefore by the time that the second conveyance took effect on 15th December 1987 there were only 10 grazing units left to convey. Whilst the objector’s alternative view on the effect of the 1987 conveyances is a reasonable one, and one that formed the basis of his 2017 corrective application, upon detailed analysis I found it not to be correct at law.
7.3 I conclude that on the balance of probabilities a mistake was made when creating entries 417 and 418 in so far as they do not accurately reflect the true legal effect of the 1987 conveyances. The quantities of grazing units split between the two entries should be amended accordingly.

7.4 I recommend that this Committee resolves that the Register of Common Land be corrected and entries 417 and 418 are cancelled and replaced by two new entries, one showing 298 grazing units in the name of the Applicant, and the other showing 10 as yet unclaimed grazing rights in the name of the original applicant (Sidney Herbert Cole).

Angela Jones  
Executive Director – Economy and Infrastructure  
2nd November 2020

APPENDICES

Appendix 1 – Register copy showing entries 417 & 418  
Appendix 2 – Application form and supporting statement  
Appendix 3 – Commons Commissioner’s Decision  
Appendix 4 – 1987 Conveyances  
Appendix 5 – Objection and response from the Applicant  
Appendix 6 – Further representations submitted by the objector

IMPLICATIONS

Staffing: None  
Financial: There would be cost implications in the event of an application for judicial review, however the Council is the registration authority and therefore has a statutory duty to decide applications.  
Property: None  
Electoral Division(s): Thursby  
Human Rights: The Council as registration authority has to make a decision in accordance with the law and in particular with the provisions of the 2006 Act, given these legal criteria a decision must reflect the legislation despite any other rights of individuals.

PREVIOUS RELEVANT COUNCIL OR EXECUTIVE DECISIONS

Application CA10/36 (determined by the Committee on 11/07/2018)  
CONSIDERATION BY OVERVIEW AND SCRUTINY

Not considered by Overview and Scrutiny

BACKGROUND PAPERS

Commons Act 2006
Commons Registration (England) Regulations 2014

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