

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 19 January 2021

From: Executive Director – Economy and Infrastructure

CA13/19 – APPLICATION TO CORRECT NON-REGISTRATION OF COMMON LAND; LAND AT THIRLMERE.

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 Mr. Ian Brody to correct non-registration of common land at Thirlmere.*
- 1.3 *The applicant claims that the application land was omitted from registration as part of the register unit CL413 Whelpside, Steel End, West Head, Armboth and Bleaberry Fells and has requested that the Application Land is added to that register unit.*
- 1.4 *The applicant claims that the Application Land was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965 and that it is recognised or designated as common land by or under an enactment, that enactment being The Manchester Corporation Waterworks Act 1879, and thus satisfies the criteria specified in paragraph 2 of Schedule 2 of the Commons Act 2006.*
- 1.5 *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 rejects the application on the grounds that the land in question does not satisfy the criteria specified in paragraph 2 of Schedule 2 of the Commons Act 2006. It is considered that the Manchester Corporation Waterworks Act does not recognise or designate the land which is subject to this application as common land.*

4.0 **BACKGROUND**

The Application:

- 4.1 On 6th October 2017 Cumbria County Council, as registration authority for common land and town and village greens (“the Registration Authority”), received an application on Form CA13 (“the Application”) under Paragraph 2 of Schedule 2 to the Commons Act 2006 (“the 2006 Act”) from Ian Brodie (“the Applicant”) to register land as common land on the grounds that it was omitted from registration of land as CL413 Whelpside, Steel End, West Head, Armboth and Bleaberry Fells. A copy of the Application is attached to this report at **Appendix 1**.
- 4.2 The Application relates to five parcels of land at Thirlmere as shown outlined and hatched in blue on the plan at **Appendix 2** and referred to hereafter as the “Application Land”.
- 4.3 CL413 was provisionally registered as common land on 24th April 1970 under Section 4 of the Commons Registration Act 1965 (“the 1965 Act”) pursuant to application no. 1304, made by the Manchester Corporation on 30th June 1968 (“the 1968 Application”). The provisional registration became final on 1st August 1972 and the land became register unit CL413. A copy of the 1968 Application is attached to this report at **Appendix 3**.
- 4.4 The Applicant claims that the Application Land was omitted from registration of land as CL413 Whelpside, Steel End, West Head, Armboth and Bleaberry Fells. The Applicant further claims that the Application Land was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965 and that it is recognised or designated as common land by or under an enactment, that enactment being the Manchester Corporation Waterworks Act 1879 (“the 1879 Act”), and thus satisfies the criteria specified in paragraph 2 of Schedule 2 of the Commons Act 2006.
- 4.5 The Applicant requests that the Application Land is added to register unit CL413 Whelpside, Steel End, West Head, Armboth and Bleaberry Fells.

4.6 The following supporting evidence was submitted by the Applicants with the Application:

- Copy of the 1879 Act.
- Copy extracts of a map (not to scale) a copy of which, the Applicant claims, was submitted by Manchester City Council to Parliament in 1879 as part of the process leading to the enactment (“the Map”);

A copy of the said evidence is attached to this report at **Appendix 4**.

4.7 On 16th May 2018 the Application was deemed to have been duly made and notice of the Application was advertised on Cumbria County Council’s website and on the site of the Application Land. The notice was also sent to relevant parties in accordance with Schedule 7 of the Commons Registration (England) Regulations 2014 (“the 2014 Regulations”). Anyone wishing to submit representations to the Application had until 28th June 2018 to do so.

4.8 One representation amounting to an objection (“the Objection”) was received from United Utilities who are the owner of the Application Land. The Objection was duly served on the Applicant in accordance with the 2014 Regulations and the Applicant provided a reply to it. Copies of the Objection and the Applicant’s reply are attached to this report at **Appendix 5**.

The Law:

4.9 Part 1 of the 2006 Act was implemented in Cumbria on 15th December 2014 and allows applications to be made to amend the Commons and Town and Village Green Register.

4.10 The Application is made under Paragraph 2 of Schedule 2 of “the 2006 Act” which states:

Non-registration of common land

2

(1) *If a commons registration authority is satisfied that any land not registered as common land or as a town or village green is land to which this paragraph applies, the authority shall, subject to this paragraph, register the land as common land in its register of common land.*

(2) *This paragraph applies to any land which—*

(a) *was not at any time finally registered as common land or as a town or village green under the 1965 Act;*

(b) *is land which is—*

(i) *regulated by an Act made under the Commons Act 1876 (c. 56) confirming a provisional order of the Inclosure Commissioners;*

(ii) *subject to a scheme under Metropolitan Commons Act 1866 (c. 1220 or the Commons Act 1899 (c. 30);*

(iii) *regulated as common land under a local or personal Act; or*

(iv) *otherwise recognised or designated as common land by or under an enactment;*

- (c) is land to which this Part applies; and
(d) satisfies such other conditions as regulations may specify.

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

4.11 The statutory criteria as set out above are considered in relation to the Application as follows:

(a) The land was not at any time finally registered as common land or as a town or village green under the 1965 Act:

It is confirmed that none of the land was at any time finally registered as common land or as a town or village green under the 1965 Act.

This element of the criteria is satisfied.

(b) is land which is—

- (i) regulated by an Act made under the Commons Act 1876 (c. 56) confirming a provisional order of the Inclosure Commissioners;**
- (ii) subject to a scheme under Metropolitan Commons Act 1866 (c. 122) or the Commons Act 1899 (c. 30);**
- (iii) regulated as common land under a local or personal Act; or**
- (iv) otherwise recognised or designated as common land by or under an enactment:**

It is claimed by the Applicant that the Application Land is common land by virtue of being recognised or designated as such by or under the 1879 Act therefore (iv) applies.

I have considered the contents of the 1879 Act. The purpose of the 1879 Act was to empower Manchester Corporation to dam the lake at Thirlmere creating a reservoir from which water would be pumped to Manchester and to purchase certain lands around the lake. It did not designate or recognise land as common land. The only clause of the 1879 Act which refers to common land is clause 62 which states:

The access heretofore actually enjoyed on the part of the public and tourists to the mountains and fells surrounding Lake Thirlmere or situate elsewhere in the townships of Saint John's Castlerigg and Wythburn and Grasmere in the parishes of Crosthwaite and Grasmere respectively shall not be in any manner restricted or interfered with by the Corporation.

The above statement is of a general nature and neither section 62 nor the rest of the 1879 Act refer to the Map, or indeed any map which shows the boundaries of the commons around Thirlmere. Further, the submitted copies of the Map do not contain any annotations that would prove its provenance or confirm that certain land shown on the Map is common land. I do not consider that the necessary link has been established in the Application between the Map and the 1879 Act. Therefore, it is my opinion that there is insufficient evidence to support a conclusion that the 1879 Act designated or recognised the Application Land as common land.

The above was put to the Applicant for his comments in a letter dated 19th June 2019.

The Applicant replied to say that he does not dispute that the 1879 Act itself does not refer to the Application Land. The Applicant went on to explain what was shown on the Map and to repeat his claims that the boundaries of common land around Thirlmere were recognised and confirmed by the Manchester Corporation on the Map which they submitted to Parliament when the 1879 Act was being debated. No further documentary evidence was provided by the Applicant in support of his claims and therefore, in my opinion, the issues put to the Applicant in the 19th June letter remained unresolved. Copies of the 19th June letter and the Applicant's reply are attached to this report at **Appendix 6**.

I consider that this element of the criteria is not satisfied.

(c) is land to which this Part applies:

Part 1 of the Commons Act 2006 applies to all land in England and Wales, except the New Forest, Epping Forest and the Forest of Dean.

This element of the criteria is satisfied.

(d) satisfies such other conditions as regulations may specify:

The 2014 Regulations require that an application made under paragraph 2 of Schedule 2 to the 2006 Act must be made on or before 15th March 2027 and include:

(i) a description of the land to which the application relates;

The Applicant provided a plan of the Application Land.

(ii) the landowner's consent to the registration, if the land to which the application relates is covered by a building or is within the curtilage of a building;

There are no buildings on the Application Land and therefore no consent is required.

(iii) a copy of any enactment or scheme referred to in paragraph 2(2)(b) of that Schedule;

The Applicant has provided a copy of the Manchester Corporation Waterworks Act 1879.

It is considered that Application complies with the formal requirements as to form and content contained in the 2014 Regulations.

This element of the criteria is satisfied.

Consideration of the Objection

4.12 The Objection made in relation to the Application was made on the following grounds:

- i. *It is unclear whether the Application is made by the Applicant as a private individual and not on behalf of the Friends of the Lake District or the Open Spaces Society. The Applicant should be asked to sign a witness statement to clarify this;*

Section 2 of the application form states that the applicant is Ian Brodie and the form is signed by him at Section 10. In any case, this is irrelevant because any person can apply to correct the register under paragraph 2 of Schedule 2.

- ii. *The Applicant does not provide any proof to support his claims that the land was erroneously omitted from registration due to illegal afforestation. The Objector maintains that the trees were planted long before registration (Annex 5) and that Friends of the Lake District who submitted their own application to register the land did not object to the Manchester Corporation's application;*

The Applicant provided copies of the map which was, allegedly, submitted by Manchester City Council to Parliament during the passing of the 1879 Act and which, in the Applicant's opinion, proves that the land was common land. The Applicant also provided a copy of the enactment referred to in paragraph 2(2)(b) of Schedule 2 as prescribed by the regulations. The fact that no objections were received during the provisional registration of the land and whether or not it was afforested illegally are irrelevant.

- iii. *It is impossible to make a comparison between the current boundaries of CL413 and the extent of the common as claimed by the Applicant because the copies of the maps he provided are not of the same scale.*

I have examined the extracts of the Map and was able to establish that the five parcels comprising the Application Land are shown in white on the Map. I do, however acknowledge that the quality of the copies of the Map is quite poor. I requested that the Applicant provides better quality copies of the map all using the same scale but the Applicant was unable to do so. It is, however, not important because, in my opinion, the Application fails to show the connection between the Map and the 1879 Act.

- iv. *The Applicant refers to a survey of boundaries of CL413 and makes certain statements about them but does not provide any evidence to support his statements.*

The conclusions of the survey, even if they show that the land was common land in the past, are not relevant. The registration authority cannot take into account evidence which is not related to the criteria in paragraph 2 of Schedule 2.

- v. *The Applicant states that he discussed the Application with a senior representative of United Utilities and that the representative acknowledged the validity of his claims. The representative accepts that he knew about the Applicant's intention to submit this Application but denies ever acknowledging the validity of the claim.*

This is not relevant to the criteria.

- vi. *The Applicant claims that the land was formerly baronial forest and should provide evidence to support this claim.*

This is not relevant to the criteria.

- vii. *The woodland was planted on the Application Land between 1900 and 1923 and protected against the common by a metal fence.*

This is not relevant to the criteria.

- viii. *Map at Annex 6 dated 1968 shows the boundaries of the Application Land and when they were repaired. Also shows the walls at the time.*

This is not relevant to the criteria.

- ix. *At the time of provisional registration the trees were already planted and fenced off against the common. United Utilities claim that the Application Land never had been common land and was enclosed woodland at the time of the provisional registration.*

This is not relevant to the criteria.

The Objector raised a number of different issues and provided some evidence as to the past status of the Application Land. However, the matter of whether the Application Land was common land at some point in the past is immaterial. The only question which the registration authority is permitted to consider under the 2006 Act is 'Is the Application Land designated or recognised as common land by or under an enactment?' I do not consider that the Objector addressed this matter in their objection.

Oral Representations

4.13 Regulation 27(7) states that

The determining authority—

(a) may not refuse an application without first offering the applicant an opportunity to make oral representations; and

(b) may not grant or refuse an application or proposal without first offering any person (other than the applicant) for whom the grant or refusal (as the case may be) would represent a determination of that person's civil rights an opportunity to make oral representations.

- 4.14 On 5th November 2019 I wrote to the Applicant informing him that I was minded to recommend that the two applications concerning land at Thirlmere (CA13/19 and CA13/20) be rejected, outlining the reasons and inviting the Applicant to make oral representations. The oral representations meeting took place on 21st November in the presence of Commons Registration and Legal Officers. The Officers explained to the Applicant the two main issues with the Application. Firstly, that there were no annotations on the Map, nor any reference book submitted with it, which would prove its provenance, establish its link to the 1879 Act and explain what is shown on it. Secondly, no case has been made to prove, on the balance of probabilities, that the 1879 Act and the Map designate or recognise the Application Land as common land.
- 4.15 The Applicant stated that he had conducted a lot of research around the Thirlmere area as part of the Lake District's World Heritage Site status bid. To address the first point, the Applicant explained that following the failure of the first Bill lodged with Parliament, the Manchester Corporation resubmitted it, providing further evidence which included the Map. To address the second point, the Applicant explained the history behind the making of the Act. He claimed that several committee hearings were held in which the bill (including the Map) was discussed. The Applicant was unable to provide any records of those hearings. The Applicant claimed that the Map showed the tenements in colour and the common land uncoloured. The Applicant acknowledged that common land is not referenced in the 1879 Act, apart from in clause 62 as mentioned in 4.11 (b) but argued that the Application Land should be registered because Parliament had recognised it as common land in the process of making the 1879 Act.
- 4.16 Following the oral representations meeting the Applicant submitted further written evidence in support of his application. The evidence is based on the Applicant's research and outlines the history of Thirlmere commons and the debates relating to common land in the period leading to the passing of the 1879 Act. Copies of the minutes of the oral representation meeting and of further written evidence is attached to this report at **Appendix 7**.
- 4.17 Having considered the contents of oral representations and further written evidence, it is my opinion that, despite there being some evidence that suggests that at some point in the past the Application Land was common land, there is still insufficient evidence to prove a direct relationship between the Application Land and the 1879 Act. No documentary evidence has been provided to support the Applicant's assertions as to the provenance of the Map and the recognition by Parliament of the land shown uncoloured on that Map in white as common land. In any case, I do not agree with the Applicant that the land recognised as common land during parliamentary debates in the process of passing the 1879 Act can qualify for registration under paragraph 2 of Schedule 2 when the 1879 Act itself makes no reference to it. For the registration authority to make that conclusion, the words of paragraph 2(iv), '*otherwise recognised or designated as common land by or under an enactment*', would have to be embellished with a further addition not set out in the 2006 Act itself, namely '*or recognised as common land by Parliament in the process of making the Act*'. I do not consider that the registration authority has discretion to make this addition to the wording of paragraph 2. In light of the above, my conclusion in 4.11 that the Application

does not satisfy the criteria in paragraph 2(b)(iv) of Schedule 2 remains unchanged.

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 Schedule 2 Paragraph 2 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 Officer Recommendations are for the Committee to proceed with determination and rejection of the Application, the Committee is not bound to follow the Recommendations, 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 Recommendations and decide either not to determine the Application or to reject the Application and not register the Application Land as common land, the Committee should set out their reasons at the meeting.
- 5.5 It should be noted that the Council may not grant or refuse an application without first offering any person (other than the applicant) for whom the grant or refusal (as the case may be) would represent a determination of that person's civil rights an opportunity to make oral representations. Accordingly, if Members reject the Recommendation and wish to approve the Application, such an offer will be made to the Objector before a further report to Committee is made.
- 5.6 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 Application Land will not be registered as common land and the register will remain unaltered.

6.3 If the Recommendation is rejected the decision will be deferred so as to allow the Objector an opportunity to make oral representations to address the reasons for the rejection.

6.4 Members should note that the decision of the Committee in relation to an application to correct the 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 not been validly made. The evidence provided by the Applicants does not show on the balance of probabilities that the Application Land was recognised or designated by or under the Manchester Corporation Waterworks Act 1879 and therefore it should not be registered as common land under paragraph 2 of Schedule 2 to the Commons Act 2006.

7.2 I consider it reasonable that this Committee resolves that the Application is rejected and the Application Land is not added to the register of common land.

Angela Jones

Executive Director – Economy and Infrastructure

18th December 2020

APPENDICES

Appendix 1 – Copy of Application CA13/19

Appendix 2 – Map of the Application Land

Appendix 3 – Copy of the 1968 Application

Appendix 4 – Copy of supporting evidence

Appendix 5 – Copies of the Objection and the Applicant's reply

Appendix 6 – Copy of further representation Documents

Appendix 7 – Copy of Oral Hearing documents

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): Keswick

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

No previous relevant decisions

CONSIDERATION BY OVERVIEW AND SCRUTINY

Not considered by Overview and Scrutiny

BACKGROUND PAPERS

Commons Act 2006

Commons Registration (England) Regulations 2014

Defra Part 1 of the Commons Act 2006: Guidance to Commons Registration Authorities and the Planning Inspectorate 2015.

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