

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 29th September 2022

From: Executive Director – Economy and Infrastructure

CA10/57 – APPLICATION TO CORRECT THE REGISTER OF COMMON LAND; CL41 – ROUNDTWHAITE COMMON, ENTRY 11

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 Albert William Morland to correct entry 11 of unit No. CL41 of the register of common land – Roundthwaite Common.*
- 1.3 *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 for the reasons contained within this report and on the specific grounds that there is insufficient evidence that a mistake of a nature claimed by the applicant was made in the original application to register the right at entry 11 of CL41 Roundthwaite Common.*

4.0 BACKGROUND

The Application:

- 4.1 On 8th June 2021 the Council, as registration authority for common land and town and village greens, received an application on Form CA10 (“the Application”) under Section 19(2)(b) of the Commons Act 2006 (“the 2006 Act”) from Albert William Morland (“the Applicant”) for the correction of entry 11 of register unit CL41 Roundthwaite Common. A copy of the Application is attached to the report at **Appendix 1**.
- 4.2 A right to graze: (a) 125 ewes and shearlings, (b) 50 hogs, (c) 10 heads of cattle and (d) 25 ponies with their foals together with the rights of turbary, estovers and to take stone over the whole of the land comprised in this register unit (“the Right”) is registered as attached to Roundthwaite Farm, Tebay at entry 11 of register unit CL41. The Right was registered pursuant to application number 1200 dated 18th November 1969 (“the 1969 Application”) made by Messrs. A. Hoggarth & Son, Kendal on behalf of the Applicant in his capacity of a tenant of Roundthwaite Farm.
- 4.3 The Applicant claims that a mistake was made in the register in that the whole of the Right was registered as attached to Roundthwaite Farm. The Applicant claims that only the right to graze sheep and hogs should have been registered as such, and the right to graze cattle and ponies should have been registered as held in gross by the Applicant. The Applicant seeks by this application to correct the claimed mistake.
- 4.4 The following supporting evidence was submitted by the Applicant:
- Copy of the 1969 Application;
 - Statutory Declaration of William Sydney Potter dated 23rd March 2021;
 - Copy of the final page of the original Lease of Roundthwaite Farm;
 - Copy of the Deed of Surrender relating to Roundthwaite Farm.

Copies of the said evidence are attached to this report at **Appendix 2**.

- 4.5 On 12th October 2021 the Application was deemed to have been duly made and 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 24th November 2021 to do so in writing.
- 4.6 Five representations amounting to objections were received. Copies of the representations are attached to this report at **Appendix 3**. One representation was from Roundthwaite and Bretherdale Commoners Association and the other four were from people who bought various parts of Roundthwaite Farm when it was sold in several lots in 2014.
- 4.7 The Law:

- 4.8 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.
- 4.9 The Application is made under Section 19 (2) (b) 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 –

(b)correcting any other mistake, where the amendment would not affect—

(i)the extent of any land registered as common land or as a town or village green; or

(ii)what can be done by virtue of a right of common;

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

- 4.10 The application complies with the formal requirements as to form and content as stipulated in the 2014 Regulations.
- 4.11 The correction which the Applicant requests would not affect the extent of any common land or town or village green, nor would it affect what can be done by virtue of a right of common as the numbers of the animals would remain unchanged.
- 4.12 Regulations specify that the Application must include evidence of the mistake. I have examined all of the abovementioned documents, and also the Commons Registration Service’s records relating to registration of common land and rights in 1967-1970 and concluded that there is insufficient evidence to prove that a mistake was made in making an entry in the register pursuant to the 1969 Application.
- 4.13 Part 5 of the 1969 Application clearly states that the right to be registered includes sheep, hogs, cattle and ponies and Part 6 states that the whole right is to be attached to Roundthwaite Farm. The 1969 Application is signed by the Applicant himself. Further, the 1969 Application contains a statutory declaration in support of the application which was sworn on oath and signed by the Applicant. In my opinion this clearly demonstrates the Applicant’s intention to register pony and cattle rights as attached to Roundthwaite Farm. The Applicant claims that he remembers signing two separate applications to register his rights, but it is not understood what the purpose of the other application would be, as all four groups of animals were already listed by the Applicant in the 1969 Application. The search of the Commons Registration Service’s records revealed that there were indeed two applications submitted by the Applicant in 1969, however, the second application, numbered 1201, was to make a note in the register in relation to the Applicant’s right of way, rather than to register a right of common.

4.14 Section 19 (5) 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.”

4.15 It is considered that, by reason of reliance reasonably placed on the register by several persons who bought various parts of Roundthwaite Farm in 2014, it would in all the circumstances be unfair to correct the register.

4.16 Four persons objected to the Application on the grounds that, when they purchased parts of Roundthwaite Farm, they placed reliance on the register and expected to get their respective shares of the Right, including pony and cattle grazing. Although the Applicant correctly states in his reply to representations that the Particulars of Sale of the Farm did not mention pony and cattle rights, the Particulars of Sale is not a conclusive proof or registration, the register of common land is. I note that in clause 2.8 of the 2014 Deed of Surrender the Landlord and the Applicant jointly agree that the commons register would be amended to reflect the Applicant’s interest as 10 cattle and 25 ponies, with the Landlord retaining the right to the sheep flock grazing on CL41. However, section 9 of the 2006 Act makes void any instrument made on or after 28th June 2005 which purports to apportion the right otherwise than rateably. It was, therefore, not possible to fulfil the intention described in clause 2.8 and sever the cattle and pony rights from Roundthwaite Farm, selling the Farm with sheep and hoggs rights only. Two of the buyers have already registered their entitlement to exercise their share of the Right, an application from another buyer is on hold pending the outcome of this Application, and the fourth buyer has indicated that he will be submitting his application in the near future. I consider that the buyers of Roundthwaite Farm were fully entitled to expect to get their share of pony and cattle rights and it would be unfair to them to correct the register in the manner requested.

4.17 The registration authority must also consider fairness to the Applicant. Upon examining all available evidence, I have concluded that, for the reasons stated in 4.18 below, it is doubtful whether the pony and cattle rights ever existed and whether they ought to have been registered at all.

4.18 Both the 1988 Lease and the 2014 Deed of Surrender of Roundthwaite Farm only mention sheep and hoggs rights which suggests that, historically, there were no cattle and pony rights attached to the Farm. In his Statutory Declaration, William Sydney Potter states that in 1952 Mr Morland put some ponies on Roundthwaite Common, having failed to sell them as originally intended. In 1953 he put four cattle on the common. It appears that this was done without any lawful authority. Indeed, the letter from David Bliss (included in Mr T J Winder’s representations as exhibit TJW7) confirms that Lowther Estate Trust (LET) were not aware of Mr Morland grazing ponies and cattle on the common and, if he did so, it was without any right (it is noted that, in his reply to representations, the Applicant disputes LET’s ownership of the common, however, he is mistaken in his belief. The LET’s ownership of CL41 is recorded in the ownership section of the register and confirmed by the Land Registry). In any event, grazing animals on a

common from 1952 to 1969 could not have created a right of common in gross. Even if it was possible to create rights of common in gross by prescription at the time, which is doubtful, the Applicant would have to prove use exceeding twenty years. The right at entry 11 was registered in 1969 so, at best, the Applicant could claim 17 years of use which is not sufficient. Lastly, there were no other rights in gross registered on Roundthwaite common during the original registration periods which suggests that, historically, all rights on that common were attached to land. It is not, therefore, possible now to state with any certainty what would have been the outcome had an application to register a right in gross to graze cattle and ponies been submitted at the time. It is possible, especially considering the content of the LET's letter and the objection of the Commoners' Association, that such an application would have attracted objections from the landowner and other commoners, and that the provisional registration would have been cancelled on referral to the Commons Commissioner.

- 4.19 It must also be noted that the Applicant was the buyer of one of the Roundthwaite Farm's lots and therefore is entitled to a share of the Right.
- 4.20 In view of the above, I do not consider that not correcting the register would be unfair to the Applicant.
- 4.21 Notwithstanding my conclusion in 4.18 it is not proposed that the pony and cattle rights are removed from the register because there is no mechanism in the current legislation to remove a right from the register on the basis that it did not exist at the time of the original registration. Also, even if the legislation did allow such a correction, to do so would be unfair to the buyers of Roundthwaite Farm.

Oral Representations

- 4.22 The 2014 Regulations state that:

27(7) 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.

- 4.23 On 11th May 2022 I wrote to the Applicant informing them that I was minded to recommend that the application be rejected, outlining the reasons, and inviting the Applicant to make oral representations. The Applicant did not respond to the invitation and was informed that the registration authority would proceed to the determination of the application as it currently stands.

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)(b) 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 right being attached to the land rather than being held in gross.
- 5.4 Although the findings of the Officer Recommendations are for the Committee to proceed with determination and rejection 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 accept the Application and correct the register, the Committee should set out their reasons at the meeting.
- 5.5 It should be noted that the Council may not grant an application without first offering an opportunity to make oral representations to any person for whom the grant would represent a determination of that person's civil rights. Accordingly, if Members reject the recommendation, such an offer will be made to the objectors 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 in whole or in part.
- 6.2 If the Recommendation is accepted the register will remain unchanged.
- 6.3 If the Recommendation is rejected the Registration Authority will give effect to the determination by deleting entry 11 of register unit CL41 and replacing it with two new entries, one showing a right to graze 125 ewes and shearlings and 50 hogs together with the rights of turbary, estovers and to take stone as being attached to Roundthwaite Farm, and the other showing a right to graze 10 heads of cattle and 25 ponies with their foals as being held in gross. In addition, the two declarations of entitlement to exercise parts of the Right, which are registered at entries 45 and 47, will be amended to remove the cattle and pony rights.

- 6.4 Members should note that the decision of the Committee in relation to an application to correct the common land 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 there is insufficient evidence to support the claim that a mistake was made in registering pony and cattle rights as attached to Roundthwaite Farm, rather than as held in gross by the Applicant.
- 7.2 I also consider that to grant this application would be unfair under section 19(5) of the 2006 Act because several persons placed reliance on the register when they bought parts of Roundthwaite Farm.
- 7.3 The available evidence suggests that the pony and cattle rights claimed by the Applicant may have not existed in 1969 and should not have been registered. However, it is not possible to correct this mistake under the current legislation and it would be unfair to the buyers of Roundthwaite Farm to do so.
- 7.4 I, therefore, recommend that this Committee resolves that the Application is rejected and entry 11 of common land register CL41 remains unaltered.

Angela Jones

Executive Director – Economy and Infrastructure

17th August 2022

APPENDICES

Appendix 1 – copy of Application CA10/57

Appendix 2 – copy of the supporting evidence

Appendix 3 – copy representations and the Applicant’s reply

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):	Kirkby Stephen
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

Common Land: Guidance to Commons Registration Authorities and Applicants 2015.

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