

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 1st December 2022

From: Executive Director – Economy and Infrastructure

CA13/39 – APPLICATION TO CORRECT MISTAKEN REGISTRATION; CL456 COCKLEY MOSS AND CL457 CHAPEL MOSS

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 Peter Ponsonby, Francis Ian Craig Strick and William Henry Harrison, to correct the mistaken registration of common land register units CL456 and CL457.***
- 1.3 The applicants claim that immediately prior to its provisional registration the application land (that land being the entirety of common land register units CL456 and CL457) was not land subject to rights of common, waste land of the manor, a town or village green (within the meaning of the 1965 Act as originally enacted) or land of a description specified in section 11 of the Inclosure Act 1845. The applicants seek by this application to remove the application land from the register of common land.***
- 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 resolves to amend the common land register by deregistering common land units CL456 and CL457, on the grounds that the land in question, immediately before its provisional registration, was not land subject to rights of common, waste land of a manor, a town or village green or land of a description specified in Section 11 of the Inclosure Act 1845.*

4.0 **BACKGROUND**

The Application:

- 4.1 On 5th July 2022 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 7 of Schedule 2 to the Commons Act 2006 (“the 2006 Act”) from Peter Ponsonby, Francis Ian Craig Strick and William Henry Harrison (“the Applicants”) to deregister land on the grounds that it was wrongly registered as common land. A copy of the Application is attached to this report at **Appendix 1**.
- 4.2 The Application relates to the entirety of common land register units CL456 Cockley Moss (“CL456”) and CL457 Chapel Moss (“CL457”), located roughly 4km north-northwest of Aspatria. Both CL456 and CL457 are shown hatched purple on the plan at **Appendix 2**, and between them they form the “Application Land”.
- 4.3 As you will see from **Appendix 2**, the southernmost section of the Application Land is registered as register unit CL457, with the two smaller sections of Application Land to the north, and bisected by the B5301, forming register unit CL456.
- 4.4 The Application Land was provisionally registered as common land on 7th May 1970 under Section 4 of the Commons Registration Act 1965, pursuant to application numbers 2072 (for CL456) and 2070 (for CL457), both made on 2nd January 1970 by the Trustees of Standish Settled Estates (“the 1970 Applications”). The provisional registrations, being undisputed, became final on 1st August 1972 and the land was registered as common land under register unit numbers CL456 and CL457. Copies of the 1970 Applications and their accompanying plans are attached to this report at **Appendix 3**.
- 4.5 The Applicants claim that on the date of its provisional registration, the Application Land was not subject to rights of common, waste land of the manor, a town or village green (within the meaning of the 1965 Act as originally enacted) or land of a description specified in section 11 of the Inclosure Act 1845.
- 4.6 All elements of the criteria will be analysed in detail later in this report, but in summary, the Applicants claim that the Application Land was all enclosed after 1814 and farmed only by the owner(s) or his or their agricultural tenant from time to time. The Applicants further assert that the Application Land, at

the time of provisional registration, was not subject to rights of common nor was it waste land of the manor. The Applicants therefore claim that the Application Land was wrongly registered by the Trustees of Standish Settled Estates and have requested the removal of the Application Land from the commons register.

- 4.7 By way of further evidence, the Applicants provided four accompanying evidential statements, three of which appear to come from locals with an extensive knowledge of the land, having lived and worked in the area for many years. The fourth statement is from a Mr Keith Hayton of Durham, who, through a keen interest in family history, has conducted a detailed analysis of the history of the land in the area, producing plans based upon the Tithe Rentcharge Award of 1847 and the Manor Court records between 1691 and 1925. The plans divide the Application Land and surrounding areas into distinctive numbered and coloured fields, with the colours identifying each different farm holding in 1847. The field numbers are those referred to throughout the statements, and the Application in general. Copies of all four evidential statements and accompanying plans are provided as **Appendix 4**, along with extracts from the 1847 Tithe Rentcharge Award and the 1814 Holm Cultram Inclosure Award (please note that extracts from the plan produced by Mr Hayton are included throughout the application, firstly as the plan labelled “*Plan No.2.*” in **Appendix 1**, although the fullest version can be found following Mr Hayton’s statement in **Appendix 4**, labelled “*Plan KH*”).
- 4.8 A copy of the entire Holm Cultram Tithe Rentcharge Award of 1847 has also been supplied by the Applicants and can be provided on request.
- 4.9 As a side note, the Applicants point to the fact that alongside the 1970 Applications, the Trustees of Standish Settled Estates also claimed ownership of the Application Land, a claim that is described by the Applicants as “*mistaken at best or dishonest at worst, as their predecessors had received compensation for the freehold interest in the surface of the former copyhold land following the passing of the Law of Property Act 1922*”. Whilst the 1970 Applications and the ownership claims relating to the Application Land were not originally contested in this case, the Applicants point to another commons registration application made in the surrounding area, and also made by the Trustees of Standish Settled Estates which was objected to. That registration was cancelled by the Commons Commissioner. The Applicants also reference more recent applications which successfully deregistered areas of common land initially registered by the Trustees of Standish Settled Estates, on the basis of wrongful registration.

Processing:

- 4.10 On 5th August 2022 the Application was deemed to have been duly made and the Notice of Application was advertised on Cumbria County Council’s website, placed on the site of the Application Land and sent to all 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 16th September 2022 to do so.

- 4.11 One official representation was received from Mr Hugh Craddock, on behalf of the Open Spaces Society. A copy of that representation is attached as **Appendix 5**. Mr Craddock was provisionally satisfied that the Application Land was not subject to rights of common and was not waste land of a manor at the date of provisional registration. However, Mr Craddock requested further explanation as to a potential description of village green use in relation to one field (1615), due to a reference to regular games of football taking place there in Mr Strick's evidential statement. Whilst being provisionally satisfied that, "*in the generality of the land*", the Application Land was not of a description specified in Section 11 of the Inclosure Act 1845, Mr Craddock also requested further evidence to that effect.
- 4.12 The Applicants, through their listed representative Mr Cartmell, responded to the representation in a series of 3 emails. Alongside the written explanations, those emails included further extracts from the 1814 Holm Cultram Inclosure Award, along with 3 further evidential statements further detailing the use of field 1615. A copy of the Applicants' full reply is attached as **Appendix 6**. You will see that Mr Craddock was copied directly into the Applicants' response. No reply was received from Mr Craddock, although it is worth noting that the Registration Authority made no specific request for additional comments.

The Law:

- 4.13 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 Registers.

- 4.14 The Application is made under Schedule 2 Paragraph 7 of "the 2006 Act" which states:

"7 (1) If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove the land from its register of common land.

(2) This paragraph applies to land where—

- a) the land was provisionally registered as common land under section 4 of the 1965 Act;*
- b) the provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act;*
- c) the provisional registration became final; and*
- d) immediately before its provisional registration the land was not any of the following:*
 - i) land subject to rights of common;*
 - ii) waste land of a manor;*
 - iii) a town or village green within the meaning of the 1965 Act as originally enacted; or*
 - iv) land of a description specified in section 11 of the Inclosure Act 1845 (c. 118)."*

- 4.15 Section 11 of the Inclosure Act 1845 states:

“Descriptions of Land subject to be inclosed under this Act:

All such lands as are herein-after mentioned (that is to say,) all lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof; all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates or other gates or stints, or any of them; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or other gates or stints, or any of them; all land held, occupied, or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds or otherwise distinguishable; all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise, shall be land subject to be inclosed under this Act.”

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

- 4.16 The Application complies with the formal requirements as to form and content contained in the 2014 Regulations.
- 4.17 The statutory criteria as set out above are considered in relation to the Application as follows:

(a) The land was provisionally registered as common land under section 4 of the 1965 Act:

The Application Land comprises of common land register units CL456 and CL457. Both register units were provisionally registered as common land on 7th May 1970 under section 4 of Commons Registration Act 1965, pursuant to application numbers 2072 (for CL456) and 2070 (for CL457). This element of the criteria is satisfied.

(b) The provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act:

The provisional registrations of both CL456 and CL457 were not referred to a Commons Commissioner under section 5 of the Commons Registration Act 1965. This element of the criteria is satisfied.

(c) The provisional registration became final:

The provisional registrations, being undisputed, both became final on 1st August 1972. This element of the criteria is satisfied.

(d) Immediately before its provisional registration the land was not any of the following –

(i) Land subject to rights of common

No rights of common were registered against any part of the Application Land under the Commons Registration Act 1965, and there is no evidence to suggest that any rights of common were held over the Application Land immediately before its provisional registration on 7th May 1970. The evidential statements describe the Application Land as having been farmed by either the owner or occupier since before provisional registration. There is no evidence to support the existence of any rights of common at the time of provisional registration, and this is further reinforced by the Inclosure of much of the land under the Holm Cultram Inclosure Act 1806, and through earlier enclosures of copyhold fields. This element of the criteria is satisfied.

(ii) Waste land of the manor

The widely accepted definition of “waste land” is taken from the case of *Attorney General v Hanmer (1858)* in which waste land was defined as “*the open, uncultivated and unoccupied lands parcel of the manor... other than the demesne lands of the manor*” (the demesne lands being the land retained and managed by the lord of the manor). The reference to “of the manor” was held by the Court in *Hampshire County Council and others v Milburn (1990)* to mean land which is or was formerly connected to the manor. In essence, it is not relevant for these purposes whether the land continues to be held by the lord of the manor, but the land must be of manorial origin.

The Applicants concede that in all probability the Application Land was once “of a manor”, but contend that the Application Land was not “waste land of a manor” immediately prior to its provisional registration, as it was all enclosed, farmed and occupied as part of a farm. The evidential statements from Mr Ponsonby, Mr Housby and Mr Strick (included as part of **Appendix 4**) support this claim, between them giving a detailed account of the management and occupation of the entirety of the Application Land, particularly in relation to the timeframe leading up to provisional registration. The statements seem to concur that the Application Land was entirely enclosed and farmed by either the landowner themselves or their tenants.

The witness accounts are further supported by the historical evidence provided by the Applicants as part of their application. Nearly all of the land within CL456 has been shown to have been enclosed under the Holm Cultram Inclosure Act 1806, by the Award of the Commissioner made in 1814. The remainder of CL456 not enclosed under the 1806 Inclosure Act (being fields 1114 and 1115) was seemingly copyhold land of the manor and likely enclosed already. In any event, those two fields are listed as arable and pasture fields owned by a Mr Younghusband and

farmed by his tenant Mr Rome in the Holm Cultram Tithe Rentcharge Award 1847, clearly pointing towards some form of occupation and cultivation which would not be in line with waste land.

The part of the Application Land comprising of CL457 was also assumed to be copyhold fields of the manor and so was also not included within the 1806 Inclosure Act. However, unlike fields 1114 and 1115, CL457 is also stated to be free from tithes in the Tithe Rentcharge Award 1847. Mr Hayton, in his detailed analysis of the tithe award (included as part of **Appendix 4**) gives reasoning as to why this is the case, namely that land which belonged to the Abbot and Convent of Holm Cultram prior to the Dissolution of the Monasteries was exempt from all tithes. In his analysis, Mr Hayton appears to have found the land in question to be listed as part of that exempted land, an opinion which I accept. The land devolving from ownership by the Church would explain how it would not be subject to tithe rent charge. Mr Hayton concludes that the part of the Application Land relating to CL457 was enclosed “well before 1814” and that by 1814 the entirety of the Application Land was enclosed.

There is no evidence within the tithe awards to suggest that any of the Application Land was waste land. Analysis suggests that any land not already enclosed, was enclosed following the 1806 Inclosure Act.

A site visit of 5th August 2022 found that the land is currently enclosed, farmed and occupied. A selection of photographs from that visit are attached as **Appendix 7**. The historic Ordnance Survey maps of the area published in 1867, 1900 and 1925, also show the Application Land as having been divided into clear, numbered parcels, which generally correspond to the layout and division of the present day fields which are enclosed and farmed. This provides a strong indication that the general layout and use of the land as a whole has not changed significantly for at least the last 100 years.

Given the evidential statements provided, coupled with the analysis of the historical evidence, there is no reason to suspect that any of the Application Land was waste land of the manor immediately prior to its provisional registration in 1970. This element of the criteria is satisfied.

(iii) A town or village green within the meaning of the 1965 Act as originally enacted

The site visit found the area to be quite remote and sparsely populated. There was no visible evidence to suggest that the Application Land had ever been used for recreational activities associated with village greens.

Despite this, the evidential statement made by Mr Strick did refer to regular games of football being carried out on one particular field (1615) contained within the Application Land. Following the representation received on behalf of the Open Spaces Society the Applicant provided further information relating to those games of football. It appears that the football occurred on Sunday mornings on a pasture/grazing field. Hired farmhands in their teens would meet on a Sunday morning and use jumpers for goalposts. Mr Strick suggests that the practice occurred for

roughly 4 or 5 years and stopped in about 1956, when the number of locally employed farmhands declined steeply. Mr Ponsonby and Mr Housby, born in 1951 and 1954 respectively, have no recollection of the games of football being played, which ties in with the practice having stopped long before the land's provisional registration in 1970.

Given the evidence received it is given that, on the balance of probabilities, the land was not a town or village green within the meaning of the 1965 Act as originally enacted.

(iv) Land of a description specified in section 11 of the Inclosure Act 1845 (c.118):

A description of the land specified in Section 11 of the Inclosure Act 1845 is included at section 4.15 of this report.

As concluded previously in this report, it is given that, on the balance of probabilities, the Application Land was entirely enclosed by 1814 when the Commissioner made an Award following the Holm Cultram Inclosure Act 1806.

As part of his representation included as **Appendix 5**, Mr Craddock, on behalf of the Open Spaces Society, had accepted that enclosure under the 1806 Act would, for the generality of the land, have extinguished any subsisting commonable rights, but asked for further information to be provided in relation to the inclosure award. One particular area of concern was the land within the parish referred to as The Marshes, which was to be converted into a stinted pasture.

As part of their response included as **Appendix 6**, the Applicants described how the area known as The Marshes was not related to the Application Land. That area, to be converted into a stinted pasture, likely referred to a separately registered common known as Skinburness Marsh located over 5 miles to the north, or to Newton Arlosh Marsh, also similarly located several miles to the north. The Applicants also provided further plans showing all of the land inclosed by the 1814 Award.

On review, there is no evidence to suggest that the Application Land had ever been a stinted pasture or other such land as described in section 11 of the Inclosure Act 1845 (c.118). The Application Land was not within the description so specified immediately before its provisional registration. It was already all enclosed and it was not subject to any common rights. Any reference to The Marshes and their conversion into stinted pasture is not directly relevant to the Application Land.

On balance, this element of the criteria is satisfied.

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 7 of the 2006 Act have been met. The burden of proof in this regard is firmly upon the Applicants 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 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 recommendation and decide either not to determine the Application, or to reject the Application and keep the Application Land on the register of common land, the Committee should set out their reasons at the meeting.
- 5.5 It should be noted that the Council may not refuse an application without first offering the Applicants 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.
- 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 Registration Authority will give effect to the determination by deregistering the Application Land. This will entail the strikethrough of the current entries in the land sections of register units CL456 and CL457, the addition of register amendment entries confirming deregistration of the entirety of each common, and amendments made to the register maps showing the Application Land marked as having been deregistered.
- 6.3 If the recommendation is rejected, the Application Land will remain registered as common land under register units CL456 and CL457.
- 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 been validly made. The evidence provided by the Applicants is sufficient to prove that the Application Land was wrongly registered as common land under the 1965 Act.
- 7.2 In my opinion, all of the necessary criteria for deregistration set out in Paragraph 7 of Schedule 2 to the Commons Act 2006 have been met, most notably that the Application Land was not common land at the time of registration and was not of a description specified in section 11 of the Inclosure Act 1845.
- 7.3 I consider it reasonable that this Committee resolves to remove the Application Land from the register of common land by deregistering common land register units CL456 Cockley Moss and CL457 Chapel Moss.

Angela Jones

Executive Director – Economy and Infrastructure

3rd November 2022

APPENDICES

Appendix 1 – Copy of Application CA13/39 (14 pages)

Appendix 2 – Map of the Application Land (1 page)

Appendix 3 – Copies of the 1970 Applications and plans (12 pages)

Appendix 4 – Copy of initial supporting evidence (37 pages)

Appendix 5 – Representation (2 pages)

Appendix 6 – Applicants’ responses to representation (10 pages)

Appendix 7 – Photographs taken on site visit - August 2022 (2 pages)

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):	Aspatria
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

- The Committee resolved to accept Application CA13/11 and deregister part of common unit CL451 on the [18th April 2018](#).
- The Committee resolved to accept Application CA13/23 and deregister part of common unit CL451 on the [23rd May 2019](#).

Please note: Although neither application listed above directly relates to the commons register units that we are considering here, the land was found to be wrongly registered by the same original applicants who registered the Application Land in this case.

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.
- Attorney General v Hanmer (1858)
- Hampshire County Council and others v Milburn (1990)

Contact: Jason Weatherill
01228 221028
Jason.Weatherill@cumbria.gov.uk