

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 1st December 2022

From: Executive Director – Economy and Infrastructure

CA13/37 – APPLICATION TO CORRECT MISTAKEN REGISTRATION; CL87 ANGERTON MARSH

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 Jonathan Beresford and Emma Louise Beresford to correct a mistaken registration in common land register unit number CL87 Angerton Marsh.*
- 1.3 *The applicants claim that immediately prior to its provisional registration the application land 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subject to rights of common, waste land of the manor, a town or village green (within the meaning of the 1965 Act as originally enacted) or land of a description specified in section 11 of the Inclosure Act 1845.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 Development Control and Regulation Committee (“the Committee”) accepts the Application and resolves to amend the common land register by deregistering part of common land register unit number CL87, 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 29th March 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 Jonathan Beresford and Emma Louise Beresford (“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 three pieces of land at Angerton Marsh comprising O.S. fields numbered 112, 113, 116 and 88 on the O.S. map 1891 which form part of the land comprised in common land register unit CL87 Angerton Marsh. The three pieces of land are shown coloured red (“the Red Land”), coloured green (“the Green Land”), and coloured blue (“the Blue Land”) on the plan at **Appendix 2** and referred to hereafter as the “Application Land”.
- 4.3 CL87 was provisionally registered as common land on 12th December 1968 under Section 4 of the Commons Registration Act 1965 pursuant to application number 169, made by the Kirby Ireleth Commoners’ Association on 26th April 1968 (“the 1968 Application”). The provisional registration, being undisputed, became final on 1st August 1972 and the land became registered as common land under unit number CL87 Angerton Marsh. A copy of the 1968 Application is attached to this report at **Appendix 3**.
- 4.4 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.
- 4.5 The Applicants claim that immediately prior to its provisional registration, and at all times since, the Red Land and the Blue Land was enclosed for many years and only grazed and managed by the agricultural tenant of the land owner. As to the Green Land, although the western boundary fence was removed sometime in the 1960’s, probably before the date of the provisional registration of the land as common on 12th December 1968, the Applicants claim that the fence removal did not create any rights of common. The fence was removed for practical purposes as it was repeatedly washed away by

high tides. Although the fence was removed, the original fence posts remained, marking the original boundary.

4.6 The Applicants therefore claim that the Application Land was incorrectly registered and request the removal of the Application Land from the register of common land.

4.7 The following supporting evidence was submitted by the Applicants with the Application (copies of which are attached to this report at **Appendix 4**):

- Copy of the 1587 Edmond Moore map;
- Tithe Commutation Award extracts 30th June 1840;
- Sales Particulars Duddon Hall Estate 1902 extracts;
- Epitome of title 1902 – 1984 including Solicitor letters dated 26th April 1946 and 29th April 1946, Conveyance dated 9th May 1946, Deed of Gift dated 6th April 1981, Deed of Gift dated 14th June 1992, Contract of Tenancy dated 9th January 1918, Requisitions on Title dated 13th April 1946, Lease dated 11th December 1945, Applicants' HM Land Registry Title register and plan for title number CU275130;
- Screen grabs of various O.S. maps dated 1850, 1891, 1913 and 1933;
- Affidavit of George Elwell sworn 26th January 1982;
- Affidavit of Harrison Gainsford sworn 26th January 1982;
- Witness statement of Brian Edward Thexton dated 14th October 2021; and
- Witness statement of Phillip Hartley dated 23rd February 2022.

4.8 On 14th April 2022, 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. See Notice of Application at **Appendix 5**. The notice was also 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 6th June 2022 to do so.

4.9 One representation was received from Hugh Craddock of the Open Spaces Society. Hugh Craddock stated that on the face of it he acknowledged the strength of the Applicants' case and recognised that most, or all of the Application Land in the past had been enclosed from the marsh, and that there is no evidence disclosed that the Application Land was subject to rights of common, could be waste land of the manor or could be used as a town or village green prior to the date of provisional registration. However, Mr Craddock stated that in view of an Indenture dated 1774 ("the 1774 Indenture") (attached at **Appendix 8**) by which rights were granted over Angerton Marsh, care should be taken to ensure that the Application Land is

not subject to Section 11 of the Inclosure Act 1845. The 1774 Indenture was mentioned in a Commons Commissioner's decision dated 16 May 1984 (attached at **Appendix 7**) and was related to ownership of land. Hugh Craddock believed that the 1774 Indenture would be key to determine the Application. The representation was duly served on the Applicants in accordance with the 2014 Regulations and the Applicants' solicitor provided a reply to it. Copies of the representation, reply and further correspondence between Hugh Craddock and the Applicants' solicitor are attached to this report at **Appendix 6**.

The Law:

- 4.10 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.
- 4.11 The Application is made under Schedule 2 Paragraph 7 of "the 2006 Act" which states:

"Other land wrongly registered as common land"

- 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).*

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

- 4.12 The Application complies with the formal requirements as to form and content contained in the 2014 Regulations.
- 4.13 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 was provisionally registered as common land under register unit number CL87 on 12th December 1968 under section 4 of Commons Registration Act 1965 pursuant to application number 169. 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 registration was 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 registration, being undisputed, 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

Documentary evidence shows, and statements confirm that no rights of common were held over the Red Land and the Blue Land immediately before 12th December 1968 and they were not grazed by any persons pursuant to rights of common immediately before its provisional registration or earlier.

As to the Green Land the evidence suggests that the western fence that separated it from the rest of Angerton Marsh had been removed for practical purposes before the date of provisional registration. This was sometime in the 1960's according to the evidence of Philip Hartley. Therefore the Green Land will have been open to the remainder of Angerton Marsh and so capable of being grazed by commoners entitled to graze the remainder of Angerton Marsh. However, according to the Applicants *it was not subject to rights of common on that date or immediately before. No rights of common could have been acquired by prescription. Not only was the period of time for which third parties (being persons other than the then owner of the land and his tenant) had access to graze the Green Land less than 20 years, but also that access was permitted by the tenant farmer's own action in removing the fence on the western boundary of the Green Land.*

Three statements from witnesses who had worked at Angerton Hall Farm between 1925 and 1970 confirmed the boundaries of the farm as incorporating the Application Land and that nobody else claimed any rights over the land or attempted to graze any animals on them. However, a fourth statement from Brian Edward Thexton, who worked the farm from 1969 until 2014 (when he retired as the agricultural tenant), when asked if anyone else grazed the Red Land, stated *'Mr Cleasby who farms at Angerton Farm on the north side of our farm used to put in a handful or so of his sheep now and then to make the point that it was*

registered as part of the common grazing and he had rights registered to graze it, as was indeed the case, but it should never have been registered in the first place.'

As part of his representation, Hugh Craddock questioned why the then owner of Angerton Hall Farm, Mr Stutt, did not lodge an objection to the Application Land being provisionally registered as common land. Mr Stutt would have had the opportunity to object between 12th December 1968 until 31st July 1972. Hugh Craddock suggests Mr Stubbs did not object because he accepted that the Application Land was subject to grazing rights. The Applicants' solicitor states that this is not a conclusion that can be drawn. Further, the final paragraph of the statement from Brian Thexton may shed some light on the reason for Mr Stutt not objecting to the registration of his land:

'I am asked why Mr Stutt did not object to the numbered areas mentioned [this is the Application Land] or some of them being [provisionally] registered as common land in 1968. My understanding is that his solicitors had never picked up on it and so made no objection within the time limits. My father [the tenant of the farm at the time] did not put in an objection to the original registration when he became the tenant [in 1968] as all the commons registration work was left to Mr Stutt our landlord and his then solicitors.'

It was not uncommon that people did not object to their land registration. Many people did not realise that their land had been registered as common land and this resulted in many mistakes in the register. Therefore the absence of the objection cannot be taken as evidence that Mr Stutt accepted that his land was subject to grazing rights.

I am satisfied that, on the balance of probabilities, the Application Land was not subject to rights of common immediately prior to its registration.

(ii) Waste land of the manor

The definition of waste land is given in the case of Attorney General v Hanmer (1858) 27LJ Ch 837 at 840:

"The true meaning of 'wastes', or 'waste lands', or 'waste grounds of the manor,' is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor."

The evidence provided in support of the Application includes:

1. The Tithe Commutation Award dated 30th June 1840 shows all of the Application Land in the ownership of the Earl of Burlington and in the occupation of Jane Mason. The Red Land is described as Moss Meadow and the Green Land and the Blue Land as Marsh. The fact that tithes were paid on the land evidences that it was not part of the waste land of the manor.

2. Various sale particulars, conveyances and deeds of gift dating from 1902 to 1981 showing the Application Land as being part of Angerton Hall Farm.
3. The four witness statements referred to earlier support the Applicants' claim that the Application Land was not waste land of the manor but was enclosed as part of Angerton Hall Farm.
4. Ordnance Survey Maps dated 1850, 1891, 1913 and 1966 all show the Application Land as enclosed fields. See the evidence at **Appendix 4**.

Having considered all of the above evidence, I am satisfied that, all of the Application Land has been enclosed and/or occupied as part of Angerton Hall Farm since at least 1840 and that, on the balance of probabilities, the Application Land was not waste land of the manor immediately prior to its original registration in 1968.

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

There is no evidence that the Application Land had ever been used for recreational activities associated with village greens. I am therefore satisfied 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):

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.”

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 (or in the case of the Green Land had until recently before 12th December 1968 been enclosed) and it was not subject to any common rights.

As part of his representation, Hugh Craddock of the Open Spaces Society asked to see a 1774 Indenture which granted rights over an area which “correspond[s] largely with the main area” of Angerton Marsh. The 1774 Indenture had been referred to in the Commons Commissioner’s Decision dated 16 May 1984 under reference 262/U/539. **See Appendix 7.** This decision dealt with a dispute over ownership of the common land. Hugh Craddock stated: “The main area appears to exclude the present application land, but it would be helpful to have confirmation”. The 1774 Indenture was duly sourced and the document and transcription is attached at **Appendix 8.**

The Indenture of 1774 conveyed Angerton Marsh to three joint purchasers, on trust for 18 named persons, in shares of different proportions. The purchase money (as the Indenture stated) having been paid by them in these portions. The Commons Commissioner accepted and found that the land conveyed corresponded largely with what he called the main area. The main area described in the Commons Commissioner’s Decision excluded all of the Application Land.

The description of the land referred to in the 1774 Indenture is as follows:

“All that his the said John Robinson’s parcel of pasture on Marsh ground situate lying and being on the south east side of Angerton in the parish of Kirby Ireleth aforesaid called or known by the name of Angerton Marsh with the appurtenances abutting Northwest on the Lands at Angerton aforesaid, Northeast on the Lands of the Right Honourable Lord George Cavendish, East of Kirkby Pool and West on the River Duddon”

The land description is vague and there is no suggestion that it includes the present Application Land.

In reply to Hugh Craddock, the Applicants’ solicitor stated: “...the Decision found that the main area of Angerton Marsh was conveyed to trustees and was held in undivided shares, so even if the area conveyed had included any part of the present application land (which it was found it did not) it was not land subject to be inclosed under section 11 of the Inclosure Act 1845. Specifically “it was not gated or stinted pasture in which the property in the soil or some part thereof was in the owners of

the cattle gates or other gates or stints or any of them". Rather the land was held in undivided shares before the 1 January 1926, as expressly found by the Commissioner at paragraph (9) of the Decision. The Indenture did not grant rights as mentioned in Mr Craddock's question. It conveyed land in undivided shares."

I am satisfied that on the balance of probabilities the land was not of a description specified in section 11 of the Inclosure Act 1845 (c.118) and 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 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 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 this 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 this 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 de-registering the Application Land. This will entail the addition of a register entry confirming de-registration of the Application Land, and amendment of the register map showing the Application Land marked as de-registered.
- 6.3 If the Recommendation is rejected, the Application Land will remain registered as common land under register unit number CL87.
- 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, on the balance of probabilities, the Application Land was wrongly registered as common land under the 1965 Act.
- 7.2 In my opinion, the necessary criteria for deregistration set out in Paragraph 7 of Schedule 2 of the Commons Act 2006 has been met as on the balance of probabilities, the Application Land was not common land at the time of registration and not of a description specified in section 11 of the Inclosure Act 1845 (c.118).
- 7.3 I consider it reasonable that this Committee resolves to deregister the Application Land from the register of common land by amending the common land register unit number CL87 Angerton Marsh.

Angela Jones
Executive Director – Economy and Infrastructure
8 November 2022

APPENDICES

Appendix 1 – Copy of Application CA13/37
Appendix 2 – Map of the Application Land
Appendix 3 – Copy of the 1968 Application
Appendix 4 – Copy of supporting evidence
Appendix 5 – Notice of Application
Appendix 6 – Representation and replies
Appendix 7 – Commons Commissioner’s Decision 262/U/539 of 16 May 1984
Appendix 8 – 1774 Indenture and transcript

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): High Furness – Cllr Matt Brereton

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.

Attorney General v Hanmer (1858)

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