



Application Decision

Site visit made on 25 August 2011

By **Peter Millman BA**

An Inspector appointed by the Secretary of State

Decision date: 27 September 2011

Application Ref: COM 172 Hackley Common, Sarnesfield

Register Unit: CL 111

Registration Authority: Herefordshire Council

- The application, dated 28 September 2009, is made under paragraph 7 of Schedule 2 to the Commons Act 2006 ("the 2006 Act").
- The application is made by Mr P Krafft of Farrer & Co on behalf of Mr R P T Marshall.
- The application is to remove land from the register of common land on the grounds specified in paragraph 7 of Schedule 2 to the 2006 Act (land wrongly registered as common land).

Summary of Decision: The application is granted.

Preliminary Matters

1. This application has been determined on the basis of written evidence and submissions and a visit to the land by the Inspector.

The Application Land

2. The land is known as Hackley Common. It comprises 21.89 acres (8.86 hectares) of land. The great majority is in one parcel, which at the time of the site visit was rough pasture, grazed by sheep, a few cattle and a flock of guinea fowl. It also includes a small block of woodland, part of a separate pasture field and part of the track leading to the large pasture. These features may be seen on the plan attached to this decision.

The Statutory Requirements

3. Paragraph 7(3) of Schedule 2 to the 2006 Act provides that any person may apply to the commons registration authority to remove land from the register of common land. The Commons Registration (England) Regulations 2008 ("the 2008 Regulations") set out the procedures to be followed.
4. The application was made on 18 August 2009¹. The application form indicates that it has been made in accordance with the provisions of paragraph 7 of Schedule 2 to the 2006 Act which provides that an application can be made where:

¹ For the purpose of remedying non-registration or mistaken registration under the 1965 Act, the application must be made on or before 31 December 2020.

- (a) the land was provisionally registered as common land under section 4 of the 1965 Act [the Commons Registration Act 1965];
 - (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).
5. An application must be made in accordance with the 2008 Regulations. Paragraph 16 of the 2008 Regulations requires that an application must –
- (a) be made in writing on a form provided by the registration authority to which the application is made; and
 - (b) be signed by, or by a representative of, every applicant who is an individual, and by the secretary or some other duly authorised officer of every applicant which is a body corporate or an unincorporated association.
6. In addition, paragraph 14 of Schedule 4 to the 2008 Regulations requires that an application under paragraph 7 of Schedule 2 to the 2006 Act must include –
- (a) a description of the land to which the application applies; and
 - (b) evidence of the application of paragraph 7(2) of Schedule 2 to the land to which the application relates.
7. The task of proving the case in support of the correction of the register rests with the person making the application, and the burden of proof is the normal, civil standard, namely, the balance of probabilities.
8. Defra's guidance to the Planning Inspectorate² states that: "It is particularly important that an application ... is fully examined where, if granted, it would have some effect on the public interest, such as where land would be deregistered. It is for the applicant to adduce [convincing] evidence, and in its absence, the application must not be granted."

Reasons

The application

9. It is not disputed that the application was properly made and I am satisfied that it was.

² Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate for the pilot implementation, February 2011.

Registration of the land as common land

10. It is not disputed that Hackley Common was provisionally registered as common land on 26 February 1968, and that registration became final on 1 October 1970.

Whether immediately before its provisional registration the land was subject to rights of common

11. The Rights Section in the record for CL 111 in the Register of Common Land records a right to graze sheep and cattle on Hackley Common. The applicant has provided evidence that at the time of provisional registration the land to which the right was attached was in the same ownership as Hackley Common. I accept, as does the objector, that where the common and the right come into the same ownership, then, under the doctrine of 'unity of seisin' the right is extinguished. Although Section 13 of the 2006 Act states that *A right of common which is registered in a register of common land or town or village greens cannot be extinguished by operation of common law*, it seems to me that that does not alter the fact that at the date of provisional registration, the rights purportedly registered did not exist.

Whether immediately before its provisional registration the land was waste land of a manor

12. Waste land of a manor is usually uninclosed and unimproved land belonging to a manor, and was often subject to common rights. The applicant provided a statutory declaration from the tenant of Hackley Common between 1957 and 1972. She recalled, from diary entries, the crop rotation followed between 1961 and 1971. Her testimony was supported by a former Land Agent for the Sarnesfield Estate, who stated that during the time he was Agent between 1967 and 1978 Hackley Common was cultivated. This is good evidence, in my view, that immediately before provisional registration, Hackley Common was not waste land.

Whether the remaining criteria in Paragraph 7 of Schedule 2 to the 2006 Act are satisfied

13. It was not argued that immediately before provisional registration Hackley Common was a town or village green, or that it was land of a description specified in section 11 of the Inclosure Act 1845, and I have seen no evidence which would lead me to conclude otherwise.

Other matters

14. Weobley District Council applied in February 1968 for Hackley Common to be registered as common land. The application for grazing rights over the land to be registered was made by Mr R A Marshall (since deceased) in June 1968. On the face of it, this is puzzling, since Mr Marshall was the owner of Hackley Common (see paragraph 11 above) and the reason for, or purpose of, his application is not obvious.
15. The objector noted this puzzling feature and argued that if 'the present application is to be allowed to proceed, [the proposed] re-trial of the original registration must include a thorough investigation of all the available evidence, not merely the evidence that the present owner [of the application land] finds it convenient to produce in support of his application. My own view... is that applications of this kind are illegitimate because they are incompatible with the

policy intentions underpinning the 2006 Act deregistration provisions.’ The objector conceded that he had not searched for any relevant evidence.

16. I accept that I have the same powers given to a registration authority in Regulation 20(2)(a) of the 2008 Regulations to direct the applicant to *provide any further information or documents necessary to enable the application to be determined*. It seems to me, however, that this Regulation implies that I would have some idea of what information or what type of document I was seeking. I do not consider that it allows me to go on what would be, in effect, a fishing expedition. The applicant’s solicitor has stated that he and the applicant have searched for relevant evidence and have found no more than has been produced already. I have no reason to disbelieve them, even though I accept that there are some puzzling features about the history of the registration of Hackley Common. In any event, I consider that I am able to determine the application from the information and documents already provided to me.
17. I cannot base my decision on ‘the policy intentions underpinning the 2006 Act deregistration process’. I accept that this application is not to do with a situation which is typical of that which the legislation was intended to remedy. I also accept that it does not follow as a matter of logic that if the criteria in Schedule 2 to the 2006 Act are satisfied then Hackley Common must have been wrongly registered. As a matter of law, however, it seems to me that if the evidence satisfies those criteria, then I have no alternative but to grant the application.

Conclusion

18. I conclude that the criteria for deregistration in paragraph 7 of Schedule 2 to the 2006 Act are satisfied for Hackley Common and that it should be removed from the register of common land.

Formal Decision

19. The application is granted and the land shown coloured ochre on the plan attached to this decision, being the whole of Hackley Common – CL111 in the Register of Common Land, shall be removed from that Register.

Peter Millman

INSPECTOR


CL171 Hackley Common, Sarnesfield
Scale 1:2500

This subject has been prepared in accordance with the provisions of the Council of the City of Sarnesfield, Sarnesfield District, (1995) (No. 1200)



Investigating Council:
Mr. J. J. J. J.
Town Clerk
Planning Department
Sarnesfield District
Tel: 0143 200100
Email: investigating@city.sarnesfield.nsw.gov.au



