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Application Decision

Hearing held on 26 July 2011

By Peter Millman BA

An Inspector appointed by the Secretary of State pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to hold a hearing and to determine the application.

Decision date: 9 August 2011

Application Ref: COM 166 Land near Hay Bridge, Eardisland

Register Unit: CL 230

Registration Authority: Herefordshire Council

- The application, dated 18 August 2009, is made under paragraph 7 of Schedule 2 to the Commons Act 2006 ("the 2006 Act").
- The application is made by Mr T Pimblett of Lloyds and Cooper LL.P on behalf of Mr R Savage and Mrs T Savage.
- 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 registered as common land).

Summary of Decision: The application is allowed as set out in the formal Decision below.

Preliminary Matters

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

The Application Land

2. The land is near the former Hay Bridge (a footbridge over the River Arrow) on the outskirts of the village of Eardisland in Herefordshire. A long, narrow area of land between the River Arrow and the road from Eardisland to Broom, amounting to no more than 0.1 hectares, is registered as common land under Register unit CL 230. It comprises two distinct strips of land. The western strip is open to the road and the river. On it is a bench, and when the water level is low there is a 'beach' in front of it. The eastern strip also lies between the road and the river, but there is a thick hedge next to the road and also between the eastern and western strips, and a vertical drop of more than a metre from the land to the river. It is inaccessible to the public. It is this eastern strip which is the subject of the application. On the plan attached to

this Decision, CL 230 is shaded green and the application land (to which I refer below as 'the eastern strip') is hatched red over the green. Hay Bridge, washed away in the 1960s, but still shown on Ordnance Survey maps, crossed the River Arrow where the western and eastern strips meet.

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:
 - (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 of 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.

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

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.

Registration of the land as common

10. It is not disputed that the land at issue was provisionally registered as common land on 30 July 1970, and that registration became final on 1 August 1972.

Whether the requirements of paragraph 7 of Schedule 2 to the 2006 Act are satisfied

11. There is no dispute that the criteria noted in paragraph 7 of Schedule 2 (paragraph 4 above) are satisfied, with the possible exception of (d)(iii), i.e. it is possible that the eastern strip might, immediately before its provisional registration, have been a town or village green within the meaning of the 1965 Commons Registration Act as originally enacted. The definition of town or village green in the 1965 Act was *land on which the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than 20 years*.
12. There is no doubt that the western strip has, as far back as human memory goes, been used as a resort for local people to swim and generally play in the River Arrow. The question at issue is to what extent the eastern strip was used for the same or similar purposes.
13. The earliest map evidence dates from the start of the 20th century. Large-scale Ordnance Survey maps of the time show the western strip unfenced against the road, and braced with it, i.e. included in the same numbered parcel of land as the road. The eastern strip, however, is shown fenced against the road and fenced from the western strip (although any small gap in a fence or hedge, or a gateway, would not have been recorded) and braced together with parcel 208, which comprises most of the land now attached to Broom Lane Cottage. There are symbols representing coniferous trees on the eastern strip.
14. Plans made under the 1910 Finance Act show that the eastern strip was in the same ownership as the land attached to Broom Lane Cottage, while the western strip was not included in any numbered taxable parcel of land. The western strip appears to have been treated by the tax authorities as highway verge.

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

15. No later map shows a different configuration. The western strip remains depicted as open to the road; the eastern strip as a small enclosure.
16. At the hearing I heard evidence from people who had been familiar with the land in the 1940s, 1950s, 1960s and 1970s. I was given written evidence from people who had known it from 1945 onwards.
17. Mr Bray recalled swimming from the 'beach' in the 1940s during the Second World War, when there were a number of evacuee children in the village who enjoyed using it. He said that the eastern strip was fenced off, but that children would climb over the fence separating it from the western strip to get changed for swimming. They would then return and swim from the beach. Only a very small part of the eastern strip, immediately over the hedge, was used for this purpose. Mr Bray acknowledged that the eastern strip was known to be part of the small-holding tenanted by Mr Caulfield, who lived at Broom Lane Cottage.
18. One of the two written pieces of evidence provided a similar story about the 1940s. The eastern strip had been used 'mainly for changing to go swimming'. The second written piece of evidence added 'fishing' to this use. It noted that access to the eastern strip was 'over fence by Hay Bridge'.
19. Mr Blatchford swam in the River Arrow in the 1950s. He said that when children wanted to change for swimming they crossed the road to climb over a gate, and changed in the field behind a hedge. They did not go onto the eastern strip, which was fenced off.
20. Mr Francis's late parents lived at Broom Lane Cottage in the 1960s and 1970s. He told the hearing that he visited them regularly, but had never seen any sign of people entering the eastern strip, which was enclosed.
21. When notice of the application to deregister was originally published in 2010 there was some confusion because the plans attached to the notice made it appear as if the whole of CL 230 was intended to be deregistered. Some of the objections were clearly based on this misunderstanding. One objector, who had known the area since the 1960s, wrote when withdrawing her objection, 'The area downstream [i.e. east] from the old footbridge is another matter altogether. I had always understood that this area belonged to the owners of Broome Lane Cottage. It has always been fenced off and not used by the public.'
22. Mrs Hanson, the chairman of Eardisland Parish Council, acknowledged at the hearing that the evidence on which the Parish Council based its objection to the application was 'hearsay'. Its objection named a number of people who were 'all willing to give evidence'. It continued 'The longest memory extends back over 60 years... They will say that as children and young adults, they used the land regularly, that they used the area to undress before swimming in the river, that the area was used to watch raft races on the river, and that it was a place where they played or just sat to watch the river. They will further say that at no time was their access impeded...'. The only one of these named people to give evidence was Mr Bray, whose oral evidence I summarised above at paragraph 17.
23. CL 230 was registered as common land in 1970 without application, i.e. on the initiative of Herefordshire County Council. The description of the land in the Register is odd in two respects. First it refers to it as extending 'to ¼ acre or

thereabouts' when its area is clearly much smaller. Second it refers to the land as 'numbered part 208 part 278 on the Ordnance Survey Map (1904 edition).' The figure '278' on the western strip on that map is actually a spot height on the road, showing that it is 278 feet above sea level.

24. Mr Thompson, the present County Land Agent, stated at the hearing that there was no evidence that any site visits had been carried out by County Council officers prior to the registration of land as common land in Herefordshire.
25. I give the evidence of those who appeared at the hearing a good deal of weight, as they were happy to answer questions about their evidence – although there was no formal cross-examination. The history that emerges from that and the map evidence is this: that from the early 20th century to the present day the eastern strip has been fenced off and formed an enclosure separate from the western strip. During the Second World War and afterwards in the 1940s people would get into the western end of the eastern strip primarily to get changed to go swimming. Access was gained by climbing a fence into land acknowledged as part of a small-holding. This practice ceased by or during the 1950s.
26. I conclude that immediately before 1970 the eastern strip did not fit the definition of 'town or village green'. I consider it likely that Herefordshire County Council was probably careless, and certainly not diligent, in its calculation of the area and position of what was registered as CL 230. I conclude that it was mistaken in including the eastern strip in the Register.

Conclusion

27. I conclude that the land shown hatched red on the plan attached to this Decision, i.e. so much of CL 230 as falls within the enclosure numbered 208 on the 1904 Ordnance Survey 1:2500 map, satisfies the criteria for deregistration in paragraph 7 of Schedule 2 to the 2006 Act and should be removed from the register of common land.

Formal Decision

28. The application is granted and the land shown hatched red over green on the plan attached to this Decision (which is so much of CL 230 as falls within the enclosure numbered 208 on the 1904 Ordnance Survey 1:2500 map) shall be removed from the register of common land.

Peter Millman

INSPECTOR

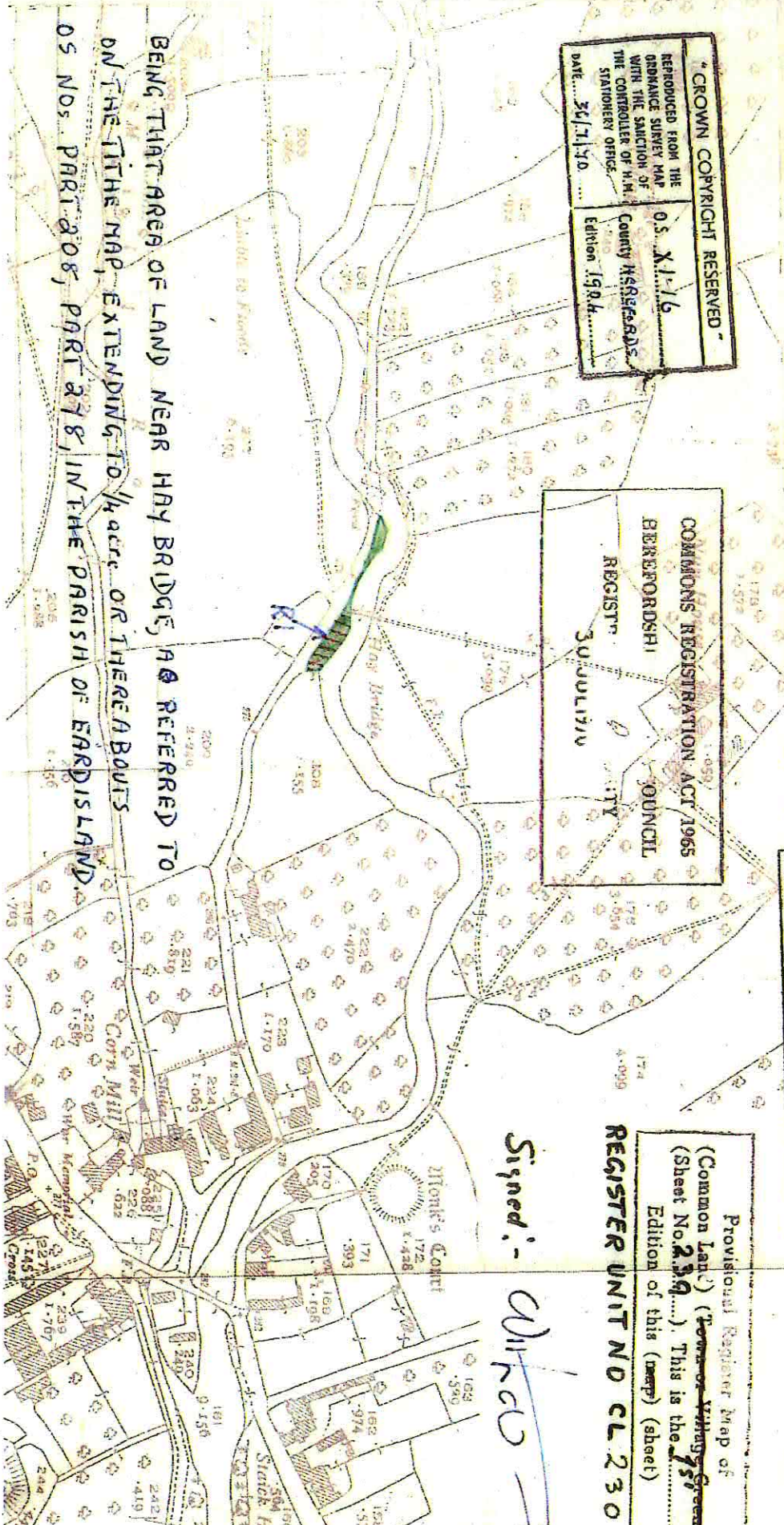
APPEARANCES

The applicants: Mr R Savage and Mrs T Savage, who spoke and were also represented by Mr T Clarke of Counsel, instructed by Mr T Pimblett of Lloyds and Cooper LLP

Supporters of the applicant: Mr D Francis, Mr W S Blatchford

Objectors to the application: Mrs M Hanson, Chairman Eardisland Parish Council, who called Mr D Bray

Representatives of Herefordshire Council: Mr E G Thompson, Ms K Lloyd.



BEING THAT AREA OF LAND NEAR HAY BRIDGE, AS REFERRED TO
 ON THE TITHE MAP, EXTENDING TO 1/4 acre OR THEREABOUTS
 OS NOS. PARI 208, PART 278, IN THE PARISH OF EARDSLAND

"CROWN COPYRIGHT RESERVED"
 REPRODUCED FROM THE
 ORDNANCE SURVEY MAP
 WITH THE SANCTION OF
 THE CONTROLLER OF H.M.
 STATIONERY OFFICE.
 DATE 26/11/20
 OS X1:16
 COUNTY HEREFORDS.
 Edition 1904

COMMONS REGISTRATION ACT 1965
 HEREFORDSHIRE
 REGISTRY
 30 JULY 2010
 COUNCIL

COMMONS ACT 2006
 HEREFORDSHIRE COUNCIL
 REGISTRATION AUTHORITY
 22 NOV 2010

Provisional Register Map of
 (Common Land) (Town of Yrington Green
 (Sheet No. 230...)). This is the
 Edition of this (map) (sheet)
 REGISTER UNIT NO CL 230

Signed: *dhfcd*

Additional documents handed in at the hearing

1. Letter from Mr D Francis
2. Two completed questionnaires