

**Application Decision**

# By J Burston BSc(Hons) MA MRTPI AIPROW

**An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Hearing held: 16 May 2023**

**Decision date: 4 July 2023**

# Application Ref: COM/3300564 Broxhead Common, Baigents Hill, Headley, Hampshire

Register Unit: CL147

Registration Authority: Hampshire County Council

* The application, dated 18 November 2017, is made under Section 19(2)(a) of the Commons Act 2006 (“the 2006 Act”) to correct a mistake made by the registration authority in making or amending an entry in the register of common land.
* The application is made by Maureen C Comber.

**Decision: The application is refused.**

# Preliminary Matters

1. I made an unaccompanied visit to the site on the 15 May 2023, where I was able to view the site from the public highway and the surrounding public rights of way network.
2. I held a Hearing relating to an adjoining application site, submitted by the same Applicant, on the 17 May 2023, reference COM/3300566.

# The Application Land

1. The application land comprises two parcels of land, shown on the map attached to this decision at Annex A, adjacent to either side of Picketts Hill Road and abutting part of Common Land Unit CL147.
2. The applicant states that the application area was never recorded as common land despite evidence to the contrary that would have been available to the Commons Registration Authority (CRA). In consequence it is stated that this area of land has been mistakenly omitted from the register of common land.

# Main Issue

1. The application has been made in accordance with the provisions of section 19(2)(a) of the 2006 Act. This section provides that a CRA may amend its register of common land to correct a mistake made by the CRA in making or amending an entry in the register.
2. The main issue is whether the entry made by the CRA in the land register for CL147 was mistaken and requires correction.
3. The onus of proving the case in support of the correction of the register rests with the person making the application and it is for the applicant to adduce sufficient evidence to merit granting the application. The burden of proof is the normal civil standard, namely, the balance of probabilities.

**Reasons**

*Background*

1. At the Hearing a discussion took place relating to the background of Common Land legislation. I believe it would be useful to set this out here to provide a context to the application.
2. Common Land is often defined as privately owned land over which others possess use rights, giving them legally recognised access to particular resources. As I heard at the Hearing, legally, Common Land is a complex patchwork of ownership and rights and does not mean that the land is ‘commonly owned’. The ownership of common land or ‘waste’ was usually vested in the lord of the manor, while the local community could have use rights. The Inclosure Act 1845 resulted in many commoner’s rights being extinguished and the land became private property. This general position existed until the Law of Property Act 1925 which was introduced to protect commons from enclosure by requiring consent from a government minister for ‘any building, fence or other work that prevents or impedes access to the common’.
3. The Commons Registration Act 1965 (the 1965 Act) provided for the registration of commons with the CRA, which was usually the county council. The 1965 Act attempted to both define and register all common land, to provide a single approach to something that had previously been on an *ad hoc* basis. However, the procedures for correcting entries were very limited. Usefully, the 1965 Act establishes a definition of Common Land at section 22(1). This states:

*“In this Act, unless the context otherwise requires,- Interpretation. ‘common land’ means- (a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods ; (b) waste land of a manor not subject to rights of common ; but does not include a town or village green or any land which forms part of a highway”*

1. The 1965 Act introduced the Commons Commissioner, whose role was to inquire into the provisional registration of an area of common land, on which an objection had been made, and either confirm with or without modification or refuse to confirm it.
2. The Commons Act 2006 (the 2006 Act) was introduced with the aim of protecting common land and promoting sustainable management. Importantly, for the application now before me, the 2006 Act introduced provisions (see Section 19 of the 2006 Act) for the correction of the register in prescribed circumstances. However, only the provision set out in Section 19(2)(a) of the 2006 Act is applicable in this case as Hampshire County Council is neither a Pioneer Authority (which include, Blackburn with Darwen, Cornwall, Devon, Herefordshire, Hertfordshire, Kent and Lancashire) or a 2014 Authority (which include, Cumbria and North Yorkshire).
3. Section 19(2)(a) of the 2006 Act establishes that CRAs can only correct the Common Land Register if the registration authority made a mistake when it made or amended an entry in the register. At part 19(3) the 2006 Act states that a mistake includes “(*a) a mistaken omission, and (b) an unclear or ambiguous description, and is immaterial for the purposes of this section whether a mistake was made before or after the commencement of this section*.”
4. The 2006 Act Explanatory Note further elaborates at paragraph 108, “*In paragraph (a), a mistake in making or amending an entry in the register (including, by virtue of subsection (3), an ambiguous description of, for example, rights of common), but only where the mistake was made by the authority. Such a mistake may arise, for example, where an error was made by the authority in transposing onto the register map a map supplied by an applicant for provisional registration of common land, or where in amending an entry in the register (for example, on an apportionment under the 1965 Act), the authority erroneously added a zero to (or deleted a zero from) the number of rights registered. An error made in a map supplied by an applicant defining the area of common land, which was faithfully reproduced in the register entry, could not be corrected under this provision (but it may be possible to correct such an error under the provisions in Schedule 2)*”
5. It is clear from the legislation and accompanying guidance that the mistake must have been made by the CRA and no other person. Furthermore, the mistake would be of an administrative nature, rather than substantive.

*Background to application*

1. The Applicant has set out an extensive history of the area, including a number of historic maps that she contends shows the application area being described and used as a Common, known locally as ‘Broxhead Common’.
2. In 1956 Mr L Tavener (Senior Lecturer in Geography, University of Southampton) was asked to undertake a survey of the ‘Commons in Hampshire’ by Hampshire County Council. In compiling the Survey, a letter was sent to each of the 237 Parish Councils, 94% of which responded. The historical archives relating to common land of Hampshire held by the County Council were also made available to Mr Tavener and the relevant landowners were consulted. Site visits were also conducted and interested parties were invited to attend.
3. At the Hearing I was provided with extracts from this survey which related to Broxhead Common (HR04). Broxhead Common is mentioned under the Parishes of Headley, Whitehill and Bordon, with an acreage of approximately 385 acres. Remarks are made that the common was “*Requisitioned by War Department. Rights to dig gravel and take turf. Some grazing rights, seldom exercised*.” Map 1 of the survey identifies the title ‘Broxhead Common’ to the south of the settlement of Sleaford but the extent of it is not shown. Map 2 also identifies Broxhead Common and demarcates it in green. However, it was agreed at the Hearing, that given the scale of the map and lack of detail it was impossible to state whether or not the application area was included.
4. An extract from the Minutes of the ‘Hampshire County Council Open Spaces Committee’, dated 8 December 1964 was submitted which records an intention of the landowner to enclose parts of Broxhead Common. The Committee resolved to take such steps as necessary to protect the Common, including proceedings under the Law of Property Act 1925. Nonetheless, there was no accompanying map or description of the land intended to be fenced.
5. Following the 1965 Act, Hampshire County Council, of its own volition, provisionally registered an area of land as CL147, this abutted, but did not form part of the application area now before me. Due to the objections received the provisional registration was referred to the Common Land Commission who held an Inquiry into the disputes which resulted in a two-part decision (Land and Rights) dated 22 November 1974. The ‘Rights’ decision was appealed to the High Court and subsequently dismissed 22 July 1975. The High Court judgement was then appealed to the Court of Appeal. This Appeal was settled outside of the Court and therefore the Appeal was dismissed by consent.
6. It was agreed at the Hearing that the land that was the subject of this application had never been registered as common land either provisionally or made final.

***Whether a mistake has been made by the Commons Registration Authority in making an entry in the register***

1. At the Hearing I summarised the Applicant’s position stating that “*it appears to me that the Applicant considers that the application area was mistakenly omitted from the Register, and this is based on the historic documentary evidence which she adduced at the Hearing*”. This was confirmed as a correct summary by the Applicant.
2. I heard from the CRA that their process for provisionally registering common land was based on the survey conducted by L Tavener as set out in paragraph 17 above. This Survey was undertaken in consultation with the Parish Council and other interested parties. Following this process, the CRA provisionally registered CL147 on the 23 April 1968. From all that I have seen and read no objections were made to extend the land parcel of CL147 to include the application site now before me.
3. I accept that the Commons Commissioner’s (CC) decision interestingly describes the history of Broxhead Common. However, he does not precisely state the extent of the wider common land, probably as his jurisdiction was solely to consider the objections made to the provisional registration at CL147 and the rights that still may subsist. Again, no person sought to appeal this decision in relation to the application land. The registration of CL147 became final with the ‘Final Disposal Notice’ dated 18 December 1978 and was recorded in the Common Land Register.
4. From all that I have seen and read the historic mapping adduced by the Applicant was not before the CRA when it made its provisional registrations over Broxhead Common, rather it relied on the work undertaken by Mr L Tavener, which it was entitled to do. Given that the CRA had no evidence as to the status of the application site as common land it could not be a mistake on their part not to include it provisionally in the common land register.
5. I also accept the CRA’s point that there is no evidence that any person complained at the time about any failure by the Council to not include the application site. Neither did any person make their own application to register the land now before me.
6. Whilst the Applicant suggested that local residents were harassed and the consultation process flawed, no evidence was provided. Indeed, it would seem from the objections made, local residents were well aware of the registration process and the Parish Council had responded to the Tavener survey request. Furthermore, local residents were aware of the extent of the Common Land given that they made a complaint to the Hampshire County Council Open Spaces Committee in 1964, before CL147 was provisionally registered.
7. Reference was made to an application decision (COM/3219561), which was also made by the same applicant, for an area of land at Broxhead Common, referred to at the Hearing as ‘the 80 acres’. I note that that decision relates to land which had been provisionally registered by the CRA, which differentiates it from the application now before me.
8. From all that I have seen, heard, and read there is nothing to indicate that the CRA was mistaken by omitting the application land from the Common Land Register. Thus, the Applicant has failed to adduce, on the balance of probabilities, sufficient evidence to merit granting the application.

*Other matters*

30. The Applicant raised concerns in respect of the fencing of the common, land ownership, the restriction of access to the land and rights of way. These are not matters relevant to my determination of this application.

# Conclusions

31. Having regard to these and all other matters raised, I conclude that the application should be refused.

J Burston

INSPECTOR

**Hearing attendees**

**For the applicant:**

Mrs M Comber

**For the Commons Registration Authority (CRA):**

Mr S Adamyk, Barrister, New Square Chambers

Instructed by:

Caroline Strickland, Legal Officer, Hampshire County Council

Mr H Goodchild, Map Review Manager, Hampshire County Council

**Interested persons:**

Mr B Milton

Mrs J Dale

Dr R Ellis

Mr D Comber

Mr P Dale

Ms L Delve

**Documents submitted at the Hearing:**

HR01 Statement made by Mr B Milton, Submitted by Mr B Milton.

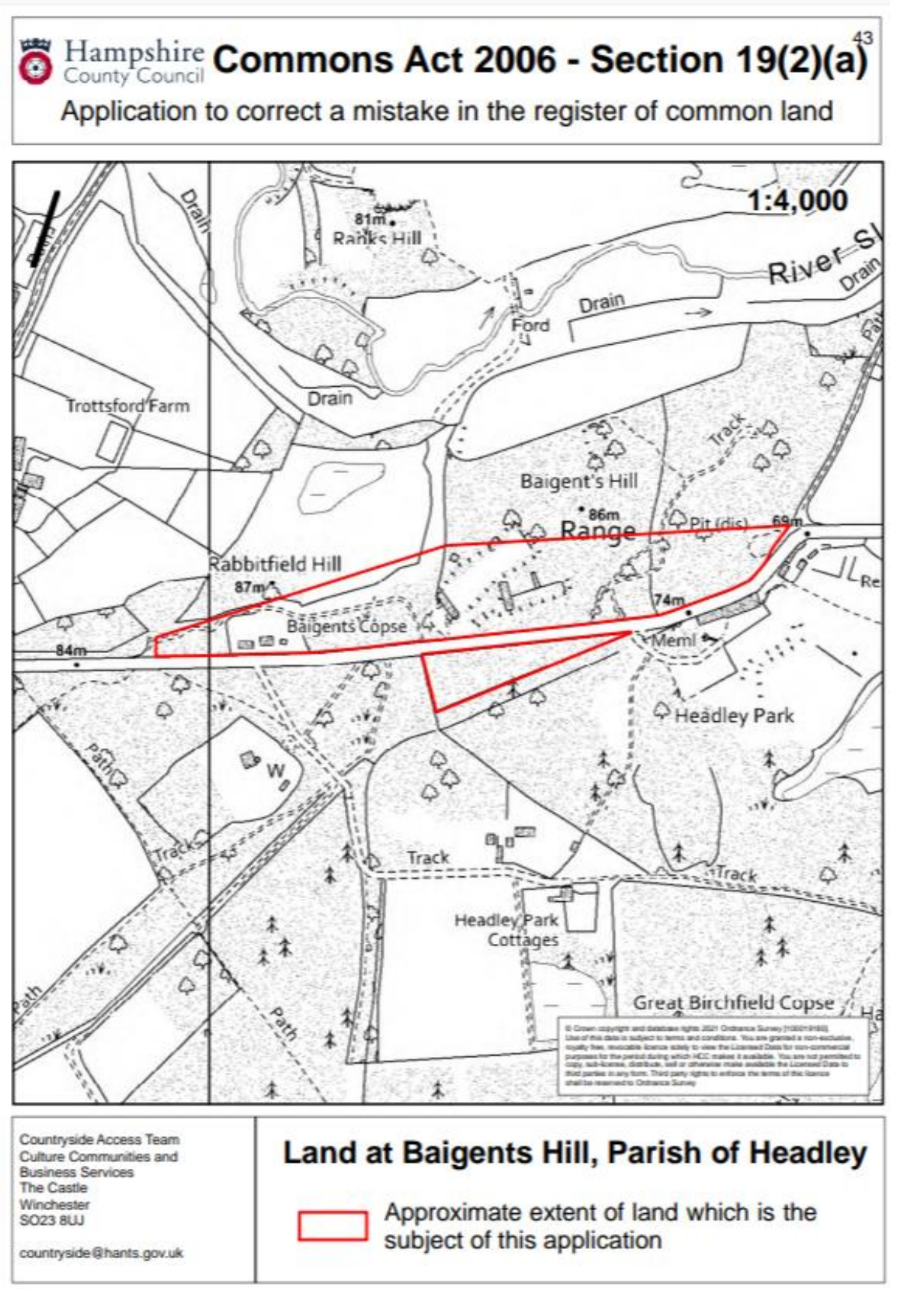
HR02 Baigents Hill Sum up, submitted by Mrs M Comber.

HR03 Extracts from Halsbury’s Laws of England, submitted by the CRA

HR04 Extracts from the Survey by Mr L Tavener, submitted by the CRA

HR05 Map of Broxhead Common (East), submitted by Mrs M Comber.

**ANNEX A**

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