

**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: 17 May 2023**

**Decision date: 4 July 2023**

# Application Ref: COM/3300566 Broxhead Common, Picketts Hill, Headley, Hampshire

Register Unit: CL147

Registration Authority: Hampshire County Council

* The application, dated 28 September 2018, 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 16 May 2023, reference COM/3300564.
3. A similar application was made to correct a mistake for land at Broxhead Common, reference COM/3219561 (dated 29 November 2019). The conclusions reached by the Inspector in refusing that application are a material consideration in considering this current application. Notwithstanding this, I have determined this application on its own merits, with regard to the case-specific circumstances.

# The Application Land

1. The application land comprises an area shown on the map attached to this decision at Annex A, abutting part of Common Land Unit CL147. The Applicant provided a plan which describes the land as Claim 1 and Claim 2. Claim 1 land had never been registered, provisionally or otherwise. Claim 2 land had been provisionally registered, but subsequently excluded from the Register following the decision of the Commons Commissioner.

# 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. Therefore, 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 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.
4. 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 the application*

1. The Applicant has set out an extensive history of the area, including a number of historic maps that she contends show 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. Within the published Survey, 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 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 a number of parcels of land, which was recorded in the Register of Commons Land on the 23 April 1968. Of particular relevance to this application are CL147 and CL330. Due to the objections received the provisional registration was referred to the Commons Commission who held an Inquiry into the disputes.
6. CL330 was determined to be void by the Commons Commissioner, decision dated 26 March 1975 and therefore not subject to ‘Final Registration’. Whereas CL147 resulted in a two-part decision (Land (No.1) and Rights (No.2)), dated 22 November 1974, which removed several areas of land from CL147 and rights of common.
7. This decision was not added to the Common Land Register as it was appealed by Mr Whitfield to the High Court. This appeal related to the ‘Rights’ decision insofar as they affected the land owned by Mr Whitfield, which the Judge referred to as ‘part C’ of Broxhead Common. The rights in question belonged to Mr Connell and Mrs Cooke. The appeal was subsequently dismissed in part on 22 July 1975; the Judge found that the Commons Commissioner erred in law in finding that Mrs Cooke had acquired grazing rights, but the case failed against Mr Connell.
8. The High Court judgement was then appealed by Mr Whitfield to the Court of Appeal. This Appeal was settled by agreement of the parties to the ‘terms of settlement’ as set out in the schedule accompanying the court papers. Accordingly, the Appeal was dismissed by consent, dated 24 May 1978.
9. The Schedule to the court papers set out: 1. A lease to Hampshire County Council for an area of land for a cricket pitch; 2. That Mr Whitfield consent to all proceedings in the Aldershot County Court being dismissed (see paragraph 29); 3. Upon release of Mr Connell of his common land rights that Hampshire County Council shall not pursue its provisional registration of the said area of common land and would support Mr Whitfield in any application made under section 194 of the Law of Property Act 1925 regarding the said fences; 4. The balance of the part of the common owned by Mr Whitfield shall be let to Hampshire County Council for the term of 20 years; and 5. That each party should bear their own costs.
10. A deed of release, dated 26 April 1978, released Mr Connell of his rights of common and therefore rights of Common over Part C of CL147 ceased to exist.
11. Following these court proceedings, the Commons Commissioner held a further hearing and found that no common rights were registered over the Part C land and therefore the registration of common land here also was not supported. The ‘Notice of Final Disposal’ was issued on the 18 December 1978. Appended to this decision were two maps GDS1 and GDS2. GDS1 referred to the areas of land removed from the provisional registration by the Commissioner in his original ‘land’ decision dated 22 November 1974. GDS2 referred to the areas of land removed from CL147 as a result of the Court of Appeal schedule and the associated deed of release. The rights section of the register became final on 19 December 1978. No appeal or judicial review was brought to this decision.
12. For that reason, the CRA carried out the instructions of the Commons Commissioner and amended the register according to his instructions.
13. In the period 1963 – 1973 the Broxhead Commoners Association were taking action against the fencing of land owned by Mr Whitfield. This area broadly corresponds to the Part C land referred to at paragraph 22. The action culminated in a Court hearing in Aldershot on the 31 August 1973. The finding of the Court was that as a Commons Commission had been set up to hear the cases, an interim order was made to allow Mr Whitfield to temporarily erect the fence pending the commission hearing.

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

Claim 1 Land

1. 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 18 above. This Survey was undertaken with 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 parcel of CL147 to include the Claim 1 application land now before me.
2. 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 as set out in the Final Disposal Notice.
3. 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.
4. Whilst the Applicant suggested that local residents were harassed and the consultation process flawed I have no evidence to confirm this. 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.
5. Taking into account the findings above, there is nothing to indicate that the entry in respect of CL147 was mistaken insofar as the Claim 1 application land was omitted.

Claim 2 Land

1. The Claim 2 land was provisionally registered as common land, the history of which is set out above. The land is irregular in shape and runs alongside the boundary of CL330 (no longer part of the register) and CL147. The ‘Claim 2’ land also includes Public Rights of Way, namely Bridleways 4, 46, 47 and 54.
2. At the Hearing several questions were raised about the status of Provisional Registration, suggesting that the CRA had no authority to alter this in the Register. As set out in Section 6 of the 1965 Act the registration of common land only becomes final either at the end of the period during which an appeal could be brought against the registration or when any appeal is finally disposed of.
3. In this case, given the appeal(s) against the Commons Commissioner’s decision, the final disposal was not until the 18 December 1978 and, in effect, up to that date the registration remained provisional, and no other notes relating to court hearings could be entered into the register. Whilst the Applicant states that the application land was removed from the register without the consent of the Secretary of State, no consent was required, in this respect, under the 1965 Act. Reference was made at the Hearing to Slab Common and that the decision in that case required referral to the Secretary of State. However, the Slab Common decision related to ‘de-registration and exchange’ which differs from the case before me.
4. I also acknowledge the suggestion that the appeal in the Court of Appeal was dismissed and the schedule formed no part of the Court’s decision. Whilst I disagree with this suggestion, even if this was the case, Mr Connell had already entered into a Deed of Release by the time the court schedule was published and accordingly his rights on the land were removed.
5. The Applicant stated that the ‘Deed of Release’ signed by Mr Connell should have been sent to all the Commoners of Broxhead Common because if he had rights all the commoners had rights. Therefore, their rights would remain even if Mr Connell’s were released.
6. It was confirmed by the CRA that no consultation was conducted relating to the Deed of Release as this was a private matter between the landowner and Mr Connell. Furthermore, the Commons Commissioner’s decision had already confirmed that the only rights that existed on the parcel of common land in question where those of Mr Connell and Mrs Cooke and at the time of the ‘Deed of Release’ the only commoner with rights remaining was Mr Connell.
7. As set out above, common land means land subject to rights of common; where these are removed the land could not be registered as common land. This was acted upon by the Chief Commons Commissioner as identified in Entry 4 of the Register. I note the memo produced by Mr Prescott (HR02), however the note of the Chief Commissioner reflects the Order of the Court and his earlier decision. There is nothing to indicate that the decision of Chief Commons Commissioner has been challenged by way of judicial review, such that the decision should be set aside. I accept that local residents were concerned about the decision and sent letters to the Commons Commissioners, however these letters do not amount to a legal challenge.
8. The narrow strips of application land, broadly located towards the south on the plan attached at annex A, are bridleways and therefore form part of the public highway. The majority of these bridleways have been recorded on the Definitive Map since 1964 and therefore in existence before CL147 was provisionally registered. As set out above, highway land cannot be registered as common land. As such there was no mistake in excluding it from the Common Land Register.
9. The only exception to this is a small section of bridleway where the route was diverted in 1992. Nevertheless, this strip of land crosses a section of CL147 which was removed from the common by the Commons Commissioner’s Final Disposal Notice. Therefore, I do not consider that this section of land was mistakenly removed from the Common Land Register by the CRA.
10. At the Hearing the Applicant and other interested parties stated that effectively the whole of the common has been established as a common, given that the whole area is known as ‘Broxhead Common’. However, as stated at paragraph 31 above, such an action would be outside of the jurisdiction of the Commons Commissioner as his role was to consider solely the provisional registration land and the objections to that provisional registration before him.
11. The Applicant stated that a number of mistakes were made by my colleague in his decision COM/3219561, referred to at paragraph 3 above. Nevertheless, permission for Judicial Review was refused on the 5 May 2020 and again on the 23 July 2020, the Judge Mrs J Thornton finding that she was “*not persuaded that the Inspector fell into error in relation to the application of section 19(2) of the 2006 Act. An application under s19(2){a) does not entitle the applicant to question the validity of a decision by the Chief Commons Commissioner in a Final Notice. Read fairly, as a whole and in the context of the relevant statutory regimes, it is clear that the Inspector did not err in his approach to the Court of Appeal's order or make any finding about the Deeds of Release (which, in any event has subsequently been found to exist).*”
12. The Applicant also brought to my attention a copy of an investigation letter from the Independent Complaints Reviewer, dated 23 September 2014, relating to a complaint made against the Land Registry (HR07). Nevertheless, the Land Registry has different legal considerations in terms of the registration of land, than my considerations as part of this application, which are set out above.
13. To draw all these matters together, there is nothing to indicate that the entry in respect of CL147 was mistaken. The Claim 2 application land was removed in accordance with the disposal notice of the Chief Commons Commissioner on 18 December 1978.

*Other matters*

1. The applicant raised concerns in respect of the fencing of the common, land ownership and the restriction of access to the land and rights of way. However, these are not matters relevant to my determination of this application.

# Conclusions

49. Overall, it is concluded that there is nothing to indicate that the entry in respect of CL147 was mistaken. The application land was either not included (Claim 1 land) or removed (Claim 2 Land) from the Register of Common Land in accordance with the Final Disposal Notice of the Chief Commons Commissioner on 18 December 1978.

50. 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

**For the Objector:**

Mr J Whitfield, Landowner

Mr E Harris, Solicitor

**Interested persons:**

Mr B Milton (PM only)

Mrs J Dale

Mr D Comber

Mr P Dale

Ms L Delve

**Documents submitted at the Hearing:**

HR01 Letter from the Commons Commissioners, dated 4 November 1974, Submitted by Mrs M Comber.

HR02 Memo dated 11 October 1978, Submitted by Mrs M Comber.

HR03 Letter from J Robbins, dated 31 January 1980, submitted by Mrs M Comber.

HR04 Section 194, Law of Property Act 1925 and Extract from Common Act 1876, submitted by Mrs M Comber.

HR05 Selection of letters between Mrs Nicholson and the Commons Commissioners, submitted by Mrs M Comber.

HR06 Letter from Hampshire County Council, dated 1 November 1979, submitted by Mrs M Comber.

HR07 Letter from the Independent Complaints Reviewer, dated 23 September 2014, submitted by Mrs M Comber.

 **ANNEX A**

