

Delegated Report

4 March 2016

Application to DeRegister Common Land

Low Etherley

Report of Colette Longbottom, Head of Legal and Democratic Services

Introduction

1. The Council is the commons registration authority (“the CRA”) for town and village greens under the Commons Act 2006. The Council must act impartially in its determination.
2. Following changes to the Commons Act 2006 which took effect from 15 December 2014, CRAs may now correct mistakes in the registers of common land and town and village greens, and remove buildings and land wrongly registered. The function is delegated to the Head of Legal and Democratic Services under Table 6 of the Constitution:

“To discharge the Council’s functions set out in Part 1 of the Commons Act 2006 and the Commons Registration Act 1965 with the exception of determinations under section 15(1) of the Commons Act 2006.”

“To appoint an inspector to hold an inquiry into applications to register land as town or village green where appropriate.”

Purpose of the Report and Background

3. An application has been received from David Burns and Lorraine Fairish to the CRA under Schedule 2, paragraph 7 of the Commons Act 2006 concerning land at Low Etherley. The land is adjacent to no. 114 Low Etherley and was originally registered as Common Land under plot number CL67.
4. The application contends that the land was provisionally registered as Common Land under section 4 of the 1965 Act, but that on the date of the provisional registration the land was not Common Land. If the application is successful then the CRA will remove the land from the register.
5. A valid application was originally received in July 2015. This was advertised as required, with a return date for representations of 1 September 2015.
6. The land in question forms part of the public highway, and part of it is in the title to an adjacent property. An objection was received from the owner of that adjacent property. In some circumstances where the CRA holds an interest in the land the subject of an application, or in any case where an objection is

received from the owner of any part of the land, the application must be referred to the Planning Inspectorate for determination upon payment of a further fee. This was communicated to the applicants, as a result of which the application was amended to relate only to the land that does not form part of the highway or the neighbour's title. The amendment was accepted by the Council after having regard to the relevant Defra guidance document. A reconsultation exercise subsequently took place, expiring in January 2016.

Description of the Land

7. The Register entry describes the whole of the land originally registered as "that piece of land at 116 and 118 Low Etherley nr. Bishop Auckland containing 0.55 of an acre or thereabouts in the Parish of Etherley..". The provisional registration took place on 6 March 1970 and, being undisputed, became final on 1 August 1972.
8. The part of the land that is subject to the amended application is delineated on a plan sent under cover of correspondence from the first applicant's solicitor on 18 November 2015. It excludes the adopted footway, and the part of the land that falls within the title to no. 116.
9. The land falls between the public highway and the former Dog & Gun public house at no. 114 Low Etherley.

The Law

10. The application has been made under paragraph 7 of Schedule 2.
11. An application or proposal under this paragraph will succeed only if it can be shown that, before its registration, the land was not common land (whether subject to rights of common or waste land of the manor), nor a town or village green within the meaning of the 1965 Act as originally enacted, nor within the definition of land subject to be inclosed under Section 11 of the Inclosure Act 1845.
12. Therefore the CRA must look for evidence of:
 - the application having been made in form CA13;
 - a description of the land to be deregistered;
 - the provisional registration of the land as common land under Section 4 of the 1965 Act;
 - the provisional registration having become final without reference to the Commons Commissioner for determination; and
 - the status of the land immediately before its provisional registration as not being—
 - land subject to rights of common,
 - waste land of a 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.

Preliminary issues

13. The application was made in the correct form and the amendments give a description of the land to be deregistered. The provisional registration of the land as common land was made under Section 4 of the 1965 Act; and that provisional registration became final without reference to the Commons Commissioner for determination, the registration having been undisputed. Therefore the only issue for consideration is whether the status of the land immediately before its provisional registration was that it was subject to rights of common, waste land of a manor, a town or village green, or land specified in section 11 of the Inclosure Act.

The applicants' case

14. The applicants submitted the statutory declaration of John James Lyons made in 1969 in support of the provisional registration. No details in support were given of that declaration, other than that the declarant had read the relevant notes to the application and stated his belief that the land described in the application was common land.
15. The applicants' case is that the 1969 declaration was in a standard form and contained no information as to why unit CL67 was common land. Mr. Lyons resided in Middlesex and so cannot be expected to have had local knowledge. However the Dog & Gun was then understood to have been owned by a family company of Mr. Lyons and so the applicants consider that the registration may have had a commercial purpose.
16. Subsequently the applicants submitted a statement from a long-standing local resident, Mr. Morgan Dent. He states his opinion that the contents of Mr. Lyon's declaration are untrue. He can remember the land from as early as around the late 1950s and from that time the Dog & Gun was a public house and the land was only ever used by customers of the Dog & Gun in association with the pub. It had been used as either a car park or a beer garden from then until its recent closure.
17. He recalled that a Mrs. Lyons had lived at 116 Low Etherley when he was growing up, and he surmised that the declarant, Mr. Lyons, would have been related to her and made the declaration with the intention that the land would not be built upon. He confirms from his own knowledge that the land was not common land; and that to the best of his knowledge, information and belief it was also not waste land of a manor, a town or village green, or land of a description specified in section 11 of the Inclosure Act 1845, although no further details are given.
18. Subsequently the first applicant commented on representations received from an objector. He considered that these representations largely supported his case. Additionally, he supplied a copy of a letter written by David Gibson of

Sidney Phillips dated 31 July 2013. In it, it is stated that the land had been used since 2002 by the clientele of the Dog & Gun for picnic tables, parking etc.

Representations

Local Highway Authority

19. An early view was sought from the Local Highway Authority, who confirmed that on the early maps there was no definition of the edge of the carriageway and the road appeared to be open to the front of the Dog & Gun. It is possible that the area could be considered to be highway land. However, although this carries implications in its own right this would not affect the outcome of the application to deregister it as common land.
20. A subsequent view from the LHA was that approximately 2m of the land formed the footway of the adopted highway. That section has now been removed from the application site.
21. Therefore the highway status of the (remaining) application land is somewhat unclear but there is no objection from the LHA to the deregistration, and furthermore there is no evidence from them about the status of the land (as common, waste, village green or inclosure) as it was immediately prior to the provisional registration.

Parish Council

22. The parish council did not respond to the consultation exercise.

Local Access Forum

23. The LAF representative responded to say that he did not recall any rights being associated with the land in terms of its registration. He considered that there was a good argument that the land had always been ancillary to the pub. He did flag up the question whether it was waste land of a manor but was unable to comment on it.

Mr. & Mrs. Wood

24. Mr. & Mrs. Wood have objected to the proposed deregistration, in both its original and amended form.
25. On 31 August 2015 Mrs. Wood wrote with several enclosures. These were:
 - (i) An early map, showing that the relevant land was unenclosed;
 - (ii) A letter from Cllr. Stubbs of 1 October 1966 to Mr. & Mrs. Lyons. It discusses 'proceedings', perhaps litigation, but gives no indication as to the subject matter;
 - (iii) A letter from 'Dad' to 'John, Vie and family' dated 20 October 1966 which included a description of a dispute about some steps that appeared to have been built on the land, and the blocking up of a passageway by the landlady of the public house;

- (iv) A letter from the clerk to the District Council to Mr. Stubbs dated 4 October 1966 concerning a dispute between parishioners (Mr. & Mrs. Lyons, and the public house) but stating that the Deeds appeared to be inconclusive as to ownership;
- (v) A further contemporary letter concerning the neighbour dispute;
- (vi) A copy of Mr. Lyons' statutory declaration of 1969;
- (vii) Building plans stamped 1976;
- (viii) Newspaper extract of June 21, 2002, announcing the sale of the public house to Punch Taverns;
- (ix) Photographs of the land, showing cars parked and (separately) picnic tables;
- (x) Newspaper extract of August 31, 2013, announcing the closure of the public house;
- (xi) Notice of planning application for a change of use dated 22 October 2013;
- (xii) title entries to no. 116 Low Etherley;
- (xiii) letter of objection to the planning department from Mr. & Mrs. Wood dated 28 October 2013;
- (xiv) letter from Teesdale DC solicitor to the occupier of no. 113 Low Etherley dated 13 August 1998 (inconclusive);
- (xv) title entries to the public house;
- (xvi) building plan stamped 18 September 2013;
- (xvii) newspaper notice of December 13, 1979, concerning ownership of unclaimed land including the application land;
- (xviii) letter from Mr. & Mrs. Wood to the planning office containing photographs of a fence dated 19 October 2013;
- (xix) correspondence from planning department dated 6 November 2013;
- (xx) copy of notice publicising the instant application;
- (xxi) copy of certain application documents (of the instant application).

26. The covering correspondence describes the enclosures. It also states that residents viewed the annual carnival from the land; that a mobile library van parked on the verge of the land; that a fruit and veg van stopped every other week; and that a car park had been formed in later years and was regularly used by taxis.

27. The subsequent correspondence of 13 January 2016 raises questions about the land ownership, the provision of fence posts upon the land, and the requirement for planning permission. However it does not address the status of the land immediately prior to the provisional registration in 1970.

Assessment

28. There is very little evidence as to the status of the land immediately before the provisional registration. Mr. Dent and the LAF representative indicate that it was in use ancillary to the public house use. An early representation from the highway authority suggests that it may have acquired public highway rights. The evidence from Mr. & Mrs. Wood reveals a 1960s neighbour dispute about title to the land and building works upon it, but does not directly touch and concern the question of what public use (if any) has been made of the land.

29. The authority must be satisfied that its status was not that of common land, a village green, waste land of a manor, or land of a description in section 11 of the Inclosure Act 1845. In effect, this requirement puts the burden of proof onto the applicants.

Common Land

30. There is no evidence that the land was common land, save for Mr. Lyon's statutory declaration that he believed it was so in 1969. There is no description in the evidence of what rights of common may have arisen. The only positive evidence that the land was not common land is Mr. Dent's declaration to that effect, to the best of his knowledge and belief, and the correspondence of the LAF representative.

Village Green

31. The question is whether the land was used for lawful sports and pastimes by the inhabitants of a locality and village green rights had accrued. There is no evidence that the land was used by the public at large save in respect of potential highway rights (which are not 'lawful sports and pastimes'). Rather, insofar as the land was used for lawful pastimes this appears to have been in association with the public house, and so the inference is that this use would likely have been at the invitation of the landlord rather than as of right by the public generally. However the only positive evidence that the land was not in use as a village green is Mr. Dent's declaration that to the best of his knowledge and belief it was not, and the correspondence of the LAF representative.

Waste Land of a Manor

32. There is no evidence that the land was the waste land of a manor. The only evidence that it was not is Mr. Dent's declaration that to the best of his knowledge and belief it was not. The LAF representative was unable to comment on this issue.

Section 11 of the Inclosure Act

33. Section 11 defines such land as follows:

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.

34. There is no evidence that the land was so held, and again there is no evidence that it was not save for Mr. Dent's declaration stating the case to the best of his knowledge and belief.

Overall assessment

35. Although there is only one deponent to the use of the land immediately before the provisional registration, being Mr. Dent, this is supported by the evidence of the LAF representative which is to similar effect. Together these are sufficient for the applicants to have made out their case. The objection of Mr. & Mrs. Woods does not deal sufficiently with the use of the land by the public to enable a presumption that the land was subject to relevant public rights at the date of the provisional registration to be maintained.

Recommendation

36. That the Application is **GRANTED** and the land in the application (as amended) is removed from the register of Common Land.
37. That it is unnecessary to convene a public inquiry to determine the issue. No known landowner interests are at stake as a result of this decision and it is considered proportionate and compliant with the Human Rights Act to determine the application on the papers.

Contact: Laura Renaudon Tel: 03000 269886

Appendix 1: Implications

Finance

None.

Staffing

There are no staffing implications.

Risk

There are no specific risk issues.

Equality and Diversity

None.

Accommodation

Not applicable.

Crime and disorder

Not applicable.

Human rights

None applicable.

Consultation

The application has been publicised by way of Notice in the locality, the local press and posted on the Council's website.

Procurement

Not applicable.

Disability Issues

Not applicable.

Legal Implications

The Application must (and does) fulfil the requirements of the Commons Act 2006.