

Registration, Commons

From: Christopher Lasper [REDACTED]
Sent: 21 May 2021 16:24
To: Registration, Commons
Cc: Hugh Craddock; [REDACTED]
Subject: Re: CA13/34 Notice of Application

Follow Up Flag: Follow up
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Categories: Red Category

Dear Mrs Bainbridge,

Referring to your below to me of 12/05/2021, please email me promptly with confirmation of receipt of my present representations on the above Application.

Since the Applicant's agents give no email address, I have copied my present email to the Applicant itself (Hugh Craddock).

My sole concern is with so much of the Application as relates to the long north/south strip of land that is coloured blue and, at its southern tip, blue/hatched yellow.

Considering the Applicant's map of that strip and Google Map images of the same area, it certainly LOOKS as though the strip is largely composed of a highway.

The 2006 Act does not define "common land" and, in the context of Schedule 2 (failures or errors of registration "under the 1965 Act"), references there to "common land" can only be to such within the meaning of the 1965 Act: section 22(1) of that Act expressly excludes highways from "common land".

In addition to the evidence from the above maps, your Authority ought to consult your Council's records in relation to section 36 of the Highways Act 1980 and section 53 of the Wildlife and Countryside Act 1981.

If, upon consideration of such maps and records, it appears to your Authority

(a) that the strip does include a highway, the Application ought, at least to that extent, to be refused; or

(b) that there is reasonable ground for believing that the strip includes a highway, the burden of proof of the Application (i.e. on the Applicant) is such that the Applicant must show that the strip does not include a highway.

Yours sincerely,

Christopher J.R. Lasper

[REDACTED], Cockermouth CA13 9HW

On 12/05/2021 10:10, Registration, Commons wrote:

Dear Sir/ Madam

Please find attached notice which was issued by Cumbria County Council in relation of the above application.

Kind regards

Svetlana Bainbridge
Commons Registration Officer | Commons Registration Service
Economy and Infrastructure | Cumbria County Council
Lady Gillford's House | Petheril Bank Road | Carlisle | CA1 3AJ
E: commons.registration@cumbria.gov.uk

Please be aware that I work flexible hours, so whilst this is a convenient time for me to send this email to you – I do not expect a response from you outside your normal working hours.

This e-mail contains confidential information (which may also be legally privileged) and is intended solely for the use of the intended named recipient. If you are not the intended recipient you may not disclose, copy, distribute or retain any part of this message or its attachments. If you have received this message in error please notify the originator immediately by using the reply facility in your e-mail software. Incoming and outgoing emails may be monitored in line with current legislation. All copies of the message received in error should be destroyed. Any views or opinions expressed are solely those of the original author. This email message has been scanned for viruses, and declared to be virus free at the point of exit from Cumbria County Council's network.

<http://www.cumbria.gov.uk>

WARNING: Email attachments may contain malicious and harmful software. If this email is unsolicited and contains an attachment **DO NOT** open the attachment and advise the ICT Service Desk immediately. Never open an attachment or click on a link within an email if you are not expecting it or it looks suspicious.

22/6/21

Howes FM
Boot-

Ref 13/34
CL58

Sir, My GRANFATHER CAME TO GILLBANK
FARM in 1901 as a Tenant of JOHN VICARS,
The FELL GATE WAS AT THE TOP OF THE STEEP
BEND, NEXT TO OUR INTAKE CORNER,
JOHN VICARS GOT PERMISSION FROM COCKERMOUTH
CASTLE TO MOVE IT TO WHERE IT IS
TODAY. HIS WORKER JOE TYSON
BUILT THE WALL

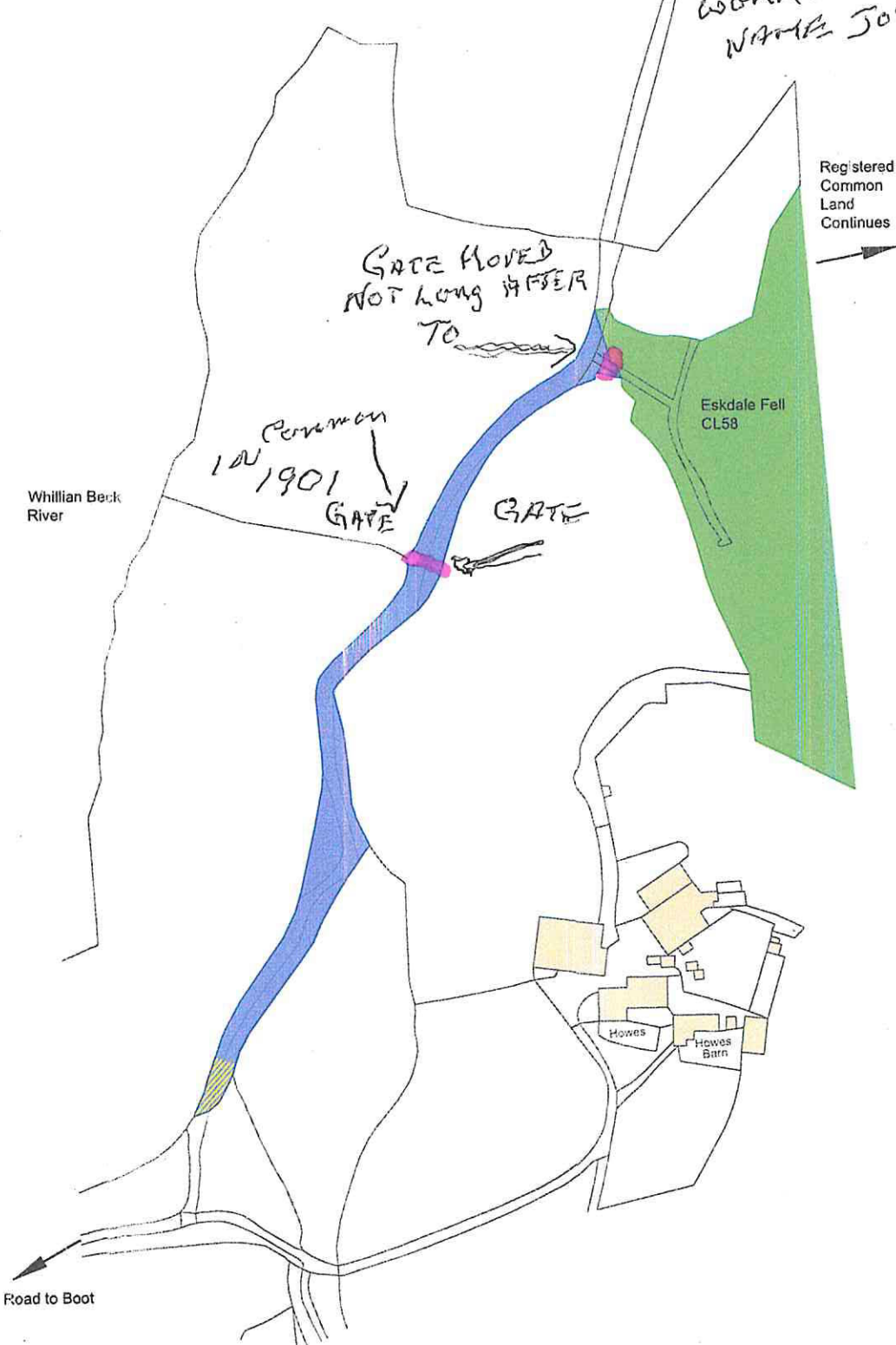
My GRANFATHER NAME JAMES BLACK
HE MOVED ^{TO} HOWES in 1923

Yours
Noel D Baines



22/6/21
 FROM BAINES
 HOWES FARM
 ESKDALE

NEW WALL Built By The
 WORKER of John VILARS
 NAME JOE TYSON



Registered
 Common
 Land
 Continues

The land shaded green is currently registered as common land.



The land shaded blue is one of the two application areas referred to in the application. This land is subject to a Deed of Limitations and an Order of Limitations, both made under section 193 of the Law of Property Act 1925.



The land shaded blue and hatched yellow is land only subject to the 1933 Deed of Declaration. This area is also included within the application land.



Landman LLP

ON BEHALF OF



1b Oaklands Court, Tiverton Business Park,
 Tiverton, Devon, EX16 6TG
 T: 01834 212380

Client
 Open Spaces Society
 Site: Grid Ref. NY 175 014

Eskdale Fell
 Boot
 Eskdale
 CA19 1TG

Project
 Commons Act 2006,
 Schedule 2, Paragraph 2

Title
 Application Plan: Eskdale Fell 1

Drawing No. 1 Issue:

Scale 1:1250 when printed at A3

Date 26 March 2021

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 E80.E

For submission with CA13 registration application.



Our ref: TMH/OSS/CL58
Your ref: CA13/34

1b Oaklands Court
Tiverton Way
Tiverton Business Park
Tiverton
Devon EX16 6TG

6 July 2021

Svetlana Bainbridge
Cumbria County Council
Commons Registration
Lady Gillford's House
Petteril Bank Road
Cumbria
CA1 3AJ

Dear Svetlana,

RESPONSE BY THE OPEN SPACES SOCIETY TO REPRESENTATIONS RELATING TO APPLICATION CA13/34 TWO PARCELS OF LAND ABUTTING CL58 ESKDALE COMMON, CUMBRIA

We are writing in our capacity as agent for the Open Spaces Society.

We and the Open Spaces Society have reviewed the two representations submitted by Mr Lasper and Mr Baines, made in connection to one of the parcels ('Application Plan: Eskdale Fell 1') of the above application, and we reply as follows:

1. This application has been made under Schedule 2, paragraph 2(2)(b)(iv) of the Commons Act 2006 ("the 2006 Act") which allows for the registration of land which is 'otherwise recognised or designated as common land by or under an enactment', that was not registered as common land under the Commons Registration Act 1965 ("the 1965 Act"). The purpose of paragraph 2 is expressly to allow for the registration of land that, given its statutory status as common land at the time, ought to have been registered under the 1965 Act.
2. The Deed of Declaration made by Lord Leconfield under section 193(2) of the Law of Property Act 1925 ("the 1925 Act") in April 1933, and an additional Order of the Minister of Agriculture and Fisheries Imposing Limitations on and Conditions as to the Exercise of Rights of Public Access made under paragraph (b) of the proviso to section 193(1) of the 1925 Act in January 1934 on the application of Lord Leconfield affirmed the status of the land as common land and provides the grounds for the current application.
3. With regards to the representation issued by Mr Lasper, where the expression 'common land' is used in Schedule 2, paragraph 2(2)(b)(iii) and (iv) of the 2006 Act, viz:

...land which is—...

- (iii) regulated as common land under a local or personal Act; or
- (iv) otherwise recognised or designated as common land by or under an enactment;

If land qualifies under sub paragraph (iv) above, it is not subject to the definition of common land established in Section 22(1) of the 1965 Act. Thus, if the enactment describes an area of land as 'common', it is eligible to be recorded as such, without exclusion of highways (unless of course, the highways themselves have been excluded in the enactment). The intention is to capture whatever the enactment thought fit to describe as common land.

4. The 2006 Act does not define 'common land', because it is not necessary to do so. Schedule 2, paragraph 2 of the 2006 Act provides a mechanism that allows the registration of any land that has the status of common land under another enactment. The fact that the land is also highway is immaterial to this application. The 2006 act does not exclude highway land from registration as common land, and there is no need to infer an intention to do so in paragraph 2.
5. Nor is it necessary to exclude highway land from registration. The exclusion of highway land from registration under the 1965 act (defectively defined and implemented in that act, as the registers testify today) was not consistent with common law nor practice, which allow for livestock to wander over unfenced highways across common land, and to graze them so far as circumstances permit (e.g. verges or unmetalled tracks). It was said in *Peardon v Underhill* that: 'Common of pasture in a waste extends...to every spot across which the cattle may wander in search of food, though there be none on the spot itself'.¹
6. Turning to the representation made by Mr Baines, we have made the assumption that the letter and accompanying plan suggest that the extent of the common was limited by the erection of a gate at some point between 1901 and 1923 that prevented access to all or part of the application land (although the point is not entirely clear).
7. As mentioned above, this application is made on the basis that the application land is subject to the 1933 Deed of Declaration and the 1934 Order of the Minister of Agriculture and Fisheries Imposing Limitations on and Conditions as to the Exercise of Rights of Public Access. These documents demonstrate the belief of Lord Leconfield as to the extent of the common at that date, and must be preferred, both in terms of post-dating the facts cited by Mr Baines, and Lord Leconfield being the landowner at the time. The documents are, in any case, sufficient to bring the application within paragraph 2(2)(b)(iii) and (iv) of Schedule 2 of the 2006 Act and no further investigation or qualification is required.
8. The Open Spaces Society remains of the view that the application land is eligible for registration under Schedule 2, paragraph 2(2)(b)(iv) of the Commons Act 2006, and as the criteria for the application are satisfied, the application should be granted.

Yours sincerely,



Tom Hannis BSc (Hons) MSc
LANDMAN LLP
e: tomhannis@landmanllp.co.uk

¹ (1850) 16 QB 120, 15 JP 705, 20 LJQB 133, 15 Jur 465, 117 ER 824

Registration, Commons

From: Christopher Lasper - [REDACTED]
Sent: 07 July 2021 21:11
To: Registration, Commons
Cc: tomhannis@landmanllp.co.uk; Hugh Craddock; [REDACTED]
Subject: Re: CA13/34 Notice of Application

Follow Up Flag: Follow up
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Categories: Svetlana

Dear Mrs Bainbridge,

Thank-you for your below and I respond to its attachment.

The Society offers not the slightest opposition to the point of fact that I put in my representations of 21 May, namely that the strip of land that I there identified “certainly LOOKS as though [it] is largely composed of a highway”. Indeed, the Society appears to concede that this strip IS a highway: see “The fact [sic] that the land is also a highway is” (paragraph 4).

The burden of proof of this application is on the Society and it ought to make its case plain; I suggest that your Authority give Hannis reasonable notice that your Authority will determine this application on the basis that the Society does not dispute that the strip is a highway and is content that the application be determined on the basis that the strip is such.

As to the dispute (of law) over the meaning of “common land” in paragraph 2(2)(b)(iii) or (iv) of Schedule 2 to the 2006 Act, the Society adopts, so early as the concluding sentence of its paragraph 1, the natural meaning of “under the 1965 Act” in the title to that Schedule: see “....land that ought to have been registered under the 1965 Act”.

But, it seems, the Society did not mean what it said in paragraph 1: according to the Society’s paragraph 3, any land that an enactment describes as “common” (only this? or as “common land” perhaps?) is within paragraph 2 of the Schedule. If this were the Legislature’s intention, “under the 1965 Act” would not have appeared in the Schedule’s title; “New provision for registers”, perhaps.

The essential point is that, unless and until it is shown that the Legislature did actually intend some retrospective and narrow changes in the scope/policy of the 1965 Act, the natural meaning of “under the 1965 Act” ought to prevail; so, highway land ought still not to be registered.

As to Hannis’ paragraph 5, my point remains that it has to be shown that the Legislature did actually intend some change to the 1965 Act.

As to Hannis’ paragraph 4, the reason why the 2006 Act needs no definition of “common land” is that, under section 3, the registers are immutable save, only, (a) additions/changes under particular sections of that Act (e.g. sections 6, 14, 15 and 16) none of which needs any such definition, or (b) under Schedule 2, where the 1965 Act definition is used.

Doubtless, you will have noticed that your attachment is another instalment of the Society’s long-standing desire to subject to section 38 of the 2006 Act the exercise by highway authorities of certain of their powers, notably of highway improvement.

Yours sincerely,