

DEVELOPMENT CONTROL AND REGULATION COMMITTEE

Meeting date: 7th June 2022

From: Executive Director – Economy and Infrastructure

CA13/34 – APPLICATION TO CORRECT NON-REGISTRATION OF COMMON LAND; TWO PARCELS OF LAND ABUTTING CL58 ESKDALE COMMON.

1.0 EXECUTIVE SUMMARY

- 1.1 *Cumbria County Council is the registration authority for common land and town and village greens under the Commons Act 2006.*
- 1.2 *An application has been received from the Open Spaces Society to register as common land 0.76 hectares of land at Wasdale and 0.28 hectares of land at Eskdale. Both parcels abut CL58 Eskdale Common.*
- 1.3 *The applicant claims that the Application Land was omitted from registration as part of the register unit CL58 Eskdale Common and has requested that the Application Land is added to that register unit.*
- 1.4 *The applicant claims that the Application Land was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965 and that it is subject to a Deed of Declaration and an Order of Limitations, both made under section 193 of the Law of Property Act 1925, and thus satisfies the criteria specified in paragraph 2 of Schedule 2 of the Commons Act 2006.*
- 1.5 *The purpose of this report is to request Members to make a decision as to whether the application should be granted, and a correction made to the Council's register of common land.*

2.0 POLICY POSITION, BUDGETARY AND EQUALITY IMPLICATIONS, AND LINKS TO COUNCIL PLAN

- 2.1 *The relevant corporate theme is that people in Cumbria are healthy and safe.*

- 2.2 ***This matter is a decision-making process of a quasi-judicial nature. There should be no policy or political consideration given and any potential financial implication should be ignored.***

3.0 RECOMMENDATION

- 3.1 ***It is recommended that the Committee accepts the application and resolves to amend the common land register on the grounds that the Application Land was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965 and that it is recognised as common land in the Deed of Declaration made under section 193(2) of the Law of Property Act 1925 on 7th April 1933 and in the Order of Limitations made under paragraph (b) of the proviso to section 193(1) of the 1925 Act on 17th January 1934, and thus satisfies the criteria for registration specified in paragraph 2 of Schedule 2 of the Commons Act 2006.***

4.0 BACKGROUND

The Application:

- 4.1 On 29th March 2021 Cumbria County Council, as registration authority for common land and town and village greens (“the Registration Authority”), received an application on Form CA13 (“the Application”) under Paragraph 2 of Schedule 2 to the Commons Act 2006 (“the 2006 Act”) from the Open Spaces Society (“the Applicant”) to register land as common land on the grounds that it was omitted from registration of land as CL58 Eskdale Common. A copy of the Application is attached to this report at **Appendix 1**.
- 4.2 The Application relates to two parcels of land, one near Wasdale Hall Farm, Wasdale (“the Wasdale Parcel”) and the other near Boot, Eskdale (“the Eskdale Parcel”). Both parcels abut CL58 Eskdale Common. The land is shown coloured blue and coloured blue and hatched yellow on the plans at **Appendix 2** and referred to hereafter as “the Application Land”.
- 4.3 CL58 was provisionally registered as common land on 15th May 1968 under Section 4 of the Commons Registration Act 1965 (“the 1965 Act”) pursuant to application no. 212, made by Eskdale Commoners Association on 12th December 1967 (“the 1967 Application”). The provisional registration became final in consequence of the Commons Commissioner’s decision on 28th January 1981 and the land became register unit CL58. It must be noted that the original plan accompanying the 1967 Application included the Eskdale Parcel. However, on 20th September 1970, prior to the registration of CL58 becoming final, Eskdale Commoners Association wrote to the registration authority asking to amend the registration by deleting the Eskdale Parcel. It is not known why this amendment was requested as the preceding correspondence has not survived. Copies of the 1967 Application, relevant sheets of the 1967 Application Map and the 1970 letter with amended map are attached to this report at **Appendix 3**. Copies of the current register map sheets showing the Application Land within red rectangles is attached to this report at **Appendix 4**.

- 4.4 The Applicant claims that the Application Land was not at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965. The Applicant further claims that the Application Land is subject to an Order of the Minister of Agriculture and Fisheries Imposing Limitations on and Conditions as to the Exercise of Rights of Public Access, made on 17th January 1934 under paragraph (b) of the proviso to section 193(1) of the Law of Property Act 1925 and/or a Deed of Declaration, made on 7th April 1933 under section 193(2) of the Law of Property Act 1925, and thus satisfies the criteria for registration specified in paragraph 2 of Schedule 2 to the Commons Act 2006.
- 4.5 The Applicant requests that the Application Land is added to register unit CL58 Eskdale Common.
- 4.6 The following supporting evidence was submitted by the Applicants with the Application:
- Copy of the 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 Law of Property Act 1925, made on 17th January 1934 (“the 1934 Order of Limitations”).
 - Copy of the map accompanying the 1934 Order of Limitations (“the 1934 Order of Limitations Map”).
 - Copy of the Deed of Declaration made under section 193(2) of the Law of Property Act 1925, made on 7th April 1933 (“the 1933 Deed of Declaration”).
 - Copy of the map accompanying the 1933 Deed of Declaration (“the 1933 Deed of Declaration Map”).
 - Two Ordnance Survey application maps. The maps show the land which is already registered as CL58 Eskdale Common coloured green. The part of the Application Land which is subject to both the 1934 Order of Limitations and the 1933 Deed of Declaration is shown coloured blue. The part of the Application land which is subject only to the 1933 Deed of Declaration (a small piece on the southern end of the Eskdale Parcel) is shown coloured blue and hatched yellow.
- Copies of the two Ordnance Survey application maps are attached to this report at **Appendix 2**. A copy of the additional evidence is attached to this report at **Appendix 5**.
- 4.7 On 11th May 2021 the Application was deemed to have been duly made and notice of the Application was advertised on Cumbria County Council’s website and on the sites of the Application Land. The notice was also sent to relevant parties in accordance with Schedule 7 of the Commons Registration (England) Regulations 2014 (“the 2014 Regulations”). Anyone wishing to submit representations to the Application had until 23rd June 2021 to do so.

- 4.8 Representations were received from Christopher Lasper of Cockermouth and from Noel D Baines of Howes Farm, Boot, which abuts the Eskdale Parcel. The representations were duly served on the Applicant in accordance with the 2014 Regulations and the Applicant provided a reply to them. Mr Lasper submitted further comments after receiving the Applicant's reply to his representations. Copies of the representations, the Applicant's reply and Mr Lasper's further comments are attached to this report at **Appendix 6**.
- 4.9 Local members for Gosforth (Wasdale Parcel), Paul Turner, and Millom Without (Eskdale Parcel), Keith Haigh Hitchen, were consulted. No response has been received from Councillor Turner. Councillor Hitchen responded to say that he had no objection to the Application.

The Law:

- 4.10 Part 1 of the 2006 Act was implemented in Cumbria on 15th December 2014 and allows applications to be made to amend the register of common land and town or village greens.
- 4.11 The Application is made under Paragraph 2 of Schedule 2 of "the 2006 Act" which states:

Non-registration of common land
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- (1) *If a commons registration authority is satisfied that any land not registered as common land or as a town or village green is land to which this paragraph applies, the authority shall, subject to this paragraph, register the land as common land in its register of common land.*
- (2) *This paragraph applies to any land which—*
- (a) was not at any time finally registered as common land or as a town or village green under the 1965 Act;*
 - (b) is land which is—*
 - (i) regulated by an Act made under the Commons Act 1876 (c. 56) confirming a provisional order of the Inclosure Commissioners;*
 - (ii) subject to a scheme under Metropolitan Commons Act 1866 (c. 122) or the Commons Act 1899 (c. 30);*
 - (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;*
 - (c) is land to which this Part applies; and*
 - (d) satisfies such other conditions as regulations may specify.*

Application of the law to the facts and evidence of the Application:

- 4.12 The statutory criteria as set out above are considered in relation to the Application as follows:
- (a) **The land was not at any time finally registered as common land or as a town or village green under the 1965 Act:**

It is confirmed that none of the Application Land was at any time finally registered as common land or as a town or village green under the 1965 Act.

This element of the criteria is satisfied.

(b) is land which is—

- (i) regulated by an Act made under the Commons Act 1876 (c. 56) confirming a provisional order of the Inclosure Commissioners;**
- (ii) subject to a scheme under Metropolitan Commons Act 1866 (c. 122) or the Commons Act 1899 (c. 30);**
- (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:**

The whole of the Application Land is subject to the 1933 Deed of Declaration made under the Law of Property Act 1925. The majority of the Application Land is also subject to the 1934 Order of Limitations made under the same Act. Both documents recognise the Application Land as common land, therefore (iv) applies.

This element of the criteria is satisfied.

(c) is land to which this Part applies:

Section 5 of the 2006 Act states that Part 1 of the Commons Act 2006 applies to all land in England and Wales, except the New Forest, Epping Forest and the Forest of Dean.

This element of the criteria is satisfied.

(d) satisfies such other conditions as regulations may specify:

The 2014 Regulations require that an application made under paragraph 2 of Schedule 2 to the 2006 Act must be made on or before 15th March 2027 and include:

- (i) a description of the land to which the application relates;*

The Applicant provided two plans of the Application Land.

- (ii) the landowner's consent to the registration, if the land to which the application relates is covered by a building or is within the curtilage of a building;*

There are no buildings on the Application Land and the Application Land does not form curtilage of any building, therefore no consent is required.

- (iii) a copy of any enactment or scheme referred to in paragraph 2(2)(b) of that Schedule;*

The Applicant has provided copies of the 1933 Deed of Declaration and the 1934 Order of Limitations.

It is considered that the Application complies with the formal requirements as to form and content contained in the 2014 Regulations.

This element of the criteria is satisfied.

Consideration of the representations

- 4.13 Mr Baines' representations contain a comment that the fell gate was moved from about one third of a way down the Eskdale Parcel to the top of it at some point around 1901.
- 4.14 Mr Lasper's representations concern only the Eskdale Parcel. Mr Lasper states that the land comprised in the Eskdale Parcel looks as though it largely composed of a highway. He argues that '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".' Mr Lasper concludes that, if the land comprised in the Eskdale Parcel is found to include a highway, the Application ought, at least to that extent, to be refused. In his further comments Mr Lasper expressed concern that the registration of Eskdale Parcel as common land would 'subject to Section 38 of the 2006 Act the exercise by highway authorities of certain of their powers, notably of highway improvement.'
- 4.15 A highways search on Eskdale Parcel revealed that part of the land comprised in that Parcel is a bridleway which is managed by the Lake District National Park Authority (LDNPA). LDNPA was one of the parties on whom the Notice of Application was served, as was The National Trust who owns the Application Land. No objections to registration of the Eskdale Parcel were received from either of those organisations.
- 4.16 The Applicant argued in their reply to the representations that the Application satisfied the criteria set out in paragraph 2 of Schedule 2 to the 2006 Act. The Application Land, therefore, was eligible for registration and no further investigation or qualification was required. Please see **Appendix 6** for the Applicant's full reply.
- 4.17 I have considered the representations and the Applicant's reply. The registration authority can only take into account facts and evidence which relate to the legal test set out in paragraph 2 of Schedule 2 to the 2006 Act. As stated in 4.12 above, it is my opinion that this test has been satisfied. I believe that the points made by Mr Baines and Mr Lasper are outside the scope of the legal test and, therefore, I cannot give any weight to them.
- 4.18 Despite my opinion that the status of the land as highway is immaterial to the determination of this application, it might be helpful to members if I addressed Mr Lasper's concern that registration of the Eskdale Parcel as

common land will create an obstacle for highway authorities. It is true that under section 38 of the 2006 Act certain works on common land require consent of the Secretary of State. However, section 38 contains a clause which exempts from the requirement to obtain consent works on any land where those works are carried out under a power conferred in relation to that particular land by or under any enactment. Further, section 38 also exempts works which are for the resurfacing of land, if they consist only of the repair of an existing surface of the land made of concrete, tarmacadam, coated roadstone or similar material. These two clauses are likely to cover the majority of, if not all, works which highway authority might wish to carry out to maintain the bridleway on the Eskdale Parcel. Consent under section 38 might be required, if the bridleway was to be developed in some way, however, as already mentioned, I do not think this is a material consideration for the purposes of this application.

Oral Representations

4.19 Regulation 27(7) of the 2014 Regulations states that the determining authority

(a) may not refuse an application without first offering the applicant an opportunity to make oral representations; and

(b) may not grant or refuse an application or proposal without first offering any person (other than the applicant) for whom the grant or refusal (as the case may be) would represent a determination of that person's civil rights an opportunity to make oral representations.

4.20 On 17th November 2021 I wrote to the owners of the Application Land, The National Trust, informing them that I was minded to recommend that the application be accepted, outlining the reasons and inviting them to make oral representations. The National Trust informed me that they were unaware of the Application because, during the Covid-19 pandemic, their offices were closed and they did not receive the copy of the Notice of Application which was sent to them. The National Trust requested that they are allowed a period of time to consider the Application and make either oral or written representations. In view of the unprecedented circumstances, The National Trust were given 42 days in which to do so, with a deadline of 31st January 2022. No representations were received, and The National Trust were informed that the registration authority will proceed to the determination of the application as it stands.

5.0 LEGAL IMPLICATIONS

5.1 The Council has a statutory duty to keep a register of common land and since the implementation of Part 1 of the 2006 Act, has the power to amend the register. The Council's Constitution at Part 2G 2.1) f) i) delegates this responsibility to the Development Control and Regulation Committee.

5.2 In considering the Application, Members must consider all of the evidence available to them and must be satisfied that the evidence shows that each

aspect of the statutory conditions set out at Schedule 2 Paragraph 2 of the 2006 Act have been met. The burden of proof in this regard is firmly upon the Applicant to provide the required evidence. The standard of proof to be applied is the usual civil standard “on the balance of probabilities” i.e. it must be more likely than not.

- 5.3 The role of this Committee is to reach its own determination on the matters of fact and law arising as a result of the Application. It is for Members to determine the Application fairly, putting aside any considerations of the desirability of the land being registered as common land or being put to other use.
- 5.4 Although the officer recommendations are for the Committee to proceed with determination and acceptance of the Application, the Committee is not bound to follow the recommendations, providing that in reaching its decision it applies the correct legal principles and duly considers the evidence. Therefore, Members are free to accept or reject any of the recommendations in the report. If the members reject the officer recommendations and decide either not to determine the Application or to reject the Application and not register the Application Land as common land, the Committee should set out their reasons at the meeting.
- 5.5 It should be noted that the Council may not refuse an application without first offering an Applicant an opportunity to make oral representations. Accordingly, if Members reject the recommendation, such an offer will be made before a further report to Committee is made.
- 5.6 All other legal considerations, issues and implications have been addressed within the detail of the report.

6.0 OPTIONS

- 6.1 The Committee may accept or reject the recommendation.
- 6.2 If the recommendation is accepted the Registration Authority will give effect to the determination by registering the Application Land as common land, which will entail the addition of a registration amendment entry in register unit CL58 confirming the addition of new land to be comprised in the same register unit, and the amendment or preparation of a fresh edition of the register map showing the Application Land contained within the boundary of register unit CL58.
- 6.3 If the recommendation is rejected the Application Land will not be registered as common land.
- 6.4 Members should note that the decision of the Committee in relation to an application to correct the register is a legal decision and is not a matter of policy or discretion.

7.0 CONCLUSION

- 7.1 I find that the Application has been validly made. The evidence provided by the Applicant shows that the Application Land is recognised as common land by the 1933 Deed of Declaration and the 1934 Order of Limitations. The Application Land also satisfies all other requirements of paragraph 2 of Schedule 2 of the 2006 Act and of the 2014 Regulations and as such should be registered in the register of common land.
- 7.2 I consider it reasonable that this Committee resolves that the Application is accepted and the Application Land is added to the register of common land.

Angela Jones
Executive Director – Economy and Infrastructure
4th May 2022

APPENDICES

Appendix 1 – Copy of Application CA13/34
Appendix 2 – Maps of the Application Land
Appendix 3 – Copy of the 1967 Application and amended map
Appendix 4 – Current register map
Appendix 5 – Copy of supporting evidence
Appendix 6 - Copies of the representations and the Applicant's reply

IMPLICATIONS

Staffing:	None
Financial:	There would be cost implications in the event of an application for judicial review, however the Council is the registration authority and therefore has a statutory duty to decide applications.
Property:	None
Electoral Division(s):	Gosforth and Millom Without
Human Rights:	The Council as registration authority has to make a decision in accordance with the law and in particular with the provisions of the 2006 Act, given these legal criteria a decision must reflect the legislation despite any other rights of individuals.

PREVIOUS RELEVANT COUNCIL OR EXECUTIVE DECISIONS

No previous relevant decisions

CONSIDERATION BY OVERVIEW AND SCRUTINY

Not considered by Overview and Scrutiny

BACKGROUND PAPERS

Commons Act 2006

Commons Registration (England) Regulations 2014

Defra Part 1 of the Commons Act 2006: Guidance to Commons Registration Authorities and the Planning Inspectorate 2015.

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