

CYNGOR SIR POWYS COUNTY COUNCIL

PLANNING, TAXI LICENSING AND RIGHTS OF WAY COMMITTEE

17th May 2023

REPORT BY: HEAD OF HIGHWAYS, TRANSPORT AND RECYCLING

SUBJECT: Application 17-001CA to correct the Register of Common Land

REPORT FOR: DECISION

Application to correct the Register of Common Land, sections 22 and Schedule 2 of the Commons Act 2006 – Application 17-001CA, Register unit MCL76, area Y – Land at Rhiwgriafol, community of Glantwymyn

The application:

1. Application 17-001CA was made by Mrs JM Wilkins, of 55 Church Road, Whitchurch, Cardiff, CF14 2DY. The application was received on 11th October 2017 and was assessed as having been duly made. A copy of the application can be found at appendix A.
2. The effect of this application, if granted, would be to remove 19.27 hectares of land from the Register of Common Land. The land affected is part of 'Area Y' of registered common MCL76 (known as Cwm Ednant, Rhiw Goch, Moelfre, Waen Ty Isaf, Cwm Wern-Fach, Ffridd Dolgadfan, Bwlch Glynmynydd, Banc Bronderwgoed, Banc Melyn, Moelfre Fach and Llanerch -yr-Aur.)
3. A location plan showing the site can be found at appendix B. A more detailed plan showing the area affected can be found at appendix C.
4. The land that is subject of this application is all within the ownership of Mrs JM Wilkins (the applicant.)
5. The land affected by the application is currently being leased.
6. There are no registered graziers on area Y of registered common MCL76.
7. A full list and the documents that were supplied to accompany the application is at appendix D. This includes documents sent later, in response to representations.
8. In addition, the Commons Registration Authority is entitled to consider the statutory documents that it holds in relation to the Register of Common Land, including the original applications for registration and the Register itself. The applicant is not required to provide copies of documents if the Registration Authority issued the document, was a party to it, or the document has been deposited with the registration authority in accordance with any enactment.

9. The evidence accompanying this application is almost entirely documentary, with only one statutory declaration from a personal witness. For this application, witness evidence is not key to meeting the legal criteria; the legal criteria are described below. As a result, it is proposed that the application be determined on the basis of the documentary evidence supplied, without a hearing.

Legal criteria:

10. This application has been made under the provisions of section 22 and Schedule 2 to the Commons Act 2006. Section 22 relates to non-registration or mistaken registration of land under the Commons Registration Act 1965. Paragraphs 1 to 9 of schedule 2 set out the circumstances under which an application may be made under section 2.
11. The applicant has chosen to make their application under the provisions of paragraph 7 of Schedule 2. Under that paragraph, an application may be made to remove 'Other land wrongly registered as common land' from the Register.
12. Under paragraph 7, the legal requirements are that:
- (a) the land was provisionally registered as common land under section 4 of the 1965 Act;
 - (b) the provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act;
 - (c) the provisional registration became final; and
 - (d) immediately before its provisional registration the land was not any of the following—
 - (i) land subject to rights of common;
 - (ii) waste land of a manor;
 - (iii) a town or village green within the meaning of the 1965 Act as originally enacted; or
 - (iv) land of a description specified in section 11 of the Inclosure Act 1845.

Publicity for application:

13. Under The Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017, publicity must be given to this type of application via the Council website and site notices. Notice of the application must also be served on statutory consultees.
14. The public notice of application and a plan of the land appeared on the Council website on 22nd November 2017. The same notices were put up on site on 28th November 2017. To allow the required period of not less than 42 days, the deadline for receipt of objections and representations was Friday 12th January 2018.
15. In line with statutory requirements, notice of the application was served on:
- (a) The owner of the land to which the application relates, being Mrs Wilkins;
 - (b) Any occupier or lessee of that land; the tenant has been notified;
 - (c) Every other local authority for that area, being Glantwymyn Community Council.
 - (d) The persons who have requested that notice of application be emailed to them.

16. Notice of application should also be served on any owner of rights of common 'in gross' that are exercisable over the area of land affected by the application. No person is registered as owning rights of common in gross over area Y.
17. There is a requirement to serve notice on Commons Councils and anyone who has made a declaration of entitlement to rights in the Register of Common Land. However, the provisions to form Commons Councils or make these declarations are not in force in Wales at the moment, so there are no Commons Councils or holders of declarations on whom notice can be served.
18. In addition, a copy of the notice was sent to Mr IH Lewis, who represents the graziers who are registered as holding rights exercisable over other adjoining areas of registered common MCL76.

Objections and representations:

19. Representations have been received to this application, from Mr H Craddock of the Open Spaces Society. As the Open Spaces Society does not have a legal interest in the land subject of the application, application 17-001CA must be determined by the Council, as the Commons Registration Authority.
20. As discussed with the Planning, Taxi Licensing and Rights of Way Committee on 2nd August 2018, Counsel opinion has been obtained in relation to this case and the objection. The report has been updated to take into account the advice received.
21. There are a series of emails from the objector, as listed at appendix E, together with the dates of the applicant's emails and letters of response.
22. The applicant and objector have been provided with copies of each other's responses and any additional documents supplied, as required by the Regulations.

Assessment of the evidence against legal criteria:

Whether the land was provisionally registered as common land under section 4 of the 1965 Act:

23. Section 4 of the Commons Registration Act 1965 required that a registration authority should "...register any land as common land or a town or village green or, as the case may be, any rights of common over or ownership of such land, on application duly made to it and accompanied by such declaration and such other documents (if any) as may be prescribed for the purpose of verification or of proving compliance with any prescribed conditions."
24. The Land section of the Register of Common Land records that registered common MCL76 was provisionally registered under the Commons Registration Act 1965 on 4th November 1969. It was registered pursuant to a statutory application for registration of land as common land, (number 398) which was made by The Rambler's Association of 124 Finchley Road, London on 27th October 1969. An extract from the written Land section of the Register can be found at appendix G.

That the provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act:

25. The application for registration of Land as common land in relation to registered common MCL76 was disputed. The Register of Common Land records that the entry was modified accordingly, as follows:

- The area to read 404.804 HA (1000.505 Acres) or thereabouts.
- The land hatched black comprising an area of 371.110 HA (917.227 acres) has been removed from the Register.

26. These modifications did not affect the land registered as Area Y; an extract from the Register Plan can be found at appendix G. Some of the areas removed from the registration can be seen and do not include Area Y.

27. The modifications were agreed through negotiation between the Commons Registration Authority and the applicant. The Register does not record any Commons Commissioner's decision, as the matter was not referred to them.

28. The Open Spaces Society representative did query this point, in his email of 10th January 2018. On receipt of clarification and the relevant extracts from the Register of Common land from the Commons Registration service, he accepted that the registration had not been subject of a referral (see email of 15th January 2018.)

Whether the provisional registration became final:

29. The Land section of the Register records that the registration of unit MCL76, (including Area Y) became final on 26th July 1973. This has not been not disputed by the Open Spaces Society.

That immediately before its provisional registration the land was not land subject to rights of common:

30. Section 22 of the Commons Registration Act 1965 sets out the criteria under which land was eligible for registration as common land. The first of these is land that the land was subject to rights of common, at the time of registration.

31. MCL76 is divided into a number of lettered areas. Rights of common are registered as being exercisable over parts of MCL76, but the rights have not been registered as being exercisable over the whole common. The original applications for registration of rights of common all specified that the rights concerned were exercisable over specific lettered areas of MCL76. No applications were made to register rights of common that were exercisable over area Y.

32. The applicant has provided a statutory declaration from Mr Geraint Wigley, who has spent most of his life living in the Talywern / Darowen area. He farmed Rhosdyrnog in Talywern, which he took over from his father in 1971. Mr Wigley notes that Rhosdyrnog is close to Rhiwgriafol. He states that by his late father's account, area Y has been exclusively grazed by the Rhiwgriafol flock since the early 20th century. Mr Wigley notes that he is not aware of anyone else who has declared an interest in, or challenged the right to graze livestock there.

33. No other evidence has been submitted to suggest that the land affected by the application was subject to rights of common, immediately before its provisional registration.

That immediately before its provisional registration the land was not land waste land of a manor:

34. Under section 22 of the Commons Registration Act 1965, land was also eligible for registration as common land if it was waste land of a manor. For an application under paragraph 7 and Schedule 2 of the Commons Act 2006, 'waste land of a manor' is land that at the time of provisional registration was both:

- part of a manor; and
- open, uncultivated and unoccupied.

35. In support of their case, the applicants have provided a number of documents in relation to this point, as described below.

36. Extracts from the Tithe Map and Apportionment:

The Tithe Maps and statutory apportionments for the whole of Wales have now been digitised and are available to the public via the Places of Wales website. The applicants have referred to this in their letter of 16th March 2018, but have also provided copy extracts of the Tithe Map and a screenshot extract of the Tithe apportionment.

37. Commons Commissioners were to determine the tithes due based on the value of land. Counsel points out that under the Tithe Act 1836, they were required to determine the "proprietors and occupiers" of the land and "whether the said several lands are then cultivated as arable, meadow, or pastureland, or as wood land, common land, or howsoever otherwise."

38. The Tithe Map for this area is titled 'Map of the inclosed land of the parish of Darowen in the County of Montgomery' and is dated 1846. The map identifies the land subject of this application as being enclosure 1033. The written apportionment describes this enclosure as being part of Graigfach; the state of cultivation is described as being 'Pasture'. The occupier at the time of the apportionment was noted as being William Bebb and the landowner was Richard Hughes. The land was subject to a tithe payment.

39. The applicant's comment on the Tithe map is that parcel numbers 1033 and 1031 are "shown as pastureland and there is no mention of them being common land or sheep walk. They were owned by a Richard Hughes of Cwmcarnedd Estate, Llanbryn-mair and tenanted by a William Bebe who later emigrated to America."

40. This would suggest that although enclosure 1033 may have been owned by the Cwmcarnedd Estate, it was not regarded as being common land or 'waste of the manor' in 1846. The enclosure was occupied by a single tenant and used as pasture. The depiction of common land on Tithe Maps does vary. Common land may be shown and described as such on Tithe Maps and Apportionments. Alternatively, it may be outside the boundary of the apportionment, or with no enclosure number, although sometimes may be labelled as 'Common.'

41. The Open Spaces Society representative has acknowledged that the Tithe Map provides evidence of the historic status of the application land, in his email of 5th April 2018. He comments that he agrees that “..this tends to show that the land was not sheepwalk at the date of tithe commutation (about 1840). It provides good evidence of the status of the land at that time, although it cannot show that the land was not common land at the date of provisional registration — only that it rules out the possibility that the land was historically not common land.”
42. In response, Counsel points out that while this is true, no manors were created after 1290 and if the Land was not a waste land of a manor in the 1840s, it could not have been one at the date of provisional registration.
43. Extracts from the Finance Act 1910 map and ‘Duties on Land Values’ book, for hereditaments 170 and 171:
The application land falls within the area shown on the Finance Act 1910 Map as being hereditament 170. Hereditament 171 is not shown on the map extract provided by the applicant.
44. The Finance Act 1910 records note the use and state of occupation of land at the time of survey. Counsel advice explains that the Act provided that the “total value of the land” should consist of the gross value of the land, from which was subtracted an allowance for any “fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land.”
45. The extract from the ‘Duties on Land Values’ book for hereditament 170 describes the land as ‘House and Land’ at Rhiwgriafol. The occupier at that time was Evan Jones; the person making the return was Margaret Francis.
46. It is of note that the return does include a line titled ‘If copyhold, name of the Manor’; this has not been completed for hereditament 170 (it is blank.) In the line above, the land as noted as being in freehold ownership. Counsel points out that these returns were made whilst copyhold still existed, which suggests that the Land was neither waste land of a manor nor common land at the relevant times.
47. The land is described as being a farm and outbuilding, and ‘Wholly agricultural.’ The land is not described as being waste of the manor, or subject to any right of common. The owner of the land would be entitled to claim a deduction from the rateable value, in relation to rights of common. Claiming a deduction falsely would be an offence, so where one is claimed, it is good evidence of the existence of the right. While no provision is made in the form to fill in manorial rights over the land, they could reasonably be expected to be mentioned.
48. In his email of 27th June 2018, the Open Spaces Society representative queried whether the land subject of this application was open, uncultivated and unoccupied at the date of provisional registration.
49. The Finance Act 1910 map provides information in relation to this. The Ordnance Survey base map used – which was at a scale of 25 inches to the mile (1:2500) – does show a boundary feature, along the northern, southern, western and part of

the eastern sides of the application land. This boundary is in the same location as the boundary line shown on the current Ordnance Survey maps and on the 1:10,560 scale base map used for the Register of Common land itself; it does not appear to have changed. However, the eastern boundary is not complete and the land is partially open to the rest of the common.

50. 1922 conveyance, from Mrs Margaret Francis and others to Mr Richard Jones of freehold hereditaments and premises known as Rhiwgriafol:

This records the transfer of land at Rhiwgriafol from Mrs M Francis to Mr Jones and includes a plan of the land concerned.

51. The land was transferred from Mrs Francis – who completed the return for the Finance Act 1910 – to Mr Jones. Counsel's advice is that as title in a manor could be transferred by conveyance in fee simple, without more information, this does not assist in determining whether that land was, or was not, the waste land of a manor.

52. However, Counsel considers that it is of help that the Schedule to the conveyance distinguishes between the 'Sheepwalk', which is now subject to rights of common which the applicant does not contest, and the land subject of application 17-001CA. The conveyance notes that the farm, outbuildings and parcels of land called Rhiwgriafol are described in the Schedule to the conveyance. It is noted that the 'Abuttals and boundaries thereof' are delineated and coloured on the plan, with farm and lands being pink and the 'Sheepwalk' being green.

53. As the applicant notes in their letter of 24th January 2018, the land subject of this application is coloured in pink, in the same way as the enclosures surrounding Rhiw-griafol house and the adjoining woodland. None of the other areas coloured in pink on this 1922 conveyance were subsequently registered as common land.

54. Most (although not all) of the area coloured in green to indicate the sheepwalk is now registered as being part of MCL76; it forms areas C, Q and K of the common.

55. A copy of the grant of probate to the estate to Mrs Wilkins' grandfather:

This is dated 11th April 1951 and records the grant of probate of the estate of the late Mr Richard Jones (Mrs Wilkins' grandfather) to his executor, Mr EH Jones.

56. A copy assent of the estate of Mrs Wilkins' grandfather to her grandmother:

This records the vesting of the estate of the late Mr Richard Jones to his widow, Mrs H Jones (Mrs Wilkins' grandmother.) It is dated 12th December 1951 and describes the land as being 'All that farm with the messuage or farmhouse farm and other outbuildings, closes or parcels of land called Rhiwgriafol' and also the Sheepwalk; it refers back to the Schedule to the 1922 conveyance and so includes the application land.

57. A copy of the 1953 grant letters of administration to the estate of Mrs Wilkins' grandmother, to her father Mr EH Jones:

This is dated 7th August 1953 and records the grant of probate of the estate of Mrs Wilkins grandmother (Mrs H Jones) to her father, Mr EH Jones.

58. A copy of the 1955 assent whereby Mr EH Jones vested the title to the lands at Rhiwgriafol into his sole name:

This is dated 16th March 1954 and relates to the vesting of the title to the lands at Rhiwgriafol in Mr EH Jones' sole name. It refers back to and includes the lands subject of the 1922 conveyance; it notes the sheepwalk as being coloured in green.

59. A copy of the 1985 conveyance through which Mr EH Jones transferred title to the land to the joint names of himself and Mrs Wilkins' mother, Mrs ME Jones:

This is dated 9th August 1985 and records the transfer of title to the land at Rhiwgriafol into the joint names of Mr EH Jones and Mrs ME Jones, who was Mrs Wilkins' mother. Again, it refers back to all of the land includes the 1922 conveyance, so includes the application land.

60. The above series of documents does span the date of provisional registration of this area of common land, which was 4th November 1969. Counsel's opinion is that the demarcation between common land (the Sheepwalk), and land which is not common in principle, supports the applicants' claim that the application land (in contrast to the Sheepwalk) is not common land or waste land of a manor.

61. Photographic evidence obtained from officer site visit:

The Commons Registration Authority can make use of the site visit to put up notices as an opportunity to make a site inspection. As noted above, a site visit was made on 28th November 2018 by the Definitive Map and Commons Registration Officer and site photos were taken.

62. Some of the photos are at appendix F. The application land is similar in character and vegetation to the adjoining areas of registered common MCL76. However, the partial boundary on the eastern side of the common is still very much in evidence on the ground, as a pronounced embankment. The ground to the north and south of the application land slopes away very steeply, to deep valleys.

63. Guidance from the Welsh Government to applicants reads:

Open land – this is understood to be land that has no physical barriers that prevent access to that land. Please note that fencing that sets boundaries of ownership can still be classed as open land, especially if the land can still be accessed on foot.

64. Counsel's advice is that there is insufficient evidence to conclude that the land was not open at the date of provisional registration. The evidence today shows no enclosure that would prevent access; the applicant only suggests (without evidence) that it was "probably" enclosed in 1922; and no mention is made of the position at the date of provisional registration.

Whether immediately before its provisional registration the land was a town or village green within the meaning of the 1965 Act as originally enacted:

65. To meet this requirement, the applicant must be able to demonstrate that at the date of provisional registration, the land was not:

- Land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality; or

- Land on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes; or
- Land on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.

66. Recreational allotments, which were later eligible to be registered as Town or Village Greens, were set out in Inclosure Awards. However, no Inclosure Award has been identified which includes the land subject of this application. Neither has any person put forward any evidence that the land has been allotted by or under any other Act for the exercise or recreation of the inhabitants of any locality.

67. No person has put forward any evidence that the land was subject to any customary right to indulge in lawful sports and pastimes, or that they indulged in such sports or pastimes in the 20 years prior to the date of provisional registration. Glantwymyn Community Council were consulted; notices were placed on site and on the Council website, so opportunity was provided for any such evidence to be put forward.

68. In his statutory declaration, Mr Wigley comments that for as long as he can remember, the land subject of the application (area Y) has formed part of Rhiwgriafol and has never been regarded as a village green. Mr Wigley goes on to explain that he understands a Town or Village Green to be an open space which has been used by local inhabitants for the purpose of recreation or playing games.

69. The Open Spaces Society representative notes that Mr Wigley's statutory declaration is "helpful, but not sufficient." He has not commented on whether the application land was a Town or Village Green at the date of provisional registration.

Whether immediately before its provisional registration, the land was of a description specified in section 11 of the Inclosure Act 1845 (c. 118).

70. The Inclosure Act 1845 sought to promote large-scale agriculture. It allowed for land to be enclosed, thereby extinguishing certain rights (like rights of common and manorial rights.) Section 11, amongst others, describes classes of land that could be enclosed, including:

- a. Common land, whether rights are exercised over the land seasonally or not.
- b. Stinted and regulated pastures.
- c. Land with rights of vesture or herbage.
- d. Lot meadows.

71. Some areas of regulated and stinted pasture were put forward for registration under the Commons Registration Act 1965, although they did not actually meet the definition set out under the 1965 Act for registration as common land. Although these areas should not have been registered pursuant to the 1965 Act, provision has not been made to remove them from the Register now, under the Commons Act 2006.

72. Land within section 11 of the 1845 Act could be enclosed if Commissioners determined that it was “proper for the protection of any public interests..” This would take effect when laid before and confirmed by Parliament through an Award. Counsel advises that to date, only 29 awards had been made under the 1845 Act as Parliament subsequently sought to preserve open spaces and considerably restricted the scope to enclose land under the 1845 Act.
73. As noted above, no Inclosure Award has been identified that includes the area of land subject of this application.
74. Neither has any other evidence been put forward to indicate that the land is ‘of a description specified in section 11 of the Inclosure Act 1845.’
- a. The matter of whether the application land is common land is described above.
 - b. Counsel points out that there is no evidence of any other persons exercising the right to take any products from the land (i.e. vestage). As far as herbage is concerned, Mr Wigley denies that any animals other than the Rhiwgriafol flock graze the land. In addition, no such rights are mentioned in the 1922 Conveyance or Finance Act returns.
 - c. There is no record of any statutory award making the Land a regulated pasture, being the most likely means to create a regulated pasture, despite the requirement for any such award to have been sent to the local authority. Neither is there evidence that a number of graziers have been making use of the land, nor are such rights mentioned in the 1922 conveyance and the Finance Act returns indicate that there was only one tenant on the land.
 - d. Enquiries have been made with Natural England and Defra to check whether the land might be of a description specified in section 11 of the Inclosure Act 1845. This has not yielded any information to suggest that it is of such a description.
 - e. To be a lot meadow, the Land would have to be owned in fee simple by a number of individuals (see para. 18.d, above) It is clear from the conveyances that only one person owned the land.

Officer summary:

75. Counsel’s advice around the standard and burden of proof in relation to an application of this nature is that whilst the text of Schedule 2, paragraph 7 does not refer to the standard or burden of proof faced by an applicant, persuasive materials suggest that the burden of proof is on the applicant and the standard is the civil standard.
76. Counsel explains that to determine a matter on the balance of probabilities, a decision maker does not need to exclude all other possibilities, however remote they may be. Rather, the decision maker must be satisfied, bearing in mind the evidence before it as a whole, that it is more likely true than not; i.e. that it carries a “reasonable degree of probability.”

77. The first three legal criteria are matters of fact that are evidenced from the Register of Common Land itself. The Register records that the land was provisionally registered under part 4 of the Commons Registration Act 1965, that the registration became final and that it was not referred to a Commons Commissioner. No rights of common are registered as being exercisable over this area of land.
78. The representations from the Open Spaces Society focus mainly on whether the land subject of this application was waste land of the manor, at the date of its provisional registration as common land. In relation to that, it is felt that the applicant has demonstrated that the land was not part of a manor at the date of provisional registration, being 4th November 1969. This is supported by the Finance Act 1910 documents and subsequent series of conveyances and transfers between members of Mrs Wilkins' family, which span the date of provisional registration.
79. There is less clarity about whether the land was open, uncultivated and unoccupied at the time of provisional registration, because the boundary on the eastern side of the land seems to have been incomplete. However, as the Open Spaces Society representative has commented, the applicant is only required to demonstrate that one of the two criteria for the land being waste of the manor is not met, to fulfil this legal test.
80. Little information has been provided about whether the land might have been a Town or Village Green at the time of provisional registration. The applicant has provided one statutory declaration that refers to this issue; no counter evidence has been provided.
81. In summary, based on the information put forward by the applicant, the documents already in the keeping of the Commons Registration Authority and Counsel opinion, it is considered that on the balance or probability, this application meets the criteria set out under paragraph 7 of Schedule 22 to the Commons Act 2006.

RECOMMENDATION:

That application 17-001CA be granted as made and that 19.27 hectares of land be removed from the Register of Common Land, as shown on the plan at appendix C.

Appendices:

Appendix number:	Description:
A	Copy of application 17-001CA
B	Location plan showing application land
C	Detailed plan showing application land
D and D1-21	A full list and the documents that were supplied to accompany the application
E and E1-11	A full list and emails and letters of objection and responses
F	Site photographs
G and G1-2	Commons Register extracts