

COMMONS ACT 2006 Schedule 2, para. 7

The Commons Registration (England) Regulations 2014 No.3038

Application to correct non-registration or mistaken registration of land at

Emmanuels Common, Castle Acre, Norfolk, CL 109/HP314/72311

FINAL DECISION

Application was made to Norfolk County Council (NCC) as Commons Registration Authority (CRA) to correct the register of Common Land by removing the area of land hatched blue on the plan attached to this Decision (Plan 1) under Schedule 2, paragraph 7 of the Commons Act 2006.

Schedule 2, paragraph 7, of the Commons Act 2006 allows applications to correct certain errors in the registers. Schedule 2, paragraph 7 reads as follows:-

Other land wrongly registered as common land

7 (1) *If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove the land from its register of common land.*

(2) *This paragraph applies to land where —*

(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(iii) a town or village green within the meaning of the 1965 Act as originally enacted; or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 (c. 118).

(3) A commons registration authority may only remove land under sub-paragraph (1) acting on —

(a) the application of any person made before such date as regulations may specify; or

(b) a proposal made and published by the authority before such date as regulations may specify.

The onus on proving the case in support of the application rests with the applicant and it is for the applicant to supply sufficient evidence which would merit granting the application, on the balance of probabilities.

Was the land wrongly registered as common land in 1967 on the balance of probability (the civil burden of proof)? Based on the evidence considered, the answer is yes.

The application satisfactorily meets the tests set out in Schedule 2(7)(2)(a-c) with further comment on the Schedule 2(7)(2)(d) below;

- Paragraph 7(2)(d)(i) Immediately prior to registration was the land subject to rights of common?

There are no registered rights of common over the land. Furthermore, there is no evidence in CRA files of any cancelled applications for rights of common over this land. None of the evidence is indicative that any new rights were acquired over the land, indeed the land has been flooded since at least the early 19th century.

- Paragraph 7(2)(d)(ii) Immediately prior to registration was the land waste land of a manor?

In relation to Common Land, the legal authority on which to judge whether land is waste land is *Attorney General v Hanmer (1859)*. Waste land of the manor was defined as “the open, uncultivated and unoccupied lands parcel of the manor...other than the demesne lands of the manor” The applicant needs only to prove, on the

balance of probabilities, that the land wasn't one of open, unoccupied or uncultivated to discharge the burden of proof on this point.

As the land was flooded at the time of its registration and at least from the early 19th century and thus inaccessible from the surrounding land it is clearly not open, and incapable of being occupied or cultivated. Contemporaneous Ordnance Survey maps show this being the case. The land therefore does not satisfy the Hanmer tests.

Whilst the land subject to this application might have been of manorial origin, there is sufficient evidence to show on the balance of probabilities the land was, in terms of its physical characteristics incapable of being waste. In addition, the land directly adjacent to the north was both enclosed and occupied and thus also not waste land, immediately prior to provisional registration, and therefore meets the legislative criteria.

- Paragraph 7(2)(d)(iii) Immediately prior to registration was the land a town or village green within the meaning of the 1965 Act as originally enacted?

The applicant provided witness testimony from which described the state of the land at the time of its registration. A statement of truth such as this is good evidence of the status of the land contemporaneous to its registration. The witness testimony describes the land in a manner inconsistent with use by local inhabitants for lawful sports and pastimes.

- Paragraph 7(2)(d)(iv) Immediately prior to registration was the land of a description specified in section 11 of the Inclosure Act 1845?

It seems an Inclosure Award for Castle Acre does not exist. Such evidence is usually conclusive that no rights as per Section 11 subsisted following inclosure. The absence of this evidence is not necessarily terminal to an application but the other evidence is required to prove this on the balance of probabilities.

The only evidence adduced by the applicant are statements by two parties which read '... it certainly was not... land as described subject to the Enclosure Act. There is no local land that I know of that is subject to the Enclosure Act' and '[the land] is not subject to the Enclosure Act 1845' respectively. Such statements can be useful but need to be substantiated by documentary sources.

Evidence received by Norfolk County Council in relation to applications made under Section 53 of the Wildlife and Countryside Act 1981 was of use in assessing this point. Though mindful of its limitations, Bryant's 1826 map of Norfolk does depict the entirety of the land either side of the river as 'Heaths and Commons'. However, the later, Tithe Award of 1838-1839 clarifies two things. Firstly, that the land adjacent to the river which was described as heath and common on Bryant's map is enclosed and inaccessible from the neighbouring land. The land parcels on the Tithe are numbered 67 and 68 which are listed in the Award as owned by Lord Leicester and leased to a Mary Powley – who also leased the Mill at this time. The parcels are described as 'meadow' and 'garden' respectively and are entirely enclosed from the surrounding land - which is parcel 70 and described as 'Common land'. Secondly, it is clearly shown that the river is of considerable width. While mindful also of the Tithe Award's limitations in terms of cartographic accuracy it has all the signs of being consistent with the latter, and more accurate, Ordnance Survey Plans of 1888 and 1905. These maps in turn show two things; firstly, that the land subject to this application and directly adjacent to the river is not depicted in the way the rest of the common is i.e. it lacks the symbology for 'rough pasture' as per the 1888 OS map and secondly they both reinforce the Tithe data in that it can be confidently stated the land subject to this application had been submerged since at least 1838, 7 years prior to the Inclosure Act of 1845. This being the case means that the land was physically incapable of being that as specified in that Act. Permanently submerged land could not be a gated or stinted pasture, hold any rights to vesture or herbage, nor on the basis of its documentary history be a lot meadow. It is also highly unlikely to be land used in common particularly when there has been no access to it from the adjacent land since the early 19th century. Simply, it's physical state precludes its applicability to the 1845 Act.

As the application satisfactorily meets all of the criteria set out in Schedule 2 Paragraph 7(2)(d)(i-iv) on the balance of probabilities, the application is granted. The area of land comprising part of register unit CL109 and hatched blue as shown on the map attached to this decision is removed from the Common Land Register for Norfolk.

N.B. Those who made representations were offered the opportunity to make oral representations by means of a Hearing. No Hearing was requested and nothing has been raised subsequently to alter the view of the CRA.

Katrina Hulatt
Director Legal Services (nplaw)
and Monitoring Officer
Norfolk County Council

Signed: Katrina Hulatt

Date: 07:12:2023

n.b. The land hatched red on the plan refers to an application to remove parcels of common land under Section 19(2)(a), of the Commons Act 2006 and a decision notice in relation to this application shall be issued separately.

Some land subject to this application is deemed to have been incorrectly registered by the CRA and as it was also applied for in the Section 19(2)(a) application it has been assessed under that application. The remainder of the land was assessed under the tests for this application.

