



Report of the Head of Planning and City Regeneration

Planning Committee – 7 December 2021

Commons Registration - Application to Correct the Register of Common Land (Application No. 002/19)

Register Unit CL74: Pentwyn Mawr & Craig y Bedw and Register Unit CL45: Cefn Drum & Graig Fawr

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| Purpose: | An application has been received to amend the Register of Common Land to correct an alleged error whereby the rights associated with Tyle Coch Farm are exercisable over register unit CL74 but have been recorded as exercisable over CL45. |
| Policy Framework: | Commons Registration Service |
| Consultations: | Legal, Finance and Access to Services and all the statutory consultees, including local members, landowners, commoners, community councils and the prescribed organisations. |
| Recommendation: | It is recommended that the application be accepted and the necessary amendments are made to the Register of Common Land to record the rights as being exercisable over register unit CL74. |
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1 Introduction

- 1.1 An application made under Section 19(2)(b) of the Commons Act 2006 by a Mr Teifion Vernon Malcolm Davies ("the Applicant") of Tyle Coch Farm, Felindre was received by the Commons Registration Authority on the 4th December 2019 ("the Application"). The Application related to the rights

located in the Register of Common Land (“the Register”) at Entry No. 25 relating to register unit CL45 (See Appendix 1).

- 1.2 Entry No. 25 (“the Entry”) was originally recorded into the Register of Common Land on 18th September 1968 as the result of an application made by Mr Teifion Vernon Malcolm Davies on the 24th June 1968. The result was the recording on the Register of a right to pasture and estovers at all times, the right to carry bracken, and to graze 30 head of cattle and 150 sheep (“the Rights”). The rights were recorded as being exercisable over the whole of the land comprised in register unit CL45 i.e. Cefn Drum and Graig Fawr Commons.
- 1.3 The Applicant contends that the recording of the Rights as being exercisable over register unit CL45 was an error and the intention was to record the Rights over register unit CL74 i.e. Pentwyn Mawr and Craig y Bedw Commons. The effect of the Application, if granted, would be to remove the Rights recorded over CL45 in the Register and to record the Rights over CL74.

2 Legal Principles

- 2.1 The application has been made under Section 19(2)(b) of the Commons Act 2006 (“the Act”) which allows any person to make an application to correct a mistake in the commons register that was not one made by the Commons Registration Authority and where the amendment would not affect:
 - (i) The extent of any land registered as common land or as a town or village green; or
 - (ii) What can be done by virtue of a right of common.
- 2.2 Further, Section 19(5) of the Act allows a Commons Registration Authority to refuse to correct a mistake if it deems it would be unfair to make a correction with regard to its effect on other persons with rights of common
- 2.3 The onus of proving the case in support of the correction of the register of common land rests with the person making the application, and the burden of proof to apply is the normal civil standard, namely, the balance of probabilities.
- 2.4 The procedure for determining an application for correction made under the Act is set out in the Commons Act 2006 (Correction, Non-Registration or Mistaken Registration) (Wales) Regulations 2017 (“the Regulations”)
- 2.5 The Regulations require that publicity must be given to this type of application via the Council website. Notice of the application must also be served on the statutory consultees, the owner of the land affected by the application and the owners of any rights of common which are exercisable over the area affected by the application.

3 Consultations

- 3.1 The public notice of application appeared on the Council's website on 5th February 2020.
- 3.2 If the application were to be granted the effect would be the registration of these rights over CL74. Therefore, on the 5th February 2020, the notice under cover letter was sent to all others with rights over this common, the owners of the common, the relevant commoners' association, the local members for the Mawr electoral ward, Mawr Community Council, the Open Spaces Society and Natural Resources Wales.
- 3.3 The statutory notice period under the Regulations is 42 days. Therefore, the notice specified that any representations or objections would need to be submitted to the Commons Registration Authority by the 20th March 2020 to allow time for postage. Two objections to the Application were received.
- 3.4 One objection was received by a commoner with recorded rights to graze on register unit CL74 ("the Objector") and one was received from the Open Spaces Society ("the Society").

4 Determination

- 4.1 The Applicant has provided a sworn Statutory Declaration in support of the Application as evidence to show that an error occurred when he made the original application to record the Rights in the Register in 1968. The original application is not available for inspection.
- 4.2 The Statutory Declaration states that the Applicant has grazed the Pentwyn Mawr Common (CL74) for 60 years and has never grazed on CL45. He states that the Commoners Association which manages both CL74 and CL45 have confirmed that they have never received any complaints from any graziers with regard to the fact his animals are grazing on CL74.
- 4.3 The Applicant has exhibited correspondence from the former secretary of the relevant Commoners Association confirming that having lived in the area for 35 years and in that time the Applicant has grazed on CL74. The information the Applicant has supplied tends to support the fact that he made an error on the original application in 1968 to record the Rights.
- 4.4 The Commons Registration Authority does not possess any additional evidence to assist the Applicant's case. However, it is noted that the Applicant's land directly abuts onto register unit CL74 and is some distance away from CL45. Whilst not conclusive in itself, this would also suggest that the Rights were supposed to be recorded against CL74. Given the evidence shows he has always grazed his animals on CL74 then a change to the Register would merely be the regularisation of the current position.
- 4.5 It is also noted that of all the holdings with rights recorded against register unit CL74 that were sent the notice of the Application (thirty-five in total) only one holding opposed the Applicant's case suggesting the majority are indifferent.

- 4.6 The Objector has questioned the validity of the Application due to the fact that the Applicant has taken over 50 years to address the error in the recording of the Rights. However, when the Register was originally compiled applications were invited in two stages between 1967 and 1970. All entries made as a result were provisional only. Following each stage objections were invited and all provisional entries were capable of challenge. Unchallenged entries were immediately confirmed and made final entries. Those entries that were opposed were sent to the Commons Commissioner Hearings. These were held predominantly during the 1980s and 1990s. The Commons Commissioner would hear evidence of errors at these hearings and would determine whether to make entries final or to remove them from the register.
- 4.7 The Entry to which this Application refers in the Register i.e. Entry No. 25 is referred to in a further entry with regard to register unit CL45. Entry No. 141 (see Appendix 2) was made on the register on 6th April 1995. The entry reads that the registration at entry no. 25 which was disputed became final on 20th March 1992.
- 4.8 This shows that the Entry subject to this Application was objected to at the relevant statutory periods in the late 1960s and early 1970s and the objection was heard at a Commons Commissioner Hearing. However, having considered the evidence presented at the hearing, the Commissioner dismissed the challenge and confirmed the entry which was made final. There is little information given in the records of the hearing. The fact the entry was confirmed may mean the Commons Commissioner determined that the Rights correctly belong on CL45. However, it is also a possibility that the Applicant failed to present enough evidence or the correct documentation at the time and the Applicant has previously advised the latter represents the true position.
- 4.9 The Objector also raises issues surrounding the conduct of the Applicant but these have not been considered as a determining factor in relation to the Application. Therefore, this objection has had no bearing on the success or otherwise of the Application and will not be considered further.
- 4.10 The objection submitted by the Society raises a point of law which could be decisive in the approval or rejection of the Application. The Society states that the change to the Rights in the Register intended by the Application cannot be implemented via an application made under Section 19(2)(b) of the Act.
- 4.11 Section 19(2)(b) only allows amendments to the Register where the change would have no effect on:
- (i) The extent of any land registered as common land or as a town or village green; or
 - (ii) What can be done by virtue of a right of common.
- 4.12 It is clear that the Application to amend the Rights would have no effect on the extent of any land registered as common land. However, it is the second point that requires careful consideration. If the Application does affect “what

can be done by virtue of a right of common” the Application will fail. However, the precise meaning of this phrase requires consideration.

- 4.13 The actual wording is fairly ambiguous and so consideration has been given to the meaning of this phrase by consulting the Explanatory Notes to the Commons Act 2006 which explain the purpose of each of the provisions of the Act (“the Explanatory Notes”) and the DEFRA Guidance on Part 1 of the Commons act 2006 (December 2014) (“the Guidance”).
- 4.14 The Explanatory Notes state that Section 19(2)(b) may be used to correct any mistake made by the Commons Registration Authority or another person provided that the amendment would not affect the extent of land registered as common land nor the “quantification” of any right of common. This suggests that “what can be done by virtue of a right of common” relates to the quantification of rights of common.
- 4.15 The Guidance supports this concept of quantification of rights stating that Section 19 does not confer a power to correct all errors in the register; for example there is no power to correct an error in the quantification of rights shown in the Register.
- 4.16 The Application is not seeking to correct the quantification of rights in the Register. It seeks only to amend the area of common land over which the Rights are exercisable.
- 4.17 Further, the Guidance clearly states that Section 19(2)(b)(ii) would not prevent the correction of an error in the identification of the land over which the rights are exercisable.
- 4.18 Therefore, it is considered that the opinion of the Society that the application must be rejected as it amends “what can be done by a right of common” is incorrect as there is to be no change to the quantification of the rights.
- 4.19 Further, if the Society’s interpretation of the legislation was correct it would effectively mean that section 19(2) of the Act would be redundant as in effect, every proposed change would be a change in what ca be done by virtue of a right of common and would therefore be prevented by section 19(2)(b)(ii). This supports the argument that section 19(2) can be used to correct the Register where the change would not affect the extent of land registered as common land nor the “quantification” of any right of common and is in line with the Guidance and Explanatory Notes.

5 Conclusion

- 5.1 The Application has been made under Section 19(2)(b) of the Commons Act 2006 and seeks to amend the Register to show the Rights as being exercisable over CL74 rather than CL45.
- 5.2 The Applicant has provided a statutory declaration to support the Application setting out details of the error made in the original application to record the Rights in 1968.

- 5.3 There is little reason to dispute the Applicant's claim that an error was made at the time the Rights were originally recorded.
- 5.4 The Application does not seek to change the extent of any land registered as common land or what can be done by virtue of a right of common. Therefore, the provisions under Section 19(2)(b) of the Act are satisfied.
- 5.5 The Application has been made in the correct form and the objections received are not considered relevant to the determination of the Application.
- 5.6 It is therefore considered that the Application should be accepted and the necessary changes be made to the Register.

6 Integrated Assessment Implications

- 6.1 The Council is subject to the Equality Act (Public Sector Equality Duty and the socio-economic duty), the Well-being of Future Generations (Wales) Act 2015 and the Welsh Language (Wales) Measure, and must in the exercise of their functions, have due regard to the need to:
- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Acts.
 - Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - Foster good relations between people who share a protected characteristic and those who do not.
 - Deliver better outcomes for those people who experience socio-economic disadvantage
 - Consider opportunities for people to use the Welsh language
 - Treat the Welsh language no less favourably than English.
 - Ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.
- 6.1.1 The Well-being of Future Generations (Wales) Act 2005 mandates that public bodies in Wales must carry out sustainable development. Sustainable development means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the 'well-being goals'.
- 6.1.2 Our Integrated Impact Assessment (IIA) process ensures we have paid due regard to the above. It also takes into account other key issues and priorities, such as poverty and social exclusion, community cohesion, carers, the United Nations Convention on the Rights of the Child (UNCRC) and Welsh language.
- 6.2 The Integrated Impact Assessment (IIA) process has been applied to the subject of this report. No implications have been identified. An IIA Screening Form has been completed with the agreed outcome that a full IIA report was not required for the reasons given in paragraph 6.3 below.

6.3 The Application has no impact on any protected persons or groups. The application, made under Section 19(2)(b) of the Act seeks to correct an error whereby the commoners' rights associated with Tyle Coch Farm have been recorded as being exercisable over register unit CL45 (Cefn Drum and Graig Fawr) but should have been recorded as exercisable over register unit CL74 (Pentwyn Mawr and Craig y Bedw). The mistake was made by the applicant when the original application to record the rights was made in 1968. Therefore, the Application merely seeks to regularise our registers to ensure they correctly depict the common land over which the rights are exercisable and over which the rights have always been exercised.

6.4 The IIA Screening Form is appended to this report for reference.

7 Financial Implications

7.1 There are no financial implications associated with this report.

8 Legal Implications:

8.1 There are no legal implications other than those set out in this report.

Background Papers: None

Appendices:

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| Appendix 1 | Entry No. 25 in the register of unit CL45 |
| Appendix 2 | Entry No. 141 in the register of unit CL45 |
| Appendix 3 | IIA |