

Broxhead Commoners Association

Founded 6th June 1968



Chairman: Mr Richard Ellis
Headley Mill
Headley
BORDON
Hants
GU35 0LL

Hon.Sec: Mrs M C Comber
The Old Cottage
Frith End
BORDON
Hants
GU35 0QS

Email: m.comber@btinternet.com

7th July 2017

Dear Countryside Team at Hampshire County Council.

Application under Section 19(2)(a) to Correct the Register of Common Land CL147 Broxhead Common

This is a covering letter to accompany the notes taken from the Opinion of George Laurence QC, Lincolns Inn, 2015. But please also note that we advise that Mr Whitfield should be subject to Full Disclosure for the documents which he supplied to register ownership of Broxhead Common with the Land Registry, as from what we can see there is nothing of substance to support his ownership.

The following and attached is an excerpt from Elizabeth Derrington ICR's Report.

In addition it seems that when Mr Whitfield eventually registered his title with the Land Registry in 2002, ALRI (assistant Land Registrar) noted on 6th December 2000 "...where the applicant owns land on both sides of rivers and roads, the whole width of the river bed and soil of the road will be included in the registration, but, as regards road, a verbal entry along the following lines will be made "The roads and footpaths in this title are subject to public rights of way". The alternative would have been for us to serve notice on the local highway authority in respect of long lengths of road, with consequent further delay". Part of the land had been conveyed for the seller's estate, right and interest and evidence had been lodged in the form of a 1962 Statutory Declaration. He asked for an up-to-date declaration to be provided. Part of the land for which they had applied (identified on one of the plans to the letter) fell within the fenced extent but did not fall within any of the title deeds (except the 1970 conveyance) and no Statutory Declaration of any age had been lodged – if the solicitors wished the necessary wording

could be included in the up-to-date declaration he had already asked for; *“As Broxhead Common or at least part of it, forms part of your application, notice has been served on the County Council as registration authority under the Commons Registration Act 1965 in accordance with the established procedure. Once I have the Declaration/s requested above, and provided they are satisfactory, the mapping of your application can be completed fairly promptly, whereupon your application will be referred for executive examination, which may give rise to further requisitions”.*

It seems the solicitor at AJG became ill and the matter was taken over by a colleague. There was a long delay in providing a full response to ALR1's letter and correspondence passed between AJG and Land Registry while the new solicitor familiarized herself with the case. In one of her letter dated 31st May 2001, she asked whether *“with regard to Broxhead Common, please advise us as to whether you have received any communication from the Local Authority.”*

In his letter dated 4th June 2001, ALR1 replied to this point.

The Registry has heard nothing back from the County Council about Boxhall[sic] Common, but we would not expect to. As I understand it the procedure is a one-way notification by the Registry to the Council of the fact of the registration of the title to the land under the Land Registration Acts.”

Following further correspondence AJG provided a Statutory Declaration made by Mr M R Porter on 6th December 2001 who had been the Estate Manager since 1962.

I have a copy of that Declaration where it states *“with regard to the land edged green...having made the searches of the estate records and enquiries, I confirm that neither Mr Whitfield nor I hold any deeds or documents to the land in question...”*

There is much to show that evidence in this declaration is false, e.g. Headley Wood Estate had not owned the land for centuries. Broxhead Common can be found in the Headley 1847 Tithe awards as *‘having no Proprietor and used by Sundry people’*

However it occurs to me that Hampshire County Council may not have been properly made aware of the public nature of all the roads and footpaths or whether they were properly advised at the time of the registration of ownership?

It should also be remembered that there are seventeen other Commoners who all have rights over the whole of CL147. (See Rights decision of Mr Squibb 22/11/1974).

Maureen Comber

Hon. Sec.

For and on behalf of Broxhead Commoners Association (BCA)

Abstracting on attached MB1 and copy list of docs shows all title and affecting deeds etc.

Abstracting

14/7/70 orig conv 23⁴ = DIR⁵..

6/5/65 orig Conv 17 As to pt...

19/11/64 Orig Conv 15 As to pt...

25/10/62 Orig Assent/Conv 11 As to pt

See Stat Dec for edged green (Doc 10)..

21/4/61 Copy conv 8 pt of as to pt

29/9/28 Orig Conv 2 pt of as to pt

Lease 8/3/60 7 affects. See also surrender 19/4/84 which is a memo thereon.⁶

Among the ALR1s replies are the following:

A (i) (a) Where both sides of the river is in the title, we can inc the whole width of the river in the title;

...

B I will request an up-to-date- Stat Dec

E. Yes. Notices are required.

F. I will ask for a Stat Dec. Pse provide a corres plan & file copy.

3. On 6 December 2000 ALR1 wrote to the solicitors. His letter said:

- He identified certain parts of the land for which they had applied and said that they would be excluded from the registration as no title had been shown;
- Where land had been conveyed "*for the seller's estate, right and interest only. The Registry does not accept that a conveyance so worded is effective to pass the legal estate unless there is evidence that the seller really did have a legal estate in the land*" but
- "*where the applicant owns land on both sides of rivers and roads, the whole width of the river bed and soil of the road will be included in the registration, but, as regards road, a verbal entry along the following lines will be made: "The roads and footpaths in this title are subject to public rights of way". The alternative would have been for us to serve notice on the local highway authority in respect of long lengths of road, with consequent further delay*";
- Part of the land had been conveyed for the seller's estate, right and interest and evidence had been lodged in the form of a 1962 Statutory Declaration. He asked for an up-to-date declaration to be provided;
- Part of the land for which they had applied (identified on one of the plans to the letter) fell within the fenced extent but did not fall within any of the title deeds

⁴The number following the deeds refers to the numbered documents on the Form DL, a copy of which was annotated by the plans officer.

⁵ Deed Inducing Registration

⁶ The Conveyances referred to above were also highlighted on the annotated form DL as being the "Title Deeds".

(except the 1970 Conveyance) and no Statutory Declaration of any age had been lodged – if the solicitors wished the necessary wording could be included in the up-to-date declaration he had already asked for;

- *“As Broxhead Common, or at least part of it, forms part of your application, notice has been served on the County Council as registration authority under the Commons Registration Act 1965 in accordance with the established procedure. Once I have the Declaration/s requested above, and provided they are satisfactory, the mapping of your application can be completed fairly promptly, whereupon your application will be referred for executive examination, which may give rise to further requisitions.”*

4. It seems the solicitor at AJG became ill and the matter was taken over by a colleague. There was a long delay in providing a full response to ALR1's letter and correspondence passed between AJG and Land Registry while the new solicitor familiarised herself with the case. In one of her letters dated 31 May 2001, she asked whether, *“with regard to Broxhead Common, please advise us as to whether you have received any communication from the Local Authority.”*

5. In his letter dated 4 June 2001, ALR1 replied to this point,

- *“The Registry has heard nothing back from the County Council about Boxhall [sic] Common, but we would not expect to. As I understand it, the procedure is a one-way notification by the Registry to the Council of the fact of the registration of the title to the land under the Land Registration Acts.”⁷*

6. Following further correspondence AJG provided a Statutory Declaration made by Mr MRP on 6 December 2001 who had been the Estate Manager since 1962. The Declaration deals with a number of the issues that had been raised in ALR1's letters, but I shall refer only to those points which appear to relate to the ownership of two small parts of Broxhead Common. MRP said in the declaration:

- He referred to one of the Land Registry plans (attached to the Declaration) which showed two areas of land tinted blue both of which lay to the East of A325 and to the South East of the New Inn;
- He had been told and believed that both pieces of land were included in the application for first registration but that they did not fall within any of the title deeds which had been lodged;
- Apart from part of the land which formed part of Tollgate House, this land (the Blue Land) comprised part of Broxhead Common, which had been in the *“ownership of the Headley Estate for centuries as is evidenced by the estate records”*;
- The position had been looked into in the 1970s and had been the subject of court action because an application had been made under the Commons Registration Act 1965 to seek a declaration whether certain people had common rights over the Common (including the Blue Land);

⁷ I have not found any evidence in the files that Land Registry did in fact send any notification to Hampshire County Council.

HEADLEY PARISH COUNCIL

27

CLERK: Mr. J. McGhee

No. 20, Church Fields,

Headley,

BORDON, Hampshire GU35 8PF

Tel: Headley Down 3192

HPC/3

27th September, 1977

R.A. Leyland Esq., IEB,
County Secretary,
Hampshire County Council,
The Castle,
WINDHILL, Hants.

Dear Sir,

BROXHEAD COMMON

In reply to your letter R.7/2/Broxhead/ENM/JP dated 13 September 1977.

The proposal to erect fencing on the above mentioned land was considered by my Council at their meeting held on 26 September and I am instructed to inform you as follows.

The Parish Council would not lend its support to erect fencing on this land despite the temporary benefit which might accrue. In addition, they would like to see the existing fencing removed as it is felt that it detracts from the natural outstanding beauty of the Common which can be appreciated from the public footpaths and bridleway.

Yours faithfully,



Clerk

c.c. M.J. Davies Esq., Clerk to Whitehill Parish Council
Mrs. R.W. Taylor, Clerk to Kingsley Parish Council

Chairman: Mr M. Moody
"Sandyfields"
Kingsley,
Bordon,
Hants.
Tel: Bordon 2553

Clerk: Mrs M. Taylor
5 Gold Hill,
Kingsley,
Bordon,
Hants.
Tel: Bordon 2347

29th September 1977

Your Ref: R7/2/Broxhead/AM/JP

Dear Sir,

Broxhead Common

Thank you for your letter dated 13th September.
The Parish Council has discussed the proposals put forward by
Mr Whitfield, and I have been instructed to send you their decisions.
The fencing in of Common Land keeps all commoners off.
The fencing in of part of Broxhead Common is unauthorised, and my
Council is opposed to any type of fencing that restricts commoners.
Mr Whitfield's proposal to fence in an area of Broxhead Common is
too vague for my Council to make any comment.


Yours faithfully, *[Signature]*

Clerk.

Mr R.A. Leyland LL.B.
County Secretary,
Hampshire County Council,
The Castle,
Winchester.

R. A. LEYLAND, LL.B.,
County Secretary.

THE CASTLE, WINCHESTER, SO23 3UJ.
Tel: Winchester 4411

 29

Please quote:

R. 7/2/Broxhead/EWM/JP

Your ref.:

Telephone enquiries to:

Mr. Mason

Ext.:

227

20th October, 1977.

Dear Mrs. Taylor,

BROXHEAD COMMON

I refer to my letter of 13th September, 1977.

Mr. Whitfield's proposal, and the views of your Council were considered by the Rights of Way Sub-Committee on 13th October.

I set out below the Resolution which calls for further information and in particular proposals concerning public access.

"That as fencing could entail substantial changes in the local scene and patterns of informal recreation -

1. That on the information currently to hand the Sub-Committee see no distinct benefit to the neighbourhood as -

- (i) there are no detailed proposals to consider; and
- (ii) there is no assurance of public access which could produce a distinct benefit to the neighbourhood.

2. That the Committee would wish to consider any detailed proposals in the light of further information on environmental, agricultural and ecological implications, having particular regard to the impact on the area identified by the Nature Conservancy Council as a potential SSSI*"

I will keep you informed about the continued progress of this matter.

Yours sincerely,

R. A. Leyland

County Secretary

TO: The Secretary and Solicitor of East Hampshire District Council
The Clerks to ~~Headley Parish Council~~
~~Whitehill Parish Council~~
~~Kingsley Parish Council~~

Copies to: Councillor B.L.P. Blacker
Sir James Scott
Councillor Mrs. E.A.L. Cole

* SSSI - Site of Special Scientific Interest

All communications should be addressed impersonally to the County Secretary

RIGHTS OF WAY SUB-COMMITTEE

12TH JANUARY 1978

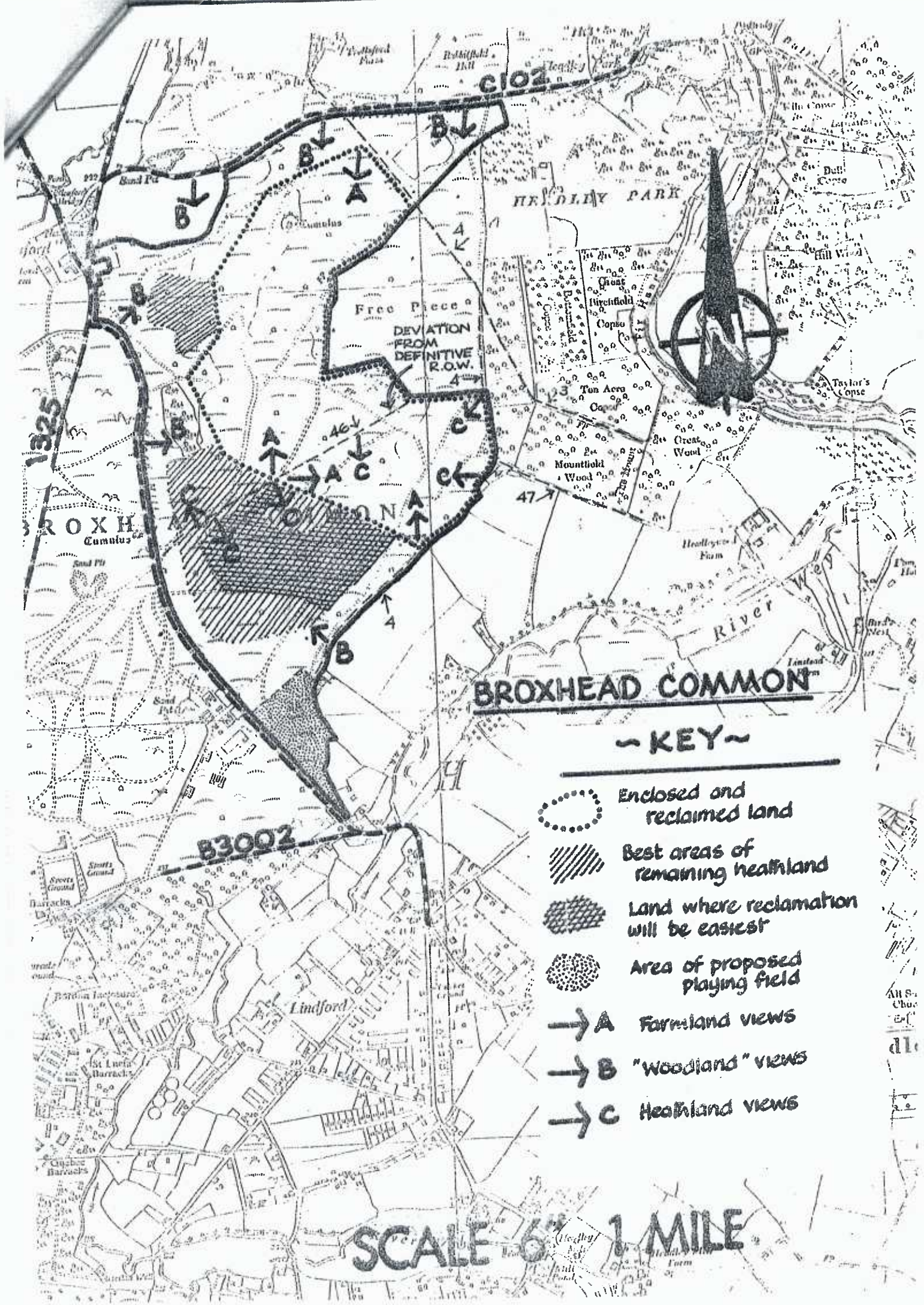
HAZELEY HEATH AND BROXHEAD COMMON - PROPOSED FENCING

Report of the County Recreation Officer

At the last meeting of the Sub-Committee I was asked to investigate the environmental and scientific implications of fencing in parts of the above commons.








The enclosed reports by Jim White, the Conservation Officer in my Department, indicate that in both cases the natural history interests of these commons would be considerably damaged. He points out that although both Broxhead Common and Hazeley Heath are pleasant enough places for walking and to some extent are already used as unofficial open spaces, the scientific interest they contain is unusually high, being fine examples of lowland heath which in national terms is becoming extremely rare. Although the owners will naturally want to make the best and most profitable use of their land, any reclamation for agricultural purposes would be extremely damaging to this scientific interest.

Therefore it is recommended that the Committee should authorise the officers to discuss with the owners how the scientific and landscape values of these areas can be safeguarded and enhanced, whilst permitting the appropriate degree of public access. One possibility could be through Management Agreements similar to the one which has operated satisfactorily for some years at Tidpit Common near Martin. Alternatively the possibility of purchasing both freeholds could be explored. In any event there seems to be no evidence to show that fencing of either common would be in the public interest.



BROXHEAD COMMON

~ KEY ~

-  Enclosed and reclaimed land
-  Best areas of remaining heathland
-  Land where reclamation will be easiest
-  Area of proposed playing field
-  A Farmland views
-  B "Woodland" views
-  C Heathland views

SCALE 6" = 1 MILE

W. Bradly Trimmer & Son,

Solicitors.

AND
COMMISSIONERS FOR OATHS

J. BRADLY TRIMMER, B.A. (CANTAB)

M. A. GOWAN.

B. A. MAUNDER.

D. M. WHELAN, B.A. (CANTAB)

ASSISTANT SOLICITOR

D. P. EGGAR.

R. J. LOOSELY.

61, High Street,

Alton, Hants.

GU34 1AB

TELEPHONE No. ALTON 82028 (3 LINES) AND 82679
(STD 0420)

AND AT: 12, CHEQUERS ROAD, BASINGSTOKE, HANTS.
TELEPHONE No. BASINGSTOKE 22322 AND 22517
(STD 0256)

OUR REF: RJL/DD

PLEASE ASK FOR

MR. Loosley

3rd December, 1974.

YOUR REF:

Dear Sir/Madam,

Re: Broxhead Common.

We have now received the final decision from the Commons Commissioner and your rights over the part of the common lying to the west of the Sleaford/Lindford road (i.e. the part owned by the Ministry of Defence) have been registered in accordance with the agreement as set out below.

As you will know Mr. Connell has a grazing right over the whole of the common and Mrs. Cooke has a grazing right over the whole of the land belonging to Mr. Whitfield. This means that effectively the whole of the common has been established as a common in law.

We are also pleased to say that the Commons Commissioner has not made any order for costs and whilst, therefore, the Broxhead Commoners Association will have to pay its own costs, there is no danger of any of the applicants having to pay Mr. Whitfield's costs, although this is, of course, a matter which could be upset if Mr. Whitfield decided to appeal against the decision.

Yours faithfully,

RIGHT REGISTERED FOR YOU OVER THE
MINISTRY OF DEFENCE PART OF THE COMMON.

1. To graze 1 horse
2. To dig and take sand.
3. Turbary.
4. Estover.

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

No.

GROUP B

22nd July 1975



IN THE MATTER of Broxhead Common, Whitehill, Hampshire
(Register Unit CL. 147)

AND IN THE MATTER of The Commons Registration Act 1965

TAKE NOTICE that the High Court of Justice, Chancery Division at the Royal Courts of Justice, Strand, London, WC2A 2LL will be moved at the expiration of 7 days from the service upon you of this Notice or so soon thereafter as Counsel can be heard, by Counsel on behalf of the Appellant ANTHONY GARY PETER WHITFIELD :

(i) for a decision as to the questions of law set out in the case stated by the Chief Commons Commissioner in the above matter and in particular for a decision that the Chief Commons Commissioner erred in law in confirming the registration of rights of common so far as they effected the land owned by the said Mr. Whitfield lying to the east of the Sleaford/Lindford road;

(ii) an order that the register of common land be amended accordingly by deleting the said land and by amending the rights of common as registered to exclude any reference to the said land;

(iii) such order as to payment of the costs of and incidental to this appeal as the Court may think just;

(iv) further or other relief

AND FURTHER TAKE NOTICE that the grounds of this appeal are that the decision of the Chief Commons Commissioner in so far as it affected the Appellant's said land was erroneous in law:

P A R T I C U L A R S

1. The decision of the Chief Commons Commissioner in relation to Claim No. 1 was unreasonable and not supported by

the evidence in that:-

- (1) There was no evidence upon which the Commissioner could reasonably have concluded (at page 6 of his said decision) that rights of common over all or any specific part of the registered unit attached either to all the tenements mentioned in the survey of 1636 or to any specific tenement there mentioned
- (2) There was no evidence that there were after 1637 any rights of pasturage, rights in the soil or any other rights appurtenant to or enjoyed with any tenement over the land now comprised in the registered unit
- (3) There was no evidence upon which the Chief Commissioner could reasonably have identified the holding the subject of Claim No. 1 with any of the land or tenements mentioned in the survey of 1636 or on which he could reasonably have concluded (on page 7 of his decision) that such holding was part of the manor of Broxhead at that time or any other time
- (4) There was no evidence that any rights over the registered unit or any part of it were ever granted or enjoyed under the leases relating to the said holding referred to on page 7 of the decision and in particular there was no evidence that the relevant lessors had at any material time any interest in the part of the registered unit east of the Sleaford-Lindford road ("the Eastern part") which would have entitled them to grant any such right over it
- (5) The Chief Commissioner erred in law in holding that any rights over the Eastern part passed with a conveyance of the said holding dated 30th November 1929 (referred to on page 7 of his decision) in view of the absence of any evidence:-
 - (a) that the grantor under the said conveyance had any interest in the Eastern part at the date of the said conveyance; and

(b) that any right over the Eastern part was ever created or reserved by or for the benefit of the said grantor or his predecessors in title

(6) The Chief Commissioner erred in law in holding that any rights could pass under a lease in the absence of express words relating thereto

2. The decision of the Chief Commissioner in relation to Claim No. 12 was unreasonable and not supported by the evidence in that:-

(1) There was no evidence upon which the Chief Commissioner could reasonably have concluded (on page 11 of the decision) that any rights or quasi-rights were enjoyed with the holding the subject of the said claim at the date of the conveyance to Mr. Sotnick on 5th January 1948

(2) In particular:-

(a) the evidence of Mr. White referred to on page 11 of the decision related to the grazing of cattle on areas of land not within the registered unit;

(b) there was no evidence that cattle (from the said holding) were grazed on any part of the registered unit at any time between 1912 and the date of such conveyance

(3) Further and in any event the Chief Commissioner erred in law in holding that any such rights over the Eastern part could pass by virtue of the said conveyance in view of the fact that the said holding was in the ownership and possession of the owner of the Eastern part at the date of such conveyance

(4) If, which is not admitted any cattle from the said holding were grazed on any part of the common at or before the time of such conveyance, the nature and extent of such use was not sufficiently clear or precise to pass as a right of common by virtue of section 62 of the Law of Property Act 1925

(5) Further and in any event any such alleged right of common would have been extinguished on the conveyance to Mr. Sotnick of part of the alleged common

3. In relation to both the said Claims No. 1 and 12 the Chief Commissioner erred in law on page 15 of the decision by adopting for the purposes of registration the measure of levancy and couchancy without any evidence that the rights allegedly enjoyed were by grant or usage so limited

4. In the premises the Appellant's said land is not subject to rights of common and is wrongly included in the register of common land

DATED the 22nd day of July 1975

Stones Porter & Co

Solicitors for the above named Appellant A.G.P. Whitfield whose address for service is 26/27 Farringdon Street, London, EC4A 4AQ

- TO the (1) Chief Commons Commissioner of Watergate House, 15 York Buildings, Adelphi, London, WC2N 6LB
- and (2) The Hampshire County Council of The Castle, Winchester, SO23 8UJ
- and (3) The Ministry of Defence whose address for service is that of the Treasury Solicitor of Matthew Parker Street, London, SW1
- and (4) David Innes Hadfield of Mellow Farm, Dockenfield, Farnham, Surrey
- and (5) Amey Gravel Limited of Lower Wootten, Boar's Hill, Oxford
- and (6) A.G. Jeffree (Male) of The Bungalow, Trottsford Farm, Headley, Hants
- and (7) Ernest Alexander Connell of Lindford Bridge House, Lindford, Hants
- and (8) Gladys Barbara Wallesley Nicholson (Married woman) of Amberwood, Headley Fields, Headley, Hants
- and (9) Laura Emily Bicknell (Married woman) of Hazel Cottage, Chase Road, Lindford Bordon, Hants
- and (10) Fiona Rosemary Diana Cooke (Married woman) of Trottsford Farm, Headley, Hants

- and (11) Kingsley Strawberries Limited of Headley Mill Farm, Bordon, Hants
- and (12) Leonard Hope Atkins of Chase Farm, Lindford, Bordon, Hants
- and (13) Patricia Margaret Elphinstone Barnard (Widow) of Picketts Hill Farm, Headley, Hants
- and (14) Mr. and Mrs. Grinsley of Apple Tree Cottage, Headley, Hants
- and (15) John Harry Ellis and Peter George Ellis both of Headley Mill, Bordon, Hants
- and (16) J. Ellis & Sons (Bordon) Limited of Headley Mill Bordon, Hants
- and (17) Joan Hunter Jackson (Married woman) of Lynton Dene, Headley, Hants
- and (18) Kristiana Maria Blackwell (Married woman) of Lindford Farm, Lindford, Bordon, Hants
- and (19) D.J.D. Youles (Married woman) of Watermeadow Farm, Lindford, Bordon, Hants
- and (20) M. Heather (Spinster) of Blacksmith's Shop, Chase Road, Lindford, Bordon, Hants
- and (21) John Conway of Five Acres, Chase Road, Lindford, Bordon, Hants
- and (22) Commodore J.S. Rawlins of Wey House, Standford Lane, Lindford, Bordon, Hants
- and (23) William H. Kerridge of Hatch House Farm, Lindford, Bordon, Hants



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(39)

The Office of the Commons Commissioners
Watergate House, 15 York Buildings
Adelphi, London
WC2N 6LB
Telephone 01-839 7198 ext

The Clerk
Whitehill PC
Council Offices
Millchare Road
Bordon

Our Reference
14/D/20-23

Date
- 4 MAY 1979

Dear Sir

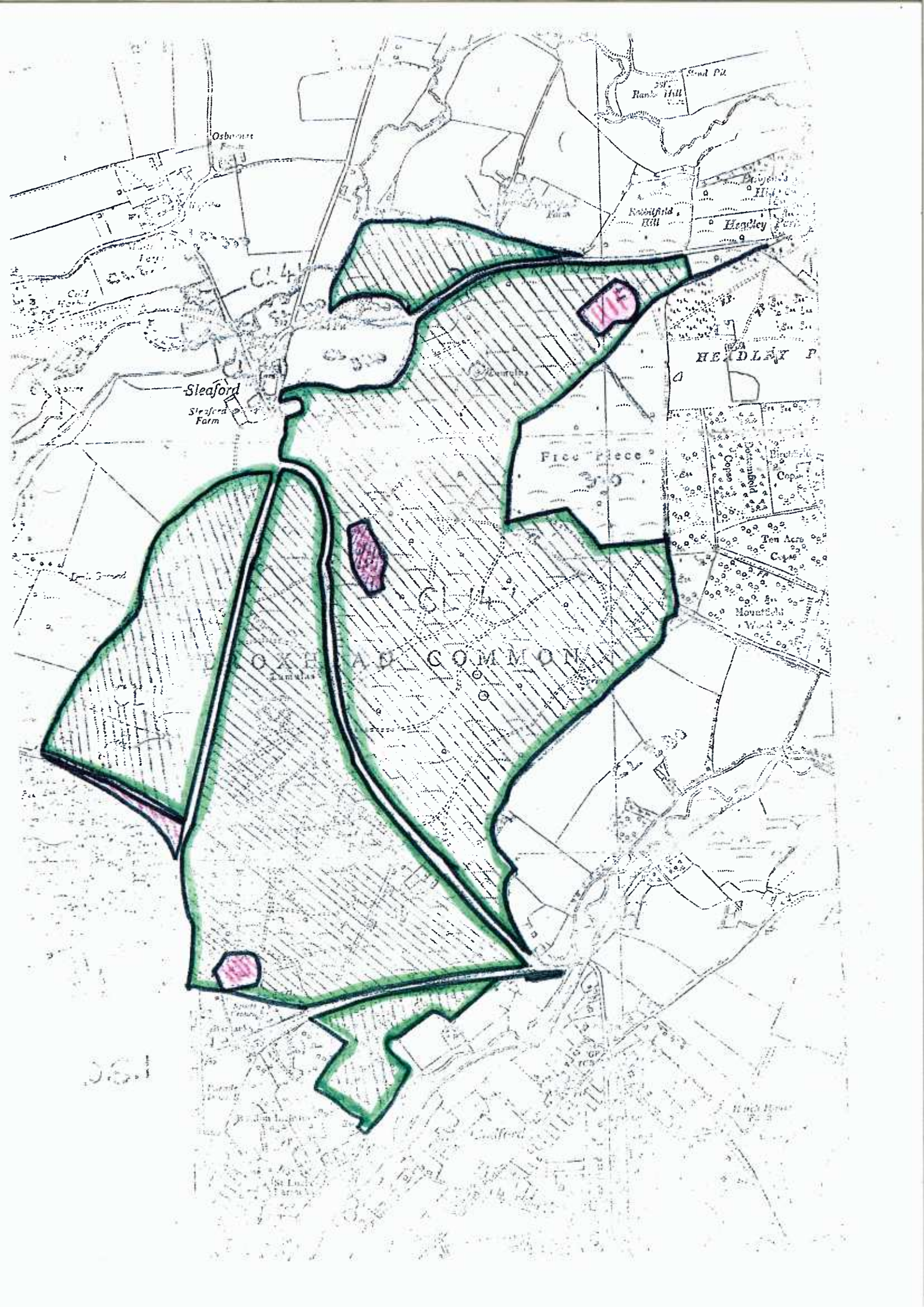
Commons Registration Act 1965

In accordance with Regulation 32 of the Commons Commissioners Regulations 1971, I enclose for your information a copy of a Notice to the registration authority.

Yours faithfully,

L. FORRESTER
S. P. TAYLOR

Clerk of the Commons Commissioners



This is a copy
of the document
held @ Whithull Town Council



RACHELLE D. CRICKARD

Hampshire



R. A. LEYLAND, LL.B., Solicitor,
County Secretary.

THE CASTLE, WINCHESTER, SO23 8UJ.
Tel.: Winchester 4411.

Please quote:

Your ref.:

Telephone enquiries to

Ext.:

CR/CL147/PD

Mrs. Davidson

229.

1st. November, 1979.

Dear Madam,

Commons Registration Act, 1965

Broxhead Common

Register Unit No. CL 147

With reference to the Common Rights registration submitted by you on the 14th. June, 1968 on Form CR 9, these Common Rights have been provisional, but I have to inform you that they are now final following the decision of the Commons Commissioner.

A copy of the entry as it now appears on my register is attached.

Also enclosed is a copy of the Land Entry which has now been amended, showing verged in green the area of land over which Common rights may be exercised.

Yours faithfully,

R. A. Leyland.

County Secretary

Mrs. G.B.W. Nicholson,
"Amberwood",
Headley Fields,
Headley,
BORDON,
HANTS.

Hampshire



4. 1891. 1893. 1898. 1900.
County Secretary

Phone 6000

20/20.187/72

20.27. 1900.

Common Registration Act, 1966
Section 60(1)

Register No. 21.142

With reference to the Common Rights registration submitted by you to the County Secretary, 20.27. 1900. at Form CR 9, these Common Rights have been provisionally set I have to inform you that they are now final following the decision of the Common Commissioner.

A copy of the entry as it now appears on my register is attached.

Also enclosed is a copy of the Land Entry which has not been amended, showing verged in green the area of land over which Common Rights may be exercised.

Yours faithfully,
R. A. Leyland.
County Secretary

Mrs. G. B. W. Nicholson,
"Amberwood",
Headley Fields,
Headley,
BORDEAUX,
HANTS.

under the Act.

44. BOUNDARY OF

The Committee considered a specimen of the production of 1,000 copies; control of the Committee.

RESOLVED:

- (a) That approval in principle be given to the production of 1,000 copies;
- (b) That the booklet be sold to the public at a price of 2s. 6d. per copy.

45. BROXHEAD COMMON

The Clerk reported upon complaints received in connection with the alleged intention of the owner to enclose part of Broxhead Common.

RESOLVED: That the Clerk be authorised, in consultation with the Chairman, to take such steps as may be necessary to protect Broxhead Common against unlawful encroachments, including the institution of proceedings under Section 194 of the Law of Property Act, 1925, to secure the removal of any unlawful building, fence or other work.

A. S. Rumpford

Chairman,
8th December, 1964.

07/07/2014 10:17

7th July 2017

Notes on the registration of Broxhead taken from an Opinion of George Laurence QC Lincolns Inn 2015

Hampshire County Council rightly, provisionally registered all 400 acres of the common CL147 in 1968 under the CRA 1965.

The Chief Commons Commissioner, GDS Squibb decided that all of this should be registered as common land.

Mr Whitfield objected which triggered a 12 day hearing before the Commissioner in London. The outcome was that five small areas outlined in red were excluded - see Land Decision 22nd November 1974. This was his final Determination.

He could not alter anything save the dates to that decision after that.

Mr Whitfield objected again appealing to the High Court in 1975. Brightman J. Agreed with the CCC that there was no reason to doubt the CCC's decision. See pages 6 & 7 of his judgement in 1977, thus confirming the Rights of the other seventeen commoners.

Mr Whitfield appealed to the Court of Appeal 24th May 1978.

The Case was dismissed and the CCC's decision once again affirmed.

4. You will see from the CA's consent order dated 24/5/78 that, by it, Mr Whitfield's appeal was expressed to be dismissed *"upon the said terms [those being] the terms for the settlement of the said Appeal set forth in the Schedule hereto"*. Those terms in paragraph 3 of the Schedule, envisage Mr Whitfield making application to the Secretary of State (with the consent and support of HCC) for his consent under section 194 LPA 1925 to the fences surrounding the 80 acres. The reason why such consent was required is that the fences had been erected in 1963 (by Mr Whitfield's predecessor Siegfried Sefton Myers) without consent. They had the effect of preventing access

to the 80 acres. Sec.194 originally applied to the 80 acres (pursuant to section 194(3)) because of the 1/1/26 (the See Report dated 12/01/1978 of the County Recreation Officer which "[encloses] reports by Jim White, the Conservation Officer in my Department," Also County Recreation Officer's Report of 12/01/1978 and of [pp 1,3, and 5] one Mr Whites reports dated 17.11.1977. (For that date, see p 5). On page 1 of Mr White's Report, under the heading "Background" the following appears: *"Some 80 acres of Broxhead Common were enclosed with fences and reclaimed for agriculture in 1963/4 by a previous owner. That fencing was and is still unauthorised."* Mr Connell in 1958 acquired the property (Lindford Bridge House) for the benefit of which the existing rights of pasture and soil over Mr Whitfield's land subsisted. See Mr Squibb's judgement of 22/11/1974 at pp7,8 of the transcript and Brightman J's judgement at pp (G-H) and 6 (A-C). See also Land judgement of the same date.

date of the commencement of LPA 1925), the 80 acres were subject to rights of common. That was the consequence of Brightman J's decision upholding that of Mr Squibb's dated 22/11/1974. The fences were therefore unlawful because they had the effect of preventing or impeding access to the 80 acres within the meaning of section 194(1).

5. The compromise of the appeal did not, however, change things. It is true that Mr Connell was due to release all his rights over the 80 acres on or after 24/5/78 (see again paragraph 3 of the schedule). I am assuming that he duly did so. However such extinction did not occur "*under any statutory provision*" within the meaning of proviso (a) to section 194(3), neither was proviso (b) to subsection (3) ever subsequently invoked so as to cause section 194 to cease to apply to the land. As a result, and despite the fact that the 80 acres may have ceased to be subject to rights of common and if and when Mr Connell released his rights over them, section 194 continued to apply to the Land and the fences continued to be unlawful.

6. The parties to the appeal of Brightman J. obviously recognised that section 194 would not cease to apply even after Mr Connell released his rights, which is why they made provision, as mentioned above, for Mr Whitfield to make an application (sc under subsection (1) to the Secretary of State for his consent to the erection of the fences surrounding the 80 acres. However, no such consent has ever been sought. Even though HCC agreed to support any application for such consent (see paragraph 3 of the Schedule to the consent order), HCC never agreed that it would remain inactive in relation to the fences if Mr Whitfield failed to seek, or was refused the consent of the Secretary of State. If HCC had formally considered the matter at any time after 24/5/78 and *correctly* directed itself on it, we feel sure that it would have insisted on Mr Whitfield seeking the Secretary of States consent to the fences and (if he refused to seek, or failed to get such consent) HCC would have sought an order of the County Court for removal of the fences under section 194(2). It would not and could not properly, simply have left the matter in limbo, without contradicting the basis upon which it had been prepared to compromise the matter before the CA

7. We respectively suggest that the matter so far may be summarised as follows:

- i. Rights of common (Mr Connell's) had been found by Brightman J in 1977 to exist over Mr Whitfield's land (including the 80 acres)
- ii. Those self same rights existed on 1/01/1926;

- iii. Their release made no difference to the continuing application of section 194 as demonstrated above;
- iv. HCC had itself initiated the registration of Broxhead Common in 1968;
- v. HCC must have recognised that there was a public interest in any land to which sec.194 applied remaining open and unenclosed;
- vi. HCC must have realised that Mr Whitfield's application to the Secretary of State would not be a foregone conclusion even with HCC's support; and
- vii. HCC would, we submit, never have reached the terms of settlement it did in May 1978 as a colourable device to enable Mr Whitfield to keep his fences *without* making the necessary application to the Secretary of State.

8. Had Mr Whitfield made such application, the detailed and exacting procedures prescribed by section 194(1) would have had to be gone through, the interested public would have been able to express their views (very probably at a public inquiry) and proper and detailed consideration could and would then have been given by the Secretary of State to the question whether the fences should remain. If he gave his consent, well and good. But if he refused his consent, HCC would undoubtedly have sought and would undoubtedly have obtained an order from the County Court that the fences be removed.

9. We know that HCC did consider the matter on 22nd June 1978 – a month after the CA consent order. See the Report of the County Secretary of that date, Paragraph 9 of that Report reads where material as follows:

The effect of the settlement is as follows:

- a) *The registration by the County Council and the Commoner is confirmed with the exception of the already ploughed and fenced 80 acres; the Commoner has released his rights over the 80 acres thereby extinguishing them. The County Council and the Commoner will support an Application by the Owner to the Secretary of State to authorise the existing fences."*

That makes it clear that HCC (correctly, as I would submit) interpreted the CA's consent order as effectively requiring Mr Whitfield to apply to the Secretary of State for his consent. And it is plain that the issue actually before the Land Sub-Committee at its meeting on 22/6/1978 (whether to authorise the lease of the

unenclosed part of Mr Whitfield's land) was being presented as part of what HCC saw as a package reflecting the compromise reached before the CA.

10. An important element of that package, as stated in paragraph 9(a) of the Report of 22/6/1978, was that Mr Whitfield would seek to obtain the Secretary of State's consent to the retention of his fences around the 80 acres. Moreover, the County Secretary recognised in paragraph 10 of the Report that such consent would not be a foregone conclusion:

- b) *The owner may use his enclosed area with the prospect that the overall package now agreed should enable him to obtain the Secretary of State's consent to authorise the fencing with support from the County Council, because he has had due regard to the "benefit of the neighbourhood", the statutory test which he must satisfy. (Emphasis supplied).*

In fact, the Report understates the difficulty of getting consent. It is the Secretary of State, not the landowner, who must have regard to the benefit of the neighbourhood.

11. The Committee was being implicitly advised that the prospect of getting consent was good for the reasons given; but also implicitly being reassured that the fencing would have to satisfy a statutory test of "benefit to the neighbourhood" (that being a criterion to which the Minister had to have regard, in deciding whether to authorise a fence. See section 194(1) and the preamble to the Commons Act 1876 therein referred to). In the event, although the *lease* contemplated by the consent order was entered into on 5/03/1980, the Secretary of State's consent never was sought.

12. That it had never been obtained was evidently questioned, nearly 10 years later, by a Mrs Potter. She had been discussing the matter with Mr E. W. Mason, Assistant County Secretary dated 7/2/1989. The penultimate paragraph of that letter reads as follows:

- c) *"You will see from paragraph 3 of the Schedule to the Court Order that the County Council would support any application by Mr Whitfield regarding the fences around the 80 acres, for the purposes of Section 194 Law of Property Act 1925. It seems probable that Mr Whitfield did not apply to the Secretary of State, because the fences enclose land which is not common land. (Emphasis supplied).*

13. In giving the reason he did as to why Mr Whitfield had never sought consent, Mr Mason was plainly mistaken. As we have demonstrated above, section 194 continued to apply notwithstanding that Mr Connell had (as we are assuming) released his rights of common over the 80 acres. Subject to what follows below.

- i. We respectfully submit that HCC should *now* remind Mr Whitfield that the fences surrounding the 80 acres are unlawful and give him the opportunity to apply to the Secretary of State for consent. If, on receipt of that reminder, Mr Whitfield fails to respond or declines to apply for consent,
- ii. we request that HCC should apply to the County Court to secure the removal of the fences. As we contend above, that is action which we have no doubt, HCC could, should and would have taken long ago if it had realised that the fences were unlawful and Mr Whitfield had refused to apply for, or been refused, the Secretary of States consent. The fact that in the person of Mr Mason (and perhaps others) it had taken the view that Mr Whitfield did not *need* consent is irrelevant. Now that the mistake has been pointed out, the appropriate action should *now*, if necessary be taken.

14. If Mr Whitfield fails to seek, or is refused, the consent of the Secretary of State and HCC seeks relief in the County Court, we submit that the County Court is highly likely to take the view that the fences should be removed. The delay will not have prejudiced Mr Whitfield, for he will have had more than 50 years of enjoyment of the 80 acres with the benefit (to him) of a fence which ought never to have been there. It is true that Mr Whitfield may say that he has lost the opportunity to seek the Secretary of State's consent owing to the repeal of section 194 by the Commons Act 2006. (As to that see further below) paragraphs) If he *has* lost that right, it is his own fault: his advisers in 1978 will have told him that he needed consent (which is why the closing words of paragraph 3 of the Schedule to the consent order make specific reference to section 194.) Despite that, he never sought consent. * In any event he will have the opportunity in the County Court proceedings, to submit to the judge that, if he had earlier sought consent, he would have been more likely than not to get it. If he can persuade the judge of that, as he would be entitled to try to do, that might or might not make a difference to the judge's decision. But it would certainly not be a reason why HCC should refuse to seek relief from the County Court in the first place.

15. In his report of 22/06/1978 the County Secretary put forward some reasons in defence of the 1978 compromise. But it is clear from the Report that HCC (quite correctly) was prepared to support the compromise precisely because the Secretary of State – and *not* HCC – would be the ultimate arbiter of whether the fences should be allowed to remain or not. For his own reasons (probably because he feared consent might be refused and because he calculated that, if he failed to seek consent, he would be allowed to get away with not doing so) Mr Whitfield chose not to seek such consent. Whatever the reasons, I respectfully submit it would be quite wrong for HCC to set itself up as the arbiter, in place of the Secretary of State, of whether the fences should be allowed to remain by continuing, now that its previous mistake has been brought to its attention, to do nothing.. By doing nothing, HCC would itself effectively grant consent to the erection of the fences without the matter being tested as the Secretary of State would have to do on an application to him under section 194(1) or as the County Court would have to do on an application to it under 194(2). Subject to what follows, we therefore repeat our invitation to HCC to invoke the two stage procedure (outlined in paragraph 13 above) of (i) inviting Mr Whitfield to apply for consent and, if he refuses to apply or is refused consent, (ii) taking enforcement action under section 194(2).

16. Strictly speaking HCC is not concerned with stage one at all. It is for Mr Whitfield as owner to decide whether he is prepared to apply for consent or not. However it is for HCC to decide whether to act under section 194(2) by applying to the County Court. And in the context of the 1978 compromise it would obviously make sense for HCC to invite and encourage Mr Whitfield to seek to regularise the position (as he should have done in 1978) before taking action itself.

We have no doubt that Mr Whitfield will be prepared to seek the necessary consent, whereupon the matter will be dealt with by the Secretary of State in accordance with **[the latest version of the “Statement of considerations” referred to in footnote above]**. The Secretary of State there advised that he would need to be satisfied that it was expedient to grant consent having regard to (i) the “benefit of the neighbourhood” meaning

“the health comfort and convenience of the [relevant] inhabitants in the general context of the enjoyment of the [Land] as an open space”.

This would be balanced against (ii) the private interests (in this case) of Mr Whitfield,

We strongly doubt whether Mr Whitfield could any longer insist on HCC supporting and consenting to any such application pursuant to paragraph 3 in the Schedule to the consent order, he having effectively repudiated his implied obligation to seek such consent within a reasonable time by his failure to do so at the time. HCC will have to make up its own mind about that. If HCC takes the view that, however late in the day, Mr Whitfield is still entitled to have HCC support his application, so be it. We and others will have the opportunity to object and have their views about the weight to be attached to HCC's support taken into account. We believe that the rationale for HCC's view as expressed in paragraph 10 of its June 1978 report (that Mr Whitfield had had regard to the benefit of the neighbourhood in seeking to keep 80 acres enclosed) is very unimpressive and would readily be exposed as being so.

19. We do not need to go into further detail now on the implication if Mr Whitfield seeks and is refused consent or refuses to seek it. We should however make it clear we do not suggest HCC would have an *obligation* to take enforcement action in that event. It would still be a discretionary matter. But we respectfully suggest that the public interest would be badly let down if HCC did nothing in that event. HCC no doubt believed that it had properly served the public interest in 1978 when it reached the compromise it did. See the June 1978 report. But it is clear from that report and from the terms of compromise set forth in the Schedule to the consent order that HCC recognised, properly, that the unlawful fence surrounding the 80 acres must be legitimised. Mr Whitfield knew that he had to get such consent. Brightman J had upheld Mr Connell's common rights and the CA by consent dismissed Mr Whitfield's appeal. Mr Connell's rights were accordingly upheld. It is true that he agreed to release his rights (which had existed since well before 1926) but knew that in so doing section 194's protection would remain. The fence around the 80 acres would remain unlawful unless and until consent to its retention was granted. Mr Connell and anybody else concerned for the benefit of the neighbourhood would be free to oppose the grant of such consent. If the grant of consent was successfully opposed, it was implicit in the compromise reached that Mr Connell's co-Respondent, HCC who had registered the land as common in the first place, would seek the removal of the fence.



The area within the blue line represents
the 80 acres as drawn on map C1 annexed to
Sheet 89 Commons Register

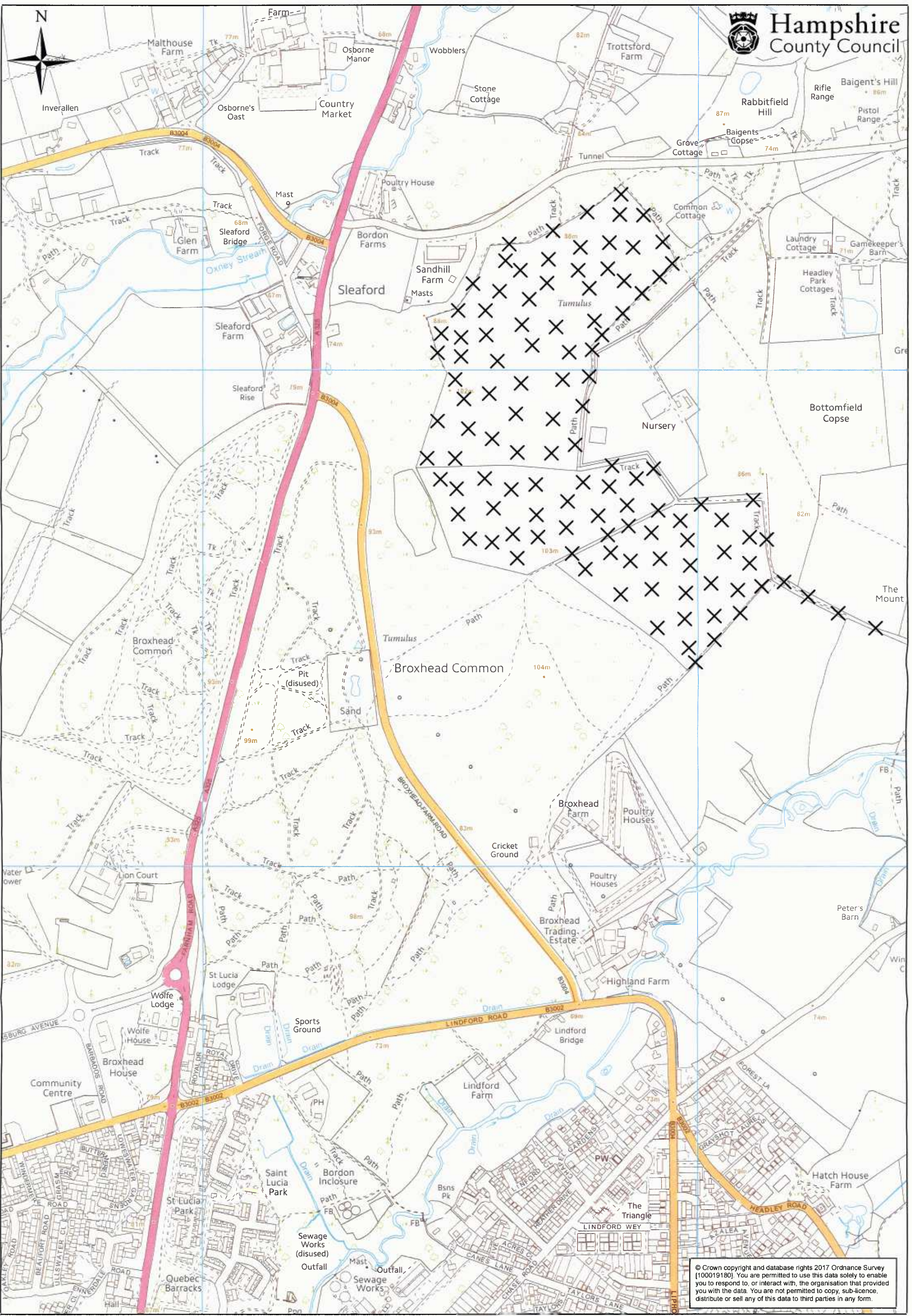
This area was excluded by HCC on
1st August 1979 according to
Sheet 1 Land Section in the
Register of Common Land.

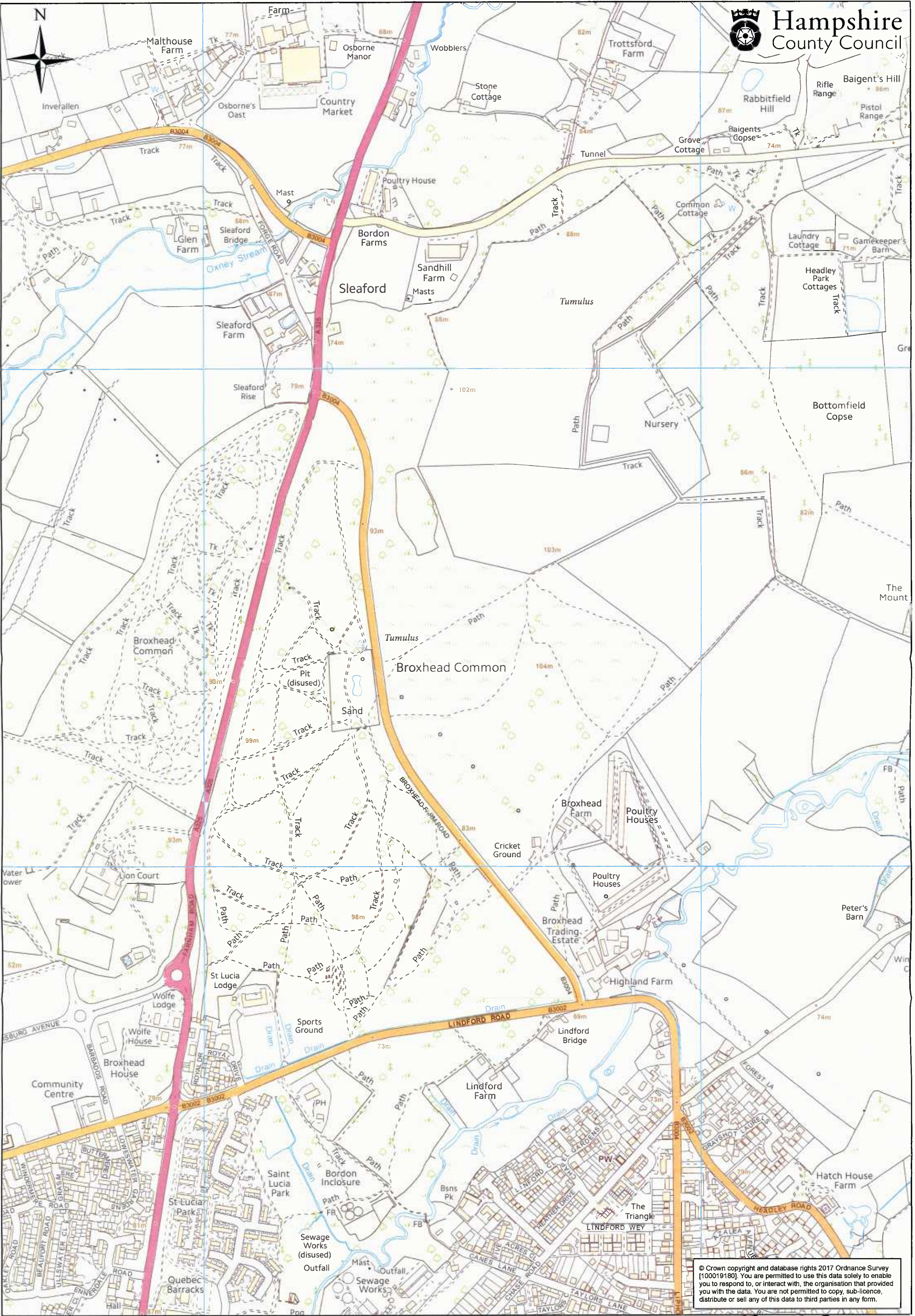
Steaforth

Broxhead Common

Sand

Broxhead
Farm





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PLANNING REGISTRATION ACT 1985

BROXHEAD COMMON
(C. 147)

Plan C
10/01/12
Sheet 59



10/01/2012 10:58