

Objection

RE: Broxhead Common

Application for registration of 80 acres of land now part of Headley Wood Farm as common land pursuant to (*inter alia*) Sections 1 – 3 of the Commons Registration Act 1965 (Application made by Knights Solicitors on behalf of Mrs Maureen Comber)

Application being made to Hampshire County Council as Commons Registration Authority

RESPONSE AND OBJECTION TO SAID APPLICATION MADE BY ANTHONY GARY PETER WHITFIELD (Mr Whitfield)

**Made on behalf of Mr Whitfield by Edward Harris Solicitors, Tredegar Fawr, Llangyfelach,
Swansea, SA5 7LS**

1. Definitions

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| 1.1. | CRA 1965 or 1965 Act | Commons Registration Act 1965 |
| 1.2. | CA 2006 or 2006 Act | Commons Act 2006 |
| 1.3. | CRA | Commons Registration Authority |
| 1.4. | FDN | Final Disposal Notice |
| 1.5. | Mr Whitfield | Anthony Gary Peter Whitfield, owner of Headley Wood |

Estate registered at HM Land Registry under title number SH6984 which includes the 80 acres the subject of said Application

1.6. The Application The Application referred to above made by Knights on behalf of Mrs Maureen Comber

1.7. 'Register' (verb or noun) or 'registration' refers to such register (verb or noun) or the act of registration in accordance with the 1965 Act and shall as applicable refer to the Land Section of the Register or the Rights Section of the Register or the Register as a whole

2. It is accepted the 1965 Act at Section 22 (1) defines 'common land' as meaning

(a) Land subject to rights of common ...

(b) Waste land of a manor not subject to rights of common;

3.1. If a 'provisional' registration of 'common land' or 'rights of common' under the 1965 Act is subject to objection, and the matter (ie the application and the objection thereto) is referred to a Commons Commissioner for Hearing, then the time of determination of whether land registered as 'provisional' common land is common land or not, or whether rights of common registered as 'provisional' rights are common rights or not is the date of the Hearing before the Commons Commissioner appointed to determine the matter, and not the date that any application for registration of the land as common land or the common rights as rights of common were registered or entered in the Register (Lands Section or Rights Section) as those lands or rights were, at that time, and until 'finalisation' by the provisions of the 1965 Act, 'provisional' only.

- 3.2. An application under Paragraph 4 Schedule 2 CA 2006 can only be made if the land the subject of the application falls within the definition of 'waste land of a manor' and is waste land of a manor at the time of such application (paragraph 4 (2)) and as we shall see, the land the subject of Mrs comber's attentions (the 80 acres) is not 'waste land' of a manor, i.e. it may fall within the definition of being by definition and interpretation of the House of Lords in Hampshire County Council v Milburn [1991] A.C 325 as being 'of a manor' but it does not in fact or interpretation of the law (to which we see below) fall within that part of the definition as being 'waste land'.
4. Entries in the Land Section or Rights Section of the said Register remained 'provisional' until the Commons Commissioner to whom any 'matter' had been referred under Section 5 of the 1965 Act should have enquired into it, and should thereafter either confirm the registration, with or without modifications, or refuse to confirm it; and the registration 'shall, if it is confirmed, become final and, if the registration is refused, become void'. [As to 'matter', see Section 6 (1) CRA 1965]
- 5.1. Such confirmation will become 'final' if no appeal is brought against the confirmation or refusal of the registration, at the end of the period [six weeks] during which an appeal could have been brought, or if such an appeal is brought when the enquiry into the said matter is finally disposed of (ie by way of Final Disposal Notice [issued by a Commons Commissioner]).
- 5.2. On being informed in the prescribed manner that a registration has become final (with or without modifications) or has become void, the Commons Registration Authority shall indicate that fact in the prescribed manner in the Register, and if it is become void, cancel the registration – Section 6 (2) CRA 1965.

- 5.3. Where a matter has become final, the Commons Commissioner shall notify that fact to the CRA by way of a FDN and the CRA shall enter the information contained in the FDN, in the prescribed manner in the Register.
- 5.4. Section 10 of the 1965 Act provides that the registration [ie final registration] under the 1965 Act of any land as common land ... or of any rights of common over any such land shall be conclusive evidence of the matters registered, ie in this case, in accordance with Section 6 (1) of the 1965 Act, it is conclusive evidence of the matters so registered.
- 5.5. The 1965 Act is definitive and conclusive as to what is registered as common land. If common land is not registered, then it is simply not common land (Section 1 (2) (a) CRA1965). It may have been common land in earlier years, but that is of no relevance as to whether the land is registered now or not. There is no presumption, as there is in highways – ‘once a highway, always a highway’ – there is no such presumption ‘once a common, always a common’. If a common is not registered in the Register of Common Land, it is deemed not to be a common (Section 1 (2) (a) CRA 1965 – unless it can be subsequently re-registered under the statutory provisions of CA 2006 Section 22 and Schedule 2 paragraph (4) (emphasis added).
6. The only person who could issue a FDN to the CRA is a Commons Commissioner – no such Notice could be issued by the Courts, whether High or Appeal. If a matter has been appealed to the High Court or to any higher Court, after the Decision of that Court, the ‘matter’ and the Decision reached by that Court is returned to the Commons Commissioner who holds a final Hearing and makes a final determination and issues a FDN to the CRA – the Courts do not issue a FDN.

7. In this matter (Broxhead Common CL147), it is accepted that the registration of Broxhead Common, including the 80 acres the subject of the Application, was registered, on its own initiative, by Hampshire County Council as CRA on the 23rd April 1968 – the registration was duly and properly marked 'provisional'.
- 8.1. Divers applications were made by way of applications for common rights.
- 8.2. The Application and subsequent entries in the Register within the Land Section and in the Rights Sections were properly marked as being 'provisional'.
- 9.1. Mr Whitfield was the owner of the provisionally registered common land on the east side of the Sleaford/Lindford Road, and Mr Whitfield objected to those lands (on the east side) of the said road as being registered as common land. Such objection to the land being registered as common land acted as an automatic objection against all rights claimed thereover [and is indeed over the whole of the common land so 'provisionally' registered, even if not owned by Mr Whitfield – but we have no interest in respect of this Application by Mrs Comber in what goes on/went on on the lands to the west of the road, or the rights thereover].
- 9.2. The 'matter' (ie, the application and the objection thereto) was not settled between the dates given under the 1965 Act, and the matter (ie, the registration and the objection thereto) therefore was referred by CRA to the Commons Commissioner's Office and a Commons Commissioner (Chief Commons Commissioner George Squibb QC) held a Hearing spread over a number of days and issued two Decisions (the first Decision in respect of the dispute in the Land Section and the second Decision in respect of the dispute in respect of the rights claimed thereover) – both dated 22nd November 1974.

9.3. Within the appropriate six week appeal period, Mr Whitfield appealed against those Decisions.

10. The matter was then heard before the High Court.

Mr Whitfield appealed that Decision to the Court of Appeal and before the Hearing before the Lords Justice, settlement was reached between the parties (including Hampshire County Council who sought to be joined as a Respondent), and the Court of Appeal ratified the Settlement as set out in the Order incorporating such Settlement Schedule, and which Order was sealed by the Court of Appeal on the 21st May 1978.

11.1. The matter was then returned to the Chief Commons Commissioner who held a Hearing in London on the 6th November 1978.

11.2. Following that Hearing, and given under his hand and seal dated 18th December 1978, the Chief Commons Commissioner gave notice to Hampshire County Council as CRA 'In the matter of Broxhead Common' that in pursuance of Section 6 (2) of the CRA 1965, that on the 24th day of May 1978, the registration at entry number 3 in the Land Section of Register Unit CL147 in the Register of Common Land maintained [by the CRA] became **'final with the following modifications, namely the exclusion of the land edged red on the plans thereto annexed, marked 'GDS1' and 'GDS2'**.

Plan marked 'GDS2' related to the 80 acres of land the subject of Mrs Comber's previous Application.

11.3. In accordance with regulation 32 of the Commons Commissioner's Regulations 1971, the clerk of the Commons Commissioners, by way of letter dated 18th December 1979, gave copy of the

said Notice to Hampshire County Council as CRA, ie notice of the final disposal of disputed registration.

- 11.4. In accordance with the said Order served on it by the Chief Commons Commissioner, Hampshire County Council as CRA amended the Register to exclude the lands referred to and shown in the plan marked GDS2 attached to the FDN, and made appropriate entry as number 4 in the Land Section of the Register for CL147 and amended the Register Plan accordingly and recorded the FDN signed by the Chief Commons Commissioner and dated 18th December 1978 – that entry being made by CRA on 1.6.1979.
12. That entry is final and is conclusive evidence (Section 10 CRA 1965) – the land is not registered as common land and ceases under the 1965 Act to be common land, Section 1 (2) (a) – 'is deemed [not] to be common land ... unless it is so registered'.
13. It is appreciated that in his first Decision of 22nd November 1974, Chief Commons Commissioner, Mr G D Squibb QC under reference 14 -D-20 used the following words:

'with regard to the land to the east of the road [ie the Sleaford – Lindford Road] Mr Mills [Leading Counsel for Hampshire County Council] put his case in the alternative, arguing that 'this land fell within the definition of 'common land' in Section 22 (1) of the Commons Registration Act 1965 either by being subject to rights of common or being manorial waste not subject to rights of common'.

There is, in my view, no substance in the alternative contention that the land to the east of the Sleaford – Lindford Road is manorial waste, for it is not and has not at any material time been in the same ownership as any part of the Lordship of the Manor, but for the

*reasons to be given in my Decision relating to reference numbers 14–D-24-29, I have
been satisfied that this land is subject to rights of common'*

- 14.1. It is accepted that at that time, the interpretation of the words 'of a manor' in the expression 'waste land of a manor' was as later interpreted and confirmed by the Decision of the Court of Appeal in Box Parish Council v Lacey [1979] 1 All. E.R.13 as being the correct interpretation.
- 14.2. It is also accepted that that view of the law of the words 'of a manor' were revisited by the House of Lords in Hampshire County Council v Milburn [1991] A.C.325.

But those decisions only dealt with the words 'of a manor' in considering the definition within Section 22 (1) (b) 'Waste land of a Manor', ie those decisions did not in any way consider the meaning of the words 'waste land'.

15. The expression 'waste land' is accepted by the Courts as being that defined by Watson B in his Judgment of Attorney General v Hanmer [1858] 27 L.J.Ch.837 with which opinion Stuart VC concurred, namely:

*'the true meaning of 'wastes', or 'waste lands', or 'waste grounds of the manor' is the
open, uncultivated and unoccupied lands parcel of the manor or open lands parcel of
the manor other than the demesne lands of the manor'*

16. The explanation of the words 'of a manor' as set out in the Application on behalf of Mrs Maureen Comber is, of course, very interesting and esoteric and is quite correct in setting out what was decided by the House of Lords in Hampshire CC v Milburn, but has absolutely nothing to do with the determination that Hampshire County Council may have to make as Commons

Registration Authority if the Application is herein correct and appropriate and can validly be made by Mrs Comber. It would be accepted that the definition of 'of a manor' is determined by the Decision of the House of Lords in Milburn, but as stated above, that Decision has absolutely no relevance to the question of whether the 80 acres, the subject of the present Application, is 'waste land'. These representations and Objections will set out that the land the subject of the Application (the 80 acres) is simply not 'waste land' and does not therefore fall within the definition of Section 22 (1) (b) of the 1965 Act ('waste of a manor not subject to rights of common') and cannot be found to be capable of being entered as common land in the Common Land Register held by Hampshire County Council as CRA – ie the said 80 acres are incapable of being so registered.

17. It is set out in the Application that, in the circumstances set out therein, paragraph 4 of Schedule 2 of CA2006 can apply whereby an application can be made to a CRA if it is found that there is 'waste land of a manor not registered as common land' and which for, and in the set out circumstances, is not registered as common land in the Land Section of the Commons Register. It is argued in the Application that as that paragraph does not yet apply to Hampshire County Council as a Registration Authority (Hampshire County Council not being in a Pilot Area or a 2014 Authority), the matter is to be dealt with under the 1965 Act paragraphs 1 – 3, and it is argued that strength to that argument is given by pronouncements by DEFRA. DEFRA do not make the law and DEFRA cannot validly or legally interpret the law. Section 4 (6) CRA 1965 provided that an 'application for registration under this section shall not be entertained if made after such date, not less than three years from the commencement of this Act, as the Minister may by order specify; and different dates may be so specified for different classes of applications'. Those dates have been set and have long since passed. Simply put, an application for registration of 80 acres of land adjoining Broxhead Common, as 'waste land of a manor', simply cannot be entertained by, or validly made to, Hampshire County Council. If

Mrs Comber is aggrieved that the land (the 80 acres) is not registered on the basis that she considers it to be 'waste land of a manor not subject to common rights' and comes within the terms and definitions of Paragraph 4 of Schedule 2, then she has no alternative but to wait for the introduction of paragraph 4 Schedule 2 CA2006 to the area of which Hampshire County Council is the CRA.

18. If such application, in due course, becomes possible, and Hampshire County Council can accept Mrs Comber's application under paragraph 4 Schedule 2, then Mrs Comber's application on the terms as set out in her present Application is doomed to failure – the land (the 80 acres) never qualifies to come within the definitions of paragraph 4. We will explain below

19. DEFRA may have expressed guidance at paragraph 5.15.4 of its Guidance to Commons Registration Authorities and the Planning Inspectorate in respect of Part I of the CA2006, but that is guidance only and cannot overtake the specific terms of an Act of Parliament. The Applicant, in paragraph 14 of her Application highlights the words *'the registration authority will need to consider whether the new statutory criteria would permit a different outcome when applied to the known facts (as decided upon by any Hearing or Enquiry held by the registration authority into the previous application'*.

There is no power in the 1965 or 2006 Acts for a Commons Registration Authority to 'reopen' the Decision of the Commons Commissioner, which Decision has been dealt with under a FDN - end of story!! However, if it were possible to have a hearing by or before Hampshire County Council under the guidance set out by DEFRA, or more properly in due course under an application to Hampshire CRA under the provisions of paragraph 4 Schedule 2 CA2006, then it

is quite clear that the land (the 80 acres) does not fall within the category of being 'waste land' of a manor and any such Application by Mrs Comber will fail (emphasis added).

- 20.1. As set out above, it is at any time of such 'Hearing' that the facts have to be determined and it is quite clear throughout the process of this registration (provisional or final) that the 80 acres has never been 'waste land', ie it is not open land, it is not uncultivated and it is not unoccupied. It matters not, therefore, whether it was parcel 'of a manor' or not and the Judgment of the House of Lords in Hampshire County Council v Milburn certainly and simply does not come into play, or have any effect or relevance.
- 20.2. It is quite clear that at the time of the initial application in 1968 for entry in the Land Section of the Commons Register (marked as a 'provisional' registration), and at the time of the Chief Commons Commissioner's Hearing in 1974 and at the time of the Chief Commons Commissioner's Hearing in November 1978 and even at the date of any Hearing that will in the future be held by Hampshire County Council under the alleged DEFRA guidance (which we do not accept can be undertaken) or any future application or hearing under paragraph 4 Schedule 2 CA2006 (when that paragraph comes into operation in Hampshire), the land (80 acres) would not at that time or any of those times fall (or will fall) within the legally accepted definition of 'waste land'.
21. It is, of course, relevant and appropriate to read the said passages of paragraph 4 Schedule 2 and note the tenses used by Parliament in the statute. We emphasise appropriate words or phrases.

'4. **Waste land** of a manor not registered as common land

4 (1) If a commons registration authority is satisfied that any land not registered as common land ... is land to which this paragraph applies, the authority shall, subject to this paragraph, register the land as common land in its register of common land.

(2) this paragraph applies to land which **at the time of the application under sub-paragraph (1) is waste land** of a manor and where, before the commencement of this paragraph –

- (a) the land was provisionally registered as common land under Section 4 of the 1965 Act;
- (b) an objection was made in relation to the provisional registration; and
- (c) the provisional registration was cancelled in the circumstances specified in sub paragraphs (3), (4) or (5)'

le, it is expressly set out that at the time of making the application under paragraph 4, the land must fall within the definition in Section 22 (1) (b) CRA 1965 as being 'waste land' as well as being 'of a manor'; this land is simply not now 'waste land' and application under paragraph 4 never gets off the ground. Any such application cannot be made or entertained because at the time of the Application the land is not waste land, and even if made, will fail.

22. It is anticipated that sub paragraph (3) of paragraph 4 may be argued by Mrs Comber as being the appropriate circumstances on the basis of the words set out by the Chief Commons Commissioner in Decision 1 dated 22nd November 1974, but it is quite clear that the Commons Commissioner was looking at the esoteric argument put forward by Mr Mills QC on behalf of Hampshire County Council, of whether this land was governed the interpretation as to whether it was 'of a manor' (as subsequently interpreted by Box Common), and whether Mr Whitfield was Lord of the Manor. It would seem clear that the Commons Commissioner was only asked

to look at the possible interpretation that the land was held by Mr Whitfield as 'of a manor' and the Commons Commissioner mentions nothing about whether this land was waste land or not.

23.1. We do not have notes of the arguments that were put before the Chief Commons Commissioner, but in the file of Messrs Stones Porter & Co, solicitors of London who acted for Mr Whitfield at that Hearing in 1974, we have a copy of a Statement of evidence which we can only but assume was put before the Commissioner, ie a statement by Mr Michael Royden Porter, employed as manager of Headley Wood Estate and who had been so employed since 1962. We attach a copy at Annex 1 hereto. It is clearly evidence prepared in anticipation of a Hearing under reference 14/D-20 for Broxhead Common, register unit CL147. It is not signed but it may be assumed that Mr Porter would have been called and would have given evidence (evidence to a Commons Commissioner being on oath), particularly as his employer (Mr Whitfield) was the Objector to the 'provisionally' registered rights claimed and to the 'provisional' registration of the land on the east side of the Sleaford/Lindford Road.

23.2. Mr Porter says that he had been employed as manager of the Headley Wood Estate since 1962. At that stage, the Estate was owned by a Mr S S Myers (as set out in the exhibits to the Application).

23.3. In paragraph 3, Mr Porter confirms that in or about March 1963, he began to clear part of the east side of Broxhead Common. The land was ploughed with the benefit of a grant from the Ministry of Agriculture. The first fencing was erected in the summer of 1963 with benefit of a Farm Improvement Scheme granted by the Ministry. Perimeter fencing of some 80 acres was completed about August 1964, consisting of three separate enclosures of 24, 18 and 30 acres respectively.

23.4. In paragraph 5, Mr Porter sets out

'5. In or about July 1970 Headley Wood Estate was bought by Mr Whitfield and I continued to be employed as farm manager and have so continued to the present day [the 'present day' being 1974 when the Hearing was to take place before the Chief Commons Commissioner]'

23.5. Mr Porter continues as follows, at paragraph 6

'6. At the present time, the land which was cleared and fenced referred to above forms an integral part of the farming unit, such land comprising 80 acres out of the 300 acres of farming land belonging to Headley Wood Farm'

23.6. Clearly, the said land had ceased to be, and was not at the date of the Hearing in 1974 'waste land' – whether of a manor or not – it had, at that time, become demesne land.

24.1. In 1973, proceedings were started in the Aldershot and Farnham County Court, plaint number 73/51089 in which John Harry Ellis, Peter Gordon Ellis and Leonard Hope Atkins as plaintiffs commenced proceedings against Mr Whitfield, claiming that since the 18th June 1968 the lands [ie, the 80 acres the subject of this Application] had been registered in the Register of Commons kept pursuant to its duty by Hampshire County Council under the Commons Registration Act 1965 provisionally registered as common land and since that said date, the plaintiffs had been the proprietors of rights provisionally so registered as appurtenant to their respective lands over the said common. They further pleaded that the Defendant had '*unlawfully and without the consent of the Secretary of State for the Environment as required by Section 194 of the LPA1925 erected a fence on a portion of the common whereby access to the common is prevented*

and the Defendant has illegally enclosed and encroached upon the common by fencing off a portion thereof'. They further pleaded that the Defendant (Mr Whitfield) threatened to erect further fencing, thereby illegally enclosing and encroaching the common, and the plaintiffs claimed an Order restraining the Defendant (Mr Whitfield) by himself, his servants, agents or otherwise from erecting a fence on Broxhead Common or otherwise enclosing or encroaching thereon, and an Order for the removal of the said fence.

24.2. Those proceedings were served on Mr Whitfield, and in due time, a Defence was filed with the Court.

Mr John Harry Ellis, the first of the Plaintiffs lodged with the County Court statement sworn by him dated 22nd August 1973. In that sworn statement, he claimed that he had registered his rights to graze 10 cows over the whole of the lands comprised in register unit CL147. Those rights were, of course, only provisionally registered, and as we know, they were not confirmed by the Chief Commons Commissioner over that part of the land lying to the east of the Sleaford/Lindford Road. None of the Plaintiffs in fact were found by the Chief Commons Commissioner to have any common rights on the lands to the east of the said road.

24.3.1. At paragraph 4, Mr Ellis stated

'4. In or about 1962, the late Mr Sefton Myers erected fences on Broxhead Common whose approximate position is shown in red on the plan attached to the Particulars of Claim herein and in or about 1969 when Mr Whitfield took over, he maintained the fences'

24.3.2. It is hardly necessary to point out that 1962, or 1963, was before the Commons Registration Act 1965, and the coming into force of that Act on 2nd January 1967.

24.4. Mr Ellis then talks about his objections through the Headley Parish Council to the said fences having been put up and that notwithstanding his objections the fences remained in place and accepted in paragraph 8 *'that therefore myself and some others of the Commoners Association being commoners exercised their right of abatement and removed all the fences except those near the perimeter of the common on the 28th July 1973'*.

25. Immediate injunction applications were commenced by Mr Whitfield and on the 12th September 1973, the Court ordered an Injunction against said John Harry Ellis in the following terms:

'2. An Order that an Injunction be granted restraining the first named plaintiff by himself, his servants, agents or otherwise from destroying or otherwise interfering with any fencing on the Defendant's land or any fences erected or to be erected by the Defendant in replacement of those destroyed by the first named plaintiff on or about the 28th July 1973, or otherwise trespassing on the Defendant's said land, such injunction to continue until the trial of this action or further order'

26. The Defence and Counter Claim filed with the Court on behalf of Mr Whitfield sought damages, being the cost of repairing the fences damaged by Mr Ellis in the sum of £2,000.00.

27.1. Following that Injunction, the matter of those Court proceedings in the County Court did not progress, presumably because it was necessary for the commoners to prove that they did, in fact, have common rights and that the lands were, in fact, and always had been, common lands, and that could only be determined by a Commons Commissioner's Hearing.

- 27.2. The fences were forthwith reinstated/repared by Mr Whitfield and the land (the 80 acres) within the fences continued to be farmed as part of Headley Wood Farm.
- 28.1. At Annex 2, there is enclosed a 'Site Plan' marked 'Management Guide' for Broxhead Common scale 1/5000 edition 1984/7 based on Ordnance Survey mapping which shows the 80 acres with their boundary fences and internal fences and Ordnance Survey NG numbers with hectarage and acreages given. The management plan also shows the area of land determined as a site boundary (thick black line), ie of the common, and as we will see later, leased to Hampshire County Council. Footpaths and bridleways, as registered under the Definitive Map of Public Paths are also shown thereon. The fields forming the 80 acres are not signified as being 'woodland, grassland (species poor), scrub or heath' – they were, in fact, improved and farmed fields.
- 28.2. It is quite clear as shown on the OS map that the said lands (the 80 acres) were observed and considered by the Surveyors of Ordnance Survey of being enclosed, cultivated and occupied, and were so indicated on the map.
- 29.1. As has been set out, following the Decision of the Chief Commons Commissioner, an Appeal was lodged by Mr Whitfield asking the Commons Commissioner to state a case for Hearing by the High Court, which came before Mr Justice Brightman, 24th March 1977. That Decision of the High Court was appealed by Mr Whitfield to the Court of Appeal where the terms of settlement as between the commoners, Mr Connell (and Mrs Cooke), Hampshire County Council who had requested to become additional Respondents, and Mr Whitfield were set out in the Settlement Schedule to the Order of the Court of Appeal (dated 21st May 1978). It is quite clear that at the time of the Hearing before the Court of Appeal, the fences enclosing

the said 80 acres were to the forefront of the Settlement, viz paragraph 2 and 3 of the Terms of Settlement set out in the Schedules (emphasis added):

*'2. The said Anthony Gary Peter Whitfield shall consent to all **proceedings in the Aldershot County Court under plaint number 7351069 being dismissed** with no order save that each party bear their own costs.*

*3. Upon the release by the Respondent, Ernest Alexander Connell, of all his rights over the area amounting to approximately 80 acres of land **at present enclosed by fences** upon the part of the common owned by the said Anthony Gary Peter Whitfield ... the said County Council shall not pursue its provisional registration of the said area as common land and the Respondents jointly and severally consent to the amendment and withdrawal by the said County Council of its provisional registration pending before the Commons Commissioner of the said area so as to exclude all reference to the said area on the Commons Register and shall further consent to and support any application by the said Anthony Gary Peter Whitfield or his successors in title of the Secretary of State regarding **the said fences** under Section 194 of the Law of Property Act 1925'*

It is quite clear that the land, at that stage, was fenced and enclosed, ie it was not waste land.

29.2. Following the Order of the Court of Appeal, a Deed of Release was entered into between Ernest Alexander Connell (Commoner) of the one part and Anthony Gary Peter Whitfield (Landowner) of the other part, dated 26th April 1978. The recital number 3 confirms that the Commoner, in consideration of the sum of £10,000.00 paid by the Landowner and on the terms thereafter appearing, had agreed to release to the Landowner his said rights of

common over that part only of Broxhead Common, owned by the landowner '**at present enclosed by fences** (amounting to approximately 80 acres) which part is more particularly delineated and shown edged red on the said plan ...'.

29.3. In the body of the deed, it was thereby witnessed that the Commoner, as Beneficial Owner, thereby conveyed and released unto the Landowner '*All and Singular the right of common of pasture and all other rights of common and commonable rights whatsoever to the said property known as Lindford Bridge House belonging to or appertaining upon or over that part only of Broxhead Common **presently enclosed by fences** and more particularly delineated and marked edged red on the plan attached hereto*'[emphasis added]. NB – the rights of common at that stage were still only 'provisional', and the entry relates to the land (80 acres)was still only 'provisional'.

29.4. It is confirmed that the plan attached thereto is the same edition as that referred to in Annex 2 herewith. For identification and assistance, we show on Annex 3 (which is produced as a reduced scale and abbreviated (at scale 1/1000) copy of the Ordnance Survey plan) edged red identifying the area shown edged red on the plan attached to the Deed of Release.

29.5. Clearly, it was fully appreciated that at that time, the land (the 80 acres) was enclosed by fences. It was not therefore open and it was occupied by Mr Whitfield and indeed it was cultivated by Mr Whitfield as part of the Headley Wood Farm.

30.1. The matter of the registration of the land as common land is by requirement of law after the Hearing before and Order of the Court of Appeal referred back to the Chief Commons Commissioner, who held a Hearing on the 6th November 1978. We do not have notes of that meeting, but it can only be but assumed, as would be perfectly normal, that at that Hearing,

the lawyers representing Mr Whitfield would have presented to the Chief Commons Commissioner the Order of the Court of Appeal, including the Schedule and would have also produced a copy of the Deed of Release of 26th April 1978.

- 30.2. The Chief Commons Commissioner would have clearly seen that the land was at the date of that Hearing not subject to rights of common (ie, the only surviving rights as provisionally registered had been surrendered by the Deed of Release of the 26th April 1978 and there were no other common rights because of the provisionally registered rights all bar two, had been cancelled by the Commissioner himself, and one of the two remaining had been cancelled by the High Court), and he would have then considered the second part of the definition of Section 22 (1) (b) and it would have also been clear that the said lands were no longer 'waste land' because clearly from the Order and Deed in front of him, the said lands had been enclosed by the fences, the lands were occupied and were cultivated, and therefore did not fall within the definition of 'waste land of a manor' and so were not registerable as common.
- 30.3. The only evidence we have of what happened at that Hearing is a letter dated 6th November 1978 from Stones Porter & Co Solicitors then acting for Mr Whitfield to their client (copy enclosed at Annex 4), which reads:

'Dear Mr Whitfield,

Just a short note to let you know that at a Hearing this morning, the Chief Commons Commissioner disposed of the Commons Registration proceedings by referring back exact instructions to the County Council for final entry of the matters to be registered in the Lands and Rights Sections of the Commons Register. Nothing untoward happened at the Hearing, the main thing being from our point of view, that the Lands Section of the

Register was altered to **delete the fenced area**, ie the area marked in red on the plan attached to the Deed of Release by Connell'

31.1. We also have further evidence provided by Mrs Comber herself and exhibited with her Application as to the existence and knowledge of the enclosure of the land and the fences so enclosing the land (the 80 acres) and in this respect, it is helpful to turn to the Report of the County Secretary (Hampshire County Council), regarding Broxhead Common (east) to the Land Sub Committee (of Hampshire County Council) of 22nd June 1978 produced as an exhibit to Mrs Comber's Application.

31.2. Paragraph 3 thereof confirms that the County Council took action to register the common as common land (the entry of course being 'provisional), and asked the Parish Councils for evidence as to the exercise of rights in substantiation of the registration

*'for the owner, who by then had **ploughed and fenced 80 acres** of the common, objected to the registration and that dispute was referred to the Commons Commissioners...'*

It recounts that some of the fences were ripped up by the putative commoners, because the required statutory consent had not been obtained and the resulting County Court injunction action was adjourned pending the finding as to the exact status of the land.

31.3. The report then sets out the Commons Commissioner's findings; where two commoners had their rights confirmed, and the High Court Hearing where only one of the commoners (Mr Connell) had had his rights confirmed.

31.4. Paragraph 7 sets out that a Rights of Way Sub Committee recognised a clash of interests which were basically conservation on the one hand and the wish of the farmer on the other to make the best use of the land, the owner wished to 'fence parts of the **uncultivated** parts of his land and reclaim by **ploughing a further** area to consolidate his **existing cultivated area...**' [ie the 80 acres].

31.5. 8. The owners proposals to **plough further areas** and therefore fragment the common have prevented the NCC from designating Broxhead as a Site of Special Scientific Interest which it otherwise deserves.

31.6. Paragraph 9 sets out the settlement proposals and at 9 (a) it is recorded

*'9 (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.'*

It then recounts that the County Council and Commoner would support an application by the owner to the Secretary of State to authorise the **existing fences**.

31.7. At 9 (b)

*'9 (b) the County Council is granted a 20 year lease at £200.00 per annum with upward reviews in the 5th, 10th and 15th years, of all the **unfenced and uncultivated parts of the common**, in order that they can be held and managed as a local nature reserve with appropriate public access'*

31.8. 9 (e) The outstanding County Court Proceedings are withdrawn subject to each party bearing their own costs.

31.9. Paragraph 10 refers in the first sub paragraph to the owners proposed use of '**his enclosed area**'.

The second sub paragraph refers to '**further ploughing**' confirming that the area so **enclosed was already ploughed**.

32. Mrs Comber has also enclosed with her Application a copy of a letter from Hampshire County Council of 31st October 2012 from a Judith Downing, Head of Information Compliance. The earlier correspondence is not enclosed, but it seems some 34 years after the Chief Commons Commissioner had issued his Final Determination Notice, Mrs Comber is complaining about the fencing in of the 80 acres – see references to **fencing of the 80 acres** on the second page of that letter.

33. It is quite clear then from at least 1962 or 1963, the 80 acres has been fenced in, ie enclosed, firstly by Mr Myers and after the disturbance to the fencing by Mr Ellis, which fencing had been repaired and restored (ie enclosed) by Mr Whitfield, and that fencing continues to this day – a total of the last 61 years the land has not been 'waste land'.

34.1. The land cannot fall within the definition of 'waste land'. As the editors of the Third Edition of Gadsden and Cousins on 'Commons and Greens' set out at paragraph 3 – 28, when commenting on the necessity of the land to be 'open' within its definition of waste land,

'open, in this context, means unenclosed...'

'Enclosure of waste is probably the most unequivocal act possible to indicate an intention that it should cease to be waste.'

'What might be said to distinguish enclosure for the purpose of determining whether land is 'open' is whether the land has been modified to create new internal or perimetral boundaries for the benefit of those managing the land – as opposed to existing perimetral boundaries for the benefit of, and generally maintained by, those managing the adjoining land'

34.2. It has been held by Commons Commissioners that land that has been fenced and cultivated has been taken into demesne by the acts of cultivation.

35. The editors of Gadsden and Cousins at paragraph 3.29 refer to the definition of 'uncultivated' and set out that whether land has been cultivated seems to be partly a question of degree of cultivation '*land taken into arable cultivation ... is unequivocally sufficient*' [ie ploughing].

As we have seen from the Reports and letter referred to above, it is quite clear that the land (the 80 acres) was and remains at all times fenced off and cultivated, ie ploughed. A simple examination at the present time would have shown the Applicant and her advisors that the land continues to be enclosed and cultivated and cannot possibly fall within the definition of 'waste land'. The whole of the Application of Mrs Comber, as referred to above is totally flawed.

36. The question of land being 'unoccupied' is dealt with by the said editors of Gadsden and Cousins in paragraph 3.30. There is no question that the land has been let or leased. It is

farmed and cultivated by Mr Whitfield (from his purchase of the Estate in 1970, and formerly, from 1963 to 1970, by Mr Myers. The land is not, therefore, unoccupied. It is clearly occupied by Mr Whitfield as part of his farm and demesne lands. It is clearly part of the 'demesne' lands, ie he has them in hand. There is clearly physical fencing. There is clearly practical occupation and improvement of the land (ploughing) and the growing of arable crops which shows an intention and exclusive and profitable use, and when down/sown to planted grassland is grazed intensively and exclusively by the animals of Mr Whitfield.

37. As we have set out before, it is clear from the Decision of Mr Justice Gough in CEGB v Clwyd CC [1976] 1WLR151 as confirmed by Corpus Christi College (Oxford) v Gloucestershire CC (1983) QB360 that the correct date to consider the state of the land is the date of the Hearing. Whether that Hearing, as referred to above will be the date of any consideration by Hampshire County Council, if so enabled, as allegedly claimed by Mrs Comber to be so enabled by virtue of the comments of DEFRA, or, as set out by Paragraph 4 of Schedule 2 of the 2006 Act to be implemented to Hampshire County Council in due course. The 'Hearing' will consider the status of the land as at the date of that Hearing, and clearly the land would not pass inspection to fall within the definition of 'waste land'; whether 'of' a manor is immaterial, and can be ignored. In any event, the lands (the 80 acres) does not pass the required test of being 'waste land' at the date of any application to be made under Schedule 2, paragraph 4 (2) and (1) (ie, it does not pass the present tense of the word 'is' at the time of the application, waste land).
38. No evidence appears to have been led by Mrs Comber as to whether Hampshire County Council sought to become Respondents to the Court of Appeal proceedings because they were 'Commons Registration Authority' or were the Recreation Committee of Hampshire County Council. It was that Committee who appears actually to have endorsed the terms of

the settlement, although the County Council, itself (as CRA) was the entity who undertook the application for registration of the land in the first place. It matters not – the land (the 80 acres) was not, and is not, 'waste land'.

39.1. As emphasised in paragraph 14 of Mrs Comber's Application and if it is appropriate for the County Council to consider whether it can hear such Application which we maintain they cannot, bearing in mind the provisions of Section 4 (6) of the 1965 Act, then the Registration Authority will need to consider whether new criteria of Hampshire County Council v Milburn (which is not actually a statutory definition, it is an interpretation by the Courts) would permit a different outcome when applied to the known facts – the known facts which would be clear to Hampshire County Council and have been clear throughout, is that 'yes', the matter of whether the holding is 'of' a manor would be determined in favour of the Milburn interpretation, but the County Council would have to take into account that the land clearly is not waste land within the definition of Attorney General v Hanmer and therefore the Application of Mrs Comber should quite properly be dismissed as showing no grounds for consideration or reconsideration of the effect of the Register or of the FDN issued by Chief Commons Commissioner Squibb QC. The Application shows no reason why Hampshire County Council would (even if it were to consider the matter) change the effect of the registration as now appears on the Register of Common Land for CL147.

39.2. Mr Justice Gough (as he then was) used the expression 'unanswerable'. Mr Whitfield's objection to the Application is unanswerable. The land (80 acres) is simply not 'waste land'.

40. The land (the 80 acres) has been enclosed, cultivated and occupied for 61 or 62 years, ie 1962/1963 to 2024, and continuing – it is not 'waste land' of a manor' to fall within part (b) of the definition of 'common land' under Section 22 (1) CRA 1965 and does not fall to be

considered under the terms of Paragraph 4 Schedule 2 CA 2006. The Application of Mrs Comber should be rejected, or more properly 'not accepted' as having any validity.

Enclosures referred to herein

- Annex 1 Copy statement of Michael Roydon Porter prepared by Stones Porter Solicitors of London for the occasion of the Hearing before the Chief Commons Commissioner in 1974.
- Annex 2 Site Plan Management Guidelines scale 1/5000 prepared by Hampshire County Council in 1978 based on OS Map, edition date unknown.
- Annex 3 Plan showing edged red the area of lands (80 acres) released by Mr Connell in Deed of Release (reduced to 1/10000 scale from 1/2500), for interpretation only.
- Annex 4 Copy of letter from Stones Porter Solicitors of London following the Hearing of the 6th November 1978. They acted for Mr Whitfield and were present at the Hearing before the Chief Commons Commissioner.

Dated

17th December 2024

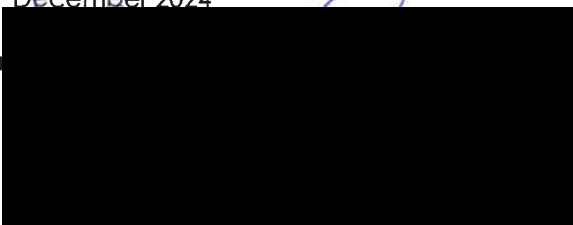
Edward Harris Solicitor

Tredegar Fawr

Llangyfelach

Swansea

SA5 7LS



OBJECTION

BY MR A.G.P. WHITFIELD

To

**Application by Mrs Maureen Comber to register 80
acres of Headley Wood Farm as Common Land
under the provision of the Commons Registration Act
1965**

Annex 1

Copy Statement of Michael Roydon Porter

**Edward Harris Solicitor
Tredegar Fawr
Llangyfelach
Swansea
SA5 7LS**

①
COMMONS REGISTRATION ACT 1965

REF. NO. 14/D/20

BROXHEAD COMMON

REGISTER UNIT CL 147

EVIDENCE OF MR M R PORTER

Stones Porter & Co.,
26/27 Farringdon St.,
London EC4A 4AQ

I, MICHAEL ROYDEN PORTER

of Woodside Headley Wood Farm Headley Bordon Hampshire
WILL PROVE AS FOLLOWS:-

1. I have been employed as manager of the Headley Wood Estate since 1962. The estate includes 170 acres approximately of land known as Broxhead Common.
2. In 1962 the whole of Broxhead Common was covered by scrub consisting mainly of gorse heather and bracken and apart from the area cleared by me to which I will refer later the land has remained in such condition until the present day.
3. In or about March 1963 I began to clear part of the east side of Broxhead Common. The land was ploughed with the benefit of a grant from the Ministry of Agriculture. The first fencing was erected in the summer of 1963 with the benefit of a farm improvement scheme grant from the Ministry. Perimeter fencing of some 80 acres was completed by about August 1964 consisting of three separate enclosures of 24, 18 and 38 acres respectively.
4. At the time that I carried out these improvements I was not aware of any subsisting rights of common over this land. At no time either then or subsequently have I seen anyone exercising or attempting to exercise any rights of common over the land known as Broxhead Common.
5. In or about July 1970 Headley Wood Estate was bought by Mr. Whitfield and I continued to be employed as farm manager and have so continued to the present day.
6. At the present time the land which was cleared and fenced referred to above forms an integral part of the farming unit such land comprising 80 acres out of the 300 acres of farming land belonging to Headley Wood Farm.
7. Prior to 1962 I lived in Sussex and therefore have no knowledge of the use of the Common before that date.

OBJECTION

BY MR A.G.P. WHITFIELD

To

**Application by Mrs Maureen Comber to register 80
acres of Headley Wood Farm as Common Land
under the provision of the Commons Registration Act
1965**

Annex 2

**Site Plan A3 - Management Guidance Hampshire
County Council scale 1/500**

**Edward Harris Solicitor
Tredegar Fawr
Llangyfelach
Swansea
SA5 7LS**

OBJECTION

BY MR A.G.P. WHITFIELD

To

**Application by Mrs Maureen Comber to register 80
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1965**

Annex 3

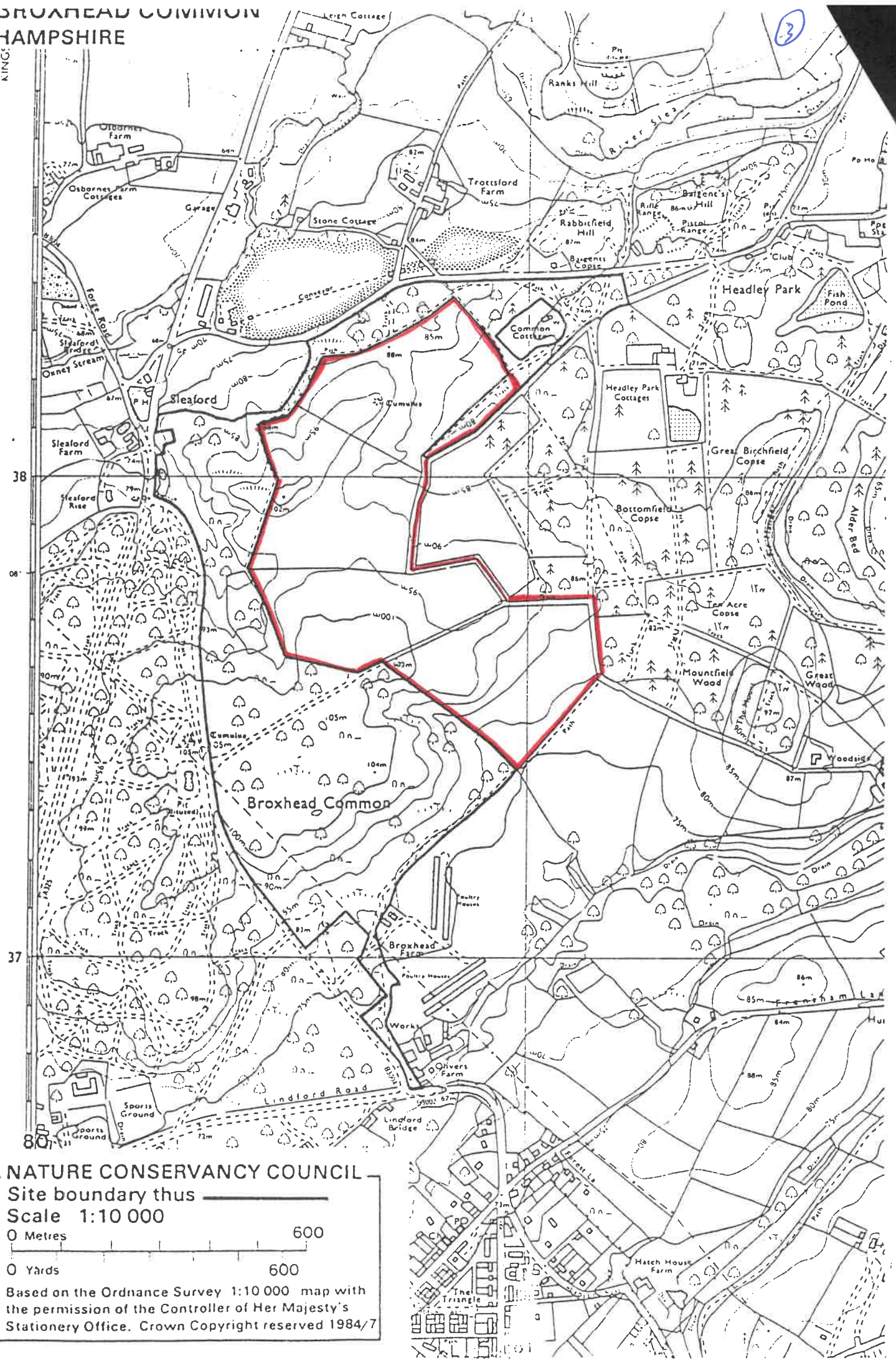
**Coloured Edged Red land released (Common
Rights) by Mrs Connell**

**Edward Harris Solicitor
Tredegar Fawr
Llangyfelach
Swansea
SA5 7LS**

BROXHEAD COMMON HAMPSHIRE

KING

3



NATURE CONSERVANCY COUNCIL

Site boundary thus 

Scale 1:10 000



Based on the Ordnance Survey 1:10 000 map with the permission of the Controller of Her Majesty's Stationery Office. Crown Copyright reserved 1984/7

OBJECTION

BY MR A.G.P. WHITFIELD

To

**Application by Mrs Maureen Comber to register 80
acres of Headley Wood Farm as Common Land
under the provision of the Commons Registration Act
1965**

Annex 4

Letter

Stones Porter, 6th November 1978

**Edward Harris Solicitor
Tredegar Fawr
Llangyfelach
Swansea
SA5 7LS**

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YOUR REF

OUR REF 49

6 November 1978

Dear Mr Whitfield

Just a short note to let you know that at a hearing this morning the Chief Commons Commissioner disposed of the Commons Registration proceedings by referring back exact instructions to the County Council for final entry of the matters to be registered in the Lands and Rights Sections of the Commons Register. Nothing untoward happened at the hearing, the main thing being from our point of view that the Lands Section of the Register was altered to delete the fenced area, i.e. the area marked in red on the plan attached to the Deed of Release by Connell.

Yours sincerely

R PARKINS

A G P Whitfield Esq
Headley Wood Farm
Headley
Bordon
Hants