HAMPSHIRE COUNTY COUNCIL

Background Report

(Non-Executive Decision)

Decision Maker	Jonathan Woods – Countryside Access Group Manager
Title	Application to deregister land wrongly registered as common land (Schedule 2 Paragraph 7 of the Commons Act 2006) CL124 – Phoenix Green, Hartley Wintney
Date	7 May 2020

Tel: 01962 846044 **Email:** harry.goodchild@hants.gov.uk

1. The decision:

1.1. Hampshire County Council, in its capacity as Commons Registration Authority ('CRA') for Hampshire, has received an application from the J P & S Services Limited, under Schedule 2 Paragraph 7 of the Commons Act 2006, for the deregistration of land within falling partially within its ownership. The application asserts that, at the time of first registration, the land known as Phoenix Green (now recorded on the register as CL 124), was not common land (see location map for details).

1.2. Following a consideration of the application, the evidence provided in its support, representations made following the advertisement of the applications and further submissions made by the applicant in response, it is considered that the requested amendment should be made to the commons register.

2. Reason(s) for the decision:

2.1. Schedule 2 Paragraph 7 provides for applications to be made to the CRA to deregister land that was wrongly registered as common land. The test to be met for the land to be deregistered is that:

(a) the land was provisionally registered as common land under section 4 of the 1965 Act;

(b) the provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act;

(c) the provisional registration became final; and

(d) immediately before its provisional registration the land was not any of the following—

(i) land subject to rights of common;

(ii) waste land of a manor;

(iii) a town or village green within the meaning of the 1965 Act as originally enacted; or

(iv) land of a description specified in section 11 of the Inclosure Act 1845 (c. 118).

2.2 In this instance, the land was provisionally registered on 26 March 1968, thus meeting the requirements of subsection (a), and although the matter was referred to a Commons Commissioner this was under Section 8 of the 1965 Act (as a result of the ownership of the land being unknown) rather than Section 5. The provisional registration became final on 1 October 1970 (thus fulfilling subsection (c)), and documents accompanying the original application (made by Hartley Wintney Parish Council) reflected that prior to provisional registration the land was not subject to any rights of common (see subsection (d)(i)). This left only subsections (d)(ii-iv) still to be addressed (See paragraph 2.4).

2.3 The regulations associated with these applications require that consultations are carried out with interested parties (including affected landowners, those with a right of common on the affected land, and other individuals who have been asked to be consulted on such proposals), and that they are advertised on the CRA's website and notices erected on site for a period six weeks. A copy of this notice can be viewed at Appendix 1.

2.4 The consultation period for the application commenced on 5 July 2019. During the six week period, an objection was received from the Open Spaces Society (OSS), citing a lack of evidence required to meet all the tests set out in Paragraph 7. Upon carrying out additional research, the applicant's representatives submitted additional material to address this shortfall, and after further exchanges between the parties, ultimately sought counsel's opinion (see 2.5).

2.5 Evidence provided in support of the application by the Heritage Network (see Appendix 2) includes historic Ordnance Survey mapping dating back to 1872 and the Hartley Wintney Tithe Map and Apportionment of 1844. It is submitted that, based upon this evidence *"it is clear that the study area was wrongly classified as manorial waste and, by extension, wrongly registered as common land".* Further submissions on the applicant's behalf by Philip Petchey of Francis Taylor Building (Appendix 3) address subsection (d)(iii) and (iv). The OSS was content that these further submissions satisfied the relevant requirements in respect of the application land, and subsequently withdrew its opposition to the application being granted. Having reviewed all the relevant material, and having had regard to all representations, officers consider that the requested amendment should be made to the register in respect of CL124.

2.6 Section 36 of the 2014 Regulations requires that the CRA gives written notice of its decision (and its reasons for reaching the decision) to the applicant, any person who made representations concerning the application. It is proposed that should be carried out following the approval of this recommendation.

3. Other options considered and rejected:

3.1. N/A

4. Conflicts of interest:

4.1. N/A

5. Dispensation granted by the Head of Paid Service:

5.1. None

6. Delegated Authority

6.1 This decision has been taken on the basis of express delegation from the Regulatory Committee.

7. Consultations

7.1 Open Spaces Society, Local Member (County Councillor David Simpson), Hart District Council, English Heritage, Natural England, Hartley Wintney Parish Council, DEFRA. Only the OSS responded.

7.2 A response was received from a local resident, having noted the notices that had been erected on site. They supported the application to deregister, stating that they would be *"pleased to get this land under management."*

8. Supporting information:

- Appendix 1 – Notice of application
- Appendix 2 – Report of Heritage Network
- Appendix 3 – Advice of Philip Petchey, Francis Taylor Building
- Location Plan

Approved by:	**Date:**
Jonathan Woods, Countryside Access Group Manager On behalf of the Director of Culture, Communities and Business Services	**7 May 2020**

CORPORATE OR LEGAL INFORMATION:

Links to the Corporate Strategy

Hampshire safer and more secure for all:	no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	no
Corporate Improvement plan link number (if appropriate):	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document	Location
Reference: 04/18 (Phoenix Green)	Countryside Access Team Castle Avenue Winchester SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment:

N/A

2. Impact on Crime and Disorder:

N/A

3. Climate Change:

How does what is being proposed impact on our carbon footprint / energy consumption?

N/A

How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts? N/A

Commons Act 2006
Application to remove
CL32
CL124 from the commons register

Phoenix Green, Hook, Hartley Wintney, Hampshire, RG27 8RT

Application land outlined in red

1:500

Works

Garage

Hawthorn Cottage

The Phoenix (PH)

CL32

74.7m

Pond

Posts

CL124

L B

Morella Cottage

1 3

1 8

8

2 2

7

El Sub Sta

CL32

Hampshire County Council

COMMONS AND VILLAGE GREENS

Registered as Common

Registered as Village Green

Extinguished from the register
(labelled with the suffix 'X' **X**)

This plan is an interpretation of the registers and does not have the legal status of the original maps

Should you need a copy of the original map sheet, one can be sent electronically to a valid email address. We are not able to provide paper copies of the original maps.

Hampshire County Council

The Commons Act 2006 - Schedule 2 Paragraph 7
Application to deregister land
wrongly registered as common land

Notice is hereby given that an application has been made under the above-named provisions by J P & S Services Limited of 102 Fulmer Drive, Gerrards Cross, SL9 7HE, to Hampshire County Council as Commons Registration Authority, in respect of land falling within its ownership (as shown outlined in red on the accompanying plan and described more fully below).

A summary of the effect of the application is as follows:

The land was provisionally registered as common land on 26 March 1968, under Section 4 Commons Registration Act 1965, and forming part of Phoenix Green (CL124). The provisional registration, being undisputed, became final on 1 October 1970. However, due to the absence of an identifiable landowner, the matter was referred to a Commons Commissioner who, not being satisfied that any person was the owner of the land, ruled that it should remain subject to protection under Section 9 of the Commons Act 1965.

No right of common is recorded in the register for CL124, and on this basis it is asserted by the applicant that the land was mistakenly registered. The application seeks to remove from the Commons Register that parcel of land shown on the accompanying plan. If the application is granted, in whole or in part, the registration authority will give effect to the determination by removing part of the land from the register of common land.

Representations:

- must quote the Application No. 04/18 – CL124
- must state the name and postal address of the person making them, and the nature of that person's interest (if any) in any land affected by the application, and may include an e-mail address;
- must be signed by the person making them;
- must state the grounds on which they are made; and
- must be sent to: The Commons Registration Authority, Hampshire County Council, Castle Avenue, High Street, Winchester, Hampshire, SO23 8UL or by email to countryside@hants.gov.uk

Representations cannot be treated as confidential. Any representations in respect of this application must be received by **16 August 2019**.

The notice relating to the application is available at www.hants.gov.uk/publicnotices
The application, and its accompanying documents, can be inspected at the above address during normal working hours.

Dated this 3rd day of July 2019

JONATHAN WOODS, Countryside Access Group Manager, Countryside Service, Hampshire County Council, Castle Avenue, Winchester, Hampshire, SO23 8UL

Description of the land concerned:

A triangular area of land of approximately 0.05 acres, situated to the south-west of the Phoenix Inn public house, London Road, Hook, in the parish of Hartley Wintney, centred on Ordnance Survey grid reference SU 7589 5577.

The personal data you provide in connection with applications to amend the registers of commons and village greens will be treated in accordance with Data Protection Legislation. The information you provide may be published in a decision report, and may also be disclosed to other interested parties, including the landowner (or their representatives) and the Planning Inspectorate. It may also be produced at a public inquiry. It will become part of the permanent records kept on commons and village greens in Hampshire. The legal basis for our use of this information is the compliance with a legal obligation – The Commons Act 2006. You have some legal rights in respect of the personal information we collect from you. Please see our website Data Protection page for further details: www.hants.gov.uk/dataprotection

You can contact the County Council's Data Protection Officer at data.protection@hants.gov.uk If you have a concern about the way we are collecting or using your personal data, you should raise your concern with us in the first instance or directly to the Information Commissioner's Office at https://ico.org.uk/concerns/

Land adjoining Phoenix Green Service Station, Hartley Wintney

HN1524

CARTOGRAPHIC ASSESSMENT

INTRODUCTION

This report has been prepared at the request of *Talbot Walker LLP*, acting on behalf of *J.P. & S. Servicess Ltd* to support an application for the deregistration of a plot of land incorrectly registered as common land, located on the east side of the A30 London Road and immediately to the south of the Phoenix Green Service Station, Hartley Wintney, RG27 8RT.

The Heritage Network is an independent practice specialising in archaeology and the historic environment. Founded in 1992, the company undertakes a wide variety of commercial projects for clients involved in housing and industrial development, pipeline and road construction, agriculture and landscaping, and the conversion and alteration of historic buildings. As a Registered Organisation, the company is monitored annually by the Chartered Institute for Archaeologists (CIfA) to ensure that its work meets the highest professional standards.

The present project has been undertaken by David Hillelson BA MCIfA, the Heritage Network's Managing Director. He holds an honours degree in archaeology from the University of Durham and has extensive experience of the management of heritage projects, and of fieldwork in both urban and rural contexts. He has been the practice's principal officer since 1992 and is a specialist in, *inter alia*, researching the history of land use in the context of planning and development.

BACKGROUND

The study area forms a trapezoidal plot that lies between the A30 London Road and the western boundary of no.11 Mortimer Close (Figure 1). Its northern boundary forms a continuation of the northern boundary of the Mortimer Close estate, which also forms the southern boundary of the Phoenix Inn. The plot is recorded on the Land Registry as being in the freehold ownership of *J.P. & S. Servicess Ltd*.

In March 1968, a successful application was made to Hampshire County Council by the Hartley Wintney Rural District Council, for the registration of nine plots of land that the Council believed to be part of the manorial waste, under the terms of the *Commons Registration Act* 1965. The present plot was one of this number. Manorial waste was defined in 1958 by The Royal Commission on Common Land as "part of the demesne of a manor left uncultivated and unenclosed, over which the freehold and customary tenant might have rights of common." The "demesne" is that part of a manor which the lord did not grant out but normally retained for his own occupation and use or that of his servants, as distinct from the manorial land farmed by the villagers. Typically, this might be expected to include hedges, verges, etc.

The present owner of the plot believes that its registration was incorrectly gained on the premise that the plot fell outside of any enclosed land over which rights of tenure had been established.

BRIEF AND METHODOLOGY

The present study was commissioned with the aim of establishing that the study area falls within an area of land that had been enclosed by at least 1843, the date of the Hartley Wintney Tithe Award, and thus separated from the manorial demesne.

To achieve this, a *map regression* exercise has been carried out, to accurately locate the plot of land on a series of historic maps extending from the present day to the Tithe Map of 1844, which records the extant buildings and land boundaries at that time. The accompanying Tithe Apportionment of 1843, lists owners and occupiers of each numbered plot, and records its size, its use and its titheable value. The map regression exercise uses the relationship between the present plot and features that are common to adjacent maps, to establish the location of the plot on each historic map, irrespective of alterations to depicted boundaries and buildings. Where survey techniques have changed between map generations, a best-fit approach has been adopted.

CARTOGRAPHIC EVIDENCE

The present location of the study area is shown on the current digital Ordnance Survey map (Figure 1). This places it on the eastern side of a wide verge bordering the A30 London Road and in the northwest corner of a sub-triangular plot forming the Mortimer Close housing estate. To its north is The Phoenix Inn, and the Phoenix Green Service Station. The registered plot does not match the boundaries shown on the map, which define a longer and wider area.

The larger area is more clearly shown on the 1:2500 Ordnance Survey map of 1977 (Figure 2), which shows the study area to be the northern half of a well-defined triangular plot forming the north-west corner of the Mortimer Close estate, and separate from the roadside verge.

The 25-inch Ordnance Survey map of 1945 (which was actually surveyed in 1939, but not published until after WWII), shows the study area occupying the north-western corner of Field Parcel 539, which later became the Mortimer Close estate (Figure 3). This field is separated by a boundary from the adjacent Phoenix Inn, to the north.

The 25-inch Ordnance Survey map of 1911 (Figure 4), shows a different boundary layout between the Phoenix Inn and the field to its south. At this period, the study area straddles the boundary, lying partly in the plot occupied by the southern outbuildings of the inn, and partly in Field Parcel 284.

Field Parcel 284 has a larger footprint on the 25-inch Ordnance Survey map of 1896 (Figure 5), encompassing the southern outbuildings of the inn. The study area lies wholly within this parcel at this period and a similar arrangement is shown on the 25-inch Ordnance Survey map of 1872 (Figure 6), although the Field Parcel is here numbered 315.

The Tithe Map of 1844 (Hampshire Record Office ref.21/M65/F7/109/2), shows the study area occupying a plot immediately to the south of the south range of the Phoenix Inn, apparently falling within Plot 370 (Figure 7). The extent of Plot 370 has been estimated on the basis of its recorded area of 3 roods and 17 perches, which equates to 3465m^2, and is shown as a green dashed line on Figure 7. Plot 370 is recorded in the accompanying Tithe Apportionment (Hampshire Record Office ref.21/M65/F7/109/1) as 'The Phoenix Inn', owned by The Revd. Thomas Matthews and occupied by James Moore. The field to the south, Plot 371, is described as 'pasture' with an area of 1 acre 2 roods and 8 perches (6270m^2), and is also owned by The Revd. Thomas Matthews and occupied by James Moore.

The Tithe Map and Apportionment also define the areas of common land. Plot 494, which extends to the west and south of the study area (Figure 8), is recorded as measuring 19 acres 2 roods and 2 perches in area. It appears to be wrongly titled in the Tithe Apportionment as 'Common west of Turnpike', while Plot 495, to the north, is titled Phoenix Green. The acreage for Plot 494 is approximately correct for the delineated area.

DISCUSSION

The aim of the present report has been to demonstrate that the study area was wrongly classified as part of the manorial waste of Hartley Wintney at the time that it was registered as common land in 1968, and to show that, in fact, it forms part of a plot of land that was recorded as being in private ownership at the time that the Tithe Award was drawn up in 1843.

The location of the study area has been accurately tracked back, across six historic maps, to show its definitive location on the 1844 Tithe Map. This places the area within Plot 370, and within the ownership of the Revd. Thomas Matthews. Furthermore, the Tithe Map confirms that the boundary of the nearby common land, forms the western boundary of the study area. While the ownership of the study area may have changed in the course of time between 1844 and the present (and that has not been the concern of this report), it has remained part of a defined land parcel that is clearly separate from the adjacent common.

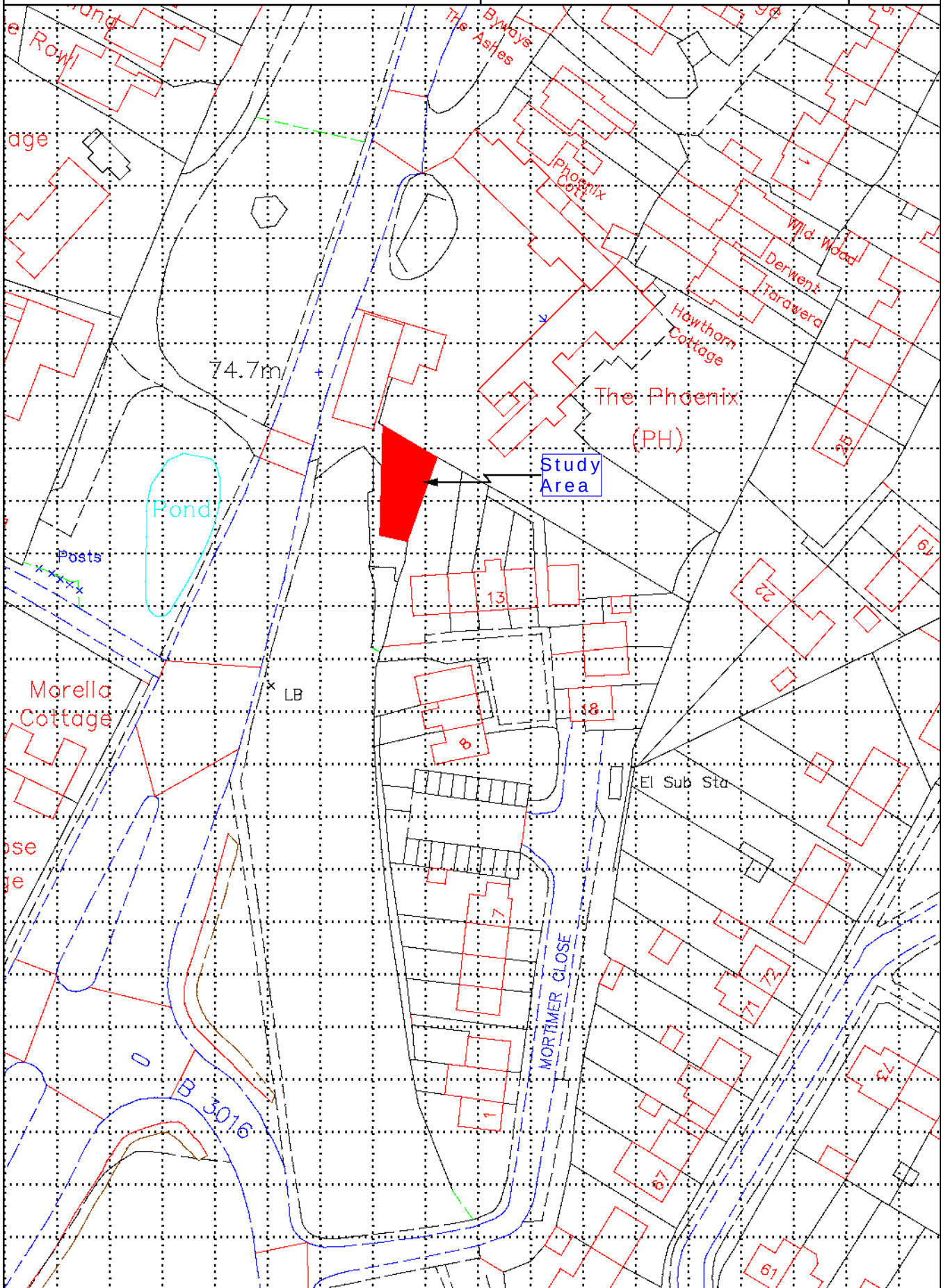
CONCLUSION

On the basis of the evidence here presented, it is clear that the study area was wrongly classified as manorial waste and, by extension, wrongly registered as common land.

ILLUSTRATIONS

David Hillelson BA MCIfA
26 September 2019

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524

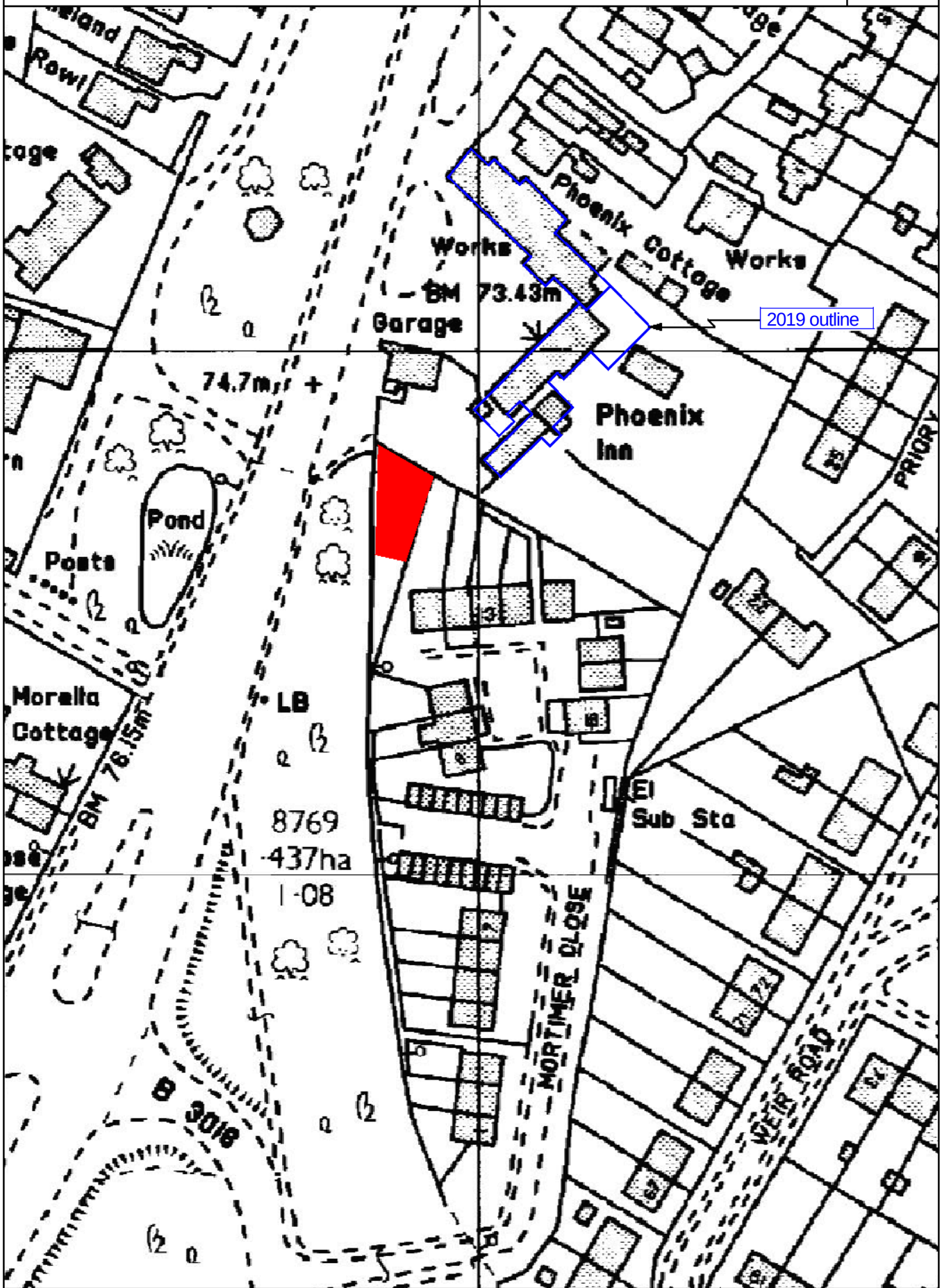


Ordnance Survey Map, 2019

Scale 1:1000

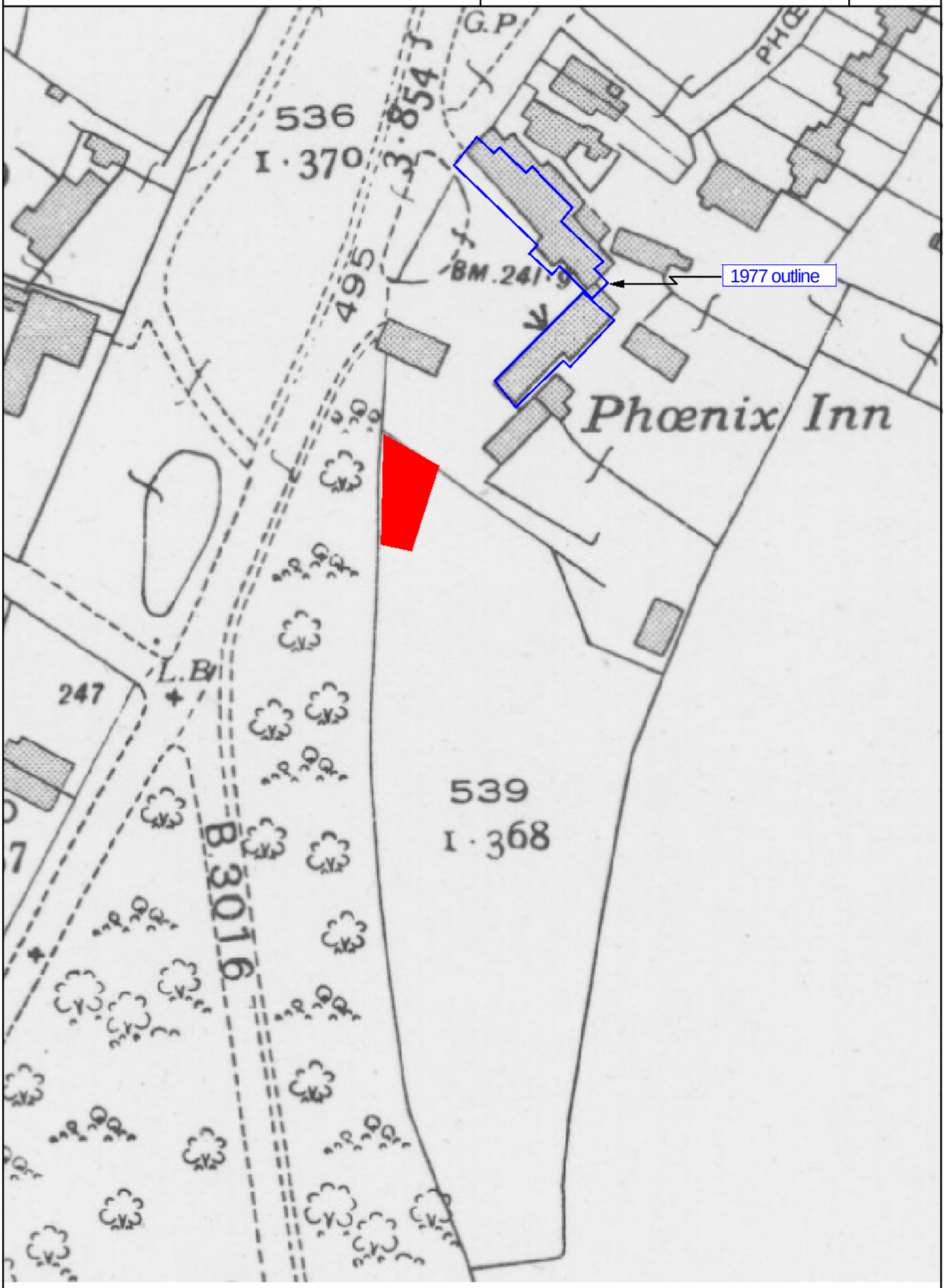
Figure 1

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



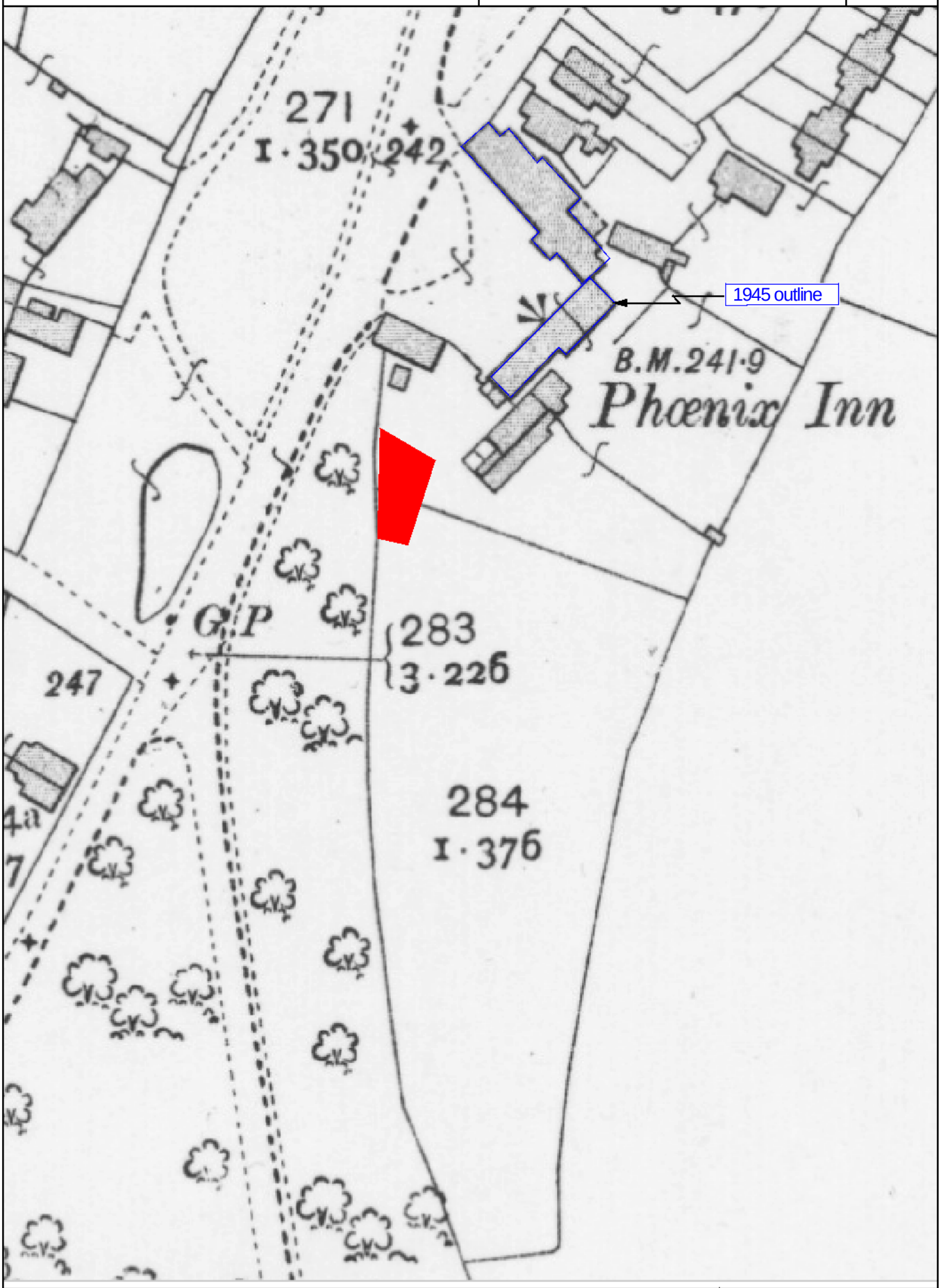
Ordnance Survey Map, 1977	Scale 1:1000
	Figure 2

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



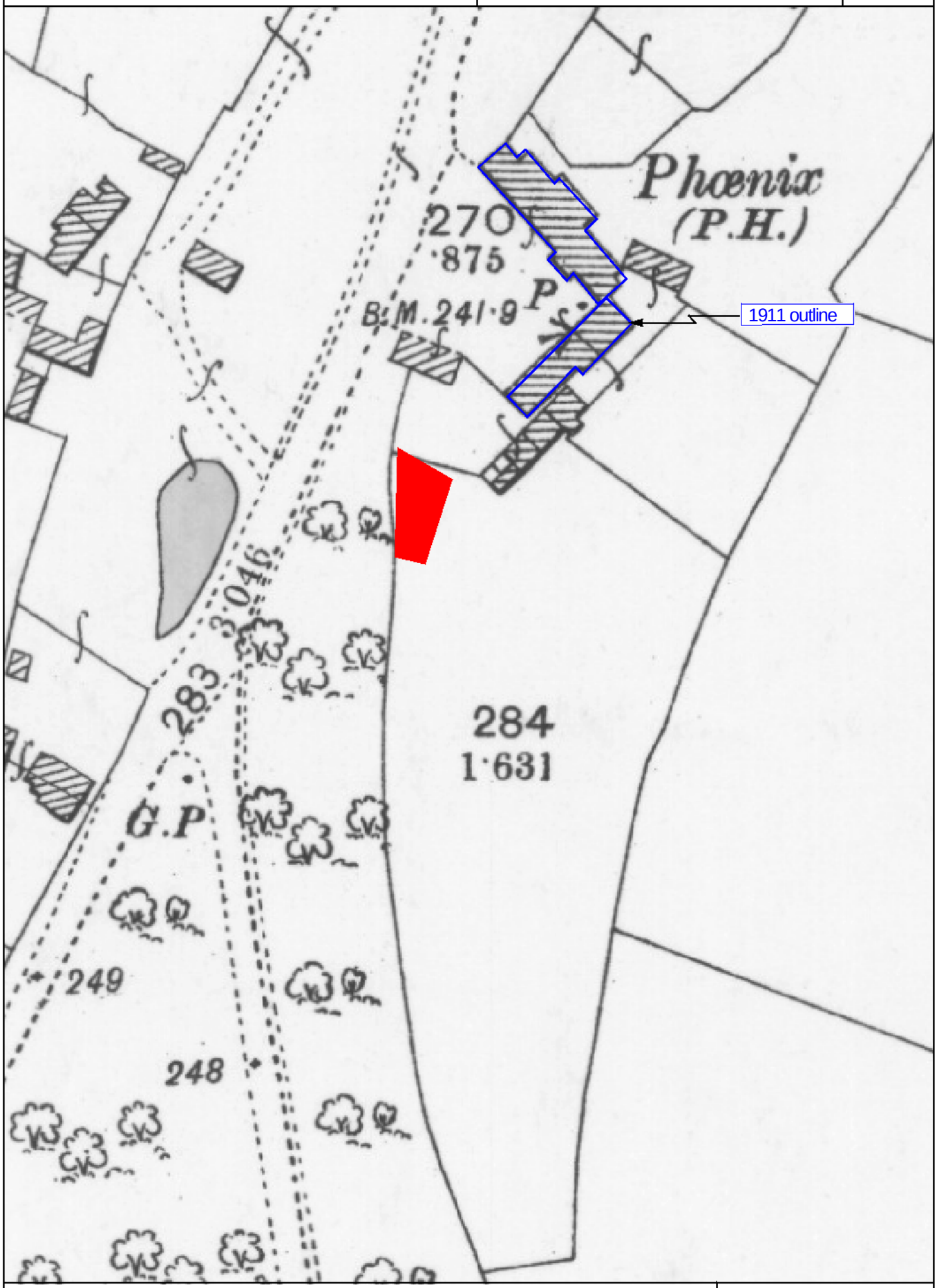
Ordnance Survey Map, 1945 (Surveyed 1939)	Scale 1:1000
	Figure 3

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



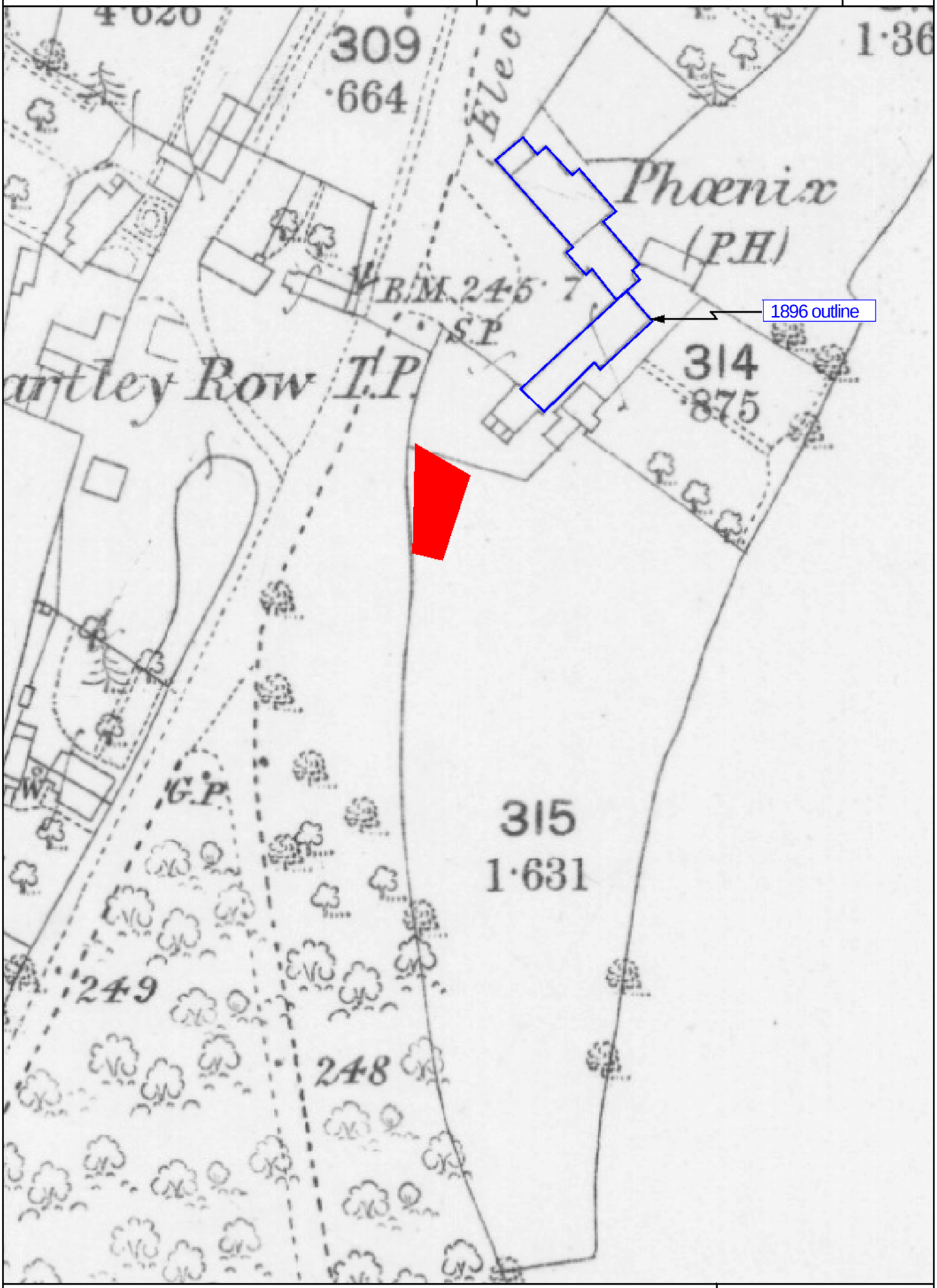
Ordnance Survey Map, 1911	Scale 1:1000
	Figure 4

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



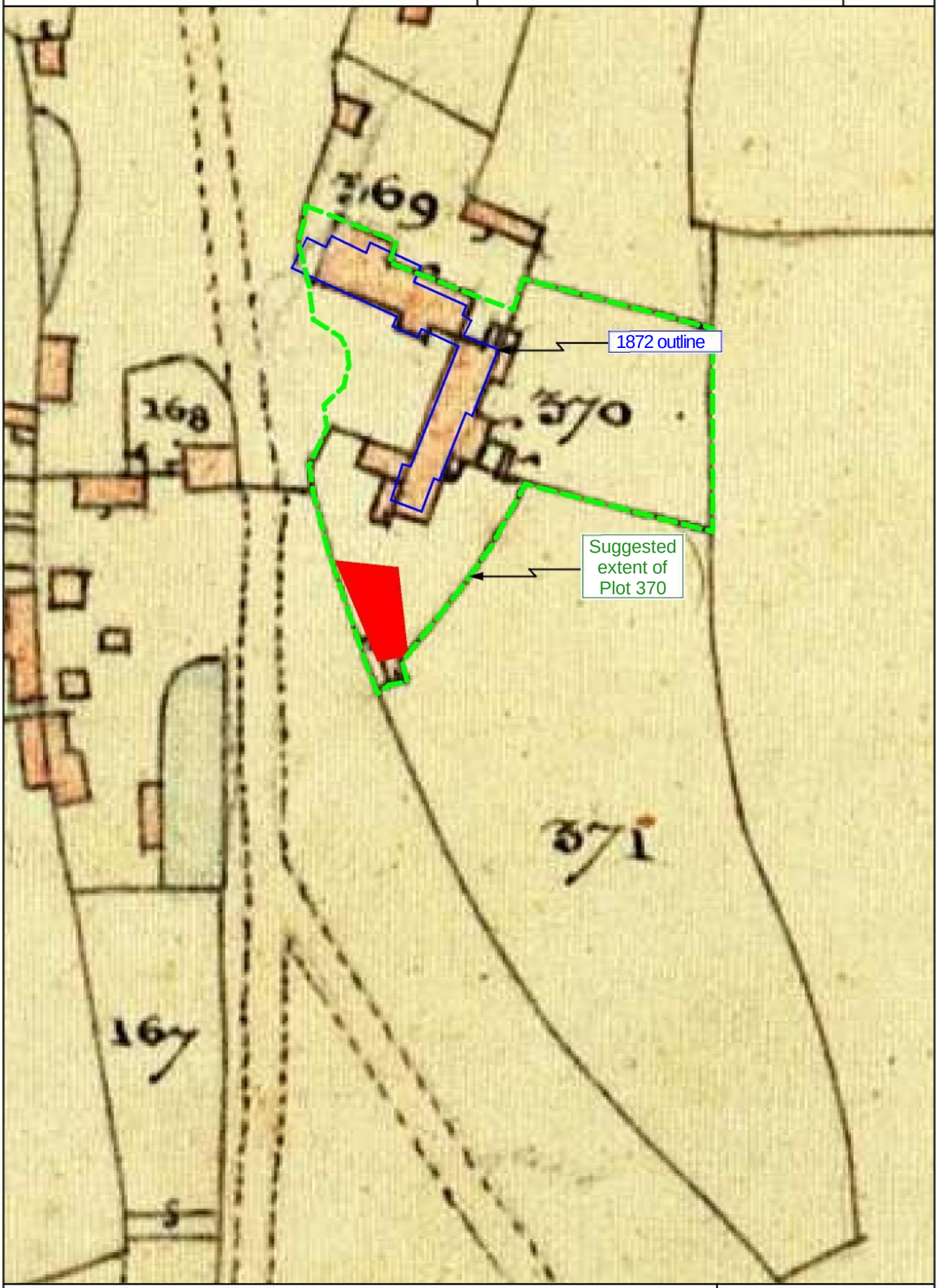
Ordnance Survey Map, 1896	Scale 1:1000
	Figure 5

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



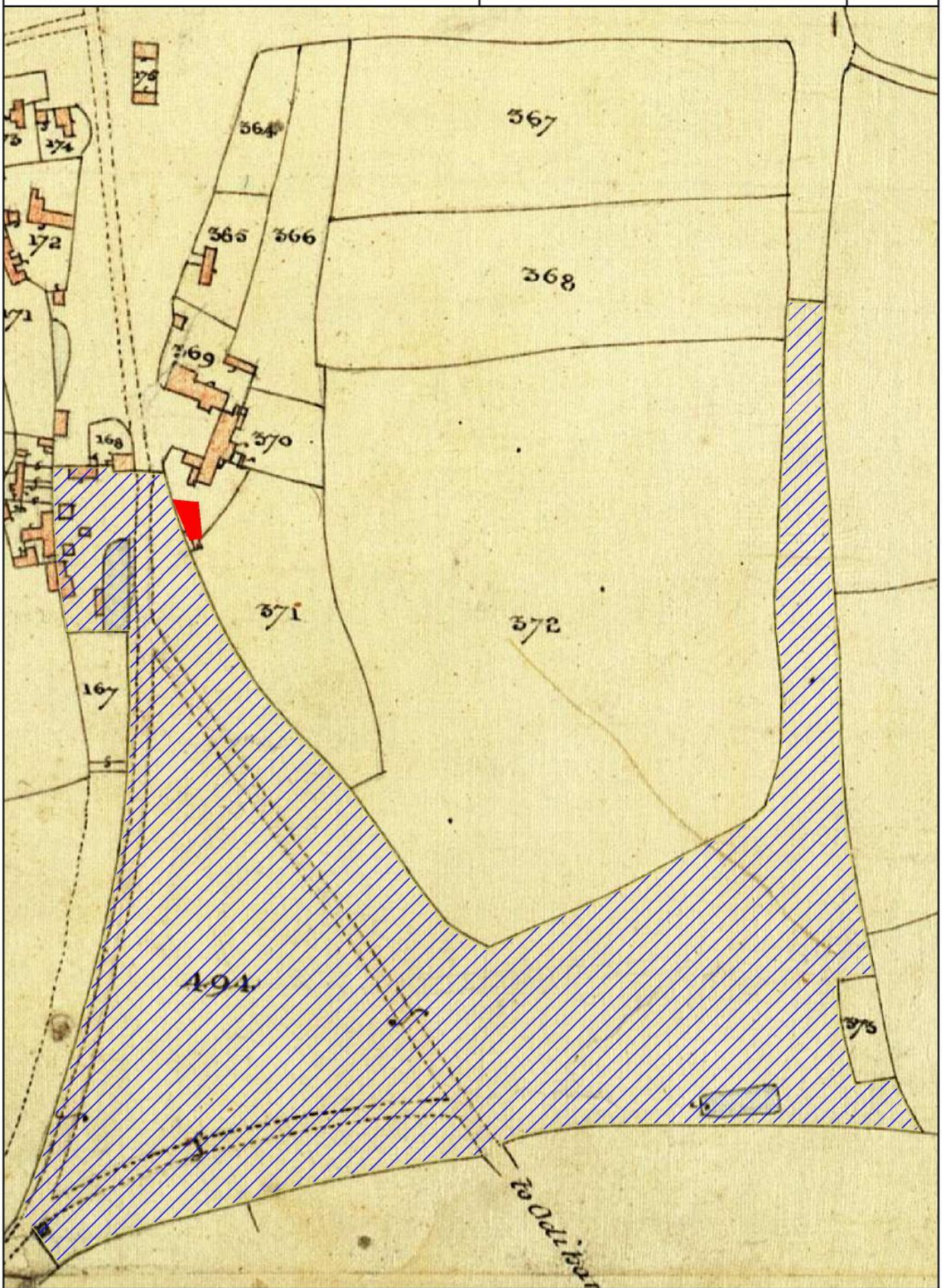
Ordnance Survey Map, 1872	Scale 1:1000
	Figure 6

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



Tithe Map, 1844	Scale 1:1000
	Figure 7

THE HERITAGE NETWORK LTD	Land adjoining Phoenix Green SS Hartley Wintney, Hants.	HN1524



Extent of Common Land (Plot 494) adjacent to the Study Area in 1844	Scale 1:2500
	Figure 8

ADVICE

Introduction

1. I am asked to advise in connection with an application dated 23 October 2018 made by Talbot Walker LLP on behalf of J P & S Services Limited under paragraph 7 of Schedule 2 to the Commons Act 2006 to remove a small piece of land ("the subject land") at Hartley Wintney, Hampshire from the register of common land. Paragraph 7 makes provision for land which was wrongly registered as common land under the Commons Registration Act 1965. The Open Spaces Society have objected to the application.

The law

2. Paragraph 7 of Schedule 2 provides as follows:

> ***7 Other land wrongly registered as common land***
>
> *1. If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove the land from its register of common land.*
>
> *2. This paragraph applies to land where–*
>
> *a. the land was provisionally registered as common land under section 4 of the 1965 Act;*
>
> *b. the provisional registration of the land as common land was not referred to a Commons Commissioner under section 5 of the 1965 Act;*
>
> *c. the provisional registration became final; and*
>
> *d. immediately before its provisional registration the land was not any of the following–*
>
> *i. land subject to rights of common;*
>
> *. waste land of a manor;*
>
> *. a town or village green within the meaning of the 1965 Act as originally enacted;or*
>
> *ii. land of a description specified in section 11 of the Inclosure Act 1845 (c. 118)*
>
> *3. A commons registration authority may only remove land under subparagraph (1) acting on–*
>
> *a. the application of any person made before such date as regulations may specify; or*
>
> *b. a proposal made and published by the authority before such date as regulations may specify.*

The facts

3. I have had the opportunity of reading a Cartographic Assessment prepared by David Hillelson BA MCIfa of Heritage Network dated 26 September 2019.

4. The history of the subject land has been traced back to 1844, when it appears on a tithe map prepared at that time. It then formed part of Plot 370. This plot is described in the accompanying apportionment as "The Phoenix Inn" and as being owned by Revd Thomas Matthews and occupied by James Moore. The map shows the Inn itself (which is still

there,trading under the same name) together with two "sub-plots", which were evidently land accommodating the Inn[1].

5. To the south-west of Plot 370 is plot 371, which was also owned by Revd Thomas Matthews and occupied by James Matthews; but is distinct from it. This plot was described as "pasture".

6. With a boundary to Plots 370 and 371 is Plot 494. This is described as "Common west of turnpike".

7. By the time of the first OS (1872), the subject land has been incorporated into Plot 371.

8. Changes to the field boundaries are shown on the OS editions for 1911 and 1945 (surveyed in 1939). In 1945 the subject land was part of a large field south of the Phoenix Inn which more or less related to Plot 370 and 371 shown on the 1844 Tithe Map.

9. The subject land came into being as a separate plot following the development of the houses at the northern end of Mortimer Close. These were evidently in existence in 1977 as they are shown on the OS of that date; a decision of a Commons Commissioner dated 1974[2] refers to Mortimer Close as having been recently developed, so the beginning of the 70s can be assigned as the date when the subject land came into being.

10. The subject land was provisionally registered as common land on 26 March 1968 on the application of the Clerk to Hartley Wintney RDC. The supporting statutory declaration is not available but it would have existed. It is likely to have been formal in its terms but it is still of some significance and (as will be seen) of particular significance in the present case because it will have indicated that the RDC did not consider the subject land to be a town or village green. It emerges from the Commons Commissioner's decision on ownership and from the fact that the RDC did not apply to be registered as owners of the land that the RDC did not claim ownership of the land.

11. The provisional registration being undisputed, it became final on 1 October 1970. Because no person was registered as owner of the subject land, a Commons Commissioner (AA Baden Fuller) held a hearing for the purpose of inquiring into its ownership. He gave his decision on this matter on 28 November 1974: not being satisfied that any person was owner of the land, he directed that it remained subject to protection under section 9 of the Act. His decision includes this passage:

Being curious about this unwanted piece of land, I inspected it is. It is (if I correctly identified it) bounded on its two longer sides, on the east by an open wire mesh fence which separates it from a recently developed building estate, and on the west by a ditch beyond which there is a narrow strip of woodland scrub and the A30 road, and bounded on its shorter side on the north by a high close boarded fence. It is grass land with two (apparently recently planted) trees. With some difficulty I gained access by walking across a steep bank where the water from the ditch flowed into a pipe.

[1] Heritage Network have helpfully marked on a plan the boundaries of Plot 370, which otherwise would not be obvious. It is possible to work out what were the boundaries with accuracy because the area is given on the accompanying tithe apportionment (3 roods and 17 perches).

[2] See paragraph 11 below

This land is by section 10 of the 1965 Act conclusively deemed to be common land; nevertheless,

I cannot imagine how it, as it now is, could be used or enjoyed by anyone. I am not surprised that the Council do not want it. Nevertheless it has been registered under the act; so I record, as I am required by the Act to do, that in the absence of evidence I am not satisfied that any person is the owner of the land and it will therefore remain subject to protection under section 9 of the Act[3].

12. The subject land is currently land used in connection with the adjoining petrol filling station. By reference to a statutory declaration by James Ashworth, who with his wife acquired the filling station in 1988, it would seem that it has been so used since that date. At the date of the acquisition it was fenced.

Discussion

13. It seems to me that the maps make it clear what the history of the subject land has been since 1840. In 1840 it was part of accommodation land held with the Phoenix Inn. By 1872 it had become detached from the Phoenix Inn and formed part of a separate field to the south of the Inn. When Mortimer Close was developed it was not developed (for reasons which do not emerge) and it was left, an undeveloped plot, alongside land which was historically common and not fenced off from it. It is not altogether surprising that when, following the passage of the Commons Act 1965, the RDC were seeking to identify and register all common land in their district, it included the subject land. One may guess that it was not included in an application for registration of the open land immediately to the west because it was physically distinct (no doubt reflecting its history separate from that open land, which was, historically at least, common land). However, although the provisional registration of the land is understandable, it seems to me that historical research shows that its registration was a mistake. Paragraph 7 of Schedule 2 to the Commons Act 2006 provides for land that was mistakenly (wrongly) registered as common land following the enactment of the Commons Registration Act 1965 to be removed from the register, provided that the registration came about because it was not opposed. This proviso has been met. The way that an applicant shows that land was wrongly registered is by showing that, immediately before is provisional registration it did not fall into one of four categories of land, as identified in the section. It is appropriate that I should say something about each.

14. Before doing so, I should begin by making the general point, namely that paragraph 7 requires the applicant to prove a negative. Obviously to show that land is **not** land subject to rights of common or not one of the other relevant categories of land, the applicant has to show **some** evidence to that effect. But he or she only has to show the required negative on the balance of probabilities. He or she is not obliged to commission comprehensive historical research or to rebut every possibility. The way this works may be illustrated by an example. In the present case it does not look as though the subject land was a recreational allotment by virtue of an Act of Parliament and there is no suggestion that it was. In these circumstances, it is not necessary for the applicant, to show that Parliament has not passed an Act to that effect. However if there were an objector who was suggesting that it were such a recreational allotment under a particular provision of a particular act, evidently it would be necessary for the applicant to show that the suggested provision did not, for whatever reason, have the consequence suggested for it. In summary, what constitutes sufficient evidence in the circumstances to rebut the negative on the balance of probabilities depends on the context.

[3] The date of the Commons Commissioner's Inspection is not set out but it is likely to have been on the same day as the hearing (17 October 1974).

Moreover, if there is nothing on the other side of the scales to suggest to the contrary, it does not necessarily take very much to prove the required negative.

Land subject to rights of common

15. It may be helpful to begin by explaining that in 1965, registrable common land was of two sorts,

    - land which was subject to rights of common, that is land over which commoners had the right to graze their cattle

    - land which was waste land of the manor over which there were not rights of common, that is, essentially, land left over after enclosure of the agricultural fields in the manor and over which no one had established rights to graze animals.

16. These were the two categories of land which, in 1965, were registrable as common land.

17. The tithe map of 1844 demonstrates that the subject land was not, in 1844, land which was subject to rights of common. It was land accommodating the Phoenix Inn; in contradistinction to the land to west which looks to have been common land, because identified as such. One guesses that that land to the west was subject to rights of common because of the area involved[4].

18. If the subject land was not subject to rights of common in 1844, there is no basis by which, against the background of the facts as set out, it might reasonably have become subject to rights of common in the period between 1844 and the provisional registration of the land on 26 March 1968. Moreover this analysis derives support from the fact that no-one registered rights of land over the land; if such rights had existed, one would have expected those entitled to the benefit of them to have registered them.

19. The Open Spaces Society accept that on 26 March 1968 that the subject land was not land subject to rights of common.

Waste land of a manor

20. The tithe map of 1844 demonstrates that the subject land was not, in 1844, waste land of the manor. It was land accommodating the Phoenix Inn; in contradistinction to the land to the west which may just have been waste land of the manor (because open and unenclosed and, conceivably, not subject to rights of common). If the subject land was not waste land of the manor in 1844, there is no basis by which, against the background of the facts as set out, it might reasonably have become such waste land in the period between 1844 and the provisional registration of the land on 26 March 1968.

21. It must be accepted that the subject land achieved registration as waste land of the manor, but this is readily explicable as a mistake as explained at paragraph 13 above.

22. The Open Spaces Society accept that on 26 March 1968 that the subject land was not waste land of a manor.

[4] It still may be, and registered as such.

A town or village green within the meaning of the 1965 Act as originally enacted

23. By section 22 (1) of the Commons Registration Act 1965, as originally enacted, *"town or village green"* means

    - *[a] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or*
    - *[b] [land] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or*
    - *[c] [land] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.*

24. It is clear that in 1844 the subject land was not which had been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality and it is clear that it has not been so allotted since.

25. It is clear that in 1844 there was not a customary right in the inhabitants of the locality to indulge in sports and pastimes on the land. The reason why one can say this is because it does not appear to be open land (in contradistinction to the large area of open land immediately to the west and south). The land was not registered in 1968 as a village green and there is no suggestion of any custom within Hartley Wintney which was overlooked at the time of the registration and which has since come to light[5].

26. It is at least theoretically more plausible that in the twenty years before 26 March 1968 the land might have become a town or village green on the basis that it was used for the preceding 20 years for lawful sports and pastimes. In my view however it is clear that it was not so used. I note first of all that the RDC did not consider that it was a town or village green. Further, very pertinent in this regard is Commissioner Baden Fuller's conclusion that *This land is by section 10 of the 1965 Act conclusively deemed to be common land; nevertheless, I cannot imagine how it, as it now is, could be used or enjoyed by anyone.*

27. It is fair to say that his description and conclusion relate to the position in 1974. However I would suggest that the "sub-text" of what the Commissioner was saying, fairly construed, is that he did not consider that the land was correctly registered as common in the first place: *Nevertheless it has been registered under the Act ...* The terms of his rejection of that possibility embrace the possibility that it might have been a town or village green (*I cannot imagine how it ... could be used or enjoyed by anyone*). Moreover apart from the recently planted trees, its physical condition will not have changed since 1968: it was grassland in 1974 and it would have been grassland in 1968. It is possible that in 1968 it formed part of a larger area, the houses at this end of Mortimer Close not yet having been built. However if the suggestion were that in 1968 there was a larger area that had been used for sports and pastimes, it would mean that Mortimer Close had been built on such land. Moreover, if there had been such a larger open area in 1968 potentially being used for lawful sports and

[5] It is possible that local inhabitants could have established a class [b] green (i.e proving a custom by 20 years' use). In this case there would have been no difference between a class [b] green and a class [c] green. My comments as regards a possible class [c] green should be taken as also referring to as class [b] potentially established on the basis of 20 years' use.

pastimes, one would have expected that area to be registered as common rather than the smaller area that was so registered. There is also the obvious point that if anyone other than the RDC (whose understanding is that it was not a town or village green) had thought that the subject land had been a village green based on twenty years' use, they would have sought to register it as such; and now, an application for deregistration having been submitted, they could adduce evidence of such use.

Section 11 of the Inclosure Act 1845

28. Section 11 of the Inclosure Act 1845 provides as follows:

All such lands as are herein-after mentioned, (that is to say,) all lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof; all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates or other gates or stints, or any of them; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or other gates or stints, or any of them; all land held, occupied, or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds or otherwise distinguishable; all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil; and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise, shall be land subject to be inclosed under this Act.

29. In principle one might have thought that all an applicant for deregistration would have to prove is that land was not at the time of its provisional registration either (i) land subject to rights of common, (ii) waste land of a manor or (iii) a town or village green; that is, one of the three categories of land registrable under the Commons Registration Act 1965. Why then is there an additional requirement to prove that it was not land of a description specified in section 11 of the Inclosure Act 1845? This question is particularly pertinent since it might appear that what section 11 is doing is providing an alternative definition of land subject to rights of common (obviously there is an overlap with *land subject to rights of common*, as identified by paragraph 7 (2) (d)).

30. The answer is provided by paragraph 7.6.4 of the DEFRA publication *Part I of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate (December 2014)*:

The exclusion for the purposes of paragraph 7 of Schedule 2 of land subject to inclosure under the 1845 Act ensures that land cannot be removed from the registers under paragraph 7 of Schedule 2 if, at the time of its registration, it was (among other things) a regulated pasture. Regulated pastures are lands which are owned in common by several persons, who also use the land in common at certain or all times of the year (for example, the land may be used to graze in common the stock of all the owners). A number of regulated pastures were incorrectly registered under the 1965 Act, but the continuing registration of such land is not thought to give rise to any difficulties, and confers some benefits in terms of security of status, and public rights of access.

31. There is no suggestion that the subject land ever was regulated pasture. It evidently was not regulated pasture in 1844 (if it had been there would have been co-owners of Plot 370, the co-owners being the occupiers). It would not have become regulated pasture between 1844 and 1968. No-one has claimed that it is regulated pasture[6].

Conclusion

32. It seems to me that in 1968 the land was neither subject to rights of common nor waste land of a manor. The Open Spaces Society accept both these conclusions. The idea that the land was regulated pasture seems fanciful. Moreover the logic of the Society's acceptance that the land was not subject to rights of common seems to apply to suggestion that it was regulated pasture.

33. The issue accordingly comes down to the question of whether the Applicant has "done enough" to show that the land was not a town or village green. I think that it has for the reason set out in paragraphs 24 to 27 above. Mr Craddock of the Society suggests that

    ... a witness statement might be offered by an elderly local resident that he or she knew the land, and recalls that it was not used (as a town or village green might be) for recreation, or photographic evidence might show that the land was fenced off and inaccessible.

34. I accept that, if available, such evidence could go to support the conclusion that the land was not a town or village green in 1968. But it does not follow that it is necessary to produce such evidence. We are looking at a small piece of land that was not suitable for sports and pastimes in 1974 and which was registered as common land, not a town or village green. In practical terms it may not be very easy to find a local resident who can speak to the 20 year period before 1968 (the end of which period ends more than fifty years ago) and, if one were found, it would still very likely to be possible to say that he or she might have been mistaken or might not have seen all that was going on. It would be very fortuitous if there existed photographs which categorically demonstrated that by virtue of fencing the land was inaccessible. Looking at the matter from the point of view of how it might now positively be proved that it was a town or village green, the only way this could be done would be by local residents making statements that they used it for lawful sports and pastimes for 20 years up until 1968. There clearly is no prospect of this happening in the present case but it is important to note that in circumstances where a piece of land which people had been using for recreation for 20 years had erroneously been registered as a common, what would have happened is that they would have gone on using the land for recreation after it registration; and when an application for deregistration was made, they would have objected. In an appropriate case such an objection is by no means far-fetched. But, to repeat, no such objection has been made in the present case.

35. In the circumstances of the present case as set out above, I consider that immediately before the provisional registration of the subject land it was not one of the four categories of land identified in paragraph 7 of Schedule 2 to the Commons Act 2016. Accordingly I consider that it should be removed from the register.

[6] There is no decided case that holds that regulated pasture is not registrable as common land and, as the DEFRA Guidance explains, regulated pasture was often registered as common land. If the land had been regulated pasture it is likely as a matter of fact that the owners would have sought to register it.

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