

Application Decision

Site visit made on 21 October 2014

by Heidi Cruickshank BSc MSc MIPROW

Appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 23 December 2014

Application Ref: COM 554

Land at Wheal Sperries, part of Hugus Common, Baldhu Downs, Cornwall

Register Unit No: CL588¹

Commons Registration Authority: Cornwall Council

- The application, dated 4 April 2013, is made under paragraph 4(5) of Schedule 2 of the Commons Act 2006.
 - The application is made by Mr T Hill.
 - The application is to register waste land of a manor in the register of common land.
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Decision

1. The application is approved in part. The land outlined and hatched brown, with the exception of that outlined and cross-hatched red, on the plan attached to this decision shall be added to the Register of Common Land.
2. The areas to be not registered are the land which is recorded as a public byway on the Definitive Map and Statement held by the highway authority; and, the enclosed area lying to the south of the main access track and the field access track.

Procedural Matters

3. An objection was made to the registration of an area of land at the southern end of the application area. As a result, I made an accompanied site inspection in relation to this area with the applicant and the objector. No objection was made with regard to the remainder of the land and so I made an unaccompanied inspection of this, dealing with the evidence on the basis of the written representations on file.
4. In considering the decision, I noted that if any documents relied upon by the applicant were deposited with the Commons Registration Authority ("the CRA"), or they were party to it, then the applicant need not submit them with the application². On submitting such applications to the Planning Inspectorate for determination, the CRA must send all material in its possession relevant to the determination of the application. It seemed that some evidence, deposited with the CRA, was not submitted to the Planning Inspectorate and, therefore, I provided a short opportunity for additional relevant evidence to be submitted for consideration.

The Application Land

5. The land comprises approximately 3.852 hectares, lying to the south-west of the road from Chacewater to Baldhu. It lies in the Parish of Kea just to the

¹ Original common land register number

² Commons Registration (England) Regulations 2008

west of Baldhu, with the hamlet of Cusveorth Coombe to the south-west. There are tracks through the land, some stone and some with grass overlying, with the track on the northern side recorded as a public byway, whilst the main central track provides, presumably private, vehicular access to the property Scots Haven³. Land Registry shows title absolute for the application land, and adjacent land, lying with the Honourable Evelyn Arthur Boscawen of Tregothnan.

6. The majority of the land is rough scrub, with some larger trees, whilst the area to the north-east, alongside the road, has the appearance of more established woodland. One section, to the south of the junction of the main track to Scots Haven and a track providing field access to the east, is enclosed from the adjacent land by hedging and fencing. It appeared at the time of my visit to be used for silage storage and dumping of general rubble.
7. The area north-east of this has some recent-looking ditch and bank works alongside the track, behind which are signs of former industrial use, with concrete, now overgrown and a shaft indicated on the mapping. The area is known as Wheal Sperries and this is presumably linked to Wheal Jane.
8. The southern-most area comprises the track, giving vehicular access to Scots Haven, with pedestrian access continuing beyond this in a generally south-westerly direction. The land south-east of the track is generally overgrown, with two areas providing access to the fields to south-east, although the northern-most gate is very overgrown and appears unlikely to have been in use over the last few years. The southern-most access, including an area to the north-east of the gate, has a rough stoned surface.

Main Issues

9. The application has been made in accordance with the provisions of Schedule 2 to the Commons Act 2006 ("the 2006 Act"). The CRA has confirmed that the requirements of the Commons Registration (England) Regulations 2008 have been met.
10. The main issue is whether the land is waste land of a manor and whether before 1 October 2008:
 - a) the land was provisionally registered as common land under section 4 of the Commons Registration Act 1965 ("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).
11. The applicant has not made it clear in his application or submissions which sub-paragraph he wishes to rely upon. I note that the 'File Checklist Form', completed by the CRA, refers to sub-paragraph (5) and so I shall consider the matter on this basis. This requires that the person on whose application the provisional registration was made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

³ This has been spelt variously as Scots-Haven, Scotshaven and Scots Haven. I shall rely on the spelling recorded by Land Registry in this decision.

12. The objection, which related to an area of land to the south, related to land adjacent to the property Scots Haven and was claimed to form part of the domestic curtilage of the property. I will need to consider whether the evidence shows that this land was within the curtilage, occupied, as claimed, and so not waste land at the date of the application, 4 April 2013, as set out by paragraph 4(2) of the 2006 Act.
13. The onus of proving the case in support of the correction of the register of common land rests with the person making the application, and the burden of proof is the normal, civil standard, namely, the balance of probabilities.

Reasons

Whether at the land was 'of a manor'

14. "*Of the manor*" is held to mean land which is, or was formerly, connected to the manor, *Hampshire County Council and others v Milburn (1991)*⁴.
15. The applicant indicated that the land formed part of the Manor of Blanchland⁵ and, along with other documents, referred to Lake's Parochial History of the County of Cornwall, 1868. I was referred to "*...a Court of survey or perambulation held for y^e manor of Blanchland 23 of May 1612 by several of ye Ten^{ts} of y^e s^d manor the Limits or Bounds of s^d manor are thus describ^d ...*". This describes the bounds of the manor and I am assisted by the digitised map, showing the boundary, as interpreted from the text. Relying on this interpretation, I am satisfied, on the balance of probabilities, that the application land is within the bounds.
16. Tenancy agreements dating from the 1980s were mentioned, with the applicant claiming that they referred to the 'Manor of Blanchland'. However, these were not submitted and so I give them no weight.
17. It is seldom possible to prove definitively that a particular parcel of land is 'of a manor'. However, I am satisfied, in the absence of any evidence to the contrary, that the land lies in an area recognised to have been manorial.

Whether at the time of the application the land was waste land

18. By reference to *Attorney General v Hanmer (1858)*⁶ ("*Hanmer*"), waste land of the manor was defined as "*the open, uncultivated and unoccupied lands parcel of the manor other than the demesne lands of the manor*". The determination as to whether or not the land is 'waste land' must be made in relation to the status at the time of the application, April 2013.

Open

19. The applicant refers to an Environmental Statement ("ES") associated with a solar farm planning application for Wheal Jane, which lies approximately a mile to the south-east of the application land. The ES refers to "*an open downland landscape containing islands of enclosed farmlands*." Wheal Jane Limited made an objection to the registration under the 1965 Act, with the signs of former industrial use supportive of their former interest in the area.

⁴ [1991] 1 AC 325

⁵ Sometimes recorded as Albalanda

⁶ 2 LJ Ch 837, 4 De G & J 205, 28 LJ Ch 511.

20. The area of recent banking and ditching makes it difficult to access the area to the south-east of the main track from the track itself, however, it is unclear whether these works were carried out before or after the date of application. Nonetheless, there is no indication that the works were carried out deliberately to enclose the land and it remains open to the north-east, such that accessing this area remains relatively straight-forward.
21. The area to the south-west of this is enclosed from the adjacent land by hedging and fencing and at the time of my site visit there was a chained gate preventing access into the area. The aerial photograph submitted to the Planning Inspectorate with the application clearly shows this as a separate area of land in 2013. Whilst the applicant mentions that no objection has been made to the application by the landowner, I do not consider the absence of opposition as suggestive that the criteria are met and need not be considered by the decision-maker. I am not satisfied that it has been shown that this area was open, that is unenclosed, at the time of the application.
22. In relation to the land to the south there are signs of old barbed-wire and pig-wire fencing, apparently used for keeping pigs. The fencing is broken in many places and, in my view, it cannot be said that this area was enclosed at the time of my site visit. It is not shown as a separately fenced area on any of the submitted maps. Given the state of the fencing, and the fact that pigs were apparently last kept there in the 1970s, I do not consider that it has been demonstrated to have been enclosed eighteen months previously, at the time of the application.
23. I am satisfied, on the balance of probabilities, that the majority of the land subject to the application was open at the time of the application. The exception is the area to the south of the main access track.

Uncultivated

24. The earliest mapping arises from the tithe documents. The Tithe Commutation Act 1836 (as amended by the Tithe Act Amendment Act, 1837) converted tithes (the tenth part of the annual produce of agriculture), provided for the support of the priesthood and religious establishments, into a tithe rent-charge, a monetary payment based on the seven year average price of wheat, oats and barley. The apportionment of tithes was recorded in a schedule and on a map.
25. Apportionments are statutory documents, which were in the public domain, and tithe maps have been treated by the courts as good evidence as to whether land was titheable or not. Tithe would have been paid on productive land and there are many reasons why land might not have been subject to tithe, for example, if it was barren, held by the church or some other religious community, or had only recently been converted to productivity from barren heath or waste land.
26. An extract of the 1842 tithe map and apportionment for the parish of Kea was submitted. The majority of the land falls under the apportionment number 1628, named Hugo's Common with no annotation in relation to the state of cultivation and no rent-charge payable. The area to the south, is under apportionment number 1910, identified as waste, again with no cultivation nor tithe payable.

27. I agree with the applicant that this indicates the areas to be uncultivated common or waste land in the mid-nineteenth century. The track on the northern edge, now generally the alignment of the byway, is indicated by a pecked line to the south, suggesting it was unfenced alongside the common land. The road to the north-east is similarly shown with pecked lines, suggesting it was unfenced, as it remains today. Other tracks are not shown.
28. I am satisfied that the land is uncultivated, with little or no evidence of recent active management. It seems likely that the majority of the land has remained in the uncultivated state noted by the tithe documents, with that used for mining generally having been abandoned and returning to an overgrown, if not exactly natural, state.

Unoccupied

29. For the majority of the land there is no obvious indication of occupation and physical use of the land to exclude others. A pylon is situated just off the track, approximately halfway along, however, it is not fenced off and so access is available around it.
30. The northern-most track is recorded as a public byway, which is a public highway. The 2006 Act does not mention highways, although the 1965 Act set out that "...*common land*"...*does not include...any land which forms part of a highway*". It seems to me that the land crossed by the byway is occupied by those using it in a public capacity. As a result, I do not consider that this area should be registered as common land.
31. The unmetalled tracks, leading to properties and land for private access, are not in my view incompatible with the registration of land as common land, albeit that some are clearly maintained to some extent to provide access. I note the comment from the Ramblers, Carrick Group, that the tracks have been used occasionally, however, as they do not appear to be currently recorded on the Definitive Map and Statement as public rights of way, I do not intend to remove them from the application land.
32. I consider that the fenced and hedged area, apparently used in connection with agriculture, judging by the use in part as a silage store, is occupied for this purpose. There is no easy access into this area and I am not satisfied that it has been shown, at the date of application, that this area was unoccupied, as required by the 2006 Act.
33. I note the desire of the objector to have the option of keeping livestock on the land to the south in the future. However, the question before me is whether it was occupied at the date of the application, April 2013, which has not been shown to be the case, as noted in relation to whether the land was open at that date.
34. In relation to the smaller area to the south, claimed to be used sporadically for parking a boat, the objector refers to it as the curtilage of the property. The word 'curtilage' is not defined in the 2006 Act, but has been considered by the courts, in particular in the context of planning and development legislation. The question of whether land is considered to be within the curtilage of a building is a question of fact and degree, and I consider that to fall within the curtilage of a building, land should serve the purpose of the building in some reasonably necessary or useful manner.

35. At the time of my site visit the land was open and unenclosed, with no indication of recent use and no evidence submitted that the land was being used for this purpose at the time of the application. The domestic property, Scots Haven, is situated on the opposite side of the main track and has associated parking and a garden area on that side. Taking account of all the information before me, I am not satisfied that it has been demonstrated that the area of land, to which objection to registration has been made, was occupied at the time of the application.

Summary

36. I am satisfied, on the balance of probabilities, that at the date of the application, 4 April 2013, the majority of the application land has been shown to be open, uncultivated and unoccupied, some of it apparently unchanged since at least the mid-nineteenth century. The exceptions relate to the track now recorded as a public byway and the area enclosed and occupied for agricultural purposes. I consider these areas to be of different character and use to the remaining land and not to fulfil the necessary criteria.

Provisional registration requirements

Whether the land was provisionally registered as common land under section 4 of the 1965 Act

37. The land was provisionally registered as unit number CL 588 following an application made by the RA. The application, dated 31 December 1969 and received by the Council on 2 January 1970, reference 2090, seems to have been properly made under section 4 of the 1965 Act, such that this requirement is met.

Whether an objection was made to the provisional registration

38. Two objections were made to the provisional registration. One, reference X417, dated 24 September 1970 was from Wheal Jane Limited. The second, X726, dated 12 January 1971, was made by the Rt Hon George Hugh Viscount Falmouth, Tregothnan. The grounds of both objections were that the land was not common land at the date of registration.

Whether the provisional registration was cancelled as set out in paragraph 4(5)

39. The provisional registration was subject to a hearing held by a Commons Commissioner. The decision, Reference Nos. 206/D/935-936 dated 17 June 1980, shows a refusal to confirm the registration. The decision sets out that "*All the persons entitled to be heard...have agreed upon the terms of the decision to be given...and have sent to the Clerk of the Commons Commissioners particulars of such terms signed by or on behalf of all such persons.*"
40. The *Register of Common Land* states that "*The registration...is hereby cancelled in pursuance of Section 6(2) of the [1965 Act] and by the direction of the Commons Commissioner dated 14 August 1980.*" Copies of the terms, referred to in the decision, and the direction have not been submitted.
41. Section 6 of the 1965 Act relates to the disposal of disputed claims where the Commons Commissioner shall either confirm the registration, with or without modifications, or refuse to confirm it, in which case the registration becomes

void. Section 6(2) simply requires the Registration Authority to record the result in the Register, cancelling the registration.

42. The CRA confirmed that they did not have copies of the terms or the direction, referred to in the decision. However, they were able to supply correspondence from 1977 which showed that the RA, who were the original applicants, were asked to sign "*agreement forms requesting the cancellation of a registration by the Commons Commissioner.*" The list included CL 588 and in subsequent correspondence, solicitors acting for one of the objectors, Lord Falmouth, referred to the withdrawal of the application. Taken together I am satisfied that the evidence shows, on the balance of probabilities, that the provisional registration was cancelled as the person on whose application the provisional registration was made agreed to its cancellation, as required by paragraph 4(5) of Schedule 2 to the 2006 Act.

Summary

43. I am satisfied, on the balance of probabilities, that the registration of the land, and subsequent removal from the register, meets the requirements of paragraph 4(2) of the Schedule 2 to the 2006 Act.

Other matters

44. I am not able to take account of issues regarding maintenance, unauthorised access or fly-tipping. I understand the concern that the objector may have on these matters but the legislation does not deal with such points, only the questions I have covered above.
45. It was suggested that the case for registration may also succeed under paragraph 2 of Schedule 2 to the 2006 Act. I am dealing with the application in relation to the section of the Act under which it was made and so have not considered this matter further.

Conclusion

46. Having regard to these and all other matters raised in the written representations, I conclude that, on the balance of probabilities, the criteria for the registration of the application land as common land under paragraph 4 of the Schedule 2 to the 2006 Act have been met for the majority of the land. Those areas should be registered in the Register of Common Land.

Heidi Cruickshank

Inspector

