



## 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: 16 December 2014

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### Application Ref: COM 582

### Part of Hugon Common, Kea, Cornwall

Register Unit No: CL590<sup>1</sup>

Commons Registration Authority: Cornwall Council

- The application, dated 7 May 2013, is made under paragraph 4 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 shown green, with the exception of that outlined and hatched red, on the plan attached to this decision shall be added to the Register of Common Land.
2. The area to not be registered is that recorded as a public bridleway on the Definitive Map and Statement held by the highway authority.

### Procedural Matters

3. No objections were received to the advertisement of the application and no-one requested to be heard with respect to the application. I made an unaccompanied site inspection and the evidence was dealt with on the basis of the written representations.
4. In considering this decision, I noted that if any documents relied upon were deposited with the Commons Registration Authority ("the CRA"), or they were party to it, then the applicant need not submit them with the application<sup>2</sup>. 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 four areas of approximately 2.992, 0.557, 0.234 and 0.021 hectares. The land lies on either side of an unnamed, unclassified road running south-west from Truro towards Baldhu. The larger area lies to the north of the road, with the north-eastern edge comprised of a small watercourse; section 61(1) of the 2006 Act sets out that "land" includes land

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<sup>1</sup> Original common land register number

<sup>2</sup> Commons Registration (England) Regulations 2008

- covered by water. The northern boundary reflects the original application, running to the south of a track, which still exists in part.
6. The three smaller areas were formerly joined; however, the central area has now been taken in hand as farmland. There are mine shafts situated within two of the areas and on the edge of the third.
  7. A public bridleway runs generally north-south, passing alongside the south-western and western edges of the southern-most areas claimed and then through the western side of the larger northern area of land. The bridleway also provides, presumably private, access to and from properties and land. The area of 0.557 hectares has a track through it to the field, possibly associated with Hugus Coombe to the south, although the application land itself is registered to Kilters Farm, to the east.
  8. The larger area also has another track, running generally north-easterly to a footbridge over the watercourse. There are several small tracks through the vegetation, but these do not appear to be permanent features. The majority of this area, and the two smaller areas south of the road, are part of Albany Farm. A small area at the eastern end is part of Hugus Farm.
  9. Land Registry copies of the register of title show the claimed land to be registered to the Honourable Evelyn Arthur Hugh Boscawen of Tregothnan. The land is within the parish of Kea and is referred to as part of Hugus Common.

### **Main Issues**

10. 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.
11. 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).
12. 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).
13. Paragraph 4(2) of the 2006 Act sets out that the tests need to be satisfied as at the date of the application. 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)<sup>3</sup>.
15. The applicant indicated that the land formed part of the Manor of Blanchland<sup>4</sup> 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<sup>e</sup> manor of Blanchland 23 of May 1612 by several of ye Ten<sup>ts</sup> of y<sup>e</sup> s<sup>d</sup> manor the Limits or Bounds of s<sup>d</sup> manor are thus describ<sup>d</sup> ...". 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, it appears that the application land is within these 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'. Taking account of all the evidence, including the lack of convincing evidence to the contrary, I consider it has been shown, on the balance of probabilities, 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)<sup>5</sup>, 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, May 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-west of the application land. The ES refers to "an open downland landscape containing islands of enclosed farmlands." I note that Wheal Jane Limited made an objection to the registration under the 1965 Act and the mine shafts indicate their former interest in this area. I note that these were noted to be old shafts on the Ordnance Survey map used as a base for the Commons Register map.
20. At the time of my site visit I found the land to be generally unenclosed, or open, and there is nothing to suggest that it had not been so at the time of the application in 2013. I am satisfied that this element is met.

#### *Uncultivated*

21. 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),

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<sup>3</sup> [1991] 1 AC 325

<sup>4</sup> Sometimes referred to as Albalanda

<sup>5</sup> 2 LJ Ch 837, 4 De G & J 205, 28 LJ Ch 511.

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.

22. 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.
23. An extract of the 1842 tithe map and apportionment for the parish of Kea was submitted. Whilst the applicant claims that the land to the north of the road is within the apportionment 1397, parts to the east are within the apportionment numbers 1397a and 1397b. Although shown under '*Hugos Common*' their name and description is given as meadow, in arable cultivation, with tithe rent-charge payable. Other areas to the east have different apportionment numbers but it is not possible to read them on the supplied copies.
24. The main area is 1397, whilst the area south of the road falls within a larger apportionment number, 1600. Both are named as Hugo's Common with no annotation in relation to the state of cultivation and no rent-charge payable. I agree with the applicant that this indicates these areas to be an uncultivated common and so waste land at that time. The road lying between the two areas is shown mostly by pecked lines, suggesting it was unfenced as it crossed the neighbouring common land.
25. With the exception of the tracks mentioned earlier, I found the application land to be generally uncultivated and in places quite overgrown, with no evidence of active management having been undertaken recently. It seems likely that the majority of the land has remained in the uncultivated state noted in the mid-nineteenth century. For those areas to the east, which were at that time cultivated, it appears that the land has been abandoned for a long period, reverting to waste. Its low-lying location alongside the stream means that it is quite wet, which has probably contributed to the apparent difficulty in managing it as a cultivated area in the long-term.

#### *Unoccupied*

26. There is no obvious indication of occupation of this land. A pylon situated at the top of the area of 0.234 hectares, does not appear to be indicate occupation as intended under the 2006 Act.
27. 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. I note that one of the tracks is also recorded as a public bridleway, which is a 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 bridleway is occupied by the bridleway and those using it in a public capacity. As a result, I do not consider that this area should be registered as common land.

### *Summary*

28. I am satisfied on the balance of probabilities, that at the date of the application, 7 May 2013, the majority of the application land has been shown to be open, uncultivated and unoccupied; much of it apparently unchanged since at least the mid-nineteenth century. The exception is that section subsequently recorded as a public bridleway, which I consider to be of different character and use, not fulfilling the necessary criteria.

### ***Provisional registration requirements***

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

29. The land was provisionally registered as unit number CL 590 following an application made by the Ramblers Association ("the RA"), identified by them as part of Hugus Common. 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*

30. Two objections were made to the provisional registration. One, reference X419, dated 24 September 1970 was from Wheal Jane Limited. Wheal Jane, now disused, lies to the south-west.

31. The second, X728, 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)*

32. The provisional registration was subject to a hearing held by a Commons Commissioner. The decision, Reference Nos. 206/D/923-924 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 by me and have sent to the Clerk of the Commons Commissioners particulars of such terms signed by or on behalf of all such persons."*

33. 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."* Section 6(2) of the 1965 Act simply requires the CRA to record the result in the Register, cancelling the registration.

34. The CRA have confirmed that they do not have copies of the terms or the direction, referred to in the decision. However, they were able to supply some 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."* 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 of CL 590 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*

35. 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**

36. 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**

37. 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, which should be registered in the Register of Common Land.

*Heidi Cruickshank*

**Inspector**

