The Planning Inspectorate

Application Decision

Hearing held on 19 February 2015

by Heidi Cruickshank BSc MSc MIPROW

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

Decision date: 17 April 2015

Application Ref: COM 576
Carn Downs and Land at Bosullow Trehyllys Settlement in the parishes of Morvah and Madron, Cornwall
Register Unit No: CL718[1]
Commons Registration Authority: Cornwall Council

- The application, dated 5 April 2013, is made under paragraph 4 of Schedule 2 of the Commons Act 2006.
- The application is made by Mr D Coles on behalf of Save Penwith Moors.
- The application is to register waste land of a manor in the Register of Common Land.

Decision

1. The application is approved in part. The land outlined and cross-hatched in red on the plan attached to this decision shall be added to the Register of Common Land ("the RCL").

Preliminary Matters

Guidance

2. The applicants, Save Penwith Moors ("SPM"), argued that the Department for Environment, Food and Rural Affairs ("defra") guidance that should be referred to in this case was that which was extant at the date of their application. The application was received by Cornwall Council, the Commons Registration Authority ("the CRA") on 10 April 2013.

3. Cornwall was one of the pilot areas and, therefore, the "*Part 1 of the Commons Act 2006, Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation*" has been relevant guidance. A number of revisions have been made to it, with the latest, published in December 2014 ("the guidance"). "*Part 1 of the Commons Act 2006, Guidance to commons registration authorities and the Planning Inspectorate*", version 2.0 relates to the full implementation of Part 1 of the Commons Act 2006 ("the 2006 Act") in a minority of registration authorities and the partial implementation in remaining registration authorities through *The Commons Registration (England) Regulations 2014*[2]. This came into force on 15 December 2014.

4. As set out in the guidance, pioneer authorities, such as Cornwall, were subject to the *Commons Registration (England) Regulations 2008*[3] and the *Commons*

[1] Original common land register number
[2] SI 2014 No. 3038
[3] SI 2008 No. 1961

Registration (England) (Amendment) Regulations 2009[4]*.* These have both been revoked and replaced by the 2014 Regulations; all applications made to pioneer authorities under the 2008 Regulations automatically switch to the equivalent stage in the 2014 Regulations.

5. I am satisfied that it is the current Regulations and guidance[5] which are relevant. Given that SPM were aware of the changes to the guidance, and able to comment on it, I am satisfied that no prejudice has arisen.

Interpretation

6. It was the view of SPM that there had been a change in the way in which Inspectors were interpreting the guidance, which they felt was to their disadvantage. Decisions do not set a precedent; although there should be some consistency, every decision will be taken on the basis of the evidence and arguments presented in relation to that particular case, against the background of the relevant legislation, case law and guidance. This may mean that some, apparently similar, circumstances lead to, apparently, differing outcomes but does not, in my view, represent a change in interpretation.

Status of Commissioners' decisions

7. Decisions relating to disputes arising from the Commons Registration Act 1965 ("the 1965 Act") were dealt with by the Commons Commissioners ("the Commissioners"). Defra abolished the Commissioners in 2010, with decisions relating to the 2006 Act now taken by the Planning Inspectorate on behalf of the Secretary of State. There was disagreement as to the weight to be given to Commissioners' decisions, with the objector[6] seeking to rely on Commissioners' decisions and SPM suggesting that they were irrelevant. A paper entitled 'Briefing Notes' was presented by SPM in support of their case, which was written by a third party.

8. I do not consider that the argument that the Commissioners' decisions predate *Hampshire County Council v. Milburn [1990]*[7] ("*Hampshire v Milburn*") means that they have no value. This is only relevant, in my view, in relation to the matter of whether land was required to be currently 'of a manor', as discussed later in this decision. If Commissioners' decisions were incorrect then they could be challenged, with appropriate case law arising.

9. Commissioners' decisions may provide assistance on certain points, however, I do take account that they were made in relation to the 1965 Act, not the 2006 Act and provide no legal precedent in the way that a court decision does. As a result, I am satisfied that where there is inconsistency greater weight must be given to the current Act, guidance and any relevant case law.

The original application to register the land

10. SPM argued that the land had been provisionally registered as open, unoccupied and uncultivated under the 1965 Act and that the withdrawal of that application had been based on misleading information. There was no

[4] SI 2009 No. 2018
[5] References to 'guidance' in this decision relate to the December 2014 defra guidance
[6] Unless otherwise stated, where I refer to 'the objector' in this decision I am referring to the owner of Carn Down, who gave evidence to the hearing.
[7] [1990] 2 WLR. 1240, [1991] 1 AC 325 – often referred to as the Hazeley Heath case

information regarding the reason for the withdrawal of the application by the West Cornwall Footpaths Preservation Society ("the WCFPS") and so I do not place any weight on this argument. SPM need to show that the land should be registered on the basis of the situation at the time of their 2013 application.

Public Interest

11. SPM believe that the decisions on these applications should be taken on an administrative basis, with a particular weight given to the public interest, not as a legal argument between the parties. I have been appointed to deal with the application in relation to the legislation under which it was made, including the regulations and guidance. Whilst of course seeking to register land which should be registered, in my view it is for the parties to provide the relevant evidence regarding their cases.

Procedural Matters

The application

12. The original application was for an area of land lying to the south-east of the village of Morvah. The CRA advised that part of the application, the area of Bosullow Trehyllys Settlement to the south, along with two fields on that side of Carn Downs, including one known as Chun Downs, and some land to the north and east, was not access land under the Countryside and Rights of Way Act 2000 ("the 2000 Act"). SPM decided to remove some areas from the application and did not pursue their registration through the hearing process.

13. There is no mechanism within the 2006 Act for amendment of the application once it has been duly made. However, in *Oxfordshire County Council v. Oxford City Council and another, 2006*[8] it was said that "*It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment…"*. Whilst this was a case to register a town or village green under the 1965 Act, I consider that the principle holds good.

14. The area identified as Bosullow Trehyllys Settlement was advertised by the CRA on 6 February 2014, attracting objections. It was agreed to remove this land from the application prior to the hearing. I am satisfied that no prejudice arises from the amendments to the original application and note that SPM and the objectors[9] agreed that this land should not be registered.

15. SPM have most fairly and readily agreed to amendments to their application following suggestions by the CRA through the process. However, any applicant should be aware of the potential concern for those whose land is affected; great care should be taken that applications are correct, so far as applicants are concerned, in the first instance.

The Application Land

16. The areas remaining included Carn Downs, shown as the blue land in Hearing Document 1[10] ("HD1"), owned by the objector. Carn Downs forms a high point in the area, lying to the south-west of a minor road running south-east from

[8] [2006] UKHL 25, [2006] 2 AC 674, [2006] 4 All ER 817 (BBE)
[9] Including those who had objected to the application as originally made
[10] Where I refer to the 'blue', 'pink' or 'green' land in this decision it is by reference to the colours used in the Hearing Document 1

Morvah. The majority of the land lies in Morvah parish and is part of Carne Farm, which lies just to the north-west.

17. A route, partly within a 'lane' left uncoloured in HD1, runs generally east-west across the bottom quarter of the land. SPM indicated at the hearing that they sought also to register the lane to the east, which had been part of the original application. This route appears to follow the parish boundary with Madron parish to the south and is promoted as the Tinners Way, although another party indicated that he also knew it as the old St Ives Road, St Ives lying to the north-east. The CRA confirmed that this route has no recorded public status.

18. I understand that the fields south of the parish boundary, within Madron Parish, shown as the pink land in HD1, are, or were, part of Kerrow Farm. This land is rented by the objector.

19. I was informed that another area lying adjacent to the road, shown green in HD1, is owned by the National Trust and tenanted, although no further evidence was provided. An area to the north-east of the road was included in the original application although, as it is not recorded as access land under the 2000 Act, SPM made no case to register it.

Main Issues

20. The application has been made in accordance with the provisions of paragraph 4 of Schedule 2 to the 2006 Act. The CRA have confirmed that the application has been processed in accordance with the regulations.

21. The main issue is whether the land is waste land of a manor, at the date of the current application, and whether before 1 October 2008:

    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). Sub-paragraph (5), on which SPM relies, 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).

22. By reference to *Attorney General v Hanmer (1858)*[11] ("*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 objector argued that the application land was not common land as it failed to meet some or all of the necessary criteria to qualify as waste land. Reliance was placed upon the land being enclosed, cultivated, owned and/or occupied.

23. SPM argued that they only needed to show that the land was once 'of a manor' and relied on the physical appearance of the land to show that it was 'waste land' at the date of their application. The burden of proof in such cases is the civil standard, namely, the balance of probabilities[12].

[11] 2 LJ Ch 837, 4 De G & J 205, 28 LJ Ch 511.
[12] Not the criminal standard of 'beyond reasonable doubt' as referred to in a letter from Lord de Mauley dated 6 January 2014

Reasons

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

24. The land was provisionally registered as unit number CL718 following an application made on behalf of the WCFPS. The application, reference 1891, dated 17 December 1969, was entered onto the RCL on 31 April 1970. There is no argument that the application was not properly made under section 4 of the 1965 Act and I am satisfied that this requirement is met.

Whether an objection was made to the provisional registration

25. The RCL refers to objections numbered X525 and X1450.

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

26. Entry 2 in the RCL, dated 2 February 1973, records that the provisional registration was modified under Regulation 8 of the Commons Registration (Objections and Maps) Regulations, 1968[13]. This allowed the CRA to cancel or modify a registration to which objection was made, at the request of the applicant. The RCL sets out that the land was removed pursuant to applications dated 18 February and 7 December 1972 made by the WCFPS. I am satisfied that this fulfils the criteria of paragraph 4(5) of Schedule 2 to the 2006 Act.

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

'Of a manor'

27. The objector, assisted by the Country Land and Business Association ("the CLA") seeks to argue that where land ceased to be waste land in the past then it could not be so registered now. Although the CLA note that the 2006 Act refers at paragraph 4 (2) to whether land is waste land of a manor (emphasis put by the CLA) I agree with SPM that this needs to be read in the context of *Hampshire v Milburn.* This holds that "*waste land of a manor…means waste land of manorial origin and accordingly refers to both waste land which belongs to a manor and waste land which formerly belonged to a manor…".* Whilst this case related specifically to a situation where the lordship had been sold separately from the land it appears to be generally accepted that changes in ownership may not in themselves remove land from being registered as waste land. The objector fairly accepted that the land was formerly '*of a manor*' and I am satisfied in this respect.

'Waste land'

28. The *Hanmer* definition is quoted with approval in *Hampshire v Milburn* and appears to continue to provide appropriate legal authority as to the meaning of waste land in this context. SPM argue that 'open, uncultivated and unoccupied' is a single description and need not be broken into its component parts. I understand the belief of SPM that this land appears to be different from the surrounding smaller fields which are clearly enclosed as part of an agricultural unit.

[13] SI 1968 No. 989

29. However, in *Re Burton Heath; Bellord and Others v Colyer (1983)* it was noted that if lands were either cultivated or occupied, or both, then they would cease to be waste land of a manor. It seems to me necessary to consider all the parts of the definition to see whether the land is 'open', 'uncultivated' and 'unoccupied', and therefore 'waste land', at the time of the application. I agree with SPM that this is a question of the physical status of the land at the date of application, April 2013.

Open

30. SPM seek to rely upon the definition of 'open' being the same as 'open country', set out by Natural England ("NE") in relation to the 2000 Act. SPM indicate this land to be typical lowland heath, with furze, bracken, heather and rough grasses. They quote NE as saying that "…*in describing heath as being 'of a generally open character', we mean that, whilst individual land parcels might comprise enclosures of varying size, they will in combination form a landscape that provides open vistas (though sometimes these are interrupted by groups or blocks of trees or scrub).*"

31. However, I agree with the objector that the definition relied upon by SPM was derived for the purposes of the 2000 Act and so should not be readily applied to different legislation. Whilst SPM say that it should not be lightly disregarded in the absence of any other legal description of open land, I consider it appropriate to place weight on the guidance issued specifically in connection with the 2006 Act, which indicates that open means unenclosed.

32. In relation to Carn Downs, the objector indicated that his family had farmed the land since at least the date of the tithe in the 1840s. He said that the current fencing and hedging already existed at the date of the application, April 2013, some of it renewed from older fencing.

33. I am satisfied, having walked the entirety of the boundary, that the blue land is enclosed by stock-proof walls and fences, which are predominantly on the land, rather than against the land. The exception to this is the field on the northern boundary of the site where very substantial stone walls have been built; in my view these walls enclose the field from Carn Downs. However, taken as a whole, I am satisfied that the blue land is not open as required.

34. The pink and blue land are separated by a wall and fence on the north side of the western part of the pink land, apportionment number 141 on the Madron tithe map and 179 on the Morvah tithe. Parts of an old wall remain on the southern boundary but it is not stock-proof. The land to the south, numbered 146 and 154 on the Madron tithe map, was originally part of the application and is fenced. On balance, the western area of the pink land is not enclosed from this adjacent land and so is open. The eastern field, apportionment number 142, is clearly enclosed as a separate field and is not open.

35. Although the objector referred to the ditch on the green land I do not consider that this forms an enclosure of this land. I consider that it is open to the lane to the south, the road and the small area of land to the north. I have considered whether the areas on either side of the road should be taken as verges forming part of the highway, which should not be registered. However, I am satisfied that these areas would not reasonably be viewed as part of this road and note that they were within the same tithe apportionment.

36. Whilst the lane, the Tinners Way, is enclosed between stone walls, apart from at the junction with the green land, it is open to the road to the east, with a stile at the western end as it enters the pink land. Whilst the adjacent land has been enclosed, in my view the fencing of it has been against, rather than on, the lane. I am satisfied that the green land, the land on the opposite side of the road and the lane remain open.

37. SPM were not able to offer any further evidence regarding the state of the land at the date of their application. Therefore, I rely on the evidence of the objector that the current situation is unaltered from April 2013.

Uncultivated

38. SPM argued that as the land was shown as open country under the 2000 Act then it must be uncultivated, being mountain, moor, heath or down. They argued that improved, or semi-improved, grassland was not included as open country and so the maps act as a guide to cultivation. The CLA indicated their understanding that the designation of land in one of the sub-sets of open country was essentially a desk exercise. The matter as to whether the designation was correct would only be investigated if a landowner objected, which did not occur in relation to this land. The classification as open country was under regulations and guidance issued in connection with the 2000 Act, not the 2006 Act.

39. Whilst it may be fair to rely on this designation as a guide, the intention to review the maps of open country would have taken account of whether the land remained of that description. My decision must be taken on the basis of whether the land is uncultivated at the time of this application.

40. I understand the blue and pink land to be managed under Higher Level Stewardship ("HLS"), an agri-environment scheme administered by NE. SPM argue that the scheme requires that the land be 'uncultivated' in order for payments to be made and so the NE definition of 'uncultivated' may be relevant. Referring to the NE website for the definition of '*What is meant by uncultivated land?*', SPM indicate that the definition says that "*Cultivation in this instance means: physical cultivation by agricultural soil disrupting activities such as ploughing, tine harrowing, sub-surface harrowing, discing and rotovating; chemical enhancement of the soil through the addition of organic and inorganic fertilisers and soil improvers.*"

41. SPM accept that arable land is cultivated, as is land which has been grubbed up and cleared, drained, ploughed, fertilised, and re-seeded as improved pasture. They say that such works have not occurred on the application area, to their knowledge.

42. The objector indicates that land has been cultivated by man since historic times, arguing that cultivation is changing the quality, quantity and variety of vegetation by man's intervention, not necessarily involving soil disturbance. He referred to actions taken by himself and his family from the 1950s to increase grass content on Carn Downs, although objectives and management altered in the 1980s when the land was entered into an Environmentally Sensitive Area ("ESA") scheme. The HLS agreement, entered into in December 2013, is targeted, including burning and strimming to reduce gorse and produce areas of heath of differing maturity.

43. An aerial photograph, dated 5/11/2009, was submitted by the objector and this shows a difference in the state of the land at Carn Downs in comparison to an area a short distance to the north-west, which the objector indicated was unmanaged bracken. There is no doubt in my mind that the land of Carn Downs is agriculturally poor, with large rocks and stones in evidence, as well as a predominance of gorse and bracken. The best of the surrounding land has been fully enclosed into a landscape of fields which most people would readily recognise as agricultural fields. However, the aerial photograph shows surprisingly large areas of grass, which suggests active improvement and management of the land.

44. Taking account of all the evidence, and the arguments with regard to definitions, I consider that there has been low-level cultivation of these areas, which was occurring at the time of the application. I am satisfied that the level of cultivation has been such that the blue land has not been shown to be 'uncultivated' at the date of the application, April 2013.

45. A letter was submitted from the former owner who had farmed the pink land, referred to as Kerrow, for around 30 years prior to selling it in 2002. He indicated that it had been improved by digging out rocks and spreading dung. Although queried by SPM, I am satisfied that this letter can be accepted as relevant evidence, although it cannot be given the weight that might be afforded to evidence given in person. The guidance indicates that land which is otherwise eligible for registration under paragraph 4 of Schedule 2, but which has been developed, improved and brought in hand cannot be registered. The NE definition relied upon by SPM indicates that the addition of organic fertiliser, such as dung, would be seen as cultivation, although I disagree with the argument of the objector that the resultant effects of grazing by cattle will of itself provide fertilisation, such that this could demonstrate cultivation. I consider that there is a difference between the eastern field and that to the west, where the land is clearly poor and, in my view, unimproved.

46. In relation to the green land, the owners and/or occupiers have not themselves given any information. I am satisfied that this land is not cultivated or improved. I note that part of the land was, at some point in the recent past, used as a silage clamp, however, at the time of my visit it was clearly long disused, with fly-tipping occurring on the land. There is nothing before me to suggest this area was in any different use at the time of the application. In relation to the green land, the land to the north-east of the road and the lane, I am satisfied that it remains uncultivated.

<u>Unoccupied</u>

47. There is some confusion as to whether 'occupation' relates to legal or physical occupation. I agree with the objector that someone may be an 'owner and occupier' in the legal sense however, the guidance clearly refers to occupation requiring some physical use of the land to the exclusion of others.

48. The earliest mapping arises from the tithe documents, generally produced in the early 1840s under the Tithe Commutation Act 1836, which converted tithes into a fixed money rent. They consist of the apportionment, map and file, concerned with identifying titheable land. The 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.

49. The blue land was numbered 180 and 181 in the Morvah tithe apportionment. The landowners and occupiers are listed as the Hichens family, with a Mary Ann Bull Daniell listed in the landowner column but with an annotation '*Lessee*'. The description for apportionment 180 is '*Great Downs'* with the state of cultivation *'Furze and Turf'* whilst 181 '*Carne Common'* is described as '*Turf*'.

50. On the Madron tithe map the eastern part of the pink land numbered 142 was owned by George John Esq. and occupied by Sarah Cargeek. It was described as '*Higher Croft'* with the state of cultivation *'Furze'* and was within the overall area of 25 acres, 1 rood and 12 perches on which tithe rent charge was paid.

51. I note that within this area was 22 perches under apportionment number 143a, described as *'Half of Carn Brea Lane',* which relates to the uncoloured lane referred to earlier. The Parish boundary runs along the centre of the lane and the northern half within apportionment 179 in Morvah Parish, *'Common and Lane outside Great Downs'.* Although there is now a stile, the lane was formerly open to the land to the west, part of 179 and also 141 in Madron. This was in the '*Undivided commons in Kerrow*', owned by George John Esq. and Richard Trembath and occupied by Francis and Sarah Cargeek and Richard Trembath, described as '*Ricks and Turbary'*, with no tithe rent charge payable. The half of Carn Brea Lane was clearly described with the state of cultivation '*Waste'* and I agree that it is highly unlikely that this was because it was being used as a rubbish dumping area. It remains a physical feature today and linked the '*Undivided commons in Kerrow*' to the undivided commons to the east, apportionment 195, '*Part of Bosullow Common'*.

52. The green land was separately numbered 397 on the Morvah tithe map and included land on either side of what is now the public road. The boundary to the blue land to the west is annotated '*Gurgo boundary*' with the section running south to Carn Brea Lane '*No Man's Land'*.

53. Whilst the objector relies on the tithe to show past occupation, I agree with SPM that the 2006 Act is looking at the situation at the time of the application. On the basis of the evidence presented to the hearing the blue and pink land was exclusively occupied by the objector in April 2013. He had the right to the produce and use of that land.

54. I note that the objector claims a private right of access across the green land to a field gate onto Carn Downs. There is no information before me to show that this land is exclusively occupied and in use by any one party. Part of the land was formerly a quarry and I take account that the guidance refers to a quarry as one of the possible exclusive uses. This land is no longer in such use and I am satisfied that it was unoccupied at the time of the application.

55. Carn Brea Lane, or the Tinners Way, is not recorded as a public highway and there is no evidence that it was exclusively occupied in April 2013.

56. SPM referred to the recording of land as access land under the 2000 Act to say that it was not subject to exclusive occupation. Whilst the land is available to the public for walking I agree with the objector there are restrictions, as landowners or occupiers able to prevent public access at certain times in order to carry out certain works. It is not my understanding that public rights of access under the 2000 Act displaces the rights of owners such that the land could be considered 'unoccupied' under the 2006 Act.

Summary

57. I am satisfied that the green land, the land to the north of the road and the lane have been shown, on the balance of probabilities, to be open, uncultivated and unoccupied. The blue land and the pink land do not, in my view, satisfy the definition as 'waste land', as in April 2013 it was not open, uncultivated and unoccupied.

58. Although my views were sought, I cannot consider whether the other areas of land should be registered as common land as they were withdrawn from the application.

Other matters

59. Concerns were raised about the interaction of NE with the general public and landowners; management of environmental stewardship and conservation grazing schemes; potential alterations to funding sources of such schemes; possible implications arising from tuberculosis (TB) restrictions on animal movements; whether archaeological sites should be open to public access; the approach taken by Parish Councils; whether or not public benefit or public input to moorland management would arise; potential conflict with the powers of the Secretary of State under Part 4 of the 2006 Act; and concerns regarding works on other sites in the area. Whilst I understand the importance of these points to those living and working in the area, they are not matters I consider relevant under the 2006 Act.

Conclusions

60. Having regard to these and all other matters raised at the hearing and in the written representations, I conclude, on the balance of probabilities, that the criteria for the registration of the application land as common land under paragraph 4(2) of the Schedule 2 to the 2006 Act has been met for part of the land applied for.

Heidi Cruickshank

Inspector

APPEARANCES

For the Commons Registration Authority:

Mr M Wright Cornwall Council

For the Applicants, Save Penwith Moors:

Mr I Cooke

Mr D Coles

In Objection:

Mr A Hichens

Interested Parties:

Mr J Mortimer Country Land and Business Association

Mr W Babcock

Mr I Flindall

Ms M Gribble

Mr WJ Trewern

Mr C Weatherhill

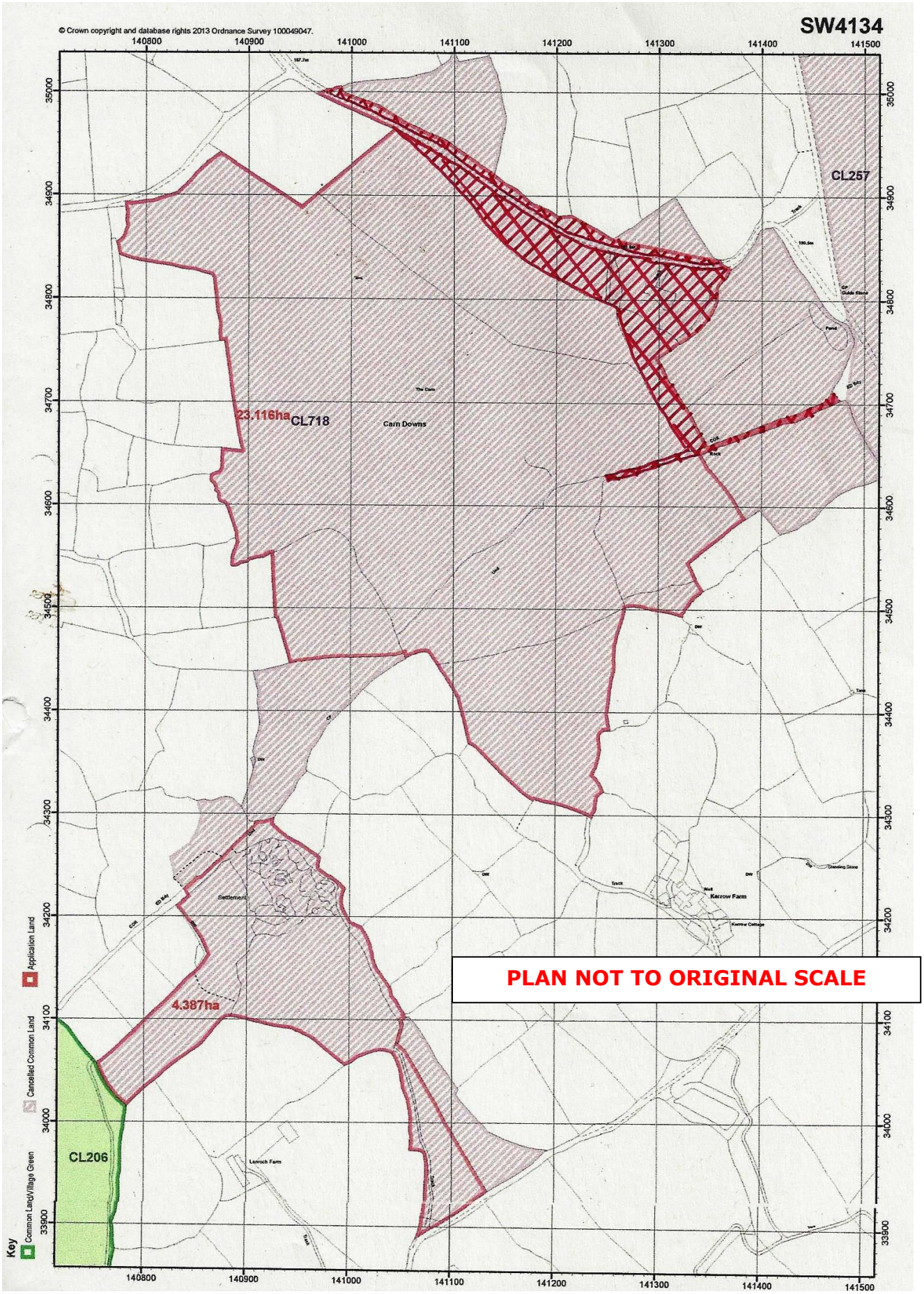
DOCUMENTS

1 Plan of the area indicating ownership

2 Documents produced by Save Penwith Moors

3 Letter from M L Prowse

4 Documents produced by Mr Hichens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SW4134
CL257
23.116ha
CL718
Carn Downs
4.387ha
CL206
Kerrow Farm
Lanroch Farm
Settlement
PLAN NOT TO ORIGINAL SCALE
Key
Application Land
Cancelled Common Land
Common Land/Village Green