The Planning Inspectorate

Application Decision

Hearing held on 6 May 2015

by Mrs H D Slade MA FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 22 May 2015

Application Ref: COM 601
Name and Location of Common: Land at Churchtown and Tremeader Commons in the Parish of Zennor, Cornwall
Register Unit No. CL525
Commons Registration Authority: Cornwall Council

- The application, dated 14 May 2013, is made under Paragraph 4 of Schedule 2 to the Commons Act 2006 ('the 2006 Act').
- The application is made by Mr David Coles on behalf of Save Penwith Moors.
- The application is to register waste land of a manor not registered as common land in the register of common land.

Summary of Decision: The application is granted in part.

Preliminary Matters

1. I carried out an unaccompanied visit on the afternoon of Tuesday 5 May 2015 in dry but very windy weather conditions. I was unable to traverse some of the area due to the nature of the vegetation and the topography, but I used available public footpaths and tracks to walk through as much of the area as possible and to obtain good views of it.

2. Only one of the objectors was represented at the hearing: Mrs Jane Barnett, who had objected on behalf of her mother, Mrs C M Rogers, was accompanied by her sister, Mrs Caroline Mann. Mr J Mortimer of the Country Land and Business Association ('CLA') was also present but had not indicated any interest in the matter previously. Mr Peter Cattran sent word that he did not intend to be present, but wished to rely on his written submission. Neither Ms Jenepher Gordon nor Mr Christopher Madden were present. I have taken account of all representations, whether made orally at the Hearing or made in writing.

3. Following the Hearing, I undertook a further, limited, site inspection of Higher Rosemorran in the company of Mrs Barnett and Mrs Cann; and with Mr Wright from the Commons Registration Authority ('CRA'), the applicant having declined to attend.

4. Prior to the hearing the CRA had produced a plan of the application land indicating the land ownership, and also a plan showing areas of land which the applicant had agreed not to pursue. These parcels of land were ones considered by the CRA as being ineligible for registration for specific reasons,

which I address in my decision. Although there is no formal mechanism in the 2006 Act to modify applications, it is open to me to modify the area to be registered if I think it appropriate to do so.

5. The regulations under which this application was made were known as The Commons Registration (England) Regulations 2008 but these have been superseded by The Commons Registration (England) Regulations 2014 ('the 2014 Regulations') which now govern all these procedures.

6. The CRA confirmed at the Hearing that they were taking a neutral stance in the matter.

The Application Land

7. The area of land which is the subject of the application extends to some 63.5 hectares lying to the south of the B3306 road immediately south east of Zennor. The road forms the northern boundary of the application land whilst the south western boundary of the land is marked by the course of a small stream. To the east and south are the previously registered parts of CL525 and CL524, and the dwellings at Rosemorran.

8. The land rises to a height of over 230 metres on Zennor Hill where it is topped by a rocky outcrop. A short distance to the south along the ridge lies the Logan Stone complex of rocks, which is situated on the land previously registered as common land. The application land lies within an expanse of land recorded as Access Land under the Countryside and Rights of Way Act 2000 ('CROW Act') and although there are a number of tracks across the area, there are only two acknowledged public footpaths across it. These are parallel to each other and run south east from the B3360. One of them follows closely the south western boundary of the application land before veering away to the south west, and it also forms the vehicular access to Higher and Lower Rosemorran. The other lies approximately 200 metres further to the north-east and provides pedestrian access to Rosemorran, continuing beyond in a south easterly direction.

9. Land registry documentation identifies Jenepher Gordon as the owner of Lower Rosemorran and Caroline Margaret Rogers as the owner of Higher Rosemorran. The ownership of Tremeader Common is claimed by Mrs Cherry Cattran, and that of Churchtown Common by her husband, Mr Peter Cattran. Mrs Cattran also states that part of the original application land is owned by Mr and Mrs Monies and is separated by a Cornish hedge from Tremeader Common. No documentation has been submitted to support these claims by Mr and Mrs Cattran. Mr and Mrs Maeckelberghe have registered a caution against first registration over part of Tremeader Common to protect access to their property at The Carne.

10. The applicant, Mr Coles, has agreed to withdraw from the application part of the land at Rosemorran, and the land allegedly owned by the Monies, on the basis that the former land lies within the domestic cartilage of the two properties concerned, and the latter has been cultivated.

The Statutory Requirements

11. Paragraph 4(6) of Schedule 2 to the 2006 Act provides that any person may apply to the CRA to add land to the register of common land. The 2014 Regulations set out the procedures to be followed.[1]

12. The application was made on 14 May 2013 and has been made in accordance with the provisions of Paragraph 4(2) of Schedule 2 to the 2006 Act, which apply to land which, at the time of the application is waste land of a manor and where:

    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) of Schedule 2.

13. This application relies on the circumstances set out in sub-paragraph 4(4) of Schedule 2 which provides that land may be added to the register of common land where:

    a. the provisional registration was referred to a Commons Commissioner under Section 4 of the 1965 Act;

    b. The commissioner decided that the land was not subject to rights of common and for that reason refused to confirm the provisional registration; and

    c. The Commissioner did not consider whether the land was waste land of the manor.

14. An application under Paragraph 4(4) of Schedule 2 to the 2006 Act must include –

    a. a description of the land to which the application relates by reference to an Ordnance Survey map at a prescribed scale, with the application area marked on it by means of distinctive colouring within an accurately identified boundary; and

    b. evidence to support the application relevant to the criteria under which the application has been made.

15. 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 the land was provisionally registered as common land under Section 4 of the 1965 Act

16. An application to register land at Churchtown and Tremeader Commons was made by the West Cornwall Footpaths Preservation Society ('WCFPS') on 25 November 1969. That application encompassed all the land included in the

[1] See comments in paragraph 5

present application and was entered onto the register on 16 December 1969. No-one has contested this and I am satisfied that the application satisfies this criterion.

Whether objections were made to the provisional registration

17. Two objections to the provisional registration of the 1969 application were made: Connor Hubert Fallon objected to the registration of Churchtown Common, and M Griggs objected to the registration of the whole area then applied for. I am therefore satisfied that this criterion is satisfied.

Whether the provisional registration was cancelled

18. A Commons Commission was appointed to determine the matter and opened a hearing on 6 October 1980, but was unable to conclude it until 11 March 1981. Although he confirmed the registration of part of the area of the Unit Land in his determination, the provisional registration of the area of land covered by the present application was cancelled. The application is therefore validly made in this respect.

The Commons Commissioner's decision

19. The Commissioner's decision was dated 26 August 1981 and covers his consideration of both a village green application (for an area of land principally on the north side of the B3306) in addition to the common land application. A small part in the extreme south east corner of the claimed village green coincided with the extreme north western part of Churchtown Common. The village green registration was voided in its entirety.

20. The decision records, on page 4, that the WCFPS had written a letter dated 9 June 1980 withdrawing their application for registration of common land[2], but the Commissioner continued to consider the matter since there were claims for rights which needed to be determined. The Commissioner concluded that large parts of the unit land did not carry any properly registered common rights and consequently voided the registration of the parts he described as 'the Churchtown Piece', 'the Tremeader Piece' and the 'VG/CL Piece'. With respect to the two remaining areas ('the East Piece' and 'the South Piece') he concluded that, had they been given separate registration unit numbers, there would have been no objections to their registration and, in the interests of public benefit and fairness, he proceeded to confirm the registration of those two areas despite being in some doubt as to whether the claimed grazing rights over them actually existed.

21. Although the WCFPS allegedly withdrew their application (a fact for which I have no supporting evidence) the Commissioner's decision makes brief reference to applications from Mr P A S Pool and Mr W F Lloyd in respect of the registration of common land. I do not have copies of these applications, both of which are noted on the Commons Register. I therefore conclude that, despite one applicant withdrawing, the remaining two did not.

22. It was agreed by all parties at my Hearing that there is no reference whatsoever in the Commissioner's decision to the question of whether or not the land not subject to rights of common was capable of registration by virtue of being 'waste land of the manor'. I conclude that the Commissioner did not

[2] I have not seen a copy of this letter

consider this matter and thus the all the criteria of Paragraph 4(4) of Schedule 2 to the 2006 Act are satisfied. The application is validly made in this respect.

Whether the application land has a manorial origin

23. The applicant presented evidence taken from material produced by Mr Peter A S Pool, a noted scholar of Cornish history and antiquities, which was referred to as the 'Penheleg Manuscript'. He also referred me to an extract from Lakes Parochial History dated 1867 which identifies a number of manors within the Zennor area. The manor of Treneglos (or latterly Treveglos) is identified in Lakes Parochial History and is identified to be synonymous with 'Churchtown' in the Tithe Apportionment of 1840 or thereabouts.

24. It was initially Mr Coles' view that the application land fell within the manor of Hornwell, shown on the map of the Tithings of the Hundred of Penwith produced by Mr Pool in 1959. However, after studying the available documents at the Hearing it was agreed by all present that the whole of the application land was contained within the tithing of Rosemorran. Nonetheless no information has been submitted by the applicant to show how this particular tithing related to its constituent manors, or what those manors were.

25. Mr Cattran, in his written submission, states that SPM makes generalised references to the land being part of land of a manor but have not provided any evidence to demonstrate that the application land was formerly part of a manor or manors, a view shared by Mr Mortimer of the CLA.

26. I agree that the evidence provided is rather generic and sketchy. However, paragraph 7.3.15 of the Defra guidance makes the point that the vast majority of land in England is formerly 'of a manor' with the notable exception of Crown lands and boroughs. There is no record of the application land being Crown land nor of it being part of a borough. I am satisfied that the available evidence in the Tithe Apportionment indicates that the likelihood is that at least half of the land was in the manor of Treveglos, with a small portion listed under Rosemorran, and that the rest of it was likely to have been in the manor of Tremeader. Mr Mortimer agreed that there is no evidence to suggest that the land was not of manorial origin, and I am satisfied that, on the balance of probabilities, it was.

Whether the land is, or was, waste land of the manor

27. The accepted definition of waste land of the manor is that given in the judgement in *Attorney General v Hanmer (1858).* The definition was approved in *Hampshire County Council v Milburn (1990)* and is expressed as being the open, uncultivated and unoccupied lands parcel of the manor or open lands parcel of the manor, other than the demesne lands of the manor.

28. A significant amount of time was taken up by the Hearing with arguments about whether the land in question had ever been waste land. Mr Mortimer was adamant that since the all the land in question can be shown to have been tenanted since at least 1840 (the date of the Tithe Apportionment) it could be demonstrated that it was not 'unoccupied'. As such it failed one leg of the three definitions, all of which needed to be satisfied for the land to qualify as 'waste'.

29. Mr Coles, on the other hand, was equally adamant that it was the state of the land at the time of the application which was critical, and not its historical

status. Nevertheless, he considered that the Tithe Apportionment showed that the land which is the subject of his application was 'waste' at that time, and there is no evidence to show it has been anything other than that.

30. The Tithe Map identifies the application land as being formed at that time of five parcels as follows:-

    a. Parcel 1229 (in Churchtown) which was named as Higher Common. It was owned by Rev. Gervys; occupied by the tenants of Treveglos in common; and its state of cultivation was described as common;

    b. Parcel 1307 (Rosemorran) which was owned by four people (the names are difficult to decipher but appear to include a Mr Gilbert and someone called Osborn); it was occupied by two people by the name of Matthew and Thomas Bean (?); it was called Common by Rosemorran and its state of cultivation was described as being common;

    c. Parcel 1587 (Tremeader) which was owned by various landowners by division; it was occupied by John and William Matthews; it was called Tremeader Common above the Road; and its state of cultivation was described as turbary;

    d. Parcel 1589 (Tremeader) was shown as being in the same ownership and occupation as 1587; it was called Lower Croft Sperris; and the state of cultivation was described as croft;

    e. Parcel 1590 (Tremeader) was also in the same ownership and occupation as 1587; it was called Higher Croft Sperris; and was also described as croft.

31. I consider that the first two parcels described above are clearly likely to have been open and uncultivated and, since they were used as commons, they were not exclusively occupied, notwithstanding that they appeared also to be subject to a tenancy. Clearly the tenancy did not interfere with the land use by other parties. These plots would seem to me to fit the description of waste at that time.

32. Mr Mortimer considered that plot (c) above could not be assumed to be waste merely because the use of the area was described as turbary. He did not accept that such a description automatically implied common rights.

33. The Oxford Dictionary of English describes turbary as being more properly and fully called 'full common of turbary' and gives the definition as '*the legal right to cut turf or peat for fuel on common ground or on another person's ground*.' I am consequently more persuaded by Mr Coles view that the description of this plot implies that, at that time, it was not exclusively occupied and that it was more likely than not to have been open and uncultivated. This area would also, therefore, fit the description of waste.

34. The remaining two plots are described in such a manner as to imply that they were, at that time, being exclusively occupied by the named tenants and that they were therefore unlikely to fall within the description of waste.

35. Nevertheless, I agree with Mr Coles that the condition of the land at the time of his application is the one that matters in this case. This is in line with the guidance in paragraph 7.3.13 if the Defra guidance. The question to be resolved is whether or not land which was not previously waste of the manor

can become, or revert to, waste. Mr Mortimer pointed me towards the view expressed in Gadsden[3] where it is said that, in principle, abandonment is possible providing always that the conditions required for abandonment of rights over land are met. In such cases where the conditions are met, there is no reason why such land should not be treated as reputed waste land of a manor. However, Mr Mortimer stressed that Commissioners in the past have required good evidence of the abandonment of demesne status[4] before accepting such a premise.

36. I consider that the actual use and state of the land must be taken as a good indication of its classification, and that abandonment can be inferred from its condition. I therefore now look at each aspect of the definition of waste in turn to determine the question.

Whether the application land is 'open'

37. In this context I consider that 'open' means unenclosed. That is not to say that there will be no hedges or fences at all but that such as do exist will be against the surrounding land being used for purposes other than 'waste'. I do not consider that boundary stones, defining parcels of land within an otherwise open landscape, can be considered to enclose land in such a way as to render it not 'open'. I did note some boundary stones on the land, and indeed some degraded and breached Cornish hedges (particularly on the ridge line between Churchtown Common and Tremeader Common), but these features are no barrier to the passage of humans or animals, and do not, in my view, render the area 'enclosed'. The majority of the application land, comprising Churchtown and Tremeader Commons, can therefore be classified in my view as being open. This includes the land described in the Tithe Apportionment as forming both Higher and Lower Sperris Crofts and which is now indistinguishable from the rest of Tremeader Common.

38. I do agree that the parcels of land allegedly owned and occupied by Mr Monies, including the small quarry adjacent to the field, are surrounded by a feature which, without doubt, qualifies as a hedge or fence, and which clearly separates those parcels from the adjoining land subject of the application. On this ground alone those parcels would fail the test and should be excluded from registration. I note that the CRA indicated at the Hearing that the land on which the quarry is sited was not included in the original application. I do not consider that this is entirely clear from the application plans but I accept in any case that it does not qualify for registration on the basis that it is used exclusively by the Monies family.

39. With respect to the land at Higher Rosemorran, there is clearly a boundary between the land used as the immediate garden, and the adjacent land through which the public footpath runs. This gives the garden a degree of privacy and it is clearly enclosed in that sense, thereby qualifying it for exclusion from registration. The land beyond this to the north east (i.e. through which the footpath runs) is demarcated on its north western side by boundary stones, and to the south east by the boundary of the application land, but is otherwise open. It is impenetrable due to the vegetation, but it is not enclosed other than against the adjacent field or from the recognisable

[3] Gadsden on Commons and Greens; Cousins and Honey – second edition 2012
[4] i.e. land held by the lord of the manor for his own purposes

garden area. I do not consider that this extended area qualifies for exclusion from registration as common land on this basis.

40. The land at Lower Rosemorran, including the access drive which also serves Higher Rosemorran, also has a degree of privacy due to the presence of vegetation providing a sense of enclosure. However it is less marked than at the neighbouring property, for the simple reason that one has to pass through this area to get to Higher Rosemorran, and the garden area is less formal. There is a marginal distinction between the wider area of land, and the immediate garden within 20 metres of the property (the 'excepted land' under the CROW Act) which feels more enclosed, and I would agree that this smaller area of land should therefore be excluded from registration on this basis.

Whether the land is 'occupied'

41. Starting firstly with the land owned by the Monies, there is no apparent dispute that the land, including the quarry, is exclusively used by that family and I am satisfied that it is 'occupied' in every sense of the word. On this aspect too it fails to meet the description of 'waste' land.

42. Turning to the land at Rosemorran, I am satisfied that the area delineated on the revised application map prepared by the CRA is sufficiently part of the curtilage of the two properties concerned as to be occupied by the relevant owners. The track is private and used solely for access to the two dwellings, and the garden areas, exempted from open access provisions by being within 20 metres of the buildings, are also clearly occupied exclusively by the respective landowners. I am therefore satisfied that this area should be excluded from registration.

43. The remaining land belonging to Higher Rosemorran is not, in my view, occupied exclusively, regardless of its legal ownership. It is currently more or less impenetrable, due to the nature of the vegetation, but this merely demonstrates that it is not managed in any way and thus not occupied in the sense of waste land.

44. With regard to the remaining land at Lower Rosemorran, I note that the landowners state that access is needed across this land to access other land within their ownership alongside the lane to Foage Farm. Registration of the application land would mean that access to the field in question would only be possible across registered common land.

45. I noted from my site visit that there appeared to be a difference on the ground between the garden area, which was obviously managed by the landowners, and the remaining area which was more natural in appearance. I have already concluded that it was not enclosed by any hedge or fence, and it would not appear to be managed in such a way as to suggest exclusive occupation. Registration would not remove ownership of the land, and access to the adjacent field would still be possible. This area of land falls outside the excepted area in respect of open access land as it is more than 20 metres from the building. I consider that it is sufficiently unoccupied to satisfy this aspect of the definition of waste land.

46. Turning to the majority of the area, comprising Churchtown and Tremeader Commons, the alleged owners (no evidence of ownership having been submitted to me) claim that the area is let by them to a local family for

shooting. Mr Cattran considers that this demonstrates that it is occupied, firstly because it is sufficiently within their control that they are able to let it, and secondly because it is managed for shooting.

47. Defra advises that occupation requires some physical use of the land to the exclusion of others. I have been presented with no evidence to support the existence of a sporting tenancy, but even if this had been forthcoming, I do not consider that such a lease would render the land 'occupied' in terms of waste land of the manor. Such use of the land does not amount to occupation to the exclusion of others. Indeed this is the sort of activity often carried out on land which is 'waste' since the typical vegetation provides good cover for game.

48. Defra also advises that land does not cease to be 'unoccupied' merely because it is subject to a tenancy or lease to enable extensive grazing. Clearly the ability to enter into such a tenancy agreement cannot be indicative of exclusive occupation, and occasional shooting is no more intrusive than extensive grazing may be. I place no weight therefore on the existence, if any, of a shooting tenancy as indicating exclusive occupancy of the land. I therefore find that neither Churchtown Common nor Tremeader Common is 'occupied' in terms of the definition of waste land.

Whether the land is 'uncultivated'

49. The Oxford Dictionary of English describes cultivated land as land which has been prepared or is being used for crops or gardening. I consider that the ordinary meaning of uncultivated land must therefore encompass land which does not fall into this definition.

50. With regard to the land at Higher Rosemorran (beyond the 20 metres of excepted land) Mr Mortimer indicated that Mrs Rogers took furze from the land for fuel. If this has happened in the past, it clearly has not taken place for some considerable time – a fact acknowledged by Mrs Barnett. The land is densely overgrown and cannot in my view be remotely described as being cultivated.

51. With regard to the land at Lower Rosemorran beyond the excepted land, I have already concluded that it does not appear to be managed in such a way as to exclude others. It does not seem to me to be productive in any way in terms of crops but, although more naturalistic than the garden which forms part of the excepted land, it nevertheless has a managed appearance and could reasonably be described as being part of the extended garden. There is no indication that this area of land was any different at the time of the 2013 application. On this basis I am persuaded to exclude it from registration as meeting one of the definitions of cultivation; thus not meeting the description of 'waste'.

52. Turning to the remaining area comprising Churchtown and Tremeader Commons, the area is covered in typical heathland vegetation, visually consisting principally of gorse (or furze), brambles, heather and moorland grasses. There are of course other plants growing on the land, but none of these are inconsistent with a description of waste. Mr Cattran claims that the land has been kept under control by controlling the growth and natural vegetation on the land. On my site visit I was able to see that it is not cultivated in the dictionary sense of the word although it may be managed occasionally by cutting or burning, or perhaps mowing; notwithstanding I saw

little or no signs of any such work during my visit. The vegetation is dense and difficult to negotiate other than on narrow paths or tracks. I do not consider that any management which takes place is capable of being described as bringing the land 'in hand'. In my view the land presents all the characteristics of being uncultivated land.

Conclusions

53. With respect to the land allegedly owned and occupied by the Monies family, I conclude that it did not comprise waste land at the time of the application; being cultivated, enclosed and occupied. This includes the quarry area, whether or not it formed part of the application land[5].

54. With respect to the excepted land and the access track at Higher and Lower Rosemorran, I conclude that it comprised a combination of enclosed, cultivated or occupied land at the time of the application such that it cannot meet the definition of waste land.

55. I conclude that the remaining land at Higher Rosemorran was and is open, uncultivated, and unoccupied and constitutes waste land in this respect; but that the remaining land at Lower Rosemorran was sufficiently cultivated to prevent it fulfilling the description of waste land.

56. With respect to the land at Churchtown and Tremeader Commons, it is open, unoccupied and uncultivated and is therefore waste land for the purposes of this application.

Conclusions

57. Having regard to the relevant matters raised in the written representations and at the Hearing I conclude that the criteria for the registration of the application land as common land under Paragraph 4(4) of Schedule 2 to the 2006 Act have been met for most of the land applied for and that those parts should be registered as common land. The remaining parts should not be so registered as they do not meet the necessary criteria.

Formal Decision

58. The application is approved in part. The land outlined in red, with the exception of that land which is shown cross-hatched in red on the plans attached to this decision shall be added to the register of Common Land. For clarity, those parts EXCLUDED from registration are as follows:

- The land in the north east owned and occupied by Mr and Mrs Monies (including the quarry);
- The land identified by the CRA as 'excepted land' under the CROW Act 2000 at Higher and Lower Rosemorran;
- The remaining land forming part of the garden to Lower Rosemorran.

Helen Slade

Inspector

[5] See my comment in paragraph 38

APPEARANCES

For the Applicants, Save Penwith Moors:

Mr D Coles

Mr I Cooke

For the Objectors:

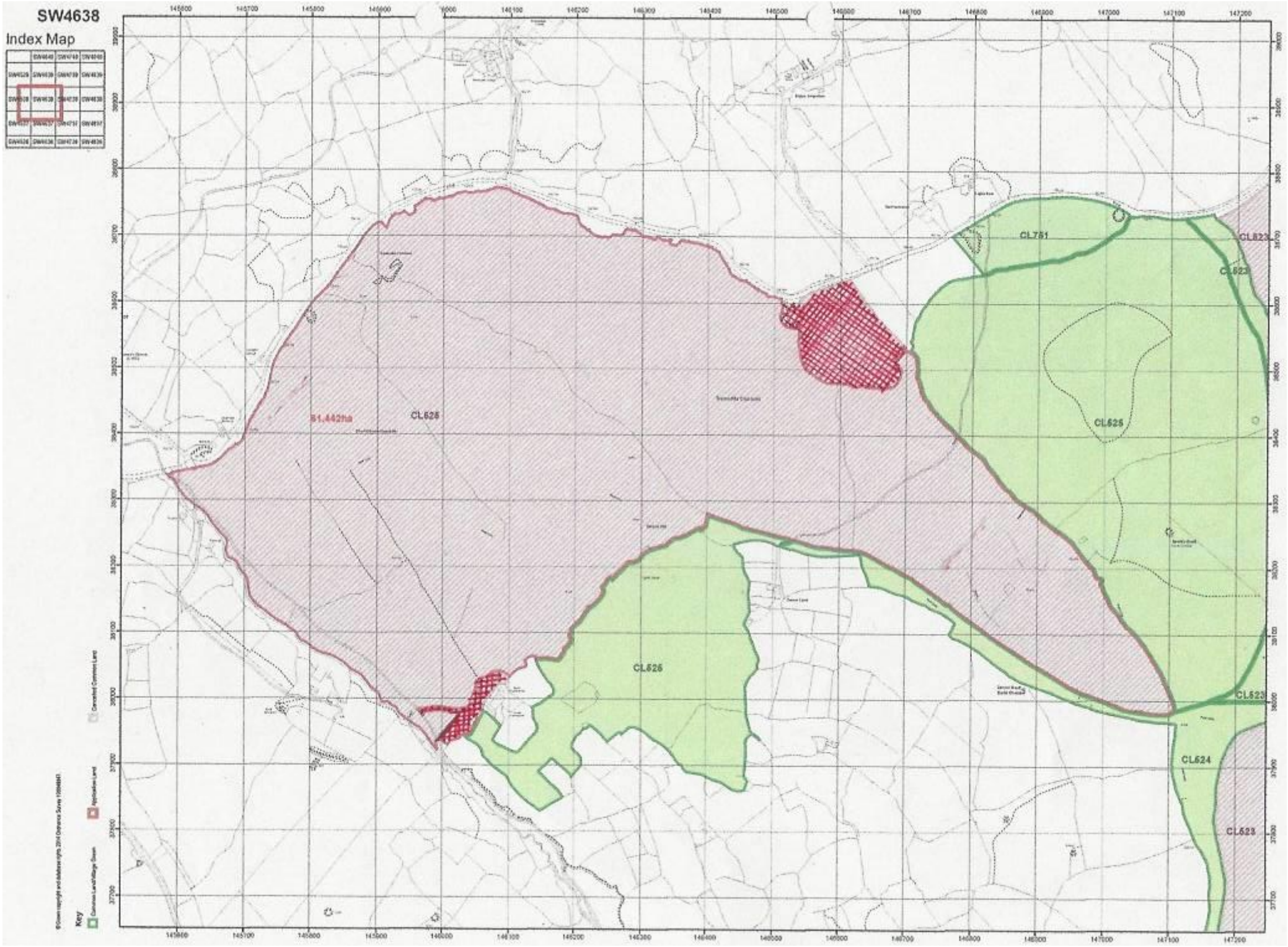
Mrs H J Barnett	on behalf of Mrs C M Rogers
Mrs C Mann	on behalf of Mrs C M Rogers
Mr J Mortimer	Country Land and Business Association

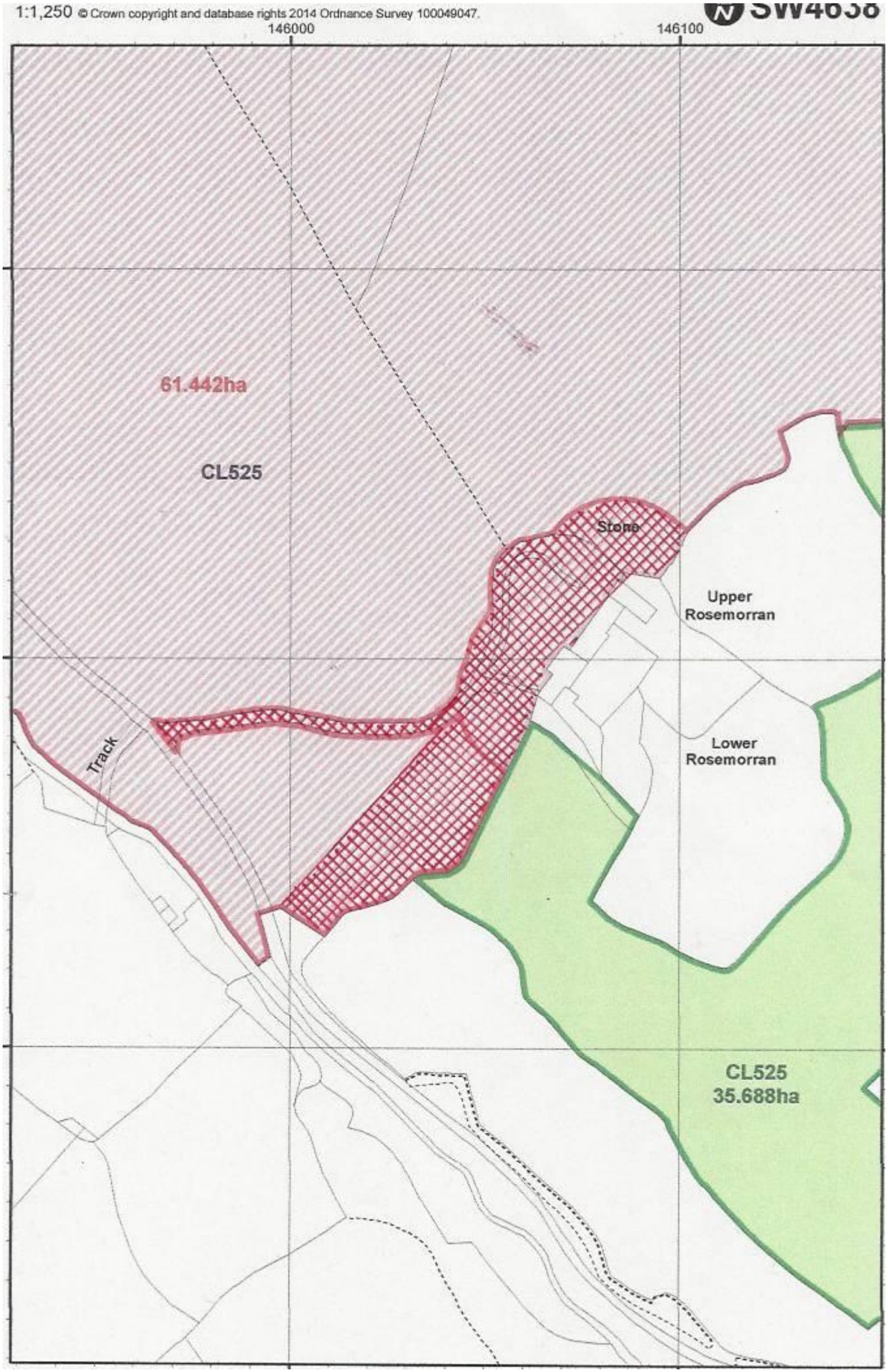
For the Commons Registration Authority

Mr M Wright	Cornwall Council
Mr M Eastwood	Cornwall Council

HEARING DOCUMENTS

1. Bundle of authorities submitted by Mr J Mortimer.


SW4638
Index Map
CL751
CL823
CL525
CL526
CL524
CL523
81.442ha
Key


1:1,250 © Crown copyright and database rights 2014 Ordnance Survey 100049047.
146000
146100
SW4638
61.442ha
CL525
Stone
Upper Rosemorran
Lower Rosemorran
Track
CL525
35.688ha