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# Application Decision

Hearing held on 7 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**

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**Application Ref: COM 602**

**Name and Location of Common: Land at Gear, Treen, Porthmeor and Bosphorthennis Commons in the Parish of Zennor, Cornwall**

Register Unit No. CL526

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 not granted.

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## Preliminary Matters

1. I carried out an unaccompanied visit on the morning of Tuesday 5 May 2015 in dry but blustery 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 tracks and the adjacent road to walk the length and breadth of the application land and to obtain good views of it.
2. All four objectors appeared at the hearing: Mr H Bowden and Mr A Bowden who were assisted by Mr Dunstan; and Mrs L Storey and Mr F Berryman who were assisted by Mr J Mortimer of the Country Land and Business Association ('CLA'). Following the hearing, I undertook a further, limited site inspection in the company of the aforementioned objectors and their representatives, Mr Coles (the applicant) and Mr Wright from the Commons Registration Authority ('CRA').
3. Prior to the hearing the CRA had produced a plan of the application land indicating which land was the subject of objections, as it appeared that the owners of some of the land had not submitted objections. At the start of the hearing, Mrs Storey confirmed that she was objecting (on behalf of the Berryman family) to the registration of the whole of the application land and not merely those parts to which they claimed ownership. The CRA confirmed that they were taking a neutral stance in respect of the part of the application land which they had understood was being contested, but that they supported the application insofar as it related to areas which they did not believe had been objected to earlier in the process.

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4. I have considered the matter as a whole, including those areas to which no clear objection was made during the relevant statutory period of notice.
  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.

### **The Application Land**

6. The area of land which is the subject of the application extends to some 37 hectares lying to the south of the B3306 road at Treen, to the west of Zennor. The application land contains a number of ancient monuments including hut circles, cairns, tumuli and a circular stone enclosure. It lies within an expanse of land registered as Access Land under the Countryside and Rights of Way Act 2000 ('CROW Act') and although there are tracks across the area, there are no public rights of way recorded across any part of it. A highway bisects the application land on a north-west to south east axis (i.e. the road south from The Gurnard's Head inn).
7. None of the land appears to be registered with the Land Registry. The Berryman family claim ownership (for up to 16 generations) of Porthmeor Common, part of which is tenanted by Mr H Bowman (who lives at Porthmeor Cottage). The extent of Porthmeor and Bosporthenis Commons is marked with boundary stones at regular intervals where it adjoins other land already registered as common land, and stone walls around the westernmost perimeter of the two areas.
8. The extent of Gear Common is less clearly marked where it abuts other land of similar appearance, but it too is fenced or hedged against the fields on its northern extremities. Part of Gear Common is already registered as CL315.
9. Treen Common is already registered as common land, and lies between Gear Common (separated by the road) and Porthmeor Common, which it abuts. Part of Bosporthenis Common is also on the commons register. To the south east, Treen Porthmeor and Bosporthenis Commons abut previously registered common land (CL111).

### **The Statutory Requirements**

10. 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.<sup>1</sup>
11. 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

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<sup>1</sup> See comments in paragraph 5

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- c) The provisional registration was cancelled in the circumstances specified in sub-paragraphs (3), (4) or (5) of Schedule 2.
12. 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.
13. 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.
14. 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***

15. An application to register land at Chykembro Common, Gear Common, Treen Common, Porthmeor Common and Bosporthennis Common was made by the West Cornwall Footpaths Preservation Society ('WCFPS') on 25 November 1969. That application encompassed all the land included in the present application and was entered onto the register on 10 February 1970. There is no dispute about this and I am satisfied that the application satisfies this aspect of the criteria.

### ***Whether objections were made to the provisional registration***

16. Several objections to the provisional registration of the 1969 application were made, both to the registration of land as common land and in respect of claimed common rights. The objections did not apply to the whole area covered by the application, but the provisional registration identified the area as one unit. I am therefore satisfied the provisional registration was subject to objections and thus the relevant criterion is satisfied.

### ***Whether the provisional registration was cancelled***

17. A Commons Commission was appointed to determine the matter and held a hearing on 16 May 1979. Although he confirmed the registration of part of the

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area of the unit land in his determination, the provisional registration of the area of land covered by the present application was cancelled.

18. This application is therefore validly made.

### ***The Commons Commissioner's decision***

19. The Commissioner's decision was dated 6 June 1979 and he concluded that large parts of the unit land did not carry any properly registered common rights. He accepted that rights had been conceded by Mr Berryman over two areas south of the aforementioned road: over Treen Common and part of Bosporthennis Common. The registration of these two areas was confirmed.

20. On the second page of his determination, the Commissioner wrote as follows:

*'For any part of the Unit Land to be properly registered as common land when there are in the Rights Section no properly registered rights of common over such part, it must be within the sub-paragraph (b) of the definition of "common land" in the 1965 Act, that is "waste land of the manor not subject to any rights of common". I do not know why the Footpaths Society ever registered the Unit Land. No evidence was given that any part of the Unit Land has any manorial history;'*

He went on to describe most of the unit land as being similar in appearance and consisting of rough moorland with no obstruction to access for either humans or animals. He nevertheless accepted evidence from Mr F W Bowden that property documents showed part of the land north of the road was in his ownership at that time (this parcel of land equates to the parcel which is the subject of Mr H Bowden's objection in respect of the current application), and that this area was fenced off from the adjoining part of the unit land<sup>2</sup>.

21. The Commissioner then concluded that every part of the unit land over which there were no properly registered rights of common was not properly registered as common land.

22. I note that, at my Hearing, Mr Coles confessed that he had not read the 1979 Commissioners decision which I find somewhat surprising, given the nature of his application. It seems to me from his decision that the Commissioner was alive to the fact that he must consider the question of whether or not the land was 'waste of the manor'. I note that on page 4 of his decision the Commissioner also made reference to the public interest in the registration of common land, and he therefore seems to have been well aware of the importance of the process in protecting the interests of the public.

23. Although the Commissioner was clearly conscious of the public interest in the matter, it was not his role to actively seek out evidence which was not presented to him. One of the Commons Commissioners decisions presented to me by the CLA representative<sup>3</sup> illustrates that the applicant in that case was aware of the need to present evidence of manorial origin and attempted to do so. In this case, in the absence of any evidence being presented to demonstrate the manorial status or origin of the land in question, I consider the Commissioner was entitled to infer that it did not have such status. Having

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<sup>2</sup> The field referred to at the Hearing as OS Field No. 1740

<sup>3</sup> *In the matter of land to the north of Piper's Green Lane, Brockley Hill, Stanmore, Barnet, Greater London (Ref. No. 59/D/7) 5 June 1974*

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concluded that it was not land of manorial origin, there was clearly no possibility of it being classified as 'waste land of a manor' and, consequently, he removed the relevant land from registration.

24. As pointed out by Mr Dunstan at my hearing, if the WCFPS had disagreed with the Commissioner's decision it was open to them to challenge it in the High Court at the time. I was not presented with any evidence to suggest that they did so.
25. The chapter of the guidance produced by Defra in relation to applications such as the one I am considering<sup>4</sup> is headed 'Rectification applications and proposals' and indicates that the provisions in Schedule 2 (which are transitory provisions) are designed to correct certain omissions and errors in very specific circumstances. I have set out the ones relevant to this application at paragraph 12 above.
26. I acknowledge that, at my hearing, Mrs Storey stated that the Berryman family accepted that their land did have its origins in the manorial system, and identified that manor as the Lanhydrock Manor. The applicants, on whom fell the burden of proving their case in this respect, had not identified this manor as the relevant manor, merely pointing to the Tithing Map produced by Mr Peter Pool which indicated that the application area fell within the tithing of Hornwell. The description of the manor of Hornwell in the associated 1959 article by Mr Pool for the Journal of the Royal Institute of Cornwall does not identify Lanhydrock in its list of constituent manors. It is therefore of no help to the applicants on this particular issue.
27. Whilst I accept that the likelihood is that some, if not all, of the application land had manorial origins, I do not consider that this new information with regard to the Porthmeor land indicates that the Commissioner erred, in his 1979 determination, in the manner allowed for in Paragraph 4(4) of Schedule 2 to the 2006 Act. He clearly did consider the question of whether or not the land was waste of the manor at that time and determined the question in the negative. He gave the matter due consideration and did not merely overlook the issue.
28. This application therefore does not fulfil the relevant criteria for re-consideration since it fails the test set out in Paragraph 4(4)(c) of Schedule 2 to the 2006 Act.

### **Other Matters**

29. For completeness, and in case I determined that the Commissioner *had* failed to consider the question of waste land of the manor, I listened at my Hearing to all the arguments presented about whether or not the land could be considered to be waste land of the manor, and the opinions about what constituted waste land. I was presented with references to a variety of legal judgements and previous decisions by both Commons Commissioners and Inspectors, and heard evidence about the use and occupation of the land concerned.

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<sup>4</sup> Part 1 of the Commons Act 2006: guidance to Commons Registration Authorities and the Planning Inspectorate – December 2014 – Chapter 7

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30. In the light of my conclusion at paragraph 28 above, I have not needed to address those issues in my decision, so I decline to do so as they are not relevant in this case.

**Conclusions**

31. Having regard to the relevant matters raised in the written representations and at the Hearing I conclude that the criteria set out in Paragraph 4(4) of Schedule 2 to the 2006 Act have not been met in relation to the application land, and thus the application cannot be granted.

**Formal Decision**

32. The application is not granted

*Helen Slade*

Inspector

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## **APPEARANCES**

### **For the Applicants, Save Penwith Moors:**

Mr D Coles

Mr I Cooke

### **For the Objectors:**

Mr J Dunstan                                 CVC Solicitors

Mr H Bowden

Mr A Bowden

Mr F C Berryman

Mrs L Storey

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. West Penwith ESA Scheme Prescriptions submitted by SPM
2. Downloaded information sheet (National Archives) on Tithes submitted by SPM
3. Transcript of 1756 Indenture in respect of land at Porthmeor, submitted by Mrs L Storey
4. Bundle of legal authorities and commissioners decisions submitted by Mr J Mortimer



# SW4437

## Index Map

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|        |        | SW7962 |
| SW7761 | SW7861 | SW7961 |
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### Key

- Common Land/Village Green
- Application Land
- Cancelled Common Land

