



Application Decision

Hearing held on 5 February 2013

By Sue Arnott FIPROW

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

Decision date: 11 April 2012

Application Ref: COM 406

Land at Chûn Downs, Parish of Madron, Cornwall

Register Unit: CL 206

Registration Authority: Cornwall Council

- The application, dated 17 January 2012, is made under paragraph 4(6)(a) of Schedule 2 to the Commons Act 2006 ('the 2006 Act').
- The application is made by Mr I McNeil-Cooke of 'Save Penwith Moors'.
- The application is to register waste land of a manor as common land in the register of common land.

Summary of Decision: The application is granted.

Preliminary Matters

1. A public notice of the application appeared in the 7 June 2012 edition of *The Cornishman* newspaper, on Cornwall Council's website and was displayed on the application land for the appropriate statutory period. Notice was also served on interested parties as required. In response, three letters of objection were submitted together with six representations in support of the application. In addition, letters from two other parties were forwarded by the applicant, one of which opposed registration of the land as common.
2. To assist in determining the application I held a public hearing on Tuesday 5 February 2013 at the Old Town Hall in St Just, Cornwall (also known as the St Just Community and Business Centre) having made an unaccompanied inspection of the application land the previous afternoon.
3. Since it became apparent at the hearing that some interested parties had not seen all the relevant documents submitted in evidence, I arranged for the circulation of a number of items after the close of the proceedings, allowing a further period for the receipt of any additional comments. In reaching my conclusions I have taken into account these late submissions alongside all documentation provided in advance and evidence presented verbally at the hearing.

The Application Land

4. The application land forms the south eastern part of the area known as 'Chûn Downs'¹, formerly Castle Downs, in the north western corner of the parish of

¹ Chûn Downs also includes adjacent land to the north and west. This is the subject of a separate application for registration as CL 519 (Planning Inspectorate Ref: COM 404).

Madron. The area is predominantly open heathland, bounded along most sections of its eastern and southern sides by traditional Cornish hedges. Trehyllis Farm lies in its south eastern corner.

5. The whole of the site is designated as a Scheduled Ancient Monument, noted for its field systems, round house sites and barrows as well as Chûn Castle which lies on the north western (undefined) boundary. In addition it is recorded as open access land under the Countryside and Rights of Way Act 2000 and lies within the Cornwall Area of Outstanding Natural Beauty.
6. Ownership of the land is unregistered. However, the objectors assert shared ownership, producing an extract from an abstract of title for Bossulow Veor in evidence.

The Statutory Requirements

7. Paragraph 4(6)(a) of Schedule 2 to the 2006 Act provides that any person may apply to the commons registration authority to register waste land of a manor as common land in the register of common land. The Commons Registration (England) Regulations 2008 (the 2008 Regulations) set out the procedures to be followed.
8. The application was registered by Cornwall Council on 18 January 2012². The application form (dated 17 January 2012) indicates that it has been made in accordance with the provisions of paragraph 4 of Schedule 2 to the 2006 Act which provides that an application can be made where the land at issue is waste land of a manor and where before 1 October 2008:
 - (a) the land had been provisionally registered as common land under section 4 of the Commons Registration Act 1965;
 - (b) an objection was made in relation to the provisional registration; and
 - (c) the provisional registration was cancelled in any of the following circumstances:
 - (i) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act and the Commissioner had determined that although the land had been waste of the manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor and for that reason only the Commissioner refused to confirm the provisional registration;
 - (ii) the provisional registration was referred to a Commons Commissioner under section 5 of the 1965 Act and the Commissioner had determined that the land was not subject to rights of common and for that reason refused to confirm the provisional registration and the Commissioner did not consider whether the land was waste of a manor;
 - (iii) the person on whose application the provisional registration had been made requested or agreed to its cancellation (whether before or after its referral to a Commons Commissioner).

² For the purpose of remedying non-registration or mistaken registration under the 1965 Act, the application must have been made on or before 31 December 2020.

9. An application must be made in accordance with the 2008 Regulations. Paragraph 16 of the 2008 Regulations requires that an application must –
- (a) be made in writing on a form provided by the registration authority to which the application is made; and
 - (b) be signed by, or by a representative of, every applicant who is an individual, and by the secretary or some other duly authorised officer of every applicant which is a body corporate or an unincorporated association.
10. In addition, paragraph 14 of Schedule 4 to the 2008 regulations requires that an application under paragraph 4 to Schedule 2 to the 2006 Act must include –
- (a) a description of the land to which the application applies; and
 - (b) evidence of the application of paragraph 4(2) of Schedule 2 to the 2006 Act to the land to which the application relates.

Reasons

The application

11. The Registration Authority (Cornwall Council) confirmed that the application was properly made and the required statutory procedures followed. Whilst none of the representations dispute this, I understand Mr Trewern was unable to view the deposited documents in the nominated office. However he confirmed to me that this had subsequently been rectified by Cornwall Council who had ensured he had seen all the information placed on deposit.
12. Consequently I am satisfied the application is sufficient to meet the procedural requirements of sub-paragraph 4(6) of Schedule 2 to the 2006 Act and that the procedures prescribed in the statute were followed.

Whether the land at issue is waste land of a manor

13. Waste land of a manor is regarded as being “the open, uncultivated and unoccupied lands parcel of the manor other than the demesne lands of the manor”, a definition established in the case of *Attorney General v Hanmer*³.
14. The applicant submits that it is reasonable to consider the application land as waste land of a manor, despite conflicting evidence as to manorial ownership for most parts of West Cornwall. His initial investigation indicated that the application land was once part of the Manor of Alverton, relying on a description of the Parish of Maddern (now Madron) in Lysons’ History and Topography (1814).
15. However subsequent investigation led him to believe that it had later been a part of Lanyon Manor. His research revealed that Chûn (also noted as Chyoone, Chyowne and Chywoone) came into the possession of the Lanyon family in 1215; part was sold to the Rashleigh family in 1632. A lease in 1704 from John Rashleigh to John Maddern (a copy of which was submitted) mentions Chywoone, and another in 1789 from Philip Rashleigh to Elizabeth Mathews mentions Chyoone; both refer to Lanyon Manor⁴.

³ *Attorney General v Hanmer* [1858] 2 LJ Ch 837

⁴ The applicant also noted a letter from Charles Rashleigh dated 4 September 1807 referring to a dispute over grazing and fencing of a common in the area but the exact location could not be confirmed as including the application land.

16. The Tithe Map and Apportionment for the Parish of Madron in 1841 recorded the application land as "Castle Downs" (parcel 14), one of six "undivided commons in Great Bussulow". These six 'commons' were recorded as being in the collective ownership of eight individuals holding varying proportions of the whole. Groups of occupiers were listed for each of the undivided commons, three individuals being noted in respect of Castle Downs. The apportionment lists the state of cultivation as "Turbary"; no tithe appears to have been payable for any of these undivided commons.
17. The applicant highlights the lack of cultivation and no recorded rent charge, submitting this is indicative of common land.
18. At the hearing Mr Weatherhill drew attention to the work of an eminent Cornish historian, P A S Poole MA FRSA, and in particular a paper published in the Journal of the Royal Institution of Cornwall Volume III Part 3 (1959)⁵. This described many changes to manors in the area and was said to include a sketch map of manorial boundaries within the Hundred of Penwith. From this Mr Weatherhill concluded that the application land had once been part of the Manor of Lanyon and later in the Manor of Binnerton, and submitted a map onto which he had hand-drawn his interpretation of the boundary between the Manors of Hornwell and Binnerton, Chûn Castle being located on the boundary.
19. In support of his submission, the applicant highlighted the published guidance which acknowledges that "it is seldom possible to definitively prove that a particular parcel of land is of a manor. But it should be sufficient to show that, on the balance of probabilities, the land lies in an area which is recognised to have been, or still be, manorial, and that there is no convincing evidence to the contrary"⁶.
20. The objectors challenge the credibility of the applicant's claims that the application land was once manorial waste given the flimsy nature of the historical evidence submitted. They contend that none of the submitted documents suggest Lanyon was ever a manor, nor that it had any connection with Chûn Downs. They submitted that much of the evidence supplied has no provenance and the research on which the application relies constitutes the opinions of individuals rather than qualified expert witnesses.
21. Mr Trewern submitted a copy of a map dated 1845 entitled "Plan of Sundry Tenements in Great and Little Bussulow in the Parish of Madron and County of Cornwall: The Undivided Property of Messrs John & Nicholas Bottrell, Mr Jos. Roberts and Mrs Ann Saundry, Mother and Guardian of William Saundry (a minor) ALSO The Commons & Waste Undivided between all the Lords of Great and Little Busulow". A further note on the map stated that it was "Surveyed for the Commutation of Tythes 1839 Copied in 1845 by R Henwood". [This provided similar information to the tithe map and award.]
22. I find that evaluation of the applicant's case is not assisted by the absence of copies of some of the evidence referred to, and the objectors are right to point to the lack of detail available to demonstrate the provenance of some of the documentation and statements submitted in evidence. This has inevitably reduced the weight I can attach to some of the supporting material.

⁵ Despite my request, no copy of the relevant extract could be supplied.

⁶ At paragraph 9.2.14: Guidance to applicants in the pilot implementation areas Version 1.22 September 2011; repeated at paragraph 9.3.16: Guidance to commons registration authorities and PINS for the pioneer implementation Version 1.43 September 2011.

23. Nevertheless, I accept there is reference to 'Chywoone' in the 1704 lease and to 'Chyoone' in 1789 (which I take to be the present 'Chûn'), both documents also mentioning the Manor of Lanyon. I do not regard this as conclusive evidence but it is endorsed to a degree later in the mid-nineteenth century by the treatment of Castle Downs in the tithe map and award (where it is noted as 'turbary' along with other land described as 'furze', 'morass' and 'waste') and similarly a short time afterwards on the plan of the undivided lands (including commons and wastes) of Great and Little Bussulow.
24. I agree with the objectors who take issue with the terminology: 'undivided commons' are not necessarily 'manorial waste land'. However, I take the view that on a balance of probability the listing of the application land (Castle Downs) along with other types of 'waste' land reflects its earlier origins as the 'open, uncultivated and unoccupied lands parcel of a manor' albeit that the exact manor may have altered several times over previous centuries.
25. Although the hard evidence in this case is scanty, there is nothing to counter the reasonable conclusion that at one time the application land probably did form part of the waste land of a manor (whether that was the Manor of Binnerton as apparently implied by P A S Poole in 1959, the Manor of Lanyon as suggested by the 1704 lease, or any other).
26. The shared ownership of the application land that has existed since the middle of the nineteenth century (at least) does not preclude earlier manorial origins as uncultivated waste. As the case of *Hampshire County Council v Milburn [1990]*⁷ made clear, it is not a requirement that the land in question is still in the ownership of the Lord of the Manor or otherwise attached to a particular manor.
27. Having regard to the published guidance referred to above, on balance I consider the evidence tips in favour of the application land having once been manorial waste.
28. The description of the application land as 'open' is not disputed; indeed Mr Trewern and his late father facilitated public access long before it became recognised as access land under the Countryside and Rights of Way Act 2000. Mr Bates pointed out that the objectors had been unable to enclose it because of the restrictions attached to its status as a Scheduled Ancient Monument.
29. Nevertheless, in 1980, with the agreement of English Heritage and Penwith District Council, the Trewerns built a stone hedge across the southern entrance to Chûn Downs and in 1999 erected granite gate posts with Cornish style iron gates to prevent unauthorised access by travellers' vehicles.
30. Mr Trewern contended that it is (in part) 'cultivated', noting that this is grazing land; through grazing his stock on the land, the grass was encouraged to grow and therefore he had cultivated it. Had he not done so, the land would have become overgrown with gorse and bracken. Further he had ploughed a strip of land in 1962 and planted a belt of trees along the eastern boundary to the north of his farm (before the Scheduled Ancient Monument was designated) which was further evidence of cultivation.
31. I have noted the variation in vegetation in different parts of the application land, and the greater proportion of grass in the vicinity of Trehyllis Farm. I

⁷ *Hampshire County Council v Milburn* [1990] 2 All ER 257

have no reason to doubt that this is the result of the concentrated grazing of Mr Trewern's stock at certain times of year. However from my inspection of the land, both the grassland and the tree planting appear to be incidental to the main use of the land for grazing, rather than cultivation in the sense intended by the 2006 Act.

32. All the objectors submit that the application land is 'occupied'. They argue that it is grazed in the exercise of their rights as joint owners, not as the holders of common rights, and that this amounts to their occupation of their own land.
33. Mr and Mrs Bates and Mr Roberts are joint freeholders of the farm Bosullow Veor and together hold a one sixth share of the application land. They have provided documents relating to the title of the farm showing this dating back to 1855⁸. The shared grazing of Chûn Downs has been enjoyed by the farm to their direct knowledge at least since 1962 when Mr Roberts and Mrs Bates' parents bought the property.
34. Mr Trewern's family has been associated with Trehyllis Farm⁹ since 1926, initially as tenants but as owners since 1936. The land has been grazed by their cattle and bracken cut for animal bedding by his family since 1949. Mr Trewern's parents placed a large boulder on the hillside in 1949, painted it white and trimmed out a path to Chûn Castle so that visitors could find it more easily although most tracks visible today have been created by their cattle.
35. In reaching my conclusions I again note the published guidance¹⁰ which makes clear that whilst grazing may take place periodically, the land does not cease to qualify as "unoccupied" in this context unless there is some physical use which requires the exclusion of others. Nor does shared upland grazing of land of manorial origin cease to be 'waste' merely because there is acknowledged provision for grazing, either in tenancy agreements or otherwise.
36. On the evidence available in this case, where there is grazing of the land held in shared ownership, I am bound to conclude that this is not sufficient to constitute occupation of the land in this context. In summary I find that the application land is probably of manorial origin and that it has the character of waste land in that it is open, uncultivated and unoccupied.

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

37. The land was provisionally registered as common land (CL 206) on two occasions: (1) on 25 March 1968 following an application (ref. 0159) by Mr W T Trewern; (2) on 2 July 1970 in response to application (ref 1611) by Mr J T and Mrs M Trewern. A third application was noted in the register on 20 March 1970 (ref 1999) from the St Just and Pendeen Old Cornwall Society, made on 30 December 1969.
38. Whilst the first two applications were for the registration of rights¹¹ over the land, the third sought registration of the land as a common.

⁸ I note that one of the parties named in this document (William Backwell Praed) was also mentioned in the tithe apportionment of 1841 where his mother was listed as holding his one-sixth share of the undivided commons, he being described as a minor at that time.

⁹ Previously known as Bosullow Lane End Farm and Great Busullow Farm before that.

¹⁰ At paragraph 9.3.14: Guidance to commons registration authorities and PINS for the pioneer implementation Version 1.43 September 2011

¹¹ The right to graze 30 head of cattle and the right to take stone for hedge building

39. Although the first application sought only to register rights – paragraph 4(2)(b) of the Commons Registration Act 1965 required a commons registration authority to “register any land in any case where it registers any rights over it under this section”. Thus the first application by Mr Trewern to register rights automatically prompted registration of the land.
40. Registration of Mr F J Lennox-Green as owner of CL206 was not disputed; the register records this entry becoming final on 1 August 1972.
41. It seems clear that the land was provisionally registered as common land although the sequence of events leading to this is complex.

Whether an objection was made to the provisional registration

42. An objection dated 30 January 1969 by Mrs Mabel Trewern to the first registration of the land (reference X23) was recorded in the Register on 17 December 1969. The grounds for the objection were that the application should have been made in the joint names of Mr and Mrs Trewern since Mrs Trewern was at that time the joint owner of Trehyllis Farm to which the claimed rights were said to be attached. On 16 March 1970 Mr Trewern requested cancellation of the first registration and the Register records that the entry (in the rights section) was cancelled by the Registration Authority on 2 July 1970. On that same date, the second registration was recorded, responding to the revised application (1611) from Mr and Mrs Trewern.
43. In the intervening period, the third application had been submitted (ref 1999) and noted in the register on 20 March 1970.
44. An objection was made on 22 July 1969 (ref X13) by Mr F T Lennox-Green and recorded as received on 24 July 1969. This challenged the provisional registration of the land and the rights on the grounds “that the land is not common land and the right does not exist”.
45. Further objections were made on 15 September 1970 jointly by Mr F T Lennox-Green and by J A and Z W Roberts to the provisional registration of the land (in objection ref X317) on the grounds that the land was not common land at the date of registration, and to the registration of the rights claimed by Mr and Mrs Trewern (ref X318) on the grounds that “the right does not exist at all”.
46. The evidence shows there to have been more than one objection to provisional registration of CL 206.

Whether the provisional registration was cancelled in the circumstances specified in paragraph 4(3)–(5)

47. Provisional registration of the land (arising from the consecutive applications from the Trewerns) was recorded on 8 October 1973 as being “cancelled by virtue of entry No. 3 in the Rights Section”. This entry recorded, under a heading “REGISTRATION CANCELLATION”, that registration (of the claimed rights) had been “withdrawn at the request of the applicants”.
48. Whilst the Land section notes that the application by the St Just and Pendeen Old Cornwall Society (Ref No 1999) had also been withdrawn, the application had been merely noted in respect of the actual registration which had been recorded on the basis of the claimed rights made by the Trewerns.

49. It therefore appears that the persons on whose application the provisional registration had been made requested or agreed to its cancellation and consequently the requirements of sub-paragraph 4(5) of Schedule 2 to the 2006 Act (as set out in my paragraph 8(c)(iii) above) are satisfied.
50. At the hearing Mr Angove questioned whether the request from Mr and Mrs Trewern (by letter dated 28 July 1973) to 'withdraw' their applications was the same as requesting or agreeing to cancellation of provisional registration. Since the only relevant means of removing the provisional registration at that stage was cancellation, withdrawing an application would have no effect unless it were interpreted as requesting cancellation.
51. I fully understand the explanation given by Mr Trewern that his parents were badly advised at the time but the fact remains that the relevant circumstances apply in this case. It does appear that, even if the first two applications had not fulfilled the criteria, the third would have done so.

Other matters

52. Comments have been made by several parties on matters which are not related to the criteria on which this application must be determined. It is not my role to consider the motives of the applicant, or whether or not registration of the land would unnecessarily present more restrictions on the owners' ability to use the land. The condition of the land is not relevant (other than in the context of establishing its general character) nor am I concerned with its future management. I have addressed only the criteria required by the 2006 Act as set out above.

Conclusion

53. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that, on a balance of probability, all the relevant criteria for registration of the application land as common land are satisfied.

Formal Decision

54. The application dated 17 January 2012 is granted and the land edged in yellow on the plan attached to the application shall be added to the register of common land.

Sue Arnott

INSPECTOR

APPEARANCES

In support of the application

Mr I McNeil-Cooke Applicant; Co-ordinator of Save Penwith Moors
Mr D Coles Representing the Applicant

Mr R Milton
Mr C Weatherhill
Ms M Tonkin
Mr D Lockhart Chairman of Penwith/Kerrier Group of The Ramblers

Opposing the applications

Mr W J Trewern Joint Landowner
Mr P & Mrs M Bates Joint Landowners
Mr S Roberts Joint Landowner

Mr R Angove National Farmers' Union

Representing the commons registration authority

Mr M Wright Senior Development Officer; Cornwall Council
Mr D Coles Senior Development Support Officer; Cornwall Council

DOCUMENTS

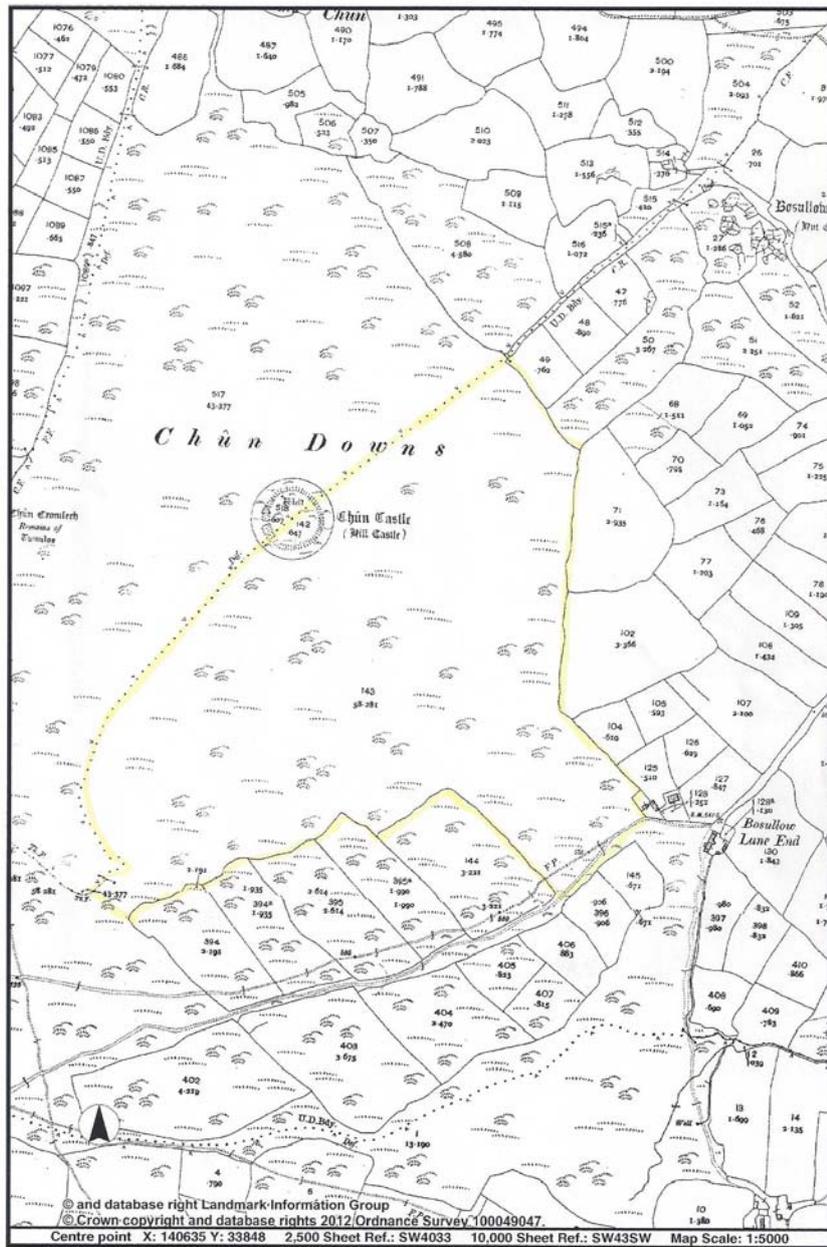
1. The application and supporting documents forwarded by Cornwall Council

Produced at the hearing

2. Correspondence from Mr & Mrs Bates dated 29 October 2012 (with enclosures), Mr W J Trewern dated 24 December 2012 and Mr W E Wilkins on behalf of Madron Parish Council dated 7 January 2013
3. Map showing boundaries of historical manors of Hornwell and Binnerton submitted by Mr Weatherhill
4. Statement and photographs submitted by Mr Trewern

Submitted after the close of the hearing

5. Copies of objections X23 (from Mabel Trewern, including background correspondence), X317 and X318 (from Mr F J Lennox-Green and J A & Z W Roberts); notification of objection X317 to St Just and Pendeen Old Cornwall Society (application 1999); withdrawal of applications 1611 and 1612 by M & J T Trewern; statements (date stamped 18 June 1971 and 10 December 1971) withdrawing application 1999, and Form 15 Notice of Cancellation of Registration in respect of CL 206 issued 8 October 1973
6. Letters and/or emails from Mr Coles (11 February & 8 March 2013), Mr Bates (13 February & 14 March 2013), Mr Trewern (15 February (with map) & 12 March 2013) and Mr Milton (17 February & 7 March 2013)



<http://mapping.cornwall.gov.uk/servlet/com.esri.esrimap.Esrimap?ServiceName=hist...> 13/04/2012

Reference COM 406
Not to original scale



The Planning Inspectorate

3/25B Hawk Wing
Temple Quay House
2 The Square
Bristol, BS1 6PN

Direct Line:
Customer Services:
e-mail:

0303 444 5408
0303 444 5000
Willie.Lengers@pins.gsi.gov.uk

Martin Wright
Cornwall Council
Circuit House
St Clement Street
Truro
Cornwall TR1 1DT

Your Ref: MW/App. 2799
Our Ref: COM 406
Date: 16 April 2013

Dear Mr Wright,

**COMMONS ACT 2006: SCHEDULE 2 PARAGRAPH 4(6)(a)
REGISTER WASTE LAND OF A MANOR**

**LAND AT CHUN DOWNS, PARISH OF MADRON, CORNWALL
APPLICATION REFERENCE NUMBER COM 234**

I write further to my letter of 11 April 2013, enclosing the decision regarding the above application. It has come to our attention that there is a mistake in the list of appearances annexed to the decision. It lists Mr D Coles as representing the commons registration authority. It should read Mr T Hill, instead.

We apologise for the error.

Yours sincerely,

Willie Lengers

