The Planning Inspectorate

Application Decision

Hearing held on 7 August 2012

By Barney Grimshaw BA DPA MRTPI (Rtd)

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to hold a Hearing and to determine the application.

Decision date: 20 September 2012

Application Ref: COM 325
Land at Wheal Baddon, Parish of Kea, Cornwall

Register Unit: CL 593

Registration Authority: Cornwall Council

- The application, dated 27 September 2011, is made under Schedule 2, Paragraph 4 of the Commons Act 2006 ("the 2006 Act").
- The application is made by Tomas Hill.
- The application is to add land to the register of common land on the grounds specified in Paragraph 4 of Schedule 2 to the 2006 Act (Waste land of a manor not registered as common land).

Summary of Decision: The application is granted.

Preliminary Matters

1. I held a public hearing into this application on Tuesday 7 August 2012 at Carrick House, Truro. I made an unaccompanied visit to the land referred to on Monday 6 August 2012.

2. Concern was expressed on behalf of one objector to this application on the grounds that the applicant, Mr Tomas Hill, is currently employed by Cornwall Council, the Commons Registration Authority (CRA) and that as a result there was a risk of a conflict of interest and the appearance of bias. A letter from Martin Wright, Senior Development Officer, Land Charges (Highways) and Commons & Greens Planning and Registration Service, Cornwall Council, confirms that Mr Hill is employed on a temporary basis in his section but states that he (Mr Wright) has been the sole person who has processed the current application and representations related to it. He also states that the application has been dealt with in accordance with the relevant regulations and that Mr Hill has not had access to any information that was not in the public domain. Cornwall Council adopted a neutral stance with regard to the determination of the application. I have noted the objector's concern and the authority's response and would comment that there is nothing in the relevant legislation that suggests that Mr Hill's employment by the council precludes him from submitting an application of this sort. Furthermore, there is no evidence to suggest that here has been any impropriety with regard to the way that the

application has been dealt with by Cornwall Council or that this has not been undertaken in strict accordance with the relevant regulations.

3. I attach a copy of the plan that was attached to the application for reference purposes.

The Application Land

4. The application land is approximately 1.198 hectares in area. At present it is open heathland occupied by rough vegetation including gorse, bracken, brambles and a few scattered trees. The largest part of the land is owned by the Hon. EAH Boscawen, part is occupied by an access track owned by Mr and Mrs Trenerry and a small area appears to be unregistered. The land is crossed by a public footpath.

The Statutory Requirements

5. 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 Commons Registration (England) Regulations 2008 (the 2008 Regulations) set out the procedures to be followed.

6. The application was made on 15 October 2010[1]. The application has been made in accordance with the provisions of Paragraph 4 of Schedule 2 to the 2006 Act which provides that land can be added to the register of common land where:

   (a) at the time of the application the land was waste land of a manor;

   (b) the land was provisionally registered as common land under Section 4 of the Commons Registration Act 1965 (the 1965 Act);

   (c) an objection was made in relation to the provisional registration; and

   (d) the provisional registration was cancelled in one of a number of circumstances, the relevant one in this case being – 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).

7. 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 CRA 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.

8. In addition, Paragraph 14 of Schedule 4 to the 2008 Regulations requires that an application under Paragraph 4 of Schedule 2 to the 2006 Act must include –

   (a) a description of the land to which the application applies; and

[1] For the purpose of remedying non-registration or mistaken registration under the 1965 Act, the application must be made on or before 31 December 2020.

(b) evidence of the application of Paragraph 4(2) of Schedule 2 to the land to which the application relates.

9. 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.

The Application

10. It is not disputed that the application was properly made and I am satisfied that it was.

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

11. The applicant stated that he believed the application land to form part of the Manor of Blanchland and, in addition, to have been administered as part of the Manor of Bessow. He substantiated this by reference to a history of Cornwall[2] and to other documents. In particular, a court of survey or perambulation of the Manor of Blanchland, dated 23 May, 1612, describes in detail the bounds of the manor and appears to include the application land. In addition, a lease dated 1889 and marked *"Manor of Bessow"* is said to include a plan of the application land. It was also pointed out that a more recent lease, dated 1989, referred to by one of the objectors is headed *"Manor of Blanchland"*.

12. It was argued on behalf of one of the objectors that the evidence that the land was manorial land is at best circumstantial. However, the objector made no reference to the 1612 court of survey or perambulation document or the 1889 lease. These documents seem to me to provide evidence which is more than circumstantial and on balance show that the land has been manorial.

13. Defra's published guidance[3] makes it clear that, as a result of the judgement in the *Hazeley Heath* case[4], it is not relevant for these purposes whether the land continues to be held by the lord of the manor. The question therefore remaining to be answered is whether the land was waste land of the manor at the time of the application.

14. The term 'waste land of the manor' has been defined[5] as *"…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"*. Further guidance with regard to what is meant by demesne lands is given in another judgement[6] to the effect that *"Upon creation of manors, the lord took as much as was for their own use into their demesnes, they distributed as much as was convenient amongst their tenants; what was left was called the lord's waste, which was neglected by the lord because he had before taken into his demesnes what he had need of"*.

15. The applicant suggested that a number of factors pointed to the likelihood that the application land is waste land of the manor. The 1846 Tithe Map and Apportionment for the parish of Kea shows that the application land fell entirely within a parcel of land numbered 2968 and named as *"Wheal Baddon"*. This parcel is described as *"Common"* and no cultivation or rent is recorded. Under

[2] Parochial History of the County of Cornwall, Vol II, 1868,William Lake
[3] Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate for the pilot implementation, Version 1.43, September 2011.
[4] Hampshire County Council and others v Milburn.
[5] Attorney General v Hanmer, 1858
[6] Potter v North (Sir Henry)

the Tithe Commutation Act 1836, tithes were converted to a fixed money rent. In most areas this required detailed surveys to be carried out in order to apportion the amount of tithe payable among the landowners of a parish. Tithe documents that were prepared had the sole purpose of identifying titheable or productive land. They were statutory documents which were in the public domain. The documents referred to would seem to suggest that in 1846 the application land was not productive land and was regarded as common or waste.

16. The applicant also referred to recent maps and photographs which appear to show the application land unenclosed and occupied by natural vegetation rather than being cultivated. He also referred to the Environmental Statement prepared in connection with the proposed development of the Wheal Jane Solar Farm in June 2010, which describes the general area as containing a large proportion of open downland in the second half of the 18th century but does not refer specifically to the application land.

17. It is argued on behalf of the Hon. EAH Boscawen that the application land is neither unoccupied nor uncultivated, nor is it open. A Tenancy Agreement, dated 30 April 1989, appears to relate to part of the land and includes a clause relating to the cultivation of the land. However, it seems to me that the clause referred to is primarily designed to restrict any form of cultivation that would damage or exhaust the land. In the Schedule attached to the Agreement, the application land is described simply as *"Unenclosed"*, whereas other parcels of land are described as being arable or pasture.

18. It was also suggested that the land has been used for timber extraction in the past and that the growing of trees for timber is itself a form of cultivation.

19. On my visits I noted that the application land appeared open and uncultivated. There was no evidence of any active management having been undertaken recently, with the exception of the construction of a metalled track from the northern boundary of the land, the Helston Water road, leading to field access gates. I also, saw no evidence of timber extraction having taken place. The adjoining land to the east and the west is fenced but the application land is open from the roads to the north and south and from the public footpath that crosses it.

20. Mr and Mrs Trenerry argued that it would be inappropriate to regard the metalled track leading to their fields as being waste or indeed common as its character is that of a private roadway. However, the character of this route has been significantly altered since the submission of the application and photographs show that it was previously unmetalled and overgrown with bracken. In any event, I am aware of no reason why the existence of a private field access route is incompatible with the registration of land as common. I note that there is already a public footpath along the same route, which would be unaffected by registration of the land as common. In the survey carried out in 1951, which led to the recording of this footpath, it is described as *"Cart road at edge of fields and over common…"*.

21. Defra's published guidance (already referred to, Para. 13) states that land should not be regarded as having ceased to be unoccupied and therefore not waste merely because it is subject to a tenancy or lease whose sole or principal purpose is to enable the land to be grazed. It also indicates that occupation requires some physical use of the land to the exclusion of others.

22. In the light of the above, it is my view that at the date of the application (27 September 2011) the application land had all the character of waste land in that it appeared open, uncultivated and unoccupied. Although part of the land was subject to a tenancy agreement and part comprised an access track this did not involve the physical use of the land to the exclusion of others. In addition, there is no substantive evidence that the land was ever significantly different in character. Also, I have already concluded that the land was part of a manor. Accordingly, it is my view that, on the balance of probabilities, the application land can be regarded as having been waste land of a manor at the time of the application.

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

23. The land was provisionally registered as common land on 24 February 1970 (CL 593) following an application made by the Ramblers Association.

Whether an objection was made in relation to the provisional registration

24. An objection was made to the registration of the land as common on 12 January 1971 by the Rt Hon George Hugh Viscount Falmouth, Tregothnan on the grounds that the land was not common land at the date of registration.

Whether the provisional registration was cancelled

25. The provisional registration was cancelled on 16 September 1981 after a hearing held by a Commons Commissioner who refused to confirm the registration as the parties had signed a written request that confirmation of the registration be refused.

Other Matters

26. It was argued by Mr and Mrs Trenerry that there are no commoners claiming rights over the application land and that it is unsuitable for the exercise of rights of common, such as grazing. Although this may be the case, the existence of commoners with specific rights of common is not a prerequisite for the registration of common land.

27. Mr and Mrs Trenerry claim that they have a right of vehicular access over the application land and appear concerned that this might be affected if the land is registered as common. However, if such rights exist, they will be unaffected by registration as common land.

28. It was also pointed out that the rest of Wheal Baddon Common is some distance away from the application land which, it was suggested, cast doubt on whether it was really part of it. However, the documentary evidence referred to seems to indicate that this was the case and, although some intervening land may have changed in status, the evidence does not show that the application land is no longer common.

29. It was also suggested that the registration of the land as common would amount to its appropriation and would contravene the Human Rights Act 1998. However, registration of the land as common would not affect the situation with regard to its ownership and I see no reason why registration would not be compliant with the Human Rights Act.

Conclusions

30. Having regard to these and all other matters raised at the hearing and in written representations I conclude that, on the balance of probabilities, all the criteria for the registration of the application land as common have been satisfied.

Formal Decision

31. The application is granted and the land shaded yellow on the plan attached to the application dated 27 September 2011 shall be added to the register of common land.

Barney Grimshaw

INSPECTOR

APPEARANCES

Applicant

Mr Tomas Hill	Applicant

Objectors

Michael Trenerry	Landowner
Elizabeth Trenerry	Landowner

Commons Registration Authority

Peter Blackshaw	Cornwall Council

DOCUMENTS

1. Letter and enclosures, dated 26 July 2012, from Foot Anstey LLP on behalf of the Hon EAH Boscawen.
2. Letter and attachments, dated 24 July 2012, from Michael Trenerry.
3. Extract from court of survey or perambulation of the Manor of Blanchland document, 1612 and map derived from it prepared by the applicant.
4. Extract from Tithe Apportionment document, 1846.
5. Copy of Survey of Public Rights of Way, dated July 1951.

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APPENDIX (i)