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# Application Decision

Hearing held on 18 January 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: 9 February 2012

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## **Application Ref: COM 273**

### **Land at Carrine Common, Parish of Kea, Cornwall**

Register Unit: CL 312

Registration Authority: Cornwall Council

- The application, dated 15 October 2010, is made under Schedule 2, Paragraph 4 of the Commons Act 2006 ("the 2006 Act").
- The application is made by Mr 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.

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## **Preliminary Matters**

1. I held a public hearing into this application on Wednesday 18 January 2012 at The Council Chamber, Truro City Council, Truro. I made an unaccompanied visit to the land referred to on Tuesday 17 January 2012 and a further visit after the hearing on Wednesday 18 January when I was accompanied by parties represented at the hearing.
2. Concern was expressed on behalf of the objector to this application on the grounds that the applicant, Mr Tomas Hill, had been appointed to the Land Charges section of Cornwall Council, the Commons Registration Authority (CRA) and that as a result there was a risk of unfairness, bias and procedural irregularity. In a statement on behalf of the CRA it was made clear that Mr Hill had commenced his employment with the council on 3 May 2011, by which time a substantive part of the processing of his application had been completed. It was also stated that Mr Hill had at no time been involved in processing his own application or any objection or correspondence in connection with it, nor had he had access to any documents related to it that were not available to the public. The CRA also confirmed that the application had been processed in accordance with the regulations and that it maintained a neutral stance with regard to the substantive issue raised by the application. These assurances were accepted at the hearing on behalf of the objector.

## The Application Land

3. The application land comprises 2 parcels to the north and south of an unclassified road, approximately 17.35 hectares in total area. At present it is open heathland occupied by gorse, brambles and a few scattered trees. The land forms part of a slightly larger area of designated Open Access land under the Countryside and Rights of Way Act 2000; it is also part of a notified Site of Special Scientific Interest (SSSI) known as Carrine Common and Penwethers and a designated Special Area of Conservation (SAC) under the EC Habitats Directive. The land is also part of the Cornwall Area of Outstanding Natural Beauty. It has been leased to Natural England (formerly English Nature) since March 2003 and it is intended that it should be declared as a National Nature Reserve as it is considered to be a site of national importance.

## The Statutory Requirements

4. 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.
5. The application was made on 15 October 2010<sup>1</sup>. 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).
6. 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.
7. 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

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<sup>1</sup> 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 6(2) of Schedule 2 to the land to which the application relates.
8. 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

### ***The Application***

9. 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***

10. The applicant stated by reference to a history of Cornwall<sup>2</sup> that he believed the application land to form part of the manor of Blanchland. The objector argued that this evidence was insufficient to show that the land was ever manorial and accordingly could not be regarded as satisfying the criteria of the 2006 Act. However, at the hearing the objectors representatives produced copies of various old deeds which they agreed showed that the land had been part of the manor of Allett. The objection on the grounds that the land was not 'of the manor' was therefore withdrawn. It is my view that the documents produced showed that the application land had been manorial land. Defra's published guidance<sup>3</sup> makes it clear that, as a result of the judgement in the *Hazeley Heath* case<sup>4</sup>, 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 its provisional registration as common.
11. The term 'waste land of the manor' has been defined<sup>5</sup> 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<sup>6</sup> 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*".
12. The applicant suggested that a number of factors pointed to the likelihood that the application land is waste land of the manor. The 1841 Tithe Map and Apportionment for the parish of Kea names the northern part of the application land as "*Carrine Common*" and the southern part is referred to as "*Part of Goodern Common*", no cultivation or rent is recorded in respect of either part. I have not seen a copy of the tithe documents but the information provided by the applicant was not challenged by other parties. Under the Tithe Commutation Act 1836, tithes were converted to a fixed money rent. In most

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<sup>2</sup> Parochial History of the County of Cornwall, Vol II, 1868, William Lake

<sup>3</sup> 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.

<sup>4</sup> Hampshire County Council and others v Milburn.

<sup>5</sup> Attorney General v Hamer, 1858

<sup>6</sup> Potter v North (Sir Henry)

- 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 but were not produced to record public rights. Nevertheless, the documents referred to would seem to suggest that in 1841 the application land was not productive land and may well have been regarded as common or waste.
13. Ordnance Survey (OS) maps from 1880 to the present day have consistently annotated the area including the application land as "*Carrine Common*". Again I have not seen copies of most of the maps referred to but the information provided by the applicant was not challenged by others. In my view the use of the name "*Carrine Common*" on OS maps is indicative of what the area was generally known as at the time of the surveys but cannot be regarded as a reliable indication of the true status of the land.
  14. The applicant also suggested that the inclusion of the land within designated areas of importance for nature conservation is indicative of the fact that the land has not been cultivated or improved otherwise the habitats for which the area is valued would have been destroyed. He also pointed out references in the Environmental Statement prepared in connection with nearby Wheal Jane Solar Farm; these described the area as open downland.
  15. On behalf of the objector and landowner it was argued that the land did not have the character of waste land as it had been occupied and cultivated over a considerable period. Specific reference was made to two one-year leases of 1802 and 1812 referring to land commonly known by the name Carryan or Caryne and said to be for mining purposes. It was suggested that, if the land was let for mining purposes, it must have been valuable and would therefore have been demesne land rather than waste. However, it was not clear to me from the leases that they related specifically to the application land and I have seen no evidence of mining ever having taken place on the application land although there is considerable evidence of past mining activity further to the west. Another lease referred to dated from 1893; this was also a one-year lease and related to "*...all that messuage and dwelling house barn and stable and outhouses and forty seven acres of land or thereabouts situate at Cryon in the Parish of Kea*". The lease also stated that the land had been occupied by the lessee for many years past. No plan was attached but the description, referring as it does to a house and other buildings, suggests to me that the land leased was not the application land, on which there is no evidence of such development. In addition the application land totals less than 43 acres which is not the same as the area leased. The applicant also submitted copies of 2 conveyances from 1930 and 1979 relating to land at Carrine Farm, immediately to the west of the application land and suggested that this may have been the land referred to in the 1893 lease.
  16. Since 2003 the application land has been leased to Natural England. The lease requires that the land be managed in a proper and efficient manner as a nature reserve and does not preclude "*normal agricultural operations*"; it also requires that staff are provided to warden the site to keep it free from litter and other waste. On behalf of Natural England it was stated that the general purposes of the organisation include the promotion of nature conservation, access to the countryside and open-air recreation, the conservation and enhancement of the landscape and various other purposes related to the management of the natural environment. With regard to the application land, no management plan

is yet in place but it is intended that one will be prepared. Management activities undertaken so far were said to include the installation of a bollard at an access point to the southern part of the area from Pound Lane to prevent unauthorised vehicular access and reduce fly tipping, the cutting of fire breaks to limit damage from wildfires and facilitate planned burning of the land, and the maintenance and clearing of public rights of way on the land. Items, including a fridge, that have been illegally dumped on the land have also been removed. Natural England has not objected to the application for the land to be registered as common.

17. On my visits I noted that the application land was open and uncultivated. There was no evidence of any active management having been undertaken recently, with the exception of the installation of the bollard; the line of the public byway across the northern part of the site was so overgrown with gorse and brambles that it was almost impossible to locate and impassable even on foot.
18. Defra's published guidance (already referred to, Para. 10) 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. In the case of the application land the current tenancy is not for the principal purpose of grazing but involves even less interference with its natural condition. Natural England's 'occupation' of the land involves very little active management and certainly does not include the exclusion of the public. In fact, its aim is largely to maintain the open, uncultivated nature of the site, allowing the natural vegetation to thrive.
19. In the light of the above, it is my view that at the date of the application (15 October 2010) the application land had all the character of waste land in that it was open, uncultivated and unoccupied except for the tenancy of Natural England which does not involve the physical use of the land or the exclusion of others. In addition, there is no substantive evidence that the land was ever significantly different in character. Also, as previously mentioned, it is accepted that the land was part of a manor. It is accordingly 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***

20. The land was provisionally registered as common on 10 October 1968 (CL 312) following an application made by Mr Tyrrell Stanley Winkworth.

***Whether an objection was made in relation to the provisional registration***

21. 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***

22. The provisional registration was cancelled on 5 October 1981 after a hearing held by a Commons Commissioner who refused to confirm the registration as the successor to the original applicant, Mr William Scott, had written stating that he had decided not to proceed with the matter.

### **Other Matters**

23. Some concern was expressed that registration of the application land might in some way result in damage to the biodiversity of the area or reduce its scientific interest and conservation value. Public authorities are required to have regard to such matters in the exercise of their responsibilities and I therefore take this matter seriously. In this case Natural England has produced a list of operations likely to damage the special interest of the area. However, having considered this, I do not believe that any of the operations listed are more likely to take place if the application is approved nor do I think that registration of the land as a common would significantly inhibit Natural England's management of the area in a way that would reduce its value. I also note that Natural England has not objected to the application.

### **Conclusions**

24. 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**

25. The application is granted and the land outlined in pink on the plan attached to the application dated 25 October 2010 shall be added to the register of common land.

*Barney Grimshaw*

INSPECTOR



