



Application Decision

Hearing held on 21 October 2010

By Peter Millman BA

An Inspector appointed by the Secretary of State pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to hold a hearing and to determine the application.

Decision date: 2 December 2010

Application Ref: COM 159 Part of Lady Downs and Conquer Downs

Register Unit: CL 711

Registration Authority: Cornwall Council

- The application, dated 30 September 2009, is made under paragraph 6(3)(a) of Schedule 2 to the Commons Act 2006 ("the 2006 Act").
- The application is made by Mr J E D Wood
- The application is to remove land from the register of common land on the grounds specified in paragraph 6 of Schedule 2 to the 2006 Act (buildings registered as common land).

Summary of Decision: The application is granted in part as set out in the formal Decision below.

Preliminary Matters

1. This application has been determined on the basis of written and oral evidence and submissions and a visit to the site of the land by the Inspector.

The Application Land

2. The land is at Conquer Downs in the Parish of Towednack in Cornwall. Parts of Conquer Downs are registered as common land in Register Unit CL 711. The land which is the subject of the application comprises a cottage and land surrounding it. The cottage lies just inside the boundary of the common. Some of the land surrounding it is within the common, and some outside its boundary. On the plan attached to this Decision I have edged the common land in blue, and the application land in red.

The Statutory Requirements

3. Paragraph 6(3) of Schedule 2 to the 2006 Act provides that any person may apply to the commons registration authority to remove land from the register of common land. The Commons Registration (England) Regulations 2008 ("the 2008 Regulations") set out the procedures to be followed.
4. The application was made on 30 September 2009¹. The application form indicates that it has been made in accordance with the provisions of paragraph 6 of Schedule 2 to the 2006 Act which provides that an application can be made where:

¹ 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.

- (a) the land was provisionally registered as common land under section 4 of the 1965 Act;
 - (b) on the date of the provisional registration the land was covered by a building or was within the curtilage of a building;
 - (c) the provisional registration became final; and
 - (d) since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building.
5. 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 of some other duly authorised officer of every applicant which is a body corporate or an unincorporated association.
6. In addition, paragraph 14 of Schedule 4 to the 2008 Regulations requires that an application under paragraph 6 of 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 6(2) of Schedule 2 to the land to which the application relates.
7. The task of proving the case in support of the correction of the register rests with the person making the application, and the burden of proof is the normal, civil standard, namely, the balance of probabilities.
8. Defra's guidance to the Planning Inspectorate² states that: "It is particularly important that an application ... is fully examined where, if granted, it would have some effect on the public interest, such as where land would be deregistered. It is for the applicant to adduce [convincing] evidence, and in its absence, the application must not be granted."

Reasons

The application

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

Registration of the land as common

10. It is not disputed that the land at issue was provisionally registered as common land on 31 March 1970, nor that registration became final.

Whether at the date of the provisional registration and at all times since, the land at issue has been covered by a building or has been within the curtilage of a building

² Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate for the pilot implementation, March 2010

11. There is no doubt that part of the land was covered by a building at the date of provisional registration, and that the building has continued in existence ever since. Conveyances of the building (which was two cottages, since converted into one) from the 1950s and 1960s describe a small area to the south of the building as garden. These conveyances also include a strip of land 15 feet wide to the north and west of the cottages, which, although not described as such, would have provided access. I consider there to be no doubt that the garden and the 15 foot wide strip are part of the curtilage of the cottage(s). On the plan attached to this Decision I have shown the building, the garden which falls within the boundary of the common and the access strip shaded yellow. It should be noted that on the plan the yellow strip extends slightly further than 15 feet on the western side of the cottage. This is because at the time of the conveyances there was a small extension on its western end.
12. The application, however, extends to a wider area, and in order to come to a conclusion on whether the whole of the land subject to the application can be considered to be and have been part of the curtilage of the cottage(s) it is necessary to examine their history and the history of the registration of the land as common.
13. Conquer Downs was registered as common land following an application by the West Cornwall Footpaths Preservation Society in 1969. The map included in the application was of small scale and, to put it kindly, poor quality. When Cornwall County Council drew up the official map of common land it must have been difficult to judge precisely where the boundary of the common in the area of Middle Conquer was intended to be. It would not have been possible to deduce from the application map whether it was intended to run north or south of the cottage(s). No building is marked on the application map. I consider that there can have been no deliberate decision that the boundary of the common should encompass any of the application land.
14. At the date of provisional registration, the applicant, Mr J Wood, owned the eastern cottage, but it was occupied by Mr H Burt. The western cottage was owned by Mr N Potter, who sold it to Mr Wood in 1973, but it was either unoccupied or occupied by Mr Burt. Mr Burt took a two year tenancy of the eastern cottage in 1968, but did not move out when the tenancy ended, continuing to occupy it, and subsequently the western cottage, until his death in 1982.
15. Mr K Roberts is the sole objector to this application. There was in 1968, and still is, a dispute about access to the cottage(s) between Mr Wood and Mr Roberts. Mr Roberts sold Mr Burt some land surrounding the cottages in 1968. I have shaded the land sold to Mr Burt in green on the plan attached to this Decision.
16. Mr Wood's belief is that Mr Roberts sold the land to Mr Burt for the purpose of frustrating Mr Wood's vehicular access to the cottages.
17. Mr Roberts wrote to the Land Registry in 2006 about Mr Burt's land. He stated that: 'the land was once part of my farm I sold it to HK Burt many years ago for £40 he gave me a verbal agreement that when he finished with it he would either sell it back or give it back to me unfortunately he died suddenly 20 years ago and never carried out his agreement he needed the plot to grow vegetables and plants etc as he was a keen Gardner I know it was his wish that the plot of land should go back to the farm...'

18. There is no documentary evidence, in the form of a conveyance, of the sale of the land from Roberts to Burt, but I have no reason to suppose it did not take place.
19. Following Mr Burt's death, title to the land shown in green has, it is assumed, passed to his next of kin, but they have not been traced and have not occupied or used the land. At the moment much of that land is covered with brambles and gorse, although there are traces of former cultivation in the form of a couple of hydrangea bushes and a patch of montbretia (crocsmia). Mr Wood has used parts of it for camping and hanging out washing, but it has remained uncultivated. Mr Wood is currently attempting to obtain possessory title to the land, as is Mr Roberts.
20. There is no straightforward legal definition of the term 'curtilage'. It is the subject of guidance (see footnote 2 on page 2 above), which states *The word 'curtilage' is not defined in the 2006 Act, but has been considered by the courts in various contexts. In the Skerritts case in the Court of Appeal, the court: "held that land is considered to be within the curtilage if it is part and parcel of the principal building or other structure. Land is within the curtilage if it is owned and enjoyed with the principal building and can be regarded as ancillary to it. It is a question of fact and degree in each case, and examples include a yard, basement area, passageway, driveway and garden, which are intrinsically part and parcel of the house."* Although that guidance is clearly wrong in the sense that what is stated to be a quotation should have been referred to as a summary of the judgment in the Skerritts case (*Skerritts of Nottingham Ltd v Secretary of State for the Environment (no. 2)* [2001] QB 59), it is helpful.
21. The Abstract of the title to the cottages shows that in the 19th century and the first half of the 20th century the cottages and the land shaded green were in common ownership, being part of a block of land containing about 31 acres, but it does not follow from that fact that the land shaded green was within the curtilage of the cottages. An Ordnance Survey plan from 1908 shows most of the land shaded green as part of the large area to the north-west labelled 'Conquer Downs' and marked with the symbols for rough pasture and furze. Mrs E Thomas, who gave evidence in support of Mr Wood, remembered some of the northern part of the land sold to Mr Burt having been 'green' 50 or so years ago, by which I understand that it had more of the character of level grassland than rough moorland, but this evidence is insufficiently clear to be of significant value.
22. At the time of provisional registration Mr Burt may well have been using some or all of the land shown shaded green as a garden, but if Mr Roberts' memory is correct, then that use was only considered to be temporary. It certainly ceased on Mr Burt's death in 1982. Since then Mr Wood has attempted to obtain title, but the Land Registry decided (in 2006) that 'the acts of possession evidenced are not sufficient to support the grant of a possessory title at this stage. It is clear from our inspection that there has been very little activity on the land and such activity as there has been, has been somewhat intermittent.'
23. The land coloured green is not at present 'owned and enjoyed' with the cottage, and cannot be regarded as 'ancillary' to it. It has, since provisional registration in 1970, never been conveyed with it, and is not 'part and parcel' of it. I conclude, therefore, that it is not within the curtilage of the cottage.

Conclusion

24. I conclude that the land and buildings shown yellow on the plan attached to this Decision satisfy the criteria and should be removed from the register of common land.

Formal Decision

25. The application is granted in part and the land and buildings shown yellow on the plan attached to this decision shall be removed from the register of common land.

Peter Millman

INSPECTOR



John Wood 30/9/09

APPEARANCES

The applicant: Mr J Wood

Supporters of the applicant: Mrs E Thomas and Mr J Thomas

Representative of Cornwall Council: Mr P Wilson