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## Application Decision

Site visit made on 20 November 2013

**by Heidi Cruickshank BSc MSc MIPROW**

Appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 7 January 2014

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### **Application Ref: COM 462**

### **Fleetwood, Race Hill, Bissoe, Cornwall**

Register Unit No: CL586

Commons Registration Authority: Cornwall Council

- The proposal, dated 20 December 2012, is made under paragraphs 6 and 7 of Schedule 2 of the Commons Act 2006.
  - The proposal is made by Cornwall Council.
  - The proposal is to remove land from the register of common land on the grounds specified in paragraphs 6 and 7 of Schedule 2 to the Commons Act 2006, relating to buildings and curtilage wrongly registered as common land and other land wrongly registered as common land.
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### **Decision**

1. Consent is granted in accordance with the application dated 20 December 2012, in relation to the common land affected. The land outlined in red on the plan attached to this decision shall be removed from the register of common land.

### **Preliminary matters**

2. Cornwall Council ("the Council") made this proposal because in September 2010 they provided a local authority search reply, reference 30712/10, mistakenly indicating that the relevant land was not registered as common land. The statement for the proposal indicated that it was being made in order to resolve the problem of an incorrect search reply, for which the Council was responsible. The matter has been referred to The Planning Inspectorate for determination in line with *The Commons Registration (England) Regulations 2008* ("the Regulations") and *Guidance to commons registration authorities and The Planning Inspectorate for the pioneer implementation, October 2013* ("the Guidance").
3. On considering this matter I asked the Council to provide a plan indicating the individual areas of the land which they believe should be considered under paragraph 6 and paragraph 7 of Schedule 2 to the Commons Act 2006 ("the 2006 Act"), which were the paragraphs under which the proposal was made and advertised. The Council responded on the basis that they believed all of the application plan area falls under paragraph 6 of Schedule 2, i.e. all of the application area was covered by a building or within the curtilage of a building. They said that reference to paragraph 7 had been a belt and braces exercise.
4. There appears to be no reason why a proposal cannot be made under both paragraphs, but only one then relied upon, and so I shall consider the matter on the basis of paragraph 6.

### **Procedural Matters**

5. No party requested to be heard with respect to this proposal and so I made an unaccompanied site inspection. I have made my decision on the basis of the written representations on the file and additional information subsequently supplied by the Council, on request.

### **The Application Land**

6. The proposal relates to the property known as Fleetwood, Race Hill, Bissoe, Truro, TR4 8RH. This land comprises approximately 0.268 hectares or thereabouts<sup>1</sup>, forming part of common land register unit No. CL 586.

### **Main Issues**

7. The proposal was made by the Council under paragraphs 6(3)(b) and 7(3)(b) of Schedule 2 to the 2006 Act, however, subsequently reliance has been placed upon paragraph 6 only. By reference to the sub-paragraphs within the 2006 Act, the main issues are whether:
  - (2)(a) the land was provisionally registered as common land under section 4 of the Commons Registration Act 1965 ("the 1965 Act");
  - (2)(b) on the date of the provisional registration the land was covered by a building or was within the curtilage of a building;
  - (2)(c) the provisional registration became final; and
  - (2)(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.
8. The task of proving the case in support of the correction of the register rests with the person making the proposal, and the burden of proof is the normal, civil standard, the balance of probabilities.
9. No objections were received to the notice given of the proposal.

### **Reasons**

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

10. CL 586, which includes the land subject of this proposal, was provisionally registered on 24 February 1970, following an application made by the Ramblers' Association ("the RA"). The application, dated 31 December 1969 and received by the Council on 2 January 1970, seems to have been properly made under section 4 of the 1965 Act, such that this requirement is met.

*Whether on the date of the provisional registration the land was covered by a building or was within the curtilage of a building*

11. The Planning Control Record and History Card for this property shows that on 28 May 1951 conditional approval was given for the erection of a sectional wooden bungalow. A property was clearly built, as on 30 July 1956 conditional approval was granted for the retention of a wooden bungalow.

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<sup>1</sup> The originally identified area of "0.290 hectares or thereabouts" included a small area to the south-west which is part of the property in the Land Registry title but is not registered as common land.

12. The current property was erected as a result of a decision of 5 February 2004 for the demolition of existing and erection of replacement dwelling. The evidence as a whole, including photographs, points to the 'existing' as having been the original wooden bungalow dating from the 1950s. I consider this convincing evidence that the building must, therefore, have been in place on 24 February 1970, the date of the provisional registration.
13. The Council indicate that it has been difficult to obtain mapping dating from the relevant period and rely on a map attached to a conveyance of June 1964. They suggest that this would mean that the land was all one at that time, and subsequently.
14. The word 'curtilage' is not defined in the 2006 Act, but has been considered by the courts, in particular in the context of planning and development legislation. The question of whether land is considered to be within the curtilage of a building is a question of fact and degree, *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions*(2000) and *Dyer v Dorset County Council* (1988) 3 WLR 213. Whilst earlier decisions suggested that the key factors to be taken into account were the physical layout of the land and buildings, as relied upon by the Council, more recent judgments place more weight on use and function than on ownership *Morris v Wrexham County Borough Council and the National Assembly for Wales* (2001) EWHC 697 (Admin) and *Lowe v First Secretary of State and Tendring District Council* (2003) EWHC 537 (Admin).
15. I consider that to fall within the curtilage of a building, land should serve the purpose of the building in some reasonably necessary or useful manner, as established in *Sinclair-Lockhart's Trustees v Central Land Board* [1950] 1 P&CR 195. In *Dyer v Dorset* it was held that curtilage is a small area forming part and parcel with the house or building which it contained or to which it was attached. *McAlpine v SSE* [1995] JPL B43 indicated that curtilage is an area about a building and must be intimately associated with the building.
16. I consider that this land, immediately surrounding the house and clearly defined as garden and driveway with lawn and garage, is within the curtilage of that building. It is clearly and obviously intimately associated with the building. Photographs of the former bungalow demonstrate the access and parking for cars, as well as a lawn area with a shed, plant pots and shrubs. Although there is no direct evidence that this area was what would be the curtilage of the original property at the relevant date in the 1970s, I consider that it is likely to have been used in much the same manner in the past.
17. I am satisfied, on the balance of probabilities, that the land was covered by a building or was within the curtilage of a building on the date of the provisional registration, 24 February 1970.

*Whether the provisional registration became final*

18. The register shows that a modification to the registration was made under Regulation 8 of the *Commons Registration (Objections and Maps) Regulations 1968*. Part of the land was removed from the register, following objections and further application from the RA of 23 May 1973. The register indicates that the provisional registration, subject to the modification, became final on 23 May 1973. I am satisfied with regard to these points in relation to the proposal as a whole.

*Since the date of provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building*

19. It is not necessary that the land has been covered by the same building throughout the period since the date of provisional registration. The current property was built following permissions granted in the early part of this century. There will have been a period when the old dwelling was pulled down and the new building constructed but there is no indication that there was a substantial intervening period, when the land was no longer covered by, or within the curtilage of, a building, that would be fatal to the proposal in relation to the garden area.
20. I am satisfied, on the balance of probabilities, that since the date of provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.

*Summary in relation to the proposal under paragraph 6 of Schedule 2 to the 2006 Act*

21. I am satisfied that the land was provisionally registered as common land under section 4 of the 1965 Act and became final in 1973. I consider that at the date of the provisional registration the land was covered by, or within the curtilage of, a building and that land has at all times been, and still is, covered by, or within the curtilage of, a building.

#### **Other matters**

22. I have considered the case against the criteria as set out above, with the problems which may arise from a mistake of the Council not being relevant to my decision.

#### **Conclusions**

23. Having regard to these and all other matters raised in the written representations, I conclude, on the balance of probabilities, that the criteria for deregistration set out in paragraph 6 of Schedule 2 to the 2006 Act have been satisfied and that the proposed land should be removed from the register of common land.

*Heidi Cruickshank*

**Inspector**

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