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# Application Decision

Hearing held on 21 November 2013

**By Sue Arnott FIPROW**

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

Decision date: 18 March 2014

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## Application Ref: COM 463

### Land at St Agnes Beacon, Parish of St Agnes, Cornwall

Register Unit: CL 567

Registration Authority: Cornwall Council

- The application, dated 22 June 2012<sup>1</sup>, is made under paragraph 4(6)(a) of Schedule 2 to the Commons Act 2006 ('the 2006 Act').
- The application is made by Mr T D J S Hill.
- 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.

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## Preliminary Matters

1. A public notice of the application appeared in the 13 December 2012 edition of *The West Briton* 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, two letters of objection were submitted together with three representations in support of registration.
2. As the commons registration authority, Cornwall Council supports the application where there are no objections to the land being registered as common land but takes a neutral stance as regards those parts to which objections have been made.
3. To assist in determining the application I held a public hearing on Thursday 21 November 2013 at Carrick House, Pydar Street, Truro, having made an unaccompanied inspection of the application land the previous afternoon. It soon became clear at the hearing that circumstances on the ground had changed since I visited the site. Consequently, after closing the proceedings in Truro, I made a further inspection, on that occasion accompanied by Mr Hill (the applicant), Mr O Sawle (an objector and a landowner) and Mr Wright (from the commons registration authority, Cornwall Council).
4. Since the hearing, the Department for the Environment, Food and Rural Affairs (Defra) issued a letter revising paragraph 9.3.15 of its "Guidance to commons registration authorities and the Planning Inspectorate". Since this concerned an issue of fundamental importance in this case, I invited further comments from all parties on its implications and have taken account of the responses received in reaching my conclusions.

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<sup>1</sup> Reference 2808

## The Application Land

5. The application land comprises the area known as 'St Agnes Beacon' situated within the Parish of St Agnes and lying to the west of the village of the same name. The area is predominantly open heathland, bounded on the east, south and western sides by traditional stone walls and/or Cornish hedges. The mound or cairn at the summit is designated as a Scheduled Ancient Monument, noted as dating from the Late Neolithic period to the Late Bronze Age.
6. With the exception of a small area to the north west of the road (Beacon Drive) that is now used for roadside parking, CL 567 is recorded as open access land under the Countryside and Rights of Way Act 2000 (the 2000 Act). The whole land unit lies within the Cornwall Area of Outstanding Natural Beauty.
7. Ownership of the land is registered to four owners: the National Trust, Mr G F K Thomas, Mr O Sawle and South West Water Ltd, the main holding being National Trust land. It is the registration of land owned by Mr Sawle and South West Water Ltd to which objections have been made by the respective parties.

## The Statutory Requirements

8. 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.
9. The application was registered by Cornwall Council on 25 June 2012<sup>2</sup>. The application form (dated 22 June 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 (the 1965 Act);
  - (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;

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<sup>2</sup> 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.

- (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).
10. 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.
11. 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*

12. None of the representations, nor the registration authority (Cornwall Council), dispute that the application was properly made and the required statutory procedures followed. From my examination of the papers submitted I am satisfied the application is sufficient to meet the procedural requirements of sub-paragraph 4(6) of Schedule 2 to the 2006 Act.

### *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, or open lands parcel of the manor other than the demesne lands of the manor”, a definition established in the case of *Attorney General v Hanmer*<sup>3</sup>. However it is not necessary for the land to have remained part of a manor; this point was confirmed in the *Hazeley Heath case*<sup>4</sup> in 1990.

### *Whether the land was formerly manorial land*

14. Guidance published by Defra acknowledges that, when establishing whether the land in question is manorial in origin, “*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.*”<sup>5</sup>
15. Here, the applicant has referred to several documents which he submits confirm that the land in question once formed part of the waste lands of the

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<sup>3</sup> *Attorney General v Hanmer* [1858] 2 LJ Ch 837

<sup>4</sup> *Hampshire County Council and others v Milburn* [1990] 2 All ER 257

<sup>5</sup> At paragraph 9.2.15: Guidance to applicants in the pilot implementation areas Version 1.4 October 2013; repeated at paragraph 9.3.16: Guidance to commons registration authorities and PINS for the pioneer implementation Version 1.46 January 2014

Manor of Tywarnhayle within the Duchy of Cornwall. Numerous documents listed as held by Cornwall Records Office refer to leases of land at 'Goonvrea' being within Tywarnhayle Manor. In fact the manorial origin of the application land (which is located at 'Goonvrea') has not been challenged and, although I have not seen the records listed by the applicant, no evidence to the contrary has come to light.

16. The applicant seeks to demonstrate that the application land formed part of the waste lands of Tywarnhayle Manor by reference to the Tithe Map and Apportionment for the Parish of St Agnes dated 1842. In this record, the land parcel listed as 'Commons, Wastes and Roads at Goonvrea' (No. 5126) appears under the heading "Commons, Wastes and Roads". This extensive area amounted to a total of 575 acres 0 roods 27 perches and reached much further than (but included) the area which is the subject of this application, now known as St Agnes Beacon. The 1842 Apportionment listed no occupiers, and no 'state of cultivation' or rent charge was recorded.
17. I agree with the applicant that the tithe documents point towards the application land being regarded as common or waste in 1842. However no common rights have ever been registered over this area.

*Whether the land is 'open, uncultivated and unoccupied'*

18. Objecting to registration of the land in his ownership<sup>6</sup>, Mr O Sawle argued that the land did not - and does not - have the character of waste land as it has been occupied by his family since the 1880s. During the twentieth century, it was grazed, to a greater or lesser extent, in association with the adjoining Beacon Cottage Farm land and has been ever since. The description 'uncultivated' was not disputed but, as from the day before the hearing<sup>7</sup>, his land was separated from the rest of the application land by a fence<sup>8</sup> and therefore could not properly be described as 'open'.
19. Addressing firstly the issue of 'occupation', Mr O Sawle drew attention to the Higher Level Stewardship (HLS) Scheme operating at Beacon Cottage Farm and the recent inspection which had found that, 2 years into the 10 year scheme, all was in order. The 2-acre area in his ownership which forms part of the application land was - and is - used for occasional grazing as an integral part of the farm management plan and has in the past been facilitated by the erection of a temporary wire fence whilst cattle are on the land. Other than a wayleave for an overhead electricity line and open access for the public on foot, he has exclusive use of the land; it is not in shared occupation with any other party.
20. In reaching my conclusions I note the published guidance<sup>9</sup> 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. On the evidence available in this case, where the land has simply been grazed, albeit regularly and for a great many years, I am bound to conclude that this is not sufficient to constitute (exclusive) occupation of the land in this context.

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<sup>6</sup> This lies in the south western corner of the application land.

<sup>7</sup> In fact the fence was not present on my visit to the site mid-afternoon on 20 November.

<sup>8</sup> At the hearing the applicant questioned the legality of this fence, an issue which could not be fully answered at the time. Although it has no direct bearing on my conclusions, I understand that the fence did not contravene any of the rules that apply to access land designated under the Countryside and Rights of Way Act 2000 since the public has been provided with two access points at north and southern ends of the fence.

<sup>9</sup> Now at paragraph 9.3.14: Guidance to commons registration authorities and PINS for the pioneer implementation Version 1.46 January 2014

21. The second issue, concerning the 'open' characteristic, was strongly disputed.
22. At the time of the hearing, the Guidance published by Defra (at paragraph 9.3.15)<sup>10</sup> stated: "In Defra's view, the question of whether land is waste land of the manor is one which must be satisfied at the time the application or proposal is determined. It is therefore possible that land which may have satisfied the test at the date of application or proposal has ceased to do so at the date of determination."
23. Following revision in January 2014, this Guidance now states: "In Defra's view, the question of whether land is waste land of the manor is one which must be satisfied at the time the application or proposal is submitted."
24. In response to this change, Mr O Sawle has argued strongly that the advice as it stood at the time of the hearing should prevail. In his submission it would not be just to apply the amended guidance retrospectively especially as the change appears to have been prompted by the particular circumstances of this case.
25. It was not disputed that the post and wire fence that was erected along the boundary separating Mr Sawle's land from National Trust property had not been in situ at the time the application was made but it had clearly been in place on the day of the hearing.
26. I fully understand Mr Sawle's protestations against the apparent injustice of the change in the Defra Guidance given its potential consequences for his property. However I intend to follow the current advice for two main reasons.
27. Firstly the Guidance is intended to assist in the interpretation of the statute, in particular the 2006 Act and the associated 2008 Regulations. Sub-paragraph 4(2) of Schedule 2 to the 2006 Act (which deals with the registration of '*Waste land of a manor not registered as common land*') states: "This paragraph applies to land which at the time of the application<sup>11</sup> under sub-paragraph (1) is waste land of a manor and where ... (the criteria set out in my paragraph 9 above are satisfied). The second reason is that the Guidance, correct or not, cannot displace the legislation itself.
28. Consequently, it is the situation at time of application in June 2012 that is relevant here. At that time there was no permanent fence along the boundary of Mr Sawle's land although there was – and is - an earth bank which coincides with much of its length. It was said that traditionally this was sufficient to separate the adjacent land parcels (which have always had different Ordnance Survey field numbers). Mr Sawle contended that the land had been sold as enclosed in 1880 but Mr Hill questioned whether the evidence did in fact support this. Further Mr Milton suggested there was nothing to show the earth bank was itself lawful in the first place; although he went on to speculate that this bank had been abandoned as a means of enclosure, I find there to be no evidence to support that theory either.
29. In conclusion I consider it entirely possible that the origin of the earth bank was to define land ownership once the common or waste known as Goonvrea in 1842 was divided and sold. I have no reason to doubt Mr Sawle's claim that the freehold of his land was bought by his forebears in the 1880s but it has not been firmly established whether or not the earth bank was in situ at that time.

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<sup>10</sup> Guidance to commons registration authorities & PINS for the pioneer implementation Version 1.45 October 2013

<sup>11</sup> My underlining

30. Nevertheless it was clearly in place at the time of the application so that the question arises whether this was sufficient to render the character of the land 'enclosed' or more specifically not 'open'. However, given its limited height, it alone would not contain grazing animals although Mr Sawle explained that in earlier times it would probably have been shepherded.
31. I understand that from time to time temporary fencing was erected to supplement the raised bank so that cattle could graze the area periodically along with other Beacon Cottage Farm fields but I cannot accept this as sufficient to prevent a finding that Mr Sawle's portion of the application land was otherwise undistinguishable from the adjacent National Trust land and adjoining parts of the application land in the sense of being 'open, uncultivated and unoccupied'.
32. In summary I find that the application land is of manorial origin, that it probably formed part of the waste land of the Manor of Tywarnhayle and that, at the time of the application, it had the character of waste land in that it was open, uncultivated and unoccupied as defined in this context.

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

33. Records show that the land was provisionally registered as common land (CL 567) under the 1965 Act on 24 February 1970 following an application dated 31 December 1969 (ref. 2090) by the Ramblers' Association, London, recorded as received by Cornwall County Council on 2 January 1970.

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

34. Three objections were submitted. The first, (ref. X603) dated 30 September 1970 and received by Cornwall County Council on 5 October 1970, was submitted by Mrs B M Skinner of Beacon Cottage Farm. The grounds for her objection were "*that the land, marked in green in plan attached, was not common land at the date of registration*". (This was the land now in the ownership of Mr O Sawle.)
35. A second objection dated 22 December 1971 (ref X919) was made by Mr K H Benney of Beacon Farm and was recorded as received on 23 December 1971. This challenged the provisional registration of the land on the grounds "*that the entire property shown verged red on the plan annexed hereto was not common land at the date of registration*". (This was the land now owned by Mr Thomas.)
36. The third objection (ref. X1033), dated 14 June 1972 and received on 15 June 1972 was made by the National Trust on the grounds "*that the land was not common land at the date of registration*".
37. Clearly the evidence shows there to have been more than one objection to provisional registration of CL 567.

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

38. Provisional registration of the land was recorded as being cancelled on 28 August 1973 "in consequence of the Objection Nos. X603, X919 and X1033 and the whole of the land involved in the provisional registration has been removed from the register pursuant to an application dated the 26<sup>th</sup> July, 1973 made by The Ramblers Association ... London."

39. In its letter to Cornwall County Council dated 26 July 1973, the Ramblers' Association requested that its applications for registration of a number of land parcels be cancelled (including CL 576) *"if you can confirm in each case that the whole of the land is owned by the National Trust and your Council respectively."*
40. The Register records that registration of CL 567 was consequent upon this request even though it is clear from the information now supplied that the whole land parcel was not wholly owned either by the National Trust or Cornwall (County) Council.
41. Nevertheless I am satisfied that the persons on whose application the provisional registration had been made *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 9(c)(iii) above) are satisfied.

### ***Other matters***

42. At the hearing Mr O Sawle drew attention to the fact that a member of his family (Mrs Skinner) had objected to the provisional registration of the land in the 1970s. He argued the objection had been sufficient for it to be withdrawn then and should be considered so now. However the statutory criteria for registration under the 2006 Act are different to those under the legislation which applied at the time of Mrs Skinner's objection to the 1969/70 application.
43. Mr O Sawle suggested that confrontation at the hearing could have been avoided had he been consulted before the application was submitted. However in response Mr Hill explained that Mr Sawle's ownership had only been revealed by the Land Registry searches which followed submission of the application.
44. In its objection to registration of the small parcel of land in its ownership, South West Water Ltd asked that it be excluded in order to protect the company's interests and its ability to continue to carry out its statutory undertakings. These are not matters which can be taken into account in determining an application of this nature.
45. Comments were made by several other parties on matters that are not relevant to the criteria on which this application must be determined. I make clear that it is not within my remit to consider the potential effect of registration on Mr O Sawle's HLS Scheme or future management of the application land. Nor can I take into account any implications, either here or elsewhere, for equestrian rights of access. I have addressed only the issues required by the 2006 Act.

### **Conclusion**

46. 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**

47. The application dated 22 June 2012 is granted and the land edged in yellow on the plan(s) attached to the application shall be added to the register of common land.

*Sue Arnott*

**INSPECTOR**

## **APPEARANCES**

### **In support of the application**

Mr TDJS Hill                      Applicant  
Mr R Milton                      Representing the BHS

### **Opposing the application**

Mr O Sawle                      Landowner  
Mr J Sawle

### **Representing the commons registration authority**

Mr M Wright                      Senior Development Officer; Cornwall Council

### **Attending in a neutral capacity**

Mr D Coles  
Ms P Thomas

## **DOCUMENTS**

1. The application and supporting documents forwarded by Cornwall Council
2. The letters of objection and representations in support
3. Letter dated 23 July 2013 from Mr T Hill to the Planning Inspectorate with extracts from the 1842 Tithe map & apportionment for St Agnes Beacon
4. Email sent on 28 August 2013 from South West Water to the Planning Inspectorate
5. Copy of letter dated 26 July 1973 from the Ramblers' Association to the Cornwall County Council
6. Statutory restrictions on access land: A guide for land managers published by the Countryside Agency February 2004

*Submitted following the close of the hearing*

7. Letter dated 10 January 2014 from Defra to the Planning Inspectorate in respect of Paragraph 4 of Schedule 2 to the Commons Act 2006: waste land of a manor not registered as common land
8. Letter dated 22 January 2014 from Mr Hill to the Planning Inspectorate
9. Email dated 24 January 2014 from Cornwall Council to the Planning Inspectorate
10. Email dated 27 January 2014 from Mr O Sawle to the Planning Inspectorate
11. Email dated 1 February 2014 from Mr S Byrne to the Planning Inspectorate



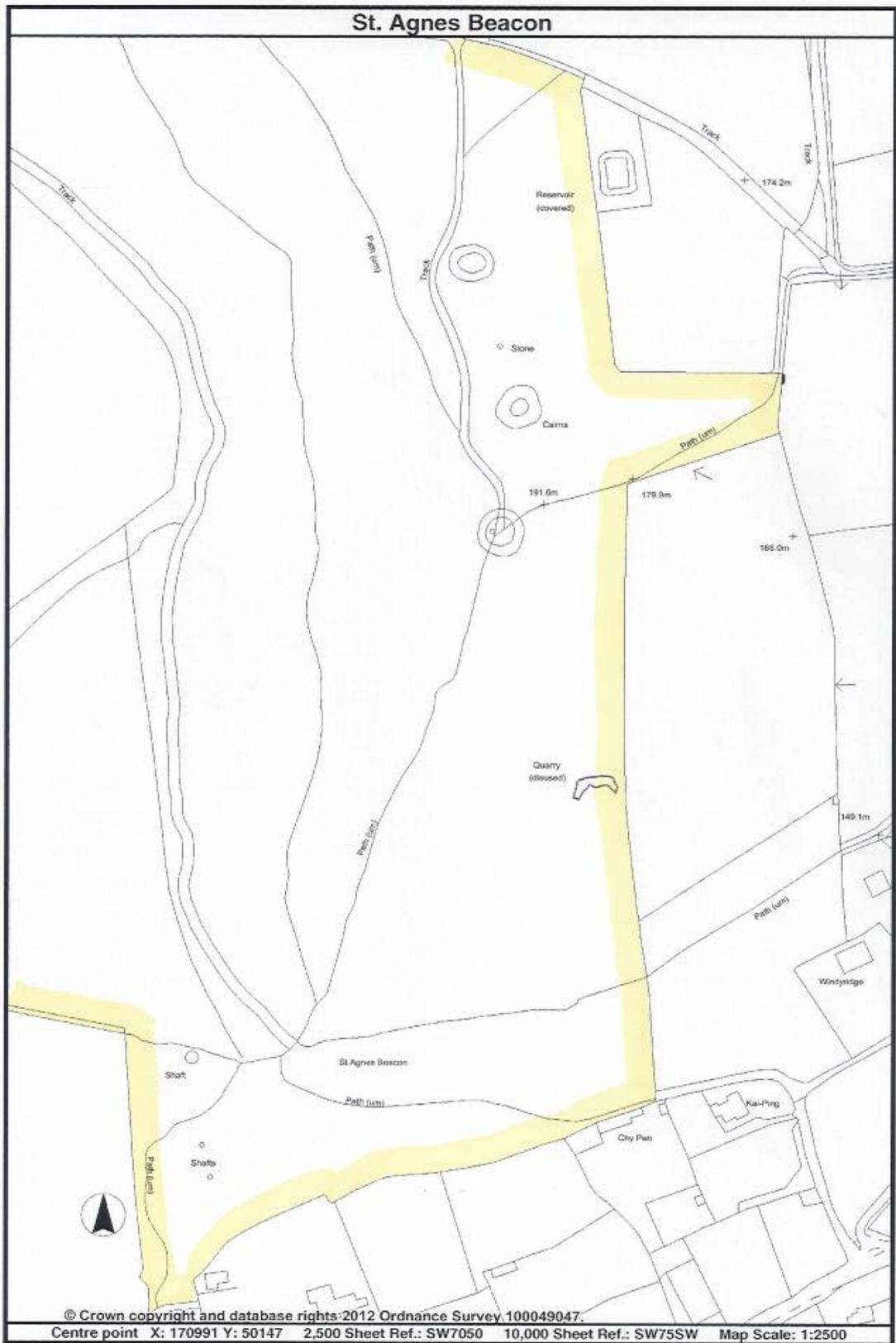
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NOT TO ORIGINAL SCALE



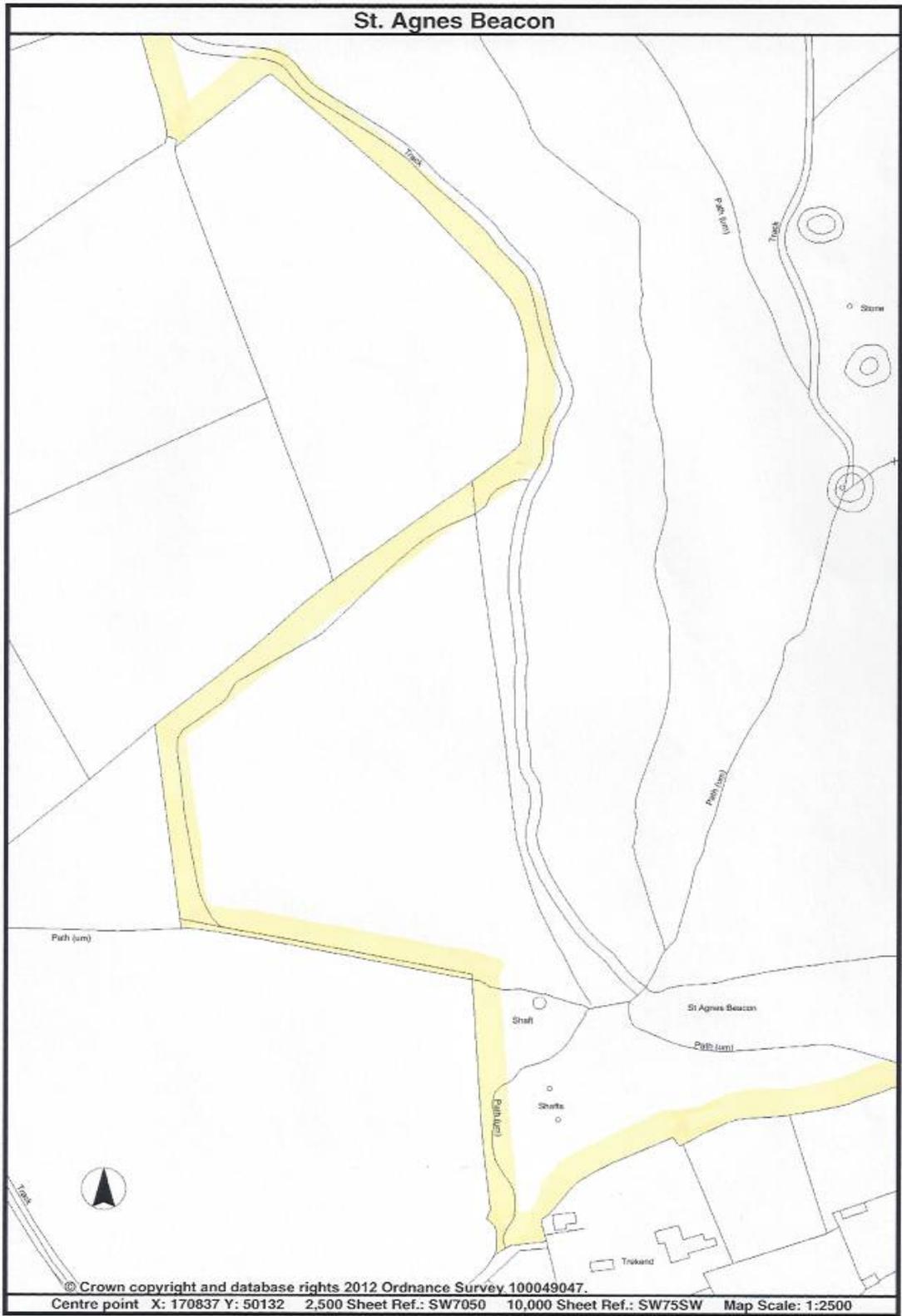
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