

Application Decision

Inquiry held on 28 October 2014

By Barney Grimshaw BA DPA MRTPI (Rtd)

an inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 9 December 2014

Application Ref: COM 555

Land at Morvah Cliffs, West Penwith, Cornwall

Register Unit: CL 702

Registration Authority: Cornwall Council

- The application, dated 21 March 2013, is made under Schedule 2, Paragraph 4 of the Commons Act 2006 ("the 2006 Act").
 - The application is made by David Coles on behalf of Save Penwith Moors.
 - 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).
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Decision

1. The application is refused.

Preliminary Matters

2. I held a public inquiry into this application on Tuesday 28 October 2014 at Centre of Pendeen, Church Road, Pendeen. I made an unaccompanied visit to the land referred to on Monday 27 October 2014 and a further visit after the inquiry on Tuesday 28 October when I was accompanied by some of the parties who appeared at the inquiry, the applicants declined to participate.
3. At the inquiry, the Commons Registration Authority (CRA), Cornwall Council stated that it supported the application in respect of any land not subject to an objection by a person with a legal interest in the land but that it wished to remain neutral in respect of other land. However, during the inquiry it became evident that all of the land included in the application was the subject of objections by people with a legal interest in it and accordingly it was stated on behalf of the CRA that it wished to remain neutral with regard to all the land applied for.
4. I attach a copy of a plan showing the application land for reference purposes.

The Application Land

5. The application land is approximately 58.5 hectares in area and comprises three separate land parcels (annotated 1, 2 and 3 on the attached plan) separated by two parcels which are currently registered as common land (Register Unit CL 702). At present the land is rough land vegetated mainly with bracken, gorse, brambles and some areas of grass. All of the application land is

included in an area designated as an Area of Outstanding Natural Beauty (AONB), an Area of Great Historic Value, and a Site of Special Scientific Interest (SSSI). The whole area also lies within the St Just Mining Area World Heritage Site and is open access land under the Countryside and Rights of Way Act 1981 on which the public may walk freely. In addition, the area is crossed by the South West Coastal Path and a number of other public footpaths.

The Statutory Requirements

6. Paragraph 4(6) of Schedule 2 to the 2006 Act provides that any person may apply to the Commons Registration Authority (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.
7. The application was made on 21 March 2013¹. 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).
8. 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.
9. 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
 - (b) evidence of the application of Paragraph 4(2) of Schedule 2 to the land to which the application relates.
10. 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.

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.

The Application

11. At the inquiry it was suggested that the application might not have been properly made in as much as the supporting information appears to suggest that the provisional registration of the application land had been cancelled after having been referred to a Commons Commissioner (as described in para.4(4) of Schedule 2 to the 2006 Act). In fact it appears to have been the case that the applicant for the provisional registration, West Cornwall Footpath Preservation Society (WCFPS), had requested the cancellation without the matter having been referred to a Commons Commissioner (as described in para.4(5) of Schedule 2 to the 2006 Act). However, the application itself simply states that it is made under para.4 of the Act and I do not believe that any party has been significantly misled or had their interests prejudiced by the supporting information. I am therefore satisfied that the application was properly made and should be determined in accordance with the provisions of para.4 of Schedule 2 to the 2006 Act.

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

12. The land was provisionally registered as common land on 31 March 1970.

Whether any objections were made in relation to the provisional registration

13. Five objections were made to the registration of the land as common in 1971 and 1972.

Whether the provisional registration was cancelled

14. The provisional registration was cancelled in respect of the application land on 22 March 1973 pursuant to requests made by the applicant, WCFPS.

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

15. It was not disputed that the application land was probably manorial land although there is no clear evidence of the extent of various manors in the area. There were a large number of manors in West Cornwall and such evidence that exists is consistent with the land having been manorial. Tithe records from 1840 indicate that much of the application land was then owned by Samuel Borlase, who is believed to have been the lord of the manor at that time. Accordingly, it is my view that the application land is most likely to have been manorial land and therefore the determination of the application depends on whether it can reasonably be regarded as having been 'waste land of the manor' at the time of the application (21 March 2013).

16. The term 'waste land of the manor' has been defined² 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".

17. It was argued by objectors that evidence that the application land has been subject to tenancies since at least the 18th century and the landowner (lord of the manor) received rent for it shows that the land cannot reasonably be regarded as being 'waste'. The land was also sold before the manorial system formally ended in the 1920s.

² Attorney General v Hanmer, 1858

18. In my view, there is some room for doubt as to whether the application land was always 'waste' land of the manor in the past. However, the critical issue in the current case is whether the land can reasonably be described as having been 'waste' at the time of the application.

Open

19. On behalf of the applicants it was argued that, although there may not be a legal definition of the term 'open' in this context, some weight should be given to the fact that the land has been designated as open access land under the Countryside and Rights of Way Act 2000 (CROW Act). However, it is not necessarily appropriate for the way in which the term is used in the CROW Act to be used in connection with the current application under the 2006 Act. For example, Gadsden³, which is generally accepted as an authoritative work on the law of commons and greens, equates the term 'open' with 'unenclosed' whereas much enclosed land is designated as 'open access' land under the CROW Act.
20. Reference was also made to a report commissioned by Natural England⁴ which described the open nature of the area. However, this was also prepared for a particular purpose and again cannot reasonably be applied in the determination of the current application.
21. On my visits I noted that the application land is not 'open' in the sense of being unenclosed. Boundaries are generally marked by substantial walls, fences, 'Cornish hedges' or electrified fences. There are also walls/fences within the main land parcels in various places and fencing close to the cliff hedge to prevent livestock falling. The South West Coastal Path which crosses the area passes through a number of gates in these walls or fences. All the walls and fences I saw were in place at the time of the application and many had clearly been there for much longer.
22. In these circumstances, it is my view that the land was not unenclosed at the time of the application and should not therefore be regarded as being 'open' for the purposes of the 2006 Act.

Uncultivated

23. The applicants suggested that uncultivated land is any land that has not been subject to soil disrupting activities such as ploughing, harrowing or chemical enhancement and that accordingly all the application land should be regarded as uncultivated.
24. Objectors pointed out that the definition of cultivation relied upon by the applicants appeared to be one related to the carrying out of Environmental Impact Assessment and not necessarily one that should be applied in the present case. Much of the application land is managed under Higher Level Stewardship (HLS) agreements administered by Natural England (NE). The applicants argued that this means that 'cultivation' of the land cannot take place although the agreements do require various actions to be taken to improve the land.
25. The land is used for the rotational grazing of cattle and ponies which has required the installation and maintenance of fencing and water troughs. Active

³ EF Cousins & R Honey, Gadsden on Commons and Greens, 2nd edition, 2012

⁴ A Vision For The Moors and Related Lands in West Penwith, Cornwall, John Waldon 2009.

management is also undertaken to remove invasive European Gorse and bracken by burning and the clearance of fire breaks, hand and mechanical cutting, mechanical breaking up of root stock and chemical spraying. In addition, loose stones have been removed in several areas both to improve the land and build walls. These activities take place in accordance with the HLS agreements and it was argued on behalf of objectors that they demonstrated 'cultivation' of the land and that, accordingly, it could not properly be described as being 'uncultivated'.

26. In my view the question of whether land should be regarded as being cultivated for the purpose of the 2006 Act requires a judgement regarding the degree of cultivation that has taken place and is not simply a matter of determining whether ploughing or similar activities have taken place. With regard to the application land this is not an easy task as, although it is clear that the land is actively managed, this only amounts to a relatively low level of cultivation. Nevertheless, it is at least arguable that the land cannot reasonably be regarded as uncultivated land.

Unoccupied

27. Defra's published guidance⁵ 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, lease or licence 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.
28. Two of the three parcels of land included in the current application (Areas 1 and 2) are not subject to any tenancy, lease or licence as they are occupied by the current owners of the land, Messrs Flindall and Mr and Mrs Wilson, respectively. The third area (Area 3) is owned by the National Trust and leased to a tenant, Mr Clegg. I have not seen a copy of the lease for this land but it was said at the inquiry to be a normal agricultural tenancy rather than one whose sole or principal purpose is to enable extensive grazing.
29. There is evidence that the application land has been subject to various tenancies since at least the late 18th century. For example, Moody's map of 1782 shows the boundaries of fields and crofts and what appear to be tenants' names in some cases. Also, tithe records from 1840 include tenants' and landlords' names and the amount of tithe payable for each field. The remains of some buildings, said to have been dwellings of tenants, can still be seen in some parts of the land. Objectors argue that this confirms that the land was occupied and productive.
30. There is a disused mine known as Morvah Consols on part of the application land (Area 2). This was in use from 1820 to 1875 on the basis of a lease from the landowner.
31. Although the application land is available for the public to walk over, in accordance with the provisions of the 2000 Act, objectors argued that for all other purposes their physical use of the land involves the exclusion of others. The land is currently used for the grazing of cattle and ponies exclusively by the respective owners and tenant. They also use it for shooting, gorse

⁵ Department for Environment Food & Rural Affairs, Part 1 of the Commons Act 2006, Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation (Version 1.46), January 2014

coppicing for biomass heating, bracken harvesting for livestock bedding, fishing and other activities, all on an exclusive basis.

32. Overall, it is my view that the application land cannot reasonably be described as having been unoccupied at the time of the application.

Summary

33. In the light of the above, it is my view that at the date of the application the application land was not open or unoccupied and arguably also not uncultivated. It cannot therefore be regarded as having been waste land of the manor and should not now be registered as common land.

Conclusions

34. Having regard to these and all other matters raised at the inquiry and in written representations I conclude that, on the balance of probabilities, the criteria for the registration of the application land as common have not been satisfied.

Formal Decision

35. The application is refused.

Barney Grimshaw
INSPECTOR

APPEARANCES

Applicant

David Coles	Applicant, Save Penwith Moors (SPM)
Ian Cooke	SPM

Objectors

John Mortimer	Country Land and Business Association
Ian Flindall	Landowner of application land
Alec Wilson	Landowner of application land
Susan Wilson	Landowner of application land
Guy Clegg	Tenant of application land

Commons Registration Authority

Martin Wright	Commons Registration Officer, Cornwall Council
Mike Eastwood	Access Team Leader, Cornwall Council

DOCUMENTS

1. Bundle of documents assembled by Cornwall Council.
2. Statement of Case and supporting documents, SPM.
3. Statement of Case and supporting documents, AT & SJ Wilson.
4. Statement of Case and supporting documents, I & M Flindall.
5. Critique of objections, SPM.
6. Response to objections, set of Briefing Notes and CD containing supporting documents, S Byrne on behalf of SPM.
7. Closing Statement, SPM.

