



## Application Decision

Hearing and site visit held 27 July 2016

**By Martin Elliott BSc FIPROW**

**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: 17 November 2016**

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**Application Ref: COM713**  
**Part of Wheal Busy Downs, Chacewater**

Register Unit: CL 577

Registration Authority: Cornwall Council

- The application, dated 7 March 2014, is made under Schedule 2 paragraph 4 of the Commons Act 2006 ('the 2006 Act').
  - The application is made by Mr T Hill.
  - The application is to register waste land of a manor as common land in the register of common land.
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### Decision

1. The application is approved in part and the land shown in yellow on the plan<sup>1</sup> attached to this decision shall be added to the commons register. Land shown in red is to be excluded from the application land.

### Preliminary Matters

2. I held a hearing at Carrick House, Truro on 27 July 2016. I carried out an unaccompanied inspection of the application land on the evening of 26 July. I carried out a further accompanied site inspection following the close of the hearing. This was limited to certain parts of the application land.
3. At the hearing I invited post event submissions on the validity of the application and the issue of whether the application land was demesne land of the manor. These were issues which had been raised by the objector in their skeleton argument which the applicant had not been able to consider. I also requested a number of documents for further information. The additional submissions and documents were circulated between the parties and I have had regard to the additional submissions in reaching my decision. I note that the objector did not envisage a sequential exchange of submissions. However, in fairness to the parties it was in my view appropriate to provide an opportunity to make comments on the submissions of the other parties.
4. The applicant made reference to a number of decisions in respect of applications under the Commons Act 2006. These are not binding and each case must be decided on the merits of their own facts.

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<sup>1</sup> The plan is for information purposes and is not to scale

5. At the hearing the Commons Registration Authority (Cornwall Council) adopted a neutral stance as the applicant is an employee of Cornwall Council.

### **The Application Land**

6. The application land is identified as Wheal Busy Downs in the parish of Chacewater. The land is mainly heath and scrub but contains areas devoid of vegetation. Within the application land there are mineshaft openings which are surrounded by Cornish Hedges; these have been excluded from the application land. There are also some mine buildings on the land in varying states of repair, a number of these have also been excluded from the application. The application land includes land which is used as a car park and the land is crossed by a number of public rights of way. Some of these public rights of way are used for private rights of access to properties adjacent to the application land.

### **Main Issues**

7. The application has been made in accordance with the provisions of paragraph 4 of Schedule 2 to the 2006 Act. The main issue is whether the land is waste land of a manor and whether before 1 October 2008:
  - (a) the land had been provisionally registered as common land under section 4 of the Commons Registration Act 1965;
  - (b) an objection was made in relation to the provisional registration; and
  - (c) the provisional registration was cancelled in the following circumstance<sup>2</sup>:

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. 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**

#### ***Whether the land had been provisionally registered as common land under section 4 of the Commons Registration Act 1965***

9. The land was provisionally registered as common land unit CL 577 on 20 February 1970 following an application from the Ramblers' Association dated 2 January 1970.

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

10. An objection was raised, on 12 January 1971, to the provisional registration of CL 577 by the Rt. Hon Viscount Falmouth.

#### ***Whether the provisional registration was cancelled in the circumstances specified in paragraph 4 (5) of Schedule 2 to the 2006 Act***

11. On 17 June 1980 the Commissioner refused to confirm the registration. The objector argues that the refusal to confirm the registration does not amount to

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<sup>2</sup> The checklist completed by the CRA indicates that the section relied upon is subsection (5) of Paragraph 4 to Schedule 2 to the Commons Act 2006

a cancellation for the purpose of Schedule 2 section 4(5) of the 2006 Act. It is contended that the cancellation of the application arose consequentially to the refusal to confirm because the Commons Registration authority was required to cancel any provisional registration not confirmed under Section 6(2) of the 1965 Act. Schedule 2 section 4(5) requires the parties to agree to cancel the registration and it is argued that this did not in fact happen.

12. The decision of the Commissioner states that *'all persons entitled to be heard at the hearing of this dispute have agreed upon the terms of the decision to be given by me and have sent to the Clerk for the Commons Commissioners particulars of such terms signed by or on behalf of all such persons.'* The Commissioner accordingly refused to confirm the registration. On 11 March 1981 the Chief Commons Commissioner gave notice to Cornwall County Council that the registration became void. The land register of common land contains an entry dated 22 April 1981 stating that the registration had been cancelled in pursuance of the notice.
13. The Council provided correspondence to the Commons Commissioner where the signatories, which included Mr A Mattingly for the Ramblers Association whose signature is dated 9 March 1977, request the Commons Commissioner to refuse to confirm the registration of the land.
14. Although the notice to the County Council refers to the disputed registration as being void, the correspondence to the Commons Commissioner does suggest that the signatories, which included a representative of the Ramblers' Association, requested that the registration of the land be refused. The terms agreed between the parties are not identified in the correspondence from the Chief Commons Commissioner (17 June 1980) but the Commissioner identifies that the relevant persons have agreed upon terms and the decision was to refuse to confirm the registration. The Land Section of the Register identifies that the registration is cancelled. Looking at the evidence as a whole it appears, on the balance of probabilities, that the applicant, amongst others, requested and agreed to the cancellation of the provisional registration.

#### ***Whether the land at issue is of a manor***

15. "*Of the manor*" is held to mean land which is, or was formerly, connected to the manor<sup>3</sup>. The objector concedes that the application land is of a manor.
16. I have considered the evidence submitted by the applicant and in the absence of any evidence to the contrary it is most likely that the application land is land which, on the balance of probabilities, is of a manor; namely the manor of Blanchland.

#### ***Whether the land fulfils the character of waste land of a manor***

17. The term 'waste land of the manor' has been defined<sup>4</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*". The question as to whether land is waste land of the manor is one which must be satisfied at the time of the application.

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<sup>3</sup> *Hampshire County Council and others v Milburn (1991)*

<sup>4</sup> *Attorney General v Hanmer, 1858*

18. The objector notes that there is a pond on the north east of the application land and suggests that there may be other ponds on the land. It is submitted that ponds, and water courses, are by definition not waste. However, section 22 of the Commons Registration Act 1965 provides that land covered by water is covered in the definition of waste land.

*Open*

19. The objector argues that the land is not all open in that there are buildings, mine shafts and vents. The objector makes the point that there are 107 structures identified on the mining structures survey (CMS report). It is contended that these structures have been capped and that the surface is artificially created. As such areas covered by structures, above and below ground, cannot be seen as open, unoccupied or uncultivated.
20. The application excludes a number of mine shafts which are said to be surrounded by Cornish hedges; these shafts cannot be seen as being open. I noted on my unaccompanied site visit that the application plan does not exclude a fenced mine shaft at the northern edge of the application land in the proximity of the Engine House. It was agreed by the parties that this land is not open and should be excluded from the application land.
21. In respect of the structures which have been capped, other than those identified above at paragraph 20, whilst the surface may have been artificially created the capped structures are surfaced and are not enclosed, they are therefore open.
22. As regards buildings, again some of these have been excluded from the application land, I consider the Engine House below. However, there are other buildings and structures in varying states of repair which in effect are separated from the adjacent land and exclude access. These buildings are not open and should be excluded from the application land.
23. Returning to the Engine House, part of this land is already excluded from the application land. An additional area, identified as a contentious area on the plan produced by the Council following the hearing, to the north east of the excluded land mirrors the area of land identified as a scheduled ancient monument. However, there is no evidence before me that at the time of the application the land was enclosed. The evidence is that prior to 2015 the land occupied by the Engine House is that hatched purple on the application plan. On that basis the additional land was, on balance, open at the date of the application. I also note a small area of land to the north east of the Engine House which has been marked as contentious. However, there is nothing before me to indicate that this area of land cannot be regarded as open.
24. It is also contended by the objector that the car parks on the land are not open land. However, these are not enclosed against the adjacent application land and I do not consider that they are not open.
25. A further area to be considered in respect of whether the land is open is land occupied by a stable block; this is at the southern edge of the application land to the west of the road which bisects the site. This land is fenced and in use for the keeping of horses. Aerial photographs from 2013 show the existence of the stable block. Given the physical characteristics it cannot be said that this land is open, or indeed unoccupied. As such the land should be removed from the application land. As regards the access track to the field occupied by the

stable block, although surrounded by scrub species it is open to the road and is not enclosed.

26. The applicant refers to the fact that the majority of Wheal Busy Downs are designated as open access land under the Countryside and Rights of Way Act 2000. It is argued that this further demonstrates that the land is open. I note these submissions but the definition of open access is derived for the purpose of the 2000 Act. In respect of considering an application to record waste land of a manor as common land the test is whether the land is open, that is unenclosed. Whilst land may be open access land it does not necessarily follow that the land is open for the purposes of considering the application. Open access land is defined by whether it is mountain, moor, heath, down or registered common land but may be enclosed. It is also the case that some of the land is accessible under Section 17 of the Ancient Monuments and Archaeological Areas Act 1979. However this again does not mean that the land is open.

#### *Uncultivated*

27. The objector maintains that the property, or parts of the property, are cultivated in consequence of a Higher Level Stewardship (HLS) agreement.
28. The HLS agreement provides for the restoration of lowland heathland which is not in a favourable condition. This is to be achieved by a number of management practices including burning and/or cutting of heathland, grazing where essential, the reduction of scrub, trees and bracken to appropriate levels and restoring drainage systems. The agreement also provides for the control of invasive species by various means.
29. Whether land is cultivated or uncultivated depends on what the land is used for and how much the land is used. Whilst the management of the land is subject to a formal agreement the purpose is to improve the heathland into a favourable condition and to control invasive species. The agreement is for no other purpose. I do not consider that the management of the land for this purpose amounts to cultivation which in the ordinary meaning of the word would be to produce a crop or improve the land for grazing.
30. As noted above the objector contends that capped underground structures cannot be seen as uncultivated. I do not agree, the capping of the structures cannot be seen as cultivation but as management of the old mining structures.

#### *Unoccupied*

31. Whether land is occupied or unoccupied will depend on whether the land is used by the occupant, and if it is, how much. Unoccupied land means that nobody is physically using the land in a way that prevents other people from using it.
32. The objector contends that the land is 'in hand' and is being cultivated in consequence of an HLS agreement. As such it is argued that the land is demesne. I accept that much of the land is subject to an HLS agreement which is aimed at the restoration of lowland heathland and the control of invasive species. However, the management required by the HLS agreement is what I would regard as low level. There is nothing before me to suggest that the management of the land is to such an extent that prevents other people from using it.

33. The objector also argues that the buildings and the areas around them, car park areas, land subject to rights of way and other roads and tracks are occupied. As noted above it is also contended that the capped mining structures cannot be seen as unoccupied.
34. In my view the land occupied by the buildings is not accessible and the buildings themselves prevent other people from using that land. Consequently the land is occupied but, in any event, I have already concluded that the land occupied by the buildings is not open and cannot be waste of the manor.
35. The Old Smithy is currently leased by the Tregothnan Estate and is used for a vehicle maintenance business. Whilst the applicant makes the point that the plan of the leased area is not an official lease there is nothing to indicate that the area shown does not form part of the leased area. The objector notes the activity around the curtilage of the building by reference to an aerial photograph of 2013. I also noted during my site visits that the area around the building is being used in connection with the business. This use was consistent with that shown on the 2013 aerial photograph. Although there is no physical exclusion to the area in the form of any fencing the use would exclude others apart from those visiting the business. As regards the remainder of the land subject to the lease this in my view falls within the curtilage of the business as it forms part of the lease and again would in my view be regarded as occupied.
36. As regards the other elements identified by the objector there is nothing before me to indicate that these areas are being used in a way that prevents other people from using the land.
37. I note the point of the objector that the land recorded as a scheduled ancient monument and the land subject to access under the provisions of the Countryside and Rights of Way Act 2000 is controlled by virtue of statute. However, the issue is whether the land is being physically used to the exclusion of others. I have concluded above that, with some exceptions, the land is unoccupied.

*Whether the land is demesne*

38. As identified above, waste land is open, uncultivated and unoccupied land of the manor other than demesne lands of the manor. Demesne land is land which the lord of the manor retained in hand or leased. Such land would be held for his own purposes and benefit and occupied by him. In essence, and for the purposes of my consideration of the application, lands of the manor are either demesne or waste. As noted in '*The Law of the Manor, Jessel*', 2<sup>nd</sup> edition, at 6.1, land can pass between waste and demesne.
39. I have reached the conclusions above that, with a number of exceptions, the application land is open, uncultivated and unoccupied land. The land therefore meets the description of waste. In view of this I do not consider that the application land is retained by the lord of the manor for his own benefit and occupation and is therefore not demesne.
40. The objector argues that given the value of minerals in Cornwall and the history of Wheal Busy as a mine it is reasonable to assume that the land was demesne. From the information before me the mine at Wheal Busy has origins from the 18<sup>th</sup> century and mining ceased sometime in the 1920s. The application land is identified in the list of commons on the Manor of Blanchland

plan of 1736. Although the map does appear to indicate the presence of mine shafts on the land the recording as a common does not suggest that the land at that time was in hand and occupied by the lord of the manor. Similarly the 1843 Kenwyn Tithe map and apportionment identifies the application land as 'Downs, Waste and Roads' which again is indicative of the land being waste and uncultivated.

41. I accept that the application land has been subject to intensive mining activities but the evidence is that mining ceased on the land in the 1920s. The land is now predominantly scrub, with areas of bare ground, and is, with some exceptions, open, uncultivated and unoccupied. The land fits the description of waste.
42. The applicant questions whether Mr Boscawen is the owner of the manorial title of the land. However, the objector has confirmed that Mr Boscawen is the owner of the manorial titles. The objector also advises that the manorial titles for the land have not been registered and that Mr Boscawen has registered caution against first registration in respect of some but not all the titles. Given my conclusions at paragraphs 39 and 41 above it is not necessary to consider this matter further.

### **Other Matters**

43. The objector states that registration as common land will significantly impede its management as agricultural land. Whilst I note this concern it is not a matter which can be taken into account in reaching my decision. The relevant criteria are set out at paragraph 7 above.

### **Conclusion**

44. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that, with the exception of a number of areas which I have concluded were not open or unoccupied at the time of the application, the application land fulfils the necessary criteria for registration and consequently I approve the application in part.

*Martin Elliott*

INSPECTOR



