



Application Decision

Inquiry held on 18 February 2020

Site visits held on 17 & 18 February 2020

By Martin Elliott BSc FIPROW

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

Decision date: 12 March 2020

Application Ref: COM/3230003

Part of the Saltings and Foreshore, Brancaster, Norfolk

Register Unit: CL124

Registration Authority: Norfolk County Council

- The application, dated 1 May 2017, is made under Schedule 2(6) of the Commons Act 2006 ("the 2006 Act") to remove land from the register of common land on grounds specified in paragraph 6(2) of Schedule 2 to the 2006 Act (buildings registered as common land).
 - The application is made by The Royal West Norfolk Golf Club (RWNGC).
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Decision: The application is granted and the land, part of register unit CL124, edged and hatched blue on the plan appended to this decision shall be removed from the Register.

Preliminary Matters

1. The Registration Authority has referred the application to the Planning Inspectorate in accordance with Regulation 26 of The Commons Registration (England) Regulations 2014 (the Regulations).
2. Following the close of the inquiry further correspondence was received. This correspondence did not raise any new issues or matters which I can take into account and consequently was not circulated.

Landownership

3. Objections are raised on the basis that the RWNGC do not own the application land. I note these objections, however, paragraph 6(3)(a) of Schedule 2 to the 2006 Act provides that an application may be made by 'any person'. It is not a requirement that an application under this paragraph should be made by the landowner although the RWNGC do hold the title to the application land¹. Furthermore, matters relating to landownership, including the remainder of the common, are not relevant to the determination of the application and are not matters for my consideration. The relevant criteria are those set out at paragraph 12 below.
4. It is suggested in opposition that the 2006 Act (and the Commons Registration Act 1965) cannot be used to amend a private or local act. It is asserted that the ownership of Brancaster Salt Marsh Common is defined by the Inclosure Award of 1765 and the Tithe Award of 1841. Notwithstanding the fact that an

¹ H M Land Registry title number NK341915

application to deregister common land may be made by any person, the 2006 Act does not distinguish between types of land. Paragraph 6 of Schedule 2 to the 2006 Act makes it clear that the provisions relate to '*any land registered as common land*'. Such land can be removed from the register subject to the relevant conditions being met. The relevant section is explicit as to its intentions without qualification. The provisions of the local Inclosure Act and Tithe Award do not preclude deregistration and have no bearing on my determination of the application.

The application

5. In opposition it was claimed that the application form was faulty in that the application land was not hatched blue. Although the application form indicates that the application land must be hatched in blue the Regulations only require that any Ordnance Survey map accompanying an application must show the land by means of distinctive colouring. The application land is bounded by a red line on the Ordnance Survey map accompanying the application. The application land is clearly identified on the map and there is no evidence that anyone will have been misled.
6. It was also questioned whether the application form had been completed truthfully. The point was made that section 9 made no reference to the objections to the application. Mr Farthing explained that given the relevant criteria against which the application would be assessed (paragraph 12 below) the applicant did not envisage any objections to the application; hence section 9 remained blank. Mr Hattrell was unaware at the time of the application of any likely objection to the deregistration.
7. Noting the above, the applicant was not required to consult on the application and it was not until the application had been submitted to the Registration Authority that consultation on the application took place and objections were received. There is nothing before me to suggest that the application form was not completed truthfully such as to render the application form misleading or untrue.
8. The point was also made that not all commoners had been consulted on the application. The Registration Authority confirmed that they had consulted 79 registered common rights holders whose addresses were believed to be correct and current. The Registration Authority also confirmed that all statutory requirements had been carried out in respect of the application; there is no evidence before me that such requirements have not been met. The formal notice of the application was posted on the Norfolk County Council's website and on site, at the entrance to the application land, from 7 September up to and including 19 October 2018. Copies of the application were also placed on deposit at County Hall in Norwich. It should be noted that in making an application under paragraph 6 of Schedule 2 to the 2006 Act there are no requirements placed on the applicant by the Planning Inspectorate.
9. Although it appears that not all those with rights on the common were informed of the application the issue to be considered is whether anyone has been prejudiced. The notice of the application resulted in 118 objections (some of which have now been withdrawn) and it is apparent that some of those making objections were rightsholders. It is also of note that the Scolt Head and District Common Rightsholders' Association made an objection, as such the rightsholders would have been represented by the Association. In the

circumstances there is no evidence that any of the rightsholders will have been prejudiced.

10. A further point was made that whilst the application was dated 1 May 2017 the application was not stamped by the Registration Authority until 18 May 2018. This latter date is when the Registration Authority registered the application. The time elapsed between the application and the registration of that application has no bearing on my determination of the application.

The Application Land

11. The application land is formed by the clubhouse, changing rooms, associated buildings, the professional's shop and the members car park of the RWNGC, Brancaster. The land excludes an area of car park to the southwest of the application land which was included in the initial application but subsequently removed. This area is shown unhatched on Plan 1 at Appendix 2 of the applicant's statement of case.

Main Issue

12. Paragraph 6(2) of Schedule 2 to the 2006 Act provides that land can be removed from the register where:
- (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.
13. The main issue is whether the applicant has adduced sufficient evidence to show that the application land was registered as common land in error.
14. The burden of proof is the normal civil standard, namely, the balance of probabilities.

Definition of curtilage

15. The word 'curtilage' is not defined in the 2006 Act, but has been considered by the courts in various contexts, in particular in the context of planning and development legislation. From such cases, it appears that the question of whether land is considered to be within the curtilage of a building is a question of fact and degree². Earlier decisions suggested that the key factors to be taken into account were the physical layout of the land and buildings, past and present ownership and past and present use and function³. However, recent judgments appear to place more weight on present use and function than common ownership⁴. Examples include a yard, basement area, passageway, driveway and garden which are ancillary to the house.

² *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions and Dyer v Dorset County Council*

³ *Attorney-General v Calderdale Borough Council*

⁴ *Sumption v Greenwich London Borough Council; Morris v Wrexham County Borough Council; Lowe v First Secretary of State*

16. I was referred by the applicant to the case of *Burford v Secretary of State for Communities and Local Government & Anor [2017] EWHC 1493* which is relevant. This confirms the three factors to be taken into account in determining the curtilage of a building. These are the physical layout of the building and attached land; the ownership, past and present; and their use or function, past or present. Further, the curtilage of a building, within the context of the assessment of the above factors is a matter of fact and degree for determination by the decision maker. There is no restriction as to size but it must be fairly described as being part of the enclosure to which it refers. The relationship between the main building and the land in question is relevant when considering their function and use but this is not determinative by itself.
17. It is immaterial, for the purposes of paragraph 6 of Schedule 2 to the 2006 Act, whether any building was lawfully present on the land at the date of provisional registration.

Reasons

Whether the land at issue was provisionally registered as common land under section 4 of the 1965 Act and whether the provisional registration became final

18. The land was provisionally registered as common land on 19 March 1968. The provisional registration became final on 13 October 1980.

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

19. The golf club was founded in 1892 and temporary buildings were built to house the club shortly after its foundation. It is understood that the current club house and changing rooms were built around 1900/1901. The clubhouse and associated cottages are shown on photographs in 'The Illustrated Sporting and Dramatic News' of 18 April 1903.
20. An aerial photograph of 1946 shows the club buildings and the alignment of the boundaries which are consistent with the application land. The 1952 and 1959 Ordnance Survey maps also show the buildings and the boundaries of the application land. The Ordnance Survey map used for the commons registration plan and the 1977 Ordnance Survey map show the application land consisting of buildings with the boundaries and are consistent with earlier maps.
21. The Ordnance Survey map of 1983/84 shows the land in a similar way to maps pre-registration. The aerial photograph of 1988 clearly shows the application land as a single entity containing buildings and car park. The 2018 aerial photograph is similar although it shows the extension of the car park; this is the area now excluded from the application. The evidence from the applicant is that the car park was extended in 2000/01.
22. Having regard to all of the above I conclude that at the time of the provisional registration the land subject to the application was covered by buildings, the land not covered by buildings comprised the members car park and land adjacent to those buildings which will in part provide access between the various buildings. This land can reasonably be described as within the curtilage of the buildings as it is ancillary to the use of the club house and associated buildings. The current club house and its curtilage is defined by fences, an

earth bank and the concrete sea wall and includes the car park, and its extension, which is ancillary to the buildings. On the balance of probabilities the application land has, since provisional registration, at all times been covered by buildings or has been within the curtilage of those buildings. I acknowledge the assertion that fences have been erected illegally but that does not prevent the relevant land from falling within the curtilage of a building; the legality of the fences is not a matter for my consideration.

23. In opposition it was questioned whether there was a fence running along the most southerly boundary of the application land at the time of the provisional registration. Mr Hattrell fairly accepted that he could not recall any fence. However, the Ordnance Survey maps depict a boundary feature along this alignment and, although after the registration of the land, the 1988 aerial photograph shows a clear distinction between the car park and the adjacent land consistent with the Ordnance Survey mapping. On balance it is more likely than not that there was some form of boundary between the application land and the adjacent land.
24. It was also suggested that, in the context of a house, the extent of the curtilage should be limited to an area to accommodate around 3 to 4 cars. Whilst the size of the curtilage is a relevant factor, so is the purpose to which the building and land is put. The car park area is ancillary to the function of the buildings as a golf club. The extent of the curtilage is a matter of fact and degree and as noted above I have concluded that the land associated with the buildings falls within their curtilage.
25. In view of my conclusions above it follows that the application should be approved.

Other matters

26. Objections to the application raise issues concerning the loss of common rights and access rights under the Countryside and Rights of Way Act 2000. Objections have also been raised in respect of the deposit of a statement and declaration under section 31(6) of the Highways Act 1980 and under section 15A(1) of the Commons Act 2006. I also note areas of the common are now under car parks, roads, buildings and beach huts with signage and fencing to deter use of the common. Whilst I note these issues they are not matters which I can take into account in determining the application and are not matters for my consideration. The relevant criteria are those set out at paragraph 12 above.
27. It is also stated in opposition, by reference to the Common Land Guidance Sheet 3⁵ that the applicant has not provided any land in exchange for that being deregistered. However, this guidance relates to applications made under section 16 of the 2006 Act; the application is made under paragraph 6 of Schedule 2 to the 2006 Act which does not require exchange land to be provided.
28. I note the concerns that a previous employee of Norfolk County Council now works for the agent for the applicant. Again this is not a matter for my consideration. The application must be determined on its merits measured against the relevant criteria. Concerns were also raised that the application

⁵ Published by the Planning Inspectorate

land included the access to the beach. However, I confirmed on both of my unaccompanied site visits that the application land does not impinge on the access route to the beach.

Conclusions

29. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the application should be allowed.

Martin Elliott

INSPECTOR

