Planning Inspectorate logo

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| **Application Decision** |
| Hearing held on 21 February 2023 |
| Site visit made on 21 February 2023 |
| **by R J Perrins MA** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 24 May 2023** |

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| **Application Ref: COM/3293879**  **The Bunny Hill and part of Fentongoose Common**  Register Unit No: CL 596  Commons Registration Authority (CRA): Cornwall Council |
| * The application, dated 8 November 2020, is made under paragraph 4(6)(a) of Schedule 2 to the Commons Act 2006 (the 2006 Act). |
| * The application is made by the Open Spaces Society. * The application is to add land to the register of common land on the grounds that it constitutes waste land of a manor not registered as common land within the circumstances specified in paragraph 4 of Schedule 2 to the 2006 Act. |
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Decision

1. The application made on behalf of the Open Spaces Society is approved. The land hatched in purple on the plan attached to this decision shall be added to the Register of Common Land.

**Application land**

1. The application land comprises 3.865 hectares of land at the Bunny Hill and part of Fentongoose Common, in the parish of Kea. A broadly triangular parcel of land which stretches into linear sections to the south where it follows an access track that meets with Byway 308/34/3 and to the east where the strip of woodland is bounded by field margins and a watercourse to the north. The application land is predominantly broadleaved woodland, sloping down to the watercourse and railway to the north. The application land is hatched in purple on the plan at Appendix 1.

**Preliminary Matters and background**

1. Paragraph 4 of Schedule 2 to the 2006 Act enables certain land to be registered as common land subject to it meeting the provisions specified within paragraph 4. This includes that applications must be made before the specified date (in this instance 31 December 2020). There is no dispute in this case that the application was made prior to the relevant deadline.
2. Such an application may only be made in respect of land which is waste land of a manor at the date of the application and was provisionally registered as common land under section 4 of the Commons Registration Act 1965 (the 1965 Act). In addition, there must have been an objection to its provisional registration and the provisional registration was subsequently cancelled on account of one or more of three circumstances. In this case, there is no dispute that the aforementioned has been made out and, from the evidence before me, I accept the requirements of the Act have been met in that regard.
3. However, Schedule 2(4)(2) of the 2006 Act, sets out that the paragraph applies to land which at the time of the application under sub-paragraph (1) is waste land of a manor. Whether or not the land was waste land goes to the heart of the case. It follows that the requirements of the 2006 Act have largely informed the main issues under consideration for this application.
4. The Commons Registration (England) Regulations 2014 (the Regulations) set out the procedures to be followed for applications made under paragraph 4 of the 2006 Act. Furthermore, I have had regard to the relevant guidance contained in ‘Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate’ issued by the Department for Environment, Food and Rural Affairs dated December 2014 (the 2014 guidance).
5. The task of proving the case in support of the correction of the register rests with the applicant, and the burden of proof is the normal civil standard, namely, the balance of probabilities.
6. I held a Hearing and carried out an accompanied site visit with representatives of the applicant, objector and the CRA. The application has been determined on the basis of the written evidence, the comments submitted in writing and verbally at the hearing and my observations of the site.

Main Issue

1. The main issue in this case is:

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

Representations

1. Representations objecting to the application have been received from The Right Honourable Evelyn Arthur Hugh, Viscount Falmouth of the Tregothnan Estate. The objection raises a number of points including that the assumption that all land was of the manor is wrong. Land could be taken out of the manorial system and controlled by outsiders. In addition, the Tithe Apportionment page sets out that the property had been apportioned between The Earl of Falmouth and William Rashleigh Esq who had a moiety each, that being a legal interest in an undivided share. Such a conveyance of property created a tenancy in common at law. That does not support the view that the land was ever common, waste, or of the manor.
2. Such joint ownership would also support the view that it was demesne land, that is to say land which is owned and occupied by the lord of the manor for their own purposes. That would include the current owner. That goes to the heart of whether or not the land could be considered as manorial waste. *Attorney General v. Hanmer* (1858) 2 LJ Ch 837 (*Hanmer*) sets out that the true meaning of waste land is “..the open and uncultivated and unoccupied lands….other than demesne lands..”.
3. In this case the Objector maintains that the land is occupied and has been let under an Agricultural Holding for the rearing of game birds and the access track is gated near to the junction with the Byway preventing access. The land is therefore occupied and closed to general access.

**REASONS**

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

***application***

1. As a result of case law, waste land of a manor is generally taken to mean the open, uncultivated and unoccupied lands parcel of the manor, other than the demesne lands of the manor. It has further established that it is not relevant for these purposes whether the land continues to be held by the lord of the manor, but rather the land must be of manorial origin.
2. The 2014 guidance gives further insight into the interpretation of ‘waste land’ having regard to this definition. It confirms that the vast majority of land in England is formerly of a manor and suggests potential sources of useful information to aid research, including the national archives and local records offices. It states that it is seldom possible to prove definitively that a particular parcel of land is of a manor. Nevertheless, it should be sufficient to show that on the balance of probabilities that 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.
3. The applicant submits that the application land was in the manors of both Blanchard and Pensignance. The Tithe Survey of the Parish of Kea records that the application land known as Bunny Hill was situated in Tithe Apportionment No. 1845 which was known as Fentongoose Common. The applicant agrees the land was owned in two equal parts as set out above. In addition, the applicant points to a number of historic papers including the 1842 Tithe Map for the Parish of Kea, and extracts from a planning statement for the *Wheal Jane Solar Farm,* Lake’s Parochial History of the County of Cornwall Vol II, and the historians Hals and Tonkin. Furthermore, the applicant maintains that in accordance with *Hanmer* the land is open, unfenced and uncultivated.
4. Turning to whether or not the land was of the manor, it seems to me that the historical evidence collectively points to the land being of the manor or split between the two. I say that given the description of the historian Hals describing the ‘…waste lands of which lordship is not only abounding in tin and tin mines, but for twenty years last hath yielded its owner about twenty thousand pounds..” and Tonkin referring to the “extensive manor of Blanchland”. Along with other references that are undisputed. I also recognise that the history of manorial land is complex and rarely straightforward but there is little, if anything, before me to counter the historical case put forward.
5. Nevertheless, I recognise that land could be held by the lord of the manor without being parcel of the manor and that a moiety referred to a legal interest in an undivided share. In addition, the land was used historically for mining. However, there are no historic records before me to corroborate the view that the land was held or let or owned without being part of the parcel of the manor. Thus, on the balance of probability I find the application land was of the manor.
6. Turning to whether not the application land was waste land, *Hampshire County Council and others v. Milburn* [1990] 2 All ER sets out that ‘waste land of a manor’ meant waste land now or formerly of a manor’ or ‘waste land of manorial origin’. That was also applied in *Lewis v Mid Glamorgan County Council* [1995] 1 All ER 760. In turn the true meaning as set out in *Hanmer* is above and does not include demesne land.
7. To that end I accept that the area is currently tenanted under an Agricultural Holdings Act tenancy and the area is used for the rearing of game birds. The application land falls within the land holding associated to that tenancy. I also accept that the trackway is currently used and gated by the tenant. However, it is not clear, as discussed at the Hearing, whether or not the access was gated at the time the application was made. Undisputed photographic evidence purported to show the access at the time of the application would suggest not.
8. At the time of my visit, the woodland was uncultivated and whilst I saw evidence of gamebird release pens nearby, the application land showed no signs of any recent activity with regards to game bird rearing or any other type of management. Whilst I saw some fencing on the application land, near to the fairly deep gully marked as ‘drain’ on the drawings, it was not the type of fencing one would normally associate with rearing game birds. Moreover, the statement of the agent is untested. In addition, the Cornish hedge as indicated on the drawing attached to the statement is simply not there for large sections. The application land being generally open to the access track which in turn would have been accessible from the Byway. Also, the view of the applicant that the access and land could be walked upon (albeit trespass) without hindrance until recent times was undisputed.
9. Furthermore, the physical evidence of the land is consistent with the historic picture presented. The application land is woodland, is unenclosed and retains an uncultivated appearance. That reflects the state of cultivation as indicated by the 1842 Tithe Map for Kea Parish. In addition, the 2014 guidance states that ‘occupation’ requires some physical use of the land to the exclusion of others, that was not apparent during my site visit once past the gate, which as set out above I am not convinced was there at the time of the application.
10. In addition, I only have one page of the tenancy *Memorandum of Agreement.* That is insufficient to come to any robust conclusion on what is covered by the agreement in any event. There is nothing either, within the page of the agreement submitted, that describes the land in any detail. I recognise that the full document may contain sensitive information but again I do not know if, for instance, the full document describes the land as belonging to the manor or not, as highlighted by the applicant.
11. Pulling all of this together and having considered all of the written and verbal evidence, there is nothing before me of any significance that weighs against the case put forward with the application. Accordingly, on the balance of probabilities, I find that the application land was waste land of a manor at the time the application was made.

**Conclusion**

32. Having regard to the matters above, and all other relevant matters raised, I conclude that, on the balance of probabilities, the criteria for the registration of the application as common land are satisfied. Accordingly, it should be added to the register of common land.

**Formal decision**

1. The application is granted, and the land shown within the purple dashed line on the plan at Appendix 1 shall be added to the register of common land as register unit CL 596.

Richard Perrins

Inspector

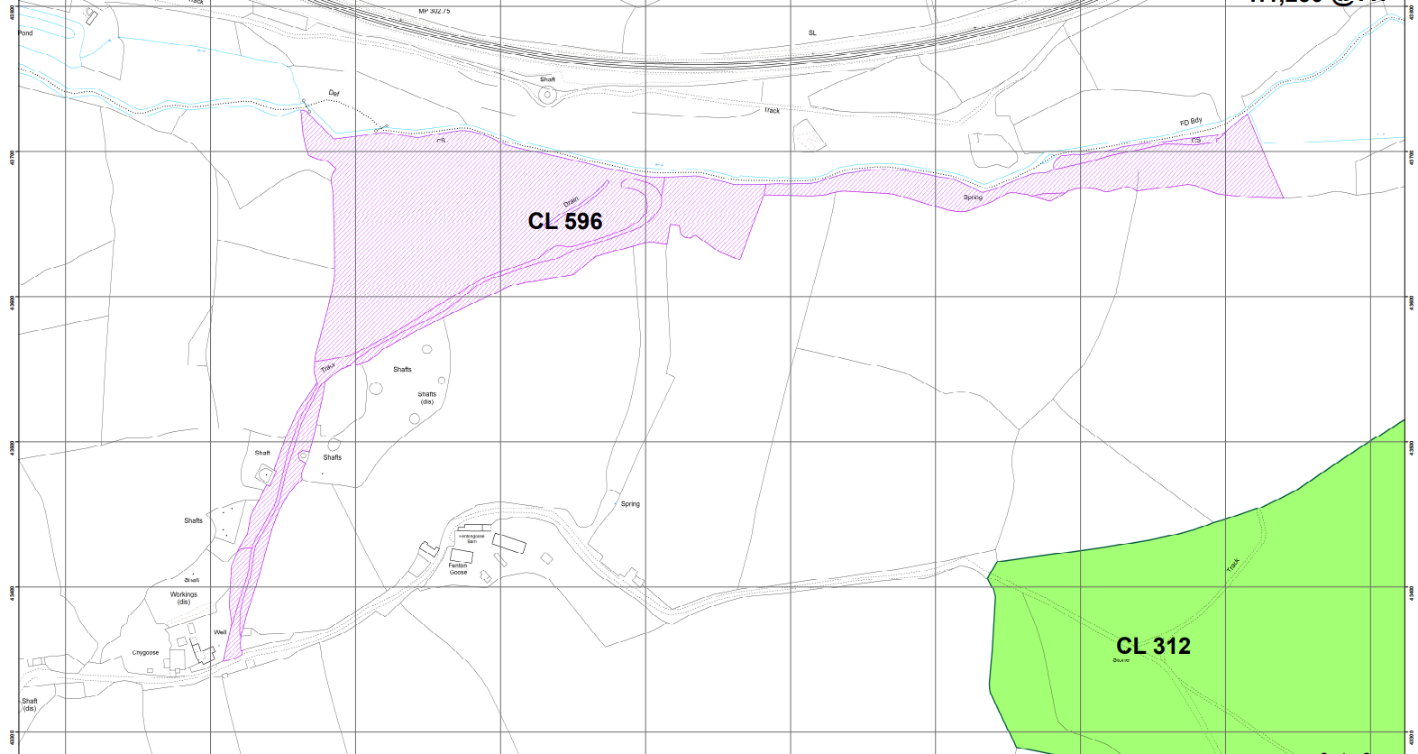
**APPEARANCES**

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| |  |  | | --- | --- | | FOR THE APPLICANT | | | Tomas Hill | Opens Spaces Society | | Frances Kerner | Open Spaces Society |  |  |  | | --- | --- | | FOR THE OBJECTOR | | | Richard Bagwell | Stephens Scown LLP | | Darran Goldby | Surveyor Tregothnan Estate | |

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| FOR THE COMMONS REGISTRATION AUTHORITY: | |
| Martin Wright | Common Land and Village Green Registration Officer |

**Appendix 1**

**Not to scale**

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