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| **Application Decision** |
| Hearing held on 28 January 2025 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 21 July 2025** |

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| **Application Ref: COM/3316968 Part of Ditsworthy Warren**Register Unit: CL188 (part)Registration Authority: Devon County Council |
| * The application, dated 31 December 2020, is made under Schedule 2, paragraph 4 of the Commons Act 2006 (the 2006 Act).
* The application is made by The Open Spaces Society.
* The application is to register waste land of the manor as common land in the Register of Common Land.
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Decision

1. The application is allowed.

**Procedural Matters**

2. I carried out an unaccompanied site visit on 28 January 2025.

3. I held a hearing at the offices of West Devon Borough Council, Kilworthy Park, Drake Road, Tavistock, Devon on 29 January 2025.

4. The application is objected to by South West Water Limited (‘the Objector’) which is the owner of the application land.

**Preliminary Matters**

5. The Applicant has applied to amend the application by removing part of the original application land. The application was made initially by reference to land provisionally registered as common land under the Commons Registration Act 1965 on the initiative of the Commons Registration Authority (‘CRA’). The application land comprises part of Register Unit CL 188 and is shown shaded grey on the first map attached to this decision (‘the map’).

6. The application was made on the basis that the entirety of the land edged red on the map is waste of the manor not subject to common rights. As a result of further investigation, the Applicant has concluded that part of the application land, shown coloured blue on the second map attached to this decision (‘the removed land’), had at some point in time, been taken in hand and physically enclosed. The removed land comprised parcels described in the Tithe Survey as ‘Higher Waste’ and ‘Outholme Waste’ (Tithe Apportionment Nos. 68 and 69). The Applicant concludes that these parcels had been taken in by physical inclosure, and for this reason had ceased to be waste. Although the stone walls and physical means of enclosure are in a state of disrepair, the Applicant accepts that, by reason of the enclosure, the removed land ceased to be waste of the manor and therefore does not qualify for registration as common land.

7**.** The Objector has drawn my attention to paragraph 5.4.1 of the Guidance to Commons Registration Authorities and the Planning Inspectorate (‘the Guidance’) which states ‘there is no statutory right enabling an applicant to amend the application once it has been duly made.’

8. It is clear from the Guidance that, whilst there is no statutory right to amend an application, the Inspectorate has a discretion to allow amendment. The approach to this is set out at paragraph 5.14.5 which states ‘*In Defra’s view, a good rule of thumb is that, where the registration authority considers the amendment to be so significant that a new notice of the application as amended ought to be published, then the registration authority may decide to refuse the amendment, on the grounds of possible prejudice to other parties. But each case will need to be considered on its merits (and in some cases, the acceptance of a significant amendment may be the fairest way of proceeding, if the alternative would be to start all over again)’.*

9. In this case the amendment requested is only to remove from the application part of the land for which registration is sought. No other amendment is requested. In these circumstances I do not consider that any prejudice will be caused to the Objector by accepting the amendment and therefore I consider it is reasonable to allow it. Accordingly, within this decision reference to the ‘application land’ is a reference to the land shown shaded grey on the map but excluding the removed land.

**The Application Land**

10**.** The application land is typical Dartmoor open moorland consisting of rough grass, gorse and bracken with some rocky outcrops.

11. The application land lies to the east of, and forms part of the catchment area for the Burrator reservoir. The reservoir was constructed in the late nineteenth century to provide drinking water for the City of Plymouth and is now owned and operated by the Objector. The application land was acquired for these purposes by a conveyance dated 28 February 1917 and made between Sir Henry Yarde Buller Lopes of the one part and The Mayor Aldermen and Burgesses of the Borough of Plymouth (‘the Corporation’) of the other part (‘the 1917 conveyance’). The land was acquired “*for the purpose of protecting against pollution nuisance encroachment or injury the water which the Corporation are by their Acts of Parliament required to take”.*

**The Main Issues**

12. The main issues are whether the application land was waste land of manorial origin at the date of the application on 31 December 2020, and whether, in accordance with paragraph 4 of Schedule 2 of the 2006 Act, before 1 October 2008:

 (a) the land was provisionally registered as common land under section 4 of the Commons Act 1965 (the 1965 Act),

 (b) an objection was made in relation to the provisional registration, and

 (c) the provisional registration was cancelled in the circumstances specified in sub-paragraphs (3), (4) or (5) of paragraph 4 to Schedule 2 of the 2006 Act.

13. Sub-paragraph (4), on which the applicant relies, requires that the Commissioner 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 the manor.

14. The Objector asserts that the effect of the 1917 conveyance, in addition to extinguishing any common rights, was also to preclude registration of any of the land conveyed as waste of the manor in accordance with the application.

15. The Objector further asserts that registration of the application land as common land would be statutorily incompatible with the purposes for which the land is held by the Objector.

***The requirements of paragraph 4 of Schedule 2***

16. The application land was provisionally registered as common land unit CL 188 on 1 May 1968.

17. On 12 December 1969 an objection (Objection 59) was made to the provisional registration by the Mayor, Aldermen and Citizens of the City of Plymouth. The basis of the objection was that the land was not common land at the date of the application because any rights of common which may have existed were extinguished by the provisions of the 1917 conveyance.

18. At a hearing held in May, July and December 1982 the Commons Commissioner upheld the objection and refused to confirm the provisional registration of the application land. The Commissioner did not consider whether the application land was waste of the manor.

19. By reason of the foregoing the Applicant and Objector agree that the requirements of Schedule 2, paragraph 4(4) of the 2006 Act are satisfied, and I agree.

***Whether the application land is waste land of manorial origin***

20.Paragraph 4(2) applies to ‘*land which at the time of the application under sub-paragraph (1) is waste land of a manor.’*

21. The definition of waste land of a manor was considered in the case of *Attorney General v Hanmer* [1858] (2 LJ Ch 837) (*Hanmer*) which established the now accepted principle that it is “*the open, uncultivated and unoccupied lands parcel of the manor other than the demesne lands of the manor*”.

22. In the case of *Hampshire County Council and others v Milburn* [1990] 2 ALL ER 257 (the *Hazeley Heath* case) the House of Lords decided that ‘waste land of a manor’ means waste land of manorial origin and accordingly refers to both waste land which belongs to a manor and waste land which formerly belonged to a manor.

23. In the light of the decision in the *Hazeley Heath* case, the test to be applied is whether the land is waste which is now, or was formerly, of a manor. I will come to the test of the character of waste land but will first address whether the manorial connection of the land is demonstrated sufficiently.

24. It is often very difficult to prove reliably that any specific parcel of land was within a particular manor. In assessing the evidence, it is often sufficient that it is credible and that no persuasive evidence has been adduced to the contrary.

25. In the application the Applicant asserted that the application land lay within the manor of Sheepstor, suggesting that the manor was coterminous with the ancient parish of the same name. The Applicant now suggests, as a result of further investigation, that the application land in fact lay within the manor of Bickleigh which was within the parish of Sheepstor. The principal evidence to support this assertion is a 17th century map titled ‘Map of p[ar]t of Bickleigh ma[n]or in Shittistor p[ar]ish’ (’the manor map’). ‘Shittistor’ is the former name (or spelling) of the parish now known as Sheepstor.

26. The Applicant contends that the manor map was commissioned to show the extent and bounds of the manor of Bickleigh. It covers an area extending from its boundary with the manor of Walkhampton in the north to the River Plym in the south. The Applicant accepts the plan is indicative rather than an accurate representation of the land in question but nonetheless believes that it does provide good evidence of the extent of the manor, and that this included the application land.

27. Corroboration of the manor map is provided in a perambulation of the manor of Walkhampton undertaken in 1882. This describes the southern boundary of the manor of Walkhampton (which is the northern boundary of the manor of Bickleigh). Features described in the perambulation are consistent with the manor map. Further corroboration is provided by manorial court records interpreted with information from the 1843 Tithe Survey (‘the Tithe Survey’).

28. The Applicant contends that the manor map demonstrates that the land lying between the manor of Walkhampton and the River Plym (which includes the application land) was within the Manor of Bickleigh.

29. The Objector notes the disparity between the Applicant’s initial assertion that the application land lay within the manor of Sheepstor and the current assertion that it was within the manor of Bickleigh. The Objector identifies issues which might cast some uncertainty over the interpretation of the manor map. For example, reference is made to the apparent description of an area as ‘Leedon or Lee Down’. It is suggested this could be consistent with the land depicted being only partly within the manor of Bickleigh. The Objector does not however adduce any positive evidence to challenge the Applicant’s conclusions. The Applicant’s response is that Leedon or Lee Down were areas within the manor of Bickleigh and that there is no reasonable basis for suggesting any inconsistency.

30. In this case I attach weight to the manor map which I accept shows the application land within the manor of Bickleigh. On this basis, and on a balance of probabilities, I accept the application land was within the manor of Bickleigh and thus satisfies the requirement for it to be of manorial origin.

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

31.Paragraph 4(2) of Schedule 2 to the 2006 Act applies to land ‘which at the time of the application under sub-paragraph (1) is waste of a manor’. Accordingly, I must be satisfied that on 31 December 2020 the application land was waste of the manor.

32. Evidence of the status of the land may come from historical sources and by reason of its character, applying the criteria set out in *Hanmer;* that it is open, uncultivated and unoccupied.

33. Where historical evidence shows that land was once waste, it can lose that status by subsequent enclosure.

34. The Applicant accepts that Tithe Survey enclosures 68 and 69, which were originally part of the waste of Bickleigh manor, were physically enclosed by stone walls and in consequence have ceased to be waste (and it is on this basis that they have been withdrawn from the application). At the hearing there was discussion as to the circumstances in which waste can cease to have that status. The parties have clarified their positions in their closing submissions.

35. The Applicant has limited any concession made at the hearing by arguing that waste land will only lose that status if, as in the case of Higher Waste and Outholme Waste, the land is physically enclosed so as to demonstrate an intention to control occupation and use of the land to the exclusion of others. The Applicant in closing submissions further argues that occupation or cultivation of the land not accompanied by physical enclosure, does not satisfy this requirement, and is therefore not sufficient for the status of waste to be lost.

36. The Objector argues that for land to be waste there has to have been a continuity of that status and that once this has been broken, by whatever means, the land cannot revert to waste other than by abandonment. Accordingly, the Objector asserts that the Applicant has to demonstrate that on balance (i) the application land was waste land of a manor pre-1926 (when copyhold tenure, and thus the manorial regime, was abolished) and (ii) that status continued unbroken until the date of the application. Thus, it is argued, if at any time between 1926 and the date of the application for registration, the land failed to meet the Hanmer tests of character it would cease to qualify for registration even if at the date of application, it did meet those tests.

37. The Objector relies upon the statement in the Guidance *“So you will not be able to apply under paragraph 4 to register land which has been developed, improved and brought in hand, or otherwise fails to fulfil the character of waste land of the manor.”*

38. I do not accept that this extract from the Guidance has the effect contended for by the Objector. I understand the Guidance to be referring specifically to the state or character of the subject land at the date of the application, not at any earlier time. The evidential burden on the applicant is to establish, on a balance of probabilities, that the application land fulfilled the Hanmer criteria at the date of the application. If this test is satisfied but the Objector wishes to argue that status as waste had been lost by reason of the land having at some earlier point in time ceased to fulfil the criteria, the evidential burden rests with the Objector to prove that to have been the case.

*Open*

39. It is necessary to determine whether the application land conforms to the tests of character set out in *Hanmer*, both prior to 1926 and at the time of the application. Having allowed the amendment to the extent of the application land, there is no serious issue as to whether the application land can be characterised as open. There are no internal structures of any kind and on inspection the land is, in my view, unquestionably open. The boundary with the removed land can be identified by the remains of ancient stone walls and banks. The northern boundary is marked by a stock proof fence but there are no structures to mark the remaining boundaries other than some marker posts defining the extent of the Objector’s land ownership.

40. The Objector argues that the marker posts are capable of indicating ownership, use and control of the land. Whilst I recognise that the posts may well be an indication of the bounds of ownership, I do not accept that they can alter the open character of the land on any reasonable definition of that word. An indication of ownership does not, in my view, give any indication as to use and control of the land. That is a matter for specific evidence in each case and there is no such evidence before me.

Uncultivated

41. On inspection there was no evidence that any part of the application land had been subject to cultivation in the sense of breaking the surface of the soil for the purposes of growing a crop. There is no evidence before me that cultivation in this sense has taken place at any time in the past.

42. The Objector argues that ‘*the meaning of ‘cultivate’ in the context of the application has to include wider husbandry and farming practices. In which case, as the land is tenanted and subject to grazing (see below), the Objector disputes that the land is not cultivated.’* I do not accept this argument. The term ‘cultivate’ has a clear and ordinary meaning. Grazing and being tenanted are not features of cultivation although they may be relevant to occupation which I shall consider next. A more credible argument might be made if there were some evidence of works undertaken to the land to improve grazing, but there is no such evidence before me.

43. I find on the evidence that the application land was uncultivated at the time of the application, and there is no evidence of it having been cultivated at any relevant point in time.

Unoccupied

44. The correct approach to determining whether land is ‘unoccupied’ for the present purposes was reviewed thoroughly by Alan Evans KC (‘the inspector’) in a report to Cumbria County Council into Commons Act 2006 registration applications concerning Hilton Fell, Burton Fell, Warcop Fell and Murton Fell (‘*Warcop’*).

45. Having reviewed a number of authorities from different contexts, the inspector set out some basic principles distilled from case law. These principles are: -

* The question of whether land is occupied is essentially a factual one.
* The basic factual elements relevant to occupation are physical presence or user, and control.
* It is necessary to assess the whole situation where the element of use and control may exist in variable degrees.
* The physical aspect of occupation does not have to be continuous.
* The consistency, or inconsistency of the activities undertaken is relevant.

46. The Objector’s principal argument is that the application land was occupied both at the time of the application and pre-1926. It is argued that the Tithe Survey, which records Sir Ralph Lopez as both proprietor and occupier of the parcel which included the application land, is suggestive of the application land having been taken in hand and occupied at that time. The Applicant acknowledges that the evidence of the Tithe survey is unclear and could be consistent with the land having been taken in hand but argues that it is not inconsistent with the land being waste of the manor. The fact that it is described as “Leddon and Harter Common” indicates that it was subject to rights of common and the fact that no rent charge was applied indicates that the land was not cultivated.

47. The Objector further argues that the field book for the 1910 Finance Act survey, recording the application land as subject to a tenancy, is not consistent with it being unoccupied waste. Significantly the Objector relies upon the effect of the 1917 conveyance and the LCCA to have extinguished any common rights that then existed and highlights the reasons why the land was acquired by the Corporation by the 1917 conveyance.

48. The Objector argues that the 1843 Tithe Survey shows that the application land was then subject to rights of common and used for grazing. By the time of the 1917 conveyance the land was not subject to any rights of common but was tenanted. It was subject to grazing licences at the time of the application for registration in 2020. The Objector suggests it is reasonable to infer that the land was continuously grazed from the mid-eighteenth century (if not before) until 1917, and that a similar regime has continued since, and this amounted to occupation of the land.

49. The stated purpose of the of the acquisition of the application land in 1917 was for the protection of the catchment area for the reservoir. The Objector states that the land is actively managed for that purpose and that grazing and ‘active management’ are sufficient to constitute occupation, and thus to preclude the land from meeting the definition of waste.

50. In *Warcop* (6.7.6.51 – 6.7.6.13)the Inspector addressed the question of whether use pursuant to grazing licences gave rise to occupation of the land in question. The Inspector declined to follow the approach taken in *Re Arden Great Moor* [1977] 268/D/209 where emphasis was placed on the landowner’s perspective. In *Warcop* the Inspector preferred the approach taken in *Re Twm Barlwm Common* [1986] 273/D/948 where it was said “*the fact that …. [the land]…has been let is a relevant consideration but is not conclusive. A tenancy merely gives a right to occupy. If a tenant never goes on the land he has taken it may well remain unoccupied. If he does make use of it the question whether the land is ‘occupied’ is a question of fact.”*

51. In *Warcop* the Inspector considered the extent of sheep grazing at the date of the application and compared it with stock numbers at an earlier date. He concluded that ‘low-level’ grazing did not give rise to a sufficient use of the Common or any part of them, to amount to occupation and that the control of what was ‘only a low-level activity’ was insufficient to found a conclusion of occupation. The Inspector also found there to be no inconsistency between such low-level grazing and land being waste land of a manor. He approved a passage from *Re Arden Great Moor* *“[l]and which is used for grazing cannot ipso facto be regarded as being occupied in the sense in which Watson B used that word in his definition of waste land, for the waste land of manors was frequently used for grazing by manorial tenants who had rights of common”.*

52. The Objector’s evidence as to the ‘occupation’ of the application land in 2020 is that it was subject to a lease in favour of the Ministry of Defence (‘MoD’) and a Farm Business Tenancy (‘FBT’). My understanding of the lease with the MoD, from discussion at the hearing, is that it gives the MoD a right to carry out training activities on areas including the application land but does not confer a right to exclusive occupation of any area of land. The FBT is said by the Objector to “ensure that only specific types and numbers of animals are permitted on the application land”. Whilst no evidence was given as to the actual extent of grazing in 2020, or the stock density permitted under the FBT, the clear inference is that levels are low so as not to impact adversely water quality within the catchment area.

53. In the absence of evidence of the extent of actual use of the application land by the Objector or its tenants I am unable to gain an understanding of the extent of control exercised over the land. There is no evidence before me of any physical factors which might demonstrate occupation and on inspection there is no physical manifestation of an assertion of control or the right to exclude. In fact, the application land is access land under the Countryside and Rights of Way Act 2000 and therefor subject to a public right of access for open air recreation.

54. On the basis of the evidence before me, and applying the principles set out in *Warcop*, I conclude that there is no evidence of sufficient acts to constitute historical occupation of the application land and that it was not occupied in 2020 by virtue of the FBT or the MoD lease or otherwise.

Conclusions on status as waste of the manor

55. Taking into account the evidence as a whole, at the time of the application, I consider the application land can be described as open, uncultivated, and unoccupied. Therefore, the application land fulfils the character of waste of the manor. Further the evidence does not show, on a balance of probabilities, that the application land had at any time in the past ceased to meet the Hanmer criteria so as to have ceased to be waste of the manor.

***Effect of the 1917 Conveyance***

56. The application land, together with extensive other adjoining land, was the subject of the 1917 Conveyance. The Objector is the successor in title to the Corporation. The 1917 conveyance was entered into by the Corporation in exercise of powers given by the Plymouth Corporation Act 1915 (the 1915 Act). It incorporated the relevant provisions of the Land Clauses Consolidation Act 1845 (‘LCCA’).

57. Section 81 LCCA provided that a conveyance made thereunder “*shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall bar and destroy all such estates tail, and all other estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever, of and in the lands comprised in such conveyances, which shall have been purchased or compensated for by the consideration therein mentioned*”. The parties agree that the effect of this provision was, inter alia, to extinguish any rights of common then existing over the application land.

58. The Objector argues that the effect of the incorporation of section 81 of the LCCA into the 1917 conveyance was not only to extinguish any extant rights of common (together with other property rights) but also to extinguish any status the land enjoyed as waste of the manor. The Objector argues that the effect of the 1917 Conveyance was akin to statutory enclosure since it demonstrated that the landowner exercised sole control over the land to the exclusion of others and the rights of others.

59. The status of land as waste of the manor does not, of itself, confer any rights over the land. Land which is waste can be subject to, or free of rights of common: there is no requirement for rights of common to exist over it for land to be waste. It follows that the extinguishment of any such rights that did exist would not alter the underlying status of the land as waste.

60. Having regard to the foregoing I conclude that, whilst the 1917 Conveyance, by reason of incorporating section 81 of the LCCA, was effective to extinguish all property rights affecting the land conveyed thereby, it did not alter status of the land as waste of the manor. That status derived from the land’s historic origin and did not, per se, confer any rights over the land.

***Statutory Incompatibility***

61. The principle of statutory incompatibility was considered by the Supreme Court in R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council [2015] UKSC 7 *(‘Newhaven’*). That case concerned an application to register as a Town or Village Green land owned and operated by a statutory undertaker for the purposes of running a working harbour. The court concluded that recreational use of land as a village green is inconsistent with the use of a harbour for the purposes for which it was held by the statutory undertaker.

62. The Objector quotes the following extract from the summary of the Supreme Court decision in *Newhaven*: - “*where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes.”*

63.Although in both *Newhaven* and the present case, the application for registration was made under the 2006 Act, the basis on which registration is sought are very different. *Newhaven* concerned an application to register land as a village green on the basis of usage. The application for registration in the present case is made on the basis of the historical status of the land as waste of the manor. It does not rely upon the acquisition of rights through long usage. The status of waste land long pre-dates the statutes relevant to the Objector’s ownership of the land. I do not consider it was the purpose of the 2006 Act to deprive land of that historical status.

64. The Objector is subject to the provisions of The Water Industry Act 1991 which impose a duty “*to develop and maintain an efficient and economical system of water supply”*. It is argued that it needs ‘flexibility to use its land as it sees fit (within the confines of its statutory duties) to ensure that it can uphold its operations.’

65. The application land was acquired under the provisions of the 1915 Act for the purposes of protecting the catchment area of the Burrator reservoir which provides drinking water for the city of Plymouth. It is operational land for the purpose of the Objector’s statutory undertaking and is said to be actively managed and maintained for this purpose. Within the application land there is no obvious physical infrastructure associated with the Objector’s statutory undertaking and no other significant indication of use or occupation. The evidence of current management of the application land was principally in relation to grazing pursuant to an FBT and military exercises under the MoD lease.

66. The Objector argues that registration of the application land would be statutorily incompatible with its existing operations but does not provide any clear evidence of the perceived conflict. The principal practical consequences of registration of land as common are twofold; first that the land would qualify as access land under the CROW Act. However, the application land is already mapped as access land under the CROW Act by reason of its designation as moorland. Registration as common land would impose no additional burden in this respect.

67. Second, section 38 of the 2006 Act prohibits works being undertaken on registered common land without consent. This will impose an additional limitation on the Objector’s ability to manage and / or develop the land. Conceptual difficulties which could arise from this were discussed at the hearing.

68. The application land is operational land under the Town and Country Planning Act 1990 and as a result has development rights under the Town and Country Planning (General Permitted Development) Order 2015. Section 38 would necessitate the obtaining of consent under the 2006 Act to works that would otherwise fall within the permitted development rights. Whilst I recognise this is potentially disadvantageous, no direct evidence has been provided of circumstances where the consequences of the additional requirement for consent could be said to be incompatible with the Objector’s ability to manage the land for the statutory purposes. The lack of any obvious physical infrastructure within the application land and the absence of evidence of proposed development works within the land suggest that the prospects of any real conflict are remote.

69. In the *Newhaven* case the court was given practical examples of the incompatibility of recreational activities on the beach with the management of a working harbour adjacent there to. The capacity for conflict was readily apparent. In the present case the prospect of such practical issues arising would seem to be sufficiently remote for it to be reasonable to conclude that there is no statutory incompatibility.

**Conclusions**

70. Having regard to these and all other matters raised at the Hearing and in the written representations, I conclude that the application land fulfils the necessary criteria for registration, and consequently, I allow the application.

**Formal decision**

71.The application is allowed.

Nigel Farthing

Inspector

**APPEARANCES**

For the Applicant - Dr. Frances Kerner

For the Objector - Stephen Humphries

For the CRA - Paul Uren

**DOCUMENTS PRODUCED AT OR AFTER THE HEARING**

1. Objector’s Closing Submissions

2. Applicant Closing Submissions



 