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| **Application Decision** |
| Hearing held on 2 October 2025 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 17 October 2025** |

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| **Application Ref: COM/3338634 Land at Perran Common, south of the village of Cubert, in the parish of Cubert, Cornwall** Register Unit: CL 543Registration Authority: Cornwall 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 Tomas Hill on behalf of The Open Spaces Society.
* The application is to register waste land of the manor as common land in the Register of Common Land. The land for which registration is sought is shown tinted blue on the plan attached to this decision (the application land)
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Decision

1. The application is not allowed.

**Procedural Matters**

2. I carried out an unaccompanied site visit on 1 October 2025.

3. I held a hearing at the offices of Cornwall Council, Treyew Road, Truro, on 2 October 2025.

4. The application is objected to by two individuals who are each an owner of part of the application land and by Cubert Parish Council (‘the Objectors’). Cubert Parish Council did not submit a statement of case and did not participate in the hearing.

**The Application Land**

5**.** For ease of reference I have annotated the application plan with the letters A to E.

6. The application land does not include the parcel of land shown tinted brown on the application plan. This land was included in the provisional registration of CL543 under the 1965 Act but the Applicant states that it has been excluded from the application because it is accepted to be enclosed and thus does not meet the requirement for it to be waste of the manor.

7. The application land is situated to the north of the boundary between the parishes of Cubert and Peranzabuloe. A stream runs along the northern boundary of the application land between points A and B. At point B the stream divides and both elements run through the application land in a south or south-easterly direction. This has the effect of dividing the application land physically into three parcels, south-west of the stream, between the streams and to the north-east of the stream.

8. The character of the application land is determined significantly by the presence of the streams. The land between the streams is covered by what appear to be naturally generated trees and scrub, making access difficult. The land in the vicinity of the streams is low-lying, soft and susceptible to flooding. Trees and scrub extend away from the streams, becoming smaller and less dense further away from the streams. Before the line between points D and E is reached there are no trees or scrub, and the character of the land here is undulating rough grass.

9. The only public access in the vicinity of the application land is by way of a public footpath which commences on the corner of the highway south-east of point D and runs in a north-westerly direction to a point mid-way along the boundary between points A and E. The precise location of the public footpath in relation to the parish boundary is not clear on the ground and therefore the extent to which, if at all, the footpath runs within the application land is uncertain.

10. Between points A and B, the stream marks the boundary of the application land. Between points B and C there is a post and barbed wire fence. There is no boundary feature between points C and D. The boundary between points A and E is marked by a post and barbed-wire fence.

11. The boundary between points D and E is not represented by any physical feature on the ground but does follow the Cubert parish boundary. The boundary of the application land is drawn in this position because Schedule 2, paragraph 4 of the 2006 Act, which concerns waste of the manor not registered as common land, relates only to land which was provisionally registered as common land under section 4 of the Commons Registration Act 1965 (the 1965 Act). Cubert Parish Council made an application under the 1965 Act to register land within that parish. No application was made to register the land to the south-west of the parish boundary, which is in the parish of Peranzabuloe, and in consequence does not qualify for registration under the 2006 Act. Thus, the line had to be drawn at the parish boundary notwithstanding that the parcel of land of which the application land forms part, extends some distance to the south-west where it meets a tarmac road. At this point there is a post and wire fence on the east side of the road. The road, although having a tarmac surface, is a private access with no public right of way of any status over it.

12. Within the application land the stream which runs due south from point B is fenced on the west side by a post and barbed wire fence. Within the land to the north of the streams (Tithe map parcels 464, 492 and 494) there is evidence of ancient banks and hedges enclosing those parcels although these structures are currently dilapidated and would not be effective to contain stock.

**The Main Issues**

13. The main issues are whether the application land was waste land of manorial origin at the date of the application, 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.

14. Sub-paragraph (5), on which the applicant relies, requires that the person on whose application the provisional registration was made, requested or agreed to its cancellation.

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

15. The application land was provisionally registered as common land unit CL 543 on 10 December 1969.

16. On 4 December 1969 (received 7 December 1969) an objection (Objection X681) was made to the provisional registration by The Secretary of State for Defence. The basis of the objection was that the land was not common land at the date of the registration.

17. A further objection, dated 15 July 1972, and received on 17 July 1972, was made by William Everett Tyzzer. The basis of this further objection was the land was not Common Land at the date of registration.

18. On 14 November 1972 the provisional registration was cancelled on the application of Cubert Parish Council.

19. By reason of the foregoing the Applicant and Objectors agree that the requirements of Schedule 2, paragraph 4(5) of the 2006 Act are satisfied, and I concur.

***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 this application the Applicant asserted that the application land lay within the manor of Tywarnhaile. The Applicant has produced in evidence a copy of a map of the Manor of Tywarnhaile which shows a significant part of the application land to lie within that manor. Following research undertaken after the application was submitted the Applicant concluded, on a balance of probability, that the remaining part of the application land lay within the Manor of Ellenglaze. Whilst there is no conclusive evidence to this effect, the Objectors do not dispute the Applicant’s conclusions in respect of the manorial origin of the land, and I am content to accept that this requirement is fulfilled.

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

26.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.

27. 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.

28. Where historical evidence shows that land was once waste, it can lose that status by subsequent enclosure. Thus, where there is historical evidence that the application land was considered waste if, at the date of the application it fails to meet the *Hanmer* test of character it will not qualify to be registered as it will have ceased to be waste.

29. There is evidence that the application land has historically been considered common or waste. The Tithe map and apportionment for the parish of Cubert describe parcel 506, which includes part of the application land lying south of the stream, as ‘part of Perran Common’. It also describes parcels 464 and 492, which form part of the application land lying north of the stream, as ‘waste’. The tithe map and apportionment for the adjoining parish of Peranzabuloe show that the land adjoining parcel 506 (which was part of the same wider parcel of land) is described as Treworthen Common. The description of land as common does not necessarily establish that the land was waste.

30. Although there is historical evidence suggestive of common land or waste status, to qualify for registration the land must also meet the requirements of being open, uncultivated and unoccupied at the date of application.

*Open*

31. Gadsden at para. 3.28 says ‘*Open, in this context, mean unenclosed. It does not have the same meaning as in common open fields which were invariably enclosed to some extent.’* ‘*What might be said to distinguish enclosure for the purposes of determining whether the land is “open” is whether the land has been modified to create new internal or perimetral boundaries for the benefit of those managing the land – as opposed to existing perimetral boundaries for the benefit of and generally maintained by those managing the adjoining land’.*

32. The application states ‘The application land is self-evidently open being unfenced and open’. In the statement of case the Applicant asserts that the application land ‘is open on the southern boundary.’

33. At the hearing there was discussion over the question of whether the application land meets the requirement to be ‘open’. The Objectors argue that the southern boundary of the application land (D to E) is an artificial line on the map, representing the parish boundary but not represented by any structure on the ground, nor reflecting the way in which the land is managed. The Objectors explain that they regard the application land to be part of a larger parcel of land extending to the road where the boundary with the road is fenced by the Objectors for the purpose of retaining stock within the compartment which includes the application land. They also point to the fence along the boundary B to C which was said to be for the purpose of retaining stock within the application land, and to the fence alongside the stream south of B which serves to retain stock and has the effect of internally compartmentalising the application land.

34. The impression I formed on my site visit was that a reasonable person inspecting the site would conclude that the application land is an intrinsic part of a larger compartment which is substantially enclosed by fencing. The boundary south-west from point A is fenced to the road via point E. It is partly this fence which enabled the Applicant to conclude that the brown tinted land is not ‘open’. The boundary along the private road is securely fenced to the point where it meets the public road. It is at this point the footpath commences. It is the footpath which provides the only ‘open’ means of access to the application land. Whilst there is no boundary structure between points C and D, nor between points A and B, the internal fencing and the streams serve to contain livestock.

35. Gadsden differentiates between perimetral fencing maintained by those managing the application land and those maintained by those occupying the adjoining land. In this case the objectors confirmed at the hearing that they are responsible for the fencing referred to which includes both boundary and internal fencing. The purpose of the fencing is to retain livestock, in this case sheep, grazing the wider compartment bounded by the private road, of which the application land is part. I regard this to constitute management of the boundary structures for the beneficial use of the application land by the objectors which is counter-indicative of the land being ‘open’ within the *Harmer* principles. The presence of internal fencing reinforces this conclusion.

36. I should deal with the Applicant’s argument that the application land is open on its southern boundary. I accept that the land is physically open between D and E but the reason for this is because it is effectively an arbitrary line drawn through a compartment of land which I find is enclosed. I do not accept that the requirement for the land to be open can be met by drawing a line across an enclosed parcel of land. The test is one of character. If the subject land lies within a wider enclosed parcel, its character cannot change to being open by the drawing of a line in a different place to the existing boundaries.

37. For the reasons given I conclude that the land does not satisfy the requirement for it to be open.

 Uncultivated

38. There is no single definition of cultivation for this purpose. Gadsden suggests that it is partly a question of degree. Usually, cultivation will involve some element of breaking the soil and raising a crop.

39. Neither landowner objector appears to contend seriously that the application land has been cultivated. I have described the application land to be in part wooded scrub and the remainder what appears to be largely unimproved rough grass. The objectors have explained that the application land lies within a Special Area of Conservation and a Site of Special Scientific Interest. These designations significantly restrict the management of the land and the opportunities for cultivation. 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.

40. I find that the application land is uncultivated and that it was so at the date of the application.

Unoccupied

41. 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’*).

42. 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.

43. The objectors argue that the application land was at the date of the application used for low level seasonal sheep grazing. The extent of grazing is constrained by the environmental designations outlined earlier.

44. In *Warcop* the Inspector concluded that ‘low-level’ grazing did not give rise to a sufficient use 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”.*

45. 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 occupation of the application land at the date of the application

Conclusions on status as waste of the manor

46. In order to fulfil the requirements of the *Hanmer* test it is necessary for the land in question to satisfy all three elements, being open, uncultivated and unoccupied. I have concluded that whilst the land was at the date of the application both uncultivated and unoccupied, it did qualify as open, and on that basis the land does not qualify for registration as waste of the manor.

**Conclusion**

47. Having regard to these and all other matters raised at the Hearing and in the written representations, I conclude that the application land does not fulfil the necessary criteria for registration, and consequently, I do not allow the application.

**Formal decision**

48.The application is not allowed.

Nigel Farthing

**Inspector**

**APPEARANCES**

For the Applicant - Dr. Frances Kerner

* Tomas Hill

For the Objectors - Bob Coad

* Alan Glanville
* Bob Mosley representing Mr Glanville

For the CRA - Tim Passmore

