

---

# Application Decision

Inquiry held on 10 September 2013

**By Martin Elliott BSc FIPROW**

**An Inspector appointed by the Secretary of State pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to hold an inquiry and to determine the application.**

**Decision date: 29 October 2013**

---

## **Application Ref: COM441**

Register Unit: CL 701

Registration Authority: Cornwall Council

- The application, dated 20 December 2011, is made under paragraph 4(6)(a) of Schedule 2 to the Commons Act 2006 ('the 2006 Act').
- The application is made by Ian McNeil Cooke for Save Penwith Moors.
- The application is to register waste land of a manor as common land in the register of common land.

---

## **Decision**

1. The application is approved in part.

## **Preliminary Matters**

2. I held a public local inquiry at the Centre of Pendeen on 10 September 2013. I carried out an unaccompanied inspection of part of the application land on the evening of 9 September 2013 and a further unaccompanied inspection of the application land following the close of the inquiry. None of the parties required me to carry out an accompanied site inspection.
3. Although Foot Anstey solicitors, acting on behalf of the Tregothnan Estates, submitted a bundle of documents as set out in my requirements for the public inquiry dated 19 June 2013 there was no representation at the commencement of the inquiry. I asked the Council to confirm Foot Anstey's intentions and I was subsequently informed that they were not intending to be present at the inquiry. I have nevertheless taken the submissions of Foot Anstey, and other written submissions into account in reaching my decision.
4. Foot Anstey raised concerns as to the involvement in the application of a Mr Hill of the Registration Authority. Mr Wright confirmed at the inquiry that, although assisted by Mr Hill, the application was predominantly dealt with by him. Whilst I note the concerns there is no evidence that there has been any impropriety with regard to the way that the application has been dealt with by Cornwall Council. Further, there is nothing to suggest that the consideration of the application has not been undertaken in accordance with the relevant regulations.

## **The Application Land**

5. The application land, usually known as Carn Kenidjack, to include Carnyorth, Botallack and Truthwall Commons at St Just in Penwith, is approximately 103.183 hectares. The land is within an Area of Outstanding Natural Beauty. The land is predominantly heath and contains a number of features of archaeological importance. The land is crossed by a number of public footpaths and, in the main, is subject to a right of access on foot under the provisions of the Countryside and Rights of Way Act 2000<sup>1</sup>. Although the application plan includes land occupied by a transmitting station Save Penwith Moors (SPM) state that this land does not form part of the application land.

## **Main Issues**

6. The application has been made in accordance with the provisions of paragraph 4(2) and (5) 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:
    - i) 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).

## **Reasons**

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

7. In support of the application SPM submitted a number of items of documentary evidence.
8. Extracts of a lease dated 18 September 1996 between the ninth Viscount Falmouth to the Hon. E A H Boscawen identifies P/552 as an aerial site comprising Moor (enclosed) and P/560, Botallack Moor, as Moor. SPM contended that this evidence demonstrated that, whilst the land occupied by the aerial was described as enclosed, the remainder of the land was described as moor thereby demonstrating the open nature of the land. In the absence of any accompanying maps it is difficult to reach any conclusions other than the fact that the aerial is enclosed and could therefore not be described as unenclosed; the extent of Botallack Moor identified in the lease can not be ascertained without a plan. The evidence does not offer any assistance in establishing whether the application land is waste land of a manor.
9. I was referred to the preamble of the tithe apportionment records which make reference to Kelinack Manor Mills belonging to the Manor or Reputed Manor of Kelinack. Whilst this evidence indicates the existence of a Manor of Kelinack there is no indication from the reference to the mill as to the extent of the Manor. The extract of the apportionment refers to Commons and Wastes on Carnyorth, plot 1400 being heathy pasture and 1442 as morassy pasture. The land is in the occupation of the Earl of Falmouth, Samuel Borlase Esq, John Scobell Esq and George Chenhalls. SPM indicated that the Earl of Falmouth

---

<sup>1</sup> I shall refer to this land as access land

- and Samuel Borlase where major landowners in the area and would have held lord of the manor status at the time. Plot 1400 is identified in an area of the tithe map marked as Carnyorth Common. The plan also identifies Botallack, Truthwall and Carn Vres Commons and Bostrase Moor all forming part of the application land.
10. Lyson's topographical and historical account of Cornwall 1814 refers to the Manor of Kelinack being dismembered around 1720 and identifies Pendeen as a seat of the Borlase's and Botallack, some time seat of the Ustick's, now a farmhouse belonging to Lord Falmouth. Lyson provides a background to the Manor of Kelinack.
  11. A translation of an extract of the Domesday Book refers to Richard the son of Thorolf holding Kelynack from the Count of Mortain. This suggests the existence of the Manor of Kelinack but provides no evidence as to its extent.
  12. A lease dated 1769, from W Borlase, for a property in Carnyorth, refers to rights of pasture, turbary, furze and heath on the commons of Carnyorth. A reference of the Manor of Trewellard in the Parish of St Just identifies an occupier as being Sampson Murrish which the SPM suggested was related to Martin Murrish identified in the 1769 lease. A lease from 1775 from E Ustick relating to a property in Carnyorth makes reference to the Manor of Saint Just and Penzance.
  13. A plan of the tenements of Truthwall and Kenidjack 1778 relating to the Usticke<sup>2</sup> Estate identifies Truthwall and Carnyorth Commons and appears to identify Botallack in the ownership of the Hon. Boscawen.
  14. Overall SPM contended that with 64 known manors in West Cornwall, although names change and manors become divided, it was inconceivable that the land was not under manorial influence.
  15. An extract from a paper produced in consequence of the Cornwall Industrial Settlements Initiative refers to two surviving historic manorial groups Truthwall and Botallack. The two manors were separated by a surviving boundary hedge. Reference is made to the Boscawen family obtaining Botallack from the Ustick family shortly after 1761.
  16. The vast majority of land in England is formerly of a manor although it is seldom possible to prove definitely that a particular parcel of land is of a manor. However the evidence should be sufficient to show, on the balance of probabilities, that the land is recognised to have been manorial and that there is no convincing evidence to the contrary.
  17. Waste land of the manor was defined in the case of *Attorney General v Hanmer (1858) 2LJ Ch 837* as the open, uncultivated and unoccupied lands parcel of the manor other than the demense lands of the manor. Of the manor was held by the court in the *Hazeley Heath* case<sup>3</sup> to mean land which is or was formerly connected to the manor.
  18. The evidence suggests the existence of a number of manors in the St Just area including the Manor of Kelinack which was dismembered in around 1720. The reference to Carnyorth Common in the tithe apportionment lends support to this part of the application land having been waste land of the manor. The

---

<sup>2</sup> Referred to elsewhere as Ustick

<sup>3</sup> *Hampshire County Council and others v Milburn [1990] 2All ER 257*

tithe map also refers to Botallack, Truthwall and Carn Vres Commons and the 1778 plan identifies both Botallack and Truthwall Commons. The identification of the land as common further supports the contention that the land forms waste land of a manor. Advice from Natural England suggests that in West Penwith the commons originate from manorial wastes. Botallack and Truthwall are identified as two surviving manorial groups by the Cornwall Industrial Settlements Initiative.

19. Although some of the evidence does not assist in establishing the manorial status of the application land, the tithe records and the 1778 plan are suggestive of the application land being manorial waste. The evidence, whilst not compelling, is just sufficient to show, on the balance of probabilities, that the land is waste land of manorial origin. There is no evidence to suggest that the land is not manorial.
20. Cornwall Council contend that the funnel shaped green at Carnyorth Terrace is a typical feature often associated with droeways entering areas of common grazing/moor land. Whilst I note this feature it does not necessarily mean that the application land is land of a manor. The funnel provides access to a number of small field enclosures and not directly onto the application land.
21. I note the assertion by Antony Richards Property Services that the original application for registration would not have been withdrawn unless there was strong evidence that the land was not waste. However, there is no evidence that the issue of the land being waste land of the manor had been considered. None of the objections to the provisional registration make reference to waste land of a manor and are made on the basis that the land is not common. The view is also taken that the absence of any commoners precludes the registration of the land under the 2006 Act. There is no requirement for the registration of common land that there should be commoners.

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

22. In view of my conclusions at paragraph 19 it is necessary to consider whether the land fulfils the character of waste land of the manor namely that it is open, uncultivated and unoccupied. The question as to whether land is waste land of the manor is one which must be satisfied at the time the application is determined. I note the representations of Mr Milton, in relation to the enclosure of certain areas of land, that advantage should not be gained by unlawful actions but nevertheless the land must satisfy the necessary criteria at the time of determination.
23. Foot Anstey point out that the land owned by the Honourable E A H Boscawen is occupied by tenants who farm and manage the land as heathland by selective cutting and grazing. As such they contend that the land is cultivated and occupied. Both Mr Boyns and Mr Trembath indicated that the land had been grazed for a considerable period. The objection of Mrs Semmens indicates that the land in the family's ownership has been grazed since 1958.
24. Whilst the application land has been extensively grazed that does not mean that the land ceases to be unoccupied. Occupation requires some physical use of the land to the exclusion of others. Much of the land is now access land although I accept the point made by Foot Anstey that it does not follow that just because the land is access land it should be registered as common. However, the issue is whether the land is occupied to the exclusion of others. Mr Trembath indicated that the public have never been prevented from

- accessing the land although I understand from the information before me that there have been some access issues in the past. Mr Boyns said that access has never been refused to land owned by the family. In my view the application land, other than that identified below, is unoccupied in the sense that others are not excluded.
25. As regards any cultivation of the land, whilst selective cutting has taken place, and the area is being actively managed under an ESA agreement, this does not amount to cultivation.
  26. Foot Anstey also contend that, since the application land is enclosed by hedges and all entrances are gated, the land is not open. I do not accept this proposition, whether the land is open or not relates to the land itself; the hedges and gates form the boundary of the land and their existence does not mean the land is not open.
  27. Notwithstanding the above there are parts of the application land where it is necessary to consider whether this land retains the character of waste land of a manor (see paragraph 17 above in respect of the definition).
  28. Along the southern boundary of the application land there is an area fenced with post and wire fencing surrounding a pond; the area can be accessed from the adjacent application land by a number of gates. Mr Trembath explained that the fencing was erected to prevent contamination of the pond by livestock. A further area to the south east corner of the application land is also fenced with post and wire fencing and again accessible from the adjacent application land. Both of these areas are access land. Whilst these areas are fenced off from the remainder of the application land the land separated by these fences remains open in aspect and there is no evidence that the land is cultivated or occupied.
  29. Immediately to the south of Higher Boslow there is an area of application land which has been subject to earthworks and is now occupied by a static caravan and used for the parking of vehicles. This area of land no longer fulfils the character of waste land of the manor and should be excluded from the land to be registered.
  30. To the south of Higher Boslow there is another area of land fenced and gated from the adjacent application land; to the south east of this land there is a derelict dwelling identified as Carnyorth Farm. This land now falls within the curtilage of the derelict dwelling and is enclosed on all sides by boundary features. Although the land is access land, such access would be difficult and I do not consider that the land remains open. In my view this land no longer retains the character of waste land of the manor and should therefore not be registered.
  31. A further area to the south east of Higher Boslow, effectively in the region of the southern most point of the access track leading in a north to south direction, is separated from the main part of the application land by a gate. Whilst the land is separated it is still of an open nature is uncultivated and unoccupied.
  32. The Registration Authority identified an additional area at Higher Boslow which in their view should be excluded from registration. This land to the east of Higher Boslow, is enclosed by Cornish hedges and is not access land. The land also appears to have been improved. In my view this land forms part of the

- enclosures of Higher Boslow and therefore does not meet the relevant criteria for being waste land of the manor.
33. A pond at the north west corner is to some extent fenced but remains open against the adjacent footpath and the application land and is access land. In my view this land is open and uncultivated and there is no evidence that the land is occupied to the exclusion of others.
34. The Registration authority identified a further area which they considered should be excluded from registration; this is the land belonging to Hailglower Farm identified by Mrs Semmens in her objection. It should be noted that the eastern part of the land identified in the objection of Mrs Semmens does not form part of the application land. The Registration Authority stated that the area of land is enclosed by a long standing Cornish hedge and is not access land. In the circumstances I do not consider that the land fulfils the character of waste land of the manor.
35. Although the application plans include the area occupied by the aerial site SPM say that this does not form part of the application land. In either event the aerial site is enclosed and occupied and does not meet the necessary criteria for registration.

*Conclusions on evidence*

36. As noted at paragraph 19 the application land is, on the balance of probabilities, waste land of a manor. However, there are a number of areas of land which no longer fulfil the character of waste land of the manor and should therefore be excluded from registration. These areas are identified in paragraphs 28, 29, 31, 33, 34 and 35. The remainder of the application land fulfils the character of waste land of the manor.

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

37. The land was provisionally registered as common land unit CL 701 on 20 March 1970 following an application made on 30 December 1969 by Mrs M H Derrington, Secretary to St Just and Pendeen Old Cornwall Society.

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

38. Five objections were raised to the provisional registration of CL 701 as common land (X738, X994, X1011, X1063 and X1324).

***Whether the provisional registration was cancelled in the circumstances specified in paragraph 4 (5)***

39. The provisional registration was cancelled under regulation 8 of the Commons Registration (Objections and Maps) Regulations, 1968 pursuant to applications dated 30 May 1972 and 23 August 1972 by Mrs Derrington of the St Just and Pendeen Old Cornwall Society.
40. These are circumstances provided for by sub-paragraph 4(5) of Schedule 2 to the 2006 Act as set out in paragraph 6(c)(i) above.

**Other Matters**

41. In opposition concerns have been raised in relation to the effect registration will have on the management of the land by landowners and health and safety

issues. Whilst I can appreciate that these matters are of some considerable concern to the landowners they are not matters which I can take into account in reaching my decision.

42. Representations in support of the application identified the motivation for the application, the future management of the land, nature conservation, the protection of scheduled ancient monuments and issues relating to the provision of public access and public interest. Again these are not matters for my consideration.

### **Conclusion**

43. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that, with the exception of the areas identified in paragraph 36 and cross hatched red on the attached plans marked COM 441 Plan A, COM 441 Plan B and COM 441 Plan C, the application land fulfils the necessary criteria for registration and consequently I approve the application in part.

*Martin Elliott*

INSPECTOR

## APPEARANCES

### **The Applicant:**

Mr I Cooke	Save Penwith Moors
Mr D Coles	Save Penwith Moors

### **The Registration Authority:**

Mr M Wright	Senior Development Officer, Cornwall Council
-------------	--

### **Also in support of the Application:**

Mr Bob Milton	British Horse Society
---------------	-----------------------

### **In opposition to the application:**

Mr A Boyns	Landowner
Mr C T K Trembath	Landowner

## DOCUMENTS

- 1 Extract from Natural England frequently asked questions sheet in relation to the West Penwith Moors
- 2 Commons Toolkit Fact Sheet 2 Published by Natural England
- 3 Statement of Bob Milton on behalf of the British Horse Society including map of pre 1974 Urban District Council boundary
- 4 Extract from Gadsden on Commons and Greens pages 149 and 150
- 5 Plan of excluded land submitted by Cornwall Council
- 6 Plan of access land
- 7 Extract from Explanatory Note for the Countryside and Rights of Way Act 2000





