

SOUTHERN AREA PLANNING COMMITTEE

29 June 2017

COMMONS ACT 2006 SECTION 22 SCHEDULE 2
APPLICATION TO DE-REGISTER LAND AS COMMON LAND AT
HERRINGTON HOUSE, WHITEPARISH

Purpose of Report

1. To bring before the Committee an application made by Burges Salmon LLP, solicitors of Bristol, on behalf of their client, Mr Gerard John Mytton Downes, to de-register the land shown hatched blue on the attached plan being land forming part of a property known as Herrington House, Whiteparish (“the Application Land”). The application is **Appendix A** to this report.

Relevance to the Council’s Business Plan

2. Working with the local community to maintain an accurate register of common land, making Wiltshire an even better place to live, work and visit.

Background

3. The Council, as the Commons Registration Authority (‘CRA’), is the appropriate authority to deal with applications to de-register Common Land under Section 22 and Schedule 2 to the Commons Act 2006.
4. The Council, as CRA, will not grant an application unless it considers it fair to amend the register having regard to the effect which the amendment will have on other parties with an interest in the registration.
5. Burges Salmon, on behalf of Mr Downes, has submitted an application dated 3 November, 2015 to de-register the Application Land. The Application Land is owned jointly by Mr Downes, Mrs Downes and Jasmine Trustees. Mrs Downes and Jasmine Trustees have consented to the application.
6. The Application Land forms part of Whiteparish Common and was provisionally registered as common land under the Commons Registration Act 1965 on 26 March 1968. The registration became final on 1 October 1970.

Main Considerations for the Council

7. The Committee is asked to consider whether the application satisfies the statutory requirements to de-register land as Common Land. The legal test is the balance of probability and the burden of proof rests with the applicant to discharge. Please see the case officer’s report and analysis at **Appendix B**.

8. Common Land is land that is usually privately owned but over which another person or persons has rights. The extent of the land and the details of the rights held over it are recorded in the Commons Register. A right of common is a right to take something naturally produced by the land (for example the right to graze animals; the right to fish; the right to dig turf or peat; the right to take wood; and the right to take sand, gravel or other minerals). Grazing rights were originally defined by reference to the commoner's own land; this changed in 1965, so that grazing rights in existence at that time became independent of the commoner's land (a "right in gross"). Under the Commons Act 2006 new rights in gross can no longer be created.

9. Section 22 of the Commons Act 2006 is as follows:

"22 Non-registration or mistaken registration under the 1965 Act

Schedule 2 (non-registration or mistaken registration under the

Commons Registration Act 1965 (c64)) has effect."

10. The application has been made under paragraphs 6 and 7 of Schedule 2.

11. Paragraph 6 of Schedule 2 is as follows:

"Buildings registered as common land

6. (1) *If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove that land from its register of common land.*

(2) *This paragraph applies to land where-*

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

(b) *on the day 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.*

(3) *A commons registration authority may only remove land under sub-paragraph (1) acting on-*

(a) *the application of any person made before such date as regulations may specify; or*

(b) *a proposal made and published by the authority before such date as regulations may specify."*

12. Paragraph 7 of Schedule 2 is as follows:

“Other land wrongly registered as common land

7. (1) *If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove the land from its register of common land.*
- (2) *This paragraph applies to land where-*
- (a) *the land was provisionally registered as land under Section 4 of the 1965 Act;*
 - (b) *the provisional registration of the land as common land was not referred to a Commons Commissioner under Section 5 of the 1965 Act;*
 - (c) *the provisional registration became final; and*
 - (d) *immediately before its provisional registration the land was not any of the following-*
 - (i) *land subject to rights of common;*
 - (ii) *waste land of a manor;*
 - (iii) *a town or village green within the meaning of the 1965 Act as originally enacted;*
 - (iv) *land of a description specified in Section 11 of the Inclosure Act 1845 (c118).*
- (3) *A commons registration authority may only remove land under sub-paragraph (1) acting on-*
- (a) *the application of any person made before such date as regulations may specify; or*
 - (b) *a proposal made and published by the authority before such date as regulations may specify.”*

13. Section 22 of the Act which gives effect to Schedule 2 contemplates non-registration or mistaken registration. Non-registration does not apply to the Application Land. The Committee is, therefore, asked to consider whether the Application Land was mistakenly registered in 1968 within the criteria contained in either Paragraph 6 or Paragraph 7 of Schedule 2 or both.

The application under Paragraph 6 of Schedule 2

14. In their Supporting Statement (at paragraph 2.15) Burges Salmon suggest that the question to be considered is what area of common was covered by buildings and the curtilage of buildings at the date of provisional registration and that area has remained as such or covered by alternative buildings or curtilage up to the date of this application. It is agreed on behalf of the Council that this approach

is correct. The relevant period is from 10 April 1968 (the date of provisional registration) to 3 November 2015 (the date of the application).

15. Paragraphs 6 (2) (b) and (d) of Schedule 2 treat in the same way land covered by buildings and land within the curtilage of buildings on the registered common land. Guidance issued by the Department for Environment Food and Rural Affairs in December 2014 entitled *Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate* at paragraph 7.5.1 makes it clear that this may also include land that is within the curtilage of a building that is not itself on the registered common.
16. The meaning of “curtilage” has been judicially explained by Buckley LJ in *Methuen – Campbell v Walters* [1979] 1 QB 525 as follows:

“...for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part of the latter. There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small pieces of land will be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtilage; they constitute an integral whole...”

A messuage may be defined as a dwelling house with outbuildings and land assigned to its use. Accordingly, the extent of the curtilage depends “on the character and the circumstances of the items under consideration”.

17. In 1968 Herrington House was known as Herrington Cottage. The plan used by Wiltshire County Council as the registration authority to register land as the “Land Section” is an extract from the Ordnance Survey Revised Map published in 1924. However, the plan used by the Council to register the “rights of common” was the Ordnance Survey Map published in 1967. Copies of both plans are detailed in **Appendix B** to this report. Herrington House (formerly Herrington Cottage) is not itself on the registered common.
18. In his Statutory Declaration (**Appendix A** to this report) (at paragraph 4.3) Mr Downes refers to the Application Land as consisting of
“2-3 acres which comprises part of some buildings and their curtilage, an access track, a tennis court and the garden to the main house and fields which I use for grazing sheep. To the best of my knowledge, none of it has ever been cultivated”.

19. At paragraph 5.3, Mr Downes refers to the map on page 2 of Exhibit GD3 as showing “a number of outbuildings and their curtilage existed at the time of provisional registration in 1968”. Mr Downes continues:

“the map on page 6 of Exhibit GD3 dated 1969 also shows the buildings and their curtilage in situ”.

The map on page 6 shows a different delineation of Herrington Cottage, from that on the map on page 2, and on the eastern part of the land registered as common land there is shown what appears to be a structure.

20. Mr Downes in paragraph 5.4 of his Statutory Declaration states that he bought the property in 1988 and that at that time “the layout of the buildings was similar to that shown on the plan at Exhibit GD5”. The plan concerned was produced by Knight Frank and is dated 23 October, 2015.
21. In paragraphs 5.5 to 5.12 of his Statutory Declaration, Mr Downes describes the alterations he has carried out to the structures on the Application Land since he purchased the property.
22. In paragraph 5.9 Mr Downes says:

“Although the footprint of some of the buildings has changed from 1968 to date, to the best of my knowledge, the extent of the buildings and their curtilage were partially situated on the Registered Land (i.e. the Application Land) at the date of the provisional registration and are still partially situated on the Registered Land today. To the best of my knowledge, there has not been any time between 1968 and today when the buildings and their curtilage were not partially situated on the Registered Land”.

This evidence is not accepted by Wiltshire Council. Overlays of maps demonstrate that, with the exception of the small temporary building to the east of the Application Land, reference to the extent of buildings and their curtilages was made during the registration of the Common and that they were excluded (see *Appendix B section 4*). As such the application does not meet the requirements of Paragraph 6 of Schedule 2 as set out in paragraph 11 above.

The application under Paragraph 7 of Schedule 2

23. In order to satisfy the grounds under Paragraph 7 of Schedule 2 the criteria referred to in paragraph 12 of this report (above) must apply.
24. The land was provisionally registered as common land on 10 April 1968 and the registration became final on 1 October 1970. The provisional registration was not referred to a Commons Commissioner.
25. The DEFRA ‘Guidance to Commons Registration Authorities and the Planning Inspectorate’ states that this impediment to registration will only apply where there has been an objection to registration rather than a reference to a Commons Commissioner for the purpose of clarifying ownership, as was the case here.

26. The land coloured orange on the plan referred to in the Land Section of the Commons Register (“the orange land”) includes all of the Application Land other than a small area of land to the north-west of the orange land. The orange land is stated in the Ownership Section as having been subject to a direction by the Chief Commons Commissioner:

“In pursuance of Section 8(2) of the Commons Registration Act, 1965, Ronald George Stride of “Little Trees”, The Common, Whiteparish and Vera Marie Bismas Stride (widow) of 26 Mill Road, Salisbury are hereby registered as owners of the land coloured orange on the register map following a direction by the Chief Commons Commissioner dated 12 May, 1975”.

The reference to the Chief Commons Commissioner was for the purpose of clarifying ownership and accordingly there was no impediment to registration.

27. The Stride Family had a long association with Herrington House. There is no evidence that, as owners of the Application Land, they had objected to its registration as common land on the basis that it was not in fact common land.
28. In paragraph 3.7 of the Supporting Statement made by Burges Salmon, they say:

“Whiteparish Common was provisionally registered as common land on 10 April 1968, before the rights came into existence. This is the case whether you look at the date of the applications, or the dates for provisional or final registration. This is clear evidence that there were no registered rights of common in existence before the date of provisional registration”.

This is considered incorrect as the land may have historically been subject to rights of common (which would satisfy the wording of the Act) even though rights of common had not been registered at the date of the provisional registration.

29. The following rights have been registered:

- An application was made on 7 June 1968 to register the grazing rights of J L M Andrews for the benefit of Barters Farm and Cottage Farm with an entry being made in the register on 31 March 1970;
- An application was made on 8 October 1968 by members of the Stride family for grazing rights and the rights of estover (to take wood) for the benefit of Goldens Farm with the rights being registered on 9 January, 1969.

30. In his statutory declaration (in paragraphs 6.1 and 6.2) Mr Downes refers to statutory declarations, made by Ronald Stride and Edward Fulford in 1975, in which they state that the Application Land was fenced up to 1975.

31. At paragraph 6.3 of his Statutory Declaration, Mr Downes states that the fences were in existence when he purchased the property in 1988 and that he replaced those fences with deer fences in that year.

32. Whilst the presence of fencing may have prevented the exercise of rights of common, it is considered by officers that fencing would not, of itself, have negated those rights. It is known that fencing occurs on other parts of Whiteparish Common and that the Application Land is now fenced. However, it was not always fenced and whilst it is accepted that the fence may well pre-date the registration of the common under the 1965 Act it is not known whether the fence was authorised (which it can be with the consent of the landowner and the Secretary of State) or whether it is an unlawful encroachment.
33. An Arboricultural Report dated 29 March 2016 prepared by Christopher Hoare Tree Services Ltd has been supplied by the applicant which supports the statement that there was a fenced enclosure predating registration of the common.
34. It is accepted on behalf of the commons registration authority and in the absence of any evidence relating to Inclosure that the Application Land is not waste land of a manor, or a town or village green or land specified in Section 11 of the Inclosure Act 1845, being the other criteria in the Act which disqualifies an application under Paragraph 7 of Schedule 2 as set out in paragraph 12 above.

Advertising the application and the representations received

35. As required by the Commons Registration (England) Regulations 2014 the application was advertised and four objections were received: from the Parish Council and from three local residents. The objections were forwarded to Burges Salmon and their comments are contained in a letter dated 6 April, 2016. The letter from Burges Salmon was sent to the objectors, but no further comments were received.
36. The letters of objection may be summarised as set out below.

The Parish Council: *the land was correctly registered as common land following an application by the Parish Council; any removal of the land from the Register would result in a loss of rights for the public and would create a precedent;*

Mrs M Dibdin: *aged 85, Mrs Dibdin recalls, as a child, cattle grazing on the Application Land and, as far as she is aware, it was not until Herrington House was occupied by Mr Downes that a hedge was planted to separate the Application Land from the rest of the common;*

Susan King: *common land is a special feature of Whiteparish; the deregistration of one area would create a precedent;*

Mrs Shirley Near (of Brympton Riding School): *the evidence provided by the applicant that the Application Land was always fenced is refuted; in the 1960's the Application Land was regularly crossed by horse-riders, passing very close to Herrington Cottage (as the house now known as Herrington House was then called); the fence in existence at that time enclosed a small garden; Whiteparish Common was grazed by cattle belonging to Goldens Farm and Cottage Farm long before the requirement for rights of common to be registered under the Commons Registration Act, 1965.*

37. The letter from Burges Salmon, in response to the letters of objection, may be summarised as set out below.
- (i) *None of the objections are disputing the fact that the buildings were present at the time the land was registered as common land and that consequently the land with buildings on should not have been registered as common land consequently the application under Paragraph 6 should be treated as unopposed.*
 - (ii) *The statutory declarations of Ronald Stride and Edward Fulford state the land had been fenced throughout the period when the land was registered as common land.*
 - (iii) *A report commissioned from an arboriculturist concludes that there is evidence of fences having been erected around the land for a number of decades.*
 - (iv) *The Application Land has been used by private arrangement for grazing animals belonging to Goldens Farm.*
 - (v) *The rights of common were registered after the land was registered as common land, therefore at the time the land was registered it was not subject to rights of common (**N.B. please note** this argument is **not** accepted by the commons registration authority because the rights of common could have been in existence but not registered).*
 - (vi) *Common Land was registered to protect rights of common and not recreational rights. The registration of land as a Town or Village Green provides protection for recreational rights.*
 - (vii) *There are statutory tests which must be met for the deregistration of common land and it is not possible to argue that evidence put forward by one applicant must be applied to another, thereby creating a precedent.*

Safeguarding Implications

38. There are no safeguarding implications.

Public Health Implications

39. There are no public health implications.

Procurement Implications

40. There are no procurement implications.

Equalities Impact of the Proposal

41. There are no equalities impact implications.

Risk Assessment

42. It is open to the Council to approve or reject the application. Whether the Council approves or rejects the application, it must do so for strong, legally valid reasons based only on the basis of the evidence before it. Failure to do so could result in a legal challenge by way of judicial review by any of the interested parties.

Financial implications

43. A successful legal challenge to the decision of the Council could involve the Council in the legal costs of both the Council and/or the applicant if successful arising from a legal challenge. At this stage it is not easy to quantify the costs; they could be in the region of £5,000 to £20,000 or significantly higher.

Legal Implications

44. If the application is successful the Application Land will be removed from the Commons Register; if the application is not successful the Application Land will remain as common land. There is no statutory right of appeal from the decision of the Council. As mentioned above, there could be a legal challenge, potentially by either the unsuccessful applicant or those commoners who have lost their rights of common (or someone on their behalf). This challenge would be by way of judicial review, based on whether the Council has demonstrated proper application of its decision making process or has made its decision in accordance with the law.

Options Considered

45. The Committee may either approve or reject the application but in so doing the Committee must be satisfied as to the following:
 - (i) Under paragraph 6 of Schedule 2 the Committee is asked to consider whether evidence has been provided by the applicant that on the day of the provisional registration (10 April, 1968) the Application Land was covered by a building or was within the curtilage of a building (whether on the Application Land or on the property Herrington House) and continued to be so up to the date of the application (3 November, 2015). If so, the Committee must approve the application and if not the Committee must reject the application.
 - (ii) Under paragraph 7 of Schedule 2 the Committee is asked to consider whether evidence has been provided to establish whether or not on the day of the provisional registration the land was subject to rights of common. If not, the Committee must approve the application and if so the Committee must reject the application.

It is noted that if the land is de-registered as common land all rights of common associated with it will also be deregistered and lost.

Conclusion

46. It is noted that the applicant purchased the property almost thirty years ago in 1988 and would have been made aware at that time that the land was registered as common land. The Common Land (Rectification of Registers) Act 1989 offered an opportunity between 1989 and 1992 to object to the registration of land which had been registered but had been covered by a dwelling house and/or land which was ancillary to it (land ancillary to a dwelling house being defined as a garden, private garage or outbuildings used and enjoyed with a dwelling house), but this was not pursued by the applicant.
47. The time lapse of nearly 30 years unfortunately now means much of the evidence (in particular from the public) which was available during the time of registration (and the members of the public who knew and used the common) has now been potentially lost. However, responses have been received to the public notice from Mrs S Near and Mrs M Dibdin (see paragraph 34 above) who clearly recall the land being used for grazing cattle distinct from any use related to Herrington House.
48. **Paragraph 6 of Schedule 2 – buildings and curtilages on registered land**
- Officers have considered the evidence adduced by Mr Downes, the objections raised to the application, responses to the objections and all relevant evidence available to the Council. The use of GIS mapping layers is invaluable in defining the boundaries and footprints of features and in this case has allowed the Council to overlay the base map used for the Commons Registration with contemporary mapping of the period of registration and a range of aerial photographs. It has been possible to align reference features in the area to validate this approach. This approach has revealed that with the exception of the small temporary building to the east of the Application Land no other buildings or curtilage of any type existent at the time of registration were registered. See **Appendix B**.
49. Officers are satisfied that the registration of the Whiteparish Common at Herrington House was correctly considered in 1968 and that due regard was made to the buildings and curtilages present at that time. The presence of the fenced area could not have been considered to be curtilage at the time of registration and accordingly cannot be now, it is an enclosed area to the south of buildings, used for grazing purposes and very distinct from other areas. The buildings had and still have distinct curtilages but this area is not one of them. It is clear that at the time of registration allowances were made for the curtilage of buildings and the shape of the registered Common reflects this. The application therefore fails the legal test set out in Paragraph 6 of Schedule 2.
50. **Paragraph 7 of Schedule 2 – Incorrect registration of land that was not common land at the time of registration**
- It is clear from the historical evidence that the land has been regarded as common land since at least 1842. It was recorded as such by the Tithe Commissioners in 1842 and by the Inland Revenue in 1910. It was regarded as such by Whiteparish Parish Council in 1968 when provisional registration was made (though a small part covered by buildings and considered curtilage was specifically considered and excluded at the time of the provisional registration). The land was subsequently the subject of a Chief Commons Commissioner's direction to record ownership.

51. Although the provisional registration of the rights post date the provisional registration of the Common itself it is noted that the registration of the rights were finalised on 9 January 1969 and 31 March 1970 (see paragraph 29 above) whereas the registration of the extent of the Common was finalised on 1 October 1970 (see paragraph 6 above). It is considered that the land was common land before its registration and hence fails the legal tests for the satisfaction of Paragraph 7.
52. It is considered that the application fails to discharge the burden of proof necessary to satisfy either paragraphs 6 or 7 of Schedule 2 to the Commons Act 2006 and accordingly the application to deregister part of the Whiteparish Common at Herrington House should be refused.

Tracy Carter

Associate Director – Waste and Environment

Report Author:

Sally Madgwick

Rights of Way Officer – Definitive Map

The following unpublished documents have been relied on in the preparation of this Report:

None

Appendices:

Appendix A Application

Appendix B Case Officer's report