

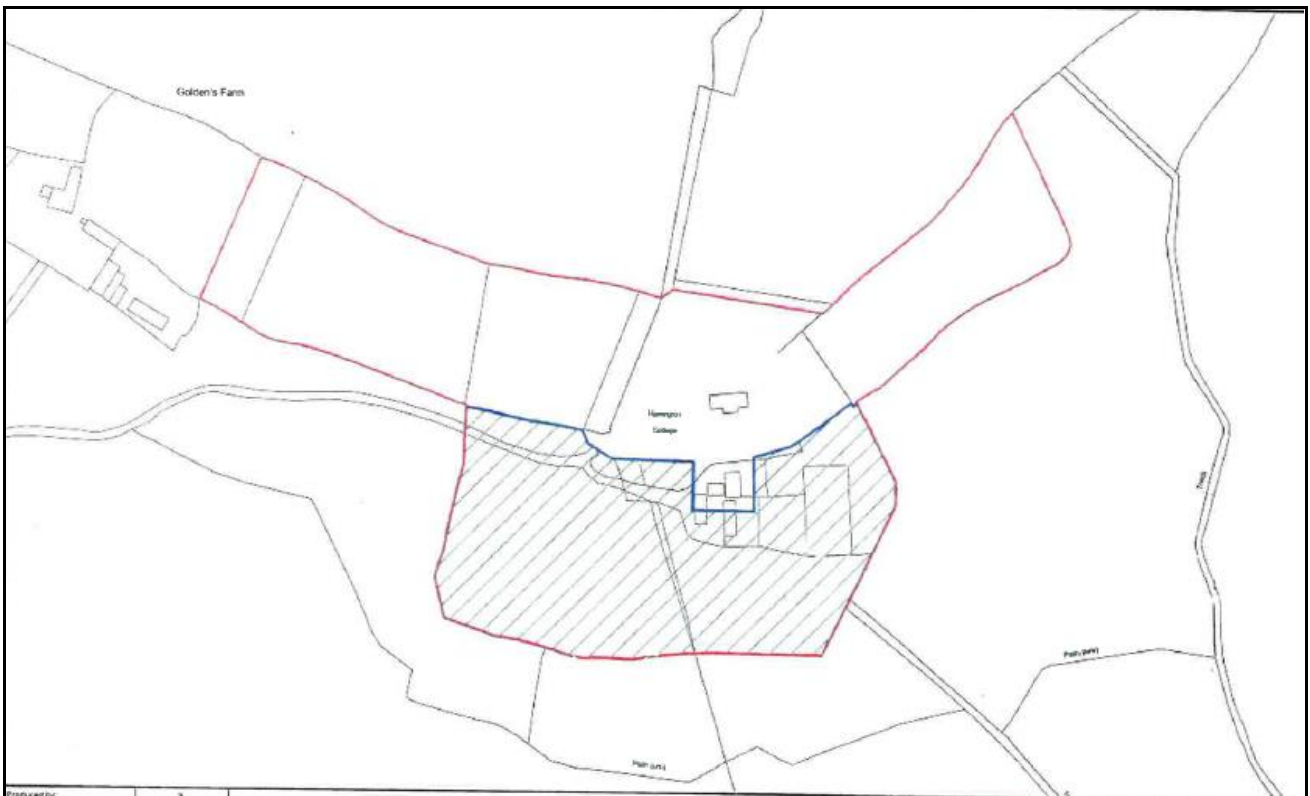
COMMONS ACT 2006: SCHEDULE 2

APPLICATION TO CORRECT MISTAKEN REGISTRATION OF COMMON LAND AT WHITEPARISH

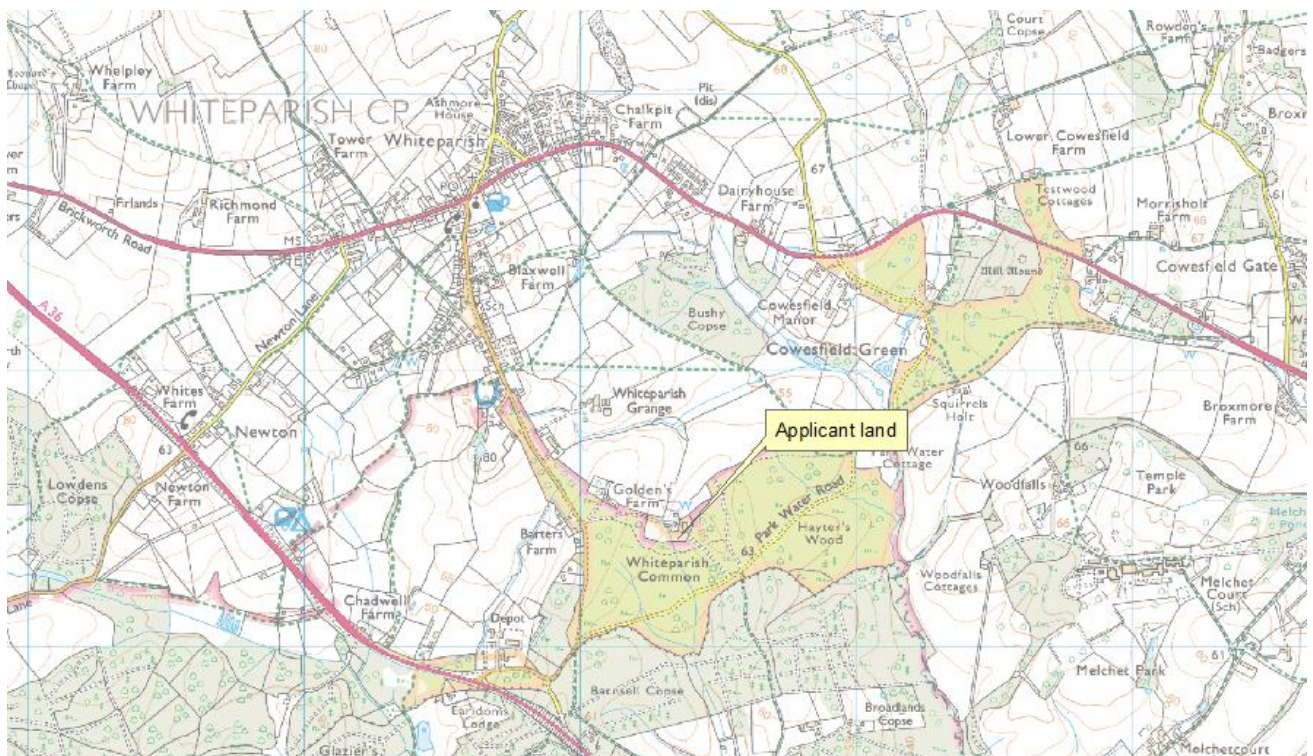
1.0 Application Details

Applicant:	Gerard Downes Herrington House Whiteparish Salisbury SP5 2RD
Application dated:	03 November 2015
Application to:	Deregister a building wrongly registered as common land <i>Schedule 2 Paragraph 6</i> Deregister other land wrongly registered as common land <i>Schedule 2 Paragraph 7</i>
Description of land:	Land to the south of Herrington House OS Grid ref. SU2531 2245
Land ownership:	Mr and Mrs G Downes and Jasmine Trustees Limited
Contents of application:	Form CA13 Application to correct non-registration or mistaken registration Plan showing the applicant land hatched in blue Letter of authority from Jasmine Trustees Limited Statutory declaration of Gerard Downes and Exhibits GD1 to 12 inclusive. Supporting statement from Burges Salmon LLP and Schedule

Land subject of application hatched in blue:



Location of applicant land



The land lies on the northern edge of Whiteparish Common to the south of Herrington House.

1.2 Legislation *Notes from Commons Act 2006 Factsheet 2 Department for Environment, Food and Rural Affairs*

The registers of common land (and town and village greens) were first prepared under the Commons Registration Act 1965 and continue to be maintained by Commons Registration Authorities. Wiltshire Council is the Commons Registration Authority (CRA) for Wiltshire excluding the Borough of Swindon.

- 1.3 In some cases the original applications to register land included maps that were either difficult to interpret or incorrectly defined the boundary of the land. Consequently some land registered under the 1965 Act was wrongly registered as common land or town or village green. Paragraphs 6 to 9 of Schedule 2 to the Commons Act 2006 enables applications to be made to deregister certain types of land and buildings that were wrongly registered as either common land or town or village green. Wiltshire Council has a duty to consider these applications.
- 1.4 **Paragraphs 6 and 8** of Schedule 2 to the 2006 Act enable the deregistration of land which is and has been covered by a building or the curtilage of a building ever since the land was registered under the 1965 Act. Typically, such land may include cottages or gardens on or abutting the common or green. It does not matter whether the building or curtilage was lawfully present on the land when it was provisionally registered under the 1965. Neither is it necessary for the land to have been covered by the same building throughout the period since the date of provisional registration. It would be sufficient, for example, that the land had at the date of registration been covered by a garage adjacent to a house, but the garage had subsequently been demolished and the land became part of the garden of that house.
- 1.5 The full criteria for deregistration set out in paragraph 6(2) and 8(2) of Schedule 2 to the 2006 Act are:
- The land was provisionally registered as common land or green under section 4 of the 1965 Act;
 - On the date of provisional registration, the land was covered by a building or was within the curtilage of a building;
 - The provisional registration became final;
 - Since the provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.
- 1.6 **Paragraph 7** of Schedule 2 to the 2006 Act allows for the deregistration of land which was wrongly registered as common land if it was provisionally registered under section 4 of the 1965 Act and the provisional registration of the land was not referred to a Commons Commissioner for determination. It must be shown that before its registration, the land was not common land (whether subject to rights of common or as waste land of the manor), nor a town or village green within the

meaning of the 1965 Act as originally enacted, nor was within the special definition of common land subject to be inclosed under section 11 of the Inclosure Act 1845.

- 1.7 The onus of proof is on the applicant to prove each of the elements of the tests arising under each of these paragraphs on the balance of probabilities.

Commons Act 2006 Schedule 2:

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 date 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.

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 common 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;
or*

(iv)land of a description specified in section 11 of the Inclosure Act 1845 (c. 118).

(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.

1.8 Curtilage *From Department for Environment Food and Rural Affairs publication “Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate” December 2014*

7.2.10 The word ‘curtilage’ is not defined in the 2006 Act, but has been considered by the court in various contexts, in particular in the context of planning and development legislation. From such cases, it appears that the question of whether land is considered to be within the curtilage of a building is a question of fact and degree (Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions and Dyer v Dorset County Council). Earlier decisions suggested that the key factors to be taken into account were the physical layout of the land and buildings, past and present ownership and past and present use and function (Attorney – General v Calderdale Borough Council). However, recent judgments appear to place more weight on present use and function than common ownership (Sumption v Greenwich London Borough Council; Morriz v Wrexham County Borough Council; Lowe v First Secretary of State). Examples include a yard, basement area, passageway, driveway and garden which are ancillary to the house.

7.5.8 See paragraph 7.2.10 for advice about the interpretation of ‘curtilage’. For example, if a house had been built on one part of a registered green, Defra would not expect the whole of the green to be regarded as the curtilage of the house. If the house had a physical enclosure around it to create its own ‘space’, the curtilage might well be taken as defined by that enclosure, but would not extend to the rest of the green.

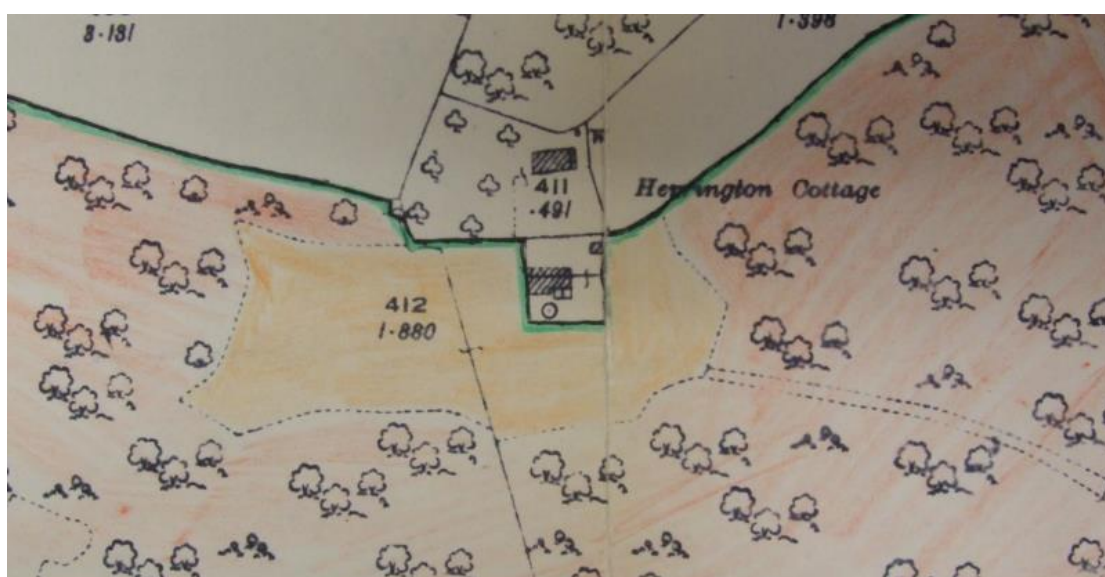
2.0 Current Registration Details

The applicant land was registered pursuant to an application by Whiteparish Parish Council on the 26th March 1968. The applicant land is recorded as part of Whiteparish Common on a map dated 10 April 1968. The land to be registered as common is shown edged in green.

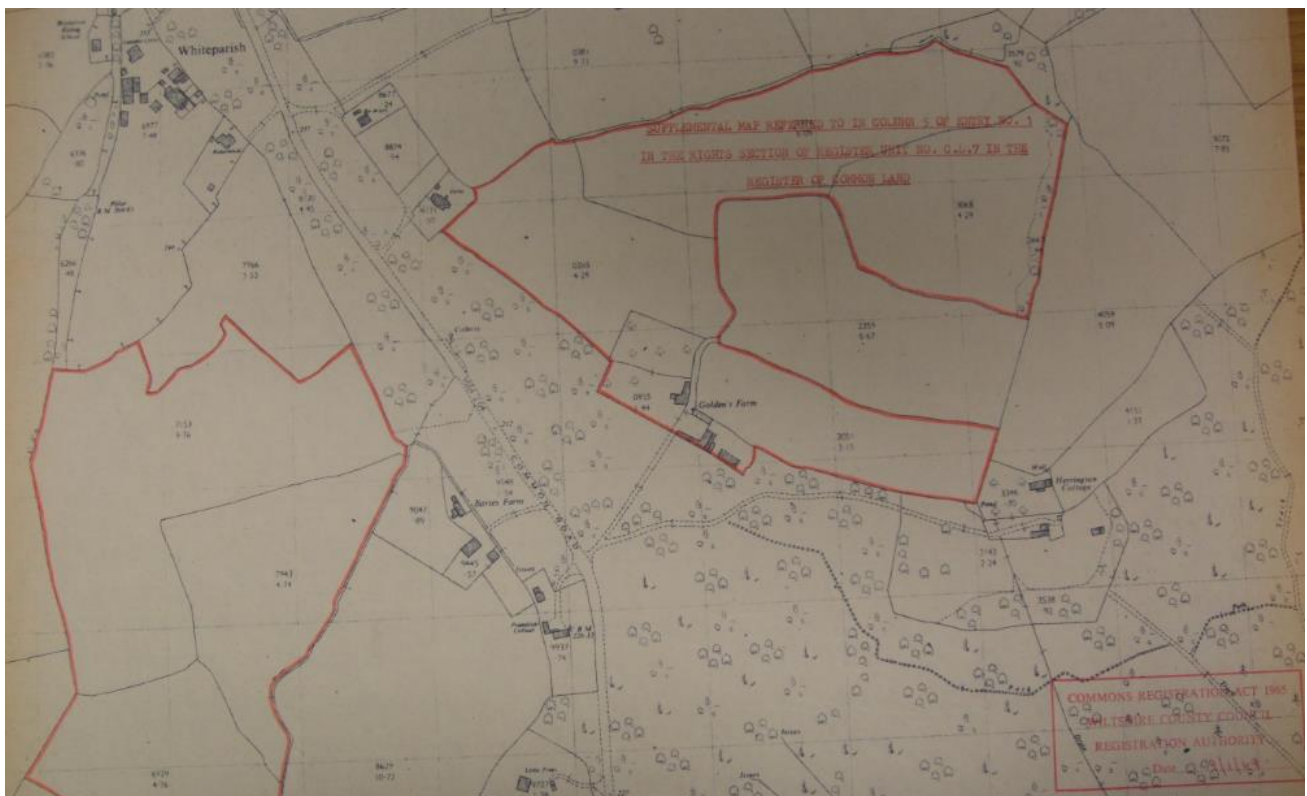
2.1 The undisputed registration was finalised on the 1st October 1970 and was entered into the Commons Register on the 22nd March 1971.



2.2 Detail of the area of the applicant land as shown in the Commons Register:



- 2.3 The land shown coloured orange in the plan at 2.2 was the subject of a decision by the Chief Commons Commissioner made on the 19th March 1975 relating to the ownership of the land. Further to the publication of a public notice informing the public of those parts of registration unit CL7 (Whiteparish Common) for which no owner is registered Mr R G Stride and Mrs V M B Stride claimed to be the freehold owner of the south of Herrington Cottage.
- 2.4 Mr R G Stride as the personal representative of Mr G Stride assented to the vesting of the land to him and V M B Stride following evidence that the land was conveyed by an indenture made 24th December 1924 between (1) Thomas Horatio, Earl Nelson (the Vendor)(2) The Vendor and the Hon. Edward Agar Horatio Nelson (3) Eliza Blanche, Viscountess Trafalgar (4) Charles Clement Tudway and Frederick John Dalgety (5) George Stride.
- 2.5 Wiltshire County Council was directed to register them as owners and did so on the 12th May 1975.
- 2.6 Application was made to Wiltshire County Council on the 8th October 1968 by Mrs A F Stride, Mr C W Stride and Mrs A F Brown Stride of Goldens Farm to register Rights of Estovers and the grazing rights for 30 cattle and 20 pigs.
- 2.7 These were registered on the 9th January 1969 and a map included in the Commons Register for the purpose of identifying the land (edged in red) to which these rights were attached.



- 2.8 It has been noted that the underlying mapping for this map is different to that used for the Registration of the Common land itself. It is undated but considered to be more recent than the underlying plan for the Commons Register and shows a small building and additional enclosures on the land registered as common that is not shown on the Commons Register plan.



3.0 History of the Common

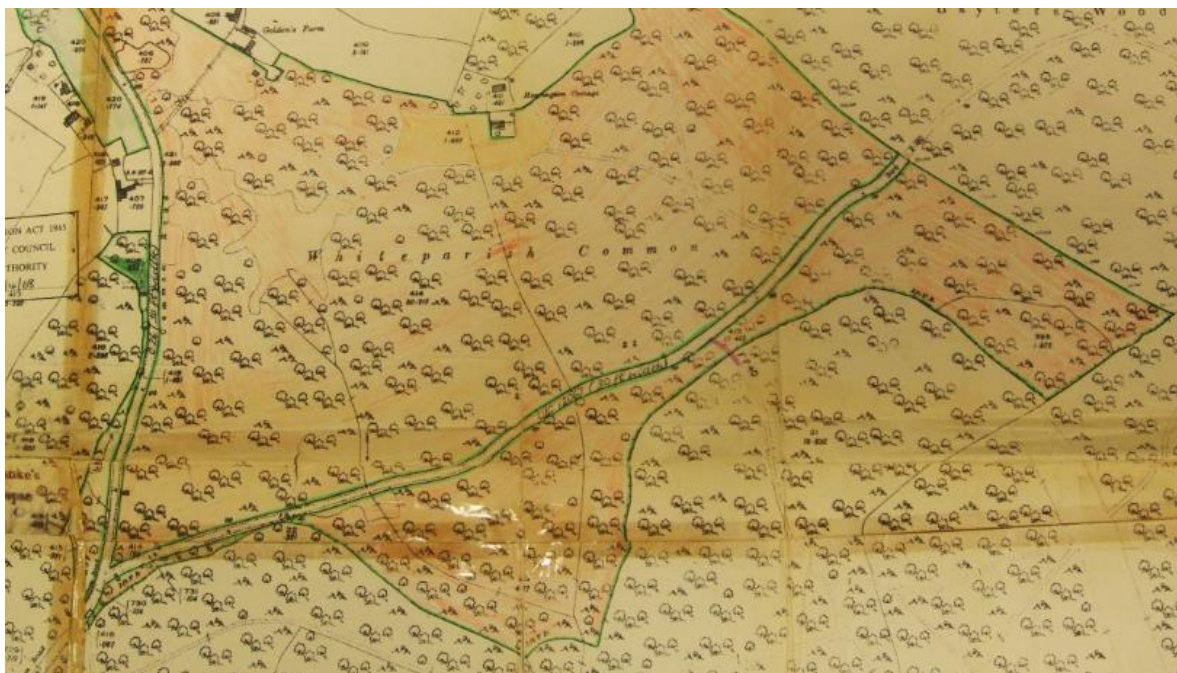
Whiteparish Common is shown on Andrews and Dury's Map dated 1773 as a wooded area forming part of Landford Wood and The Earldoms.

- 3.1 The map produced for the Tithe survey in 1842 shows the Common in a very similar shape to the land that is registered as Common today. The land that is labelled and numbered 1208 is described in the apportionment as "Whiteparish Common" "Pasture" owned by "Countess Nelson".
- 3.2 The applicant land lies within parcel 1208. A small building to the north is recorded and is considered to be Herrington Cottage, this is not part of the common and is recorded as number 1209. Golden's Farm immediately to the west is also recorded but again not as part of the Common.
- 3.3 There is agreement with the shape of the common as recorded by the tithe commissioners in 1842 and as recorded in Wiltshire Council's Commons Register.

3.4 Extract from Tithe Map:



3.5 Compared with current registration:



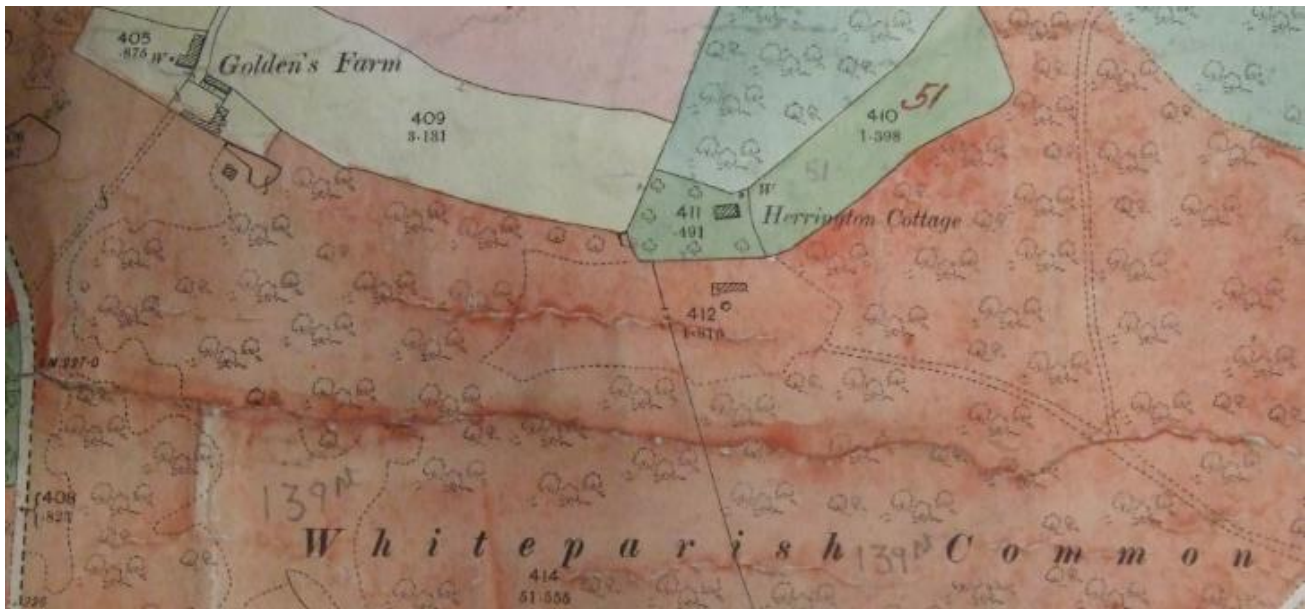
3.6 It is clear that in 1842 the applicant land formed part of the Common.

3.7 **Inland Revenue Finance Act Plans and Valuation Book 1910**

Plans produced by surveyors acting for the Inland Revenue in 1910 record Whiteparish Common in red and make similar exclusions for Herrington Cottage and

Goldens Farm as made by the Tithe Commissioners in 1842. The base map is the Ordnance Survey's County Series Map at the scale 1:2500 surveyed in 1874 and revised in 1900.

- 3.8 The applicant land forms part of the Common at that time. It is noted that the applicant land is unfenced on its perimeter but that a building is shown on it.



3.9 Ordnance Survey County Series Maps 1:2500 Sheet 72.16

Various editions of Sheet 72.16 have been viewed with a view to understanding the changes to the topographical detail that have occurred with time.

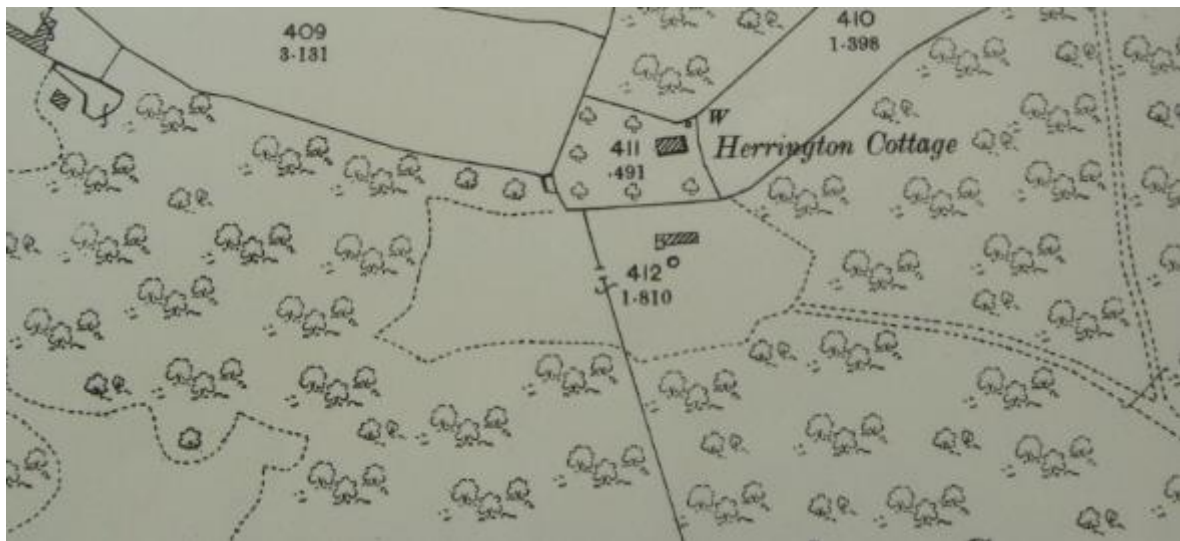
3.10 First Edition 1876



The applicant land is represented as a clearing in the common with a fence across it (leading north to south). The common is heavily wooded and is criss-crossed by open tracks. The applicant land has one of these tracks leading through it. A building that is not a dwelling is shown on the Common, south of Herrington House.

3.11 Second Edition 1874 Survey - revised in 1900

The applicant land remains unfenced on its perimeter but has a north to south fence across it with a clear gap. A building continues to be shown on the western side of this fence.



3.12 Edition of 1909 Survey – revised 1908



The 1909 edition was a simplified version, probably printed for the purposes of the Finance Act. The representation of the applicant land remains as per the 1900 edition.

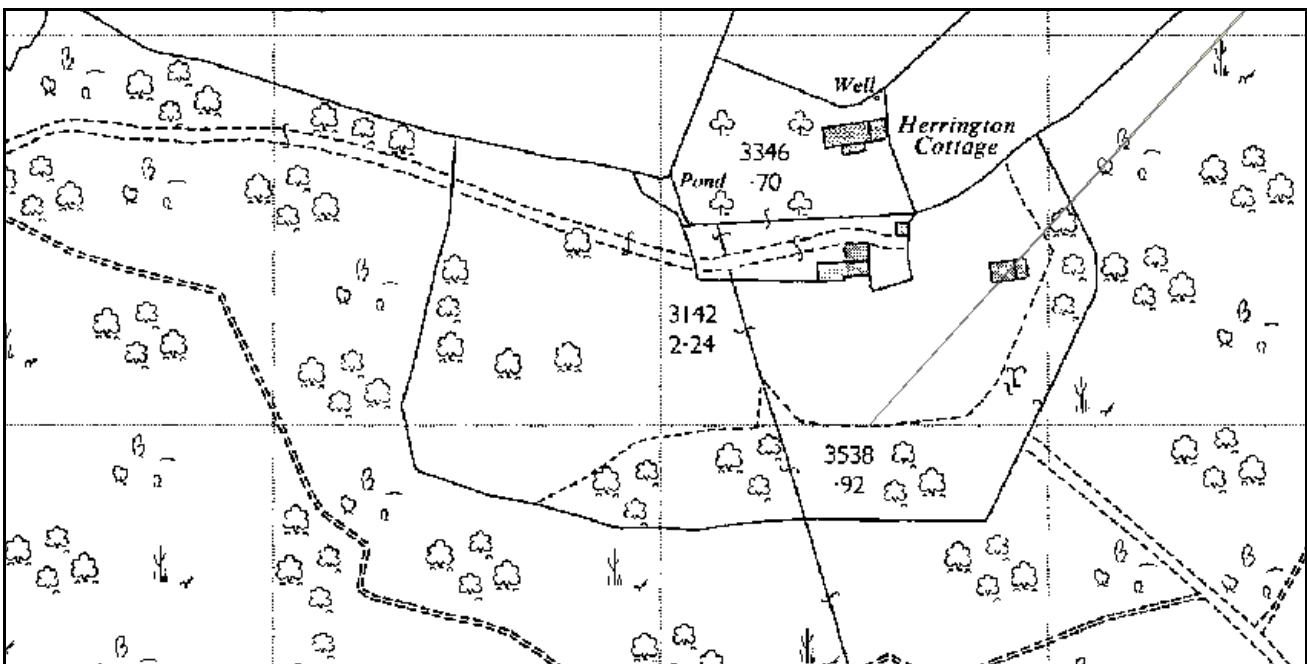
3.13 Edition of 1925 1874 survey – revised 1924

By 1924 the fence across the applicant land was recorded as being closed. The land was unfenced on the perimeter at this time and the building on the applicant land is represented in a different way and it has now shown with a small enclosure to the north.



3.14 National Grid Series 1:2500 c.1970

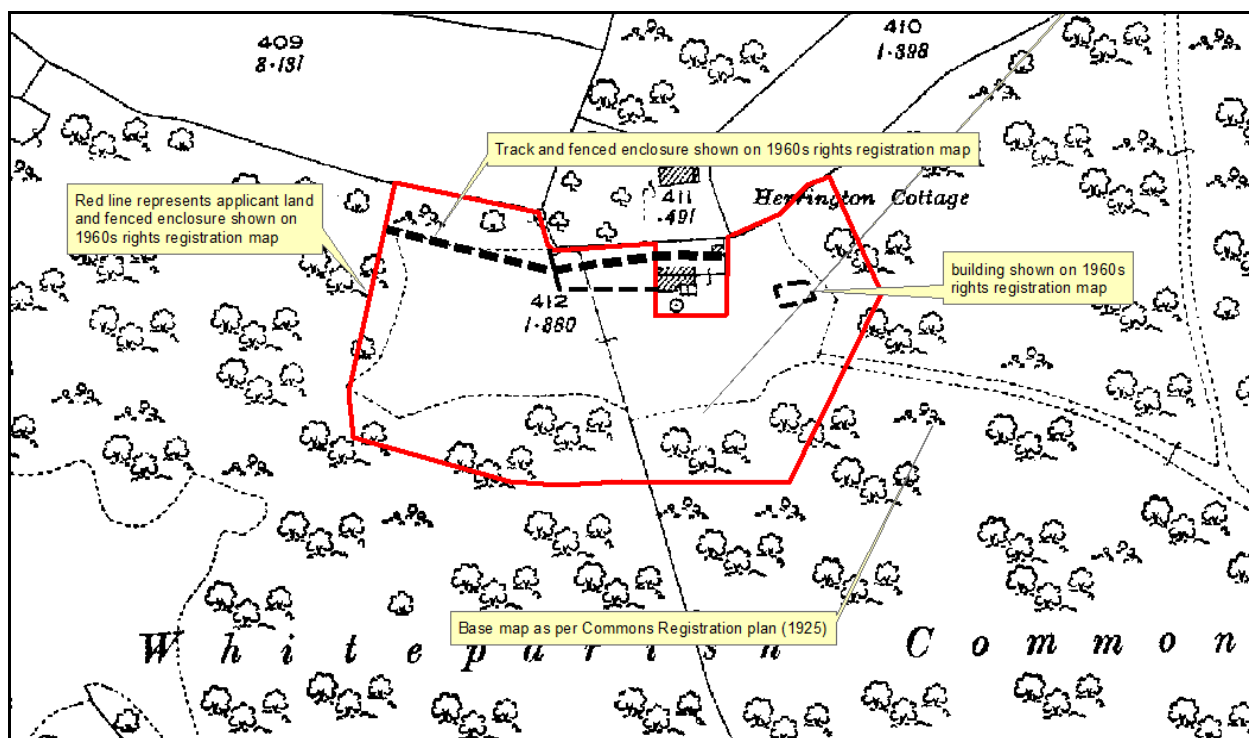
This map records significant changes to the land. The applicant land is shown with perimeter fencing and has been enlarged from the original clearing to take in some woodland. The enclosure around the building has been enlarged and a new small building has appeared on the land to the east.



4.0 Considerations relating to the application – Paragraph 6 of Schedule 2

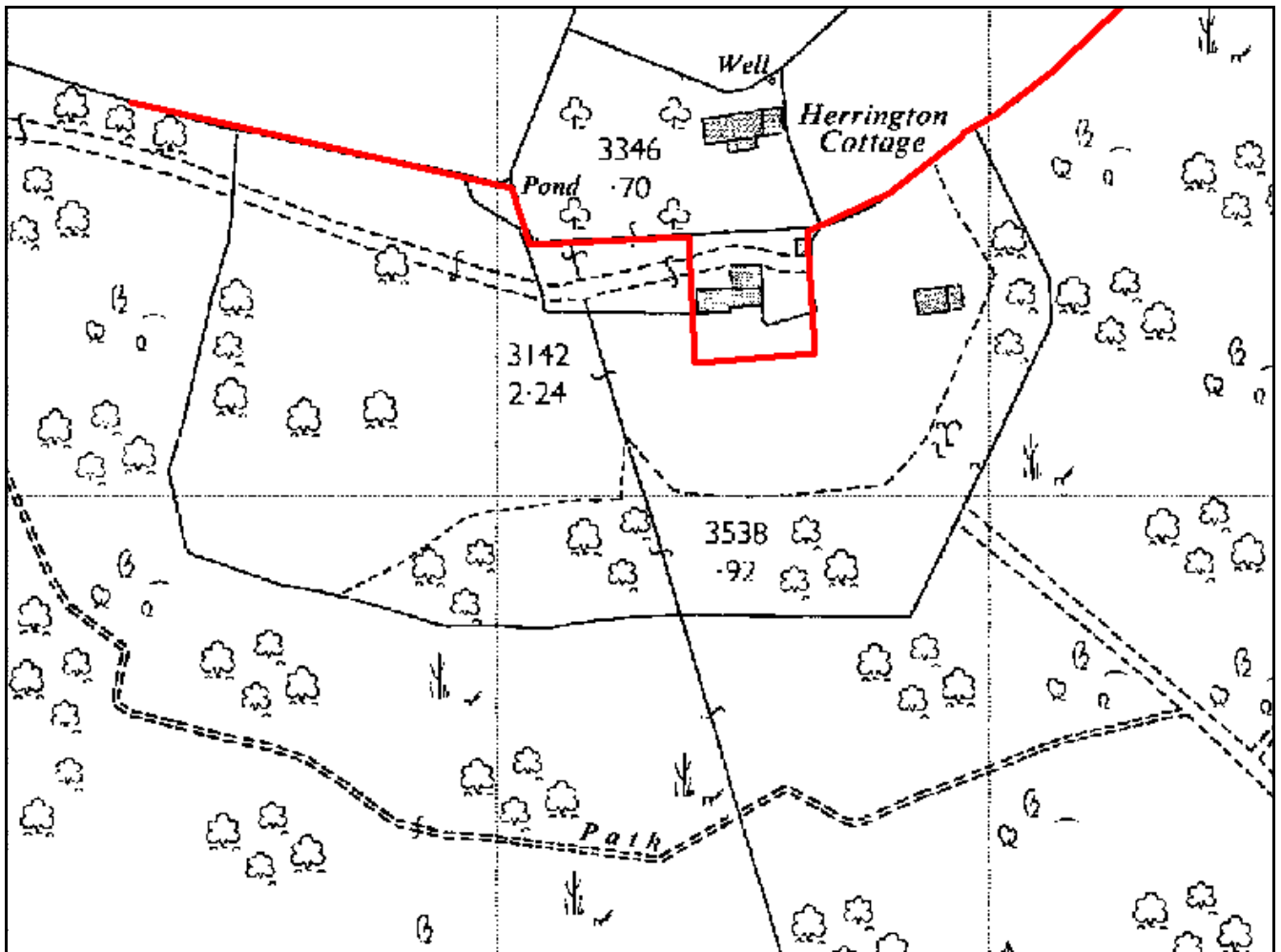
It is the applicant's case that rights were registered that should not have been.

- 4.1 At the time of registration of the Common an Ordnance Survey map of 1925 was used which, in probability, failed to accurately record features that were on the ground at the time of application for registration (1968).
- 4.2 When Rights were applied to be registered separately (1969) a different base map was used which had a more up to date survey. This map revealed that features were in place which were not recorded on the earlier map.
- 4.3 The map below has been produced to illustrate:
 - i) Base map is the 1925 Ordnance Survey map.
 - ii) Black pecked lines illustrate the additional features recorded on later (rights registration) map.
 - iii) Red line represents the applicant land for de-registration and also the fenced boundary shown on the later rights registration map.
- 4.4 It is further noted that the land originally forming part of the Common owned by Mr and Miss Stride (as confirmed by the 1975 Commissioner's decision) relates only to that within the pecked line (i.e. the clearing) and does not extend further into the woodland or to include part of the applicant land for this deregistration application..
- 4.5 This additional perimeter strip has more recently been granted Possessory Title to Mr Downes (WT242190).



4.6 The Council is able to overlay various maps held as layers in its GIS system. It is possible to define the limit of the Common as shown on the Commons Registration Plan (“the 1924 plan”) as registered in 1968 and finalised in 1971 and to overlay this extent onto the map used for defining the apportionment of Rights of Common (undated base map but used for registration purposes in 1969 – “the 1969 plan”).

4.7 **Northern extent of Registered Common from 1924 plan overlaid in red on 1969 plan.** All land south of red line is registered Common.



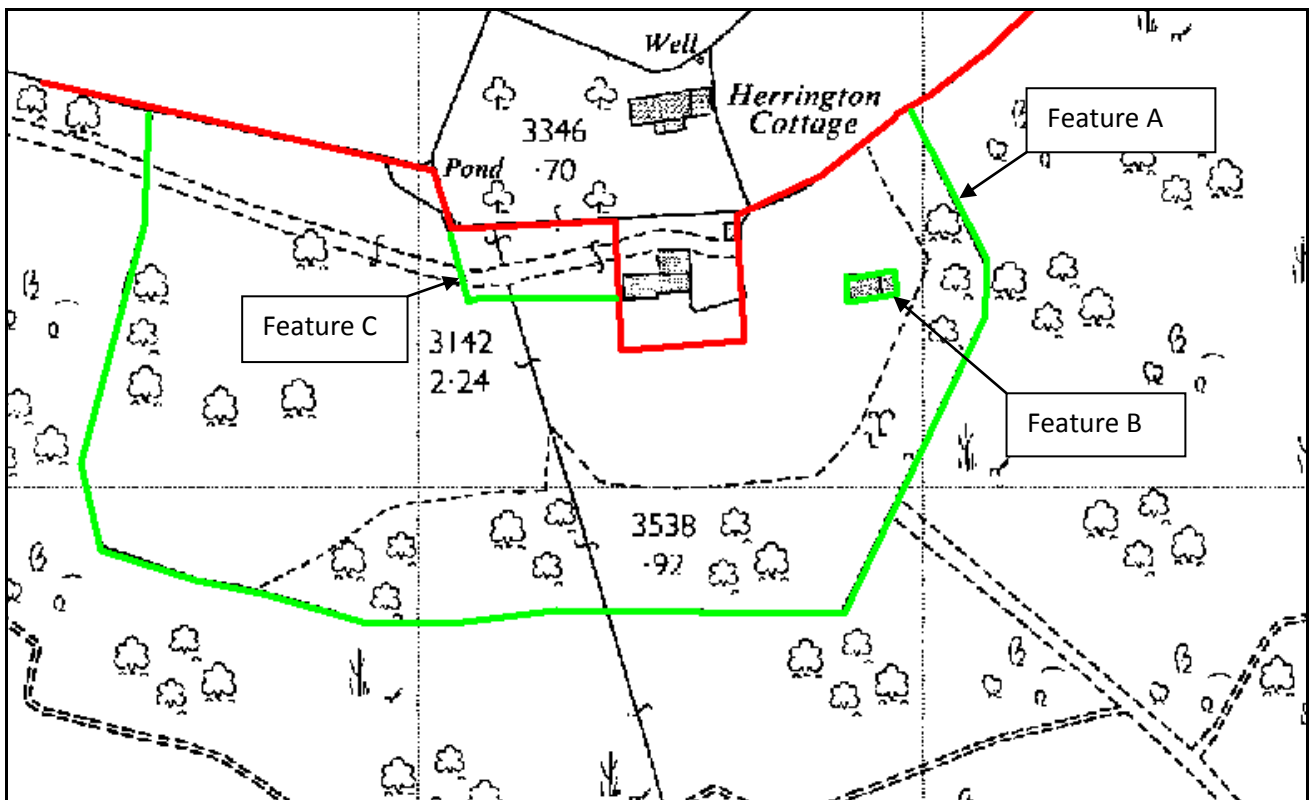
4.8 It is now clear what structures, enclosures and features were present in 1969 that are additional to those present in 1924. These include:

- i) Enclosure on the driveway to the west of the buildings
- ii) Building to the south west of Herrington Cottage
- iii) Enclosure fence within the Common

4.9 Officers consider it a reasonable assumption to make to say that these features were in place at the time of Registration even though they were not recorded on the base

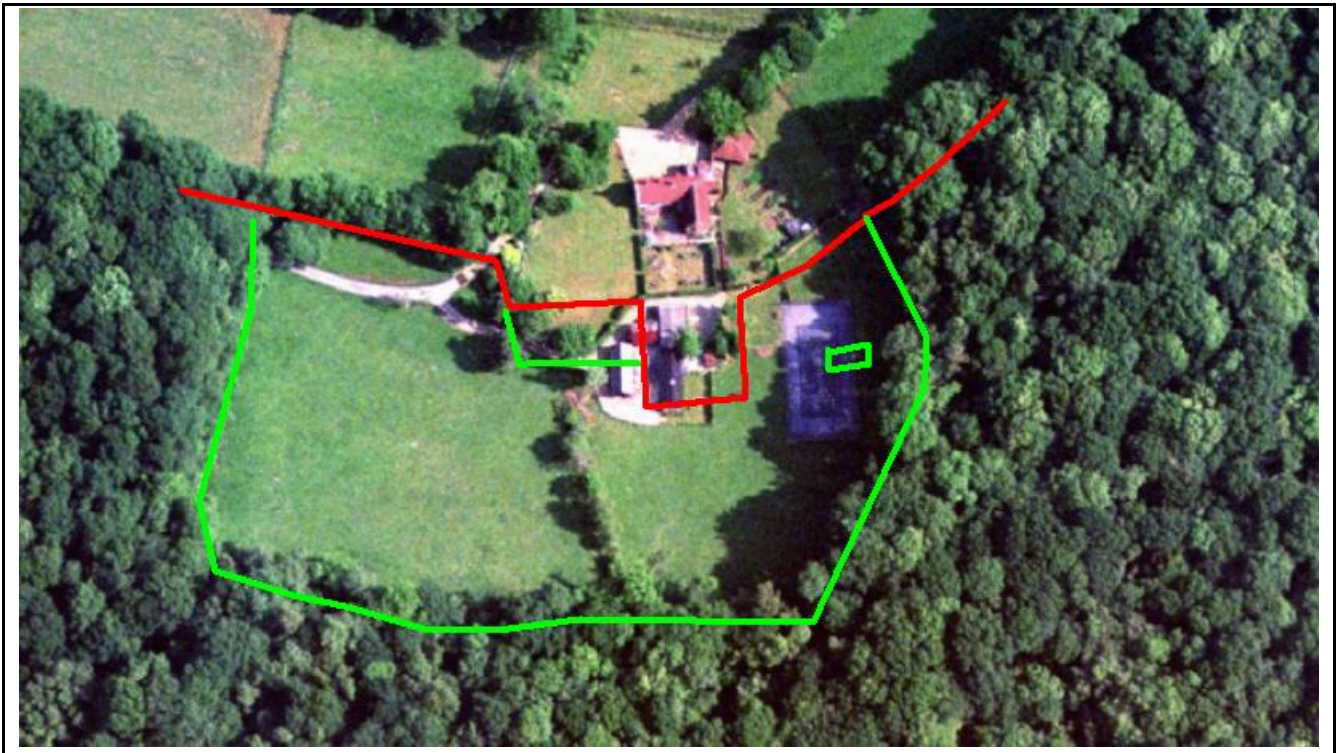
map used for the Commons Register. The map of 1924 was clearly out of date by 1968 and the basemap shown at 4.7 and used in 1969 is likely to record features that were in place only one year earlier.

4.10 These additional features are shown on the 1969 plan outlined in green. The red line continues to represent the extent of the boundary of the registered Common:

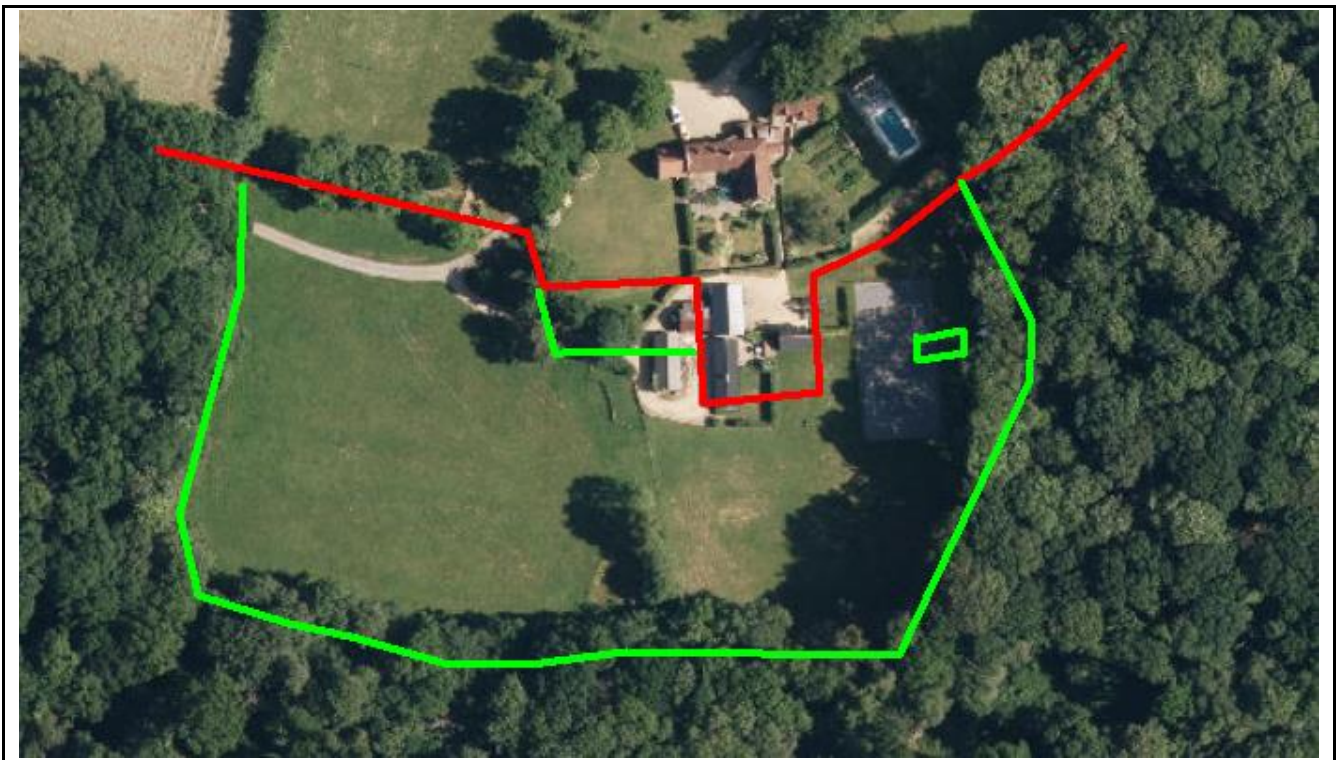


- 4.11 For the application to deregister Common Land to be successful it must be demonstrated that any features which should not have been registered have been in place (or something else on their footprint) since that time.
- 4.12 It is agreed that the fence (Feature A) that defines the southern, western and eastern extent of the applicant land (and the southern extent of the applicant's registered title) has been in place since the time of registration.
- 4.13 Feature B is a small building of some type which has been removed and a tennis court built over half of its footprint.
- 4.13 Feature C is a small enclosure that separates the larger piece of enclosed land from the buildings to the east. Officers consider that this enclosure defines a curtilage associated with those buildings. However, this enclosure has not remained in place and aerial photography reveals it had gone by 2001.
- 4.14 Aerial photography and map overlays reveal that only half of Feature B has been replaced by the tennis court by 2001.

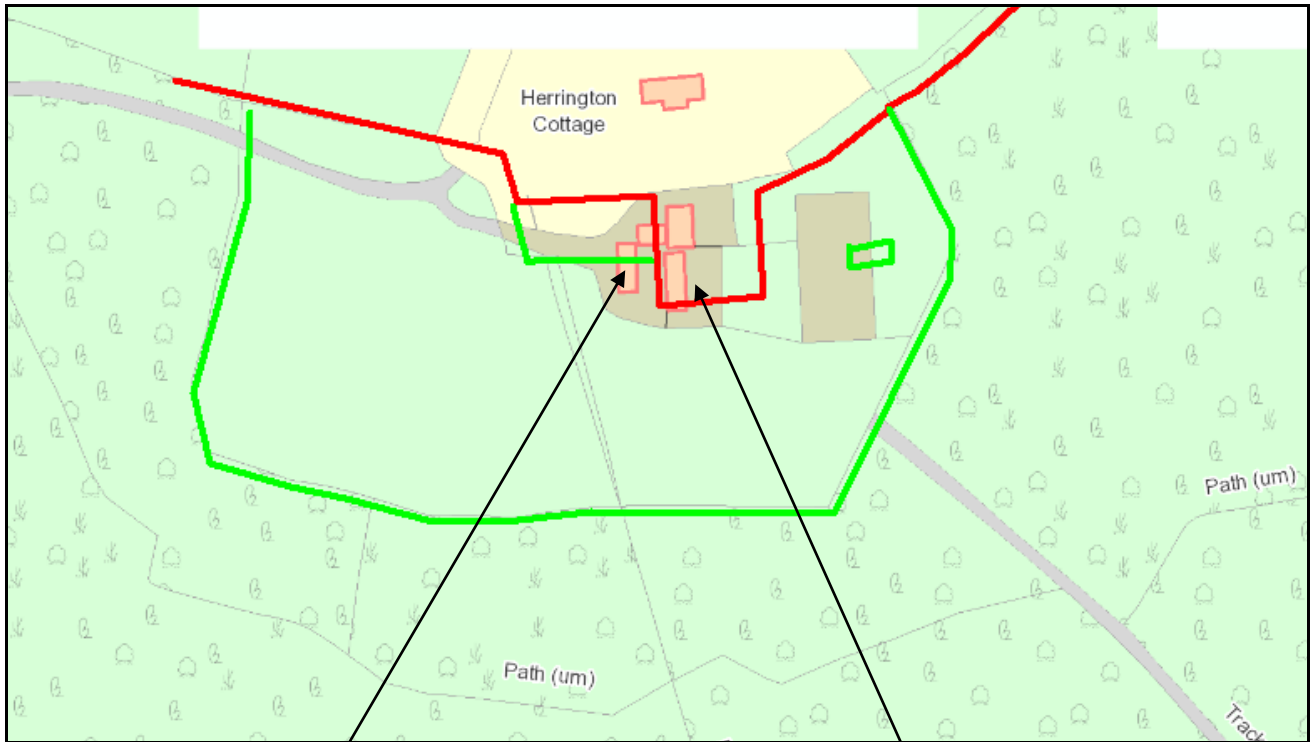
4.15 Plan showing the position of Features A, B and C relative to the Registered Common boundary and the layout of the property in 2001.



4.16 Plan showing the position of Features A, B and C relative to the Registered Common boundary and the layout of the property in 2014.



4.17 Plan showing the position of Features A, B and C relative to the Registered Common boundary and the layout of the property in 2016



- 4.18 These overlays make it clear that all of the buildings here lie within land that is not registered as Common land.
- 4.19 They also reveal that Feature C is not an enduring feature for the purposes of this application and that there have been significant changes in this area, not least the encroachment onto the Registered Common by the extension of the building seen here.
- 4.20 It is also clear that the building shown in the east (Feature B) is not an enduring feature or the footprint of one and has only in recent times (compare 2001 aerial image with the 2014 one) had the appearance of being within the curtilage of a property.
- 4.21 It is considered that the larger section of land defined at Feature A cannot reasonably be considered to define the curtilage of the temporary building Feature B or to have defined the curtilage of either the dwelling created and enlarged as described at 4.19 above.
- 4.22 While it is not disputed that the fence is a feature present both at registration and now, it merely encloses part of the Common. There are other enclosed parts of Whiteparish Common and the situation is not unique. It is possible to exercise rights of common over enclosed ground.
- 4.23 It must be noted that not only was the registration of Whiteparish Common not objected to at the time of provisional registration but care was clearly taken at the

time of registration to exclude the buildings and curtilage south of Herrington Cottage. Indeed, the Common is an unusual shape because of this. Historically, the Common was not this shape (see evidence History of the Common section 3.0).

- 4.24 Subsequent to the provisional application to register the Common in March 1968 rights of common were applied for in October 1968 and registered in 1969. The land cannot reasonably be viewed to form the curtilage of Herrington Cottage or its associated buildings when clear rights to graze animals were specifically claimed and recorded over it, notably, without objection.
- 4.25 Further to the registration of the Common and the registration of the Rights, in 1975 the Commons Commissioner considered the case of ownership of the applicant land and judged it to have been conveyed in 1924 to Mr R G stride and W M B Stride. Any dispute as to the registration of the land as common land is not evident from the Commissioner's decision.
- 4.26 It is illogical to consider that at the time of the conveyance of the land that the land was fenced as it is noted that the fence that was put up covers a wider area than the land covered by the conveyance. Why would you accept a smaller piece of land on paper than that which appeared on the ground? Although there is evidence for a perimeter fence from definitely the late 1960s onward (and possibly a time between then and 1924) it is clear that only the smaller conveyed parcel was recorded by the Commissioners in 1975. The additional land appears to be that which forms part of Mr Downes Possessory Title WT242190.

5.0 Considerations relating to the application – Paragraph 7 of Schedule 2

Paragraph 7 allows for the deregistration of common land that was wrongly registered. For this to succeed it must be shown that before its registration, the land was not common land (whether subject to rights of common or as waste land of the manor), not a town or village green within the meaning of the 1965 Act as originally enacted, nor was within the special definition of common land subject to be inclosed under section 11 of the Inclosure Act 1845 (which includes stinted pastures, land held in severalty by joint tenants and equivalent lands).

- 5.1 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 considered and excluded at this time) and was the subject of a Commissioners decision to record ownership.
- 5.2 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 the 9th January 1969 whereas the registration of the extent of the Common was finalised on the 1st October 1970.

5.3 The land was common land before its registration and hence fails the legal tests for the satisfaction of Paragraph 7.

6.0 Conclusion

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 should be refused.

6.1 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 has allowed the Council to overlay the base map used for the Commons Registration with contemporary mapping of the period of registration, a range of aerial photographs and contemporary mapping. It has been possible to align reference features in the area to validate this approach.

6.2 It is further noted that the base maps for the registration are at the scale of 1:2500 and that it is unwise to digitally enlarge to any extent that exceeds the use and purpose of the maps for their original purpose.

6.3 Officers are satisfied that the registration of the Whiteparish Common at Herridge 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 cannot be now, it is an enclosed area to the south of buildings, used for grazing purposes and distinct from other areas. The buildings had and 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.

7.0 Recommendation

That the application to deregister land at Herrington House, Whiteparish Common is refused.

Sally Madgwick

Team Leader Rights of Way and Highway Records

08 May 2017