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Helen Beale
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Your Ref: 2010/DEREG/005
Our Ref: COM 266
Date: 25/06/12

Dear Ms Beale,

**COMMONS ACT 2006: SCHEDULE 2 (6)
CORRECTION OF THE REGISTER**

**YATTON HILL COMMON, HEREFORDSHIRE
APPLICATION REFERENCE NUMBER COM 266**

The decision in respect of the above proposal is enclosed so that Herefordshire Council, in its capacity as commons registration authority, may take any appropriate action in amending the register of common land and village greens.

Once an application has been determined, the Planning Inspectorate cannot comment further on the terms of the decision. There is no statutory provision for appeal against a decision but it can be challenged in the Courts within 3 months of the date of the decision letter. The procedure for this involves an application to the High Court for permission to apply for judicial review under the Supreme Court Rules.

Copies of the decision are also being sent to interested parties. They will be advised that any further queries regarding any necessary post-decision action should be addressed direct to the Council. The decision will also be posted on the Planning Inspectorate website.

Thank you for all your assistance during the application determination process.

Yours sincerely,

Willie Lengers
Common Land Casework Team



Application Decision

Public Inquiry held on 9 May 2012

By Helen Slade MA FIPROW

An Inspector appointed by the Secretary of State for Environment Food and Rural Affairs

Decision date: 25 June 2012

Application Ref: COM 266

Yatton Hill Common

Register Unit: CL143

Registration Authority: Herefordshire Council

- The application, dated 18 November 2010 is made under Paragraph 6 of Schedule 2 to the Commons Act 2006 ('the 2006 Act').
- The application is made by Mr and Mrs Watkins of Silver Birch Cottage, Yatton Hill.
- The application is to deregister land at Silver Birch Cottage which is currently registered as part of Yatton Hill Common.

Summary of Decision: The application is allowed.

Preliminary Matters

1. Herefordshire Council ('the Council') referred the application to The Planning Inspectorate ('PINS') on 17 May 2011 but did not comment on the merits or otherwise of the case.
2. The application was advertised on 1 February 2011. It attracted eight objections, and seven representations in support.
3. I held a public local inquiry on 9 May 2012 at The Leintwardine Centre, Leintwardine, near Craven Arms, Shropshire having undertaken an unaccompanied site visit the previous day to familiarise myself with the locality. I held a formal accompanied site visit the morning after the close of the inquiry which was attended by the applicants and their representative; their neighbours Mr and Mrs Davis (the principal objectors); and Mr Willis who had attended the inquiry. No officer from the Council was in attendance.
4. At the inquiry it became apparent that Mr and Mrs Davis had submitted a statement which had not been seen by the applicants or their legal representative. I therefore adjourned the inquiry for a short period to allow the examination of the statement and for copies of it to be made. The inquiry was then resumed and no request was made for any further adjournment. Following the close of the event further written submissions were made on behalf of Mr and Mrs Watkins, but in the absence of any exceptional circumstances I have declined to take them into consideration.¹

¹ See PINS 'Common Land Guidance Sheet 3', paragraph 31

The Application Land

5. The application land consists of the parcel of land occupied by Silver Birch Cottage and the land within its curtilage. It is on the northern side of the registered common land unit CL143, Yatton Hill Common, towards the western extremity. Silver Birch Cottage lies on one of several small plots of land in this location, most of which are outside the boundary of the registered common. The cottage has previously been known by the names 'Yatton Hill Cottage' and 'Yew Tree Cottage'. The name 'Yatton Hill Cottage' now applies to the property occupied by Mr and Mrs Davis and which abuts the western boundary of the applicants' property.
6. Yatton Hill Common extends to an area of approximately 93 acres (about 37.5 hectares) and the application land is said by the applicant to extend to approximately 2 roods, which is approximately 0.5 of an acre or 0.2 of a hectare.

The Statutory Requirements

7. Paragraph 6 of Schedule 2 to the 2006 Act states that 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.
8. Paragraph (6) applies to land where:
 - a) the land was provisionally registered as common land under section 4 of the 1965 Act²;
 - 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.
9. A commons registration authority may only remove land acting on—
 - a) the application of any person made before such date as regulations may specify³; or
 - b) a proposal made and published by the authority before such date as regulations may specify.
10. In this case, the application was made by Mr and Mrs Watkins. The onus of proving the case in support of the correction of the register of common land rests with the person making the application, and the burden of proof is the normal, civil standard, namely, the balance of probabilities.

Reasons

The Application

11. The applicants' case is that the application land at Silver Birch Cottage has been wrongly recorded as part of Yatton Hill Common as it has been occupied

² The Commons Registration Act 1965

³ The specified date is 31 December 2020

by buildings, or otherwise been within the curtilage of those buildings, for many years and at least since the date on which the common was provisionally registered under the 1965 Act.

12. Despite some initial difficulties over the accuracy of the notice and accompanying plan, and following amendments to it which were made by the Council, I am satisfied that the application has been made and advertised in accordance with the 2008 Regulations.

Background

13. A great deal of material has been submitted in this case, principally by the applicant, containing documentation relating to a number of issues connected with the application land and other land in the vicinity. Whilst this material is helpful in setting the background to the application, I do not propose to refer to every item individually as it would be impractical and unnecessary to do so. It is my intention to restrict this report to the essential matters critical to determining the application against the relevant criteria, but drawing on the background material where it is helpful to do so.

History of the site

14. In brief, the earliest evidence of any building on the application land is contained in the Tithe Apportionment documents of 1842. The plan shows a parcel of land numbered 545 and described as being a house and garden extending to 37 perches in area. It was owned and occupied by Thomas Payne. The adjoining parcel to the west is numbered 544 and is also described as a house and garden, its area extending to 2 roods. It was owned and occupied by Eleanor Payne.
15. An Archive Assistant from Herefordshire Records Office provided clarification in an email to the County Land Agents, dated 22 March 2011, that a perch measures 30¼ square yards and that a rood measures 40 perches. One acre equals 4 roods.
16. The Council commissioned a survey of the area around the application land which was undertaken in July 2010 by Monument Geomatics. This document is helpful as it also includes copies of the earliest large scale Ordnance Survey ('OS') mapping available. The first edition of the OS County Series mapping at a scale of 1inch to 25 miles for this area was surveyed and published in 1886. The map shows a plot of land, similar in shape to Plot 545 shown on the Tithe Map, and with a building on it. The plot is numbered 905 and given a measurement of .635 acres. The immediately adjacent plots to the west (including a narrow strip which appears to be marked as an orchard⁴) are not numbered but there are faint bracing markings suggesting that the plots may have been measured together.
17. The second edition was published in 1903/4. The paper copies of this edition that were supplied by Mr Watkins and the Council show that the application land appears on one sheet whilst the adjoining property is divided by the edge of the map and therefore appears on two sheets. This is rather unhelpful as the three plots were measured together (the bracing marks are clearer on paper photocopies of this map) and all given one plot number, as before: plot 905, with the same area (.635 of an acre). The copy of the map provided by

⁴ OS mapping symbol

Monument Geomatics also reveals the bracing (more faintly due to different copying techniques) and, furthermore, provides details of the survey dates. These details indicate that the area was re-surveyed in 1903 and 1904, which contradicts Mr Watkins' assertion that there had been no re-survey undertaken since 1887. Mr Watkins was of the view that the delay between the survey of the land (in 1887) and the publication of the map in 1903 meant that there could have been a change in the boundary of his plot in the meantime that was not recorded on the second edition of the OS map.

18. The second edition shows a change to the building situated on the western part of plot 905 and I therefore conclude that the area had been re-surveyed, at least to the extent of resurveying the buildings. I consider it unlikely that a survey which identified a change to a building would not have identified a change to a demarcated boundary line, if it had been altered.
19. However I do acknowledge that the internal boundary lines which divide the whole plot into three parts present a different picture to that of the Tithe map which showed only two plots. In addition, as pointed out by Mr and Mrs Davis, the external boundary of parcel 544 on the Tithe map was different by the time of the 1886 OS map. These changes must have occurred at some point between 1842 and 1886. Mr and Mrs Davis conclude that the resulting measurement of the two present plots (one internal boundary now having gone) is approximately 0.3 of an acre each. In their statement they indicate that their own plot is 0.33 of an acre, meaning that Mr and Mrs Watkins' plot must be 0.3. This would make the curtilage of Silver Birch Cottage about 1476 square yards or just over 1.2 roods. Mr and Mrs Watkins assert that their property is currently approximately 2 roods (2300 square yards) in area. Clearly these figures are incompatible and there is a conflict of views.
20. Mr Watkins was also able to supply copies of successive conveyancing documentation for his property, which were supplemented by copies of the current Land Registry details and a sworn affidavit made by Harry Hector Harper dated 1959, which was originally submitted by Mr and Mrs Davis. These appear to show, in brief, the following pattern of ownership of the cottage now known as Silver Birch Cottage:
 - i. 8 August 1873: Thomas Payne conveyed the property to John Gethin, James Greenhouse and Charles David Andrews.
 - ii. 18 March 1896: Martha Mary Andrews conveys to Thomas Price *'...All that messuage or tenement with the garden lands and appurtenances thereto adjoining and belonging situate at Yatton Hill in the parish of Aymestrey in the County of Hereford containing by estimation two roods be the same more or less and as the same is now in the occupation of William Payne bounded on the east and partly on the north by Yatton Hill aforesaid on the south by the premises late of Timothy Payne deceased and on the west by property now or late of the Reverend Thomas Taylor Lewis...'*
 - iii. 1903: By his will Thomas Price bequeathed his freehold cottage and garden to his nephew Mark Payne.
 - iv. 12 May 1911: Mark Payne conveyed to Anne Chambers the property as described in 1896, then in the occupation of Annie Payne.

- v. 25 March 1914: Anne Chambers sold the property, as described in 1896 and still in the occupation of Annie Payne, to Miss Mercy Payne.
 - vi. 23 December 1946: Mrs Mercy Dallman⁵ conveyed to Mrs Sarah Anne Hanbury property described as follows: '*...All that stone built messuage tenement or cottage with the garden lands and appurtenances thereto adjoining and belonging situate at Yatton Hill in the parish of Aymestrey in the County of Hereford containing by estimation two roods or thereabouts and forming part of Ordnance Number 905 for the said Parish which said property is now or was lately in the occupation of Osmond Roberts and is bounded on the east and partly on the north by Yatton Hill aforesaid and on the north west by the Yatton Court estate and is commonly known as Yatton Hill Cottage...*'
 - vii. 19 June 1954: Sarah Anne Hanbury sold to Mr Harry Hector Harper and his wife the property as described in (vi) above but which by then had recently been in the occupation of a Mrs Tomkins. Mr Harper was described as a 'cycle wheelmaker'.
 - viii. In 1959 Mr Harper swore an affidavit to the effect that his property, Yew Tree Cottage (see (ix) below) adjoined the east side of a property consisting of a cottage and a garden which had formerly been occupied and owned by Mark Payne (who had recently died) and that Mark Payne's father had owned it before him. The affidavit confirmed that the property was shown as part of plot 905 on the OS map. The map attached to the affidavit confirms that the sworn statement related to the property now occupied by Mr and Mrs Davis.
 - ix. 25 October 1974: The Harpers sold to Mr J T Cooper the property broadly as described above (vi) above but noting that the cottage was '*...formerly known as Yatton Hill Cottage but was now known as Yew Tree Cottage...*'.
 - x. 3 April 1992: Mr Cooper conveyed the property described as in (ix) above to Mr and Mrs Watkins, making specific reference to the conveyance of 25 October 1974, and also to a plan showing the extent of the property and the rights of way enjoyed.
 - xi. 7 May 1992: The property was registered at the Land Registry by Mr and Mrs Watkins with the Title Number HW112425 in the name of Silver Birch Cottage. The filed plan shows the property outlined in red, corresponding to the boundaries of the OS parcel, part 905.
21. I am satisfied from the evidence of the various conveyances and the OS and Tithe documentation that there has been a property on the site of Silver Birch Cottage since at least 1842 and that the property has always had a garden associated with it. I am also satisfied that the description of the property has remained largely the same since 1896 and that it appears to have a total acreage of approximately 2 roods.
22. I note Mr Davis' arguments that the measurement of 2 roods applied to the whole of OS parcel number 905 (with which I agree) and that, since the parcel is divided into two dwellings, each one must necessarily be smaller than 2 roods. I accept that this would seem logical. However, the conveyances relating to the eastern portion of plot 905 over the years are consistent with

⁵ Miss Mercy Payne having married in 1926

one another, and also consistent in describing the area of what is now Silver Birch Cottage as being itself approximately 2 roods in area. No evidence of similar standing has been submitted to refute that description and I must therefore place significant weight on the evidence contained in the relevant property documents. In fact, Mr Watkins stated at the inquiry that the land he occupies is just less than 2 roods being now 2300 square yards, by his own measurement.

23. It is not my role to determine whether or not a mistake has been made in the property descriptions or transactions over the years. Nor, in fact, is the actual area of land legally owned by the applicant a determining factor in reaching a decision on the application. What is relevant is whether the application land was occupied by buildings or within the curtilage of those buildings at a specific point in time, and whether or not that situation has pertained ever since. It is clear from the survey information provided by the Council and undertaken by Monument Geomatics that the current curtilage of Silver Birch Cottage extends beyond the parcel boundary shown on the OS maps. If the boundary of Silver Birch Cottage has been extended at some point in time, the question of interest to me is 'when did that happen' and not necessarily 'who did it'. I therefore move on to consider the relevant criteria against which this application must be assessed.

Whether the land was provisionally registered as common land

24. Yatton Hill Common was the subject of a claim under the 1965 Act made by Mr Sidney Jones, Chairman of Aymestrey Parish Council, on 30 March 1968. The application map was loosely drawn, showing a red line boundary superimposed onto an OS base map at a scale of 2½ inches to one mile.
25. The description of the land in the Land Section of the Commons Register ('CR') states that the area to be registered extended to 93 acres or thereabouts and comprised the OS numbered plots 904 and 1142 (part) as shown on the 1903/4 edition of the OS map at 1/2500 scale. The 1st edition of the register map, which forms part of the CR and is also at 2½ inches to the mile, is more carefully drawn. It does not include any part of OS plot number 905 and therefore does not include the majority of the application land. However it is undated and endorsed 'This sheet was replaced by a fresh edition on 4/11/71'. Nevertheless, the second entry on the Land Section of the CR indicates that the provisional registration was not challenged and became final on 1 October 1970, the CR being annotated accordingly on 16 March 1971.
26. Notwithstanding, on 11 November 1971 an entry was made onto the CR recording that an application had been made on 22 July 1971 by Captain T R Dunne, consequent on an objection (no. 103) made on 1 September 1970 in respect of an area hitherto excluded from the register unit. It records that all parties had agreed that the excluded area (part of OS parcel 1142) should be added to the Register Unit for Yatton Hill Common and it was duly done. The map relating to this amendment is marked as being the 2nd Edition of the Provisional Register Map and is dated 4 November 1971. The copy of this map supplied by the Council is on a very faint OS base map and it is almost impossible to interpret it accurately. However a better copy has been provided which shows that part of OS parcel 905 was included within the boundary of the common land and a small amendment was also made on the very northern boundary of the common. Rather oddly, it seems that a small strip of land in

the extreme north was actually omitted on the 2nd edition plan, in addition to any alteration in the boundary which may have been made to include another area, as had apparently been agreed.

27. Not surprisingly this sequence of events has produced confusion over the years, and indeed it does not appear to have been realised by the Commons Registration Authority ('CRA') that the second edition of the register map actually existed, until Mr Watkins' application prompted its discovery. Indeed the confusion still appears to reign since, in the submission letter to the Planning Inspectorate, the Council states:

"The first common map was correct; the second map, which was meant to correct the first was inaccurate in the (sic) it included the whole of Silver Birch Cottage, house and garden and part of Yatton Hill Cottage, due to a colouring error."

28. Nevertheless, it would seem that the second edition of the register map is the most recent and therefore the relevant provisional map in respect of this application.
29. Despite the fact that the description of the registration unit (CL143) does not refer to the inclusion of any part of OS plot number 905 within the unit, the provisional map clearly does show the boundary of the common surrounding and including the whole of the application land, of which some of OS plot 905 forms a part. The entry on the Land Section of the CR was made on 11 November 1971 whilst the map was apparently amended on 4 November 1971.
30. I am therefore satisfied that the application land was provisionally registered as common land on 4 November 1971.

Whether the land was covered by a building or within the curtilage of a building at that time

31. I have already concluded in paragraph 21 above that there has been a building on the site of Silver Birch Cottage for well over 150 years. I am also satisfied that, whatever the total extent of the curtilage may have been, it has always extended at least as far as the boundary indicated on the OS plans forming the eastern section of Plot 905. None of the parties to this matter has expressed disagreement with that.
32. The question at the heart of this application is whether or not the land which now comprises the garden to Silver Birch Cottage, but which lies outside the boundary of OS plot 905 as currently shown on the extant OS mapping, formed part of the curtilage of the dwelling in November 1971. It is Mr and Mrs Watkins' case that the curtilage has been larger than the OS mapped plot for a considerable period of time but that, due to the fact that no proper survey has been carried out by the OS since prior to 1903/4, the real extent has never been properly recorded. As a consequence both the Land Registry map of their property and the CR mapping are wrong.
33. Neither Mr and Mrs Watkins, nor their neighbours Mr and Mrs Davis, were in occupation of their properties in 1971 and therefore they cannot speak directly to the matter. Mr Watkins has been able to provide some documentary evidence relating to his property to which I have already referred, and also photographs over the years, including an aerial photograph dating from 1975 and another old photograph dating from about 1940.

34. The photograph from 1940 is of little help due to the fact that it does not show much of the land to the east of the wicket gate. I place no weight on this picture as showing the existence of an outbuilding, as claimed by Mr Watkins, because the picture is simply inconclusive.
35. However, the aerial photograph from 1975 is the more important picture as it is almost contemporaneous with the provisional registration of the land as common land, and it also shows more of the land to the east of the gate. This photograph would have been taken around the time of the conveyance from Mr Harper to Mr Cooper. Mr Harper was stated to have been rather a recluse, operating a small business from his home and being a very keen vegetable gardener. The aerial photograph clearly shows a garden which was neatly kept.
36. The aerial photograph shows a considerable amount of garden area to the east of the wicket gate, and also the building housing the generator. Mr Watkins considers that this photograph shows that the garden extended beyond the limits of the OS boundary line. The curtilage of Mr Watkins' garden is defined by a boundary which is variously fenced and hedged, including along the eastern boundary of the garden which has a fence running up to the field boundary. The fence was replaced in 2002 and is now buried amongst garden shrubbery. Mr Beaumont was certain that there was a fence all round the garden when he last visited in the 1960s and Mr Watkins was adamant, in the face of questioning from Mr Davis, that he had never moved any of the boundary positions. Mr Owen stated that he had visited the area many times over the years that he had known it (he was born in 1935) and he had never noticed any changes although he would not be able to tell from a map; he would only be able to tell on the ground. I can place limited weight on the evidence of vague recollections.
37. Mr Watkins has recently been in the process of constructing a new building which he states is on the same footprint as a previous structure. However, the 1975 picture shows no building in that location, and thus any structure which the new building is replacing was not present at the time of the provisional registration of the common land. It therefore cannot help me to identify the extent of the curtilage in that area at the time.
38. In the absence of any evidence from persons closely associated with the property in 1971 I must place most weight on contemporary documentary evidence of sufficient reliability. Conveyancing documents are important legal documents on which people ought to be entitled to rely. The conveyancing and related documents have consistently described the property as containing 2 roods or thereabouts. The current area of the house and garden is said by Mr Watkins to be just under 2 roods and this has not been disputed. This evidence is consistent with the documentary evidence, particularly the conveyance in 1974 to Mr Cooper which took place only three years after the provisional registration of the common land which included the application land.
39. I conclude that, at the time of the provisional registration of the common land, an area of approximately 2 roods comprising the house and garden of Yew Tree Cottage (now Silver Birch Cottage) was covered by buildings or lay within the curtilage of that building. I deal below with the actual extent of that land and thus the area which it may be applicable to deregister.

Whether the provisional registration became final

40. The CR records that the entry at no. 3 on the register, recording the amended registration, became final on 1 August 1972 having been undisputed.

Whether the application land has, at all times since the provisional registration, been covered by a building or within the curtilage of a building

41. It was the case of the objectors that Mr and Mrs Watkins have extended the curtilage of their garden over the years such that not all the application land ought to be deregistered. Mr Davis acknowledged that property should not be registered as common land but produced photographs which demonstrated, in his view, that parts of the boundary of Silver Birch Cottage had been moved. He could not pinpoint all the areas, and said that in some cases it might be inches and in other cases it might be feet. He felt that the eastern boundary of the garden had been 'fluid'. He produced photographs to demonstrate changes he believes to have taken place adjacent to the track and, in particular, to the area of the large gate adjacent to his own property boundary.
42. Mr Luscott who moved into the village in 1989 and can see the hillside property from his garden, considered that the area of the garden had grown considerably. He said that it had previously been possible to see the cottage but that the garden was overgrown. He conceded that clearance of the garden may have made it look larger. Nevertheless he considered it was 'drastically' different.
43. Other objectors appeared to be more concerned about the size of the new building in the process of being constructed and the alterations to the track. There seemed to be a general impression that the alterations to the house and the garden had encroached onto the track.
44. The survey undertaken by Monument Geomatics does show that the present property boundary against the track appears to be further out than the original boundary plot marked on the OS base map, but also shows several other discrepancies in relation to the position of tracks and boundaries elsewhere (not affected by the application). Mr Watkins does not deny that he undertook work to the track, with the permission of the person whom he believed to be the landowner (Mrs Gardner) but the difference in the position of the track beside Silver Birch Cottage as shown on the survey is minimal when compared to the differences between, say, the tracks to the west. There are so many discrepancies that it would be hard to rely on this survey as showing that all the encroachment had taken place since 1972.
45. Nevertheless, I consider that Mr Davis' photographs do support his contention that there has been some encroachment onto the track, particularly by the repositioning of the large field gate at the western end of the boundary to Silver Birch Cottage. The difference is difficult to measure but appears to be in the order of up to a metre or so. This movement must have occurred since Mr and Mrs Davis moved into their property in 1994 since Mr Davis did not know the area before that time.
46. However there is no evidence to substantiate any significant alteration to the boundaries of the application land at any other point since 1972, and the alteration in the boundary between Silver Birch Cottage and the track lies

outside the application land. The application land boundary is based on the OS line (and an extension of it) which Mr Watkins says has not been re-surveyed since 1903/4.

47. Thus a small strip of the land forming part of the present curtilage of Silver Birch Cottage has not, in my view, been either covered by a building or within the curtilage of that building at all times since the provisional registration of the common land in 1971. However, that strip of land falls outside the application land.

Conclusions

48. From the information available to me I conclude that, at all times since 1971, the date of the provisional registration of the common land, the application land has been covered by a building or has been within the curtilage of a building and should therefore be deregistered.
49. It should be noted that the application land, as shown on the map attached to the Notice of Application published on 1 February 2011 and agreed as correct on behalf of Mr Watkins on 2 April 2012 by his solicitors, has been drawn by reference to the boundaries of the OS parcel 905 where it abuts the track. For the avoidance of doubt, the area to be deregistered is the area shown on the application map.

Formal Decision

50. The application is allowed.

Helen Slade
INSPECTOR

APPEARANCES

For the applicants:

Miss Anne Vincent

Solicitor, Gabbs Solicitors

Who called:

Mr Alan Watkins

Mr Edwin Owen

Mr T Beaumont

For the objectors:

Mr Miles Davis

Mrs Olga Goodwin

Mr Francis Luscott

Interested party

Mrs Christine Lawson

DOCUMENTS

1. Summary of Submissions for the applicant with bundle of documents, submitted by Miss Anne Vincent
2. Statement of Mr Alan Watkins
3. Letter dated 3 April 2012 with photographs attached, submitted by Mr and Mrs Miles Davis

