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From: Hugh Craddock [redacted]
Sent: 11 May 2022 11:05
To: Catherine Valiant [redacted]
Subject: RE: App1883 Photographs

Hi Catherine

Thank you — no, I don't think we had received the photos with the filename 'path'.

Having seen these, we consider that the site photographs support our objection. It is plain that the side elevation of Rangers Cottage (formally the side elevation of the northernmost cottage nearest the alleyway) opens onto the alleyway much as a terraced house opens onto the street. That is, the side elevation forms the boundary to the property, and the alleyway Is no part of it save as a means of access to what was, at least formerly, the front door, and possibly to a passage at the rear giving access to the back entrances to what were once the four cottages. The canopy over the front door appears to be a later innovation, which presumably went unchallenged by the estate owner of the alleyway: had the applicant not acquired title to the alleyway, he might be able to point to a prescriptive easement to maintain the canopy in place.

There is nothing else about the alleyway which suggests that it forms part of Rangers Cottage, save the recent innovation of a gate at the front to block passage along the alleyway. There is no evidence, for example, that flower beds were cultivated in the alleyway, or that a vehicle was parked in it.

In *Challenge Fencing Limited v Secretary Of State For Housing Communities And Local Government* (attached), Lieven J set out at para.18 the factors which might be relevant in determining curtilage, gleaned from the authorities.

These include (para.18(ii)) the three *Stephenson* factors:

- Physical layout;
- The ownership past and present;
- The use or function of the land or buildings, past and present.

We observe that the alleyway has always been separate from Rangers Cottage, with the north elevation of the building forming the external boundary to it. We note that, until recently, the alleyway remained in the ownership of the owner of the common. We note that, although the alleyway forms a means of access to the northernmost cottage (when there were four cottages), it did so as a quasi-public path, and there is not the slightest evidence that it was within the control of the owner of that cottage until recently acquired.

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The alleyway was not (per para.18(iv)) ancillary to Rangers Cottage: it was quite separate from the building, was not conveyed with it, and was previously open to public access: the position may lately have changed. In practice, the alleyway served the same function as any public footpath alleyway might, where it forms the only means of access to one or more houses along it. A garden might well be ancillary to the building, and a side passage wholly within the enclosure containing the building and garden almost certainly would be, but that is not the position here throughout most of the period since 1968.

Lieven J also refers (para.18(v)) to the test of: 'The degree to which the building and the claimed curtilage fall within one enclosure'. Here, they do not. The alleyway remains a separately enclosed path. To the extent that the position has changed, that is a recent innovation.

Lieven J refers at para.18(vi) to: 'The relevant date on which to determine the extent of the curtilage is the date of the application', but this refers to the particular planning circumstances of the case. In a para.6 application, the curtilage is to be determined in relation to the whole of the period between provisional registration and the date of determination.

In *Methuen-Campbell v Walters* (attached), a leasehold reform case, Buckley LJ considered what was meant by the curtilage of a property. Buckley LJ said (pp.543–544):

> ...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 and parcel 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 a 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 would 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.

In *Blackbushe Airport Ltd v R (on the application of Hampshire County Council)* in the Court of Appeal (the society intervening), the court dealt with the meaning of curtilage in the specific context of para.6. Andrew LJ, who gave the leading judgment with which the other judges agreed, said (paras.25, 57 and 62) that:

> There is in truth only one test, and that is the test articulated by Buckley LJ in *Methuen-Campbell*...

and:

> *Methuen-Campbell* is the authority in which the concept of curtilage is most clearly explained, and its correctness has never been called into question.

And:

> ...this is as good an expression of the concept of curtilage as one is likely to find.

Andrew LJ employed the last words directly following the extract from *Methuen-Campbell* quoted above.

Buckley LJ referred (emphasis added) to a 'passageway..., *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 would be held to fall within the curtilage of the messuage.' The distinct ownership and character of the alleyway here is crucial: it is not a side passage, of the kind often seen with detached, semi-detached or end of terrace houses, giving access from the front to the rear garden, but an entirely separate and separately-owned path which the northernmost cottage used as a quasi-public means of access.

So far as the applicant may have rearranged the character of the alleyway in recent years, we have received no information as to when such changes were made. But it is clear that they long post-date

provisional registration. Even if the application land could be said now to be curtilage of Rangers Cottage (which we do not concede), that does not begin to satisfy the requirements of para.6.

In our view, the application land during the period since 1968 failed to satisfy the approach taken by Lieven J in *Challenge Fencing*, and fails the classical *Methuen-Campbell* analysis. The application must therefore be refused.

regards

Hugh

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From: Hugh Craddock [redacted]
Sent: 10 May 2022 09:21
To: Catherine Valiant [redacted]
Subject: RE: APP1883 Rangers Cottage, Peaslake. Application to deregister common land

Caution: This email originated from outside Surrey County Council.
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Hi Catherine

Thank you for your recent emails. We do wish to respond to them.

First, we object to the applicants being permitted to amend their application so as to exclude part of the application land.

In the *Trap Grounds* case before the House of Lords (*Oxfordshire County Council v Oxford City Council*), the judicial committee was asked for:

> a ruling as to whether, as a matter of law, it was open to the [county council] to permit the application to be amended so as to refer to some lesser area, and if so, according to what criteria… .

The application was one to register land as a town green under s.13 of the Commons Registration Act 1965, in which the applicant subsequently sought to exclude from the application part of the area originally applied for. We submit (and it seems generally to be accepted) that the same principles should be applied to such an application under s.15 of the Commons Act 2006, and more generally, to any application under Part 1 of the 2006 Act (and particularly one affecting the extent of registered land).

Lord Hoffmann, who gave the leading opinion, said (para.61):

> …it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared.

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Lord Hoffmann endorsed the approach taken by the inspector and the general remarks of Carnwath LJ in the Court of Appeal below (he refers to paras.73–75, but this appears to be an erroneous reference to paras.103–105). In his opinion, he reports (para.30) the conclusions of the inspector as follows:

> Mr Chapman decided that he (or the registration authority in whose name he was acting) had power to allow an amendment but refused leave on the ground that the owner of the land (the city council) was entitled to have the status of the whole application land determined and not be faced with the possibility of a later application in respect of land which had been excluded.

Lord Scott agreed (para.111), wishing:

> …to emphasise my agreement that a registration authority should be guided by the general principle of being fair to those whose interests may be affected by its decision.

Lady Hale agreed with the ruling of Carnwath LJ.

It appears that the sole purpose of the amendment sought by the applicants is to remove the determination of the application from the jurisdiction of the Planning Inspectorate, by excluding from the application area the land in which the parish council holds a leasehold interest. in our view, the amendment has an artificial purpose, which is to deprive objectors of the opportunity of having their objections heard and determined by an inspector appointed by the Planning Inspectorate.

Where an amendment is sought to be made in recognition that, for example, parts of the original application land were ineligible for deregistration, or the applicants had changed their mind and no longer wished to secure the deregistration of a particular part, then it might be that none of the objectors would demur if the commons registration authority accepted the proposed amendment.

However, here, we do object to the proposed amendment, and we submit that it ought to be refused. We say that the objectors, including the parish council, are entitled to have the application determined in relation to the proposed excluded land, and not to have that determination of the status of that land removed from the scope of the decision-maker because it suits the applicants to do so — still less to influence the course of the determination of the application. Insofar as your authority has purported to accept the application to amend, we submit that it was incorrect to do so, and should resile from that decision.

Secondly, we note that the application continues to lack a credible narrative of why the application land is curtilage of Rangers Cottage. The applicants appear to be at pains to show that the cottage long predates the date of provisional registration of the common, which we understand to be 8 May 1968. We do not for a moment dispute that. But what the applicants have not shown is whether the application land is curtilage of the cottage, and if so, whether it also was curtilage in 1968 and throughout the intervening period. The applicants focus on whether the alleyway today is curtilage, but without submitting any evidence to demonstrate the position in 1968 and subsequently.

It is not for the objectors to prove their case by submitting evidence that the land is not curtilage, but for the applicants to submit evidence to show that it is curtilage. This they have failed to do. The applicants make the following relevant statements in their response dated 13 October 2021, which for convenience we have labelled (a) to (e):

(a) The land is situated at our northern boundary and is separated from our neighbours' property by a formidable man-made ancient wall of earth and rubble and goodness knows what else, which is over six feet high in places and originally eight or nine feet wide at its base.

(b) We would further make the point that there was no fence or hedge dividing our garden from the subject land when we purchased our property, and it was to all intents and purposes indistinguishable from our garden as a single entity enclosed by this boundary wall.

(c) It is clear on any physical observation that the land is four-square within the curtilage of our dwelling, and is integral to the functioning of our end cottage and provides the only access to the front door.

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(d) …the land was purchased separately from Rangers Cottage…

(e) The land is barely five foot wide where it meets the front door of our end cottage and further narrows beyond our building to a tunnel-like, dank and unpleasant track.

As the applicants have noted (at (d)), they acquired the title (SY849295) to the application land, along with the common between Rangers Cottage and the road, separately from Rangers Cottage itself. They acquired this from the Bray estate. They appeared to acquire this land in 2015, having regard to the date shown in the proprietorship register. That the title to the application land and Rangers Cottage was held separately and by different parties until 2015 is itself strongly suggestive that the application land was not, at the date of provisional registration and at least until 2015, curtilage with Rangers Cottage. We note that the Ordnance Survey County Series 25-inch map of 1913 shows the application land as a distinct, enclosed alleyway between Rangers Cottages (as they then were) and the parcel of land to the north. It may well be that the northernmost of the four cottages took and continues to take access from the alleyway: that no more constitutes the alleyway curtilage of the end house (still less the building as a whole) than any alleyway might be curtilage of a house to which it gives the sole means of access (a common arrangement in the nineteenth century). It also will be noted on the 1913 map that, at that date, the cottages did not have gardens stretching back west to the common boundary.

We acknowledge the substantial northern boundary wall to the alleyway. We do not know for how long the southern boundary, shown on the map of 1913, endured, or indeed whether it has been rebuilt by the applicants (as they imply (at (b)) — but then nor do you. Without such evidence — and more recent Ordnance Survey mapping should be helpful in that respect — it is impossible to conclude, as the applicants assert, that the alleyway was in 1968 curtilage of Rangers Cottage, and remains so today.

Moreover, we note that, whereas in 1968 Rangers Cottage presumably was still four separate cottages, today it is only one. In our view, the applicants must also show that, in 1968, the alleyway was curtilage of a 'building', and identify which building to which they refer.

Finally, I note that the response dated 13 October 2021 states that:

> We can send you more photographs to illustrate the point further if required, but those we have sent… .

I do not think we have seen the photographs already sent at this time. Please may we have copies?

regards

Hugh

Hugh Craddock
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From: Bob Milton [redacted]
Sent: 10 April 2022 14:25
To: Catherine Valiant
Cc: [redacted]
Subject: RE: APP1883 Rangers Cottage, Peaslake. Application to deregister common land

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Dear Team
Further to your email below this is to confirm that I have not changed our comments and maintain our objection.
Bob Milton
SE Regional Common land officer
British Horse Society

From: Catherine Valiant [redacted]
Sent: 07 April 2022 11:02
Subject: APP1883 Rangers Cottage, Peaslake. Application to deregister common land

Good morning all,

I write with reference to the ongoing application to deregister common land at Rangers Cottage, Peaslake.

Following submission of objections and comments from a number of sources we advised the applicants that we would need to refer the application to the Planning Inspectorate for determination, as Shere Parish Council has a leasehold interest in part of the application site and had raised objections to the application. This is in accordance with regulations 26(2) and (3) of the Commons Registration (England) Regulations 2014/3038.

The applicants subsequently submitted an amended application plan, excluding the area subject to the lease, showing the application site hatched blue. We are proceeding on the basis of the amended application plan and the application will remain for determination by the Council.

As the application plan has been amended this is being circulated, and is attached to this email. I have also included additional information and photos recently provided by the applicants, for comments. In addition I have attached an email dated 25th October from the applicants which, in looking back at my records, I don't believe I have sent before.

In order that we can move this case on I would be grateful if you could take a look at the attached documents and if you have any comments or observations that you wish to make that you do so by 28th April.

If you originally objected to the application for deregistration it would be useful if you could confirm whether you maintain your objection in the light of the amended plan and comments by the applicant.

Many thanks

Catherine Valiant
Countryside Access Officer (Legal Definition)
Countryside Access Team
[redacted]

From: Shere Parish Council
Sent: 11 April 2022 09:41
To: Catherine Valiant
Cc: [redacted]
Subject: RE: APP1883 Rangers Cottage, Peaslake. Application to deregister common land

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Caution: This email originated from outside Surrey County Council.
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Dear Catherine

Thank you for the detailed outline concerning APP1883. Please see comments below from Raymond Smith, Planning Committee Chairman;

By saying that "The Bray Estate's own evaluation of the land which it included in the sale of almost 384 acres of the Hurtwood, was that it was little more than manorial waste" they have destroyed their claim. If the land was sold to them as manorial waste then it cannot have been part of the curtilage of the house. It was by definition unenclosed land and one would expect it to have been common land. It is also implied that the land was sold to the applicants separately from them buying the house, which means that it cannot have been part of the curtilage (even if it had not been common land). This is further confirmed by the applicants' statement that they bought Rangers Cottage over 20 years ago whereas the sale of land on the Hurtwood was within the last 10 years.

Assertions about the age of the house are irrelevant, this is not in dispute. The significant question is the extent of its curtilage, not whether it existed.

As common land there is a right of public access over it under the CROW Act. This is not the same as whether there is a specific right of way.

The garden wall to the front of the cottage(s) continues back and joins the frontage of the cottage at its northern end. If the land to the north of the cottage was part of the curtilage then there would not have been a need for a wall. This clearly implies that the door on the north wall which gave access to the most northerly of the original cottages opened onto the common land.

The photos appear to show the boundary bank of Old Vine Cottage to the north of the unenclosed land. This does not indicate that the land in question was enclosed. The applicants refer to the land as being enclosed. Physically that is now the case in that there is a new gate and hedge between the land the parish council leases and the strip at the side of the cottage, however that is a new and unauthorised installation

on common land and does not establish that the land is legally enclosed. It is worth noting that this new fence is in line with the front of the cottage garden, not on the boundary of the land claimed on the revised map. The fence is therefore clearly on land that they are no longer claiming as part of the curtilage. Some of the hedge may be on land leased by the parish council (this is based on a Google Streetview image dated July 2021, not on a site visit). The bank that crosses the unenclosed strip (i.e. north-south) does not appear to be boundary bank but may be the result of excavation to facilitate the building of the most northerly (and youngest) section of Rangers Cottage.

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As to the comment about the Bray estate not burdening the access with registration as common land, the registration would have been based on matters of fact not on the wishes of the Bray estate. In the absence of a chronology for the original sale of the cottage(s) it is not possible to see how far their reasoning is meaningful.

Kind regards

Jonathan Duffy
Drop-In Coordinator/Administrator
Shere Parish Council
01483 203431
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ANNEX H

Tel: [redacted]
Please ask for: Judith Shephard
Email: [redacted]

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Mr H Craddock
Case Officer
Open Spaces Society
25a Bell Street
Henley on Thames
RG9 2BA

By email

Our ref: Legal/110333/JSH

13 May 2022

Dear Mr Craddock

Application 1883 – Rangers Cottage, Peaslake

I write with reference to your email of 10 May 2022 to Catherine Valiant.

It is within the Council's discretion to allow amendments to an application. Allowing an amendment to the application plan in this case follows DEFRA's guidance on this point and is not inconsistent with the *Trap Grounds* case.

The Council is endeavouring to follow a fair procedure and there is no intention on the Council's part to exclude the objectors from the process. The amended plan was sent to the consultees for comments. These will be sent to the applicant for any further comment before the next steps on this application are taken.

Whether the decision maker is the Council or the Planning Inspectorate, in determining the application, it is assessed against the same criteria in Schedule 2 (paragraph 6) of the Commons Act 2006.

We will keep you updated on the progress of this application.

Yours sincerely

[redacted]

Judith Shephard
Senior Lawyer