ADVICE

In the Matter of an application to de-register land as a common at Blackheath

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1. I am instructed by Surrey County Council in its capacity as the commons' registration authority ('CRA'). My advice is sought on whether grounds exist which require it to accede to an application to de-register land falling within the reference CL 435. We are dealing with a substantial Grade II listed property set in the Surrey Hills Area of Outstanding Natural Beauty with gardens and grounds extending to around 12.4 acres. Not all of this land is managed. My impression from the plans and from what I have been able to observe on *Google earth* is that roughly half the land (i.e. the western half) comprises of extensive woodland acting as a buffer between the main house and Littleford Lane in the west and the publicly-accessible heath to the north.

2. The issue on which my advice is sought is whether the CRA should accede to the application to de-register CL 435 and, if not, how should the application be managed from hereon by the CRA?

3. This application is made under the Commons Act 2006, Sch.2, at para/6, which enables land to be de-registered as common land in circumstances where land was registered under the default procedure contained in the Commons Registration Act 1965. This was originally a registration of rights of common. However these rights were released by the applicant commoner in 1978; in other words, the relevant land is a registered common to which the public has access under the CROW Act 2000 but with no subsisting rights of common thereon.

4. It was a deficiency of the 1965 Act that registrations of common land and common rights could become final by default even though the land was never common land or the rights never existed. Furthermore, regulations made under the 1965 Act did not even provide for sufficient notification to the public

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of applications made for provisional registration of common land and rights of common. This meant that many provisional registrations became final without objection and thus without any independent appraisal of the original application. The Court of Appeal also found (*Corpus Christi College v Gloucestershire CC* [1982] 3 All ER 995) that the 1965 Act provided no mechanism to enable land to be removed from the register once the registration became final even where the land had clearly been wrongly registered as common land. The likelihood of this happening was exacerbated by the fact that there was no provision for notifying the landowner that an application for registration had been made. Particular problems arose when registration included back gardens or even buildings, as arises in this instance. The result was that although the 1965 Act made provision for alteration of the register arising from event occurring after 1970, no such provision was made to overcome mistakes made in the course of the original registration process.

5. Provision for rectifying registers (i.e. de-registration) was initially made in the Common Land (Rectification of Registers) Act 1989, but the Act only applied in the case of land on which there is a dwelling-house or land which is ancillary to a dwelling-house. For the purposes of the 1989 Act, land ancillary to a dwelling-house was taken to mean a garden, private garage or outbuildings used and enjoyed with the dwelling (s.1(3)). There are two useful authorities on the 1989 Act (under which any application had to be made by mid-1992), namely *Cresstock Investments Ltd v Commons Commissioner* [1992] 1 WLR 1088, and *Re Land at Freshfields* (1993) 66 P&CR 9.

6. It is, I think, plain from these cases that the expressions used in the 1998 Act were to be construed liberally having regard to the purposes of the Act which was the remedying of inadvertent expropriation or dedication of public use. So it was that in *Cresstock* that a registration was cancelled in the case of a little over an acre of garden land which was found to be overgrown woodland (which was quite separate from the dwelling which was surrounded by a well-cultivated lawn and flower beds. The view taken was that the fact that ownership of the land had passed with the house since 1933 raised a

presumption that the land was ancillary to the house as part of its garden and there was no evidence to rebut that presumption. Although it is quite true that we are dealing, in this instance, with a substantial residence dating from a period when large gardens were commoner than they are today, Judge Paul Baker QC in *Cresstock* on p.1093 at C, did note *'that it may be that the grounds associated and held with a house are so extensive that they could not be said to be ancillary to it'*. The *Freshfields*' case involved two fields (which had been used at times for cattle grazing or the growing of hay) adjoining the applicant's home but separated from it by a high and overgrown hedge. The Commissioner and, on appeal, the court ruled that the fields could not be described as a garden within the meaning of s.1(3) of the 1989 Act.

7. One then turns to the Planning (Listed Buildings and Conservation Areas) Act 1990 which, at s.1(5)(b), extends the meaning of a listed building to *'any object or structure within the curtilage of a building which, although not fixed to the building, forms part of the land and has done so since before July 1, 1948 .. '*. In *AG, ex rel. Sutcliffe v Calderdale BC* [1983] JPL 310, the Court of Appeal held that a terrace of cottages which had been constructed as mill-workers' dwellings adjacent to, and linked by a bridge to, a mill which was now a listed building, was within the curtilage of the mill and thus included in the listing by virtue of s.1(5). In *Morris v Wrexham County Borough Council* [2002] 2 P&CR 7 the High Court derived from the various authorities the principle that building A is within the curtilage of building B if (a) the buildings are sufficiently close and accessible to one another; and (b) in terms of function, building A is ancillary to building B. In the same year the Court of Appeal ruled in *Skerrits of Nottingham Ltd v SSETR* [2000] 2 PLR 102, that it was not an essential feature of a curtilage that it be small, and that in the context of the 1990 Act, the curtilage of a substantial listed building was likely to extend to what were, or had been, in terms of ownership and function, ancillary buildings (such as, for instance, stabling and associated buildings within a courtyard or other outbuildings near the main house and might even extend to statues in a closely managed garden or terrace). Accordingly, in *Skerrits* the Court of Appeal ruled that a stable block some 200m away from the listed building fell within the curtilage of that property.

8. The difficulty with drawing analogies with the 1990 Act is that its purpose is to protect listed buildings and ancillary structures which have a real impact on their setting. It has nothing at all to do with the curtilage of a building which has been mistakenly included within the registration of land as common land to which the grounds for de-registration contained in the 1989 Act are clearly more suited. I agree with the Open Spaces Society ('OSS') in their email dated 12/09/2016 that the correct approach in this case must surely be to look at the mistakenly registered building in isolation and to determine the true extent of its curtilage without regard to the heritage of the built environment. Such a conclusion is also consistent with what one commonly looks for in terms of curtilage, at least as a useful starting-point, namely the land immediately surrounding a house or dwelling, including any closely associated buildings and structures. It is clearly feasible to include a large garden within the curtilage of the principal house but if the grounds are very extensive or even unmanaged or unfenced it becomes difficult to say that such land is ancillary to the main building. The fact that it may be held within the same title as the land nearer the main building will of itself, in my view, never be enough.

9. We are helpfully provided with a plan (Figure 12) showing an outline in green of the registered land and (in red) of the land held by the applicants. On the face of it, the eastern side of this parcel appears to be managed land with the remainder comprising a large area of woodland which seems to have little or no functional association with the main house and its surrounding land and, on the face of it, appears to be indistinguishable from the neighbouring heath. The OSS say that they have no objection to the application being granted *'in relation to the buildings contained within the application area, and the gardens, yards and other immediately ancillary land to them'*. However, without a plan defining this specific curtilage it would inevitably become a matter of interpretation and contention. I might add that I agree with the view of DMH Stallard on behalf of the applicants that the designation of land as a SSSI does not preclude such land from being within the curtilage of a building mistakenly registered as common land.

10. One then turns to the CA 2006, Sch.2, para/6 (under the heading: Buildings registered as common land), which came into force in the area of the CRA in 2014. If the CRA is satisfied that the relevant land complies with the conditions mentioned in para/6(2) then it must remove the land from its register of common land. Para/6(2) applies to land where (a) it was provisionally registered as common land under s.4 of the 1965 Act (which occurred in this case on 24/09/1968); (b) on that date the land was covered by a building or was within the curtilage of a building (the main house in this case was built 1894-5); (c) the provisional registration became final (this occurred 1/08/1972); 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 (this is the case). The main question then is to identify the curtilage of the qualifying built development.

11. I am firmly of the opinion that the CRA should not accede to the application in its current form. What I think the CRA should do is to inform the applicants' solicitors that the preliminary view of the CRA is that the application should be rejected unless the application plan is amended to exclude the woodland on the western side which is considered to be outside the curtilage of the qualifying built development and managed areas to the east of the woodland. It is no function of the CRA to find a line for the applicants who should be encouraged to seek advice about the matter before lodging a new plan to which further consideration will be given.

12. This is a case where the Commons Registration (England) Regulations 2014 apply (see reg.1(3)(b)). It is not a case where PINS should be invited to take over the application under regs.26(2)-(4). It is (at least at the moment) an appropriate case for the appointment of an inspector and an informal hearing under reg.27(7).

13. In the first instance, the applicants should be asked whether they wish to proceed with their application in its current form or whether they wish to amend their application plan (and the CRA may direct applicants to provide any further information or documents necessary to enable the application to be determined (reg.20(2)) to exclude the woodland on the western side which

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is considered by the CRA to be arguably outside the curtilage of the qualifying built development. It is no function of the CRA to tell the applicants where they should draw their line.

14. If the applicants do not wish to amend their application plan then arrangements should be made for the instruction of an inspector who should carry out an accompanied site visit with a view to an informal hearing later on the same day under reg.27(7). In such a case it would be sensible if the inspector provided a short report in advance in which he identifies the issues in the case and the concerns of the CRA.

15. If the applicants do wish to amend their application plan to exclude the contentious curtilage the new plan should be forwarded to the objectors for their consideration. These objectors should also be invited to a site visit and to a later hearing unless, that is, the new plan is plainly acceptable in which case the CRA may prefer that the matter is disposed of on the basis of written representations.

16. My instructing solicitor should not hesitate to get back to me if she has any further queries in the meantime.

William Webster

3 Paper Buildings

Temple

17 October 2017