

**WORCESTERSHIRE COUNTY COUNCIL  
COMMONS ACT 2006**

**REPORT OF PRINCIPAL CONVEYANCER FOR DECISION BY HEAD OF LEGAL  
AND DEMOCRATIC SERVICES**

**APPLICATION FOR THE REMOVAL OF LAND FROM THE REGISTER OF COMMON  
LAND:**

**LAND FORMING PART OF THE MOUNT, TRIMPLEY GREEN, HABBERLEY ROAD,  
TRIMPLEY, BEWDLEY WORCESTERSHIRE DY12 1NL – REGISTER UNIT NO.  
CL100**

Documents attached:

1. Application form with supporting documents numbered
2. Plan showing the extent of Unit CL100 according to the Applicants
3. Extract of Register of Common Land
4. Objections (paginated)
5. Documents from the Council's historic file (paginated)
6. Further representation of applicant dated 17 August 2017

**1. The Application**

- 1.1 A joint application under Schedule 2 paragraph 6 of the Commons Act 2006 was made on 27th July 2016 by Roger Michael Wood and Brenda Constance Wood of Crofton Park, Habberley Road, Trimpley, Worcestershire DY12 1NL and Jonathan Pass and Elizabeth Anne Pass of Crofton Lodge, Habberley Road, Trimpley, Worcestershire DY12 1NL.
- 1.2 The Applicants claim that the land registered under register unit number CL100 includes land wrongly registered as common land. The application states that the land wrongly registered as common land forms part of the

curtilage of premises now known as Crofton Park and Crofton Lodge Habberley Road Trimpley Worcestershire DY12 1NL ("the Disputed Land") the extent of which is shown edged blue on the attached plan and being registered at HM Land Registry under title numbers HW154497 and WR165175 and which can be found at supporting documents 4a and b in the Application Form.

- 1.3 The Applicants state that Crofton Park and Crofton Lodge are currently houses and gardens and will continue to be used as such.

## 2. Representations

39 representations were made of which 36 were objections. None of the objectors has a proprietary interest in the Disputed Land or CL100. An anonymous letter was circulated in the village and when a letter was sent to the objectors to clarify the extent of the application two objections were withdrawn. Of the remaining objections the majority referred to the loss of 'amenity'. This is not a legitimate ground for refusal and the Council has had regard only to objections relating to the statutory grounds for application and to evidence relating to the existence or otherwise of a house and curtilage on the Disputed Land at the time of provisional registration. A good number of the objections were in relation to the amenity of CL100 more generally and did not refer specifically to the Disputed Land.

## 3 Background

- 3.1 The Commons Register and Map shows that the common land registration including the Disputed Land was made provisional on 27 June 1968 and became final on 15th April 1971 (Sheet 299 entry number 4). At that time there was no building on or against the Disputed Land. The adjacent site was occupied by the original Mount Cottage which was set within its own enclosed garden. The only access to the cottage was through a wicket gate from the road and it was hedged against the common. There was no access across the common land as indicated on the attached photographs / copy maps marked "A" and "B". The Disputed Land referred to in the application did not form part of the original Mount Cottage or its curtilage.

- 3.2 A planning application KR 495/72 for the extension, renovation and improvement of the original Mount Cottage was submitted but refused on 19th December 1972
- 3.3 A further planning application KR455/73 was subsequently submitted and approved in 1973.
- 3.4 The modernised house (now called Crofton Park, formerly Mount Cottage, together with Crofton Lodge, which was converted from the garage serving Crofton Park and for which planning permission was finally granted in 2010 after having been used as a dwelling in excess of four years without permission) was not built in its present form until after 1973. It would appear that the present driveway across the Disputed Land was constructed around 1977 (see Para 3.6 below).
- 3.5 In September 1977 an inspection of the Disputed Land by the County Estates Surveyor revealed that part of the Disputed Land had been made into a lawn and the access drive to Mount Cottages had been laid over it. There was also a sign which stated that the area was "private".
- 3.6 On 31st May 1979, the Council wrote to Mr J. K. Briggs, Mrs J. E Briggs and Mr D Hall (the former two being the owners of the two areas of common land within which the Disputed Land is situated at the time of registration; and the latter the owner of Mount Cottage at the time of writing the letter) requesting action to remove encroachments from the Common (copy letters attached). Following this, the fencing was understood to be removed, the private sign removed from the Disputed Land but the driveway remained as constructed.
- 3.7 On 15th June 1979 a telephone call was received by the Council from Mr Hall, a Parish Councillor of Trimpley as well as part owner of Trimpley Common followed by a letter from Mr Hall dated 16 June 1979. He confirmed that it was his drive and admitted that it had been constructed with his knowledge on common land approximately two years previously (copy letter dated 16th June 1979 attached).
- 3.8 There is extensive correspondence on file about this dispute, but this mainly comprises letters from complainants and is at this stage considered to be personal information.
- 3.9 On 10th July 2003 Caroline Cooper of Mount Cottage, Habberley Road, Trimpley, Bewdley Worcestershire made a declaration ( copy attached)

which would not appear to have been submitted to the Land Registry that since 2nd September 1994 she and Robert John Cooper had used and occupied the Disputed Land continuously as garden ground and Driveway continuously in full free and undisturbed possession and enjoyment of it to the exclusion of all others without giving any acknowledgement of the title or any other person to it or any part of it and without the consent of any person and without any claim adverse to their title to it. A similar statutory declaration was also made by a Mrs Wright who had occupied the property from 1972 with her former husband John Hall and was then owner of the property from 12 March 1992 until its sale by her in 1994. Neither of these statutory declarations is considered relevant to the status of the land as common land.

- 3.10 The statement contained in Clause 3 of the Coopers' Declaration is qualified to the extent that both Caroline Cooper and Robert John Cooper were aware of the fact that the Disputed Land is subject to rights of common as noted on the result of an Official Search of the Registered of Common Land and Town or Village Greens dated 11th June 2003 including the plan annexed thereto.
- 3.11 Since 2003 the Disputed Land has remained unfenced and no steps would appear to have been taken by the declarant or her successors in title to substantiate a claim for adverse possession.
- 3.12 On 6th May 2016 a letter was received from Messrs Bendall & Sons Solicitors of Ashton House, Mill Street, Mildenhall, Suffolk IP28 7DW notifying the Council of a proposed application to remove the Disputed Land from the Commons Register on the basis that it had been incorrectly registered.
- 3.13 On 29th July 2016 a joint application was received on behalf of the Applicants to deregister a small part of common land under Unit CL100 being an area of registered common land that they purported to lie within the curtilage of their properties (being their garden and driveway).

#### **4. The Law**

- 4.1 The Commons Act 2006 Schedule 2 Paragraph 6 requires the deregistration of common land which is covered by a building or within the curtilage of a building if the Council is satisfied the statutory grounds are

made out. If not so satisfied, it cannot deregister. Typically, such land may have been registered so as mistakenly to include cottages or gardens on or abutting the common or green. The criteria for deregistration under paragraph 6 of Schedule 2 is set out in paragraph 6(2), to the effect that:

- 4.1.1 the land was provisionally registered as common land or green under Section 4 of the 1965 Act,
  - 4.1.2 on the date of the provisional registration, the land was covered by a building or was within the curtilage of a building,
  - 4.1.3 the provisional registration became final, and
  - 4.1.4 since the date of provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.
- 4.2 The application must comply with the Commons Registration (England) Regulations 2014 and the County Council as Commons Registration Authority is obliged to deal with the application in accordance with those Regulations.
- 4.3 The application now falls to be determined by the Council under Regulations 26 and 27.
- 4.4 The Council is not aware of any other person whose civil rights would be determined if the application is refused and considers that all other matters referred to in Regulations 26 and 27 have been complied with.
- 4.5 Under Regulation 33, before the application is determined the Council may conduct an inspection of the land affected by the application. In the circumstances of this application it is considered that an inspection is not required as the determination is reliant on historical fact rather than current conditions. In accordance with their legal rights, the applicants requested to make oral representations in relation to the draft report, and accordingly met Mr Simon Mallinson with Mrs Fiona Morgan in attendance in May 2018. This report has had regard to those representations.

## **5. Conclusion**

- 5.1 The application is flawed in that it does not make out the statutory grounds for deregistration.
- 5.2 Having first considered the evidence on the Council's file when the land was first registered it is clear that the Disputed Land was registered as part of the common prior to the renovations and extensions to the former Mount Cottage.
- 5.3 The Commons Register shows that the land was provisionally registered on 27 June 1968 and finally registered in April 1971 under the Commons Registration Act 1965 (sheet 299 Entry 4 dated 15<sup>th</sup> April 1971). At that time there was no building in, on or against the Disputed Land. The original Mount Cottage was set within its own enclosed garden with the only access through a wicket gate from the road. It was hedged against the common and did not form part of any application to register it as part of CL100. There was no access across the common land as shown on the attached photographs and maps supplied by Kidderminster Foreign Parish Council. Whilst the applicants believe that the photographs produced by objectors may not show the Disputed Land in its entirety and there was a possibility that the Disputed Land could have been used as a drive at the time of provisional representation, they accept that there is no actual evidence of that.
- 5.4 Furthermore it is clear that from persuasive evidence produced by several of the objectors that at the time of registration of the common the property known as Mount Cottage was occupied by the housekeeper of the owner of The Mount on the opposite side of the road, Mrs Briggs, who was also one of the owners of part of the common and made no objection to the inclusion of the Disputed Land in the common rather than exclusion as part of the curtilage of Mount Cottage.
- 5.5 The historical maps and photographs and objections indicate on balance that Mount Cottage was a single dwelling completely enclosed by hedging

and with no access to the adjoining Disputed Land until such time as a subsequent owner installed a new driveway across the common.

5.6 While the applicants felt that the existence of a Conveyance that the Disputed Land was sold 'without encumbrances' indicates that the common land rights and status were extinguished, in law this is not the case.

5.7 Subparagraph 2 of Paragraph 6 of Schedule 2 to the Commons Act 2006 sets out various tests which an application must meet if the application is to be granted.

5.8 The outstanding tests are those set out in paragraphs (b) and (d) of subparagraph (2).

These are that:

(b) on the date of the provisional registration the land was covered by a building or was within the curtilage of a building

(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.**

5.9 The test is whether the Disputed Land was at the time of provisional registration and still is covered by a building or within the curtilage of a building. The applicant has provided no evidence that the Disputed Land was curtilage as at 27<sup>th</sup> June 1968. It is clear from the evidence produced by several of the objectors that the Disputed Land did not 'belong' to the original Mount Cottage or form part of its curtilage. The 1972 Conveyance conveys the land as two separate parcels of land and the Disputed Land is separately described and has a separate root of title from the remainder of Mount Cottage and its land which is also persuasive of the fact that it did not form part of the curtilage of Mount Cottage at the time of provisional registration of the common.

5.10 The modern house (now called Crofton Park, formerly Mount Cottage) was not built in its present form until at least 1973 following a

refusal of the original planning application in 1972 and following the eventual grant of planning permission in 1973. There is no evidence that the Disputed Land was covered by a building on 27 June 1968.

- 5.11 The present driveway across the Disputed Land was constructed some time after this building work was carried out.
- 5.12 The application does not satisfy the relevant tests (based on the balance of probabilities) during any part of the relevant period as it is clear that there was no building on the Disputed Land at the time of provisional registration and that the Disputed Land was not within the curtilage of a building at that time and no attempt was made to bring it within the curtilage of a building until at least 1973.
- 5.13 In respect of Human Rights, it may be that deregistration of the Disputed Land would deprive the commoners and public at large of part of their rights. Deregistration would be beneficial only to the applicants, who would gain exclusive control over the Disputed Land. It would serve no public interest to deprive the commoners of their property rights, or the public at large of the qualified legal access to the Disputed Land although it is acknowledged that the provisions of the Countryside and Rights of Way Act 2000 does not give the public at large access to 'excepted land' which is land within 20 metres of a dwelling house. The applicants have indicated that such access rights were not taken up in practice and that the above provision meant that they were of little use anyway.
- 5.14 The Council needs to make its decision based on the statutory grounds. There has been no mistake in the registration of the Disputed Land and the application should be refused as the statutory grounds under Commons Act 2006 Schedule 2 Paragraph 6 have not been met.
- 5.15 Following communication of this original recommendation to the applicants a representation from the applicants dated 17<sup>th</sup> August 2017 was received by the Council. Although the applicants made claims that a previous owner of the land and of common rights had surrendered his rights of common in



1972 and thereby the land had ceased to be common land, no evidence was offered to support this; no mention was made regarding the owners of other common rights over the common; no application was made to change the register at any time until the current application; and the Commons Act 2006 specifically provides in s3(6) that "no land registered as common land...nor any right of common registered in the commons registers is to be removed therefrom except as provided for under the 2006 Act or any other enactment." It is therefore considered that nothing in this representation affects the conclusion that the Disputed Land was correctly registered and this application should be refused.

- 5.16 The applicants in accordance with the Regulations have been offered an opportunity to make oral representations having been notified of the anticipated refusal of the application and provided with the draft report. This took place at the Council's offices on 9 May 2018. The applicants made some fair references to perceived inaccuracies in the Report circulated. Some changes were made in the Report but the overall conclusion remained the same.
- 5.17 The Council accepts that the applicants made their application in good faith and based on a misunderstanding of this complex area of law. It also accepts that there is some question about whether the Disputed Land is 'access land' under the Countryside and Rights of Way Act 2000 due to its proximity to a dwelling house. However, fundamentally the ownership or use of the land or consequences of being registered common land are not matters for the Council, which must decide whether the statutory grounds for deregistration are made out.

## **6. Other matters**

- 6.1 The Hereford & Worcester County Council (the predecessor to the Council) was made aware of the encroachment onto the Common Land by Councillor D Hall of Mount Cottage in 1979 but resolved to take no further action other than demand that the notice "Private Land" be removed. It was felt that the means of access did not interfere with the rights of other commoners or the public.

- 6.2 The driveway required consent under Section 194 of the Law of Property Act 1925 (if constructed before 2007). There appears to be no record of any such consent being given by the Secretary of State.
- 6.3 Any person is entitled to take court proceedings in respect of unauthorised works on a common (s.41 Commons Act 2006). The Council does not have any particular role in this respect and it is not proposed that the Council as Commons Registration Authority take any specific action beyond determining this application. It is noted the encroachment has been in place many years.
- 6.4 The Council is not the authorising body for works on Commons (the Secretary of State has this function). That being so, it is not the Council's function to seek to regularise the position.
- 6.5 There may be private land law questions over land ownership and access, but these do not affect the status of the Disputed Land as Common.

## 7. Recommendation

It is recommended that the application be refused on the grounds set out in Paragraph 5 above.

Fiona Morgan  
Principal Conveyancer

25 May 2018

I agree/ ~~do not agree~~ the recommendation made in the report above.



25/5/18

S Mallinson  
Head of Legal & Democratic Services



