APPENDIX 5

1.

From: Christopher Lasper [redacted]
Sent: 21 April 2022 15:36
To: Registration, Commons <Commons.Registration@cumbria.gov.uk>
Cc: [redacted]
Subject: Re: FW: Application CA13/36 - Waterhead Marine, Waterhead, Ambleside

Sirs,

Further to your below of 19 April, I have hesitated to take any of your time with any further representations; however:

I am concerned only with the easterly parcel; such attempts as the Applicant's response makes to show that any of the easterly parcel is curtilage of any building all fail because they rely on tests rejected by the first of the passages in Buckley LJ's judgment that the Court of Appeal italicised in their paragraph 61, namely "*Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other*."

Nor is it encouraging of any case for the easterly parcel that it was wholly acquired under the independent title CU262225 (the other side of the A591); how is such land capable of being part and parcel (i.e. curtilage) of other land (cf. paragraph 59's last sentence)?

Yours sincerely,

Christopher J.R. Lasper

OBJECTION TO APPLICATION REF NO CA13/36 TO DEREGISTER CL.155 (TWO SMALL AREAS OF LAND TO THE SOUTH OF WATERHEAD, AMBLESIDE ON EITHER SIDE OF THE A.591)

(1). The following are my comments on the applicants' response of 13 April to the objections received on case no CA13/36 (Waterhead Marine, Waterhead, Cumbria). My main concern is with the parcel of land that lies to the east of the A591. It may be that the land to the west of the A591 is covered by Schedule 2(6) and that the application in respect of this land is valid. However, as is pointed out below, even as regards this land, the case presented by the applicants is vague, incomplete and inconclusive.

(2). The Schedule 2(6) application concerns two distinct pieces or parcels of land that are separated from each other by a main road. There are buildings on the western piece of land but none on the eastern piece. In terms of Schedule 2(6), then, the applicants must show that the eastern piece is the curtilage, or forms part of the curtilage, of one or all of the buildings on the other side of the road.

(3). It is not possible to be more precise than this because the applicants have not specified whether there is (e.g.) a principal building with a curtilage that includes all of the other buildings; or whether each of the buildings possesses its own separate curtilage. In either case, the necessity would be to identify the building whose curtilage is claimed to include the land on the other side of the road. In fact, the applicants have made no attempt to do so.

(4). According to para 9 of the applicants' response:

> The land on the eastern side of the A591 has been used for the storage of boats and to provide parking in connection with the operations in the buildings. One of the buildings on the western parcel is a workshop, which is used in connection with the adjacent marina and the land and on the east side of the road is part and parcel of the operations which take place within the building.

The claim here, then, is not that the land to the east of the A591 is part of the curtilage of one of the buildings (the workshop) on the other side of the road; and that it would naturally be considered to be part and parcel of that building (with the two taken together constituting an integral whole). ***This is what would need to be shown if the Schedule 2(6) application were to be valid.***

(5). However, what is being asserted – and no more than this is being asserted – is that the land to the east of the A591 is considered by the applicants to be essential to *the operations that take place* in the workshop. This is on a par with the claim that the land is useful for parking or the storage of boats. Neither of these claims, however, implies that the land to the east of the A591 forms part of the curtilage of a building. ***They are not assertions about a building but about a business (or business 'operations').*** As such, they are clearly incompatible with the analysis of 'curtilage' to be found in the Court of Appeal judgement on Blackbushe Airport.

(6). Whatever is true of the land to the west of the A591 the land to its east cannot on any grounds be included in the Schedule 2(6) application because it forms a completely separate parcel of land. According to para 47 of the Blackbushe judgement:

> If a building is to be deregistered, the common land under or adjacent to it only qualifies for deregistration if and to the extent that it has a defined relationship with that building. It must be covered by the building or within that building's curtilage.

The reference here is to land that is under or adjacent to a building. And it is only land that is 'adjacent to' a building that could be considered to form a part of its curtilage. The suggestion that an area separated from a building by a road might be considered to form part of its curtilage is dismissed out of hand at paras 76–8 of the judgement. Looking in particular at the final sentence of para 77:

> They [the firemen's houses] could have been built on the other side of the road and would have been equally convenient, but *on no basis could they then have been described as being within the curtilage of the fire station*. [Emphasis added]

(7). The Blackbushe judgement offers a wide-ranging analysis of the concept of 'curtilage' and its application in the context of Schedule 2(6). At the core of this analysis is the definition offered at para 61 of the judgement, which is said by Andrews LJ in the following paragraph to be 'as good an expression of the concept of curtilage as one is likely to find' (on this, see also: para 116):

> "What then is meant by the curtilage of the property? In my judgment it is not sufficient to constitute two pieces of land parts of one and the same curtilage that they should have been conveyed or demised together, for a single conveyance or lease can comprise more than one parcel of land, neither of which need be in any sense an appurtenance of the other or within the curtilage of the other. Nor is it sufficient that they have been occupied together. *Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other*. A piece of land may fall clearly within the curtilage of a parcel conveyed without its contributing in any significant way to the convenience or value of the rest of the parcel. **On the other hand it may be very advantageous or convenient to the owner of one parcel of land also to own an adjoining parcel, although it may be clear from the facts that the two parcels are entirely distinct pieces of property.** *In my judgment, 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*.

The italics were added by Andrews LJ. My own emphasis is added in bold to the penultimate sentence; although, once more, it should be noted that the present application does not even involve an 'adjoining' parcel of land.

(8). It may well be that the applicants consider the land to the east of the A591 to be useful, or indeed essential, to the business that is based on the land to the west of the road. As they express it, the eastern piece of land is 'part and parcel *of the operations* which take place within [one of] the building[s]' (i.e. the 'workshop'). There is no implication, however, that the eastern piece of land therefore forms part of the curtilage of the workshop; let alone that it would naturally be considered to be *part and parcel of that building*.

Steve Byrne
[20 April, 2022]

Open Spaces Society

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Waterhead

Application CA13/36 to Cumbria County Council for deregistration of common land at Waterhead under paragraph 6 of Schedule 2 to the Commons Act 2006

Open Spaces Society: further objection

1 General comments

1.1 The application CA13/36 to which the society objects has been made to the council by Windermere Aquatic Ltd under paragraph 6 of Schedule 2 to the Commons Act 2006. Steven Abbot Associates LLP acts as the applicant's agent: where we refer to the applicant, we include the agent acting on behalf of the applicant.

1.2 This submission supplements the society's objection dated 28 February 2022 to the application, and responds to the applicant's letter of response dated 13 April 2022 (the 'letter').

1.3 References below to paragraphs 6 and 8 are to those paragraphs of Schedule 2 to the 2006 Act.

1.4 Paragraph 6 sets out in subparagraph (2) various tests which an application must meet if it is to be granted. The society does not dispute that the tests in paragraphs (a) and (c) of subparagraph (2) are met. The society infers from the council's notification of the application that it is duly made for the purposes of compliance with the procedural requirements of the Commons Registration (England) Regulations 2014.

1.5 The outstanding tests are therefore 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.

1.6 The society notes that the application land on the east side of the main road ('the east land') is not and was not covered by a building, nor is it claimed otherwise. Insofar as certain buildings are claimed to have been present on the application land on the west side of the road ('the west land') since the date of provisional registration, the society does not dispute that the statutory test is met in relation to those buildings, and in relation to that land generally.

1.7 The test in relation to the east land is therefore whether that land was and is covered by the curtilage of a building.

1.8 The society is informed that the application land was provisionally registered under section 4 of the Commons Registration Act 1965 on 16 March 1970. It follows that, for the purposes of determination of the application, the relevant, outstanding, tests ('the relevant tests') are whether:

- the application land was within the curtilage of a building, on 16 March 1970 ('the opening date');
- since the opening date, the application land has at all times ('the relevant period') been within the curtilage of a building; and
- the application land still is within the curtilage of a building.

Paragraph 6 is not entirely clear as to the date up to which the relevant tests must continue to be satisfied. The society suggests that it is the date of determination, but nothing appears to turn on it.

1.9 Assertions have been made (letter, para.10) that the application land was wrongly registered as common land. However, the question is diverting but irrelevant for the purposes of determining the application. Part 1 of the Commons Act 2006 does not provide for a review of the rightfulness of any registration made under section 4 of the 1965 Act. Instead, each of paragraphs 5 to 9 of Schedule 2 to the 2006 Act provides for the deregistration of registered land where certain tests are met. In relation to paragraph 6 (and paragraph 8 in relation to town or village greens), the tests confer recognition that, where land which was registered[1] under section 4 of the 1965 Act was, at that time, already covered by a building or enclosed within the curtilage of building (and has remained so ever since), it was questionable to register the land at that time, and the passage of (at the time of the 2006 Act) nearly 40 years since has rendered the registration insupportable.

1.10 It may be helpful to illustrate with an example. It may be that, shortly before the date on which application was made under section 4 of the 1965 Act to register land as common land, a building was unlawfully erected[2] on part of that land and no enforcement action was subsequently taken. At the date of the application for registration, and very probably at the date of registration (even if this occurred after the erection of the building), the land remained common land, being subject to rights of common, and remained eligible for registration. An objection to the registration[3] (as regards the land covered by the building) within the appropriate time ought not to have succeeded. But paragraph 6 (and in similar circumstances in relation to town or village greens, paragraph 8) recognises that, given the elapse of time, the unlawful erection of the building, and its endurance during that time, renders the status of the building *de facto* legitimate, immune from enforcement action[4], and beyond any

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[1] Strictly, the Act refers to provisional registration, but this statement will hereafter refer simply to registration.

[2] Contrary to section 194 of the Law of Property Act 1925 (as it was in force at the time), and interfering with the exercise of rights of common.

[3] Under section 5 of the 1965 Act.

[4] Defra has previously expressed the view that enforcement action against unlawful works on common land, taken under section 41 of the 2006 Act, would be subject to the 12 year limitation period in section 8 of the Limitation Act 1980.

likelihood that anything might be done about it. It is therefore sensible that the legislation recognises the practical consequences, and makes limited provision for deregistration.

1.11 The relevant tests therefore are not concerned with a reassessment of the legitimacy of the original registration: they are concerned only with whether the presence of a building, or curtilage of a building, has endured on the registered land for so long — and in any case since the date on which the land was first registered — that it should cease to be registered.

2 The 'curtilage' test

2.1 Curtilage is a term which sees significant use in English law. Most obviously, it is used in planning and listed building legislation. It has also been used in relation to tax and rating legislation, and Church of England law. The term is also used elsewhere in the 2006 Act in regulations made under paragraphs 2 and 3 of Schedule 2[5] (where it fulfils the role of excluding land from registration).

2.2 Paragraphs 6 and 8 have a very different purpose. They enable, as we have seen (para. 1.11 above), the deregistration of a building, or curtilage of a building, which has endured on the registered land for so long that it should cease to be registered. These provisions are a concession to pragmatism, but they are a constrained concession. Following the registration of land under section 4 of the 1965 Act, no effective provision was made by that Act for deregistration of wrongly registered land. The Common Land (Rectification of Registers) Act 1989 ('the 1989 Act') made very specific, time constrained provision for deregistration of land covered by a dwelling house or land ancillary to a dwelling house[6]. Once the 1989 Act had become spent[7], no further provision was made for deregistration of registered land until paragraphs 6 and 8 were brought into force in December 2014[8].

2.3 The intention of the inclusion of curtilage in the relevant tests must therefore be to enable the deregistration of land, which is not covered by a building, but which is so intrinsically connected with the building that it is only right that it should also benefit from the same statutory pragmatism, for to deregister only the building itself might confer a very partial benefit on the applicant. The most obvious examples of land likely to fall within the scope of curtilage are those specified as 'ancillary to a dwellinghouse' in the 1989 Act, defined as: 'a garden, private garage or outbuildings used and enjoyed with the dwellinghouse'[9]. However, the present application is not concerned with domestic premises.

3 The *Challenge Fencing* factors

3.1 The letter (para.5) notes that:

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[5] Paragraph 14(3) of Schedule 4 to the Commons Registration (England) Regulations 2014 (SI 2014/3038).

[6] Section 1(2). The Act, which has been repealed, does not use the expression 'curtilage'.

[7] Notice of objection under the Act had to be given by 21 July 1992; the Act was repealed on 1 October 2006.

[8] Part 1 of the 2006 Act was brought into force earlier in relation to certain pioneer areas.

[9] See s.1(3) of the 1989 Act.

> The [application] land is understood to have been in a single ownership at the time it was registered as common land and has been at all times since.

3.2 Ownership is merely one factor which illuminates whether land is curtilage. In *Challenge Fencing Limited v Secretary Of State For Housing Communities And Local Government*,[10] Lieven J set out the factors which might be relevant in determining curtilage, gleaned from the authorities.

3.3 These include the three Stephenson[11] factors:

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

3.4 In the present case, while the ownership has remained consistent, the application land is divided by a main road, and the east land is quite separate and remote from the west land, being also fenced off from the road itself. The east land is not part of one enclosure with the buildings on the west land — see the fifth test in *Challenge Fencing*.

3.5 As to function, it is accepted that the east land has long been used in connection with the business operations of the west land, and indeed, it may be said to be ancillary to those operations. However, that is not to say that the land is ancillary to any particular building — the fourth test in *Challenge Fencing*. We discuss this critical aspect further below.

4 The meaning of 'curtilage' in relation to paragraph 6

4.1 *Methuen-Campbell v Walters*[12], a leasehold reform case, considered what was meant by the curtilage of a property[13]. The court said:

> …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.

4.2 In *Blackbushe Airport Ltd v R (on the application of Hampshire County Council)* in the Court of Appeal[14] (cited by the applicant; '*Blackbushe*' below), the court dealt with the meaning of curtilage

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[10] [2018] EWHC 2900 (Admin), at para.18.

[11] *Attorney-General ex rel Sutcliffe v Calderdale BC* (1982) 46 P. & C.R. 399 at 407.

[12] [1979] QB 525.

[13] The court was concerned with identifying the 'appurtenances' of a house, but relied on case law which constrained appurtenances to the curtilage of a house.

[14] [2021] EWCA Civ 398. The Society intervening.

in the specific context of paragraph 6. Andrew LJ, who gave the leading judgment with which the other judges agreed, said 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.[15]

The judge employed the last words directly following the extract from *Methuen-Campbell* quoted in paragraph 4.1 above.

4.3 We note that the Government's guidance to commons registration authorities on the interpretation of curtilage in relation to the 2006 Act[16] states that:

> 'The meaning of 'curtilage' isn't clearly defined. In recent judgments, common ownership seems to be less important than current use — for example, a basement area, driveway, passageway, garden and yard. A whole common or green is unlikely to be the curtilage of a building, but if a house has a physical enclosure around it (eg a wall or a fence), then the whole area within that enclosure (except the house) could be considered to be curtilage.'

That approach, while unsophisticated, appears to the society to be consistent with the above analysis.

5 The east land and curtilage of buildings

5.1 The key element of the relevant tests is whether the application land was at the opening date and subsequently, curtilage to a building. The society believes that the east land was not curtilage at the opening date nor at any time within the relevant period.

5.2 Notably, 'no piece of land can ever be within the curtilage of more than one building'[17].

5.3 This is both a matter of law and of common sense: if land falls within the curtilage of a building, '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.'[18] There is little room in such an approach for land to be intimately associated with <u>two</u> buildings. But there may be unusual exceptions: for example, a detached common privy in the middle of the common yard of two terraced houses.

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[15] At paras.25, 57 and 62.

[16] *Commons registration authorities: correct mistakes*: this guidance has not been updated following the *Blackbushe* judgment.

[17] *Secretary of State for the Environment, Transport & the Regions & Anor v Skerritts of Nottingham Ltd* [2000] EWCA Civ 60, *per* Walker LJ, at paragraph 23.

[18] *Methuen-Campbell v Walters*, pp.543–4.

5.4 An example of an application satisfying the relevant tests will be land which is registered as common land, but has been fenced off from the common and forms part of the garden of a dwelling since before the date of registration. Perhaps the land was wrongly registered as common land, or perhaps the garden is a long-standing encroachment: either way, the resident has treated that part of the common as his or her own, and has excluded all but visitors to the premises. There may be a public right of access to the garden[19], but it has not been recognised by the resident, and it has not been exercised by the public. In such a case, paragraph 6 recognises a justified case for deregistration.

5.5 The society will show, however, that the east land fails the relevant tests according to these principles.

5.6 In order to satisfy the relevant tests, the east land must be shown to be within 'the curtilage of a building' throughout the relevant period. It is claimed that this land[20]:

> has been used for the storage of boats and to provide parking in connection with the operations in the buildings.

and that

> One of the buildings on the western parcel is a workshop, which is used in connection with the adjacent marina and the land and on the east side of the road is part and parcel of the operations which take place within the building.

5.7 Paragraph 5.3 above explains why, with unusual exceptions, land cannot be regarded as within the curtilage of two or more buildings. Yet the applicant is unable to adduce evidence that the east land is curtilage of any particular building on the west side of the road. It states that the east land is used for storage and parking associated with 'operations in the buildings' generally, and yet that the east land is 'part and parcel of the operations' in the workshop building.

5.8 The *Methuen-Campbell* test is that '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.'

5.9 The east land is 'intimately associated' with neither the workshop building nor any other[21]. It is not part and parcel of the workshop building, for if it were, it would not be used for storage and parking associated with operations in the buildings generally. In truth, the east land is merely a slightly inconveniently-located extension of the overall premises of the applicant business, used on an *ad hoc* basis for whatever purpose happens to be convenient. It has no strong attachment to any building on the west land.

5.10 The applicant has fallen into the same error of interpretation as did Blackbushe Airport Ltd. In effect, the applicant sees the east land as part of an integral whole with operations on the west land. In *Blackbushe*, Andrews LJ said:

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[19] For example, under section 193 of the Law of Property Act 1925.

[20] Letter, para.9.

[21] See *Methuen-Campbell*, quoted at para.4.1.

> …the test [is not] whether the Application Land and the terminal building together form one part of an operational unit or whether they fall within a single enclosure. The question whether, by reason of the association between them, the law would treat them as if they formed one parcel, or as an integral whole, depends on the application of the 'part and parcel' test to the facts of the particular case.

5.11 We accept that the east land is part of an operational unit which comprises the whole of the application land (and indeed, other land). In the same way, in *Blackbushe*, it was accepted that the airfield was a single operational unit including the terminal building. But while land which is curtilage of a building may together form an integral whole, the converse does not follow: land which is an integral whole with a building is not necessarily curtilage of that building.[22] Moreover, land which is an integral whole with a group of buildings may well not be curtilage of any one of those buildings.

5.12 The distinction admirably was understood by the court in *Barwick & Barwick v Kent County Council*.[23] The appellants sought to exercise the right to buy their home, which was a dwelling adjacent to the back yard of a fire station and occupied in the course of the first appellant's employment. The right to buy was excluded where the dwelling was 'within the curtilage of…a building' held for fire purposes. In the Court of Appeal, Parker LJ, referring to the respondent's submissions, said that[24]:

> It is sought to say that [the dwelling] should be regarded as "within the curtilage of the fire station"; but that, with respect, is not the question… . The question is whether it was within the curtilage of the fire station *building*. …I cannot see how it could properly be described as being within the curtilage of the fire station building, however much it might have been possible, had the facts so warranted it, to say that it was within the curtilage of the fire station.

6 Conclusion

6.1 The position in the present case is similar. The applicant may be able to show that the east land is part of an operational unit along with the business premises operating on the west land. It cannot show that the east land is within the curtilage of any particular building on the west land, and the application must therefore be refused.

Hugh Craddock
Case officer
20 April 2022

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[22] See *Blackbushe*, para.64.

[23] (1992) 24 HLR 341.

[24] P.346.

Attachments

Challenge Fencing Limited v Secretary Of State For Housing Communities And Local Government

Methuen-Campbell v Walters

Barwick & Barwick v Kent County Council

(See embedded hyperlinks for the judgments in *Blackbushe Airport Ltd v R (on the application of Hampshire County Council* and *Secretary of State for the Environment, Transport & the Regions & Anor v Skerritts of Nottingham Ltd* .)