

Committee: Commons and Village Green Registration Panel
Date: 19 March 2025
By: Director of Communities, Economy and Transport
Title: Application to deregister buildings wrongly registered as common land at common land register unit CL48 (Markstakes Common)
Applicant: Mr Francis Nation-Dixon
Application No: CL48-001
Contact Officer: Mr Michael Walsh
Local Member: Councillor Matthew Milligan

Recommendations: The Panel is recommended to:

- 1) Accept the application made to deregister land from common land unit CL48 – Markstakes Common; and**
 - 2) Authorise the updating of the register of common land to remove the land from common land unit CL48- Markstakes Common.**
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1. Background

- 1.1 The registers of common land and town and village green were first produced under the Commons Registration Act 1965 (1965 Act) and are maintained by East Sussex County Council (the Council), in its capacity as Commons Registration Authority (CRA) for East Sussex.
- 1.2 In some cases, the original applications to register common land under the 1965 Act were produced on maps that were either difficult to interpret or incorrectly defined the boundary of the land. As a result, some common land was missed, and some land was wrongly registered as common land or town or village green. The latter typically includes cottages or gardens on or abutting an area of common land or a town or village green.
- 1.3 The Commons Act 2006 (2006 Act) enables landowners to apply for the deregistration of land which is deemed to have been mistakenly registered under the 1965 Act. The Council have a duty to consider such applications.
- 1.4 On 16 July 2024 the Council received an application on Form CA13 (the Application) under Schedule 2 of the 2006 Act from Mr Francis Nation-Dixon (the Applicant). The Application seeks to deregister a part of common land unit CL48 (CL48) (the Application Land) on the grounds that it was wrongly registered as common land under the 1965 Act.
- 1.5 A plan of the Application Land produced by the Council is a background document to this report. This plan shows the full extent of CL48, hatched and outlined in green.
- 1.6 A copy of the Application containing the evidence submitted by the Applicant is a background document to this report.

2. Law

2.1 Paragraph 6 of Schedule 2 of the 2006 Act enables the deregistration of land that has been covered by a building or the curtilage of a building since the land was provisionally registered under the 1965 Act. It does not matter whether the building or curtilage was lawfully present on the land when it was provisionally registered under the 1965 Act. Neither is it necessary for the land to have been covered by the same building throughout the period since the date of provisional registration.

2.2 Paragraph 6 of Schedule 2 to the 2006 Act states that:

Buildings Registered as common land

6(1) *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.*

6(2) *This paragraph applies to land where -*

(a) The land was provisionally registered as common land under section 4 of the 1965 Act;

(b) On the date of 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 provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.

6(3) *A commons registration authority may only remove land under subparagraph (1) acting on—*

(a) the application of any person made before such date as regulations may specify; or

(b) a proposal made and published by the authority before such date as regulations may specify.

2.3 The onus of proof is on the applicant to satisfy each of the elements of the legal tests.

2.4 The tests should be made on the balance of probabilities.

2.5 Curtilage - The word "curtilage" is not defined by the 2006 Act but has been considered by the Courts in other contexts, particularly in planning and development legislation. Key factors to be taken into account when considering the curtilage of a building are the physical layout of the land and buildings, past and present ownership and past and present use and function.

2.6 Examples of land which could fall within the curtilage of a building include a yard, basement area or passageway but may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, or garden. It is generally accepted that what constitutes the curtilage should be taken as a matter of fact and degree for each case.

3. Current Registration Details

- 3.1 The common land register unit CL48 was provisionally registered on 28 March 1968 under section 4 of the 1965 Act, pursuant to an application made by the Commons, Open Spaces and Footpaths Preservation Society (the Society) on 3 March 1968 (the 1968 Application). The provisional registration of the 1968 Application became final on 1 October 1970.
- 3.2 In 1993 the common land and town and village green registers for East Sussex as well as much of the related material were destroyed by fire. The registers were reconstituted under the Commons Registration (East Sussex) Act 1994 (1994 Act) and validated in 2004.
- 3.3 The reconstitution of the registers provided for a public consultation during which a case to deregister the Application Land was presented by the Applicant. The reconstitution was undertaken with the sole purpose of creating a new register in the same likeness as the lost registers based on the available evidence. Accordingly perceived mistakes made in the 1960s were not addressed as part of this process and the case for deregistration of the Application Land was dismissed by the Commissioner.

4. The Application

- 4.1 The Application was submitted on the relevant form on 16 July 2024 and was duly made for the purposes of the 2006 Act. The Application Land currently exists as a residential property known as Markstakes Cottage with associated garden and outbuildings covering an area of approximately 1.43 acres. The site lies south of Markstakes Lane, roughly 2 kilometres north-east from the village of South Chailey, East Sussex.
- 4.2 The Applicant believes that on the date of provisional registration the Application Land was covered by a building or was within the curtilage of a building, and 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. The Applicant therefore claims that the Application Land was wrongly registered as part of common land unit CL48 and has requested the removal of the Application Land from the commons register.
- 4.3 The Application was accompanied by the following supporting documentary evidence:
 - Two Maps of common land searches produced by the Council and Lewes District Council (LDC) showing the Application Land as part of CL48.
 - An extract from the 1910 Ordnance Survey (OS) map at a scale of 1:2,500 showing the Application Land and the existence of Markstakes Cottage as a separate unit to CL48 at this time.

5. Consultation and Representations

- 5.1 On 24 September 2024, Notice of the Application was advertised on the Council website and posted on-site inviting representations. The Notice was also sent to local organisations and all statutory consultees in accordance with Schedule 7 of the Commons Registration (England) Regulations 2014 (“the 2014 Regulations”). The deadline for those wishing to make representations in relation to the Application was given as 8 November 2024.

- 5.2 The Council received 4 representations, from the Society, Chailey Parish Council, Friends of Markstakes Common and one local individual. None of these parties directly opposed the application, with support coming from Chailey Parish Council.
- 5.3 Concerns were raised by the Society regarding what could be interpreted as the curtilage to the building, as shown on the OS map of 1909 provided as evidence with the Application. The Society comment that internal divisions of the garden shown on this map could suggest that part of the Application Land at the time of provisional registration may not have been within the curtilage of the main residential building. The society advised that a further application under Paragraph 7 Schedule 2 of the 2006 Act would be required if the entirety of the Application Land could not be shown to have existed within the curtilage of building at the site.
- 5.4 Under Regulation 25 of the 2014 Regulations, all representations were forwarded to the Applicant with an opportunity to respond. The Council requested that the Applicant provide additional evidence in relation to the Society's concerns over the curtilage of the site at the time of provisional registration.
- 5.5 The Council received a response from the Applicant containing further evidence which they believe shows the entirety of the Application Land as curtilage to the main building at the time of provisional registration. This new evidence consisted of 2 photographs of the Application Land from the sales particulars of 1943 and 1970. The Applicant further states that no significant boundary features were present within the garden when the property was purchased by their parents in 1970. The Applicant states their belief that the mistaken inclusion of the Application Land in CL48 can be explained by its position on the edge of the OS map sheet. A copy of the common land register map for the area has been submitted to illustrate this point.
- 5.6 The Society provided further comments following the Applicant's response as well as providing a link to a 1956 OS map: this map shows the western half of the Application Land with no internal divisions. The Society comment that based on the 1956 OS map and the new evidence provided by the Applicant, the Application would appear to satisfy the legal tests for deregistration of the Application Land under Schedule 2 of the 2006 Act.

6. Consideration under Paragraph 6 Schedule 2, 2006 Act

(a) The land was provisionally registered as common land under section 4 of the 1965 Act;

- 6.1 The entry for common land unit CL48 clearly demonstrates that the Application Land was provisionally registered pursuant to the 1968 Application.
- 6.2 The Council believes that this aspect of the legal test is satisfied.

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

- 6.3 Historic OS maps clearly show the Application Land existing as a sperate unit to CL48 for a considerable length of time prior to the date of provisional application. It is also clear from historic maps that a building or buildings have been present on the site for an equal length of time prior to the provisional registration.
- 6.4 The 1956 OS map provided by the Society shows roughly the western half of the Application Land with no internal divisions of the garden existing prior to the

provisional registration. No division of the Application land can be seen in the photographs provided by the Applicant from 1943 and 1970.

6.5 Considering the OS mapping evidence and the statements and photographs provided by the Applicant, the Officer believes that the entirety of the Application Land was covered by a building or was within the curtilage of a building at the time of provisional registration.

6.6 The Council believes this aspect of the legal test is satisfied.

(c) The provisional registration became final; and

6.7 The common register entry for common land unit CL48 clearly demonstrates that the provisional registration of 1968 was confirmed and became final on 1 October 1970.

6.8 The Council believes that this aspect of the legal test is satisfied.

(d) Since the provisional registration, the land has at all times been, and still is, covered by a building or within the curtilage of a building.

6.9 There is no doubt that at the time of provisional registration, the building and associated curtilage were in existence and have remained so throughout the period up to the submission of the Application.

6.10 The Council believes this aspect of the legal test is satisfied.

7. Conclusion and Reason for Recommendation

7.1 It is necessary for members of the Panel to consider whether the Application and evidence provided during the consultation satisfies the statutory requirements to deregister the Application Land as common land. The Applicant must prove that the requirements are met on the balance of probabilities.

7.2 It should be noted that under the 2014 Regulations, the Council may not refuse an application without first offering the Applicant an opportunity to make oral representations. Accordingly, if members of the Panel do not agree with a recommendation to grant the Application, Officers would recommend that the decision should be deferred, and such an offer made to the Applicant before a further report is made to the Panel.

7.3 It is clear from the available material that the Application Land has existed as a separate enclosure to CL48 with a building present on the site for a considerable length of time. The inclusion of Markstakes Cottage and associated garden within CL48 would therefore appear to have been a mistake made during the 1968 application and provisional registration under the 1965 Act.

7.4 Whilst internal divisions at the site and what could be considered as curtilage to the main building were initially questioned, the additional evidence provided by the Applicant and the 1956 OS map provided by the Society would appear to show that the garden at the site existed as a single parcel of land, ancillary to the main building at the time of provisional registration. The Application Land can therefore be shown to have existed as a building or within the curtilage of a building from this time and up to the date of application.

7.5 The Officers consider that the Application has been duly made and has passed all legal tests within the relevant legislation.

7.6 Section 36 of the 2014 Regulations requires that the Registration Authority gives written notice of its decision (and its reasons for reaching the decision) to the applicant and any person who has made representations concerning the application. Such notice will be given in accordance with the decision of the Panel.

8. Formal Recommendation

8.1 It is recommended that the Application is granted, and that the register of common land held by East Sussex County Council should be amended to remove the Application Land from unit CL48 – Markstakes Common.

RUPERT CLUBB

Director of Communities, Economy and Transport

BACKGROUND DOCUMENTATION:

Application, Plan of Application Land, commons register entry and map for common land unit CL48, Notice of Application, Representations and responses, Scheme of Regulation and Management 1915 plan, 1956 Ordnance Survey map, Historic Ordnance Survey maps