

COMMONS REGISTRATION ACT 1965

Reference Nos 210/D/217 - 218

In the Matter of About 43 acres of Land,  
Portland, Weymouth and Portland,  
Dorset (No. 1)

## DECISION

These disputes relate to the registration at Entry No. 72 in the Land section of Register Unit No. CL 72 in the Register of Common Land maintained by the Dorset County Council and are occasioned by Objection No. 19 made by Cove Chalet Park (Portland) Ltd and Objection No. 447 made by the Clerk of the former Dorset County Council and both noted in the Register on 1 June 1971.

I held a hearing for the purpose of inquiring into the dispute at Dorchester on 21 September 1976. The hearing was attended by Mr N Butterfield, of Counsel, on behalf of the Crown Estate Commissioners, the applicants for the registration, Mrs R Colyer, whose application for registration was noted under section 4(4) of the Commons Registration Act 1965, Mr P F Prideaux, solicitor, on behalf of Cove Chalet Park (Portland) Ltd, and Mr D S Harper, solicitor, on behalf of the Dorset County Council. Mr Butterfield also appeared for the Commoners and Court Leet of the Island and Royal Manor of Portland, the applicants for the registration of rights of common over the whole of the land comprised in the Register Unit.

Mr Butterfield informed me that his clients were prepared to meet Objection No. 19 by agreeing to the exclusion from the Register Unit of an area of land coloured blue and pink on an agreed plan. This left for consideration the land the subject of Objection No. 447, which had either been purchased for highway use or was considered by the Objector to be maintained verges. Mr Butterfield agreed that the land purchased for highway use should be excluded from the Register Unit.

The land remaining the subject of dispute consists of grassland adjoining made-up roads. The applicants claim that the roads were laid out over common land and that the width of the highway is limited to 30 ft. It is alleged in the Objection that the disputed land is considered to be maintained verges.

This pattern of a metalled road bordered by unmetalled margins and beyond the margins by hedges is a not unusual one, which can have been brought into being in one of two ways. The road may have originally been laid out across the uninclosed waste of the manor and the fences may have been put up at some later time to separate the adjoining closes from the waste. On the other hand, the fences may have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. In the former case it is doubtful whether there is any presumption that the highway extends beyond the metalled road: see per Vaughan Williams, L.J. in Neeld v. Hendon U.D.C. (1899), 81 L.T. 405,410.

Here there is no evidence to show in what circumstances or for what purpose the fences were put up. Therefore the fence is prima facie the boundary of the highway, unless there is some reason for supposing that it was put up for a different purpose: see per Warrington, J. in Offin v Rochford Rural District, [1906] 1 Ch. 342, at p. 354. However, the question whether the space between



the fences is all highway can depend to a great extent on many other circumstances, such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the fences, and the levels of the land adjoining the road: see per Vaughan Williams L.J. cited by Warrington, J. in Offin's Case, supra, at p.353.

The land the subject of the dispute varies greatly in width, some of it being as little as 2 feet wide, but some of it affords ample room for grazing by tethered horses and ponies, Weston Road, for example, being in places 160 feet wide between the fences or hedges (hereafter referred to collectively as "fences").

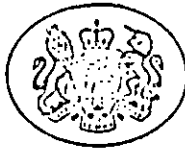
This road pattern is of some antiquity, being shown in its present form on a map made by Francis Webb in 1800. Although the copy of this map with which I was provided (the reproduction in J. H. Bettey's, The Island and Royal Manor of Portland) is on a very small scale, it appears that the space between the fences was the same in 1800 as it is to-day, the only difference being that the land beyond the fences on either side largely consisted of enclosed fields, while there are now many houses and other buildings on the land immediately behind the fences. There is nothing in the evidence before me to indicate that the roads were originally laid out over unenclosed common land. I have, therefore, to start with the prima facie view that the fences are the boundaries of the highways, and then to consider whether there is some reason for supposing that they were put up for some different purpose.

Although the width of the land varies considerably between its narrowest and widest parts, there are no abrupt changes and the lines of the fences are quite regular, other than at one point where a footpath to the south of the Portland County Secondary School joins Weston Road. In some places the level of the metalled road is above that of the adjoining land, which forms a supporting bank.

The only fact which might be regarded as in anyway contrary to the land in question forming part of the highways is the grazing of the wider parts by tethered horses and ponies. The adverse effect of this is, in my view, more apparent than real. There is nothing inconsistent between land being part of a highway and its being used for grazing. At common law the owner of land who had dedicated it as a highway did not lose his ownership by the dedication. He did no more than grant to the public a right of passage over it, and he retained his other rights in the land subject to that right of passage. In particular, he retained his rights in the herbage: see Stevens v. Whistler (1809), 11 East 51. Now most highways are vested in highway authorities under modern legislation, and the vesting carries with it the right to the herbage, which the highway authority can let, if it so wishes: see Coverdale v Charlton (1878), 4 Q.B.D. 104.

I have left until the last the matter which was put in the forefront of the case for the County Council, namely the maintenance of the land in question by the highway authority. This maintenance has chiefly taken the form of cutting the grass. In my view, such maintenance would not confer upon members of the public a right of passage over land which had not previously formed part of the highway. On the other hand, however, the continuance of such work for the period of over 30 years covered by the evidence without any protest from anybody claiming to be the owner of the land is some indication that it was accepted by all concerned that the land in question was part of the highway.

I have therefore come to the conclusion that the land the subject of Objection No. 447 does not fall within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 because each part of it forms part of a highway.



For these reasons I confirm the registration with the following modifications:- namely, the exclusion of the land the subject of Objection No. 447 and of the land shown on the plan agreed between the Applicants and the Objectors Cove Chalet Part (Portland) Ltd.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 17<sup>th</sup> day of March 1977

Chief Commons Commissioner