



Application Decision

Inquiry held from 2 to 5 April 2019

Site visit made on 4 April 2019

by Alan Beckett BA MSc MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs pursuant to Regulation 4 of the Commons Registration (England) Regulations 2014 to determine the application

Decision date: 12 June 2019

Application Ref: COM/3206697

Yateley Common, Yateley, Hampshire

Register Unit: CL 24

Registration Authority: Hampshire County Council

- The application, dated 1 November 2016, is made under paragraph 6 of Schedule 2 to the Commons Act 2006 ('the 2006 Act') to remove land from the register of common land on the grounds specified in paragraph 6 (2) of Schedule 2 to the 2006 Act (buildings registered as common land).
 - The application is made by Blackbushe Airport Limited.
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Decision: The application is granted.

The Application Land

1. The application relates to that parcel of land shown edged red on the plan appended to this decision which was registered as being part of Yateley Common (CL 24). The Application Land forms part of a general aviation facility known as Blackbushe Airport. The applicant contends that the Application Land lies within the curtilage of the Terminal Building of the airport and should be de-registered.

The Main Issues

2. The application was made on 1 November 2016¹ under paragraph 6 of Schedule 2 to the 2006 Act. The main issues arising are therefore whether:
 - (a) the land was provisionally registered as common land under section 4 of the 1965 Act;
 - (b) on the date of the 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 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 For the purposes of the Commons Registration (England) Regulations 2014 the Registration Authority is 'a 1965 registration authority'. For the purpose of remedying non-registration or mistaken registration under the 1965 Act, the application must have been made on or before 15 March 2027.

3. It was common ground between the parties that in regard of paragraph 6 (2) (a) the application land had been provisionally registered on 16 May 1967 and that in regard of paragraph 6 (2) (c) that provisional registration had become final on 26 March 1975.
4. In addition to the statutory tests outlined above, there were several other issues raised by the parties in this case. First, whether the relevant date for the purposes of paragraph 6 (d) is the date of the application or the date on which the application is determined; secondly, whether or not the term 'building' was of narrow applicability and whether part of a building could qualify under paragraph 6; thirdly, whether paragraph 6 was applicable to buildings which were unlawful; fourthly, whether a mistake was required to be shown in the original registration as a precursor to consideration of matters under paragraph 6.
5. In determining this application, I will set out a brief history of the airport and address these additional matters and the issue of curtilage before considering the matters in paragraph 6 (2) (b) and (d) in relation to the Application Land.

Brief history of the airport site

6. The airport forms part of the site which was developed by the Royal Air Force during World War II on land requisitioned from the Calthorpe Estate and from the Church Commissioners. The boundary between these two landholdings being the former course of Vigo Lane which was closed between the Anchor public house and the A30 as part of the requisition. RAF Hartford Bridge² comprised three runways oriented to provide take-off and landing facilities irrespective of the prevailing wind, together with hangarage and other facilities to the north and south of the A30. Contemporaneous documentary evidence in the form of aerial photographs and maps demonstrate that the RAF base was significantly larger than the current airport.
7. Following the cessation of hostilities, in January 1947 RAF Blackbushe was taken over by the Ministry of Civil Aviation and became Blackbushe Airport. The runways which traversed the A30 remained in operation with traffic lights controlling traffic to allow aircraft to fly over the road. In 1951 the Church Commissioners sold that part of Yateley Common to the east of Vigo Lane to Yateley Parish Council for use as recreational open space.
8. In 1953 the Ministry of Civil Aviation began the construction of a new Terminal Building which straddled the boundary of the land requisitioned from the Calthorpe Estate and the land which the Parish Council had bought. In 1958 a new arrivals hall was added to the eastern end of the terminal building which resulted in around two-thirds of the entire terminal building having been built on land requisitioned from the Parish Council.
9. In May 1960, Blackbushe Airport was closed by the Ministry of Civil Aviation in preparation for the requisitioning of the land coming to an end in December of that year. The de-requisitioned land to the west of Vigo Lane was handed back to the Calthorpe Estate with the land to the east of Vigo Lane being handed back to Yateley Parish Council. Although much of the infrastructure of the airport was dismantled and auctioned off, the runways remained in situ as did the terminal building.

² RAF Hartford Bridge was renamed RAF Blackbushe in November 1944

10. In May 1961 the Calthorpe Estate sold its land to Air Vice-Marshall Donald Bennett who re-opened the airfield for general aviation purposes in October 1962. AV-M Bennett constructed a clubhouse for the Three Counties Aero Club ('TCAC') at some point in late 1962 or early 1963 which was the subject of enforcement action taken by Hampshire County Council ('the Council') under section 194 of the Law of Property Act 1925 ('the 1925 Act') as the clubhouse had been built on common land without ministerial authority. Although the enforcement action went to trial, the judge declined to order the demolition of the clubhouse; what is now the Bushe Café occupies the former TCAC clubhouse building.
11. In 1964 Yateley Parish Council sold its land to the Council for use as public open space and use of the runways built to the east of Vigo Lane appears to have ceased from around this date. However, the terminal building as constructed by 1958 remained in place and despite the change in ownership of the land on which the building was located, part of the terminal building to the east of Vigo Lane appears to have remained in use for airport purposes. The documentary evidence demonstrates that in or around the time of provisional registration of the common, the terminal building and the TCAC clubhouse were present on the Application Land.
12. In July 1973, the airport was sold to Douglas Arnold who erected hangars to the north west of the site together with a dozen 'lock-up' hangars. These buildings were replaced by other hangars in 1983 and although these buildings were on land outside the Application Land they were in use to provide maintenance facilities and parking for aircraft using the airport as a home base.
13. In 1985 the airport was sold to British Car Auctions ('BCA'). Amongst other things, under the provisions of a section 52 agreement entered into by BCA, the use of the two northern runways was to cease. Although the hangars to the north-west of the site and the taxiway that served them remained in use the operational area of the airport was reduced. BCA subsequently redeveloped part of the site to the north-west of the airport as a car auction facility utilising some of the hangar space which had been built by Mr Arnold. Some of the hangars remained in use by the airport until 2015 when BCA incorporated them into the car auction site. Consequently, the operational area of the airport was reduced to its current area.
14. Although BCA had attempted to acquire that part of the Terminal Building east of Vigo Lane, negotiations with the Council came to nothing and the whole of the building east of Vigo Lane was demolished in 1996; the remainder of the Terminal Building was refurbished by BCA which included the replacement of the control tower at the western end of the building.
15. That part of the Terminal Building west of Vigo Lane has therefore been present on site since 1953 with the operational area of the airport contracting in 1964, 1985 and again in 2015.

Reasons

Whether the relevant date in relation to paragraph 6 (d) is the date of the application or the date of determination

16. The Open Spaces Society ('OSS') submitted that the date for considering the fulfilment of the provisions of paragraph 6 was the date on which the

application was determined and not the date on which the application had been made. It would be expected that the relevant date would be the date of determination as there would be something unattractive in allowing land to be deregistered after the circumstances which gave rise to a claim for deregistration had ceased to exist (such as the destruction of a relevant building after the application date). In the OSS's view, this was a matter common to all the cases in schedule 2 except for paragraph 4.

17. The applicant considered that the question of whether the application date or the date of determination was the relevant date in relation to paragraph 6 was immaterial to the decision to be reached on this application. There had been no change in the material circumstances of the Terminal Building or the Application Land between the date of the application and the date of the inquiry. However, the applicant considered that the relevant date must be the date of the application as paragraph 6 was an application-based procedure; it followed that evidence of compliance with the provisions of paragraph 6 (d) should be considered as the date of the application.
18. Although not a matter which has any bearing on the determination of this application, the proviso found in paragraph 6 (2) (d) suggests, in my view, a requirement for that paragraph to be satisfied up to the date the application is determined. I consider that the inclusion of the present tense '*and still is*' in paragraph 6 (2) (d) to require the application land to be covered by a building or to be within the curtilage of a building up to the date the application is determined. That this would appear to be the case is reflected in paragraph 128 of the Explanatory Notes³ which reads "*The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application or proposal.*"

Whether the term 'a building' in paragraph 6 is of narrow applicability

19. One of the points raised in objection to the application was that the dictionary definitions of the term 'curtilage' all referred to an enclosed area of land attached to or being part of a 'house' or 'dwelling'. There was no suggestion in those definitions that curtilage related to other than domestic or residential property. Furthermore, the various authorities produced by the other parties in regard of 'curtilage' related to either dwelling houses, listed buildings in use for residential purposes or residential use of a former factory site.
20. In relation to the 2006 Act and buildings, paragraph 6 (2) simply refers to 'a *building*' in contrast to that part of the Common Land (Rectification of Registers) Act 1989 ('the 1989 Act') which made provision for the correction of the registers in relation to land occupied by a '*dwellinghouse*' or land '*ancillary to that dwellinghouse*'. The 1989 Act was therefore aimed at the rectification of the registers in relation to a particular type of structure with a particular use whereas the 2006 Act's use of the term '*a building*' without any qualification as to the type of building being contemplated suggests that paragraph 6 has a much wider ambit than that found in the 1989 Act and is not restricted to residential buildings.
21. Whilst it is likely that many of the applications made under paragraph 6 of the 2006 Act would relate to residential property, the term '*a building*' is

³ Explanatory Notes Commons Act 2006 (Defra) TSO undated (page 28)

unrestricted and the 2006 Act does not provide any definition of that term. Consequently, and although the objectors contended that 'a building' should have a narrow meaning in the context of paragraph 6, in the absence of any interpretation or guidance on the meaning of the word in relation to the 2006 Act, I consider that the term 'a building' should be accorded its normal broad meaning which encompasses both residential and non-residential buildings.

22. Had Parliament intended to restrict the operation of paragraph 6 to a particular type of building it could have done so in the way that the 1989 Act was so restricted. Furthermore, it is clear from the authorities that a non-residential or non-domestic building can have a curtilage. An agricultural college (*Dyer v Dorset CC* [1989] 1QB 346), a former woollen mill (*A-G ex rel Sutcliffe v Calderdale* [1983] 46 P&CR 399) a "lunatic asylum" (*Jepson v Gribble*) and warehousing (*Challenge Fencing v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 553 (Admin)) are cases where the issue of curtilage has been considered in relation to non-domestic buildings.
23. I conclude that the term 'a building' in the context of paragraph 6 is not limited to 'dwellinghouses' and (if all other criteria are met) would be applicable the Terminal Building of Blackbushe Airport.

Whether paragraph 6 applies to buildings that are unlawful

24. The applicant contends that at all material times the Application Land was covered by a building or was within the curtilage of a building. The building at issue is the Terminal Building of the airport with the operational land of the airport being said to be its curtilage.
25. From the history of the airport outlined above, what is currently in use as the Terminal Building is only around one-third of that constructed by the Ministry of Civil Aviation between 1953 and 1958; that part of the building east of Vigo Lane having been demolished in 1996. It is also clear that the building now occupied by the Bushe Café has been in existence since around 1963.
26. The OSS contends that a general principle of law was that "no-one should be allowed profit from his own wrong" and that to de-register common land as a result of the existence of an unauthorised and therefore unlawful building would penalise those with rights of common as there was no provision in schedule 2 for compensation. The OSS made no case that the Terminal Building had been constructed without Ministerial consent and its case in respect of paragraph 6 being inapplicable regarding 'unlawful' buildings was directed against the possible deregistration of the land occupied by the Bushe Café.
27. From the known history of the airport, it is more probable than not that the current Terminal Building was erected under requisition powers which were still available to the Minister for Civil Aviation in 1953 and 1958. As such the Terminal Building (that part of it which remains) had a lawful origin. The original building which stood where the Bushe Café now stands appears to have been constructed without Ministerial authority although when action was taken by the Council under section 194 of the 1925 Act, the order sought for its removal was refused, and no further action had been taken against its continued existence. Although the TCAC clubhouse had been erected without consent, its continued existence has been legitimised by the refusal of the County Court to make an order requiring its removal.

28. Irrespective of the origins of the Terminal Building and what has in the fullness of time become the Bushe Café, paragraph 6 draws no distinction between a building which has been lawfully or unlawfully erected on the land at issue. For a conclusion to be drawn that the reference to 'a building' in paragraph 6 referred only to a building which had received Ministerial consent under s194 of the 1925 Act would require the importation into paragraph 6 the word 'lawful' which Parliament has chosen to omit. Paragraph 128 of the Explanatory Notes to the Commons Act 2006 states "*It is immaterial for the purposes of paragraph 6 whether the building was lawfully present on the land at the date of registration*".
29. Although the OSS raised the issue of absence of provision for compensation for those who would be deprived of the exercise of their rights of common, it is highly likely, as submitted by the applicant, that it would not have been possible for rights to be exercised over land which was covered by a building or in use as a licenced airport during the relevant periods. No evidence was submitted to demonstrate that common rights have been exercised over the Application Land since the land was requisitioned. The likely inability of commoners to have been able to exercise their rights over such land may be a reason why there is no provision for compensation within paragraph 6 of schedule 2.
30. Regarding the buildings at issue in this case, the available evidence suggests, on a balance of probabilities, that the Terminal Building (in whole or in part) was constructed lawfully under the requisition powers available to the Ministry of Civil Aviation. In contrast, the building which now houses the Bushe Café did not have the benefit of Ministerial consent. However, the legitimacy or otherwise of these buildings is immaterial in relation to the operation of paragraph 6 of schedule 2 to the 2006 Act.

Whether 'a building' in paragraph 6 refers to a 'whole' building

31. It was initially argued on behalf of the Council that the term '*a building*' had to refer to a 'whole building' and paragraph 6 could not be invoked in those cases where (as here) only 'part' of the building originally present at the time of provisional registration remained on the Application Land. The submission that that the term '*a building*' could not relate to 'part of a building' was subsequently withdrawn.
32. The applicant welcomed the withdrawal of the Council's submission on this point which the applicant considered to be an incorrect reading of paragraph 6. In the applicant's view, the terms '*covered by a building*' or '*within the curtilage of a building*' were considered to be straightforward use of language; Parliament had not seen fit to qualify '*a building*' in any way by means of reference to 'an entire building' or 'part of a building' as it had done in other legislation. In the Applicant's submission, land was '*covered*' by '*a building*' so long as some part of '*a building*' was doing the covering.
33. The evidence in this case demonstrates that the current Terminal Building is part of the building erected by the Ministry of Civil Aviation in 1953 and that the Terminal Building in 1967 and in 1975 covered part of the registered common. The evidence also demonstrates that by 1996 the Terminal Building had become '*a building*' on the registered common due to the demolition of the remainder of the original structure to the east of Vigo Lane.

34. It follows therefore that the current Terminal Building formed 'a building' present on the land at the date of provisional registration, as did the building housing the Bushe Café. The terms of paragraph 6 (2) (b) as regards 'a building' are therefore met. Those same buildings were present at the date when the provisional registration became final and buildings on the same footprints have stood on the land at all material times since that date such that the terms of paragraph 6 (2) (d) as regards 'a building' are met.
35. Even if the term 'a building' is required for the purposes of paragraph 6 (2) (b) and (d) to relate to the whole of the building originally erected in the 1950s, this would not be fatal to the application as it could still proceed on the basis of the Application Land being claimed to be land within the curtilage of a building.

Whether a mistaken registration of the land as common land is required to be shown for a paragraph 6 application to proceed

36. One objector contended that the Application Land had not been mistakenly registered as common land. The application to register CL24 (including the Application Land) had been examined at a public inquiry in 1974 with the Commissioner being fully aware that the land was in use as an airport. This had not prevented the Commissioner from registering the Application Land as common land nor the rights of common which existed over it.
37. It is not disputed that CL24 (of which the Application Land forms part) is subject to rights of common nor that the Commissioner was under any doubt as to the use of this part of the common as an airport. However, paragraph 6 does not make any express reference to a mistake whereas paragraphs 5, 7 and 9 do provide for the rectification of mistakes where land had been "wrongly registered". In addition, section 19 of the 2006 Act provides for the correction of mistakes made by registration authorities when making or amending entries in the register. Furthermore, paragraph 7.1.4 of Defra's published guidance⁴ states that "*Paragraphs 6 to 9 of schedule 2 therefore do not simply provide for a 'retrial' of the registration of any land: instead they ensure that certain registrations may be treated as having been wrongly registered if they meet the tests laid down in the 2006 Act*" (emphasis added).
38. The published guidance therefore shows that if the criteria set out in paragraph 6 are met, the Application Land may be treated as having been wrongly registered. I conclude from both the omission in paragraph 6 of any reference to land having been 'wrongly registered' and the published guidance that there is no requirement to demonstrate that a mistake had been made when the land subject to the application had been registered as common land.

Curtilage

39. The principal matter in dispute between the parties was whether the operational area of the airport could be described as the curtilage of the Terminal Building and whether the Application Land was land within that curtilage.
40. It is to be noted that although the current Terminal Building has remained on site throughout the relevant period, the history of the airport demonstrates that its operational area has progressively contracted through time such that

⁴ Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate Defra December 2014

the current operational area is different from and smaller than the operational area which was in existence in 1967 and 1975⁵.

41. The word "curtilage" is not defined in the 2006 Act but has been considered by the courts in various contexts, notably in relation to planning and development legislation but also in cases of enfranchisement, taxation and listed buildings. I was referred to several cases by the parties in which the courts have determined the extent of curtilage in each case. None of the cases provide a definition of curtilage but the leading cases provide guidance as to those factors which may be relevant when determining what is or is not the curtilage of a building.
42. Of the cases I was referred to, the parties placed particular emphasis on *Trim v Sturminster RDC* [1938] 2 KB 508; *Sinclair Lockhart's Trustees v Central Land Board* [1950] P & Cr 195; *Methuen-Campbell v Walters* [1979] 2 QB 525; *A-G ex rel Sutcliffe v Calderdale* [1983] 46 P&CR 399; *Debenhams v Westminster City Council* [1987] AC396; *Dyer v Dorset CC* [1989] 1QB 346; *Skerritts of Nottingham v Secretary of State for the Environment, Transport and the Regions* [2001] QB 59; *Morris v Wrexham BC* [2002] 2 P & CR 7; *Lowe v First Secretary of State* [2003] EWHC 537 (Admin); *Burford v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 1439 (Admin) and *Challenge Fencing v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 553 (Admin).
43. *Challenge Fencing* is the most recent case to consider the meaning of curtilage, and the court considered that several factors may inform a decision on the existence and extent of curtilage in any given case. Having reviewed the available authorities, Lieven J held "From these cases I draw the following propositions:
 - (i) the extent of curtilage of a building is a question of fact and degree, and it must therefore be a matter for the decision-maker, subject to the normal principles of public law;
 - (ii) The three *Stephenson* factors must be taken into account; (a) physical layout; (b) the ownership past and present (c) the use or function of the land or buildings past and present;
 - (iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration *Skerritts*;
 - (iv) Whether the building or land within its claimed curtilage is ancillary to the main building will be a relevant consideration but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts*;
 - (v) the degree to which the building and the claimed curtilage fall within one enclosure is relevant and the quotation from the OED of curtilage as "A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors".

⁵ The dates of the provisional and final registrations of CL24 as common land

44. It was the OSS' case that the courts had adopted two approaches to curtilage, one approach being a 'conveyancing' meaning and the other being that applied to listed buildings. The OSS say that the part and parcel test applied in *Methuen-Campbell* requires curtilage to be a small area of land which need not be ancillary to the building but may extend to include ancillary buildings such as outhouses, a garage or a garden.
45. The OSS also submit that *Calderdale* however had rejected the strict conveyancing meaning of curtilage and found that a terrace of houses fixed to a listed building fell within the curtilage of that listed building. In the context of listed buildings, curtilage land is required to be ancillary to the building. The OSS say that this different approach was confirmed in *Skerritts* as that case was considered curtilage in the context of the Planning (Listed Building and Conservation Areas) Act 1990. In relation to listed buildings, curtilage need not be small but there has to be a functional relationship between the listed building and the adjacent land so that the curtilage land is ancillary to the listed building.
46. In the OSS' view, what is needed when determining curtilage is a refining mechanism provided either by the conveyancing 'smallness' test of *Methuen-Campbell* or the listed building 'ancillary' test found in *Calderdale, Debenhams and Skerritts*. With regard to the 2006 Act, Parliament must have had in mind one definition or the other and in terms of giving protection to common land, it must have had in mind the 'conveyancing' meaning whereby curtilage would be 'small' and not 'ancillary' to the building at issue. The claimed curtilage of the Terminal Building did not satisfy these tests.
47. The applicant submits that the suggestion that 'curtilage' has a 'conveyancing meaning' and a 'listed building' meaning is wrong. The concept of curtilage had been considered in enfranchisement (*Trim*), rating (*Debenhams*), taxation (*Sinclair-Lockhart Trustees*) and planning (*Calderdale; Skerritts; Lowe; Burford; Challenge Fencing*) cases and there has been no suggestion that there are two (or more) meanings of the term. In the Applicant's view, land lies within the curtilage of a building where the relationship is such that they can be said to be 'part and parcel' of the same entity or an 'integral whole' or where they are so inter-related to form a single unit. 'Smallness' was not a requirement for curtilage and a primary / ancillary relationship between the building and land was not a legal requirement. Consideration should be given to various factors including the functional relationship of the land to the building, physical layout and ownership.
48. The applicant also submits that an application of the appropriate principles, and when taken in the context of the functional relationship of the Terminal Building with the wider airport land, the Application Land formed part and parcel of, an integral whole, and a single unit with the Terminal Building. It was the applicant's case that the operational land of the airport formed the curtilage of the Terminal Building and that the Application Land lay within that curtilage.
49. As noted above, the term curtilage is not defined in the 2006 Act nor does it appear to have been defined in any of the other legislation in which the term is to be found, whether that legislation is concerned with planning or listed building matters, housing or local taxation. The absence of any definition of what amounts to curtilage is commented on by Robert Walker LJ in *Skerritts*: "This case demonstrates that not even lawyers have a precise idea of what

"curtilage" means. It is, as this court said in *Dyer's case*, a question of fact and degree."

50. In *Methuen-Campbell*, Buckley LJ held 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". Although Buckley LJ went on to give consideration to the concept of smallness, he indicated that each case should be considered on its merits: "How far it is appropriate to regard this identity as parts of one message or parcel of land extending must depend upon the character and circumstances of the items under consideration." A determination of curtilage is therefore a matter of fact and degree where a given set of circumstances may produce one outcome and where a different set of circumstances may produce a different outcome.
51. In the recent *Challenge Fencing* case, Lieven J reviewed the authorities and apparently saw no difficulty in taking the principles established by the courts when considering curtilage in the context of housing, local taxation and listed buildings and applying those principles to a case involving commercial premises. There is nothing in that judgement to suggest that a different definition of curtilage exists or should exist when considering curtilage in relation to residential buildings, listed buildings or commercial buildings.
52. The principles established from the cases dealing with the question of curtilage in respect of differing legislation suggests to me that the submissions made by the OSS as to there being a 'conveyancing' meaning and a 'listed building' meaning of the term curtilage are not correct. Given the extent to which this subject has occupied the mind of the courts it appears that there is no hard and fast definition of curtilage, nor that its definition falls neatly into 'conveyancing' and 'non-conveyancing' cases.
53. The OSS suggested that smallness was part of the 'conveyancing' test, and that in conveyancing terms a large area of land is unlikely to be the curtilage of a building. However, the requirement for the curtilage of a building to be small was considered by Robert Walker LJ in *Skerritts* as "unhelpful as a criterion" when considering the curtilage of a substantial country house and its satellite buildings. Smallness is therefore a relative concept and whereas the curtilage of a modest house may equally be of a modest size, the curtilage of an industrial or commercial building may or may not be.
54. The guidance which appears to be given in the above cases is that land which may form the curtilage of a building is land which is part and parcel of the building (*Trim*), or forms one enclosure with the building (*Dyer*) which serves the purposes of the building in some necessary or reasonably useful way (*Sinclair-Lockhart*) or is intimately associated with the building such that the land is part and parcel of the building and an integral part of the same unit (*Methuen-Campbell*) and does not have to be small but relative size is a relevant consideration (*Skerritts*).
55. Although a definition of curtilage was not provided by Lieven J in *Challenge Fencing*, the judgement helpfully sets out the factors to be taken into consideration in determining whether land can be said to comprise the curtilage of a building. I consider it appropriate to determine the issue of curtilage in this case with reference to the factors identified by Lieven in *Challenge Fencing*.

56. *Physical layout*: The land and building at issue in this case forms part of an operational airport; the extent of the land involved is therefore by necessity not small. The operational area of Blackbushe Airport currently comprises the runway and associated perimeter taxiways, fuel storage depot, the terminal building and control tower, the Aerobility facility and the Bushe Café. In addition, there is an area of car parking on the site between the A30 and the Terminal Building and the Bushe Café which provides parking for airport staff, visitors to the airport, the café and the various general aviation concerns on site. The operational area is divided into 'airside' and 'landside' sectors by a fence with security gates in it to mark the division between the two.
57. As noted above, the operational area of the airport in 1967 was smaller than that which had been constructed by the RAF as the Council returned its de-requisitioned land (east of Vigo Lane) to open space and was further reduced operationally in 1985 and in 2015. However, since the 1940s the Application Land has been used for aviation, whether for defence purposes, for civil aviation or since the 1960s for general aviation. The physical layout of the Application Land (other than minor changes to the layout and composition of buildings on the landside part of the airport through time) has, by and large remained the same from the time the common was provisionally registered until the date of the application.
58. The current and previous managers of the airport gave evidence as to how the boundary of the airport's operational land had been marked out. This evidence was derived from both personal experience, an analysis of the available documentary evidence, aerial photography and the recollections of those witnesses who had been engaged in general aviation at the site from the 1960s. With regard to the boundary with the A30, the evidence suggests that a fence had been present along the A30 since the mid-1960s.
59. The north-western boundary of the airport had originally been marked by a change in vegetation between the airport's outfield and the adjacent Forestry Commission land. The north-western boundary of the airport appears to have been physically defined by fences from around 1985 when BCA acquired the land; the boundary between the current airport and BCA land is marked by a steel palisade fence.
60. The northern boundary had similarly been marked by a change of vegetation from the close mown area of the airfield to the rough vegetation of non-airfield land along with warning signs about the existence of an active aerodrome. On the eastern boundary, a ditch had been dug along the part of the course of old Vigo Lane with the point where the current runway had formerly extended onto the Council's land being marked by a wire fence supported by concrete filled oil drums. I understand that the eastern boundary remained in this condition up to around 2015 when the post and rail fence which is currently present was erected.
61. A photograph taken in the early 1960s shows that an attempt had been made to distinguish between the 'landside' and 'airside' parts of the airport for the protection of the visiting public by the erection of a rope barrier in the vicinity of the TCAC clubhouse. It is not known how long this rudimentary barrier was in place, but a more substantial fence is currently in place which has recently been amended to provide increased parking space for light aircraft. I consider it highly likely that at all material times there would have been some form of

- barrier in the vicinity of the Terminal Building / Bushe Café which separated airside operations from those areas where there is general public access.
62. Although the landside / airside fence runs on the north and western sides of the Bushe Café, I do not consider that this fence (or any barrier which predated it) indicates the curtilage or potential curtilage of the Bushe Café as the purpose of the fence is quite clear; to mark that transition point between the landside part of the airport and the airside part for reasons of public safety. I consider that the Terminal Building, the operational area of the airport and the Application Land have therefore been and have remained within one enclosure which is identified by the various boundary treatments which have surrounded the operational airfield from time to time.
63. The absence of any boundary treatment on the western and northern boundaries of the airport in the 1960s is unsurprising; fencing the perimeter of the operational airport at that time would have been a substantial and expensive task. In an age when security requirements were not as onerous as they are today, anyone approaching the airport from the north or west in the 1960s and 1970s would have been aware of the operational extent of the airport by both advisory notices and through the change of vegetation; furthermore it is not uncommon for the boundaries of common land to be unfenced.
64. The fences and ditches present on the eastern and southern sides of the airport would have given a clearer indication of the boundary of the operational land in places where there was likely to have been greater opportunity for public access. Although the curtilage of some buildings may be identifiable by a physical feature such as a fence or ditch, Mackintosh LJ held in *Sinclair-Lockhart* that land may lie within the curtilage of a building although “*it has not been marked off or enclosed in any way*”. Whilst *Sinclair-Lockhart* was concerned with the curtilage surrounding a newly-built farmhouse, I see no reason why this principle would not be applicable in other circumstances. The absence of a physical boundary on the western and northern side of the airport at the time of first registration does not, in my view, indicate that the operational area of the airport could not be curtilage.
65. Ownership past and present: As noted in paragraphs 6 – 15 above, the ownership of the airport has changed hands several times during its existence. It is currently owned by Falcon 4 Propco, a former subsidiary of BCA. The airport land is currently leased to Blackbushe Airport Limited.
66. Although the airport and the Application Land has changed hands several times since the land was de-requisitioned, it has at all material times been owned as a single entity and has been bought and sold as such.
67. The use or function of the land and buildings past and present: The applicant’s witnesses gave evidence as to their involvement with the airport, whether as employees, flying instructors and examiners based at Blackbushe or as recreational pilots and members of the various flying clubs that had been based at Blackbushe from time to time. Collectively, the evidence covered the period from the early 1960s to the present day.
68. Witnesses described the development of the airport and the changes which had occurred to the operational area of the airport over time and to changes made to the buildings which had existed on site. Collectively, the evidence was that

- the Terminal Building formed the hub of the operation of the airport as it housed the administrative and support facilities of the airport together with the control tower from which movements of aircraft airside were controlled.
69. Facilities within the Terminal Building had been let to other aviation interests which had been based at Blackbushe in addition to providing a base for the airport's own staff. The evidence was that whilst the lessees of parts of the terminal building had altered over time, occupation of the building had only been by parties within general aviation. The Bushe Café was considered to be an essential part of the airport; it provided an area for the rest and recuperation of pilots, a place for social interaction between aviation enthusiasts and was a facility open to the general public.
70. The evidence given by the Applicant's witnesses demonstrated the nature of the operations undertaken at the airport and the facilities which the Terminal Building and the airport offers to pilots, passengers, airport staff and visitors to the site. The Terminal Building currently accommodates airport reception and passenger accommodation, airport operations management, air navigation services for the airport and aircraft companies and operators based at Blackbushe.
71. The evidence given demonstrated that the current use of the Terminal Building and the operational area is the same as the use to which the Terminal Building and operational area were being put in 1967 and at all material times in between, given that allowance has to be made for the contraction of the operational area of the airport in 1985 and 2015 and making allowances for the dismantling and reconstruction of the control tower at the western end of the building during the 1990s. To all intents and purposes, the use of the Terminal Building and the Application Land has remained unchanged during the relevant period under consideration.
72. *Relative size*: The objectors referred to various dictionary definitions of curtilage, all of which related to domestic buildings or dwelling houses and which placed emphasis upon the small and proximate nature of the land which could be described as the curtilage of a dwelling house. In *Challenge Fencing*, Lieven J referred to the definition of curtilage found in the shorter OED as part of the *Calderdale* criteria and noted that whilst curtilage need not be small, the relative size between a building and its claimed curtilage was a relevant factor.
73. In *Dyer*, the curtilage of Kingston Maurward House was not considered to encompass the whole of the 100-acre parkland surrounding the house; in *Lowe*, the park of Alresford Hall was similarly not considered to be the curtilage of the house. In *Challenge Fencing*, although the premises of the fencing company were in a single compound, the curtilage of that building was found not to extend to the whole of the compound as it had formerly provided premises for other businesses in other buildings, each of which would have had its own curtilage.
74. The Council submitted that even if size was only a relative matter, there would come a point when the land said to comprise the curtilage of a building becomes too large to be described as curtilage. The OSS submitted that the Application Land, on any reasonable view, would be simply too big to be the curtilage of the small Terminal Building located in the south-eastern corner of the Application Land.

75. The size of the curtilage in relation to the building of which it forms part is a relevant matter, but so too is the purpose to which the building and land are put. In this case the operational area of the airport may appear excessive given the relatively small size of the Terminal Building, but in the context of the purposes to which the building and land are put I do not consider that to be the case. The building and land form part of a general aviation airport. A functioning airport (even a relatively small one such as Blackbushe) will by its nature require a significant quantity of land for the provision of runways, taxiways, hangarage or storage, fire and rescue services, fuel storage and dispensing facilities, customs and quarantine facilities and so forth.
76. The evidence before me is that the operation of the airport and the use of the facilities on its land is and has been controlled and directed from the Terminal Building which is, as the OSS point out, a relatively small building on the south-eastern side of the Application Land. Although the claimed curtilage may appear wholly disproportionate to the physical size of the Terminal Building, when consideration is given to the land and the building in the context of an operational airport, the relative size of the application land to the Terminal Building is proportionate to the function and purpose to which the building and land are put.
77. Ancillary: The applicant's evidence was that the Terminal Building was a hub from which the operational activity at the airport (both 'landside' and 'airside') was directed. The airport's administration was conducted from the Terminal Building. Lighting across the airport was provided from the Terminal Building and the standby generator was located there. In addition, IT and telecommunications for the entire airport and for the airport fire station is provided from the Terminal Building. Although Blackbushe is a small general aviation facility and does not provide air traffic control service, the level of air traffic using the airport requires some form of service and the control tower at the western end of the Terminal Building provides an air flight information service ('AFIS') to regulate and control take-off and landing.
78. It was the applicant's case that the Terminal Building was at the heart of the operations carried out at the airport and that the aviation related infrastructure – the runway and taxiways, aircraft parking areas and the public car parks and hangars - had a functional relationship to the Terminal Building and operated by virtue of the activities which took place within the Terminal Building.
79. The objectors submitted that the relationship between the Terminal Building and the Application Land was the inverse of what the applicant contended. It was submitted that the function of the Application Land was as a place where aircraft could safely take off and land and that this is achieved where there is a system in place to guide people onto and off the runways and taxiways. The control tower attached to the Terminal Building which provided an AFIS permitted the safe and efficient use of the airfield, but there were no activities on the airfield which facilitated the safe and efficient use of the Terminal Building. The applicant's approach was considered by other objectors to be contrived as it was evident by the nature of the use of the Application Land that the Terminal Building was ancillary to the use of the airfield and not the other way around.
80. The Council submitted that the land and the building may each serve the other's purpose in some necessary or reasonably useful way, although such

functional equivalence would not give rise to the application land being the curtilage of the Terminal Building. The applicant's response was that there was no difference between 'functional equivalence' and the land being said to be 'part and parcel' of the same unit; if there was 'functional equivalence' between the operational land and the Terminal Building, it demonstrated that the land and the building formed an integral part of the same unit.

81. In addition to co-ordinating the safe arrival and departure of aircraft it is evident that the Terminal Building provides administrative and technical support to the various activities at the airport. Those functions performed within the Terminal Building (the co-ordination of on-site fire and safety provision, the medical assessment of airport staff, customs and quarantine services for international flights for example) which are not directly related to the safe take-off and landing of aircraft are nonetheless part and parcel of the safe and efficient operation of the airport.
82. Although the Council described this state of affairs as a '*functional equivalence*' and that as such the land could not be curtilage and the objectors described the land and buildings as having a '*symbiotic relationship*', such relationships indicate that whilst there may be an ancillary relationship of the building to the land, there is also an ancillary relationship of the land to the building. As set out in *Challenge Fencing*, it is not a legal requirement for there to be an ancillary relationship although such a relationship exists in this case. I consider that the operational land of the airport and the Terminal Building are part and parcel of the same unit and that they are integral parts of the same unit.

Summary regarding curtilage

83. Taking all of the above into account, I find that the operational area of the airport was and is associated with the Terminal Building to such an extent that the operational area was and is part and parcel with the building and an integral part of the same unit; that it forms one enclosure with the building and serves the purposes of the building in some necessary or reasonably useful way. I consider that the operational area of the airport formed and forms the curtilage of the Terminal Building. It follows that I conclude that the Application Land, which has at all material times been part of the operational area of the airport, can be properly described as being within the curtilage of the Terminal Building.

Whether the land was provisionally registered as common land under section 4 of the 1965 Act

84. It is not disputed that the application land was provisionally registered as common land on 16 May 1967 under section 4 of the Commons Registration Act 1965. The application land was registered as part of Yateley Common. I conclude that this requirement is met.

Whether on the date of provisional registration the land was covered by a building or was within the curtilage of a building

85. The photographic and other documentary evidence shows that there were two buildings present on the land at the date of provisional registration – the Terminal Building and the TCAC clubhouse. Therefore, at the date of provisional registration, part of the Application Land was covered by the footprint of the Terminal Building and by the footprint of the clubhouse.

86. In 1967 the operational airport extended to some 224 acres as the two northern runways remained in use up to 1985. The Council submitted that if the operational airfield between 1967 and 1985 was around 224 acres, the alleged curtilage in 1967 would have been approximately twice that of the Application Land. Reference was made to *Dyer* where Walker LJ held that in relation to Kingston Maurward House that “*a park of this size [100 acres] is altogether in excess of anything which could properly be described as the curtilage of a mansion house*”. As noted above, the Council submitted that there comes a point where the land which comprises the claimed curtilage of a building is just too large to be properly so described. The OSS were of the same view in that the relative size of the land was far in excess of what could be described as curtilage.
87. The assessment of curtilage is a matter of fact and degree and the relative size of the land claimed as curtilage has to be seen in the context of the use to which the building and land is put. An operational general aviation airport will occupy a significant area of land and that land is likely to dwarf the size of the Terminal Building associated with it; such is the nature of airports. At the time of provisional registration in 1967, the operational area of the airport was much greater than that which is operational today. For the reasons set out above, I consider that the Application Land was within the operational area of the airport in 1967 which at that time was the curtilage of the Terminal Building such that paragraph 6 (2) (b) is satisfied.

Whether the provisional registration became final

88. It is not disputed that the provisional registration became final on 26 March 1975. It is also not disputed that a claim for judicial review against that decision was dismissed in *re Yateley Common* [1977] 1 WLR 840. I conclude that the provisions of paragraph 6 (2) (c) are satisfied.

Whether 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

89. With regard to the land identified above as being the curtilage at the time of the provisional registration, I am satisfied that the Application Land has at all times been, and still is, covered in part by the Terminal Building and the former TCAC clubhouse and despite the reduction in the operational area of the airport, the Application Land has at all times been, and still is, within the curtilage of the Terminal Building.

Other matters

Validity of the application

90. One of the objectors submitted that the application had not been made by the owner of the land. The objector appears to have conflated the provisions of section 16 of the 2006 Act with those of paragraph 6 to schedule 2. Whilst section 16 requires an application for de-registration and exchange of common land to be made by the owner of the land, paragraph 6 of schedule 2 is not so restricted. Paragraph 6 (3) (a) sets out that an application can be made by “any person”. The application was made by Blackbushe Airport Limited as the lessee of the land; the application was therefore validly made.

Neighbourhood interests test and environmental concerns

91. The objector also submitted that the application was not in the interests of the neighbourhood or the public interest in nature conservation, landscape, the protection of public rights of access or archaeology. Whilst I acknowledge the objector's views on these matters, they are factors to be considered under section 16 or section 38 of the 2006 Act but are not matters within the ambit of paragraph 6 to schedule 2.
92. I acknowledge that there is a public interest in the continued existence of registered common land and that the Secretary of State's policy is to ensure that the stock of common land is not diminished. However, the 2006 Act provides a mechanism whereby, in certain circumstances (in this case where the provisions of paragraph 6 to Schedule 2 are met) land registered as common land may be de-registered.
93. The objectors also stated that whilst they regarded the airport as a valuable resource in the area, the expectation was that if it ceased to operate then the land would be returned to common. Whilst the status of the land as registered common limited development opportunities, the common had been a valuable resource for centuries and had been a valuable resource in times of war.
94. I also acknowledge the concerns of the objectors of the possible future use of the Application Land if it were to be de-registered and the potential for the uplift in the value of the land if it were no longer registered common. Concerns were also expressed that de-registration would leave a 'hole' within Yateley Common an area within the Thames Basin Heath Special Protection Area.
95. Whilst I acknowledge the concerns raised by the objectors about these matters, they are not ones which I can take into consideration in determining this application as they fall outside my remit under paragraph 6 of schedule 2.

Summary

96. I am satisfied that the Application Land was provisionally registered as common land under section 4 of the 1965 Act on 16 May 1967 and that the provisional registration became final on 26 March 1975. I consider that at the date of the provisional registration the Application Land was covered by a building or was within the curtilage of a building and that the Application Land has at all times been, and still is, covered by a building or is within the curtilage of a building.

Conclusions

97. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the criteria for deregistration set out in paragraph 6 of Schedule 2 to the 2006 Act have been satisfied in relation to the Application Land and that the land should be removed from the register of common land.

Alan Beckett

Inspector

APPEARANCES

For the **Applicant** Blackbushe Airport Limited:

Mr Douglas Edwards QC of Counsel and

Mr George Mackenzie of Counsel

Who Called:

Mr C Gazzard

Mr R Belcher MCP MCTA

Mr P Brown

Mr P Coombs MSc CEng MRAes

Mr M Hemming ATCO AFISO

Mr M Lambert

Professor M Bagshaw MB BCh MRCS LRCP FFOM DAvMED DFFP FRAes FRSB

Ms A Bartaby BSc DipTP, MRTPI, FRAes, FRGS

Objectors:

For the Open Spaces Society:

Mr Philip Petchey of Counsel

Mr P J Tipton

Cllr D E Simpson

Cllr A Collett

Interested Party (neutral) Hampshire County Council:

Mr George Laurence QC of Counsel and

Mr Simon Adamyk of Counsel

Inquiry documents

1. Hampshire County Council Statement of Case.
2. Copy of email from OSS to HCC dated 13 March 2019.
3. Copy of email and attachments from OSS to Planning Inspectorate dated 25 March 2019.
4. Comments by Mr Tipton on the Council's comments on his statement of case, dated 21 March 2019.
5. Applicant's supplementary bundle.
6. Applicant's opening statement.
7. Extracts from the News Chronicle July 9 1960 and the Aldershot News January 6 1961.
8. Blackbushe London's Lost Airport 1942 – 1960 by Robert Belcher, AJ Aviation Publishing.
9. Opening Submissions on behalf of Hampshire County Council.
10. Enlargement of Exhibit CG05.
11. Enlargement of Exhibit CG05 (North west corner).
12. Photographs of hangars on north-west side of the airport.
13. Copy of letter from Hart District Council dated 23 February 2015 regarding the erection of hangar and portacabin.
14. Extract page 259 and 260 of 308 from Hampshire County Council's file regarding Blackbushe Airport.
15. Additional statement from Mr Tipton.
16. Location plan showing Yateley Common (CL 24).
17. Closing statement of Mr Tipton.
18. Closing statement of Cllr Simpson.
19. Closing statement of Cllr Collett.
20. Closing statement on behalf of the OSS.
21. Closing statement on behalf of the Applicant.

