

Wiltshire Council

Eastern Area Planning Committee

17 November 2016

COMMONS ACT 2006 – SECTIONS 15(1) AND (2) APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN THE GREEN, BONDFIELD, WOODBOROUGH

Purpose of Report

1. To:
 - (i) Consider an application to register land at Bondfield, Woodborough as a town or village green.
 - (ii) Recommend that Wiltshire Council seeks Counsel's Opinion on the officer's report contained at **Appendix 1** and the decision therein not to hold a non-statutory public inquiry.

Relevance to Council's Business Plan

2. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. On 7 October 2015 Wiltshire Council received an application to register land at Bondfield, Woodborough as a town or village green. The application was supported by a statutory declaration and evidence from 19 users of the applicant land.
4. The basis for the application is that the land has been used for lawful sports and pastimes for a period of at least 20 years in a manner that is 'as of right'. That is without permission, force or secrecy. To succeed, this application must also show that a significant number of inhabitants of any locality (or neighbourhood within a locality) were the users of the land and that use continued at the time of application.
5. A recent change in the law (detailed at section 7 **Appendix 1**) requires the Council, on receipt of an application, to identify whether a 'trigger event' has occurred. Trigger events are specific events governed by Regulations that cause an application for a town or village green to be returned to the applicant and the right to apply not exercisable unless a terminating event has occurred.
6. When this application was received on 7 October 2015 no trigger events had occurred. An application for planning permission on the site was subsequently validated and published by Wiltshire Council (on 14 October 2015). Although the first publication of an application for planning permission is a trigger event, in this

case it occurred after the application was received by the Council and cannot apply.

7. Accordingly, the application was advertised for the statutory period and notice duly served. One objection was received to the application and has not been withdrawn.
8. Under the Council's constitution, one of the functions of the Area Planning Committee is, in cases where an objection has been received and has not been resolved, to consider matters of local importance within the area such as the registration of town or village greens. In this case, the owners of the applicant land objected to the registration of the land as a town or village green.
9. Officers have considered the evidence adduced with the application, responses from the objector, the applicant's comments to those and relevant case law. The draft decision report appended at **Appendix 1** to this report details this and concludes that it is considered that on the balance of probability part of the applicant land should be registered as a town or village green.

Main Considerations for the Council

10. Under the Commons Registration Act 1965, Wiltshire Council is charged with maintaining the register of town and village greens and determining applications to register new greens. The application to register land at Bondfield, Woodborough as a town or village green, has been made under Sections 15(1) and (2) of the Commons Act 2006, which amended the criteria for the registration of greens. Section 15 of the Commons Act is set out in full at part 7 of the Decision Report attached at **Appendix 1**.
11. Sections 15(1) and (3) of the Act, state:

"15 Registration of greens

- (1) *Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*
- (2) *This subsection applies where –*
 - (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
 - (b) *they continue to do so at the time of the application*

Overview and Scrutiny Engagement

12. The determination of Town and Village Green Applications is governed by Statutory Regulations, relevant case law and non-statutory guidance.

Safeguarding Considerations

13. There are no safeguarding considerations as matters relating to safeguarding are not permitted within Section 15 of the Commons Act 2006. Any determination must be based only on the relevant evidence before the Registration Authority

Public Health Implications

14. There are no public health implications, as considerations relating to public health are not permitted within Section 15 of the Commons Act 2006. Any determination must be based only on the relevant evidence before the Registration Authority.

Corporate Procurement Implications

15. Corporate procurement implications are covered under Financial Implications below. The determination of Town and Village Green Applications is a statutory duty for the Council and not a discretionary power.

Environmental and Climate Change Considerations

16. Considerations relating to environmental impact are not considerations permitted within Section 15 of the Commons Act 2006. Any determination must be based only on the relevant evidence before the Registration Authority.

Equalities Impact of the Proposal

17. Considerations relating to the equalities impact of registering land as a town or village green are not considerations permitted within Section 15 of the Commons Act 2006. Any determination must be based only on the relevant evidence.

Risk Assessment

18. In the event that the application is refused, and no land is registered, the applicant may seek judicial review of the Council.
19. In the event that land is registered the landowner or the applicant may seek judicial review of the Council or may appeal to the High Court under s.14(b) of the Commons Act 1965 to have the register rectified (for example where it appears to the court that no amendment or a different amendment ought to have been made).
20. In either case there is a risk of substantial costs being incurred by the Council.

Financial Implications

21. Presently, there is no mechanism by which a Registration Authority may charge the applicant for processing an application to register land as a town or village green and all costs are borne by the Council.
22. Where the Council makes a decision to register land as a town or village green it must give a reason for its determination as this decision is potentially open to legal challenge. The legal costs of a successful legal challenge against the Council could be in the region of £40,000 - £100,000. The cost of seeking Counsel's opinion on the decision not to hold a public inquiry or any other specific matter is likely to be in the region of £1,000 to £2,000. The cost of a public inquiry is likely to be around £30,000. The Committee should be aware that the number of applications received by the Council for the registration of town and village greens is very low and that all costs incurred in the processing of this application are currently unfunded.
23. There is currently no duty for Registration Authorities to maintain land registered as a town or village green.

Legal Implications

24. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision by an appeal to the High Court under Section 14(1)(b) of the Commons Registration Act 1965 ('1965 Act'), which applies where Section 1 of the Commons Act 2006 is not yet in place (i.e. outside stated pilot areas). Wiltshire is not a pilot area for the purposes of the Commons Act 2006. Section 14(1)(b) of the 1965 Act allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify. The overall effect is that the registration of the land is deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the town or village green without limit of time. The application which could be made many years after the decision potentially enables the Court to hold a re-hearing of the application and consider the facts and law and could lead to de-registration of the land.
25. Where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, although the decision of the Council may be challenged through judicial review, for which the permission of the court is required and the application must be made within three months of the date of the decision. A landowner could also use judicial review proceedings to challenge the Council's decision to register their land as a town or village green.
26. There is currently no statutory or non-statutory guidance available to authorities regarding when it would be considered to be appropriate for a Registration Authority to hold a non-statutory public inquiry. However, judicial cases have confirmed that it is the authority's duty to determine an application in a fair and reasonable manner and recent judicial decisions have also sanctioned the practice of holding non-statutory inquiries. In *R (Cheltenham Builders Ltd) v*

South Gloucester District Council the court decided that the holding of a non-statutory inquiry in some circumstances would be necessary as a matter of fairness. In *R (on the application of Naylor) v Essex County Council (2014)* the Court confirmed that a public inquiry was one means by which a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received in written form.

27. In the case of the application before this committee, officers consider that a number of points will not be resolved by holding a public inquiry, these being matters of fact and interpretation rather than disputes relating to the quality and consistency of the user evidence adduced with the application. In cases where the evidence adduced by either side is conflicting, the benefit of cross examination offered by an inquiry is clear.
28. The objector has four main points of objection:

(i) **Section 15C**

The objector maintains that on account of them applying for planning permission on 30 September 2015, a trigger event had occurred. However, the application was not validated, registered and first published until 16 October 2015 (N.B. Officers consider that this date was 14 October).

The Growth and Infrastructure Act inserted the new Section 15C and schedule 1A into the Commons Act 2006 which deal with the exclusions to the registration of greens. Under s15C and schedule 1A the relevant trigger event is defined as *'An application for planning permission in relation to the land which would be determined under Section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act'*.

The reference to 'publication' of a planning application is dealt with under s.65 (1) TCPA – Section 65 (1) which states:

'(1) A development order may make provision requiring—

(a) notice to be given of any application for planning permission, and

(b) any applicant for such permission to issue a certificate as to the interests in the land to which the application relates or the purpose for which it is used,

and provide for publicising such applications and for the form, content and service of such notices and certificates.'

This section is referring to the publication of a planning application not just the issue of a certificate by an applicant as to the interests in the land. The s.65 (1) statement *'and provide for publicising such applications and for the form, content and service of such notices and certificates'* clearly refers to the general publication of the application. The current

development order is the Town and Country Planning (Development Management Procedure) (England) Order 2015 which sets out the publication requirements in paragraph 15. Paragraphs 15 (1) and 15 (2), whichever applies, depend on whether the application for planning permission is made as an EIA application or affects a right of way (15(1) or is a planning permission for a major development (15 (2)). However, both 15 (1) and 15 (2) require the publication of the application by the display of a site notice and the publication of a notice in a newspaper circulating in the locality in which the land to which the application relates is situated.

Accordingly, the trigger event had not occurred when the application was submitted.

(ii) **Incorrect Identification of the land**

The objector notes that the applicant land has been incorrectly identified in as much as the statutory declaration and evidence cannot relate to it all on account of it including garages, car parking and an area used under licence as a garden.

Officers accept these points but note that the Registration Authority is entitled to register a lesser amount of land than has been applied for.

(iii & iv) **Insufficient user as of right for 20 years or at date of application**

The objector considers that the area of applicant land is small, has been substantially enclosed and has been maintained for the use of the tenants by both Kennet District Council and Sarsen Housing Association (now Astor) and not as public open space.

These matters are considered in detail in **Appendix 1** but are not considered to be matters that would be advanced by a public inquiry. It is noted that a copy of the transfer of the applicant land from Kennet District Council to Sarsen Housing Association Limited is appended at **Appendix 2** and although it makes clear that access to all forecourts, carriageways, roads, highways, paths, ways and passageways (“Accessways”) for residents of Bondfield is by right (and not as of right) it is silent as to the ‘green space’ area and there is no implication of permission or right for the public to use this space. Only two of the witnesses are Bondfield residents and evidence relating to their own use has been discounted.

29. Although the objector also considers that the main use has been for the village fete, the evidence forms themselves reveal that children playing and other activities have taken place and all of these are activities that may be considered as lawful sports and pastimes.
30. It is therefore considered that the holding of a public inquiry would not benefit the determination of this application.

Options Considered

31. Members of the Committee need to consider whether to:
- (i) Refuse the application to register the applicant land as a town or village green.
 - (ii) Register all or part of the applicant land as a town or village green.
 - (iii) Hold a non-statutory public inquiry and receive an inspector's recommendation.
 - (iv) Seek Counsel's opinion on the officers' report contained at **Appendix 1** and the decision not to hold a public inquiry.

Reason for Proposal

32. It is considered that in the interests of fairness to all parties the legal opinion of independent counsel, who is an expert in this area of law, should be obtained before this committee proceeds with determining this application. It is further considered prudent to reduce the risk of legal challenge with its resultant costs by seeking this opinion.

Proposal

33. That Wiltshire Council seeks Counsel's opinion on the officer's report contained at **Appendix 1** and the decision not to hold a non-statutory public inquiry.

Tracy Carter

Associate Director – Waste and Environment

Report Author: **Sally Madgwick** Rights of Way Officer

The following unpublished documents have been relied on in the preparation of this Report:

None

Appendices:

- Appendix 1 – Decision Report (with appendices A to D inclusive)
- Appendix 2 – Transfer Document relating to the applicant land (WT145624)