

COMMONS ACT 2006
APPLICATION FOR THE REGISTRATION OF A
TOWN OR VILLAGE GREEN: LAND AT BEECH GROVE, TROWBRIDGE

Purpose of Report

1. To ask the Committee to consider the application of Roger Feltham to register land in Trowbridge known as Beech Grove Community Garden as a town green under section 15 of the Commons Act 2006 and to seek a decision on the application.

Background

2. Under the Commons Registration Act 1965, all common land and town or village greens were required to be formally registered. County Councils as registration authorities were charged with compiling a register and failure to register land within the prescribed period, which expired in 1970, resulted in that land ceasing to be common land or town or village green.
3. However, under Section 22(1A) of the Commons Registration Act 1965 (inserted with effect from 30th January 2001 by the Countryside and Rights of Way Act 2000), land could continue to be registered provided the registration authority was satisfied that it met the statutory criteria.
4. The Commons Act 2006 came into force in part on 6 April 2007. The Act amends the definition of a town or village green and sets out the circumstances in which a new registration can be effected. If a green is registered, it means that the inhabitants of the locality would have the legal right to indulge in lawful sports and pastimes over the land. Further, it is an offence to do any act which injures a green or interrupts the use or enjoyment of it and to construct anything on it.
5. Whilst an application under the Commons Act 2006 must be processed in accordance with The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007, these have not amended the advertising and objecting requirements. If an application to register land as common land or as a town or village green is submitted and is validly made, the registration authority must advertise the application in the local press and on site, inform the other local authorities in the area and the owner, lessee, tenant or occupier of the land concerned. A period of not less than six weeks must be allowed for objections to the application to be lodged.

6. The application and objections must then be considered by the registration authority and a decision made as to whether the land is to be registered or not. Whilst there is no formal right of appeal against a rejected application, the applicant or an objector may seek permission from the High Court to judicially review the authority's decision if he/she believes it to constitute an abuse of power or to be wrong in law, unreasonable, procedurally improper, biased, or contrary to legitimate expectations.

Main Considerations for the Council

7. The application site, Beech Grove Community Garden, is on the College Estate in Trowbridge and is shown highlighted in grey on the plans attached to Mr Feltham's application (**Appendix 1**). The site is owned by West Wiltshire District Council (WWDC). The land abuts the Clarendon School site and is adjacent to an area of land owned by the County Council and used as a coach park.
8. The College Estate was built between 1964 and 1966 but the application site was never built on. There is some evidence that the land was wasteland until Mr Feltham adopted it in or around 1990 and turned it into a Community Garden.
9. In June 2007, WWDC's cabinet resolved to sell the application site for development. WWDC obtained a valuation of the land which suggests that it is worth some £125,000 as a development site as against £5,000 as a garden.
10. On 1 July 2007, Roger Feltham applied to the County Council to register Beech Grove Community Garden as a town green (**Appendix 1**). Mr Feltham's application is accompanied by a statutory declaration and 34 supporting statements.
11. The application was advertised in August 2007 and in September 2007 an objection was received from WWDC (**Appendix 2**). WWDC challenges the user evidence and Mr Feltham's ability to satisfy the requirements for registration. WWDC submits that the application should be dismissed summarily rather than go to public inquiry. Alternatively, WWDC submits that a barrister should be appointed to advise on the merits.
12. Mr Feltham has submitted a response to WWDC's objections dated December 2007 (**Appendix 3**). Copies of all the documents are available in the Members' Room and are also available for inspection through either of the report authors.
13. In order to meet the requirements for registration under section 15(2) of the Commons Act 2006, Mr Feltham must demonstrate that "*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 they continue to do so at the time of the application*". That said, there is a transitional provision in the Act at section 15(4) which provides that notwithstanding the above, an application can be made to register land as a town green up to five years after use as of right has ceased in certain

circumstances. This provision is relevant to this application and is discussed at paragraph 29.

14. Each of the statutory requirements is examined below. The standard of proof is the usual civil standard of the balance of probabilities.

A significant number

15. "Significant" does not mean considerable or substantial. In this context, what matters is that the use is sufficient to indicate that the land is, in general, used by a large number of the local community rather than occasional use by individuals as trespassers (see *R (McAlpine) v Staffordshire CC* (2002)).
16. In this case, 34 witnesses have filled out questionnaires confirming their use of the land.
17. WWDC maintains that 35% of the user questionnaires should be discounted as (i) two have not stated the years during which they used the site, (ii) nine have not used it for a continuous 20 year period and (iii) one is unsigned. WWDC question whether the remaining 22 witnesses amount to a "significant number".
18. Officers do not consider that the statements referred to at (i) and (ii) above should be ignored when considering whether a significant number of people have used the land (although (i) is relevant to the 20 year period as discussed below). Also, there is no requirement for each individual to have used the land continuously for 20 years as explained at paragraph 28 below. Officers agree that the unsigned statement should be discounted for present purposes.
19. Taking the above into consideration, officers believe that, on the balance of probabilities, the applicant has established a prima facie case that there has been general use of the site by a significant number of the local community.

Inhabitants of any locality or neighbourhood within a locality

20. A locality must be a distinct and identifiable community such as a division of the county known to law, like a borough, parish or manor. An ecclesiastical parish can be a locality. A neighbourhood within a locality can be a housing estate (*R (McAlpine) v Staffordshire CC* (2002)).
21. Mr Feltham defines the locality as the College Estate in Trowbridge which is shown edged in black on Plan A attached to his application at **Appendix 1**. An analysis of the addresses of the applicant's witnesses shows that the vast majority live on Beech Grove itself or on the streets just off it.
22. WWDC accept that Beech Grove is a locality within the meaning of the 2006 Act but states that it is a matter for the applicant to prove that the area claimed has the character and facilities to enable it to be defined as a neighbourhood.
23. Officers consider that in light of the case law referred to in paragraph 20 above, that the College Estate can be said to be a neighbourhood within the locality of

Trowbridge and thus a distinct and identifiable community which meets the statutory definition. However, this is an issue which may need to be tested since WWDC puts the applicant to proof.

Use as of right

24. In order to demonstrate that use of the land has been of right, the use must have been open, that is, without force, stealth or permission and does not turn on the subjective beliefs of the users: *R v Oxfordshire CC ex p Sunningwell PC* (2000).
25. As stated above, the College Estate was built between 1964 and 1966 but the application site was never built on. 33 individuals living in the area have provided statements confirming that there have never been fences or notices preventing use of the land. All of the statements say that the users of the land did not seek permission to use it.¹ Many of the witnesses say they used the land from the 1960s or 1970s and some recall playing on the site as children in the 1970s and 1980s. In the early 1990s, Mr Feltham started creating a garden on the site and the evidence of the witnesses is that the garden has been used by members of the community for observing wildlife, picking blackberries and enjoying the environment. It follows that there is a prima facie case that the locals enjoyed use of the site, as of right, from its creation in the 1960s for, amongst other things, children's play notwithstanding the fact that there is some evidence that it was waste land until the 1990s. A summary of the user evidence is at **Appendix 4**.
26. On 2 September 2003, Mr Feltham entered into a formal licence agreement with WWDC to maintain the garden. Clause 1 of the licence provides:

"The Owner grants to the Licensee permission to enter onto the piece of land at Beech Grove, Trowbridge, Wiltshire shown edged red on the plan annexed to this Agreement ("the Land") to voluntarily maintain only, the land on behalf of the Owner but not so as to exclude the Owner who may continue to visit the Land and if so desired permit its use for normal recreation jointly with the Licensee".

The licence is personal to Mr Feltham and provides that *"no person other than the Licensee and his family may use the land without the written permission of the owner whose discretion in granting such permission will be absolute"*.
27. WWDC submit that since the licence agreement grants permission for use of the land and is still in force, there has been no use of the land as of right since 2 September 2003 and indeed no use as of right prior to 2003 because, it says, *"a period of twenty years continuous use has not been achieved or demonstrated by the Applicant on the balance of probabilities"*. WWDC does not clarify the position further and this point may need to be tested.

¹ Mr David Galliers of 46 Beech Grove has also filled out a form confirming that there has never been fences or notices preventing use of the land and that he did not seek permission to use it. However, that statement is unsigned and it has, therefore, been disregarded for present purposes.

28. Officers consider, however, that, on the balance of probabilities, the applicant has demonstrated that the land was used as of right until 2003. It is not necessary for each individual to have used the land for 20 years: it is the body of evidence taken as a whole which must demonstrate use continuously throughout the 20 year period. Further, the fact that the applicant's use as of right ceased in 2003 does not defeat the application as there are two provisions of the Act which may apply as follows.
29. First, section 15(4) of the 2006 Act introduces a provision which allows an application to be made where the statutory requirements have been met but use as of right is no longer continuing. The application must, however, satisfy the following conditions:
- “(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
 - (b) they ceased to do so before the commencement of this section; and*
 - (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).”*

This section commenced on 6 April 2007 and the date of cessation was 2 September 2003, therefore, (b) and (c) appear to be met. There are exceptions which prevent an application succeeding where planning permission was granted before 23 June 2006 and/or where construction works have been or will be carried out pursuant to such permission. However, these exceptions do not apply in this case.

30. Second, section 15(7) of the Act provides that the grant of permission does not stop continuing use of the land being regarded as of right where 20 years has already elapsed. WWDC maintains that this section of the Act does not apply to the present case because the applicant has not demonstrated 20 years continuous use. Although WWDC has not commented on the applicability of section 15(4), it is likely that it would make the same point. In the circumstances, it may be prudent to test the evidence on this issue at public inquiry.

Lawful sports and pastimes

31. Mr Feltham states that the land has been used for lawful sports and pastimes. The statements which accompany the application contain details of the use of the land including informal recreation such as walking, wildlife and bird watching, children's play and blackberry picking.
32. WWDC accept that the activities described by the witnesses amount to lawful sports and pastimes but question whether such use took place in view of the nature of the land and difficulty of access.

33. Whilst officers consider that the activities described satisfy the statutory criteria, the evidence of actual use may need to be tested.

The land

34. It is necessary to consider whether the whole of the land subject to the application has been used for informal recreation by local people. There is no evidence that it has not.

Use for a period of at least 20 years

35. Mr Feltham claims that the application land became a town green by actual use of the land by local inhabitants for lawful sports and pastimes as of right for not less than 20 years. He does not specify which 20 year period applies.
36. The relevant period in this case is the 20 year period immediately prior to the cessation of use as of right. If this is the date of the formal licence agreement, then the correct 20 year period runs from 1983 to 2003. As stated in paragraph 18 above, it is not necessary for each witness to have used the land for 20 years: it is the body of evidence taken as a whole which must demonstrate use continuously throughout the 20 year period.
37. The summary of user evidence at **Appendix 4** shows that 26 of the 33 individuals who signed questionnaires say that they used the land from 1983 (and before) and 23 of these individuals say that they continued use of the land to the date of the application. The other witnesses commenced use of the land in 1986, 1989, 1991, 1992, and 1995 respectively.
38. Moreover, Mrs Sheila Ellis of 42 Beech Grove has written a letter to the County Council dated 21 August 2007 in which she says:

"As a resident of Beech Grove for over forty years I would like to support Mr Roger Feltham. This land has always been used as an amenity site. My children played along with most other children living in the area."

Mrs Ellis does not give any specific dates of use in her letter.

39. Furthermore, Trowbridge Town Council has written to the County Council to advise that the Town Development Committee met on 11 September 2007 and resolved to support Mr Feltham's application adding:

"The Town Council is aware of the maintenance of this area of land as open green-space for the general enjoyment of the public, in particular, the residents of the College Estate area of Trowbridge for a number of years, as indicated on the application and supporting statements".

40. In addition, letters have been received from S Feltham and D Feltham of Great Western Road, 19 Westfield Road, Trowbridge dated 28 September 2007 who advise that they have been visiting friends/relatives who live at 77 Beech Grove for the last 15 years and have seen individuals, adults and children, playing

walking, bird watching and taking nature photographs. However, there is no indication that these were local people nor that they used the land on a regular basis so these letters are very weak evidence.

41. WWDC challenge the user evidence. It submits that the site was "*most probably*" used by the residents on an occasional basis since 1991 and it doubts that anyone used the site prior to that date. WWDC say that access to the site is physically difficult and there are brambles and bushes surrounding the perimeter of the site. Moreover, WWDC says that "*there is no formal gateway or defined access or easy route into the site either now or in the past*". Further, WWDC refer to letters from the applicant to WWDC dated January 2004 which refer to the land being a "*waste ground*" and a further letter from Dr Andrew Murrison MP to WWDC which referred to the site having been "*a dumping ground for domestic goods*" before Mr Feltham transformed it. WWDC also says that one of its former employees recalled the site as being "*neglected and overgrown*" from 1987 to 2002. WWDC submit, therefore, that the land was unusable for recreational purposes before 1991 as it was a waste ground.
42. It is clear from the case law that what matters is not the character of the land, rather the rights exercisable over the land. There was a case in 1977 in which rocks at Llanbadrig, Ynys Mon which had been used by the local inhabitants to moor their boats were registered as a town or village green. Moreover, the House of Lords in The Trap Grounds case refused to hold that the statutory definition of a village green should incorporate physical characteristics of the traditional village green. It follows that although the land may have been neglected from the mid 1960s to 1992, that does not prevent it being registered as a green provided the other statutory criteria are met.
43. Whilst some of the evidence of the applicant's witnesses on paper appears to satisfy the 20 year user requirement, WWDC have strongly contested this evidence. In such circumstances, it is difficult to reach a view without oral evidence being given so that it can be tested.

Environmental Impact of the Recommendation

44. Approval of the application for registration would result in the site being registered as a town green under the Commons Act 2006.
45. Should the application to register fail, the land will be sold for development.

Risk Assessment

46. If the application is approved, the Beech Grove Community Garden would be entered in the register as a town green. Any person aggrieved by the inclusion of the land in the register may appeal to the High Court.
47. If the application is rejected, particularly on the basis of the papers alone, there is a risk that the applicant may seek a judicial review if he believes the decision to be wrong in law or procedurally improper. Moreover, the applicant may have grounds for challenge on the basis that there is a conflict of interest between

the County Council's role as registration authority and its position as future owner of the land as unitary authority for Wiltshire. If so, this matter could, potentially, generate significant public and political interest. There could also be cost ramifications which are dealt with in paragraph 50 below.

Financial Implications

48. If the application is approved and the land entered in the register as a town green, it could not be sold as a development site. As mentioned in paragraph 9, the estimated development value of the site to WWDC is £125,000. The only direct cost to the County Council would be the administrative cost of dealing with the application, report and registration. There would not be any obligation on the County Council to maintain the land.
49. If the application is referred to a non-statutory public inquiry, the costs of such an inquiry would be borne by the County Council. The cost to the County Council of holding an inquiry based on a one day hearing, is estimated to be in the region of £2,500 to £5,000 which comprises advertising, hire of accommodation and Inspector's fees and expenses.
50. There would also be financial implications if there were a High Court challenge to any decision made. High Court proceedings are invariably expensive and frequently generate a significant costs liability, which could be in excess of £50,000.

Options Considered

51. Members may:-
 - a) approve the application;
 - b) reject the application. If so, Members are advised to give reasons for the rejection.
 - c) decide that a barrister experienced in this area of law be appointed as an Inspector to hold a non-statutory local inquiry and make a recommendation to the Committee on the application or to advise on the merits of the application.

Reasons for Recommendation

52. On the evidence submitted, the application appears to satisfy the statutory requirements. However, the objector has challenged the user evidence and the applicant's ability to satisfy the requirements for registration of a town green. Since the evidence has been challenged to such an extent, it should be tested by oral evidence before an Inspector at a non-statutory public inquiry.
53. Officers do not recommend summarily dismissing the application or referring it to a barrister to advise on the merits as suggested by WWDC. If a barrister were asked to advise on the merits it is probable that he/she would want to test

the evidence orally. This extra step would, therefore, merely increase the cost of referring the matter to a non-statutory public inquiry.

Recommendation

54. Members are asked to refer the application to a non-statutory local inquiry and to request the Inspector to make a recommendation to the Committee on the application.

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Unpublished documents relied upon in the production of this report: None.