

APPLICATION BY MR [REDACTED] R [REDACTED] TO REGISTER
LAND AT PEMBROKE ROAD, HOUGHTON CONQUEST
AS A TOWN OR VILLAGE GREEN

INSPECTOR'S REPORT

Preliminary

Introduction

1. I am instructed by Central Bedfordshire Council ('the Council') to advise it in its capacity as registration authority, regarding determination of the application dated 1st July 2010 ('the Application') submitted by Mr A [REDACTED] R [REDACTED] ('the Applicant') seeking the registration of land at Pembroke Road, Houghton Conquest ('the Land') as a town or village green pursuant to section 15(2) of the Commons Act 2006 ('the 2006 Act').
2. The Application is the subject of an objection by the landowners, Mr [REDACTED] C [REDACTED] and Mrs [REDACTED] C [REDACTED]. An objection dated 1st October 2010 was lodged on behalf of Mr and Mrs C [REDACTED], who are referred to collectively for the purposes of this Report as 'the Objectors'.
3. I held a public inquiry ('the Inquiry') which sat for one day on 9 March 2011 at Houghton Conquest Village Hall. At the Inquiry, the Applicant did not appear, whilst the Objectors were represented by Mr Douglas Edwards QC, of counsel.
4. Prior to the opening of the Inquiry, I conducted an unaccompanied site visit. There was no request from any party that I conduct an accompanied site visit, and I did not consider it necessary to undertake one.

The Applicant & the Application

5. This case is somewhat unusual, insofar as on 24th January 2011 the Applicant contacted the Council and indicated that he wished to withdraw the Application. The 2006 Act does not

contain any provision which expressly allows for the withdrawal of an application to register land as a town or village green, and accordingly the Council contacted the Objectors' representatives and invited them to make representations before reaching a decision in respect of the Applicant's request. The Objectors indicated that they wished the Application to be determined.

6. Having considered the representations of both parties, the Council decided to proceed to determine the Application. Accordingly I issued directions on 2 February 2011 which provided, inter alia, a timetable for all parties to submit the documentary evidence on which they proposed to rely. The Applicant initially indicated that he would pursue the Application, but subsequently indicated that he would not appear at the Inquiry¹.
7. In order that the residents of Houghton Conquest should not be prejudiced by the Applicant's actions, the Council notified all those persons who had submitted written evidence in support of the Application regarding the Applicant's request to withdraw, by letter dated 2 February 2011. The letter expressly indicated that should the recipient wish to support the Application, he/she could attend the Inquiry.
8. In the event, no person attended the Inquiry in support of the Application.

Without Prejudice Correspondence

9. On 8th March 2011 the Applicant submitted three documents to the Council, in purported response to the witness statement of Mr C [REDACTED]. These documents, which comprised a draft deed of settlement between Mr C [REDACTED] and the Applicant (A1), an undated letter to the Council containing submissions (A2) and a further letter dated 8th February 2011 from the Objectors' solicitors to the Applicant's solicitor (A3). The significance of these documents was insofar as they apparently related to an attempt by the parties to negotiate a settlement in relation to the Application.

¹ The Applicant requested that the Inquiry be delayed, but the Council declined to postpone it. The Applicant also indicated that he would be unable to comply with the timescale for submission of evidence contained in my directions. The Council wrote to the Applicant indicating that it was prepared to relax the terms of the directions, so as to provide him with a further period to submit his evidence, but the Applicant indicated he would still be unable to comply.

10. The Objectors did not object to the late submission of evidence by the Applicant, but contended, through their counsel Mr Edwards, that the matters and documents which the Applicant sought to raise had all been discussed/prepared in the course of 'without prejudice' correspondence. In relying on the documentation, the Applicant had, they asserted, waived his right to privilege in respect of that correspondence. Accordingly, they sought permission to adduce a witness statement from Mr Mauro, the Objectors' solicitor, to which was exhibited a bundle of further documentation which I was informed comprised the full extent of the 'without prejudice' correspondence between the parties.
11. I granted that application, but made a direction that the witness statement and exhibit of Mr Mauro ('O1') should be provided to the Applicant, with provision for him to make representations in respect of it within 7 days, should he so wish. The Applicant subsequently provided a response to Mr Mauro's statement; I have given the reference 'A4'. Document A4 was provided to the Objectors, and the latter have indicated that they do not wish to add anything to the representations made on their behalf at the Inquiry.
12. Before turning to the substance of the Application, I consider it appropriate to make certain observations regarding documents A1, A2, A3, A4 and O1.
13. I do not consider that this documentation provides me with any material assistance in making my recommendation to the Council.
14. It is apparent that in the course of the last six months or so, the parties have discussed the possibility of the Applicant withdrawing the Application, on payment of a sum of money by the Objectors. However, I make no finding as to whether either party ever intended to go through with the proposed transaction; I do not consider that I need to do so, since the question of whether either or both parties genuinely sought to reach settlement has no significant bearing on the matters which I need to resolve.
15. In particular, I do not consider the fact that they were prepared to pay the Applicant to withdraw the Application represents any acknowledgement or recognition on the part of the Objectors that the Application was in any way well-founded.

16. In this context I note the statement in Mr Mauro's email of 11 August 2010² (which enclosed a copy of a draft deed of settlement) to the effect that:

"I should also make it clear that my client does not accept that this land has been used as alleged in Mr R██████████'s application and we strongly refute the application".

However, even in the absence of such a caveat, I would not regard such attempt at settlement as necessarily amounting to any sort of concession. Rather, it is my view that a decision by a landowner to negotiate in this way may be nothing more than a commercial decision to attempt to bring prompt resolution to a potentially problematic situation.

17. Similarly, and although his course of conduct as asserted in document A4 strikes me as peculiar, I do not see that the decision by the Applicant to entertain settlement discussions relating to the withdrawal of the Application necessarily demonstrates any bad faith on his part, or indeed a lack of conviction as to the merits of the Application.

The Application

The Legislation

18. The Relevant legislation for the purposes of the Application is, as already noted, to be found in the Commons Act 2006. Insofar as is relevant section 15 of that Act provides:

(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.

² Contained in the exhibit to O1.

The Land

19. The Land comprises a broadly rectangular shaped area located at the northern end of Pembroke Road. To the south lie no.s 19 and 21 Pembroke Road, located either side of the public highway. To the west are situated six garages, which appear to be accessed by a road running along the south west of the Land. The Land is bounded to the north by brambles and a hedge, whilst to the east there are more brambles. Part of the Land is mud and grass but the northern portion comprises hard standing. I understand that the hard standing represents the remains of the old village hall, which once stood there.

The 20 Year Period

20. The Application was made pursuant to section 15(2) of the 2006 Act. As such the relevant period within which the Applicant must show that the Land has been used in the requisite manner in order to satisfy the statutory requirements of the 2006 Act is the 20 year period 1st July 1990 and the 1st July 2010 ('the Relevant Period').

Neighbourhood & Locality

21. The Application is made in reliance on the use of the Land for sports and pastimes by the inhabitants of "Houghton Conquest Parish (The village of Houghton Conquest)". It is unclear whether reliance is placed on use by members of the parish – it being a 'locality' for the purposes of the 2006 Act – or on the use by inhabitants of the village, it being a 'neighbourhood' within the locality of the parish.

Applicant's Evidence

22. As already indicated, no person attended the Inquiry in support of the Application. However, the latter included evidence as to the use of the Land by local people, in the form of 21 evidence questionnaires. These had been completed by persons who either live or, at some point during the Relevant Period, lived at one of 10 addresses in Houghton Conquest. Of these addresses, 8 of them are located in Pembroke Road³, one is located in Victoria Drive⁴, and one is in Church Close⁵.

³ No.s 4, 13, 14, 15, 16, 17, 23 and 27 Pembroke Road

⁴ No. 20 Victoria Drive

⁵ No.2 Church Close.

23. The signatories of the questionnaires⁶ all state that they have used the Land for various activities during the Relevant Period. The activities in question include pastimes such as dog-walking, cricket and football, as well as more sedentary pursuits such as painting and bird watching.
24. Further, 14 of those who have signed the questionnaires claim to have used the Land throughout the entirety of the Relevant Period. Of the remainder, a further 5 people appear to have used the Land whilst a resident of Houghton Conquest for a portion of the Relevant Period, whilst 2⁷ do not claim to have used the Land during the Relevant Period, other than when living elsewhere than Houghton Conquest.
25. In addition to the questionnaires, the Applicant has also provided a statutory declaration in support of the Application.

Objectors' Evidence

26. Aside from document O1, the evidence submitted by the Objectors comprised statutory declarations from 5 individuals, namely Mr C [REDACTED], Mr Stephen French, Mr John Hargreaves, Mr Paul Hooley and Mr Krzysztof Reiter⁸.
27. In the following paragraphs, I summarise the evidence given by those of the Objectors' witnesses who appeared before me at the Inquiry. This section of my Report is not a precise minute of each witness's evidence, but rather a general record of what I considered to be the thrust of their testimony (both written and oral), insofar as it was relevant to the matters to which I must have regard in making my recommendation.

Mr C [REDACTED]

28. Mr C [REDACTED] had acquired a contractual interest in the Land in 2005, and subsequently acquired the freehold title in 2009. He had only ever known it to be scruffy and overgrown. He considered that he had visited the Land on approximately 100 occasions, and had never once seen any use of it for lawful sports or pastimes. He indicated that he had seen children

⁶ One of the questionnaires, that of Mr Adam Dickinson, is signed by the Applicant 'for' Mr Dickinson. Mr R [REDACTED] has also signed a questionnaire himself.

⁷ Tony Speers and Mr D Speers

⁸ Mr Reiter's declaration was provided after the Objectors' bundles were submitted in accordance with my directions. Accordingly I gave that document a reference number, 'O2'.

playing on Pembroke Road on about half a dozen occasions, but the area of play had been significantly to the south of the Land, at the point where that part of the road which runs 'north-south' joins the 'east-west' limb of Pembroke Road. He had provided a written record of certain site inspections he had undertaken, which indicated that he had only ever seen the Land used for parking cars.

29. He had spoken with certain local people, notably the inhabitants of no.s 19 and 21 Pembroke Road, who had indicated that they wished to see the Land 'cleaned up'.
30. Mr C [REDACTED] had pursued various development options on the Land in the period 2005-2010. In 2007 he had succeeded in obtaining planning permission for a development which would have required him to acquire and demolish the Applicant's property at no.17 Pembroke Road. However, he had elected not to pursue this scheme since he no longer regarded it as viable. He suspected that the Applicant's motivation in submitting the Application was disappointment that Mr C [REDACTED] was no longer proposing to acquire his property to effect his development on Pembroke Road.

Mr French

31. Mr French is the director of a company known as Taylor French Developments. He has entered into an arrangement with Mr C [REDACTED] which entitles him to purchase the Land. A planning application was submitted on his behalf in 2009, which sought consent to develop an area which includes the Land, for 10 residential units.
32. Mr French considered that he had visited the Land on roughly 20 occasions, and had never seen it in use for lawful sports and pastimes. He had twice seen children playing in the area, but they had not been playing on the Land. Rather, they had been cycling on that part of Pembroke Road which runs 'east-west' towards Rectory Lane.
33. He had never seen the Land looking other than its current state, which he described as scruffy and unmaintained. He had made inquiries of the landowner previous to Mr C [REDACTED], Aragon Housing Association, which indicated that the land had never been formally maintained whilst it had been in their ownership. Like Mr C [REDACTED], he had also spoken to the inhabitants of no.s 19 and 21 Pembroke Road, who had expressed a desire to see the condition of the Land improved.

Mr Hargreaves

34. Mr Hargreaves is a director of Woods Hardwick Planning Ltd. His involvement with the site began in 2005, when he assisted Mr C [REDACTED] in bringing a planning application for residential development of an area which included the Land. He subsequently pursued a planning appeal to the Secretary of State on Mr C [REDACTED]'s behalf in respect of that planning application (in 2006), and later succeeded in obtaining development consent in 2007. He was not responsible for the most recent planning application, submitted on behalf of Mr French.

35. He had visited the Land on roughly 3 occasions, and had never seen it in use for sports and pastimes. He felt the current appearance of the Land was indicative of how it had appeared throughout the period 2005-2010.

Discussion and Conclusions

36. In order for registration of land to be justified, an applicant must demonstrate on the balance of probabilities⁹ that it has been used for lawful sports and pastimes by a significant number of the inhabitants of a neighbourhood or locality during a relevant 20 year period, such use being as of right.

37. In the following paragraphs, I consider the extent to which the Applicant in the present case has satisfied each of the elements of the statutory 'test'.

'As of Right'

38. In making his closing submissions Mr Edwards indicated that, for the purposes of the Application only, the Objectors were prepared to concede that such use of the Land for lawful sports and pastimes as had taken place, had been carried on as of right.

'Neighbourhood and Locality'

39. Mr Edwards accepted on behalf of the Objectors that the parish of Houghton Conquest was a 'locality' for the purposes of the 2006 Act. However he contended that such evidence of

⁹ In having regard to the burden of proof, I note the comments of Lord Bingham at paragraph 2 of the decision in R (on the application of Beresford) v Sunderland City Council [2004] 1 AC 889, citing with approval Steed LJ in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102.

user as was before the Inquiry did not support the case that the Land had been used by the inhabitants of that locality, since there was an insufficient 'spread' of users throughout the extent of the locality.

40. In answer to a proposition which I put to him, Mr Edwards indicated that, were I to interpret the Application as having been made on the basis of the use of the Land having been undertaken by the inhabitants of the village of Houghton Conquest, that being a neighbourhood within the locality of the parish of Houghton Conquest, his position would be the same – namely that there was insufficient spread throughout the geographical area relied upon¹⁰.

41. I consider that Mr Edwards ground of objection is well founded. I am not aware that there is any settled authority of the courts which conclusively addresses this question of 'spread and fit'. However, it is my view that in order for it to be demonstrated that use of land has been carried on by the inhabitants of a particular neighbourhood or locality, it is necessary that an applicant must show that use has been carried out by the population of that area as a whole, and not simply by those living in a particular corner of it. Of course, it will not be necessary to demonstrate use by an inhabitant of every street – still less every property. Further, I recognise that in very many cases there will be a concentration of users in the properties which are situated closest to the alleged town or village green. However, there should in my view be something approaching a 'scattering' of users throughout the area relied upon – or at least throughout large parts of it. I am aware that various other inspectors have reached similar conclusions, and indeed Mr Edwards provided me with various reports in this regard¹¹.

42. As already noted above, those persons who have claimed to have used the Land throughout the Relevant Period hail overwhelmingly from a particular street in its immediate vicinity – namely Pembroke Road.

¹⁰ I accept the proposition of Mr Edwards that in order for an area to comprise a neighbourhood it must possess a 'degree of cohesiveness', as indicated by Sullivan J in R (on the application of Cheltenham Builders Ltd) v South Gloucestershire District Council [2003] 4 PLR 95. I recognise that I heard no evidence as to whether Houghton Conquest is capable of comprising a neighbourhood; however I consider it highly likely that the settlement would comprise a neighbourhood. Having regard to the Applicant's answer to question 7 in the Application form, it is my view that it is at least possible that the Applicant intended to rely on the village of Houghton Conquest as a neighbourhood or locality, and so have considered this possibility in drafting my Report.

¹¹ See the Objectors' Authorities' Bundle, Tabs 13 – 16.

43. Accordingly, insofar as there has been use of the Land for lawful sports and pastimes during the Relevant Period, I do not consider that use has been carried on by the inhabitants either of the locality of Houghton Conquest parish, or the neighbourhood of Houghton Conquest within Houghton Conquest Parish, but rather by the residents of certain properties in the immediate vicinity of the Land.

'Significant Number'

44. Mr Edwards on behalf of the Objector contended that the Applicant had not demonstrated use of the Land by a significant number of the inhabitants of either the parish or the village of Houghton Conquest had made use of the Land. Given my conclusions as to the degree to which the Land was used for lawful sports and pastimes (see the following section of this Report), it follows that I accept that the Land has not been used for the requisite sports and pastimes by a significant number of the inhabitants of a neighbourhood or locality.

'Use of Land for lawful sports and pastimes'

45. It is well-recognised that in the context of an application to register land as a town or village green, the burden of proof falls on the applicant¹².

46. In the present case, having regard to the comments of Lord Hoffman in R v Oxfordshire County Council ex parte Sunningwell Parish Council (2000) 1 AC 335, I accept that the various activities described in the evidence questionnaires are such as would comprise lawful sports and pastimes for the purposes of the 2006 Act. Further, I note that a substantial number of the signatories of those questionnaires claim to have used the Land for sports and pastimes throughout the Relevant Period.

47. However, neither the Applicant nor any of his witnesses attended the Inquiry to give oral evidence. As such, it was not open to Mr Edwards to cross-examine them, nor was I able to put questions of my own. In circumstances such as these, where the evidence is entirely untested, I do not consider I can attach anything more than limited weight to it.

48. In addition, I consider that the Applicant's position in this regard is further weakened by the various representations which the Objectors provided to me, which had been written by

¹² In having regard to the burden of proof, I note the comments of Lord Bingham at paragraph 2 of the decision in R (on the application of Beresford) v Sunderland City Council [2004] 1 AC 889, citing with approval Steed LJ in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102.

local people to the Council in the context of the various planning applications which had been submitted in recent years in respect of the Land. These representations, the vast majority of which were opposed to the development proposed, mentioned various reasons why planning permission should not be granted to develop the Land. However, none of them (save one by the Applicant, which I consider in paragraph **) stated in terms that permission to develop should be refused, owing to the use of the Land made by local people for recreation, and the loss of 'recreational space' that would result in the event that development were to take place.

49. In circumstances where a local community is opposed to development I would expect an issue such as this to be raised as a ground of objection. I consider its omission to be strongly indicative that such use of the Land as did take place for lawful sports and pastimes was very limited, and certainly not such as to suggest to the notional landowner that local people were asserting village green rights over his Land¹³.

50. The only reference to recreational activity in the context of these objection letters (again, saving that of the Applicant), is to children 'playing in the road'¹⁴. However, such statements do not justify my concluding that activity was taking place on the Land, as opposed to elsewhere. Indeed, in this context I note that both Mr French and Mr C [REDACTED] witnessed children playing in the road – namely Pembroke Road – as opposed to on the Site.

51. The exception is, as I have already indicated, the objection letter written by the occupant of 17 Pembroke Road dated 18 May 2010¹⁵. In that letter the Applicant refers to the use of the Land as an "*impromptu play area for children*", claiming also that since 1976 the Land "*has been used by local people for recreation and play*".

52. Such statement might, in ordinary circumstances be a weighty consideration in favour of the Application. However, in having regard to the letter of 18 May 2010 I must also have regard to previous letters written by the Applicant in support of previous development proposals

¹³ See R v Oxfordshire County Council ex parte Sunningwell Parish Council (2000) 1 AC 335 at 352H where Lord Hoffman confirmed that, when considering whether the manner/nature of use of land is such as to justify registration as a town or village green, the question for the court to consider is "*how the matter would have appeared to the owner of the land*" during the Relevant Period

¹⁴ See for example the letters of Mr and Mrs Rose of 5 Pembroke Road, dated 12 and 21 April 2005. This issue was picked up by officers in their report in respect of the planning application – see Objector's Bundle, page 124C.

¹⁵ Objector's Bundle, page 207. Although the author's name is blacked out, the address is that of the Applicant. Given that the Applicant apparently continues to reside at 17 Pembroke Road, I see no reason to conclude other than that the Applicant wrote the letter in question.

on the Land. For example, I note that in a letter received by the Council on 16 May 2005¹⁶ the Applicant described the Land in the following terms, namely as a:

“rough area at the end of the road [which] has been an eyesore since 1975 when the old Village Hall was knocked down. Since then it has been untended and gets the odd car dumped on it and is overgrown and spoils the end of the road completely”

I also note the comment in a subsequent undated letter that the area is a *“derelict waste piece of land”*¹⁷.

53. Significantly, these earlier letters were written in respect of proposals which entailed the developer purchasing the Applicant's property, no. 17 Pembroke Road. I note the representation of 18 May 2010 was written in respect of a proposal which did *not* entail use of any of his property.
54. Taking this correspondence in the round, I do not see that I can attach any significant weight to the untested assertions by the Applicant as to the use of the Land for recreation as contained in the letter of 18 May 2010. It must be appropriate for me to approach this written evidence with particular caution in circumstances where the Applicant's various statements are clearly inconsistent, especially where these statements appear to have been made with a view to emphasising or minimising the importance of the Land, depending on whether or not the development proposal in question required use of the Applicant's Land.
55. Further, as against the Applicant's evidence, I must consider the materials relied upon by the Objector. The evidence of all of the Objectors' witnesses was wholly consistent, and painted a picture of land which has not been put to any material use for sports and pastimes. In addition, 3 witnesses appeared before me to give oral evidence, and I have no reason to disbelieve their testimony. All of them appeared credible and convincing in terms of their demeanour when giving evidence.
56. Their account of what they had witnessed on the Land, - or rather the lack of it - was consistent with my own appraisal of the Land. Certainly there was nothing about the Land which I saw on the occasion of my site visit, to suggest that the area was habitually used by local people for recreation of any sort. Rather, it appeared to be a piece of unkempt scrub land, part covered by brambles and part covered by broken concrete

¹⁶ Supra, pages 108-9.

¹⁷ Supra, pages 139-140.

57. As regards my conclusions on this issue, I have already indicated that I consider the key question to be that of how matters would have appeared to a notional landowner during the Relevant Period. On the basis of the evidence before me, and having particular regard to the weight which I can attach to that evidence in light of the total absence of any oral testimony in support of the Application, it is my view that the Applicant has failed to demonstrate on the balance of probability, that the Land was used for sports and pastimes throughout the Relevant Period.

58. In reaching this conclusion I have had particular regard to the evidence of Mr C [REDACTED]. It seems to me that, albeit he has only formally been the freehold owner of the Land for some 2 years, he has visited it in a role similar to that of a landowner some 100 times in the last five years. I accept his evidence that he did not see any use of the area such as could have alerted him to the fact that local people were asserting rights of village green over the Land. In these circumstances, and having regard to the test identified by Lord Hoffman in Sunningwell regarding the import of how matters would have appeared to the notional landowner, it is my view that the use of the Land for sports and pastimes – to the extent that it has taken place at all – was not sufficient to justify registration of the Land as town or village green.

Conclusion & Recommendation

59. Accordingly, having regard to the evidence and arguments presented to me, it is my recommendation to the Council that it reject the Application on the basis that the Applicant has failed to demonstrate that:

- (i) The Land has been used for sports and pastimes during the Relevant Period; and that
- (ii) Use of the Land has been carried on by a significant number of the inhabitants for locality, or neighbourhood within a locality.

Alexander Booth

17 March 2011

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