

Meeting: Development Management Committee
Date: 14th September 2011
Subject: An application to register land described in the Application as “Town Farm Court and Town Farm Orchard”, Henlow as a Town or Village Green
Report of: Director of Sustainable Communities
Summary: The report proposes that Central Bedfordshire Council notify the Applicants that their second application to register the land described as “Town Farm Court and Town Farm Orchard”, Henlow as a Town or Village Green has been rejected.

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Public/Exempt: Public
Wards Affected: Arlesey – Cllrs Rita Drinkwater Ian Dalgarno and Richard Wenham
Function of: Council

CORPORATE IMPLICATIONS

Council Priorities:

Promoting Healthier Lifestyles - by protecting and promoting access to areas of public recreation and leisure.

Financial:

The provisions of the Commons Act 2006 or any other subordinate legislation do not permit the Council to charge a fee for processing applications to register land as a town or village green.

Legal:

See Guide to the Law at Appendix A and Section 15 of the Commons Act 2006 is set out in full in Appendix B.

Risk Management:

No risk management issues have been identified by the author.

Staffing (including Trades Unions):

No staffing issues have been identified by the author.

Equalities/Human Rights: Article 8 of the European Convention on Human Rights states amongst other points that everyone has a right to respect of his home.

No equalities/HR issues have been identified by the author

Community Safety:

No community safety issues have been identified by the author.

Sustainability:

No sustainability issues have been identified by the author.

RECOMMENDATION(S):

That Central Bedfordshire Council notify the Applicants that their second application to register the land described as “Town Farm Court and Town Farm Orchard”, Henlow as a Town or Village Green has been rejected.

Introduction

1. The Commons Act 2006 (“the Act”) makes provision for the registration of common land and town or village greens. Commons Registration Authorities were created to maintain two registers, one for common land and the other for town or village greens. Central Bedfordshire Council (“the Council”) is the relevant Commons Registration Authority. Section 15 of the Act came into force on 6 April 2007 and made changes to the criteria for the registration of a Town or Village Green in response to a line of cases heard in the upper courts.
2. The Council received an application pursuant to Section 15(3) of the Act (see paragraph 6) dated 29 July 2010 (“the First Application”) from Mr Raymond Rapacchi, a local resident (“the Applicant”) to register a piece of land as a village green, which he described as “Town Farm Orchard” and is located off the High Street, Henlow (“the First Application Land”). The statutory procedures as detailed in the 2 February 2011 report were adhered to and on that date the Development Management Committee considered the Report’s conclusions and recommendation. After careful consideration of the evidence submitted by the Applicant, the Objectors and 23 letters of representation the Council resolved to reject the First Application. The said Committee was satisfied that there was no evidence of use by a significant number of people and that the criteria/test of a locality, or neighbourhood within a locality had not been met.

3. In addition the evidence demonstrated that the use of the First Application Land had not been "as of right". Therefore, the First Application had not satisfied the statutory tests and criteria for registration as a new Town or Village Green under the Commons Act 2006 and the said Committee unanimously agreed the following resolution: "That the applicant be notified that his application to register the land described as Town Farm Orchard, Town Farm Court, Henlow as a Village Green had not been accepted".

The Second Application

4. The Council has now received a further application dated 3 March 2011 ("the Second Application") to register land as a town or village green from Mr Raymond & Mrs Wendy Rapacchi ("the Applicants"), part of which the Applicants described as Town Farm Orchard. The Second Application also includes an additional area of land Town Farm Court, Henlow (which is a private driveway). The Second Application was allocated the application number CBC4/2011 and a copy of the application form is attached at Appendix C.
5. Following consideration of the Second Application the Council requested further information from the Applicants on 23 March 2011, which was received on 1 April 2011 see Appendix D. The Council then gave consideration as to whether the Second Application constituted a "repeat" application and as to whether there was sufficient evidence in support of the Second Application. It was concluded that the Second Application had been "duly made" pursuant to Paragraph 3 of The Commons (Registration of Town and Village Greens) (Interim Arrangements) (England) Regulations 2007("the Regulations") and, therefore, was formally accepted on 4 May 2011.
6. The Second Application has been made pursuant to Section 15(3) of the Act, because the Applicants state that recreational use "as of right" for 20 years or more ended on or after 6 April 2007 but no more than two years before the application was submitted (see Appendix A – heading "As of right" for further details).

Location of the Second Application Land

7. The land which is the subject of the Second Application ("the Second Application Land") is described by the Applicants as "Town Farm Court and Town Farm Orchard" (which is located at the western end of Town Farm Court), Henlow. A plan of the land is shown at Appendix E to this report.

Relevant Law

8. The law relevant to the Second Application is set out in Section 15 of the Act. A guide to the law is attached at Appendix A (including an extract of this Section of the Act at Appendix B), although each element of the statutory criteria/test is addressed in this report. In summary, an applicant must prove that the land has been used by a significant number of local inhabitants for lawful sports and pastimes “as of right” for a period of twenty years.
9. The Regulations apply to all applications made under the Act and govern how town or village green applications should be processed by registration authorities.
10. In dealing with an application to register a new Town or Village Green the Council must consider the following criteria:
 - (i) Whether use of the land has been by a significant number of inhabitants
 - (ii) Whether use of the land has been from a particular locality, neighbourhood or a neighbourhood within a locality?
 - (iii) Whether use of the land has been for the purposes of lawful sports and pastimes.
 - (iv) Whether use of the land has been “as of right”?
 - (v) Whether use has taken place on the land identified in the application.
 - (vi) Whether use has taken place over twenty years or more and when the use ended.

Each of the above criteria in connection with Town Farm Orchard is considered under the heading “The Evidence and Determination in connection with Town Farm Orchard” (see paragraphs 25 -36). Town Farm Court is considered under a separate heading in paragraphs 21 - 24 below.

Relevant Planning History

11. (a) 23 August 1995 – Certificate of Lawful Use or Development (which confirmed domestic use for more than 10 years) issued by Mid Bedfordshire District Council, which included the Application Land.
- (b) MB/08/02392/FULL – Invalid application for a change of use of land and buildings from private garden to agricultural use and storage.
- (c) CB/09/06626/FULL - December 2008: Initial planning application for the residential development of 29 dwellings made, which included the Application Land.
- (d) 4 March 2009 – Initial planning application withdrawn while Mid Bedfordshire District Council sought confirmation of village settlement envelope behind 53 and 55 High Street.
- (e) 16 December 2009 - planning application reinstated, following the Planning Inspector’s decision that village settlement envelope included all garden behind 53 and 55 High Street.
- (f) January & February 2010 – Central Bedfordshire Council requested an ecological and archaeological evaluation before the Development Management Committee consider the planning application.
- (g) CB/09/06930/FULL – Change of use of garden land to agricultural land granted 12 February 2010.

- (h) CB/09/06626/FULL – Residential development of 29 dwellings granted subject to Section 106 Agreement in March 2010.
- (i) CB/09/06630/CA – Conservation Area Consent to demolish the bungalow at No 53 High Street, Henlow granted in conjunction with CB/09/06626/FULL above.

Consultation and Publicity

- 12. In accordance with the Regulations the “Notice of Application” for the Second Application (Appendix F) was placed in the Biggleswade Chronicle on 27th May 2011 and displayed on the land itself. It was also served on the landowners and the Parish Council with a request to place the Notice of Application on their parish notice boards.

Statement of Objection and Representations

- 13. The Second Application Land is private land in the ownership of Mr & Mrs H (“the Landowners”) who have submitted a very detailed Statement of Objection within the statutory objection period. In addition, 17 letters of objection to the Second Application were also received by the Council within the objection period from former and present residents of Henlow, which confirmed their support for one of the Landowners main points of objection, namely, that the land had been used with their permission. The Landowners made a request to the Council that their Statement of Objection and the 21 letters of representation to the First Application should be included as an integral part of their objection to the Second Application. The Landowners have dealt with the Second Application by way of two separate constituent parts. Firstly Town Farm Orchard as garden Area G and secondly Town Farm Court as the private driveway Area A. Therefore, this report will consider Town Farm Court (a private driveway) on a separate basis as well (see paragraphs 21 - 24 below).
- 14. A letter re-dated 7 July 2011 (which is in the same terms as a letter dated 1 November 2010) from a Mr B in connection with Town Farm Orchard states that Mr B was given permission by the Landowners to use an area of Town Farm Orchard as a vegetable garden and was provided with a key to the main gate, following his retirement on medical grounds. He states that he spent much of his time in the vegetable garden and confirmed that the Applicant’s children only gained access with permission and that very few strangers entered the land described as Town Farm Orchard.
- 15. A copy of the Landowner’s key points of objection is at Appendix G and copies of their Statement of Objection and the 17 objection letters are available for public inspection. Henlow Parish Council replied to the Council confirming that their Members did not wish to comment on the Second Application. The Parish Council also stated that they have been in contact with the Applicants concerning a claim on their web site.

16. In compliance with the Regulations, the Council sent copies of the Statement of Objection and the 17 objection letters to the Applicants on 13 July 2011. The Applicants were invited to deal with the issues raised in these documents and were given the opportunity to amend and/or clarify any points and issues set out in the Second Application (copy of the Council's letter is at Appendix H). A copy of the Applicant's reply dated 27 July 2011 (covering letter and written comments on the Landowners Statement of Objection and letters of objection) are attached at Appendix I. Additional documents relevant to this reply are available for inspection.
17. The Applicants have contended that they consider that the Landowners Statement of Objection in connection with the First Application (reference 2/2010) is not relevant evidence as the Second Application is a further and different application from the First Application. They have also commented on each of the other letters of objection. In addition, the Applicants asked numerous questions to be put to the Landowners and the other objectors. These were forwarded to the Landowners and the objectors on 2 August 2011 requesting any further comments that they may wish to make as soon as possible.
18. The Landowners replied on 4 August 2011 to the Applicants response stating that they reject the Applicants request to withdraw comments they consider irrelevant (Appendix J). Additional documents relevant to this reply are available for inspection. The Landowners pointed out that they consider that the Commons Registration Authority is the arbiter and should decide what evidence is valid. Twelve of the 17 objectors have replied most of whom have confirmed that they wished their previous comments to the First Application should again be taken into account in connection with the Second Application.
19. The process undertaken by the Council as outlined in paragraphs 17 and 18 has caused such delay that as a consequence the report on the Second Application could not be issued in time to the members for it to be considered at the Development Management Committee which was held on 17 August 2011. In addition, the Applicants sent a further letter dated 23 August 2011, as detailed in paragraph 20.
20. The Applicants commented on the Landowners response in a letter dated 6 August 2011 (Appendix K) and on the other objector responses in a letter dated 23 August 2011 (Appendix M). Additional documents relevant to the Applicant's first response are available for inspection. The Council has given due consideration to the issue between the Applicants, Landowners and other objectors with regard to what evidence is admissible and it is clear that the Council is relying upon evidence from the parties submitted in respect of the Second Application variously dated between November 2010 and August 2011 insofar as the objectors have either repeated or reiterated their original comments and representations made in respect of the First Application.

Town Farm Court (A Private Driveway)

21. Part of the Second Application Land consists of a private driveway which serves Town Farm Court and is shown on Plan B submitted with the Application. The Neighbourhood, whose inhabitants use of the Land is relied upon to justify registration, is identified and appears to comprise six properties, namely numbers 1, 2 and 3 Town Farm Court and numbers 49A, 49B and 49C the High Street, Henlow. The Applicants have stated that “The neighbourhood have passed and re-passed Town Farm Court for over 20 years on foot, bicycle and vehicle”. There is also reference to “the area being in general use by the neighbourhood rather than sporadic use by trespassers” and continuous use of the land by a local neighbourhood within a locality”.
22. As regards Town Farm Court, examination by the Council of the Land Registry documentation and historic conveyance documents indicate that rights of way to pass and re-pass (with or without motor vehicles or other vehicles) from time to time and at all times hereafter and for all proper purposes over this access road were conferred on the above 6 properties which comprise the Neighbourhood. Clearly private rights have been granted and therefore insofar as the Applicants are seeking to register the Town Farm Court private driveway as a town or village green, the Council considers that in the light of the decision in the case of R v. Oxfordshire County Council and Others, Ex Parte Sunningwell Parish Council, [1999] ‘use’ of the driveway land has been carried on ‘by right’ rather than ‘as of right’ and therefore it would not appear to the Landowner to be the assertion of a right (see paragraph 32 for further details) and the Council therefore does not accept that this part of the Second Application Land is eligible or meets the criteria for registration as a town or village green.
23. Further, as regards Town Farm Court, in a letter dated 7 July 2011 Mr B commented that if any cars or people, occasionally, came into Town Farm Court and appeared “uncertain of their whereabouts”, he would ask if he could help them, letting them know, if necessary, that they were in a private area. On a few occasions he would ask people not to park their cars, as it is a private driveway. Also in the reply from Henlow Parish Council their Members were “puzzled as to how a hard surfaced private access road could be termed as a village green”. The Landowners and other objectors accept that resident’s children do occasionally play on Town Farm Court, but also state that it is primarily a driveway. The Landowners have pointed out that part of the driveway area on the Second Application plan includes a private parking area owned by 49b and 49c High Street.
24. In view of the above the Council cannot accept that this area (Town Farm Court) of the Second Application Land can constitute a locality, or neighbourhood within a locality in which a significant number of its inhabitants used Town Farm Court for lawful sports and pastimes as of right for a period of twenty years.

The Evidence and Determination in connection with “Town Farm Orchard”

(i) Significant Number of Inhabitants

25. The Second Application included Map B (Appendix C) showing the neighbourhood within the locality, which has used Town Farm Orchard and includes the residents of the six properties in Town Farm Court and the High Street, Henlow, (see paragraph 21) stating that this area had been used by them for sports and pastimes (see paragraph 30 for details of claimed use) The Second Application included seven completed evidence questionnaires by the Applicants; Mr G P; Mr N T (signed on his behalf following a telephone interview); Miss L R; Mr N R; Mrs O T and Mrs T S.
26. The Landowners have commented on the evidence questionnaires to the effect that the questions could not be completed in a meaningful manner and have given detailed reasons for this in their Statement of Objection. They also commented that the Applicants sent these questionnaires to all current and several previous Town Farm Court residents and that only Mr G P completed one.
27. The Landowners also point out that Mr G P answered question 29. of the Evidence Questionnaire “Did anyone ever give you permission to go onto the land?” – Yes we were given a padlock key in 1993. However, the Landowners state that he never possessed a key to the gate. The Applicants answered – Yes, we were given a padlock key around 1986 to access the field. The Landowners also point out that following a stroke Mr G P cannot write and has reading difficulties. The Applicants have not commented on this.
28. The Landowners state that Mrs T S and Miss L R are the Applicants daughters and Mr P R is their son. Also they have advised the Council that Mr N T is Mrs Rapacchi’s brother and Mrs O T is her mother. The Applicants have not disputed this information. Therefore, the Council considers that this criteria/test in connection with Town Farm Orchard has not been met.

(ii) Locality, or neighbourhood within a locality

29. The Applicants stated in the Second Application that the residents of the six properties in Town Farm Court, and High Street Henlow (see paragraph 21) had habitually used Town Farm Orchard for over 20 years. However, the Landowners refute this and the Council has not received any letters in support of the Second Application from the residents of the other four properties in Town Farm Court and the High Street, Henlow. Therefore, it is considered that this criteria/test in connection with Town Farm Orchard has not been met.

(iii) Lawful sports and pastimes

30. The Applicants and the other people who completed Evidence Questionnaires state that Town Farm Orchard has been used for allotment gardening, dog walking, community celebrations, children on cycles & games, fishing & herbage, football & cricket, walking, bird watching, fruit gathering, sheep grazing, drawing & painting, picnics and caravanning. Other quoted activities would not qualify.

31. Most of these activities on Town Farm Orchard are consistent with use as a town or village green and fall within the criteria/test of “lawful sports and pastimes”,

(iv) As of Right

32. To meet this criteria/test the Applicants need to demonstrate that the use of Town Farm Orchard has been without force, without secrecy and without permission. The evidence from the Landowners supported by the 17 letters of objection (who confirmed that they had used Town Farm Orchard at the invitation of the Landowners) is that the Applicants and others were given permission by the Landowners to use Town Farm Orchard. There was a “squeeze gate” and the Landowners state that it was merely a 12 inch gap at the north end of the Applicant’s western boundary to Town Farm Orchard until 11th May 2009, when the Landowners closed the said squeeze gate and informed the Applicants that they did not wish them to enter Town Farm Orchard. The Landowners have further stated that as the gap is approx 12 inches wide it would not easily afford access to Town Farm Orchard. On 27 July 2011 the Applicants provided a clearer photograph of this gap (see Appendix L). The Applicants have confirmed that the Landowners gave them a key to the adjacent padlocked main gate to enter Town Farm Orchard (see paragraph 27) and therefore entry was with the Landowners permission.
33. The Landowners Statement of Objection has provided detailed evidence on how they gave permission to certain people to enter Town Farm Orchard to carry out the activities listed in paragraph 30 and that some activities may have been carried out in secrecy. In addition, the Landowners have stated that access to the land described as Town Farm Orchard was generally via their back yard and not through the small gap. The Landowners also explained that the Applicant’s children rarely entered Town Farm Orchard and then only by specific invitation.
34. The Landowners have also indicated that 75% of Town Farm Orchard was fenced off and unavailable for the activities claimed for the first 3 years of the claimed 20 year period and that they gave the Applicants a key to the padlocked gate at the end of Town Farm Court. Therefore, it is considered that use of Town Farm Orchard has not been “as of right”.

(v) Application Land (Town Farm Orchard)

35. The Applicants have clearly identified Town Farm Orchard on the plan marked “A” submitted with their application form. Therefore, it is considered that Town Farm Orchard was capable of being used for the twenty year period for the required recreational purposes.

(vi) For a period of twenty years

36. The Applicants claim a 20 year period from May 1989 to May 2009, when they received a letter from the Landowners which withdrew their permission to enter Town Farm Orchard. This is permitted under Section 15(3) of the Act.

Conclusions

37. Following a very through consideration of the evidence submitted by the Applicants (which the Council considers to lack the necessary quality of independent and cogent evidence), the Landowners Statement of Objection and the letters of objection, the Council as the Commons Registration Authority considers that the Applicants have failed to demonstrate that:
- (i) The Second Application Land has been used for sports and pastimes, as of right during the relevant period; and that
 - (ii) Use of the Second Application Land has been carried on by a significant number of the inhabitants of a locality, or neighbourhood within a locality.
38. Therefore, the Second Application has not satisfied the statutory tests and criteria for registration as a new Town or Village Green under the Commons Act 2006.

Appendices:

Appendix A – Guide to the Law
Appendix B – Extract from the Commons Act 2006 – Section 15
Appendix C – Application to register land as a Town or Village Green
Appendix D – Letter dated 30 March 2011 from the Applicants
Appendix E – Plan of Application Land
Appendix F – Notice of Application
Appendix G – Key points of Landowners Statement of Objection
Appendix H – Letter dated 13 July 2011 to the Applicants with Landowners Statement of Objection and other objections
Appendix I – Applicant’s letter dated 27 July 2011 giving comments on Landowners Statement of Objection and other objections
Appendix J - Letter dated 4 August 2011 from the Landowners
Appendix K – Letter dated 6 August 2011 from the Applicants
Appendix L – Photograph showing the “squeeze gap”
Appendix M – Letter dated 23 August 2011 from the Applicants

Background Papers: (open to public inspection)

- (i) Supporting documents submitted with Application to register land as a Town or Village Green....
- (ii) Statement of Objection and 17 letters of representation/ objection. ...

Location of papers: Priory House, Chicksands
