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| **Application Decision** |
| Hearing held on 12 December 2023Site visit made on 12 December 2023 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 15 December 2023** |

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| **Application Ref: COM/3319187****Land at Farway Common, Devon**Register Unit No: CL 214Commons Registration Authority: Devon County Council |
| * The application, dated 31 December 2020, is made under paragraph 4(6)(a) of Schedule 2 to the Commons Act 2006 (the 2006 Act).
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| * The application is made by the Open Spaces Society.
* The application is to add land to the register of common land on the grounds that it constitutes waste land of a manor not registered as common land within the circumstances specified in paragraph 4 of Schedule 2 to the 2006 Act.
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Decision

1. The application is refused.

**Application Land**

1. The application land comprises a triangular parcel of land amounting to approximately 0.3ha and lies close to the junction of Roncombe Hill with Seaton Road. The application land is shaded in blue on the plan reproduced at Appendix 1.

**Preliminary Matters and Background**

1. Paragraph 4 of Schedule 2 to the 2006 Act enables certain land to be registered as common land subject to it meeting the provisions specified within paragraph 4. This includes that applications must be made before the specified date. It is not disputed that the application was made prior to the relevant deadline.
2. Such an application may only be made in respect of land which is waste land of a manor at the date of the application and was provisionally registered as common land under section 4 of the Commons Registration Act 1965 (the 1965 Act). In addition, there must have been an objection to its provisional registration with the provisional registration subsequently cancelled on account of one or more of three specified circumstances. It follows that the statutory provisions of the 2006 Act have largely informed the main issues under consideration for this application.
3. The Commons Registration (England) Regulations 2014 (the Regulations) set out the procedures to be followed for applications made under paragraph 4 of the 2006 Act. Furthermore, I have had regard to the relevant guidance contained in ‘Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate’ issued by the Department for Environment, Food and Rural Affairs dated December 2014 (the 2014 guidance).
4. The task of proving the case in support of the correction of the register rests with the applicant, and the burden of proof is the normal civil standard, namely, the balance of probabilities.
5. Regulation 37 of the Regulations sets out the circumstances where an award of costs might be made. This makes no allowance for an application or an award of costs for applications determined by the hearing procedure.

Main Issues

1. The main issues in this case are:
* Whether the application land was waste land of a manor at the time of the application, and if so:
* Whether the land was provisionally registered as common land under section 4 of the 1965 Act, and if so, whether an objection was made to the provisional registration.
* Whether the provisional registration was cancelled in circumstances specified in sub-paragraph (3), (4) or (5) of paragraph 4 to schedule 2 of the 2006 Act.

Representations

1. Three representations objecting to the application have been received. Firstly, the owner of the land does not consider that the historical evidence submitted by the applicant demonstrates that the application land is waste land of a manor. The conclusions that it formed part of Farway manor are, in the absence of cartographical evidence, based upon assumptions and conjecture that do not meet the evidential burden. The land is locally known as Roncombe Gate, not Farway Hill or Farway Down. In any event, it is stated that the land fails to meet the definition of waste land as it is neither open, uncultivated nor unoccupied. This is largely owing to the combination of fencing, hedgerow, ditch and embankment along the three boundaries which impede access. As such, the owner has had exclusive access to the land and has managed it in accordance with government management schemes. Amongst other things, this has involved cultivating trees, cutting trees, managing shrubs, topping the land and cutting bracken.
2. An objection from the present owner’s father, who previously owned the land as part of a wider farm holding makes broadly similar points. He refers to a longstanding family connection and first-hand knowledge of the land. Reference is made to the land being used for grazing sheep and cattle and cutting of bracken for bedding. He contends that there is no reason to conclude the land is open, uncultivated or unoccupied.
3. Finally, the occupants of the residential property adjoining the land to the south object. They assert that the boundaries of the application land are well defined. Permission has been sought to gain access to the land via the New Zealand gate to maintain the laurel hedgerow along the boundary. Confirmation is given that the owner planted trees and topped the land in the 1990s. Wildlife has flourished during the present owner’s management of the land. Concerns are raised that public access would increase the risk of fire, trespass and littering to the neighbouring property.

**Reasons**

***Whether the application land was waste land of a manor at the time of the***

***application***

1. Waste land of a manor is regarded as being “the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor”, a definition established in the case of *Attorney General v Hanmer [1858] 27 L.J. Ch. 837*. Case law has further established that it is not relevant for these purposes whether the land continues to be held by the lord of the manor, but rather the land must be of manorial origin. Hence, my determination in relation to this issue has focused on whether the application land is of manorial origin, and thereafter, whether it was waste at the time of the application having regard to the definitive factors (open, uncultivated and unoccupied).

*Whether the land is of manorial origin*

1. The applicant has referred to a range of documents which it is submitted point to the land in question once having formed part of the waste land of the manor of Farway. These include an extract from an Ordnance Survey drawing dating from 1806 which illustrates an extensive tract of probable waste land in the parish of Farway. This suggests the land in question was part of that tract between Farway Hill and Broad Down.
2. In the 19th century, the manor of Farway was held by Rev. Thomas Putt. The tithe apportionment extract from the parish of Farway dated 1838 indicates that the application land was also owned by the Rev. Thomas Putt. Although the land formed part of a considerable tithe plot, the plot is described as rough pasture and brake.
3. An extract from a survey of the manor of Farway made in 1682 reveals that several farms and properties were included within the manor, and records rights of common. Subsequent historical surveys of the manor of Farway similarly list farms in the manor and establish amongst other things that Devenish Pitt Farm had a right of common, namely common of pasture. The tithe survey records indicate that the farms listed in the surveys were also owned by the Rev. Thomas Putt in the 1838 tithe records.
4. Extracts from maps and a field book created under the Finance Act 1910 indicate that the application land was described as unenclosed furze and heath land.
5. The application land is situated on the parish border adjacent to the parish of Sidbury. A tithe survey extract and map pertaining to land adjacent to the application land describes it as common with heath and furze. It is not unusual that remnants of waste land are found in marginal ribbons along roadsides, junctions of route ways and administrative boundaries.
6. Individually, none of these documents conclusively show that the application land is of Farway manor. However, cumulatively they allow plausible deductions to be made that do point to it being more probable than not, that the application land is manorial in origin.
7. Furthermore, the 2014 guidance confirms at paragraphs 7.3.15-16 that the vast majority of land in England is formerly of a manor. It states that it is seldom possible to prove definitively that a particular parcel of land is of a manor. Nevertheless, it should be sufficient to show that on the balance of probabilities that the land lies in an area which is recognised to have been, or still be, manorial and that there is no convincing evidence to the contrary.
8. Whilst I acknowledge the objectors’ reservations regarding the historical evidence, which admittedly is not perfect, they accept that the evidential burden is on the balance of probabilities. I am satisfied that the applicant has conducted a comprehensive examination of the available relevant historic records, as encouraged by the 2014 guidance. In the absence of any other credible explanation to show an alternative origin or status of the land, I am satisfied that the historical evidence does display the manorial origin of the application land.

*Whether waste land of a manor at the time of the application*

*Open*

1. Paragraph 7.3.14 of the 2014 Guidance states that open means unenclosed. There are three sides that comprise the boundaries of the land in question. Along the western boundary with Roncombe Hill there is a barbed wire and post fence, which the photographic evidence from the applicant shows was in situ at the time of the application. Along the southern boundary with the adjacent residential boundary there is an established tall laurel hedgerow and wire fence in some places.
2. At the hearing it was confirmed that the presence of the fencing and hedging on these two boundaries at the time of the application is not disputed. Moreover, it was generally agreed that they effectively prevent access onto the application land across those boundaries. The area of dispute is in relation to the long northern boundary adjacent to Seaton Road.
3. I am required to consider the situation at the date the application was made, namely in December 2020. When asked, no one at the hearing considered that the nature of the northern boundary had materially altered since that time. The photographic evidence taken on 22 November 2020 provided by the applicant contains three photographs that show sections of the northern boundary. Moreover, an extract from the accompanying written report from that visit refers to a shallow ditch of about ‘3 foot wide’ and ‘2 foot deep’ running the length of the triangle. This was broadly consistent with my observations when I visited the site, which were that a ditch and some banking does physically delineate the boundary of the land adjacent to the road for its whole length.
4. The applicant accepted at the hearing that ditches and embankments could in principle enclose land, but it was a question of degree, and that to enclose land they ought to present a significant physical impediment to someone on foot. Nevertheless, no statutory definition or case law was produced to establish this as a legal test of enclosure. In the absence of this, it was generally agreed at the hearing that this effectively calls for an exercise of judgement in the circumstances of each case.
5. However, assistance on the meaning of ‘open’ is found in paragraph 3-28 of ‘Gadsden & Cousins on Commons and Greens, Third Edition’ to which both parties refer to as a relevant authority. It states, ‘*What might be said to distinguish enclosure for the purposes of determining whether land is “open” is whether the land has been modified to create new internal or perimetral boundaries for the benefit of those managing the land – as opposed to existing perimetral boundaries for the benefit of, and generally maintained by, those managing the adjoining land.’*
6. At the hearing the owner of the application land described how he re-established the ditch along the northern boundary when he bought the land in approximately 1986. This involved digging a shallow trench and piling the earth inwards along the whole length of the northern boundary. He went on to confirm that this was intended to establish the boundary and prevent access, and was not dug for any other purpose, such as for example, drainage purposes.
7. From my observations and the photographic evidence provided, the presence of the ditch and bank constitute a physical feature. Although the ditch does not result in dramatic differences in topography and the banking is more pronounced in some sections, they would nevertheless generally act to discourage access. I further observed that the banking was for the most part, elevated in comparison to the road. Standing water and soft mud within the ditch would act as a further physical hindrance at certain times of the year.
8. It may be the case that a walker could, depending on ground conditions, traverse the terrain. Indeed, at the hearing we heard about one such incidence. Nevertheless, I am not convinced that a higher threshold as outlined by the applicant is a pre-requisite to establishing enclosure in these circumstances. With reference to Gadsden & Cousins, I find that the land was sufficiently modified by the owner to create a perimetral boundary, and it was done to deter access.
9. Accordingly, on the balance of evidence before me, I find that the land in question was enclosed at the date of the application, and therefore, it was not open. Consequently, it fails to meet the definition of waste land as established in case law. Given my finding on this point, it becomes unnecessary to further examine whether the land was uncultivated or unoccupied as it would not alter the ultimate outcome.
10. It further follows that as the land was not waste land of a manor at the time of the application, it is immaterial to my overall finding as to whether the land meets the further statutory provisions of paragraph 4 to schedule 2 of the 2006 Act as specified in the second and third main issues. Accordingly, there is no need to address those matters further.

**Other Matters**

1. Concerns have been outlined in the representations regarding the potential implications of the land being registered as common land, including increased fire risk, trespass to adjacent residential property and security. At the hearing concerns were also raised relating to highway safety of pedestrians. These are not matters that I have given material weight when reaching my decision as the main issues are framed by the statutory requirements.

**Conclusion**

1. Having regard to the matters above, and all other relevant matters raised at the hearing and in the written representations, I conclude that, on the balance of probabilities, the application land does not fulfil the necessary criteria for registration. Accordingly, the application is refused.

**Formal Decision**

1. The application is refused.

Helen O’Connor

Inspector

APPEARANCES AT THE HEARING

Dr Frances Kerner Open Spaces Society (applicant).

Mr Martin Banks, owner of the land.

Mr Trevor Glasper, land agent representing his client Mr David Matthews, a local resident.

Rosemary Kimbell, interested member of the public.

**Appendix 1**

**Not to scale**

