

CHESHIRE EAST COUNCIL

PUBLIC RIGHTS OF WAY COMMITTEE

Date of Meeting: 13 December 2010
Report of: Borough Solicitor
Subject/Title: Village Green Application No. 48
Gorsey Bank Field, Wilmslow

1.0 Report Summary

- 1.1 This report seeks a decision on how to proceed with a village green application (No.48) in respect of Gorsey Bank Field Wilmslow.

2.0 Recommendation

- 2.1 That a non-statutory public inquiry be held into the application
- 2.2 That the Borough Solicitor be authorised to appoint an appropriately qualified independent person to conduct that Inquiry and provide the committee with a report and a recommendation.

3.0 Reasons for Recommendations

- 3.1 There are substantial disputes as to fact which will be central to the outcome of the application. Furthermore, the Council is the objecting landowner and it is appropriate to introduce the element of independence which such an inquiry process will deliver to the decision making

4.0 Wards Affected

- 4.1 Wilmslow South

5.0 Local Ward Members

- 5.1 Councillor G Barton, Councillor W Fitzgerald and Councillor R Menlove

6.0 Policy Implications including - Climate change - Health

- 6.1 N/A

7.0 Financial Implications (Authorised by the Borough Treasurer)

- 7.1 There will be costs in the region of £15000 exclusive of VAT incurred by the Council in appointing an independent person to hold the non-

statutory public inquiry. The costs will be charged to Health and Well being..

8.0 Legal Implications

- 8.1 The Council is the registration authority for the purposes of village green applications and the keeping of the register of village greens. This was previously a function of County Councils, but following local government reorganisation, it became a function of this Council.
- 8.2 In recent years there has been much case law and legislation surrounding village greens and both case law and legislation continue to evolve. Legislation in the form of the Commons Act 2006 ("the Act") was partially introduced in 6 April 2007, specifically section 15 which changed the criteria for registration of new village greens. Procedures for dealing with village green applications were also introduced in April 2007 by regulation (albeit these are interim).
- 8.3 Village greens can be registered either as a result of an application by a third person or by a voluntary registration by the landowner.
- 8.4 The Committee adopted a procedure for determining village green applications on 7 December 2009. Option 4 of that procedure is relevant in this case as it accepts that an application validly made may be referred to an independent person either to consider the application on the basis of written representations or to hold a non statutory public inquiry and to provide a report to the committee. Factors relevant in deciding whether to appoint an independent person are listed in the adopted procedure and include complexity of evidence, where evidence is finely balanced and where the land is owned by the Council.
- 8.5 There is no statutory obligation on the Council to hold a non statutory inquiry however and the Committee could determine the application itself by way of hearing evidence. This is Option 5 of the adopted procedure. Obviously there are legal risks in so doing through the possibility of a challenge to the decision the Committee might come to as well as financial constraints and democratic issues surrounding members and officers being committed to several days' hearing evidence and preparing a full report which might be scrutinized in the High Court. On balance it is felt that a member of the Planning Bar should be appointed as an Inspector. The Committee is not obliged to accept the inspector's decision.
- 8.6 The burden of proof that the application meets the statutory tests is upon the applicant, on the balance of probabilities. It is open to the Committee to register only part of the land within the application as village green, provided it does not cause irremediable prejudice to anyone.

- 8.7 In deciding upon applications, the Committee should consider the advice given to it by its officers and by any independent person appointed and decide the application in the light of all of evidence submitted and the advice received, and acting in accordance with the principle of natural justice and good administration.
- 8.8 Once registered as a village green,,land will be subject to the statutory protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 2006. Section 12 protects greens from injury or damage and interruption to their use or enjoyment as a place for exercise and recreation. Section 29 makes encroachment or inclosure of a green, and interference with or occupation of the soil, unlawful unless it is with the aim of improving the enjoyment of the green.
- 8.9 There is no right of appeal against the Committee's decision not to register land as village green. The route for any challenges would be via judicial review.

9.0 Risk Management

- 9.1 If the Council chose to determine the application without independent input, then, as it is the landowner, it may increase the risk of challenge.

10.0 Background and Options

- 10.1 The Council is the registration authority for village greens and responsibility for this function was delegated to the Public Rights of Way Committee under the Council's Constitution.
- 10.2 This application was submitted on 24 March 2009 to Cheshire County Council by Mr C Stubbs on behalf of the Friends of Gorsey Field. The land involved is at the rear of Gorsey Bank Primary School Wilmslow and is bounded to the north by 23 to 33 Alton Road and to the west by 1 to 7 Gorsey Road. It is shown on Appendix A attached.
- 10.3 The application alleges that the land is a village green because it has been used as of right for lawful sports and pastimes for a period of at least 20 years by a significant number of the inhabitants of a locality or a neighbourhood within a locality [in this case the Pownall Park housing estate].
- 10.4 The application is accompanied by 88 supporting statements, which are claimed to cover 85 households and 340 inhabitants. It is claimed that this amounts to 20% of the households on the Pownall Park estate.
- 10.5 The application is based on use of the land for football, rugby, cricket, rounders, ball games and dog-walking, and also for dog training, picnics, cycling, kite and model aeroplane flying, sledging, berry-

picking, hide and seek, tag, bird watching, tree climbing, playing with children and general recreation.

- 10.6 An objection has been submitted by Cheshire East Borough Council as landowner and by the Governing Body of the Gorsey Bank Primary School. This objection is based on a number of factual and legal submissions, including:
- any use is not by the inhabitants of a locality or neighbourhood
 - any such use is not in any event use by a significant number of such inhabitants
 - any such use is not use “as of right”
 - the uses claimed do not qualify as lawful sports or pastimes
- 10.7 Over 100 letters support the objection; while in excess of 80 other letters of objection have been received
- 10.8 The applicant has disputed the factual and legal grounds on which the objection is based.
- 10.9 As stated above, the holding of a non-statutory public inquiry is not mandatory. However, advice has recently been received from Counsel on another application in similar circumstances to this one. This is to the effect that case law has established that a non-statutory public inquiry is the most appropriate course of action to take where there are substantial disputes as to fact, as is the case here, and particularly where the Council is also the landowner. Although an alternative under Option 4 of the adopted procedure would be to appoint an independent person to consider the application on the basis of written representations and write a report, this is not considered to be an appropriate way forward because the factual disputes referred to above will require cross examination of evidence.
- 10.10 Such a non-statutory public inquiry would be held in front of a legally qualified inspector who would make findings of fact and provide a report and a recommendation to the Committee on the application of the law to those facts.

11.0 Access to Information

Village Green Application No 48

Correspondence and evidence from the Council as objector

The background papers relating to this report can be inspected by contacting the report writer:

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