

# CHESHIRE EAST COUNCIL

## Public Rights of Way Committee

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**Date of Meeting:** 19 September 2011  
**Report of:** Borough Solicitor  
**Subject/Title:** Village Green Application No.47 – Field between Birtles Road and Drummond Way, Whirley, Macclesfield

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### 1.0 Report Summary

1.1 This report deals with an application by the Birtles Conservation Forum to register the field between Birtles Road and Drummond Way, Whirley Macclesfield as a new village green under section 15 of the Commons Act 2006.

### 2.0 Recommendation

2.1 That the Committee receives and accepts the report of Douglas Edwards QC (attached as appendix A), and

2.2 That the application is rejected

### 3.0 Reasons for Recommendations

3.1 The application is recommended for rejection because Mr Edwards has concluded that:

- 1 the Applicant has not demonstrated that the land was capable of being used or was used as of right during the qualifying period by reason of the fencing works carried out by the landowner, and
- 2 on the balance of probabilities, it has not been demonstrated that the land was used for lawful sports and pastimes to any material extent during much of the qualifying period, and
- 3 the Applicant has not demonstrated a qualifying neighbourhood.

### 4 Wards Affected

4.1 Broken Cross and Upton

### 5.0 Local Ward Members

5.1 Councillor Louise Brown  
Councillor Martin Hardy

## **6.0 Policy Implications**

6.1 N/A

## **7.0 Financial Implications**

7.1 There would be a cost in the event of an application for judicial review however the Council is the registration authority and therefore has a statutory duty to decide applications.

## **8.0 Legal Implications (Authorised by the Borough Solicitor)**

8.1 There is no right of appeal against a Committee decision not to register land as a village green. The route for any challenges would be via judicial review.

8.2 Although the findings of the Inspector are recommended for acceptance by the Committee, the Committee is not bound to follow them.

## **9.0 Risk Management**

9.1 It is important that decisions are taken in a way that demonstrates fairness and complies with the rules of natural justice. To that end the Committee adopted a procedure for determining village green applications on 7 December 2009 and it has followed the adopted procedure in the case of this application. The advice of Queen's Counsel to hold a non statutory public inquiry has been taken and followed.

## **10.0 Background and Options**

10.1 The Council is the registration authority for village greens and responsibility for this function is delegated to the Public Rights of Way Committee under the Council's constitution.

10.2 The application is dated 30 September 2008 and was submitted to Cheshire County Council on 2 October 2008 by the Birtles Conservation Forum. This Council is the successor authority to Cheshire County Council. The application relates to a piece of land described in the application form as 'The Field on Birtles Road' at Whirley Macclesfield and it was advertised in accordance with the statutory requirements. The land, the subject of the application ('the land'), is shown edged green on the map attached as Appendix B.

10.3 The application is made pursuant to section 15(2) of the Commons Act 2006. That requires the applicant to demonstrate that the land was used :

- a. for lawful sports and pastimes for a period of at least 20 years and that this use continued to the date of the application
- b. by a significant number of the inhabitants of a locality or of a neighbourhood within a locality
- c. as of right

- 10.4 Macclesfield Borough Council as owner of the land objected to the application and the Council is its successor as landowner.
- 10.5 This Committee on 7 December 2009 adopted a procedure for dealing with village green applications and on the same date decided in pursuance of that procedure that in relation to this application to authorise the Borough Solicitor to appoint a suitably qualified independent person to hold a non statutory public inquiry in the event that this was advised by the suitably qualified independent person and following consultation with the Committee Chairman. The then Borough Solicitor (following advice from Douglas Edwards QC and consultation with the then Committee Chair) decided on 20 May 2010 to hold a non statutory public inquiry and to appoint Douglas Edwards QC as Inspector. Both the applicant and objector supported the choice of Inspector.
- 10.6 The Inspector was provided with copies of the application, plan and supporting information in the form of a statutory declaration by Mrs Bentham, witness statements, photographs and correspondence as well as the objector's objection letter and supporting information including title information and photographs. The applicant and objector were both given the opportunity to comment on and add to the instructions to ensure they were satisfied that the Inspector had all available information. In addition the Inspector directed the applicant and objector to provide bundles of supporting documents to him in advance of the opening of the inquiry.
- 10.7 A public inquiry was held on 12 to 14 October and 21 October 2010. Mrs Peggy Bentham represented the applicant and Miss Ruth Stockley of counsel represented the objector. The inquiry was advertised in accordance with the Inspector's directions. It was common ground amongst the parties at the inquiry that the qualifying period for the purposes of the application is the 20 year period between 30 September 1988 and 30 September 2008.
- 10.8 The Inspector's report is attached as Appendix A. It takes account of the written information produced to the Inspector and evidence received during the Inquiry. The Inspector explains at paragraph 129 that he has attached less weight to written evidence than to oral evidence which has been tested by cross examination at the Inquiry.
- 10.9 The Inspector has found as a matter of fact that there were periods, albeit short, when the land was fenced off by the objector to prevent access. Full details of the findings of fact in relation to fencing are set out at paragraphs 173 to 193 of the Inspector's report.
- 10.10 The Inspector has also found on a balance of probabilities that a temporary access for construction traffic was laid across the land in 1999 to 2000. Full details are set out in paragraphs 194 to 204 of the Inspector's report.
- 10.11 The Inspector has concluded that from the early to mid 1990s there has been significant use of the land as a cut through connecting Birtles Road and Drummond Way and that this has given rise to the path or track which is now a noticeable feature on the land. Beyond use of the track and its margins, the inspector has found that evidence of use of the remainder of the land so as to support the applicant's case is distinctly lacking. He concludes that use of the

land beyond the path and its margins has not occurred to any material extent during the qualifying period at least until the clearance works of the last year to 18 months. These findings are detailed at paragraphs 205 to 227 of the inspector's report.

- 10.12 The Applicant advances Whirley as a neighbourhood rather than a locality but the Inspector did not find evidence supportive of this. The Applicant's own witnesses could not provide a consistent description of what Whirley comprised. The Inspector's findings on this are set out at paragraphs 228 to 235 of his report.
- 10.13 The Inspector's detailed conclusions are set out at paragraphs 236 to 250 of his report. Use as of right comprises use without force, stealth or permission. The Inspector has found that fencing was erected to exclude trespassers and repeatedly damaged and removed. There is evidence of a contest between users and the landowner which leads him to conclude that any use of the land for lawful sports and pastimes after the erection of the fences should be regarded as forcible and not as of right. The Inspector's advice is that this of itself is sufficient reason to reject the application.
- 10.14 Paragraphs 241 to 246 of the Inspector's report demonstrates that beyond the path which crosses the land and its margins the use of the land was limited to the occasional trespasser and did not comprise anything approaching use by the general community for recreational purposes.
- 10.15 At paragraphs 247 to 250 of his report the Inspector considers whether there has been use by a significant number of the inhabitants of a neighbourhood within a locality and he concludes that there has not for the whole of the qualifying period. He could not find evidence to support the Applicant's contention that Whirley is a neighbourhood or to support it being a locality and he declined to consider alternative neighbourhoods as they had not been advanced by the applicant.

## **11.0 Access to Information**

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

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