

# **CHESHIRE EAST COUNCIL**

## **REPORT TO: RIGHTS OF WAY COMMITTEE**

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**Date of Meeting:** 7 December 2009  
**Report of:** Borough Solicitor  
**Subject/Title:** Village Green Applications

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### **1.0 Report Summary**

- 1.1 This report seeks approval of a procedure for determining village green applications.

### **2.0 Decision Requested**

- 2.1 That the procedure outlined in this report be noted and adopted for handling existing and future applications in respect of village greens.
- 2.2 That officers arrange the necessary training for the Committee.

### **3.0 Reasons for Recommendations**

- 3.1 The Council is the registration authority for the purposes of village greens and in that capacity it is responsible for determining applications received and for the keeping of the register of village greens.

### **4.0 Wards Affected**

- 4.1 Various

### **5.0 Local Ward Members**

- 5.1 N/A

### **6.0 Policy Implications including - Climate change - Health**

- 6.1 N/A

### **7.0 Financial Implications for Transition Costs (Authorised by the Borough Treasurer)**

- 7.1 N/A

## **8.0 Financial Implications 2009/10 and beyond (Authorised by the Borough Treasurer)**

- 8.1 There will be costs to the Council associated with obtaining Counsel's Advice or in appointing an independent person to consider written representations or hold a public inquiry. There may be costs of hiring a venue for an inquiry if the Council's own premises are unavailable.
- 8.2 We are not aware of an existing budget. We envisage that any costs detailed shown in 8.2 will be charged to Legal Services initially with a corresponding recharge to the relevant service during 2009/10.

## **9.0 Legal Implications**

- 9.1 The report as a whole contains legal implications, however, the following paragraphs are of a general nature.
- 9.2 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.
- 9.2 In recent years there has been much case law and legislation surrounding village greens and both case law and legislation continue to evolve. New 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. New procedures for dealing with village green applications were also introduced in April 2007 by regulation (albeit these are interim). The procedure outlined in this report will be applicable to all applications received, regardless of whether they were received before or following 6 April 2007.
- 9.3 Village greens can be registered either as a result of an application by a third person or by a voluntary registration by the landowner. The procedure detailed in this Report will relate only to applications received from persons other than the landowner.
- 9.4 It is commonly understood that the Council may hold a public inquiry as a result of an application being received and it is often referred to as 'non-statutory' because the legislation in respect of village greens does not specifically provide for inquiries to be held. The Local Government Act 1972, however, does enable local authorities to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of its functions. In appropriate cases, the holding of an inquiry (or requesting consideration by written representations) would facilitate the determining of the village green application. The holding of an inquiry is at the discretion of the Committee.
- 9.5 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.

- 9.6 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.
- 9.7 Once registered as a village green, it 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.
- 9.8 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.
- 9.9 Prior to any application being determined by the Council, it is possible for an objector/landowner to apply to the High Court to seek a declaration that the land is not a green (or as to whether it is capable of being registered). Should this occur it would clearly impact upon the application of any procedure.

## **10.0 Risk Management**

- 10.1 it is important that the Council makes its decisions in a way that demonstrates fairness and complies with the rules of natural justice. It is easier to achieve this by adopting an appropriate procedure and ensuring that it is followed. Sometimes this may involve the use of independent advisers.

## **11.0 Background and Options**

- 11.1 The Council is the registration authority for village greens and responsibility for this function was delegated to the Rights of Way Committee under the Council's Constitution.
- 11.2 The Council currently has three village green applications, all of which were submitted to the former County Council. One of those applications is on hold at the request of the applicant whilst the other two applications are being progressed and are at slightly different stages of consideration. One of those applications is the subject of a report elsewhere on the Agenda for this Meeting. Given the existence of these applications it is necessary to provide the Committee with a proposed procedure specifying the various options or paths the application may take. The Committee will then be able to make decisions upon individual applications with an understanding of the various options available to it.
- 11.3 The procedure is set out as Options below. Members should note, that whenever the word 'application' is used within this report it includes the evidence and any other documents submitted by the applicant in support of the application;

### Option 1 – Reject application for failing to meet basic statutory requirements

Reasons for rejection at this stage would relate to failing to meet the basic statutory requirements for an application, for example, not completing the correct form, the form being unsigned, the absence of a statutory declaration, the plan not being in accordance with legislative requirements or other such requirements.

This would not require any decision of the Committee and practically, would involve the Council's Legal Officer returning the application to the applicant giving them an opportunity to attend to any missing requirements before resubmitting their application.

### Option 2 – Accept application as validly made and write a report to the Committee recommending acceptance of the application and registration of the land as village green (in whole or in part).

This assumes that the application has met all of the statutory requirements and there are no remaining requirements to be addressed by the applicant under Option 1.

This would tend to be in more straightforward cases where the applicant has proved the application meets the statutory tests for registration and any objections received have not been sufficient to prevent the matter being proved by the applicant on the balance of probabilities. A report would be taken to the Committee recommending acceptance of the application (which could recommend acceptance of the land in whole or in part) and the Committee would make its decision.

### Option 3 - Accept application as validly made and write a report to the Committee recommending rejection of the application.

This assumes that the application has met all of the statutory requirements and there are no remaining requirements to be addressed by the applicant under Option 1.

A rejection of the application would usually be on the grounds that

- a) the application is such that it does not meet the statutory tests for registration;
- b) any objections received have been sufficient to demonstrated that it does not meet the statutory tests for registration; or
- c) there is a legal issue which means as a matter of law the application cannot succeed

or a combination of any or all of a), b) and c).

It is possible, for example, for a legal point to arise, which if correct, means that the application cannot succeed and in such circumstances it may not

have been necessary for the legal officer to have considered the application any further in arriving at his recommendation.

In accordance with the Interim Regulations, the applicant would be given a reasonable opportunity of dealing with any objections or other matter relating to the application which appears to the Council to afford possible grounds for rejection of the application. In the interests of fairness, any response would then be sent to the objector(s) for comment and any such response received from the objector(s) would be sent to the applicant for final comment.

Under this option, a report would be taken to the Committee recommending rejection of the application and the Committee would make its decision.

Option 4 - Accept application as validly made, and appoint an independent person either:

- a. to consider the application on the basis of written representations;  
or
- b. to hold a non-statutory public inquiry  
and to provide a report to the Committee.

This assumes that the application has met all of the statutory requirements and there are no remaining requirements to be addressed by the applicant under Option 1.

The factors which may be relevant in deciding whether to appoint an independent person may be (not an exhaustive list):

- the complexity of the evidence (both within the application and received from objectors)
- where the evidence is very finely balanced
- where the land within the application is owned by the Council
- where the Council has some other interest in the land within the application such as being a sponsor of proposed development on the land.

The above factors, however, would not be determinative of the appointing of an independent person, which is at the discretion of the Committee.

There are no legislative requirements as to the procedure to be taken in written representation or at an inquiry, however, in practice inquiries generally would be expected to follow the rules relating to planning inquiries, thus involving oral evidence and cross-examination. The procedure at the inquiry, however, is at the discretion of the person appointed. The 'independent person' would usually be a barrister with experience in the field, although in some instances local authorities have appointed, planning inspectors as the 'independent person'. It is possible that the independent person, having been asked to consider the matter on written representation, advises an inquiry is more appropriate. In those

individual cases, it is suggested that where such a recommendation has been given by the independent person, the Borough Solicitor be given delegated authority to determine if an inquiry should take place, after consulting the Chairman of this Committee.

The independent person would then prepare a report, concluding with a recommendation as to whether the application should be accepted (in whole or in part) or refused. It is common for this report to be made available and parties may be given an opportunity to comment on it if it is considered desirable. The independent person's report would be presented to the Committee, together with a report from the Borough Solicitor and the Committee would make its decision.

Option 5- PROW Committee holds a hearing itself and then decides whether to accept (in whole or in part) or reject the application.

In such circumstances, the Committee would hear from both the applicant and any objectors, would provide an opportunity for questions, the Committee would retire to consider the matter and return to provide its decision in public. If this Option is one which Members may choose in respect of any application, it will be necessary to consider a procedure to be followed at such hearings to enable all parties to understand their roles. It would also require additional Members' training to enhance existing skills and knowledge. These additional requirements would be the subject of future reports to the Committee.

- 11.4 Again, the Borough Solicitor may seek Counsel's advice at any point during the stages of the application on matters of law or evidence.
- 11.5 In detailing the options, it is not intended to prevent any issues relevant to the application being raised at anytime as they arise. For example, it is possible that an independent person in the course of an inquiry may observe a failure in the basic statutory requirements.

## **12.0 Overview of Year One and Term One Issues**

12.1 N/A

## **13.0 Access to Information**

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

Name: Kathryn McKevith

Designation: Solicitor

Tel No: 01244 973959

Email: [kathryn.mckevith@cheshireeast.gov.uk](mailto:kathryn.mckevith@cheshireeast.gov.uk)