

# Public Rights of Way Committee

## Agenda

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**Date:** Monday 16th March 2015  
**Time:** 2.00 pm  
**Venue:** Committee Suite 1,2 & 3, Westfields, Middlewich Road,  
Sandbach CW11 1HZ

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The agenda is divided into 2 parts. Part 1 is taken in the presence of the public and press. Part 2 items will be considered in the absence of the public and press for the reasons indicated on the agenda and at the top of each report.

### **PART 1 – MATTERS TO BE CONSIDERED WITH THE PUBLIC AND PRESS PRESENT**

1. **Apologies for Absence**

To receive any apologies for absence

2. **Declarations of Interest**

To provide an opportunity for Members and Officers to declare any disclosable pecuniary and non-pecuniary interests in any item on the agenda.

3. **Minutes of Previous meeting** (Pages 1 - 11)

To approve the minutes of the meeting held on 8 December 2014

4. **Public Speaking Time/Open Session**

Member of the public may speak on a particular application after the Chairman has introduced the report, provided that notice has been given in writing to Democratic Services by 12 noon one clear working day before the meeting. A total of 6 minutes is allocated for each application, with 3 minutes for objectors and 3 minutes for supporters. If more than one person wishes to speak as an objector or supporter, the time will be allocated accordingly or those wishing to speak may agree that one of their number shall speak for all.

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For any apologies or requests for further information, or to give notice of a question to be asked by a member of the public

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Also in accordance with Procedure Rule No. 35 a total period of 10 minutes is allocated for members of the public to address the Committee on any matter relevant to the work of the Committee. Individual members of the public may speak for up to 5 minutes but the Chairman will decide how the period of time allocated for public speaking will be apportioned where there are a number of speakers. Members of the public are not required to give notice of the intention to speak, however as a matter of courtesy, a period of 24 hours notice is encouraged.

Members of the public wishing to ask a question at the meeting should provide at least three clear working days' notice in writing and should include the question with that notice. This will enable an informed answer to be given.

5. **Highways Act 1980 s.119: Application for the Diversion of Public Footpath No. 13 (part), Parish of Over Alderley** (Pages 12 - 17)

To consider the application to divert part of Public Footpath No.13 in the parish of Over Alderley

6. **Highways Act 1980 s.119: Application for the Diversion of Public Footpath No. 21 (part), Parish of Lower Withington** (Pages 18 - 26)

To consider the application to divert part of Public Footpath No.21 in the parish of Lower Withington

7. **Village Green Application - Land Adjacent to Chelford Road and Black Firs Lane, Somerford** (Pages 27 - 52)

To consider the report of the Independent Expert

8. **Village Green Application: Relating to Land to the North of Cresswellshawe Road, Alsager which is commonly referred to as "Wood Park** (Pages 53 - 60)

To consider how to proceed with a village green application in respect of land north of Cresswellshawe Road, Alsager, which is commonly referred to as 'Wood Park'

9. **Village Green Application: Relating to Land at Banky Fields, Congleton CW12 4BW** (Pages 61 - 67)

To consider how to proceed with a village green application in respect of land at Banky Fields, Congleton

10. **Public Inquiry to Determine Definitive Map Modification Order: Addition of Public Footpath No 15, Parish of Wybunbury Modification Order 2013** (Pages 68 - 82)

Information report to brief the Committee on a recent Public Hearing and the outcome.

**CHESHIRE EAST COUNCIL**

Minutes of a meeting of the **Public Rights of Way Committee**  
held on Monday, 8th December, 2014 at Committee Suite 1,2 & 3, Westfields,  
Middlewich Road, Sandbach CW11 1HZ

**PRESENT**

Councillor Rhoda Bailey (Vice-Chair, in the Chair)

Councillors A Barratt, S Davies, K Edwards, M Parsons and J Wray

**Officers**

Mike Taylor, Public Rights of Way Manager  
Marianne Nixon, Public Path Orders Officer  
Elaine Field, Highways Solicitor  
Rachel Graves, Democratic Services Officer

**20 APOLOGIES FOR ABSENCE**

Apologies were received from Councillor M Hardy.

**21 DECLARATIONS OF INTEREST**

There were no declarations of interest.

**22 MINUTES OF PREVIOUS MEETING****RESOLVED:**

That the minutes of the meeting held on 15 September 2015 be confirmed as a correct record and signed by the Chairman.

**23 PUBLIC SPEAKING TIME/OPEN SESSION**

The Chairman advised that she would invite the two speakers to address the Committee when the relevant application was being considered.

**24 HIGHWAYS ACT 1980 SECTIONS 118 AND 119: APPLICATION FOR THE DIVERSION OF PUBLIC FOOTPATH NO. 16 (PARTS), PARISH OF BRERETON AND PUBLIC FOOTPATH NO. 9 (PART), PARISH OF SANDBACH AND FOR THE EXTINGUISHMENT OF PUBLIC FOOTPATH NO. 9 (PART), PARISH OF SANDBACH**

The Committee considered a report which detailed an application from Mrs J Davenport of The Old Vicarage, Chelford Lane, Over Peover, Nr Knutsford requesting the Council make an Order to divert part of Public Footpath No.16 in the parish of Brereton (B-C-D on Plan No. HA/098) and on condition that this diversion was successful, to make an Order to

extinguish Public Footpath No.9 (part) in the parish of Sandbach (D-E-F) under sections 119 and 118 respectively of the Highways Act 1980.

The report also detailed an application received from Mr Malcolm Sloane (agent) of Sloane Mead on behalf of Archibald Bathgate Group Ltd, Arclid Quarry, Congleton Road, Sandbach requesting the Council make an Order to divert part of Public Footpath No.9 in the parish of Sandbach (G-H-I-F). Further the landowner had given permission to allow the Public Rights of Way Team to request the Council to include in the Order a diversion of part of Public Footpath No.16 in the parish of Brereton (A-B). The two diversions would be dependant on each other so that the part of Public Footpath No.16 Brereton would only be diverted if the diversion of part of Public Footpath No.9 Sandbach was approved.

In accordance with Section 119(1) of the Highways Act 1980 it was within the Council's discretion to make an Order to divert a public footpath if it appeared to the Council to be expedient to do so in the interests of the public or the owner, lessee or occupier of the land crossed by the path.

In accordance with Section 118(1) of the Highways Act 1980 it was within the Council's discretion to make an Order to extinguish a public footpath if it appeared to the Council that it was expedient to do so on the grounds that it was not needed for public use.

Mr C Meewezen, spoke on behalf of Congleton Ramblers, stating that they supported the proposed Public Footpath No.16 Brereton diversions and the extinguishment suggested by Mrs Davenport in relation to Public Footpath No.9 Sandbach. However they objected to the diversion to Public Footpath No.9 Sandbach proposed by Mr Malcolm Sloane on behalf of Archibald Bathgate Group Ltd as the proposed new route would be less convenient and a less enjoyable route and therefore failed the legal test.

Cheshire East Council had proposed the diversion of part of Public Footpath No.16 Brereton (A-B) as this part of the path was obstructed by ponds and in places by dense hedge growth. Historically it would appear that this part of Public Footpath No.16 Brereton may have been inaccurately recorded on the definitive map as the ponds were of some antiquity since it was unlikely that the path and ponds coexisted. Removing the obstructions or legally moving the line of the Footpath by a Definitive Map Modification Order to a usable line would prove costly to the Council and would take much longer to effect. The proposed diversion would run in a similar alignment but along the south of the hedge boundary. The land belonged in part to Safeguard Limited and in part to Archibald Bathgate Ltd. Permission to divert the footpath had been given by Safeguard Limited via their agents, Strutt and Parker. Permission had been given by Archibald Bathgate Ltd on condition of the success of the diversion of part of Public Footpath No.9 Sandbach.

Mrs Davenport had proposed to divert part of Public Footpath No.16 Brereton from point B to point D. The path ran through fields into the grounds of Arclid Hall Stud Farm. The new route would run across a pasture field (points D-F) to the south of the property grounds and would afford improved security and privacy to the property buildings and enable better management of land and livestock. This diversion would also resolve path obstructions along parts B- C and also resolve existing alignment issues.

This proposed diversion would create a situation where two public footpaths cross the same field in close proximity to pass between points D-F as part of Public Footpath No.9 Sandbach already crossed the field between points D-E-F. It was considered that two path sections providing similar routes were unnecessary. Therefore since Public Footpath No.9 Sandbach was not as direct as the proposed diversion route of Public Footpath No.16 Brereton, it was proposed that this be extinguished on the basis that this was no longer needed for public use, on condition that Mrs Davenport's proposed diversion of Public Footpath No.16 Brereton was successful.

Mr Sloane on behalf of Archibald Bathgate Ltd had proposed a diversion of part of Public Footpath No.9 Sandbach (G-F) to improve the security and privacy of sand quarry working and excavation areas by taking users further away from these areas. The proposed diversion would start at point G and would immediately leave the green track via a kissing gate into a field to the north. It would then follow the eastern field boundary in a northerly direction to exit through a gap into a section field (point J). It would then follow a short section in an easterly direction before again at point K running in a northerly direction until it joined the proposed diversion route for Public Footpath No.16 Brereton at point L.

It has been agreed with Mr Sloane that the Council's proposed diversion of Public Footpath No.16 Brereton would be dependent on the success of Mr Sloane's proposal to divert the section of Public Footpath No.9 Sandbach, as the Council's diversion would place a longer stretch of public footpath on land owned by Archibald Bathgate Group Ltd.

In relation to Public Footpath No.16 Brereton, the Committee noted that no objections had been received during the informal consultation period. The Committee considered that the proposed routes for Public Footpath No.16 Brereton would be a significant improvement to the existing route and the diversion of the two sections to realign the path would be of considerable benefit to both the public and the landowner. It was considered that the proposed routes would be satisfactory alternatives to the current ones and that the legal tests for the making and confirming of the relevant diversions orders were satisfied.

The Committee concluded that with the diversion of Public Footpath No.16 Brereton into the same field as the section of Public Footpath No.9 Sandbach, this section of Public Footpath No.9 Sandbach (D-F) would no

longer be needed for public use and considered that the legal tests for the making and confirming of an extinguishment order were satisfied.

The Committee noted the objection by Congleton Ramblers to the diversion route for Public Footpath No.9 Sandbach proposed by Mr Sloane on behalf of Archibald Bathgate Ltd and noted that the proposed route would follow field boundaries making navigation easier for path users and that there would be less and more easily accessible path furniture. Looking at the path length in total from Congleton Road to Newcastle Road the proposed diversion would increase by just 147m which was not considered as significant. The Committee concluded that the proposed diversion would be an improvement on the existing route and would benefit the landowner in terms of enhancing privacy and security to their sand quarrying operations. It was considered that the proposed route would be a satisfactory alternative to the current one and that the legal tests for the making and confirming of the diversion order were satisfied.

The Committee unanimously

**RESOLVED:** That

- 1 Two Orders be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981 to divert:
  - Part of Public Footpath No.16 parish of Brereton (as proposed by Mrs Davenport)
  - Part of Public Footpath No.16 parish of Brereton and part of Public Footpath No.9 parish of Sandbach (as proposed by Cheshire East Council and Mr M Sloane on behalf of Archibald Bathgate Ltd respectively)

Diversions to be made by creating new sections of public footpath and extinguishing the current path sections, as illustrated on Plan No.HA/098, on the grounds that it is expedient in the interests of the owners of the land crossed by the paths.

Subject to an Order being made to divert part of Public Footpath No.16 in the parish of Brereton (proposed by Mrs Davenport) that a subsequent Order be made under Section 118 of the Highways Act 1980 to extinguish Public Footpath Path No.9 (part) in the parish of Sandbach (also proposed by Mrs Davenport), as illustrated on Plan No. HA/098, on the grounds that it will be no longer be needed for public use.

- 2 Public Notice of the making of the Orders be given and in the event of there being no objections within the period specified, the Orders be confirmed in the exercise of the powers conferred on the Council by the said Acts.

- 3 In the event of objections to the Orders being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

**25 TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257: APPLICATION FOR THE DIVERSION OF PUBLIC FOOTPATH NO. 19 (PART), PARISH OF RAINOW**

The Committee received a report which detailed an application from Mr R Gascoigne (agent) of Emery Planning Partnership Ltd on behalf of Mr W Horne, Further Harrop Farm, Bakestonedale Road, Rainow, requesting the Council to make an Order under Section 257 of the Town and Country Planning Act 1990 to divert part of Public Footpath No.19 in the parish of Rainow.

In accordance with Section 257 of the Town and Country Planning Act 1990, the Borough Council, as the Planning Authority, can make an Order diverting the footpath if it was satisfied that it was necessary to do so to enable development to be carried out in accordance with a planning permission that had been granted.

Planning permission had been granted to the applicant on 16 October 2014 by the Peak District National Park. The application is cited as Planning Permission Ref: NP/CEC/0814/0898 Erection of agricultural livestock building, associated alterations to immediate site levels, alteration to farm track along with part diversion of footpath (Rainow FP19).

The existing alignment of Public Footpath No.19 Rainow would be directly affected by the construction of the planned sheep shed. Therefore a footpath diversion was required to provide public access around the sheep shed.

The proposed new route would be approximately 48 metres long, just 5 metres longer than the current route and would take users around the sheep shed. The route would be 2 metres wide throughout and would have a similar grass surface to the current route since it would cross the same pastureland no more than approximately 12 metres to the west of the current route.

As part of the informal consultation the users groups had been consulted and no objections received. East Cheshire Ramblers had suggested that a shallow depth of top soil be removed along the new route and replaced with stone to provide a solid foundation walkable in all seasons whilst acting initially as a clear indication of the line of the new footpath. This would be on the understanding that in time grass would grow over the stoned section so the footpath would blend back into the surrounding pastureland. Given that the new route would run across similar ground to the current route and no issues had been reported to date, stoning of the new route was not deemed to be necessary. East Cheshire Ramblers had

also suggested that the new route be waymarked. The need for waymarking would be reviewed in due course.

The Committee concluded that it was necessary to divert part of Public Footpath No.19 Rainow to allow for the erection of a sheep shed. It was considered that the legal tests for the making and confirming of a Diversion Order under section 257 of the Town and Country Planning Act 1990 were satisfied.

The Committee unanimously

**RESOLVED:** That

- 1 An Order be made under Section 257 of the Town and Country Planning Act 1990 to divert part of Public Footpath No.19 Rainow, as illustrated on Plan No. TCPA/022, on the grounds that the Borough Council is satisfied that it is necessary to do so to allow development to take place.
- 2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.
- 3 In the event of objections to the Order being received and not resolved, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

**26 VILLAGE GREEN APPLICATION - LAND ADJACENT TO NO. 16 BELL AVENUE, SUTTON, MACCLESFIELD**

The Committee received a report seeking a decision on how to proceed with a village green application in respect of land adjacent to No.16 Bell Avenue, Sutton, Macclesfield.

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

An application had been submitted on 8 March 2013 by Sutton Parish Council. The Application Land was shown on Appendix A to the report. The evidence in support of the application contained six witness statements stating various uses. The application was based on the use of land "as of right" for pastimes such as a children's play area, walking and exercising of dogs, bicycle riding, football and general recreation.

Simon Richardson, spoke on behalf of Peaks & Plains Housing Trust, stating that they supported the report's recommendation to appoint an Independent Person to consider the application.

Following the statutory consultation process, the Council had received a further 82 letters/forms in support of the application and one letter of objection from Peaks & Plains Housing Trust, who owned the land.

The landowners' objection was based on a number of factual and legal submissions, including:

- The use of the land by a "significant" number of inhabitants
- The "neighbourhood/locality" that use the land
- That the use of the land is not use "as of right"
- The actual use of the land.

The applicant had disputed the factual grounds on which the objections were based.

Although the Council did not have a legal interest in the land, they did have an interest in Peaks & Plains Housing Trust. In such cases it was considered appropriate that an independent person be appointed to consider the application.

An non-statutory public inquiry was not being recommended because it was considered that given some of the objections were of a legal nature, it may be possible for the application to be considered on the written evidence in the first instance. It may be possible that the independent person, having received the documentation, recommends an inquiry is held instead. In the event of such a request it was recommended that delegated authority be given to the Head of Legal Services, in consultation with the Chairman of the Public Rights of Way Committee, to determine if a non-statutory public inquiry should take place.

The Committee unanimously

**RESOLVED:** That

- 1 That the Head of Legal Services be authorised to appoint an independent expert to consider the application on the basis of written representations and provide a report.
- 2 That Head of Legal Services be given delegated authority to determine if a non-statutory public inquiry should take place upon the recommendation of the independent expert, after consulting with the Chairman of the Public Rights of Way Committee.

**27 VILLAGE GREEN APPLICATION - LAND AT PICKMERE INFORMAL RECREATION OPEN SPACE, JACOBS WAY, PICKMERE, KNUTSFORD**

The Committee considered a report seeking a decision on how to proceed with a village green application in respect of land at Pickmere Informal Recreation Open Space, Jacobs Way, Pickmere, Knutsford.

The Council was the registration authority for village greens and the responsibility for the function was delegated to the Public Rights of Way Committee under the Council's Constitution.

An application had been submitted on 5 February 2013 by Mrs Catherine Plowden. The Application Land was shown on Appendix A to the report. The evidence in support of the application contained several witness statements stating various uses and several photographs. The application was based on the use of the land for pastimes and sports such as dog walking, children play areas, bird watching, picnics, football, cricket, flying kites, sledging and general recreation.

Following the statutory consultation process, the Council received a further 18 letters in support of the application, one letter of objection from a local resident and an objection from Pickmere Parish Council as landowner.

The landowners' objection was based on a number of factual and legal submissions, including:

- The use of the land is not use "as of right"
- The length of use and the ability to use the land.

The applicant had disputed the factual and legal grounds on which the objections were based.

It was recommended that an independent person be appointed to consider the application. A non-statutory public inquiry was not recommended because it was considered that given that some of the objections were of a legal nature, it may be possible for the application to be considered on the written evidence in the first instance. It may be possible that the independent person, having received the documentation, recommends an inquiry is held instead. In the event of such a request it was recommended that delegated authority be given to the Head of Legal Services, in consultation with the Chairman of the Public Rights of Way Committee, to determine if a non-statutory public inquiry should take place.

The Committee unanimously

**RESOLVED:** That

- 1 The Head of Legal Services be authorised to appoint an independent expert to consider the application on the basis of written evidence and provide a report.
- 2 The Head of Legal Services be given delegated authority to determine if a non-statutory public inquiry should take place upon the recommendation of the independent expert, after consulting with the Chairman of the Right of Way Committee.

**28 PUBLIC HEARING TO DETERMINE DEFINITIVE MAP MODIFICATION ORDER: UPGRADING OF PUBLIC FOOTPATH NO.9 (PART) TO BRIDLEWAY AND ADDITION OF PUBLIC BRIDLEWAY NO 12, PARISH OF HIGHER HURDSFIELD AND ADDITION OF PUBLIC BRIDLEWAY NO 98, PARISH OF MACCLESFIELD**

The Committee received an information report on the outcome of a public hearing to determine a Definitive Map Modification Order.

The Committee, at its meeting on 24 September 2012, approved an Order upgrading Public Footpath No.9 in the parish of Higher Hurdsfield to Public Bridleway, with the exception of the route past Close House Farm (C-H-I-D on Plan No. WCA/004). This part of the route was refused on the grounds that there was insufficient evidence to show the existence of bridleway rights. Approval was also given for the making of an Order for the additional of two further sections of bridleway between points C-G-D and E-F.

A Modification Order was made on 17 January 2013 and advertised on 6 February 2013. Four formal objections were submitted to the Order and not withdrawn. Three objections were based on the fact the Council had omitted the section past Close House Farm. The fourth objection related to the way in which the Order schedule recorded the width of the bridleway at a point where a large oak tree narrowed the path. A further representation was received not objecting to the Order but stating that they would object if the Order was modified to include the section past Close House Farm.

The appointed Inspector was Sue Arnott and a public hearing was held on 9 September 2014 at Macclesfield Town Hall. It was the Council's approach that the evidence was sufficient to justify making an Order to record the claimed bridleway but not over the entire length of the route. The historical evidence was not strong enough to support the existence of a status higher than that of footpath, which was already recorded on the definitive map. The evidence in opposition was that the historical evidence showed dedication of the full length of Footpath No.9 as a bridleway.

The Inspector addressed the historical evidence submitted by the Applicant, as well as the additional evidence gathered by the Council during the investigation. The Inspector also addressed the user evidence and looked at the use on horseback for both the Order route and that of the route past Close House Farm. She also addressed the landowner's intentions and whether there was any evidence to show a lack of intention to dedicate a public right of way for horses.

The hearing was closed and concluded on 9 September following an accompanied site visit. The Inspector issued a decision letter on the 14 November 2014 in which she confirmed the Order, with no modifications. The balance of the argument weighed in favour of the Order route having been deemed to have been dedicated as a bridleway.

**RESOLVED:**

That the report be noted.

**29 PUBLIC HEARING TO DETERMINE PUBLIC PATH EXTINGUISHMENT ORDER: THE CHESHIRE EAST BOROUGH COUNCIL (PUBLIC FOOTPATH NO. 29 (PART) PARISH OF SANDBACH) PUBLIC PATH EXTINGUISHMENT ORDER 2013**

The Committee received an information report on the outcome of a Public Hearing to determine a Public Path Extinguishment Order.

At the meeting of the Committee in September 2013 an Order had been approved to extinguish part of Public Footpath No.29 in the parish of Sandbach. Two objections to the Order were received from Congleton Ramblers and Peak & Northern Footpath Society. As the objections were not withdrawn, a file of the relevant information was submitted to the Planning Inspectorate in April 2014.

The appointed Inspector was Michael Lowe and a public hearing was held on 30 September 2014. The basis of the evidence in support of the Order was that the lack of complaints about the long standing obstruction was a good indication that the footpath was not needed and that the alternative, more attractive and safer route was satisfactory. The evidence in opposition was that Public Footpath No.29 was a more attractive route for walkers in comparison to the alternative route and that it would be a more direct route for some residents to access the local shop and wider countryside. The Ramblers had gathered 24 signatures on a petition in support of this.

The Hearing was closed and concluded on 30 September and the Inspector issued a decision letter on 18 November 2014 in which he did not confirm the Order. The balance of the argument weighed in favour of retaining the footpath as the Inspector believed that a significant number of local residents on the estate would find the footpath a convenient route to the local shop and other locations if it were available and attached considerable weight to this factor.

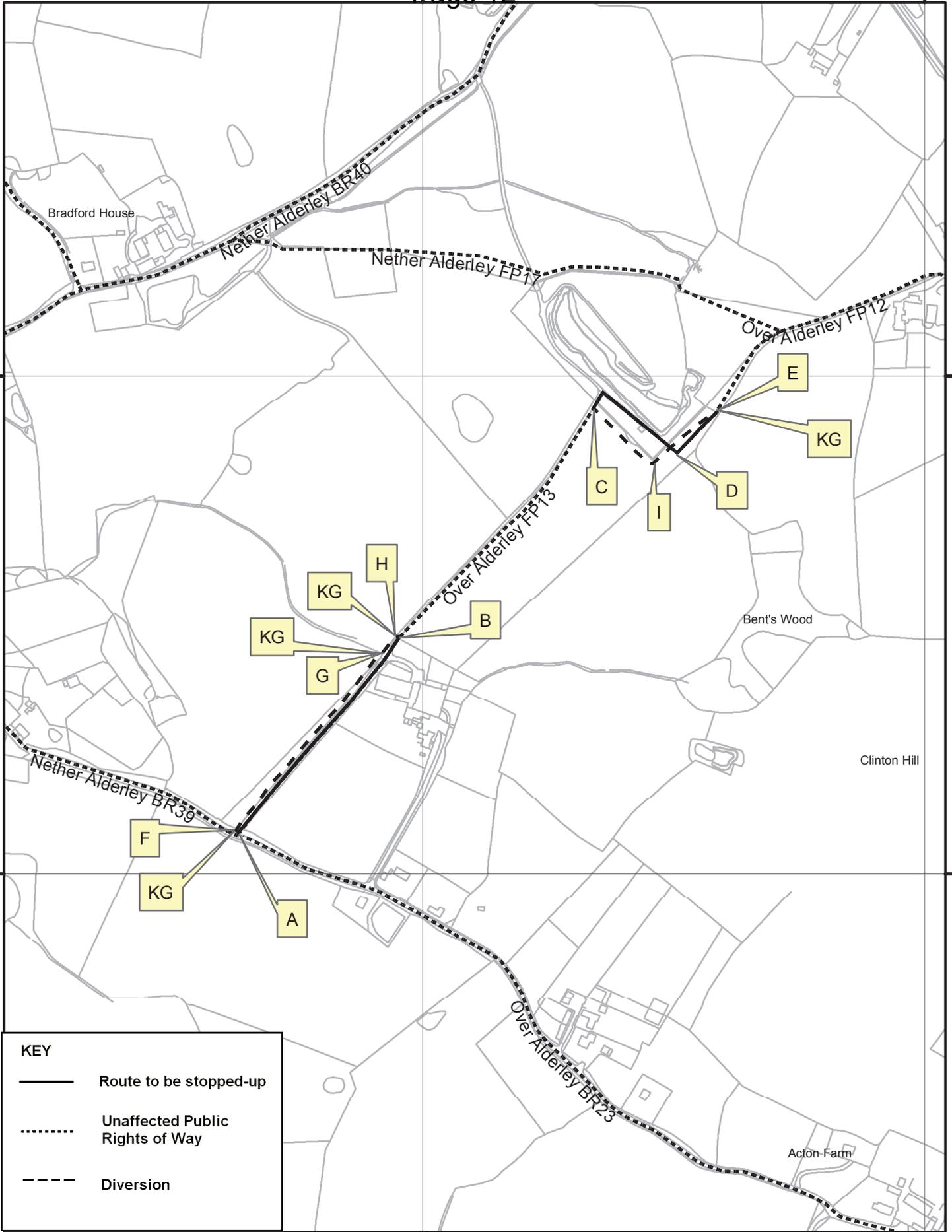
**RESOLVED:**

That the report be noted.

The meeting commenced at 2.05 pm and concluded at 3.33 pm

Councillor Rhoda Bailey (Vice-Chair, in the Chair)

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**KEY**

- Route to be stopped-up
- ..... Unaffected Public Rights of Way
- - - Diversion

	<p>Proposed Diversion of Public Footpath No.13 Over Alderley</p>	<p>Plan No. HA/099</p>	<p>This is a working copy of the definitive map and should not be used for legal purposes</p>
<p>1:5,000</p>	<p>© Crown copyright and database rights 2015. Ordnance Survey 100049045.</p>		
			

## CHESHIRE EAST COUNCIL

### Public Rights of Way Committee

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<b>Date of Meeting:</b>	16 <sup>th</sup> March 2015
<b>Report of:</b>	Public Rights of Way Manager
<b>Subject/Title:</b>	Highways Act 1980 s.119 Application for the Diversion of Public Footpath no. 13 (part), Parish of Over Alderley

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#### 1.0 Report Summary

- 1.1 The report outlines the investigation to divert part of Public Footpath No.13 in the Parish of Over Alderley. This includes a discussion of consultations carried out in respect of the proposal and the legal tests to be considered for a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit as an application has been made by the landowner concerned. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether or not an Order should be made to divert the section of footpath concerned.

#### 2.0 Recommendation

- 2.1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpath No.13 by creating a new section of public footpath and extinguishing the current path as illustrated on Plan No. HA/099 on the grounds that it is expedient in the interests of the public and the owner of the land crossed by the path.
- 2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.
- 2.3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

#### 3.0 Reasons for Recommendations

- 3.1 In accordance with Section 119(1) of the Highways Act 1980 it is within the Council's discretion to make the Order if it appears to the Council to be expedient to do so in the interests of the public or of the owner, lessee or occupier of the land crossed by the path. It is considered that the proposed diversion is in the interests of both the public and the landowner for the reasons set out in paragraph 10.8 and 10.9 below.

3.2 Where objections to the making of an Order are made and not withdrawn, the Order will fall to be confirmed by the Secretary of State. In considering whether to confirm an Order the Secretary will, in addition to the matters discussed at paragraph 3.1 above, have regard to:

- Whether the path is substantially less convenient to the public as a consequence of the diversion.

And whether it is expedient to confirm the Order considering:

- The effect that the diversion would have on the enjoyment of the path or way as a whole.
- The effect that the coming into operation of the Order would have as respects other land served by the existing public right of way.
- The effect that any new public right of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

3.3 Where there are no outstanding objections, it is for the Council to determine whether to confirm the Order in accordance with the matters referred to in paragraph 3.2 above.

3.4 The proposed route will not be 'substantially less convenient' than the existing route and diverting the footpath will offer improved privacy and security for the landowner and will be safer for the public by keeping them away from the quarry area. It is considered that the proposed route will be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order are satisfied.

#### **4.0 Wards Affected**

4.1 Chelford and Prestbury.

#### **5.0 Local Ward Members**

5.1 Councillor G Walton and Councillor J P Findlow.

#### **6.0 Policy Implications**

6.1 Not applicable

#### **7.0 Financial Implications**

7.1 Not applicable

## **8.0 Legal Implications**

- 8.1 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the local highway authority to confirm the order itself, and may lead to a hearing/inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources.

## **9.0 Risk Management**

- 9.1 Not applicable

## **10.0 Background and Options**

- 10.1 An application has been received from Mr. and Mrs. K. Oakes of Haymans House, Hocker Lane, Over Alderley, requesting that the Council make an Order under section 119 of the Highways Act 1980 to divert part of Public Footpath no. 13 in the Parish of Over Alderley.
- 10.2 The land over which the section of the current path to be diverted and the proposed diversion run belongs to Mr and Mrs Oakes. Under section 119 of the Highways Act 1980 the Council may accede to an applicant's request, if it considers it expedient in the interests of the landowner to make an order to divert the footpath. The first part of this proposed diversion is in the interest of the landowner, the second section is in the interest of the public.
- 10.3 Public Footpath No. 13 Over Alderley commences on Hocker Lane at O.S. grid reference SJ 8531 7604 (point A on plan no. HA/099) at the point where Over Alderley Bridleway no.23 and Nether Alderley Bridleway no.39 meet. It runs in a generally north easterly direction along the drive to the property, which is a semi-surfaced track. At point B the current definitive line of the footpath enters the adjacent field through a field gate at O.S. grid reference SJ 8547 7623. The section of path to be diverted is shown by a solid black line on Plan No. HA/099 between points A and B. The proposed diversion is illustrated on the same plan with a black dashed line between points F-G-H.
- 10.4 The proposed new route for this section is to the west of the current route, alongside the access track on the field side; it is shown as a bold dashed line between points F-G-H. From point F the proposed route follows a north easterly direction to point G and then continues in this direction to point H. It then re-joins the remainder of footpath no.13 at point B.
- 10.5 The proposed new route is currently used by the public as a footpath, and according to public rights of way records this section of footpath no.13 has been maintained in an offline position in the past by the previous authority, Cheshire County Council.
- 10.6 Discussions were held with the landowners in 2007/8; they were informed that the correct alignment, according to the Definitive Map, was along the access track (A-B). They had concerns in relation to their privacy and security if the

route were realigned, as long as they remember the route had always been in the field, along the field edge. They therefore agreed to apply for a diversion order. It has only recently come to light that even though works were carried out by Cheshire County Council to install new path furniture, the legal order diverting the route was not made.

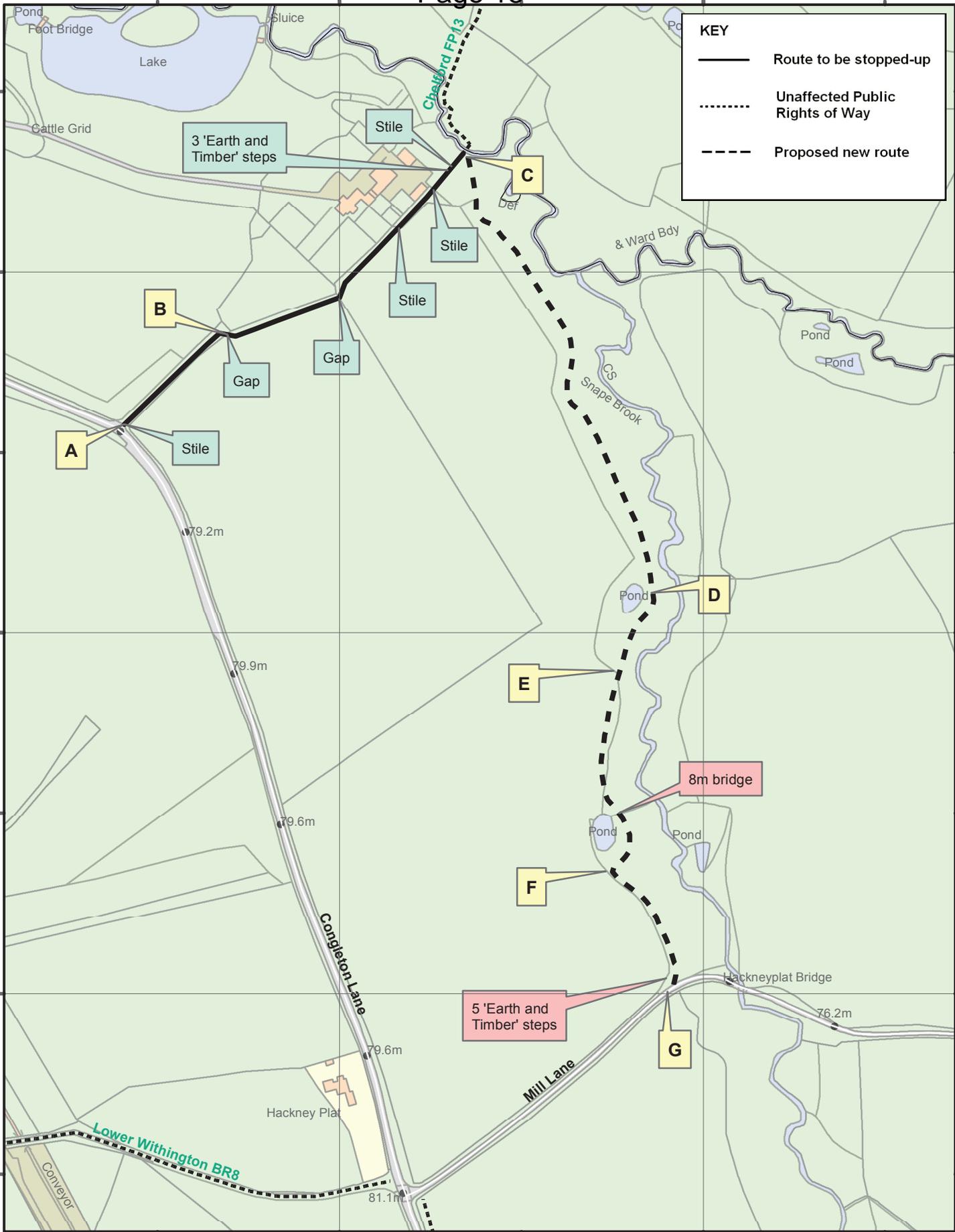
- 10.7 The new route would have a width of 2 metres, except for one point where it is restricted to 1.3 metres between the fence and a tree. The route would not be enclosed and it would be a grass surface. There are currently three kissing gates at points F, G and H, and these would remain in situ. On the current route there are field gates. Therefore in terms of accessibility the new route is considered no less easy to use than the original.
- 10.8 This part of the diversion is in the landowners' interest as the current route goes along the driveway to the property; the diversion would allow the landowners to improve their privacy and security.
- 10.9 The second proposal is around the quarry area of footpath no.13 Over Alderley. It is proposed to divert this section in the interest of the public, as the definitive line of the footpath is within the boundaries of the quarry and at some point has been quarried away. To make this route available would be a danger to the public, due to the proximity of the path to the quarry.
- 10.10 Again referring to the attached plan (plan no. HA/099). The current definitive line is shown as a bold black solid line between points C-D-E.
- 10.11 It is proposed to divert footpath no.13 onto the route C-I-E, shown as bold dashed lines. The proposed route follows the line that is currently used by walkers. At point E there is a kissing gate and the proposed route re-joins the remaining section of footpath no.13. The route C-I-E keeps the line of the path within the field boundary and away from the quarry area, the footpath would be 2 metres wide and unenclosed; it has a grass surface.
- 10.12 The Ward Councillors were consulted about the proposal. No comments have been received.
- 10.13 Over Alderley and Nether Alderley Parish Councils have been consulted. Nether Alderley Parish Council has responded and has no objections to the proposal. No response has been received from Over Alderley Parish Council.
- 10.14 The statutory undertakers have also been consulted and have raised no objections to the proposed diversion. If a diversion order is made, existing rights of access for the statutory undertakers to their apparatus and equipment are protected.
- 10.15 The user groups have been consulted. The Peak and Northern Footpath Society has no objection to the proposals. The East Cheshire Ramblers also have no objection and state that the diversion appears to follow the path that has been walked for a number of years and appears to be in very good condition. No further responses have been received.

- 10.16 The Council's Nature Conservation Officer and Natural England have been consulted and have raised no objection to the proposals.
- 10.17 An assessment in relation to the Equality Act 2010 has been carried out by the PROW Network Management and Enforcement Officer for the area and it is considered that the proposed diversion would be no less convenient to use than the current route.

#### **11.0 Access to Information**

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

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Designation: Definitive Map Officer  
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PROW File: 234D/501



**KEY**

- Route to be stopped-up
- Unaffected Public Rights of Way
- Proposed new route

N

Highways Act 1980 s119  
 The Cheshire East Borough Council  
 (Footpath No. 21 (part) Parish of Lower Withington)  
 Public Path Diversion Order 2015

Plan No.  
 HA/100



1:3,500

## CHESHIRE EAST COUNCIL

### Public Rights of Way Committee

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**Date of Meeting:** 16<sup>th</sup> March 2015  
**Report of:** Public Rights of Way Manager  
**Subject/Title:** Highways Act 1980 s.119  
Application for the Diversion of Public Footpath No. 21  
(part), Parish of Lower Withington

---

#### 1.0 Report Summary

- 1.1 The report outlines the investigation to divert part of Public Footpath No.21 in the Parish of Lower Withington. This includes a discussion of consultations carried out in respect of the proposal and the legal tests to be considered for a diversion order to be made. The proposal has been put forward by the Public Rights of Way Unit as an application has been made by the landowner concerned. The report makes a recommendation based on that information, for quasi-judicial decision by Members as to whether or not an Order should be made to divert the section of footpath concerned.

#### 2.0 Recommendation

- 2.1 An Order be made under Section 119 of the Highways Act 1980, as amended by the Wildlife and Countryside Act 1981, to divert part of Public Footpath No.21 Lower Withington by creating a new section of public footpath and extinguishing the current path as illustrated on Plan No. HA/100 on the grounds that it is expedient in the interests of the owner of the land crossed by the path.
- 2.2 Public Notice of the making of the Order be given and in the event of there being no objections within the period specified, the Order be confirmed in the exercise of the powers conferred on the Council by the said Acts.
- 2.3 In the event of objections to the Order being received, Cheshire East Borough Council be responsible for the conduct of any hearing or public inquiry.

#### 3.0 Reasons for Recommendations

- 3.1 In accordance with Section 119(1) of the Highways Act 1980 it is within the Council's discretion to make the Order if it appears to the Council to be expedient to do so in the interests of the public or of the owner, lessee or occupier of the land crossed by the path. It is considered that the proposed diversion is in the interests of the landowner for the reasons set out in paragraph 10.4 & 10.5 below.

3.2 Where objections to the making of an Order are made and not withdrawn, the Order will fall to be confirmed by the Secretary of State. In considering whether to confirm an Order the Secretary will, in addition to the matters discussed at paragraph 3.1 above, have regard to:

- Whether the path is substantially less convenient to the public as a consequence of the diversion.

And whether it is expedient to confirm the Order considering:

- The effect that the diversion would have on the enjoyment of the path or way as a whole.
- The effect that the coming into operation of the Order would have as respects other land served by the existing public right of way.
- The effect that any new public right of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

3.3 Where there are no outstanding objections, it is for the Council to determine whether to confirm the Order in accordance with the matters referred to in paragraph 3.2 above.

3.4 The proposed route will not be 'substantially less convenient' than the existing route and diverting the footpath will be of considerable benefit to the landowner in terms of offering enhanced security and privacy to his property. It is considered that the proposed route will be a satisfactory alternative to the current one and that the legal tests for the making and confirming of a diversion order are satisfied.

#### **4.0 Wards Affected**

4.1 Gawsworth

#### **5.0 Local Ward Members**

5.1 Councillor Lesley Smetham

#### **6.0 Policy Implications**

6.1 Not applicable

#### **7.0 Financial Implications**

7.1 Not applicable

## **8.0 Legal Implications**

- 8.1 Once an Order is made it may be the subject of objections. If objections are not withdrawn, this removes the power of the local highway authority to confirm the order itself, and may lead to a hearing/inquiry. It follows that the Committee decision may be confirmed or not confirmed. This process may involve additional legal support and resources

## **9.0 Risk Management**

- 9.1 Not applicable

## **10.0 Background and Options**

- 10.1 An application has been received from Mr Anthony Cotter (agent) of Midas Investment Management Ltd, Basement Office, 21 Brompton Square, London, SW3 2AD on behalf of Mr Mark Sheppard whose family own Mallerstang, Congleton Lane, Chelford, Cheshire, SK11 9AG requesting that the Council make an Order under section 119 of the Highways Act 1980 to divert part of Public Footpath no. 21 in the Parish of Lower Withington.
- 10.2 Public Footpath No. 21, Lower Withington, commences at its junction with Congleton Lane at O.S. grid reference SJ 8260 7314 from where it enters a hedge bound grass track via a stile which it follows in a generally north easterly direction to then pass through arable fields in generally east, north easterly and north easterly directions to enter woodland within which a pedestrian footbridge takes it across a stream to its termination point at the Parish boundary where it joins Chelford FP13. The section of path to be diverted is shown by a solid black line on Plan No. HA/100 between points A-B-C. The proposed diversion is illustrated on the same plan with a black dashed line between points C-D-E-F-G.
- 10.3 The land over which the current path and the proposed diversion run belongs to Mr Mark Sheppard's family. Under section 119 of the Highways Act 1980 the Council may accede to an applicant's request, if it considers it expedient in the interests of the landowner to make an order to divert the footpath.
- 10.4 Virtually the entire length of Public Footpath No. 21, Lower Withington detailed in section 10.2, is to be diverted with the exception of the stretch running over the pedestrian footbridge and on to the Parish boundary. As it runs through the arable fields, this section of Lower Withington FP21 runs in close proximity to the applicant's property and diverting it would afford improved privacy and security for the applicants by taking users further away from their property.
- 10.5 The new route would follow a generally south, south easterly direction from the bridge over the stream towards Mill Lane. The new route would follow a woodland path skirting a pond en route and then ascending to a more grassed surface along the edge of a field. It would follow this for a short section before descending to cross an 8m timber footbridge over a boggy area past a second pond. It would then ascend once more to reach the boundary

fence between the woodland and adjacent field to the west and would run along this fence line within the woodland. On reaching 5 'earth and timber' steps, it would descend to Mill Lane where it would terminate.

The new route would be 2 metres wide throughout except for over the footbridge and at the steps where it would be approximately 0.9 metres and 1 metre respectively. The surface of the new route would be woodland earthen path and grass.

Although not currently certified as meeting Council standards, the new proposed route has been installed on the ground by the applicant and is currently private although by permission, may be used by the public. Consequently, the impact of water logging has been taken into account when designing this new route and drainage solutions put in place (installation of a pipe drain, raising the path as appropriate, installation of a footbridge, etc.).

The landowner has agreed to provide a sum of money to provide for the future increased maintenance liability of the path due to the increased length and structures present.

It is recognised that the proposed new route would be much longer than the length of the current path section to be diverted. However, looking at the wider path network (see plan entitled 'Rights of Way Network around Lower Withington FP21'), this new route would provide users with an alternative to having to use Congleton Lane to reach Lower Withington BR8 and Lower Withington FP22, and would be of a similar distance.

In summary, the proposed new route would follow a line that would:

- be more convenient since it would be a 'barrier free route' whereas the current path has four stiles.
- be more enjoyable as it would pass through natural woodland that would be more scenic and interesting from a wildlife perspective, than the current route through the fields.
- provide an alternative link for users to connect with Lower Withington BR8 or Lower Withington FP22 rather than having to walk along the metalled Congleton Lane for approximately 0.5km with moving traffic.
- Afford improved privacy and security for the applicant.

This diversion would be made in the interests of the landowner.

- 10.6 Ward Councillors have been consulted about the proposal. No comments were received.
- 10.7 Lower Withington Parish Council has been consulted. No comments have been received to date and will hereafter be reported verbally.
- 10.8 The statutory undertakers have also been consulted and have raised no objections to the proposed diversion. If a diversion order is made, existing

rights of access for the statutory undertakers to their apparatus and equipment are protected.

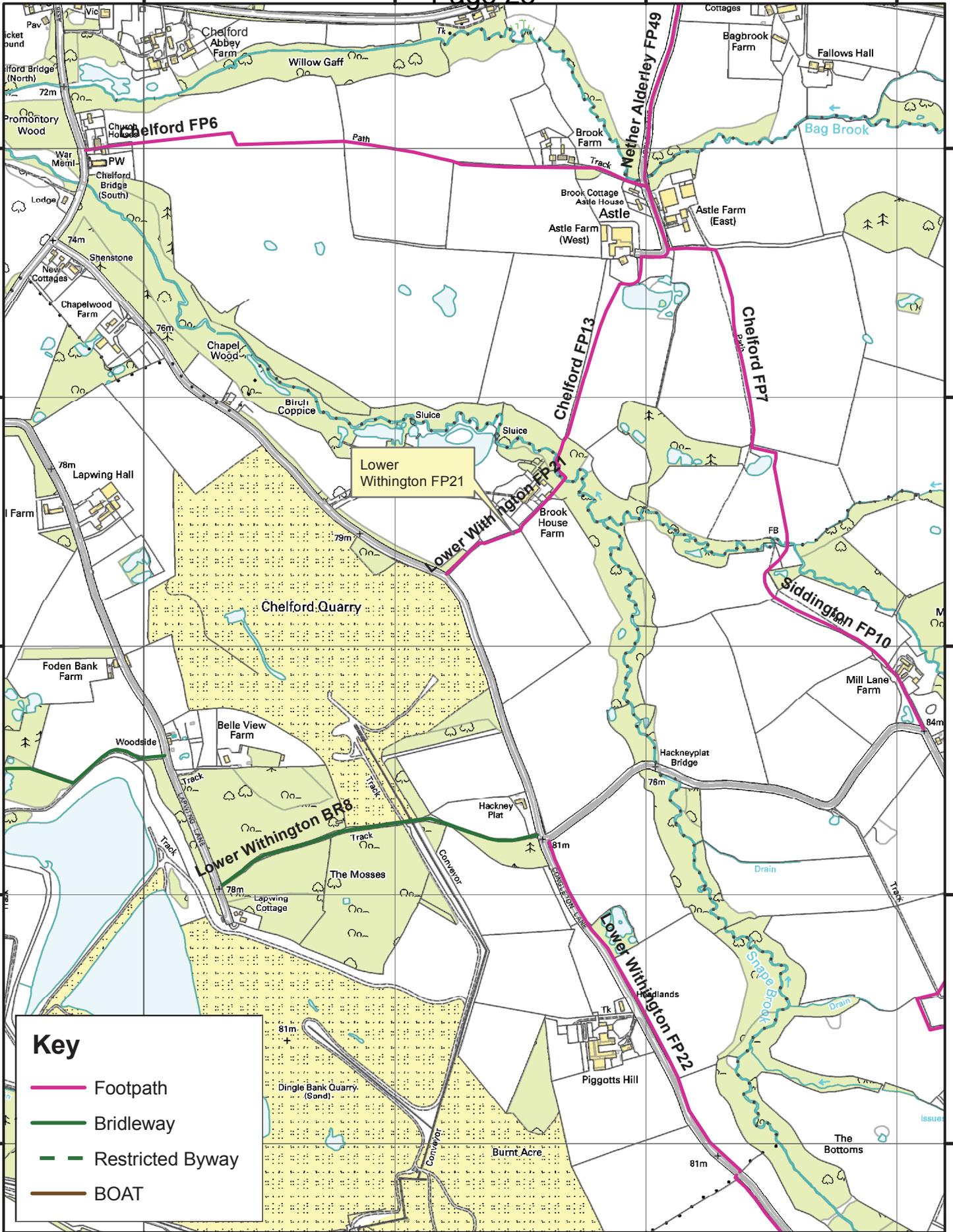
- 10.9 The user groups have been consulted. No objections have been received. Following inspection, the East Cheshire Group of the Ramblers Association and the Alderley Wilmslow and District Footpath Preservation Society registered their approval for the new route. The latter found it to be very enjoyable and attractive providing satisfactory links with other footpaths in the area.
- 10.10 The Council's Nature Conservation Officer has been consulted and has raised no objection to the proposals.
- 10.11 An assessment in relation to the Equality Act Legislation 2010 has been carried out by the PROW Network Management and Enforcement Officer for the area and it is considered that despite being longer, the proposed diversion is an improvement on the current route as it does not have any path furniture whereas the current route has four stiles. It has steps and a footbridge but the current route also has steps and the footbridge on the proposed diversion route is easily negotiated being open at both ends. Further, the proposed diversion route provides more varied scenery and offers a more convenient link to the southern path network compared to the current link along Congleton Road where walkers must remain mindful of traffic.

#### **11.0 Access to Information**

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

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Designation: Public Path Orders Officer  
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PROW File: 325D/502

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**Key**

- Footpath
- Bridleway
- - - Restricted Byway
- BOAT



Rights of Way network around Lower Withington FP21

This is a working copy of the definitive map and should not be used for legal purposes

1:10,000

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## CHESHIRE EAST COUNCIL

### Rights of Way Committee

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**Date of meeting:** 16<sup>th</sup> March 2015  
**Report of:** Head of Legal  
**Title:** Village Green Application – Land Adjacent to Chelford Road and Black Firs Lane, Somerford

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#### 1.0 Report Summary

- 1.1 This report deals with an application by Nicholas Bell to register land adjacent to Chelford Road and Black Firs Lane in Somerford as a new village green under section 15 of the Commons Act 2006.

#### 2.0 Recommendation

- 2.1 That at its meeting of 16<sup>th</sup> March 2015, the Committee receives and accepts the report of James Marwick (attached as appendix A) and that the application is rejected.

#### 3.0 Reasons for Recommendation

- 3.1 Mr Marwick is of the view that there is no obligation to postpone the consideration of the application. The parties have been afforded the opportunity to make representations in writing based upon the report, which is the central item to be considered by the Committee, and every opportunity to make relevant submissions has been afforded during the preparation of the report

- 3.2 The application should be rejected on the basis of Mr Marwick's conclusion that:

3.2.1 That section of the Land which is identified in the Development Strategy document is excluded from registration and that part of the Application falls to be rejected.

3.2.2 Regardless of that finding, there has not been sufficient qualifying user of the Land capable of making the Land registerable and therefore the Application should be rejected in its entirety.

#### 4.0 Wards Affected

- 4.1 Brereton Rural

**5.0 Local Ward Members**

5.1 Councillor John Wray

**6.0 Financial Implications**

6.1 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.

**7.0 Legal Implications**

7.1 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.

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

**8.0 Risk Assessment**

8.1 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

**9.0 Background and Options**

9.1 On 3<sup>rd</sup> May 2013 the Council received an application to register land adjacent to Chelford Road and Black Firs Lane, Somerford as a village green. The application was submitted by Mr. Nicholas Bell and relates to unregistered land which is part of the adopted highway. Ownership of the subsoil is unknown.

9.2 The application was made pursuant to Section 15(2) of the Commons Act 2006, on the grounds that the Application Site had been used by the locality for recreational purposes for in excess of 20 years. The Application is supported by 31 statements from local residents either claiming to have used or to have witnessed the use of the Application Land for recreational purposes during this period.

9.3 On 12<sup>th</sup> September 2013, the Application was advertised in the Congleton Chronicle and notice of the application was served in accordance with the Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007. Anyone wishing to object to the Application had until 6<sup>th</sup> December 2013 to do so in writing.

- 9.4 The Registration Authority received an objection from Gateley LLP solicitors, on behalf of Richborough Estates Limited, who have an interest in an area of land bound by the Application Land, on 6<sup>th</sup> December 2013. The Council, as Highway Authority, submitted an objection on 23<sup>rd</sup> January 2014.
- 9.5 On 10<sup>th</sup> June 2014, the Council wrote to the applicant to impose a deadline for submitting comments on the objections by Friday 1<sup>st</sup> August.
- 9.6 On 30<sup>th</sup> June 2014, the Council (as Highway Authority) wrote to the Registration Authority objecting to the application. These comments were forwarded to the applicant and the Registration Authority agreed that the applicant could have until Friday 5<sup>th</sup> September 2014 to provide any comments.
- 9.7 While preparing the report for the 15<sup>th</sup> September PROW committee meeting, the officer drafting the report noted that the changes introduced by the Growth and Infrastructure Act 2013 came into force on 25<sup>th</sup> April 2014 (i.e. before the date the village green application was made). The Council's planning department subsequently confirmed that a "trigger event" may have occurred. By virtue of Section 15C Highways Act 1980, the right to apply for land to be registered as a town or village green ceases to apply if a 'trigger' event (as specified in Schedule 1A of that Act) has occurred in relation to the land.
- 9.8 The Council's legal officer obtained advice from James Marwick and was advised that the application could still go to the PROW committee at its meeting in September but that the applicant and objectors should be given an opportunity to respond on whether a 'trigger event' has taken place before the application is considered. The report to the PROW committee was amended accordingly. The report recommended that an Inspector be appointed to consider the application, based on the papers, in the first instance.
- 9.9 At its meeting on Monday 15<sup>th</sup> September 2014, the Committee resolved as follows:

*That the Head of Legal Services offer the applicant and the objectors twenty eight days to make representations on the potential trigger event which may affect part of the land subject to the village green application.*

*Following expiration of the twenty eight day period referred to in Recommendation 2.1 the Head of Legal Services be authorised to appoint an independent expert to consider the application on the basis of written representations and provide a report.*

*That the Head of Legal Services be given delegated authority to determine if a non-statutory public inquiry should take place upon the*

*recommendation of the independent expert, after consulting the Chairman of this Committee.*

- 9.10 On the 17th September 2014 an email was sent to the applicant and the objectors asking for their comments on the trigger event by 16th October 2014. Further information in relation to the trigger event was sent to the applicant and the objectors on 10th October 2014. Comments were subsequently received from Richborough Estates, Somerford Parish Residents Action Group, the applicant and the Council (as Highway Authority).
- 9.11 On 27<sup>th</sup> November 2014, James Marwick, Barrister of Trinity Chambers, Newcastle upon Tyne was provided with all necessary documentation and instructed to consider the Application. It is of the view that the Application can be dealt with by way of written representations and without the need for a non statutory public inquiry to:
- Sit as an independent person to consider it.
  - Thereafter to prepare a report, to go to the Council's Public Rights of Way Committee, recommending whether the Application should be approved or not.
- 9.12 In accordance with instructions, in his report dated 12<sup>th</sup> February 2015 (a copy of which is at Appendix A), Mr Marwick concluded that:
- 9.12.1 'A Trigger Event' had occurred excluding the part of the Land which falls within the area of land identified in the Development Strategy document from registration. This has the consequence of severing the parts of the Land which are registrable in two; namely the remaining part of the claimed land on Black Firs lane and the Chelford Road section
- 9.12.2 Rejecting the Applicant's argument to the contrary, there is strong evidence that the Land in its entirety is highway maintainable at public expense so as to justify proceeding on the basis that on balance, it is Highway land.
- 9.12.3 Considering all the evidence relied upon in support of the Application, practically all the user relied on by the Applicant could be regarded as having been enjoyed pursuant to the public's highway rights and therefore must be discounted as qualifying user as any use by right rather than as of right is to be discounted from consideration: per R. (Barkas) v North Yorkshire County Council [2014] UKSC 3. What user that remains, if any, is insufficient to warrant Registration.
- 9.12.4 The evidential position is not rectifiable at a public inquiry for the reasons given in his report. It follows that he is satisfied that his conclusion is one properly reached without the need for a public inquiry
- 9.13 Anita Bradley, Head of Legal Services, being satisfied that the Independent Person's conclusion that the evidential position is not

rectifiable at a public inquiry, determined, in accordance with her delegated authority that it is not necessary to hold a public inquiry.

- 9.14 Mr Marwick's report was circulated to the parties on 25 February 2015 advising that the application is to be considered at the Committee meeting on 16<sup>th</sup> March 2015. The parties were invited to make any representations in relation to the report by 4pm on 4<sup>th</sup> March 2015.
- 9.15 Richborough Estates responded on 26 February 2015 advising that that the report is considered to be to be most thorough and detailed. It has analysed all issues relating to the application, reaches a reasoned conclusion and as a result, the recommendations therein are agreed.
- 9.16 The applicant Mr Bell responded on 2 March 2015. He stated that he would like to address the Committee in relation to the application, but would not be able to attend on the 16th March due to being on holiday. He requested that the application be considered at the next meeting of the Committee, so as to afford him an opportunity to be present and make submissions.
- 9.17 In response to Mr Bell's request, Mr Marwick advised that in his view, there is no obligation to postpone the Committee meeting as the applicant has been afforded the opportunity to make representations in writing based upon the report, which is the central item to be considered by the Committee, and every opportunity to make relevant submissions has been afforded during the preparation of the report. He also pointed out that the Committee has a discretion whether or not to receive written representations made after the 4<sup>th</sup> March as part of their decision making process.

**10.0 Access to Information**

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

***For further information:***

*Officer: Peter Jones*

*Tel No: 01270 685849*

*Email: peter.jones@cheshireeast.gov.uk*

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**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BLACK FIRS LANE AND  
CHELFORD ROAD, SOMERFORD AS A TOWN OR VILLAGE GREEN**

**AND IN THE MATTER OF THE COMMONS ACT 2006**

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**OPINION**

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Introduction and Procedural Matters

1. I am appointed by East Cheshire Borough Council (in its capacity as the relevant registration authority under the Commons Act 2006) (the **Registration Authority**) to consider and report upon an application dated 3<sup>rd</sup> May 2013 (the **Application**) to register land adjacent to Chelford Road and Black Firs Lane in Somerford (the **Land**) as a town or village green.
2. I have been provided with copies of the Application and all the material (including correspondence and statements) provided in support of it; the objections duly made to it; and further correspondence, submissions and evidence from all concerned with the Application. I have had regard to all of that material in compiling my report and recommendations.
3. In a preliminary note dated 14<sup>th</sup> December 2014, I recommended to the Registration Authority that a written report could be sought in the first instance without the need for a public inquiry and gave a suggested timetable for the filing and serving of further evidence and submissions by the parties.

4. The Applicant takes two procedural issues in its representations. First, that it is a breach of natural justice for the Registration Authority to determine this application given the perceived conflict between itself as landowner/highways authority and registration authority. Second, that any determination should be after a public inquiry rather than by a written report.
  
5. It is well established that it is acceptable and proper practice for a registration authority with such a perceived conflict to appoint an independent expert to consider the application for registration. Such an approach was endorsed by the Court of Appeal in **R. (Whitmey) v Commons Commissioners [2005] QB 282**. In my view, there is no reason in this case for such an approach to be departed from by referral to a third party local authority or otherwise.
  
6. It is equally well established that a registration authority may determine an application without a public inquiry in certain circumstances, which will include where it is not necessary for a fact finding exercise to be undertaken to determine an application. I advised in my earlier note that I considered that this was potentially such a case given the points of law raised in the objections and that it would be appropriate for a written report to be obtained in the first instance.
  
7. The duty is to act reasonably and the Registration Authority, in my view, has so acted in its approach to date by virtue of what I have set out above.
  
8. Suffice it to say that this report does not undertake a fact finding exercise on the papers but considers the untested evidence in support of the Application at its highest.

9. To the extent that I consider that any matter (whether determinative of the application or not) would properly require determination after a public inquiry, I say so within this report.

10. As a final procedural matter, I note that the Applicant has objected to the late service of evidence by the Council in its capacity as objector. From what I understand, the Council disclosed its evidence and further representations together in a bundle on 27<sup>th</sup> January 2015. Thus, any new evidence therein was technically disclosed two weeks after the 13<sup>th</sup> January 2015 deadline. The evidential part of the Council's bundle primarily relates to the dedication of the Land as public highway and includes a number of conveyancing documents from the 1930s. As I understand it, at least some of the documentation has been disclosed previously and indeed is commented on in the Applicant's representations.

11. In my view, no prejudice is caused to the other parties by the late disclosure. The disclosure is relatively incontrovertible documentary evidence and having considered it in detail, it does not significantly alter the Council's position or my view of the issues in this matter. I have therefore had due regard to it but emphasize that it has not proven determinative on any point.

The Purpose of this Report

12. The primary purpose of this report is to consider whether the Application, in whole or in part, can be determined by consideration of certain issues in the matter which the objectors submit are summarily determinative of the Application without the need for a public inquiry.

13. Those issues are whether any part of the Land is excluded from registration by virtue of there having been a relevant trigger event under the statutory regime and whether the consequence of the Land being Highway land (as asserted by the objectors) is that there has not been any, or any sufficient qualifying user of the Land so as to make it registrable.

#### The Application

14. The Application is dated 3<sup>rd</sup> May 2013, contained within Form 44 and completed with an appropriate statutory declaration. The Applicant is a Mr. Nicholas Bell of 9 Chelford Road in Somerford.
15. It seeks registration of what is referred to as Somerford Green. The extent of Somerford Green is not particularised within Form 44 but the Land is outlined and cross-hatched in red on the Ordnance Survey plan (scale 1:2500) annexed to the Application.
16. It is a grassed area, with some trees on it, which lies between two tarmacked carriageways known as Chelford Road and Black Firs Lane (which form an inverted “v” shape where they meet) and the land within that v shape which is a combination of agricultural land and residential properties. The Land is not particularly wide in any part and on Black Firs Lane it is intersected by the driveways of a number of residential houses.<sup>1</sup>

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<sup>1</sup> I undertook an informal and unattended site visit on 11<sup>th</sup> February 2015 in order to form a clear impression of the Land.

17. The locality and/or neighbourhood within a locality is not specified in writing in the Application but rather delineated by a hand-drawn line on the plan annexed to the application which effectively encompasses the residential triangle formed by Chelford Road, Black Firs Lane and Holmes Chapel Road. The Applicant has since clarified that this neighbourhood is locally known as the Somerford Triangle and lies within the Parish of Somerford (being the relevant locality).
  
18. The Application is supported by a number of statements of present and former residents of the aforesaid streets forming the Somerford Triangle. Statements on behalf of approximately 30 present and past inhabitants were provided with the Application. These have been supplemented by further statements served as part of the directions provided for in my preliminary review note.
  
19. The statements are contained in a pro-forma which provides for the witness to provide details of, among others, their use of the Land, to which period in time it relates and their residence at material times. The statements contain a statement of truth and the witness is invited (by striking out either alternative) to state whether "*I would/would not describe my use to go beyond that which I would lawfully be entitled to do on a public highway, which I understand is restricted to a right to pass and re-pass.*" In every case, this clause has been answered in the affirmative. Each statement further asserts that use of the Land has been as of right, and not by permission or force. A pro-forma clause is inserted in this respect.

20. It is reasonable to say that a large range of activities are spoken to in the statements. These range from walking, walking and playing with dogs, horse riding and training, foraging for berries, children's games and playing generally to family gatherings. I consider this in further detail below. This paragraph is intended only as a short summary of the activities undertaken.

21. The Application avers that there are approximately 70 properties within the Somerford Triangle and that the evidence in support of the application demonstrates that there has been a significant number of such residents of the Somerford Triangle using the Land.

Statutory Framework: The Commons Act 2006 (the **2006 Act**)

22. The Application is made under section 15(2) of the 2006 Act. That section provides the following test for registration of land as a town or village green:-

*“(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*

*(b) they continue to do so at the time of the application.”*

23. The burden of proving that the Land has become a town or village green lies with the Applicant. The standard of proof is the balance of probabilities. All the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on the balance of probabilities, per the guidance given by Lord Bingham in **R v. Sunderland City Council ex parte Beresford [2004] 1 AC 889**.

24. The Growth and Infrastructure Act 2013 (partly in force as from 25<sup>th</sup> April 2013) introduced a number of further significant measures to the law on registering new town and village greens under the 2006 Act, which require consideration in addition to the provisions of section 15(2) above.

25. Section 15C of the 2006 Act took effect on 25<sup>th</sup> April 2013 and excludes the right to apply for the registration of land in England as a town or village green where a trigger event has occurred in relation to the land. The right to apply for registration of the land as a green remains excluded unless and until a terminating event occurs in relation to the land. Trigger and terminating events are set out in Schedule 1A to the 2006 Act. Section 15(C) provides as follows:

*“(1) The right under section 15(1) to apply to register land in England as a town or village green ceases to apply if an event specified in the first column of the Table set out in Schedule 1A has occurred in relation to the land (“a trigger event”).*

*(2) Where the right under section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table occurs in relation to the land (“a terminating event”).”*

26. Although section 15(C) is only of effect in relation to applications brought on or after the date on which it came into force, by section 16(4) of the 2006 Act, the relevant trigger event may be one which has occurred prior to the coming into force of section 15(C).

Trigger Event

27. It is thus a precursor to an application for registration that the land is not excluded from registration by virtue of the trigger event regime set out hereinabove. It is therefore the appropriate starting point in consideration of the Application, before the traditional criteria for registration under section 15(2) of the 2006 Act are considered.
28. The Registration Authority notified the parties on 17<sup>th</sup> September 2014 that it was considered that the third trigger event provided for in Schedule 1A of the 2006 Act had occurred prior to the Application, namely:- *“A draft of a development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 Act.”*
29. It was said that the relevant event had been that East Cheshire Council had consulted on its Development Strategy and Emerging Policy Principles document in January and February 2013 (the **Development Strategy** document). The Development Strategy presented East Cheshire Council’s preferred policy and site options, and identified the Back Lane and Radnor Park site for potential development, which included land forming part of the Land (in particular the upper part of Black Firs Lane which borders the adjacent agricultural land).
30. All parties were given the opportunity to address this issue in further representations. I say at this point that I consider that no party has been prejudiced by the relatively late taking of this point as an opportunity to make representations on the issue was afforded to all parties.

31. The Applicant submits that no trigger event has occurred. Its primary objections are that the Development Strategy document was not a relevant development plan document within the meaning of Schedule 1A (as further defined), that there was therefore no relevant consultation exercise and that in any event no part of the Land was identified for potential development within the meaning of Schedule 1A. I have had due regard to the full submissions of the Applicant.

32. The 2004 Act referred to in the third trigger event to Schedule 1A is the Planning and Compulsory Purchase Act 2004 (the **2004 Act**). The Town and County Planning (Local Planning) (England) Regulations 2012 (the **2012 Regulations**) are made in pursuance of section 17(7) of the 2004 Act and define a “*development plan document*”. Regulation 2 thereof provides that:-

*“local plan” means any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the [2004] Act these documents are prescribed as development plan documents”.*

33. The relevant sections of regulation 5 provide as follows:-

*“5.—(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are—*

*(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—*

*(i) the development and use of land which the local planning authority wish to encourage during any specified period;*

*(ii) the allocation of sites for a particular type of development or use;*

*(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and*

*(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;*

*(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.”*

34. The Development Strategy was a document prepared by East Cheshire Council in its capacity as a local planning authority which presented the Council’s preferred policy and site options (and a number of alternative options) for the development and use of land. I therefore am of the view that it was a “development plan document” within the meaning of Schedule 1A because it meets the definition provided for by regulation 5(a)(i) and (ii) respectively above.

35. I am further satisfied that the Development Strategy identified land forming part of the Land. The areas of land identified for potential development are clearly set out within the Development Strategy and the plans annexed to the Development Strategy. I do not see any ambiguity between the words used to describe the areas of land for potential development within the Development Strategy document and in the plans annexed to them. Further, in my view, the reference to “potential development” in the wording to the third trigger event defeats any argument that there was insufficient certainty that the strategic site would ever be developed to consider that it was identified land within the meaning of the third trigger event.

36. Having found that the Development Strategy was a development plan document, I am also satisfied on balance that its publication for consultation in January and February 2013 was preparation, publication and consultation in accordance with regulations 18 and 19 of the 2012 Regulations and not a consultation falling outwith of the prescribed regime.

37. In this respect, and as identified on behalf of the objectors, the same is confirmed by the Council's Local Plan Strategy Statement of Consultation dated May 2014 in which the statutory consultation on the Development Strategy and Policy Principles in early 2013 is specifically identified.

38. It is not suggested that there has been any relevant terminating event.

39. It is therefore my conclusion that the part of the Land which falls within the area of land identified in the Development Strategy document is excluded from registration. This has the consequence of severing the parts of the Land which are registrable in two; namely the remaining part of the claimed land on Black Firs lane and the Chelford Road section.

40. It is well-established that a registration authority may register only part of the land contained within any application. As a consequence of this, and for the sake of completeness, I now go on to consider whether any part of the non-excluded areas of the Land would fall to be registrable under section 15(2) of the 2006 Act as well as whether the excluded area of land would in any event have been susceptible to registration. Unless stated otherwise, references to the Land continue to be to the Land as a whole

Highway Land

41. There is a dispute as to whether the Land is Highway land. The Applicant asserts that the objectors have failed to show that the application land is public highway and that no evidence, or in any event, insufficient evidence has been provided for such a conclusion to be reached.
  
42. I am satisfied that there is overwhelming evidence that the Land is public highway.
  
43. The inclusion of the Land as publicly maintainable highway on the list kept by the Highways Authority pursuant to section 36(6) of the Highways Act 1980 (the **1980 Act**) has not been challenged. This is strong evidence in itself that the Land is Highway land.
  
44. The inclusion of the Land on the list is consistent with the dedication of the wide verges adjacent to Chelford Lane and Black Firs Lane to Congleton Rural District Council (a predecessor-in-title to the present highways authority) in the late 1930s as evidenced in the relevant conveyancing material disclosed by East Cheshire Council as objector and the exchange of correspondence in September and October 2007 in this respect. The plan marked "area of land coloured red 10950 sq yards" supports that the Land was being dedicated to such use.
  
45. Further, the Land has been maintained as highway verge by the Highways Authority at all material times. Whilst it is plain that there has been some concurrent maintenance of parts of the Land by adjacent landowners, such use has been tolerated by the Highways Authority (per email dated 5<sup>th</sup> October 2007) and I do not consider it to be a factor which takes the Applicant any further forward.

46. I am therefore satisfied that there is strong evidence that the Land in its entirety is highway maintainable at public expense and I reject the Applicant's argument that there is insufficient evidence in this respect. I therefore proceed on the basis that the Land is, on balance, Highway land.
47. Highway land is not precluded by law from being registered but the status of land as highway means that qualifying user under the 2006 Act is markedly constrained by the fact that the public can lawfully do anything reasonable on highway land provided it does not interfere with the public's right of passage: per **DPP v Jones [1999] 2 AC 240**. Such use is by right not as of right and therefore not qualifying user. Among others, recreational walking, with or without dogs, and other activities such as picking fruit would therefore be by right rather than as of right. Furthermore, any significant use of highway land for recreational purposes is capable of amounting to an interference with the highway and may be treated as unlawful (and therefore not use for lawful sports and pastimes).
48. It is this combination of consequences which flow from the Land being Highway land which the objectors say allow the matter to be disposed of without further consideration or a public inquiry. In broad summary they say, first, the public have the right to carry out the vast majority, if not all, the activities on the Land relied upon in support of the Application by virtue of it being a highway. There is therefore no or no sufficient qualifying user of the Land. Second any activity which goes beyond such reasonable user as they are entitled to carry out by right amounts, on balance, to a public or private nuisance which obstructs the highway and which is therefore not a lawful sport or pastime within the meaning of section 15(2) of the 2006 Act.

Qualifying User

49. The Applicant must prove, inter alia, on the balance of probabilities that there has been sufficient qualifying user (i.e. use as of right for lawful sports and pastimes) during the 20 year period (being the 20 years immediately prior to the date of the Application) to allow the Land to be registered.
50. Any use by right rather than as of right is to be discounted from consideration: per **R. (Barkas) v North Yorkshire County Council [2014] UKSC 31**. Where there is use by right by virtue of the presence of a public right of way and alleged use as of right for village green activities, the critical question is how the matter would have appeared to a reasonable landowner observing the user made of his land: per Lightman J in **Oxfordshire County Council v Oxford City Council [2004] Ch 253** and Sullivan J in **R (Laing Homes Limited) v Buckinghamshire County Council [2003] EWHC 1578 (Admin)**.
51. **DPP v Jones** is authority that user of the highway extends beyond a right to pass and repass and extends to a right to carry out other activities which are incidental to the same. In that case it was found that a peaceful and non-obstructive assembly protest on the highway amounted to a reasonable use of the highway and within the permitted uses. I place emphasis on this as it shows how significantly an activity may differ from a right to pass and re-pass and still be characterised as lawful use of the highway.
52. The use for unlawful sports and pastimes will by definition not be qualifying user but it is otherwise recognised that lawful sports and pastimes is a composite expression and to be relatively widely interpreted.

53. However, it will exclude any commercial use and any use by those from outside of the neighbourhood in question is to be discounted.

54. In the present matter, I have had the benefit of a significant number of statements from a significant proportion of the households in the alleged neighbourhood (both past and present residents). They contain a statement of truth and have been prepared with greater detail than is often seen in support of such Applications. I am therefore satisfied that these statements give a clear reflection of the nature of the evidence of user that would be forthcoming at any public inquiry.

55. I have reviewed all the statements in detail. I do not particularise each one herein. There is, on any view, a predominance of activities spoken to in the statements. These include in particular walking, exercising dogs, horse-riding, foraging and child's play. Although there are other activities spoken to including star-gazing, gardening and picnicking, I am satisfied that the substantial proportion of activities referred to in the statements are those listed above (and such other activities which are related to the same such as bird-watching and ferreting).

56. This, in my view, is entirely consistent with the layout of the Land; it is a narrow strip of land in most places which necessarily prohibits any more extensive use of the Land. A cursory review of any number of the statement would yield that these activities have formed the central usage by local residents. I bear in mind that the statements have made clear where relevant, and quite properly so, that some of the activities have not always been undertaken by a linear passage through the Land but rather by, for example, horse training and dog training in confined areas of the Land.

57. I also bear in mind that there have been gatherings and other activities on the Land which the Applicant would argue go well beyond a person passing and re-passing on a highway.
58. As I have set out above, the public can lawfully do anything reasonable on highway land provided it does not interfere with the public's right of passage. In my view, this in practice means that most of the activities relied on must be discounted as qualifying uses for that purpose. Activities such as walking ,exercising dogs, foraging and horse-riding are manifestly such activities and frequently referred to as such in the key authorities. Even those activities which are more incidental to highway use, such as star gazing and children's play still fall comfortably within the confines of reasonable activity on a highway verge and therefore do not in my view amount to qualifying user.
59. The key authority in this area of law determined that a peaceful assembly on the highway was a lawful activity. In my view, any of the instances of picnics, family gatherings, meetings between residents and the like must also be regarded as reasonable uses of the Land by virtue of it being a highway which in turn precludes reliance upon the same in support of the Application.
60. With regard to all the evidence relied upon in support of the Application, I conclude that practically all the user relied on by the Applicant could be regarded as having been enjoyed pursuant to the public's highway rights and therefore must be discounted as qualifying user. What user that remains, if any, is in my view insufficient to warrant registration.

61. Moreover, given the layout of the Land is as a broad highway verge, this is not a case where a reasonable landowner could readily discern between use by right by virtue of it being a highway and any use as of right for green activities. Therefore, I cannot regard uses, for example, for horse and dog training as being activities which fall as green activities rather than use by right even where emphasis has been placed on the non-linear nature of the activity. I also have borne in mind that part of the Land is intersected by a series of driveways to residential properties which make it even more unlikely that there has been any qualifying user over that particular section of the Land.

62. To the extent that it might be argued that the evidence at a public inquiry would come out so as to demonstrate user in a manner which fell outside user by right, in my view any user evidenced at an inquiry would likely be found to present to a reasonable landowner of the Land as either (a) reasonable use by right of the public highway or (b) if not such reasonable use by right of the public highway, then a private or public nuisance amounting to an obstruction of the highway and therefore not qualifying user for lawful sports and pastimes.

63. I accept the submission of the objectors as I find that it is likely that most of the activities referred to are activities which the local residents are entitled to do by right by way of the Land being public highway. It follows that I consider that there is insufficient qualifying user of any of the Land so as to make it registrable. Any usage which does not fall to be discounted is, in my view, so minimal that it could not be capable of forming the foundation of registration.

64. I have further made clear that I do not consider the evidential position is rectifiable at a public inquiry for the reasons I have given. It follows that I am satisfied that my conclusion is one properly reached without the need for a public inquiry.

65. In my opinion, the whole of the Land falls to be rejected for registration regardless of any trigger event having occurred for the reasons stated above, namely, that user has been by right and not as of right by virtue of the Land being Highway land.

66. In coming to this conclusion, I have considered the Land as a whole and without reference to the part of it which I consider excluded from registration by section 15(C) of the 2006 Act. Suffice it to say, that I consider that are particular difficulties in demonstrating that the lower part of Black Firs Lane, which is intersected by driveways, would fall to be registrable as a town or village green.

#### Remaining Criteria

67. I do not consider it appropriate for the remaining criteria for registration to be examined with any finality on a summary basis. However, I make the following observations.

68. I have concerns as to whether the Somerford Triangle is a recognisable neighbourhood within the meaning of section 15(2). But for my findings above, I would require this issue to be tested at a public inquiry. Further, even if I was wrong about the user of the Land not being qualifying user, I would also require the question of whether there had been sufficient qualifying user of the Land by a significant number of local residents for the requisite twenty year period to be tested at a public inquiry.

**Conclusion and Recommendations**

69. I have concluded as follows:-

69.1 That section of the Land which is identified in the Development Strategy document is excluded from registration and that part of the Application falls to be rejected.

69.2 Regardless of that finding, there has not been sufficient qualifying user of the Land capable of making the Land registrable and therefore the Application should be rejected in its entirety.

69.3 I recommend that the Application be rejected for the reasons I have given and for the reasons for rejection to be recorded as those stated in this report.

70. If there are any queries with this report, please do not hesitate to contact me.

**James Marwick**

**Trinity Chambers**

**12<sup>th</sup> February 2015**

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## CHESHIRE EAST COUNCIL

### Rights of Way Committee

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**Date of meeting:** 16<sup>th</sup> March 2015  
**Report of:** Head of Legal Services  
**Title:** Village Green Application: Relating to Land to the North of Cresswellshawe Road, Alsager which is commonly referred to as "Wood Park"

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#### **1.0 Purpose of Report**

1.1 This report seeks a decision on how to proceed with a village green application in respect of land to the north of Cresswellshawe Road, Alsager which is commonly referred to as "Wood Park".

#### **2.0 Recommendation**

2.1 That the Committee authorise the Head of Legal Services to appoint an independent person to consider the application on the basis of written representations or to hold a non statutory public inquiry and thereafter provide a report to the committee.

#### **3.0 Reasons for Recommendation**

3.1 The Council is the registration authority and also the landowner. If the Committee follows the recommendation it can be satisfied that separate roles are maintained. This separation is being maintained at officer level between the legal and administrative departments. If the Council chose to determine the application without independent input, as it is also the Landowner, there may be criticism that the Council has not been open and transparent in its dealings increasing the risk of challenge by way of costly judicial review proceedings

3.2 This application is far from straightforward. Good practice dictates that the registration authority will appoint an independent person in cases where there is a conflict of evidence and or questions as to whether the legal requirements as set out in S.15 Commons Act 2006 have been satisfied. These factors are present in this case.

#### **4.0 Wards Affected**

4.1 Alsager

#### **5.0 Local Ward Members**

5.1 Councillors R Fletcher, D Hough and S Jones

## **6.0 Financial Implications**

- 6.1 There will be costs incurred by the Council in appointing an independent person. We envisage that any such costs will be charged to Legal Services initially with a corresponding recharge to the relevant service during 2014/15.

## **7.0 Legal Implications**

- 7.1 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 was introduced by the Growth and Infrastructure Act 2013 which changed the criteria for registration of new village greens and applies to application received after 25<sup>th</sup> April 2013.
- 7.2 Village greens can be registered either as a result of an application by a third person or by a voluntary registration by the landowner.
- 7.3 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.
- 7.4 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.
- 7.5 There is no right of appeal against the Committee's decision not to register land as a village green. The route for any challenges would be by an appeal by way of judicial review.
- 7.6 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.
- 7.7 For the Committee to be in a position to make the ultimate decision to grant or refuse the application, it will be required to consider whether to accept the officer's decision in November 2014, to write to the applicant and all known landowners after the expiration of the consultation period, inviting the submission of comments in relation to the application before it was moved to the next stage. Given the lengthy period of inactivity since receipt of the application and the next stage, namely to progress the matter to this Committee, using powers under the Local Government Act 1972, officers considered that it was in the interests of natural justice and good administration to invite the submission of comments from interested parties.

There is no specific power in the relevant regulations to invite the submission of comments after the expiration of the consultation period but officers are of the view that it is lawful to do so and there is an express provision allowing the Council to consider late comments. However, given the fact that the objector is the Council as landowner and highway authority and that the applicant has expressed dissatisfaction with the fact that this has happened, the decision to write to interested parties may be the subject of criticism and or legal challenge. In order to be open and transparent in its dealings officers are recommending that the decision about whether or not to accept the Council's comments should be made by an independent person thus avoiding the allegation that the Council has been a judge in its own cause.

- 7.8 Regulation 6(2)(b) of the Regulations, provide that the registration authority *may* consider any statement that it receives on or after the expiration of the holding of the consultation period and has a discretion to refuse to do so.
- 7.9 The applicant must be given a reasonable opportunity of dealing with matters of objection and or any other matter which appears to afford possible grounds for rejecting the application. In deciding whether an applicant has been afforded a reasonable opportunity the Committee should decide whether it has sufficient information from all parties together with guidance and legal advice to determine the application on the written representations alone. If not a 'non-statutory' public enquiry should be held.
- 7.10 The applicant must prove on the balance of probabilities that the requirements of Section 15 Commons Act 2006 have been made out. The Council as landowner argues that the 'application has not been made by the inhabitants of a locality or neighbourhood.' The wording of Section 15 Commons Act 2006 states that 'upon the application of any person, if a significant number of the inhabitants of any locality ...or neighbourhood have indulged as of right in lawful sports or pastimes .....This may lead to legal argument that the application does not have to be made by inhabitants of a locality as contended by the Council but can be made by *any person* such as the applicant, Mr Mellor.

## 8.0 Risk Assessment

- 8.1 If the Council chose to determine the application without the report of an independent person:
- 8.1.1 As it is also the landowner, there may be criticism that the Council has been a judge in its own cause.
  - 8.1.2 There may be criticism that the Committee has not followed its adopted procedure for determining village green applications dated 7 December 2009 given that factors relevant to the decision whether to appoint an independent person are present in this case.
  - 8.1.3 In addition to any criticism, both of the above factors increase the risk of challenge by way of costly judicial review proceedings.

## 9.0 Background and options

- 9.1 The Council is the registration authority for village greens and the responsibility for this function was delegated to the Rights of Way Committee under the Council's Constitution.
- 9.2 The procedure for applications is provided for by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ('the Regulations').
- 9.3 This village application was submitted on 18<sup>th</sup> September 2012 by Andrew Barnard of 15 Cresswellshawe Road, Alsager, Stoke on Trent ST7 2NL with 22 supporting witness statements.
- 9.4 The notice of application was advertised on 28<sup>th</sup> February 2013 after which the registration authority carried out a consultation exercise that expired on 31<sup>st</sup> May 2013, which was extended at the request of the Council as Landowner to 12<sup>th</sup> July 2013. At the expiration of this consultation period, the registration authority received a response from Alsager Town Council expressing its support otherwise there were no further comments either in support or against the application. However on 15<sup>th</sup> July 2013 the Council Landowner confirmed that it supported the application.
- 9.5 For a number of reasons none of the registration authority's pending village green applications progressed for a number of months.
- 9.6 As a result of this delay, in November 2014 the registration authority's officers decided that the applicant and all known landowners would be written to in order to ask whether they would like to submit any comments in relation to the application before it was moved to the next stage. The deadline for submission of comments was 15<sup>th</sup> December 2014.
- 9.7 Following this letter the registration authority received an objection from the Council (as landowner) on 11<sup>th</sup> December 2014. The Council objected on the basis that the application was not in accordance with the requirements of Section 15 Commons Act 2006 in that it had not been made by the inhabitants of a locality or neighbourhood and that the applicant's use of the land was not as of right, but by right, as Open Space by virtue of Section 10 of the Open Spaces Act 1906.
- 9.8 Regulation 6(2)(b) of the Regulations, provide that the registration authority *may* consider any statement that it receives on or after the expiration of the consultation period and before the authority disposes of the application. Should the registration authority intend to take any such statements into consideration, however, the applicant must be given an opportunity to consider the statement and to deal with any of the issues raised.
- 9.9 The applicant was written to on 16<sup>th</sup> December, inviting him to submit any comments on the Landowner Council's objections by 16<sup>th</sup> January 2015. On the same day he was written to namely 16<sup>th</sup> December the applicant. He

expressed his individual concerns around the fact that the registration authority would be asked to exercise its discretion to receive the Council's objection after the expiration of the consultation period and that he struggled to understand how any application by a member of the public would stand the tests of 'neighbourhood' and 'as of right'. However he advised that he would consult with the supporters of the application.

9.10 Nothing further has been received from the applicant.

### **Options**

9.11 The Committee as registration authority can:

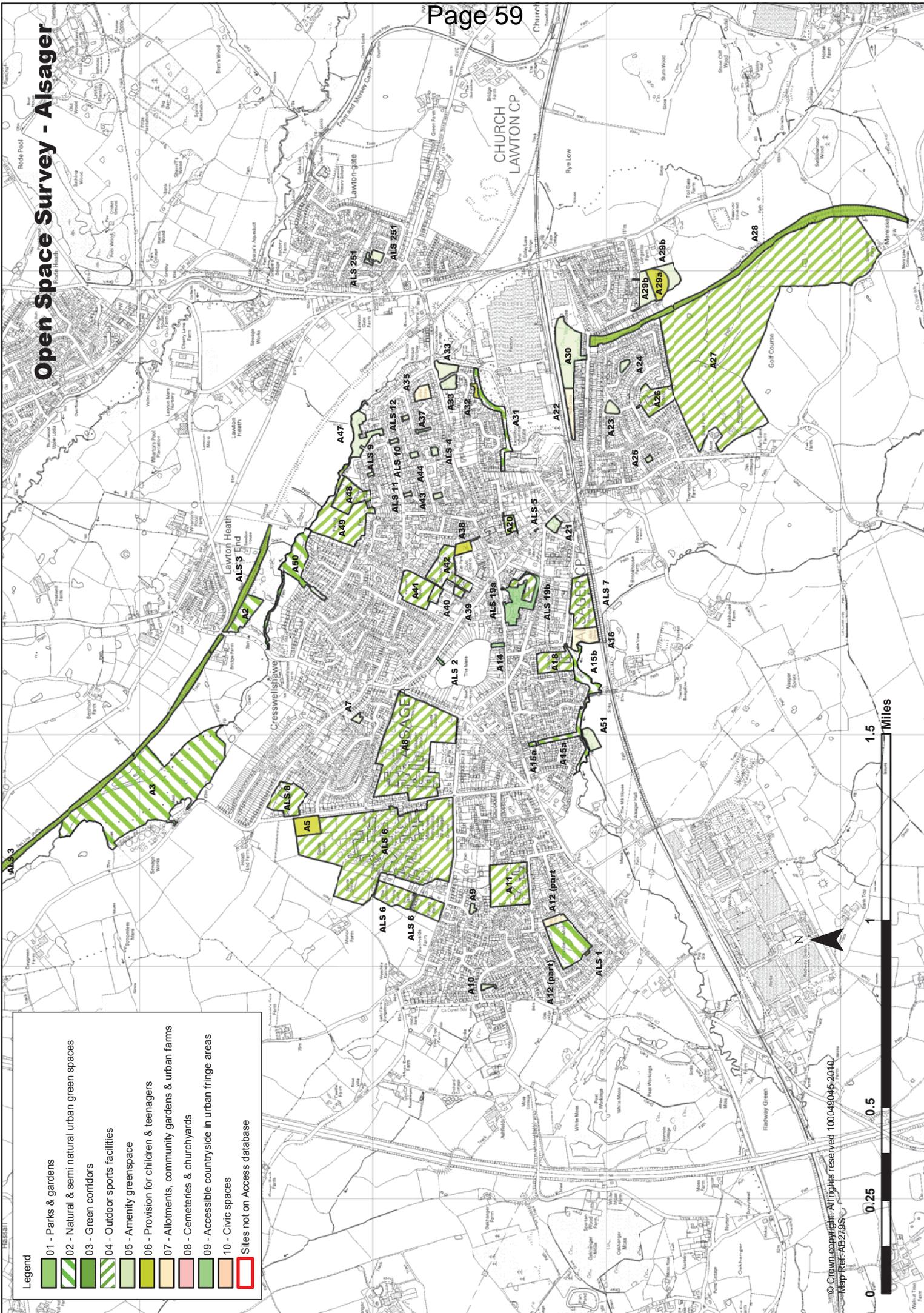
- Determine the application in its entirety, especially the issues raised at paragraphs 7.7 to 7.10 on the written representations alone  
OR
- Authorise the Head of Legal Services to appoint an independent person to consider the application on the basis of written representations or to hold a non statutory public inquiry and thereafter to provide a report to the committee.

### **10.0 Access to Information**

10.0 The background papers relating to this report can be inspected by contacting the report writer; Peter Jones, Support Lawyer, Legal Services, Westfields.

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# Open Space Survey - Alsager



**Legend**

- 01 - Parks & gardens
- 02 - Natural & semi natural urban green spaces
- 03 - Green corridors
- 04 - Outdoor sports facilities
- 05 - Amenity greenspace
- 06 - Provision for children & teenagers
- 07 - Allotments, community gardens & urban farms
- 08 - Cemeteries & churchyards
- 09 - Accessible countryside in urban fringe areas
- 10 - Civic spaces
- Sites not on Access database

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 Map Ref: AB 2795



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## CHESHIRE EAST COUNCIL

### Rights of Way Committee

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**Date of meeting:** 16<sup>th</sup> March 2015  
**Report of:** Head of Legal Services  
**Title:** Village Green Application: Relating to Land at Banky Fields,  
Congleton CW12 4BW

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#### **1.0 Purpose of Report**

1.1 This report seeks a decision on how to proceed with a village green application in respect of land at Banky Fields, Congleton CW12 4BW

#### **2.0 Recommendation**

2.1 That the Committee authorise the Head of Legal Services to appoint an independent person to consider the application on the basis of written representations or to hold a non statutory public inquiry and thereafter provide a report to the committee.

#### **3.0 Reasons for Recommendation**

3.1 The Council is the registration authority and also the landowner and highway authority. If the Committee follows the recommendation it can be satisfied that separate roles are maintained. This separation is being maintained at officer level between the legal and administrative departments. If the Council chose to determine the application without independent input, as it is also the highway authority, there may be criticism that the Council has not been open and transparent in its dealings increasing the risk of challenge by way of costly judicial review proceedings.

3.2 This application is far from straightforward. Good practice dictates that the registration authority will appoint an independent person in cases where there is a conflict of evidence and or questions as to whether the legal requirements as set out in S.15 Commons Act 2006 have been satisfied. These factors are present in this case.

#### **4.0 Wards Affected**

4.1 Congleton West

#### **5.0 Local Ward Members**

5.1 Councillor G Baxendale, Councillor R Domleo and Councillor D Topping.

## **6.0 Financial Implications**

- 6.1 There will be costs incurred by the Council in appointing an independent person. We envisage that any such costs will be charged to Legal Services initially with a corresponding recharge to the relevant service during 2014/15.

## **7.0 Legal Implications**

- 7.1 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 was introduced by the Growth and Infrastructure Act 2013 which changed the criteria for registration of new village greens and applies to applications received after 25<sup>th</sup> April 2013.
- 7.2 Village greens can be registered either as a result of an application by a third person or by a voluntary registration by the landowner.
- 7.3 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.
- 7.4 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.
- 7.5 There is no right of appeal against the Committee's decision not to register land as a village green. The route for any challenges would be by judicial review.
- 7.6 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 the evidence submitted and the advice received. It must act in accordance with the principles of natural justice and good administration.
- 7.7 For the Committee to be in a position to make the ultimate decision to grant or refuse the application, it will be required to consider whether to accept the officer's decision in November 2014, to write to the applicant and all known landowners after the expiration of the consultation period, inviting the submission of comments in relation to the application before it was moved to the next stage. Given the lengthy period of inactivity since receipt of the application and the next stage, namely to progress the matter to this Committee, using powers under the Local Government Act 1972, officers considered that it was in the interests of natural justice and good administration to invite the submission of comments from interested parties.

There is no specific power in the relevant regulations to invite the submission of comments after the expiration of the consultation period but officers are of the view that it is lawful to do so and there is an express provision allowing the Council to consider late comments. However, given the fact that the objector is the Council as landowner and highway authority and that the applicant has expressed dissatisfaction with the fact that this has happened, the decision to write to interested parties may be the subject of criticism and or legal challenge. In order to be open and transparent in its dealings officers are recommending that the decision about whether or not to accept the Council's comments should be made by an independent person thus avoiding the allegation that the Council has been a judge in its own cause.

- 7.8 Regulation 6(2)(b) of the Regulations, provide that the registration authority *may* consider any statement that it receives on or after the expiration of the holding of the consultation period and has a discretion to refuse to do so.
- 7.9 The applicant must be given a reasonable opportunity of dealing with matters of objection and or any other matter which appears to afford possible grounds for rejecting the application. In deciding whether an applicant has been afforded a reasonable opportunity the Committee should decide whether it has sufficient information from all parties together with guidance and legal advice to determine the application on the written representations alone. If not a 'non-statutory' public enquiry should be held.
- 7.10 The applicant must prove on the balance of probabilities that the requirements of Section 15 Commons Act 2006 have been made out. The Council as landowner argues that the 'application has not been made by the inhabitants of a locality or neighbourhood.' The wording of Section 15 Commons Act 2006 states that 'upon the application of any person, if a significant number of the inhabitants of any locality ...or neighbourhood have indulged as of right in lawful sports or pastimes .....This may lead to legal argument that the application does not have to be made by inhabitants of a locality as contended by the Council but can be made by *any person* such as the applicant, Mr Mellor.

## 8.0 Risk Assessment

- 8.1 If the Council chose to determine the application without the report of an independent person:
- 8.1.1 As it is also the landowner and highway authority, there may be criticism that the Council has been a judge in its own cause.
  - 8.1.2 There may be criticism that the Committee has not followed its adopted procedure for determining village green applications dated 7 December 2009 given that factors relevant to the decision whether to appoint an independent person are present in this case.
  - 8.1.3 In addition to any criticism, both of the above factors increase the risk of challenge by way of costly judicial review proceedings.

## 9.0 Background and options

- 9.1 The Council is the registration authority for village greens and the responsibility for this function was delegated to the Rights of Way Committee under the Council's Constitution.
- 9.2 The procedure for applications is provided for by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the Regulations").
- 9.3 This village application was submitted on 8<sup>th</sup> March 2013 by Mr Gordon Mellor with 13 supporting statements from local residents.
- 9.4 The registration authority carried out a consultation exercise that commenced on 12<sup>th</sup> September 2013 and expired on 6<sup>th</sup> December 2013. At the expiration of this consultation period, the registration authority had not received any comments either in support or against the application.
- 9.5 For a number of reasons none of the registration authority's pending village green applications progressed for a number of months.
- 9.6 As a result of this delay, in November 2014 the registration authority's officer's decided that the applicant and all known landowners would be written to in order to ask whether they would like to submit any comments in relation to the application before it was moved to the next stage.
- 9.7 Following this letter the registration authority received an objection from the Council (as landowner) and a letter in support of the application from Mr & Mrs Bird. The Council objected on the basis that the application was not in accordance with the requirements of Section 15 Commons Act 2006 in that it had not been made by the inhabitants of a locality or neighbourhood and that the applicant's use of the land was not as of right, but by right, as Open Space by virtue of Section 10 of the Open Spaces Act 1906 and or as licensees of the garages on the application land.
- 9.8 Regulation 6(2)(b) of the Regulations, provide that the registration authority *may* consider any statement that it receives on or after the expiration of the consultation period and before the authority disposes of the application. Should the registration authority intend to take any such statements into consideration, however, the applicant must be given an opportunity to consider the statement and to deal with any of the issues raised.
- 9.9 Mr Mellor was written to on 6<sup>th</sup> December, inviting him to submit any comments in relation to the statements by 16<sup>th</sup> January 2015. He objected to the fact that the registration authority would be asked to exercise its discretion to receive the Council's objection after the expiration of the consultation period and has raised the matter with his MP, Fiona Bruce and local ward members.

9.10 As a result of a request from Mrs Bruce, the period for response to the objection was extended until 30<sup>th</sup> January 2015.

9.11 Mr Mellor responded in writing on 26<sup>th</sup> January 2015 arguing that the Council's objection contains misrepresentations and lacks logic in its conclusion.

## **10.0 Options**

10.1 The Committee as registration authority can:

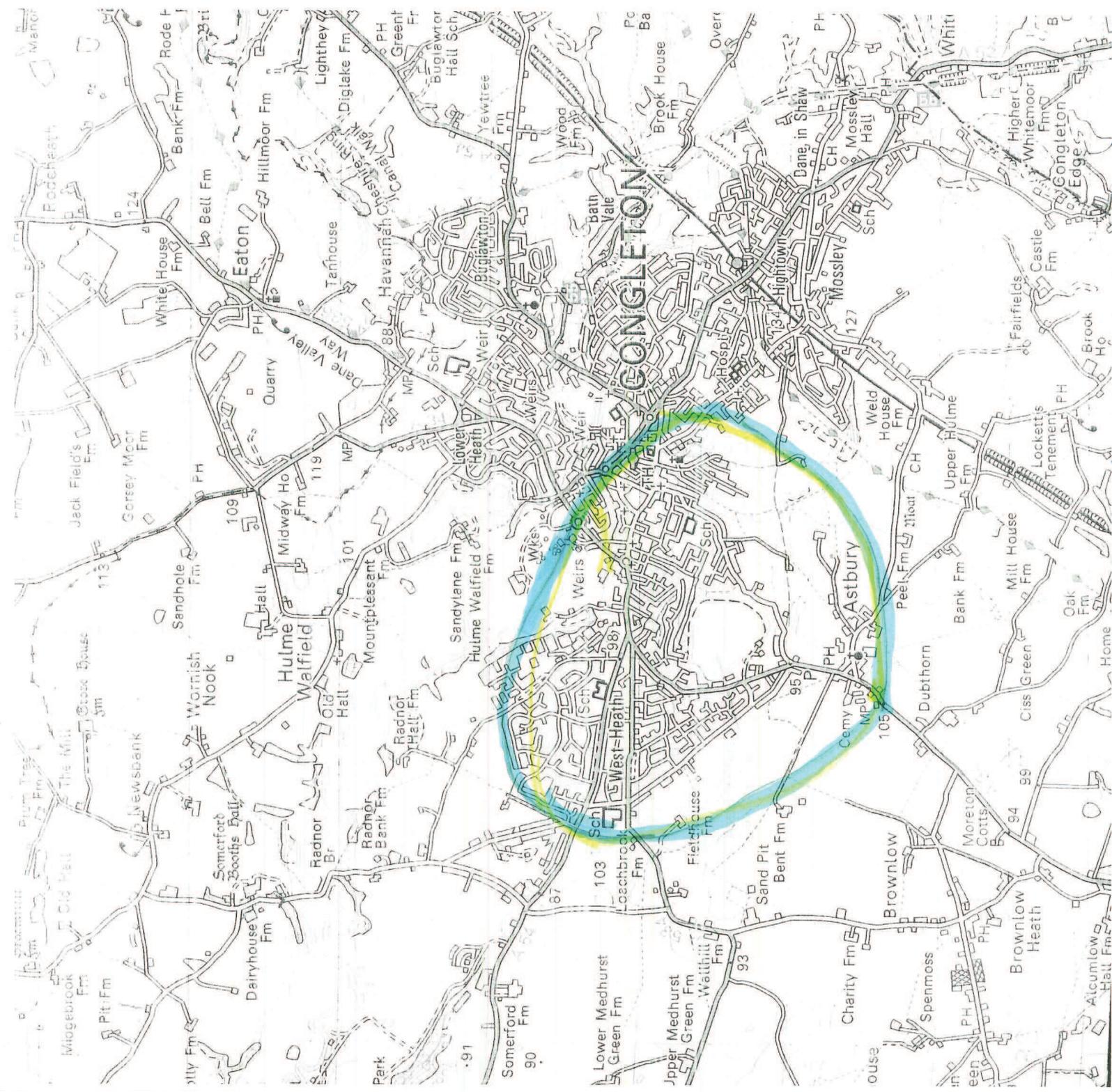
- Determine the application in its entirety, especially the issues raised at paragraphs 7.7 to 7.10 on the written representations alone  
OR
- Authorise the Head of Legal Services to appoint an independent person to consider the application on the basis of written representations or to hold a non statutory public inquiry and thereafter to provide a report to the committee.

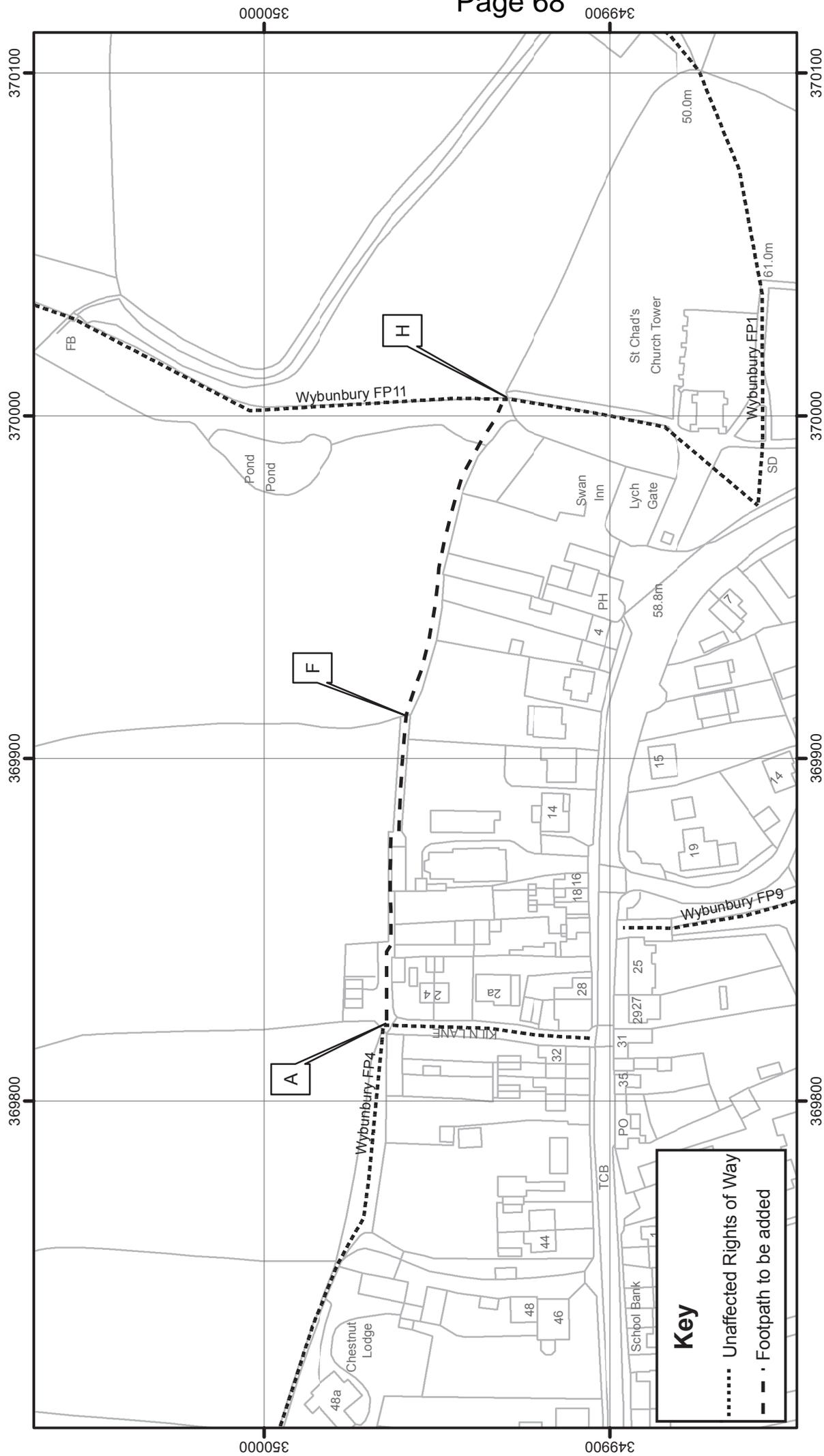
## **11.0 Access to Information**

11.1 The background papers relating to this report can be inspected by contacting the report writer; Peter Jones, Support Lawyer, Legal Services, Westfields.

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CATCHMENT AREA





Plan No.  
WCA/005A

The Cheshire East Borough Council Definitive Map and Statement  
(Addition of Public Footpath No 15, Parish of Wybunbury)  
Modification Order 2013



1:1,500

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## CHESHIRE EAST COUNCIL

### Public Rights of Way Committee

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**Date of Meeting:** 16<sup>th</sup> March 2015  
**Report of:** Public Rights of Way Manager  
**Subject/Title:** Public Inquiry to Determine Definitive Map Modification Order  
Addition of Public Footpath No 15, Parish of Wybunbury  
Modification Order 2013

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#### **1.0 Report Summary**

1.1 This report is an informative item to brief members on a recent public inquiry and the outcome.

#### **2.0 Recommendation**

2.1 No decision is required by Committee.

#### **3.0 Reasons for Recommendations**

3.1 N/A

#### **4.0 Wards Affected**

4.1 Wybunbury.

#### **5.0 Local Ward Members**

5.1 Councillors J Clowes.

#### **6.0 Policy Implications**

6.1 Not Applicable

#### **7.0 Financial Implications**

7.1 Not Applicable

#### **8.0 Legal Implications**

8.1 Under section 53 of the Wildlife & Countryside Act 1981 (WCA), the Council has a duty, as surveying authority, to keep the Definitive Map and Statement under continuous review. Section 53 (3) (c) allows for an authority to act on the discovery of evidence that suggests that the Definitive Map needs to be amended. The authority must investigate and determine that evidence and

decide on the outcome whether to make a Definitive Map Modification Order or not.

## **9.0 Risk Management**

9.1 None

## **10.0 Background and Options**

- 10.1 An application was made to Cheshire County Council in 2007 to amend the Definitive Map and Statement by adding a Public Footpath in the parish of Wybunbury. The claimed path formed a link between footpath no.4 at Kiln Lane and footpath no.11. As shown between points A-F-H on plan no. WCA/005A.
- 10.2 Cheshire East Borough Council considered this application in a report put before the Rights of Way Committee on 17<sup>th</sup> December 2012. The making of an order was approved as it was considered the user evidence was sufficient to support the existence of a public footpath. A Modification Order was made on the 21<sup>st</sup> February 2013 and advertised on 4<sup>th</sup> April 2013.
- 10.3 Nine formal objections were submitted to the order, one of which was later withdrawn. The objections were not challenging the duration or frequency of use by the public, but were mostly concerns over the recorded width of one section of the footpath. Some objectors also referred to an addition path, which went diagonally across the field owned by Natural England (from point F on the Order plan in a north-easterly direction); those objectors claimed the Order route should follow this line rather than along the field edge.
- 10.4 As the remaining eight objections were not withdrawn consequently a file of the relevant information was submitted to the Planning Inspectorate in March 2014.
- 10.5 A public inquiry was held on 4<sup>th</sup> November 2014 at Wybunbury Village Hall. Of the eight objectors only Mrs B Colbert and her son Mr P Colbert were present, representing themselves. Cheshire East Council was represented by Miss Ruth Stockley of Counsel (Kings Chambers, Manchester). The appointed Inspector was Mr Alan Beckett.
- 10.6 The inquiry heard evidence from the Council's Definitive Map Officer, Jennifer Tench and from 6 witnesses, all local people who had used the route. It was the Council's approach that the evidence was sufficient to justify making an Order to record the claimed route as a public footpath. The basis of the evidence in support of the Order route was that of user evidence. It was the Council's case that under section 31 of the Highways Act 1980, the way had been used on foot for a full period of 20 years without force, secrecy or permission and without sufficient evidence to indicate that there had been no intention to dedicate during that period. If these criteria are fulfilled then the way is deemed to have been dedicated as a public footpath.

- 10.7 At the inquiry two dates were discussed as possible dates when the status of the route was 'brought into question'; these being 31<sup>st</sup> December 1990 or 2007. The relevant 20 year period to be considered is taken back from this date. The earlier date was considered as there had been a reference in the diary of the late Mr Colbert. For that date he noted "repaired barbed wire closed footpath all day". The later date of 2007 was when scaffolding was erected around the barn which blocked the access along the footpath; there were also notices at the ends of the path which stated 'footpath closed'. It was this action that prompted the application to be made to record the footpath in the Definitive Map and Statement.
- 10.8 The inquiry was closed and concluded on 4<sup>th</sup> November 2014 following an accompanied site visit. The Inspector issued a decision letter on the 26<sup>th</sup> November 2014 (Appendix 1) in which he confirmed the order with one modification. That was to record a stile at SJ 6991 4995, this has been inserted into Part II of the Schedule under the heading 'Limitations or Conditions of Use'. The Inspector concluded that he was satisfied that the evidence was sufficient to show, on the balance of probabilities that a public footpath subsists over the Order route.
- 10.9 With regard to the user evidence the Inspector considered the two possible dates as the 'bringing into question'. He concluded that because the diaries did not give an indication as to the duration of the closures and none of the witnesses recalled the path being closed, other than when the scaffolding was erected; the closures referred to in the diary entries had little effect upon the public. Therefore he did not consider them as events which brought the right to use the path into question. In contrast the prolonged closure by the physical obstruction of the path with scaffolding and notices in 2007 did have an effect on the public, as it prompted the application to be made. Therefore the Inspector considered the relevant twenty year period to be 1987-2007.
- 10.10 For a presumed dedication of the order route to have occurred the use by the public, during the relevant period, must be shown to have been actually enjoyed as of right, without interruption, and to have continued throughout the full twenty years. The Inspector concluded that he was satisfied that there was sufficient use of the Order route, during the relevant period, to raise a presumption that the path had been dedicated as a public right of way.
- 10.11 In relation to the landowners' intention, the objectors acknowledged that they had not taken any steps to prevent the public from walking along the path or to communicate to the public that there was no intention on their part to dedicate a public right of way. Therefore the Inspector concluded there was insufficient evidence of a lack of intention to dedicate and the landowners had not rebutted the presumed dedication raised by the user evidence.
- 10.12 The Inspector considered the objection in relation to the stated width of 2.3 metres. This was for the section of path between the edge of the barn, on its eastern side, and point F. Officers had derived the proposed width from a measurement taken on site between a holly tree on the southern side of the path and a Sycamore on the northern side. In addition Ordnance Survey

mapping also showed the width between the boundaries to be 2.3 metres. Mrs Colbert contended that for this section the width of the path should be recorded as being between 1.3 metres and the maximum width suggested by the evidence.

- 10.13 Mrs Colbert stated that some wooden buildings, which had formed part of the southern boundary of the path, had previously narrowed the route. She had these buildings demolished in 1988, and submitted photographs showing the demolition. The Inspector concluded that even if the buildings had formed part of the southern boundary, the Ordnance Survey map evidence showed the path to be a uniform width and that the buildings did not unduly constrain the width. The photographs submitted did not assist in determining the width as they were taken from within the garden and did not show the path.
- 10.14 It was also submitted by the objectors that where the path dog-legged around the eastern end of the barn the path would not have been 2.3 metres as a field gate had stood in the centre of the end of the barn to control the movement of livestock. On the site visit the Inspector measured the width from the centre of the barn, where the gate had stood, to the field boundary to the north and he found this to be 3.6 metres. From this the Inspector concludes there would have been sufficient width for the path to have been 2.3 metres by the end of the barn.
- 10.15 Mrs Colbert also stated at the inquiry that in 1988 she erected a wicket gate to the east of the gable end of the barn to prevent her geese from making their way along the footpath. This gate was 0.90 metres in width and was said to constrain the width. The Inspector concludes that this may well have been the case but as the gate was erected after the commencement of the relevant 20 year period (1987-2007) it has no effect upon the width of the path that would have been available at the start of that period. At the site visit the Inspector also measured the width of the path at this point and found it to be 3.4 metres. Again he concludes that there would have been sufficient width for the path to have been 2.3 metres at this point.
- 10.16 Having considered the evidence in relation to the width, the Inspector concludes that he does not consider it necessary to propose any modification to the width to be recorded for footpath no.15 Wybunbury.
- 10.17 The other matter for consideration by the Inspector was the use by the public of an alternative path from point F to Wybunbury Moss, which was raised by some objectors. The Inspector concludes that although there was some evidence of such use presented at the Inquiry, he did not consider it to be sufficient to warrant the modification of the order to include the alternative path.
- 10.18 The Inspectors overall conclusion was that the evidence is sufficient to show that, on a balance of probabilities a public footpath subsists over the Order route. He confirmed the Order with one modification, referred to in paragraph 10.8 above.

10.19 The Council has now advertised the confirmation of the order, 42 days was allowed for a High Court challenge to be made. A challenge can only be made on the basis that the Inspector in reaching his decision has wrongly applied the relevant law.

#### **11.0 Access to Information**

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

Name: Jennifer Tench

Designation: Definitive Map Officer

Tel No: 01270 686158

Email: [jennifer.tench@cheshireeast.gov.uk](mailto:jennifer.tench@cheshireeast.gov.uk)

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## Order Decision

Inquiry held on 4 November 2014

**by Alan Beckett BA MSc MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 26 November 2014**

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### **Order Ref: FPS/R0660/7/8**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Cheshire East Borough Council Definitive Map and Statement (Addition of Public Footpath No 15, Parish of Wybunbury) Modification Order 2013.
- The Order is dated 21 February 2013 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 8 objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to the modifications set out in the Formal Decision.**

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### **Procedural Matters**

1. I held an inquiry into the Order at the Village Hall, Main Street, Wybunbury on Tuesday 4 November 2014, having made an unaccompanied inspection of the Order route on the previous afternoon. I made a further inspection of the route in question in the company of the objectors and the representatives of the Cheshire East Borough Council ('the Council') after the close of the inquiry.
2. It is the Council's case that the evidence demonstrates that the public have habitually used the footpath since at least the 1950s and that during all relevant times a stile had been present at point F on the Order map. The Council requested that the Order be modified to record the presence of the stile at point F as a limitation or condition of use.

### **The Main Issues**

3. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the DM&S subsists over the land in question.
4. The Council relied upon evidence of use by the public of the claimed footpath to demonstrate that dedication of a public right of way could be deemed to have occurred. In a case where there is evidence of claimed use of a way by the public, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is

sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, whether by a notice or otherwise.

5. At the inquiry, the objectors did not challenge the duration or frequency of use by the public of the claimed path, nor did they offer any evidence that a lack of intention to dedicate a public right of way had been communicated to the public. The objections made to the Order concerned the width of the path to be recorded between the eastern end of the barn and Point F where a stile formerly stood.
6. Whilst the evidence has to satisfy the statutory tests for the Order to be confirmed, the main issue between the parties was the width of the footpath on that short section between the eastern end of the barn and point F.
7. In addition to considering the user evidence with regard to the provisions of section 31 of the 1980 Act, if the tests found in section 31 are not satisfied, I am also required to consider whether dedication of the claimed routes has taken place at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

## Reasons

### ***The date on which the right of the public to use the way was brought into question***

8. Two possible dates for the bringing of public use into question were put forward by the Council, these being 31 December 1990 or 2007<sup>1</sup>. The earlier date had been considered as a reference in the diary of the late Mr Colbert for that date noted "*repaired barbed wire closed footpath all day*". The later date was the date at which scaffolding had been erected around the barn to facilitate repairs being made to it; at the same time Mr Colbert had erected notices at the ends of the path which stated "*footpath closed*". The scaffolding had the effect of preventing access along the footpath and it was the erection of the scaffolding and notices which prompted the application to be made to the Council to record the footpath in the DM&S.
9. In addition to the diary entry for 31 December 1990, the objectors had also submitted copies of three further diary entries which all made reference to the footpath having been closed. The entry for 12 January 1996 reads "*hedges – closed footpath*"; the entry for 7 August 2000 reads "*New gates fitted at Hollies. Blocked footpath*"; the entry for 14 January 2006 read "*tiles fell off roof of barn closed footpath*".
10. Mrs Colbert could not assist with an interpretation of the diary entries or a reason as to why the footpath had been closed on the dates identified other than saying that the safety of the public had been a concern which was why the path had been closed in 2007 when the scaffolding had been erected. It was submitted on behalf of the Council that it was likely that the entries reflected the closure of the path whilst maintenance of the Colbert's property was being undertaken.

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<sup>1</sup> The user evidence form of Mr G A Worthington records that he found the path obstructed by a notice and fencing on 29 January 2007 and was followed shortly after by scaffolding. This date is not disputed.

11. There is no indication in the diary entries as to the duration of the closures that were recorded, and none of the witnesses I heard from recalled the path being closed other than when the scaffolding was erected. If the late Mr Colbert did not regard the path as being a public path and the diary entries record his attempts to convey that view to the public, those efforts appear to have been largely ineffectual.
12. In the absence of any evidence to the contrary, I find the Council's submissions on this point to be a probable explanation of the reasons for the periodic closure of the path. In order to undertake maintenance of the property adjacent to it, it is likely that the late Mr Colbert found it necessary to temporarily close the path to prevent risk or danger to the public. Given that none of the users recalled the path being blocked, I consider it likely that once those maintenance works had been completed, the path would have been re-opened.
13. As the closures noted in the diaries had little appreciable effect upon the public, I do not consider them to be events which brought the right to use the path into question. In contrast, the physical obstruction of the path in the vicinity of the barn by scaffolding and the erection of prohibitory notices in January 2007 had such an effect. It was the prolonged closure of the path which prompted the application to have it added to the DM&S.
14. It follows that I conclude that for the purposes of section 31 (2) of the 1980 Act, the relevant 20-year period is 1987 – 2007.

***Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the right to do so was brought into question***

15. Thirty-one user evidence forms (UEFs) were submitted in support of the application to add the claimed path to the DM&S. The UEFs demonstrate use of the path from 1944 until it was blocked by scaffolding. The frequency of use varied from daily to weekly use with some respondents noting only occasional use. Use was for recreational or pleasure purposes such as walking a dog or as part of a circular walk around Wybunbury Moss.
16. Of those who completed a UEF, 16 claimed use of the path for periods in excess of 20 years prior to 2007 with a further 8 respondents claiming use for part of that period. A total of 21 users claim use for 20 years or more, although for some respondents the periods of use do not wholly coincide with the 20-year period which ended in 2007.
17. I heard from 6 witnesses at the inquiry. The oral evidence given was of continuous use of the path from the 1950s as a way to St Chad's Church, to The Swan, to Wybunbury Moss or for other recreational purposes. A number of witnesses said that the path had been used as an alternative to walking along Main Street as the pavement was very narrow in places. Frequency of use ranged from daily or weekly use to once or twice per year.
18. None of the user witnesses recalled being challenged by the owners of the land and, prior to 2007, none had seen any notices on site prohibiting use of the path. No force had been used in order to walk the path; a stile had always been present at point F, and when two wicket gates were present near the barn they had never been locked. None of the witnesses had sought or been given

permission to use the path and use had been at all times of the day. The oral evidence given by the witnesses was not challenged by the objectors.

19. The evidence of use presented at the inquiry reflects and supports the evidence found in the UEFs. I consider that the user evidence, when taken as a whole, is sufficient to demonstrate that the public has used the claimed path as of right throughout the whole of the 20-year period in question. The only suggestion of a possible interruption to use is to be found in the diary entries for 1990, 1996, 2000 and 2006. However as these temporary closures were made for the safety of the public whilst works were carried out adjacent to the path, they are not interruptions which were designed to permanently deprive the public of use of it. It follows that I conclude that the use of the path during the relevant 20-year period was also use without interruption.
20. I conclude that the user evidence is sufficient to raise a presumption that the path at issue has been dedicated as a public right of way.

***Whether there is sufficient evidence of a lack of intention to dedicate***

21. The objectors acknowledged that they had not taken any steps to prevent the public from walking along the path or to communicate to the public that there was no intention on their part to dedicate a public right of way.
22. I conclude that there is insufficient evidence of a lack of intention to dedicate for the owners of the land to be able to take advantage of the proviso found in section 31 (1) and to rebut the presumption of dedication raised by the user evidence.

***Width***

23. There is no dispute between the parties regarding the width proposed to be recorded for the path adjacent to and west of Mrs Colbert's barn, or to the width proposed to be recorded for the path to the east of point F. Mrs Colbert disputes that the width of the path between these two points has been 2.3 metres and contends that the path should be recorded as being between 1.3 metres and the maximum width suggested by the evidence.
24. The Council had derived the proposed width from a measurement taken on site between a holly tree on the southern side of the path and a Sycamore found on the northern side. Mrs Colbert acknowledged that at this point the path could be described as being 2.3 metres wide but that the path had been narrower in other parts due to the hedges. The Council had also measured Ordnance Survey maps of the area which showed the width between hedges to be a uniform 2.3 metres.
25. Advice Note No. 16 published by the Planning Inspectorate on the subject of width states at paragraph 9 " *Determination of the width will, if not defined by any inclosure award, physical boundary or statute, be based on evidence provided during the confirmation process, or, where there is no such clear evidence, the type of user and what is reasonable. Circumstances, such as the nature of the surface and other physical features, may dictate what may be considered reasonable. In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occasional pinch points excepted. This width may well be greater than the width of the "trodden path". Apart from specific instances such as the*

*reinstatement of a right of way after ploughing under Schedule 12A to the Highways Act 1980, there are no statutory widths for rights of way."*

26. Ordnance Survey mapping has consistently shown the path as being bounded to the north and south by hedges or fences. I heard from the former owner of the property that the path had been hedged on both sides. The witnesses also recalled that the path had run between hedges. Mr Charlesworth recalled a path which was 1.22 metres or wider; Mr Green said the path was at least 1.22 metres in width and wide enough for two people to walk side by side; Mr Allcock recalled the path being wide enough between the hedges for a courting couple to walk along hand in hand. These responses indicate that the path had been between 1.22 metres and at least 2.00 metres in width along this section.
27. In their written representations, some of the objectors contend that the path was only wide enough for single file traffic. I do not doubt that if the hedges had been left unmanaged then over time the useable width of the path may have become less and that the worn line in the ground may have been less than the full width between the hedges. However, the recollection of other witnesses was that the path was wide enough to allow two persons to walk along together. The recollections of this latter group accord with the evidence derived from Ordnance Survey mapping and with the Council's measurements of the width between what remained of the hedges.
28. The hedges described by Mr Robinson and others as bounding the path have been removed over a period of time and all that marks the place where the northern hedge would have run is three mature Sycamore trees. Although Mr Colbert may well be correct in stating that the field boundary is the post and wire fence on the north side of the trees, to measure the width of the path from the post and wire fence would result in the trees standing in the usable width of the path. This would be contrary to the available evidence which shows that users had walked a path which is to the south of the trees.
29. In my view it was not unreasonable for the Council to have measured the width between one of the Sycamores and the Holly tree opposite it. It is highly likely that the line of trees and the hedge between the trees was recorded by Ordnance Survey as the representing the field boundary.
30. Mrs Colbert stated that some small wooden buildings which she had demolished around 1988 had formed part of the southern boundary of the path and these had narrowed the path. Even if the buildings had formed part of the southern boundary, the Ordnance Survey map evidence shows that the boundary was of a uniform width and that the buildings did not unduly constrain that width. The photographs submitted of the demolition of those buildings do not assist with a determination of the width of the path. The photographs were taken from within the garden of the property and do not show the path; consequently they do not allow the width of the path at the time to be estimated.
31. It was also submitted that where the path dog-legged around the eastern end of the barn the path would not have been 2.3 metres as a field gate had stood in the centre of the end of the barn to control the movement of livestock. On the site visit the width from the centre of the barn where the gate had stood to the field boundary to the north was measured and found to be 3.6 metres. From this I conclude that there would have been sufficient width for the path to have been 2.3 metres by the end of the barn.

32. In 1988 Mrs Colbert erected a wicket gate to the east of the gable end of the barn to prevent her geese from making their way along the footpath. This gate was 0.90 metres in width and was said to constrain the width of the path. This may well have been the case, but as the gate was erected after the commencement of the relevant 20-year period<sup>2</sup> it has no effect upon the width of the path that would have been available at the start of that period. The width of the path at the point where the gate would have hung and the field boundary was measured on the site visit and found to be 3.4 metres. Again I conclude that there would have been sufficient width for the path to have been 2.3 metres at this point.
33. Ordnance Survey mapping shows the path to have run between boundaries which were 2.3 metres apart. The Council's measurement on site showed that such a width had been available between the remnants of the hedges that once lined the path. The witnesses recalled a path which was between 1.22 and 2.0 metres in width. The available evidence is not inconsistent with the width which the Order proposes to record between the eastern gable of the barn and point F. It follows that I do not consider it necessary to propose any modification to the width to be recorded for footpath no. 15 Wybunbury.

### **Other matter**

34. The use by the public of an alternative path to Wybunbury Moss from point F was raised by a number of objectors to the order. Although there was some evidence of such use presented at the inquiry, I do not consider that evidence to be sufficient to warrant the modification of the order to include the suggested alternative path.

### **Conclusions**

35. Having examined all the available information with regard to the presumed dedication of the Order route as a public footpath, I conclude that the evidence is sufficient to show use of the way on foot by the public as of right and without interruption throughout the period between 1987 and 2007. The evidence is therefore sufficient to raise an initial presumption that the way has been dedicated as a public footpath.
36. There is no evidence to suggest that prohibitive notices directed at pedestrian users had been erected on the land at any time during the relevant period. There is insufficient evidence that an intention not to dedicate had been brought to the attention of the pedestrians using the path.
37. It follows that I am satisfied that the evidence before me is sufficient to show that, on a balance of probabilities, a public footpath subsists over the Order route.

### **Overall conclusion**

38. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

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<sup>2</sup> The commencement of the 20-year period is the date at which the path is deemed to have been dedicated

**Formal Decision**

39. I confirm the Order subject to the following modification: in the Schedule Part II under the heading Limitations or Conditions of Use, delete 'none' and insert 'Stile at SJ 6991 4995'.

**Alan Beckett**

Inspector

APPEARANCES

For Cheshire East Borough Council:

Miss R Stockley of Counsel instructed by Iolando Puzio, Head of Legal Services, Cheshire East Borough Council, Westfields, Middlewich Road, Sandbach, CW11 1HZ.

Who called:

Mrs J Tench Definitive Map Officer, Public Rights of way Team, 2<sup>nd</sup> Floor, Old Building, Municipal Buildings, Earle street, Crewe, CW1 2BJ.

Mr P Allcock Wybunbury

Mrs S Bailey Wybunbury

Mr A Charlesworth Wybunbury

Mr A T Green Wybunbury

Mr S Robinson Wybunbury

Mr G A Worthington Wybunbury

In objection:

Mrs B M Colbert Wybunbury

Mr P J Colbert Gateshead

Inquiry documents

1. Photograph taken from Mrs Colbert's house looking toward the claimed footpath.