

CHESHIRE EAST COUNCIL

Rights of Way Committee

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

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 25th 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 pastimesThis 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 8th 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 12th September 2013 and expired on 6th 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 6th December, inviting him to submit any comments in relation to the statements by 16th 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 30th January 2015.
- 9.11 Mr Mellor responded in writing on 26th 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.