

# CHESHIRE EAST COUNCIL

## Public Rights of Way Committee

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<b>Date of Meeting:</b>	7 <sup>th</sup> December 2015
<b>Report of:</b>	Neil Weeks – Planning & Highways Lawyer
<b>Subject/Title:</b>	Village Green Application – Land at Wood Park, Alsager, Cheshire

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### **1.0 Report Summary**

- 1.1 This report deals with an application by Mr. Andrew Barnard dated 3<sup>rd</sup> September 2012 to register land known as Wood Park, Alsager as a Village Green.

### **2.0 Recommendation**

- 2.1 That at its meeting on 7<sup>th</sup> December 2015, the Committee receives and accepts the written report of Mr. Marwick (Attached as Appendix A) and refuses the application.

### **3.0 Reasons for Recommendations**

- 3.1 The written report of Mr Marwick recommends that the application must fail because any user of the land has been “by right” and not “as of right” at all material times.
- 3.2 The report also concludes that the land owners actions (The Council) prima facie are consistent with the land being held as open space for public recreational use and further weigh against any user being “as of right”.

### **4.0 Wards Affected**

- 4.1 Alsager

### **5.0 Local Ward Members**

- 5.1 Councillors Rod Fletcher, Derek Hough and Martin Deakin

### **7.0 Financial Implications**

- 7.1 There would be a cost risk in the event of an application for Judicial Review to challenge the Committee’s decision. However the Council is the registration authority for Village Greens and has a statutory duty to decide applications.

## **8.0 Legal Implications**

- 8.1 The Council is the registration authority for the purposes of village green applications and the keeping of the register of village greens.
- 8.2 In recent years there has been much case law and legislation surrounding village greens and both case law and legislation continue to evolve. 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. This application was received on 19<sup>th</sup> September 2012 and therefore will not be subject to the new legislation.
- 8.3 Village greens can be registered either as a result of an application by a third person or by a voluntary registration by the landowner.
- 8.4 It is commonly understood that the Council may hold a public inquiry as a result of an application being received and it is often referred to as 'non-statutory' because the legislation in respect of village greens does not specifically provide for inquiries to be held. The Local Government 1972, however, does enable local authorities to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of its functions. In appropriate cases, consideration of written representations only by an independent person would facilitate the determining of the village green application. The Committee adopted a procedure for determining village green applications on 7 December 2009. Option 4 of that procedure is relevant in this case as it accepts that an application validly made may be referred to an independent person either to consider the application on the basis of written representations or to hold a non statutory public inquiry and to provide a report to the committee. Factors relevant in deciding whether to appoint an independent person are listed in the adopted procedure and include complexity of evidence, where evidence is finely balances and where the land is owned by the Council.
- 8.5 At the meeting on the 16 March 2015, the Committee resolved to authorise the Head of Legal Services to appoint an independent expert to consider the application on the basis of written evidence and provide a report. The Committee also resolved to delegate authority to the Head of Legal Services 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.
- 8.6 The Head of Legal Services did appoint an independent person (Mr Marwick of Counsel) to consider the application and to provide a report. That report was provided on the 11<sup>th</sup> June 2015 and the Head of Legal Services has determined not to convene a non-statutory public inquiry.
- 8.7 The application falls to be determined by this Committee on the basis of this report and the written report of Mr Marwick which appears as Appendix A to this Report.

- 8.8` The burden of proof that the application meets the statutory tests is upon the applicant, on the balance of probabilities.
- 8.9 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 principles of natural justice and good administration.
- 8.10 If registered as a village green, land will be subject to the statutory protection of section 12 of the Enclosure 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 enclosure of a green, and interference with or occupation of the soil, unlawful unless it is with the aim of improving the enjoyment of the green.
- 8.11 There is no right of appeal within the Council against the Committee's decision. The route for any challenges would be via judicial review.
- 8.12 Although Counsel's written report is recommended for refusal by the Committee, the Committee is not bound to follow it.

## **9.0 Risk Management**

- 9.1 It is important that decisions are taken in a way that demonstrates fairness and complies with the rules of natural justice. To that end the Committee adopted a procedure for determining village green applications on 7 December 2009 and it has followed the adopted procedure in the case of this application

## **10.0 Background and Options**

- 10.1 The Council is the registration authority for village greens and responsibility for this function was delegated to the Rights of Way Committee under Part 3 of the Council's Constitution. The terms of reference allow the Committee "to discharge the authority's functions in respect of Commons and Village Greens".
- 10.2 Under section 15(2) of the 2006 Act the test for registration of land as a town or village green is that:-  
(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 20years; and  
(b) they continue to do so at the time of the application
- 10.3 The application was submitted on 19<sup>th</sup> September 2012 by Mr. Andrew Barnard and the land is shown on Appendix A attached. The evidence in support of the application contains 22 supporting witness statements stating various uses including dog walking, football and games generally.

- 10.4 The application is based on the use of the land for pastimes and sports such as dog walking, football, motor cycle riding and general recreation.
- 10.5 Following the statutory consultation process, the Council received a letter supporting the Application from the Alsager Town Council dated 26<sup>th</sup> March 2013.
- 10.6 The landowner's (The Councils) objection is based on a number of factual and legal submissions, including:
- The use of the land was not used "as of right"
- 10.7 The applicant has disputed the factual and legal grounds on which the objections are based.
- 10.8 At its meeting on 16 March 2015, the Committee resolved as follows:
- a. 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.
  - b. 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.
- 10.9 In April 2015, the Head of Legal Services instructed Mr James Marwick of Counsel
- a. to consider the Application and provide the Head of Legal with a written preliminary review as to whether the matter can be dealt with by way of written representations in the first instance.
  - b. If, after considering the Application, counsel is of the view that the Application can be dealt with by way of written representations, to sit as an independent expert to consider the Application on the basis of written representations and prepare a report, to go the Council's Public Rights of Way Committee, recommending whether the Application should be approved or not;
  - c. after considering the Application, Counsel is of the view that the Application needs to be dealt with by way of a non statutory public inquiry, he is to advise the Head of Legal Services in a telephone conference as to the reasons why an inquiry is necessary and, subject to further confirmation from the Head of Legal, to sit as an inspector for the non-statutory inquiry for the purpose of considering the evidence and to prepare a report and recommendation to go the Council's Public Rights of Way Committee on whether the Application should be approved or not
- 10.10 Mr Marwick settled his preliminary advice on the 31<sup>st</sup> March 2015. The advice given was that the legal question of whether the user of the land was 'by right'

or 'as of right' was likely to be determinative of the application. Mr Marwick advised that the application could be dealt with by way of written representations and invited the parties to submit further evidence representations and replies on the question of whether use was 'as of right'.

10.11 Further evidence, responses and replies were made in April and were passed to Mr Marwick for consideration.

10.12 Mr Marwick then settled his written report on the 11<sup>th</sup> June 2015, a copy of which is attached at appendix A.

10.13 Mr Marwick sets out his analysis in detail in his report, and concludes that:

Para 26 "It follows that the application must fail, in my view, because any user of the Land has been "by right" and not "as of right" at material times. The Applicant must prove his case on the balance of probabilities. In my view, he has no real prospect of success of doing so in relation to this issue"

Para 27 "The Applicant cited a number of examples such as the user by motor-cyclists of the land which may fall outside use "by right". Such user falls to be discounted from the test as it would not amount to a user for lawful sports and pastimes as regards the activity being undertaken. To put it another way, it is very difficult to envisage any users by members of the public for recreational use of the land which would not be use under the statutory right but user "as of right" for lawful sports and pastimes under the Commons Act 2006"

Para 29 "Suffice it to say, that the Land-owners actions prima facie are consistent with the Land being held as open space for public recreational use and further weigh against any user being "as of right"

10:13 Mr Marwick's report was circulated to the parties and the parties have been invited to submit any further representations by the 23<sup>rd</sup> October 2015. Any representations received will be provided to the Committee by way of update.

10.14 The full range options open to the Committee are to refuse the application, to allow the application, or to decide to hold a non-statutory inquiry. For the reasons set out in the report to the Committee on the occasion of the Committee meeting of the 16 March 2015, the Council has followed best practice in appointing independent counsel to advise whether to deal with the application by way of written representations or to hold a non-statutory public inquiry. Mr Marwick advised that the matter could be dealt with by way of written evidence and representations, and having considered the written evidence and representations has provided written advice on the determination of the application.

## **11.0 Access to Information**

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

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