

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting:	13 June 2016
Report of:	Director of Legal Services
Subject/Title:	Village Green Application – Land to the Rear of Gorsey Bank Primary School, Wilmslow

1.0 Report Summary

- 1.1 This report deals with an application made by Mr Chris Stubbs on 23 March 2009 to register land to the rear of Gorsey Bank Primary School, Wilmslow as a Village Green. The application was made under Section 15(3) of the Commons Act 2006. The land in question is shown on the attached plan.

2.0 Recommendation

- 2.1 That the Committee receive and accept the recommendation contained in the written report (attached) of the Council's appointed independent expert, Mr. Sauvain QC, and refuses the application for the reasons set out therein.

3.0 Reasons for Recommendations

- 3.1 Mr Sauvain QC recommends that the application should not be accepted and that the land should not be registered as a village green for two reasons.
- 3.2 Firstly, there is insufficient evidence that the land has been used "as of right" for the requisite period of time by a significant number of inhabitants of the locality or of a neighbourhood within the locality.
- 3.3 Secondly, that in accordance with the decision of the Supreme Court in *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547, the registration of the land as a village green would be incompatible with the statutory purposes for which the land is held.

4.0 Background

- 4.1 The Council is the commons registration authority for its area. As such it is responsible for determining applications to register land in its area as common land or as a town or village green.
- 4.2 This application falls to be determined under Section 15(3) of the Commons Act 2006. For the application to succeed, the applicant must demonstrate, on the balance of probabilities, all of the following. That:-
- a) Lawful sports and pastimes have been indulged in on the land for a period of at least 20 years;

- b) Those activities have been indulged in “as of right” (i.e. without secrecy, force or permission);
 - c) Those activities have been indulged in by a significant number of inhabitants of a locality or a neighbourhood within a locality;
 - d) The claimed use ceased no more than one year before the application.
- 4.3 In this case, the 20 year period is the period of 20 years immediately preceding February 2009, when a fence was erected to enclose approximately 60% of the claimed land and thereby exclude public use of it.
- 4.4 Additionally, because in this case the land is held under statute for education purposes, the application must fail if registration of the land as a village green would be incompatible with the statutory purposes for which the land is held *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547.
- 4.5 In accordance with its usual practice, the Council (following a resolution of this committee) appointed an independent expert to consider the application and prepare a report (“the Report”) making a recommendation as to how the application should be determined. The appointed independent expert was Stephen Sauvain Q.C. who held a public inquiry to consider the evidence over the course of 16 to 19 November 2015.
- 4.6 The Report extends to some 91 pages and is attached hereto. Its findings can be summarised as follows. References in bold are references to paragraph numbers in the report.
- 4.7 The application was supported by 96 user forms/statements of which 88 came from the identified “neighbourhood” of Pownall Park. **(3)**
- 4.8 Whilst the overall impression from the evidence is that there has been a level of usage which might have led a reasonable landowner to have realised that a town or village green right was being asserted, that actually only happened over the last 10 years or so of the 20 year period in question **(124)**.
- 4.9 Much of that use (in the latter 10 year period) is attributable to a relatively small number of families mostly living on Alton Road. Accordingly, there is insufficient certainty, on the balance of probabilities, that even during this latter 10 year period there has been sufficient usage by a significant number of the inhabitants of the Pownall Park neighbourhood rather than from the inhabitants of one or two streets that are in the immediate vicinity of the land. **(124)**
- 4.10 In respect of the earlier part of the requisite 20 year period, evidence of use is taken primarily from user forms only, and Mr Sauvain QC was not content that those forms provide sufficient information to satisfy him, on the balance of probabilities, that sufficient activity took place “as of right” on the land over the

full 20 year period by a significant number of inhabitants of the neighbourhood (124)

- 4.11 The concerns as to the evidence on user forms (115-123) is that much of the activity described related to use of the land by right (and not “as of right”) or with permission. In particular the uses described were most likely uses attributable to use of the footpath across the land or use in connection with trips to and/or from the school.
- 4.12 Consequently, Mr Sauvain QC recommends that there is insufficient evidence to support the application in respect of any part of the land, and it should not be registered as a village green.
- 4.13 In addition, Mr Sauvain QC found that registration of the land as a village green would be incompatible with the statutory purposes for which the land is held (education). As such the application must fail on those grounds alone. *Regina (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] A.C. 1547. (127 to 147)
- 4.14 For completeness Mr Sauvain QC clarifies that for both of these reasons, the application must fail in respect of all of the land which, for the avoidance of doubt, includes the land that was not enclosed in 2009 (148).
- 4.15 Mr Sauvain QC’s report has been sent to the applicant and objector for comment. The objector has confirmed that it has no observations on the content of the same. The Applicant, whilst not making any observations on the content of the report, has expressed a desire to understand, and for the committee to understand, why it has taken so long for this matter to be resolved.
- 4.16 The answer to that question is no more sophisticated than there having been a period of uncertainty as to where responsibility and funding for village green matters rested following local government re-organisation in 2009, in conjunction with a failure of this matter to rank amongst competing priorities. Both of those difficulties have subsequently been addressed.

5.0 Wards Affected

- 5.1 Wilmslow West and Chorley

6.0 Local Ward Members

- 6.1 Councillors Gary Barton and Ellie Brooks

7.0 Financial Implications

- 7.1 There are no immediate financial implications that flow from the recommendation.

8.0 Legal Implications

- 8.1 In accordance with its standard practice, the Council appointed one of the foremost acknowledged experts in this field to act as an independent expert in this matter. The recent high court decision in the Somerford matter has confirmed that this is an appropriate procedure to follow in the determination of village green applications.
- 8.2 The appointed expert held a public inquiry over the course of 4 days. Through that process he very carefully considered and tested all of the evidence, including submissions on all relevant matters made by the applicant, the council (as objecting landowner) and all other interested parties.
- 8.3 Whilst the Council is not obliged to follow the independent expert's recommendation, if it chose not to do so it would need a very clear and full explanation of the reasons for that decision, addressing all of the areas where it considered the independent report to be in error. Otherwise, a decision that did not follow the recommendation would be susceptible to challenge by judicial review.

9.0 Risk Management

- 9.1 This is dealt with in the legal implications section of the report.

10.0 Alternative Options

- 10.1 This is dealt with in the legal implications section of the report.

11.0 Access to Information

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

Name: Daniel Dickinson

Designation: Legal Team Manager – Corporate and Regulatory

Tel No: 01270 685814

Email: daniel.dickinson@cheshireeast.gov.uk