

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 – Banky Fields, Congleton

1.0 Report Summary

1.1 This report deals with an application made by Mr Gordon Mellor on 8 March 2013 to register land at Banky Fields, Congleton as a Village Green. The application was made under Section 15(2) 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. James Marwick of Counsel, and refuses the application for the reasons set out therein.

3.0 Reasons for Recommendations

3.1 After careful consideration of the application, evidence and all representations received, Mr Marwick has found that the land in question is held as open space, for public recreation, under statutory powers including the Open Spaces Act 1906, the Local Government (Miscellaneous Provisions) Act 1976 and the Local Government Act 1972. As such, and in accordance with settled case law, user of the land in question has been "by right" as opposed to "as of right". Therefore the statutory test cannot be made out and the application must fail.

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(2) 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) That continued to be the case at the time of the application.
- 4.3 In this case, the 20 year period is the period of 20 years immediately preceding 8 March 2013, being the date upon which the application was made.
- 4.4 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 Mr James Marwick of Counsel who, prior to preparing the Report gave preliminary consideration to the materials and, on 30 March 2015, issued Preliminary Advice and Directions (attached). The numbers in bold type below refer to paragraph numbers in either the Preliminary Advice and Directions or in the Report as the context so admits.
- 4.5 In his Preliminary Advice (**27**) and his Report (**17-25**), Mr Marwick identified the chain of cases which establishes in law the proposition that where a local or other public authority has lawfully allocated the land in question for public recreation or open space use, then such use is made of the land by the public “by right” and not “as of right”. In those circumstances the “as of right” requirement of the statutory test cannot be met and an application to register land as a village green must, on that basis, be refused.
- 4.6 In his Preliminary Advice (**25**) Mr Marwick acknowledges that there are matters raised in the application which would ordinarily mean that the matter could not be determined without investigating those matters through a public inquiry. However, he notes (**26 & 29**) that “even taking the Applicant’s case at its highest” (i.e. assuming the Applicant is correct about every other aspect of the statutory tests) the question of whether the use of the land has been “by right” as opposed to “as of right” may be determinative of the matter.
- 4.7 That question was potentially determinative because if the user was “by right” and not “as of right”, then no matter how compelling the remainder of the applicant’s case was, the application must, in law, fail. Accordingly, Mr Marwick was content to deal with that discreet matter on written representations and let the result of that determine whether an inquiry was then necessary to consider any other aspects. He issued directions to the parties on that basis.
- 4.8 Directions issued and duly complied with, and all relevant submissions made and considered, Mr Marwick the proceeded to issue his Report. In that Report (**26-31**), Mr Marwick found as follows:-

- a) The Land is open space regulated under the Open Spaces Act 1906 and has, on the evidence, been laid out as open recreational space at all material times. As such, the land was at all material times held out for a statutory purpose for use as open space by the public (**26&27**).
- b) That in accordance with the Supreme Court decision in *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC31, as a matter of law use of land held under statute for the purposes of public recreation is use “by right” and not use “as of right” (**29**).
- c) Therefore the application should be rejected (**31**).

4.9 The Applicant, and Landowners/Objector, having seen the Preliminary Advice & Directions, and having now been presented with a copy of the Report were invited to comment on the same. The Applicant commented:-

“When the Public Rights of Way committee meet to consider the village green application, I would ask them to approve the application on the grounds of this area of land is continually used for playing sports and recreational uses by the residents and children of the area, and not to refuse the application on a point of law.

If the committee refuse the application perhaps they would consider declaring the land as a public open space so the children and residents can continually use it for games and pastimes as I have for the last sixty years. But a Village Green would be better.”

- 4.10 The advice from the Council’s appointed expert is that it must refuse the application on this “point of law”. The land is already held as public open space.
- 4.11 Cheshire East Council, as landowner, confirmed it had no comments to make on the Report.
- 4.12 Two other parties understood to be landowners did not offer up any comments on the content of the Report.

5.0 Wards Affected

5.1 Congleton West

6.0 Local Ward Members

6.1 Councillors Paul Bates, Gordon Baxendale and George Heyes

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 an independent expert in this field to consider and report on 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 carefully considered the matter, issuing to the parties Preliminary Advice and Directions on the “by right” versus “as of right” issue. Following the taking of that step, the independent expert allowed ample opportunity for further evidence and representations to be submitted, which too were considered very carefully. Having done so, he reached the recommendation reported herein.
- 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:

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