

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 12th March 2018
Report of: Director Of Legal (Interim)
Subject/Title: Village Green Application: Application to Register Land opposite the entrance to St. Vincents RC Primary School adjacent to Caldershaw Road Cut Lane and Shearing Avenue Norden Rochdale as a Town or Village Green

1.0 Purpose of Report

1.1 This report deals with an application by The Friends of Heritage Green c/o Adrian Sutcliffe under section 15(2) of the Commons Act 2006 to register an area of land opposite the entrance to St. Vincents RC Primary School adjacent to Caldershaw Road, Cut Lane and Shearing Avenue, Norden, Rochdale as a new village green under section 15 of the Commons Act 2006.

2.0 Recommendations

2.1 That the Committee receives and accepts this report, and

2.2 That the application is noted and the application along with all background information is sent to an Independent Expert experienced in determining Town and Village Green Applications to determine:-

- a) whether the application can be determined on the papers or if a non-statutory public inquiry is required to be held; and
- b) to issue such timetable for the submission of representations/progression of this matter as they consider appropriate; and
- c) to determine the application and prepare a written report for the Council recommending whether or not the application should be approved or rejected by reference to the submitted evidence, and

2.3 That written notification of this Committee's decision is sent to Rochdale Borough Council within 7 days of the publication of the minutes of this meeting.

3.0 Reasons for Recommendation

3.1 The application is recommended for submission to an Independent expert because whilst it could initially be concluded in relation to the application land that;

1. the Applicant has demonstrated that the use of the land took place as of right, and
2. the Applicant has demonstrated that the area specified in the application was a locality or neighbourhood, and
3. the Applicant has demonstrated that the area specified in the application was a locality or neighbourhood and that the use for lawful sports and pastimes has been significant for at least 20 years;

An ability to demonstrate all of these meant that the application was previously recommended for approval.

3.2 Following preparation of the previous report a representation was received from Rochdale BC indicating that they took a differing view and that any use of the application land by members of the public was by right as the land had been compulsorily acquired by the Council previously and held by them as housing land.

3.3 In view of the fundamental nature of the representation received from Rochdale BC it is now considered appropriate that the application should be referred to an Independent expert for them to determine by reference to all the submitted material.

4.0 **Ward Affected**

4.1 n/a

5.0 **Local Ward Members**

5.1 n/a

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 having accepted a delegation of powers from Rochdale Borough Council ("RBC") in accordance with s.101 of the Local Government Act 1972 and therefore has a statutory duty to decide this application.

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 within this report are recommended for acceptance by the Committee, the Committee is not bound to follow them and is entitled to reach their own conclusion in the matter.

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 Application has been considered at length in this report and the conclusion reached that given the very strong case submitted by the Applicant and the representation received from RBC the matter would be best determined by reference to an Independent expert who could also decide as a preliminary point whether it was appropriate to hold a non-statutory public inquiry to test such evidence and also, if appropriate provide a timetable for the determination of the application.

9.0 Background

- 9.1 The Council is the registration authority for village greens and responsibility for this function is delegated to the Public Rights of Way Committee under the Council's constitution and a delegation of powers to determine this application on behalf of RBC was accepted by the Public Rights of Way Committee at its meeting on 13th June 2016.

- 9.2 The application is dated 9th October 2015 and was submitted to RBC by The Friends of Heritage Green c/o Mr Adrian Sutcliffe. The application relates to a piece of land described in the application form as "Village Green" being the area of land opposite the entrance to St. Vincents RC Primary School adjacent to Caldershaw Road, Cut Lane and Shearing Avenue, Norden, Rochdale". The land, the subject of the application ('the land'), is shown shaded red on the map attached as Appendix A.

- 9.3 The application is made pursuant to section 15(2) of the Commons Act 2006. That requires the applicant to demonstrate on the balance of probabilities that the land was used:

- a. for lawful sports and pastimes for a period of at least 20 years and that this use continued to the date of the application
- b. by a significant number of the inhabitants of a locality or of a neighbourhood within a locality
- c. as of right

- 9.4 When accepting the application as valid RBC's Legal Services Section also confirmed that there had been no trigger or terminating event in respect of the land and the application could be processed.

- 9.5 RBC undertook a public consultation exercise providing for a period of 6 weeks when the plan of the application land was available for inspection at the Council's offices and the provision of site notices explaining the procedure for making representations. Those notices were dated 8th April 2017 and noted that any objection should be made in writing to CEBC prior to the expiration of the consultation period on 30th May 2017. The application was also published in the Rochdale Observer on 8th April 2017.

- 9.6 No representations were received in response to the publication of the application.
- 9.7 As no objections were received to the application it was initially viewed as appropriate for this Committee to consider and determine the application based on a written report as opposed to it being forwarded to an Independent expert for consideration but given the representation received from RBC it is now considered appropriate for the matter to be determined by an Independent expert.

10 Analysis

- 10.1 The application land is owned by RBC under title numbers LA101788 and GM332481 having been part of a wider site acquired by RBC for housing purposes under a Compulsory Purchase Order in 1957.
- 10.2 It would appear that a decision of RBC to sell the land resulted in the application to register it as a town or village green.
- 10.3 As stated in 9.3 (above) the applicant is required to satisfy the 3 elements in Section 15(2) of the Commons Act 2006 and analysis of the submitted material has established the following:-

10.3.1 Whilst not all of the witnesses have used the application land for lawful sports and pastime for more than 20 years there is a large number of witnesses giving evidence that such use has occurred since 1994 or earlier. There is also strong evidence that the use of the land for such purposes was ongoing at the time the application was submitted. Further enquiries have established the existence of a facebook page promoting the use of the application land for recreational purposes and it appears to have a great deal of support from local residents/members. There is therefore, enough evidence with the application to demonstrate that this limb of the test has been satisfied.

10.3.2 The submitted material demonstrates that the land has been used for lawful sports and pastimes for more than 20 years and that such use was ongoing at the time the application was submitted to RBC.

10.3.3 As part of their application the applicant has submitted a map showing an area of land edged purple and being marked up "Neighbourhood of Heritage Green Estate" to demonstrate the neighbourhood within the locality of the ward of Norden, Rochdale, Greater Manchester.

10.3.4 There is considerable case law on the issue as to a neighbourhood within a locality and whilst the courts have emphasised the imprecision of the expression "neighbourhood" they have said that it cannot simply be any line drawn on a map – it must have some element of cohesiveness. The applicant was previously asked to clarify the criteria on which they based their definition of "neighbourhood" and they have confirmed that the "neighbourhood" they have identified consists of what is known as the "Heritage Green Estate".

10.3.5 The final element that the applicant is required to demonstrate is that the application land has been used “as of right” by people. To be able to claim a use of land “as of right” such use must be without force, secrecy or permission ie nec vi, nec clam, nec precario.

10.3.6 In support of the application 136 Village Green Questionnaires have been submitted by the applicant and these confirm that activities such as ball games, dog walking, flying kites, picnics, Frisbee throwing, Horse riding, wildlife watching, people walking, golf practice, playing in the snow, team games and bicycle riding have all been undertaken on the application land.

10.3.7 Many of the witnesses who have provided evidence in support of the application have confirmed that they have used the application land for lawful sports and pastimes openly, without force and without permission and this falls within the definition of the uses being “as of right”.

10.3.8 It is pertinent that the application land was acquired by RBC under a Compulsory Purchase Order in 1957 for housing purposes. Recent case law R(Barkas) v North Yorkshire County Council decided that where land had been acquired and held by a council for housing purposes and the council used the land for public recreational purposes in accordance with powers in the housing legislation, the public had a legal right to use the land and were accordingly using it “by right” than “as of right”.

10.3.9 A representation has been received from RBC in relation to this application on this basis – ie use being “by right” rather than “as of right” which would effectively mean the application would have to be refused. On that basis, it is considered reasonable to assume that the principle in Barkas may apply to this application and any claimed use may have been “by right” thereby not satisfying the third limb of section 15(2).

10.4 It is considered that the application satisfactorily complies with the first 2 requirements of section 15(2) Commons Act 2006 but a determination will have to be made as to whether the third such element is satisfied via any such use of the land being “as of right” as opposed to “by right” that the application should be determined by an Independent expert..

10.5 Given the nature of the representation received to the application it is considered appropriate that the matter be referred to an Independent expert for determination.

11. Applicant’s Response

11.1 This report has been discussed with the Applicant who has expressed concerns about the fact that an objection has been received at such a late stage from RBC and when a report with a positive recommendation had been prepared for the previous meeting in December. Whilst the concern and frustration of the Applicant is noted officer’s firm belief is

that whilst submitted late the representation from RBC must be taken into account in determining this application.

- 11.2 As part of any referral to an Independent Expert for determination it may be considered appropriate to invite them as a preliminary matter to issue a timetable for RBC to set out their objection to the application in writing and for such an objection to be forwarded to the applicant to respond within a defined number of days and the expert then, when considering all the evidence in this matter will attach such weight to any objection as they consider appropriate. This is considered to be the most equitable way of resolving this matter in light of the objection received.
- 11.3 When previously discussing this report with the Applicant they requested that if the Committee were minded to reject their application that consideration be given to the matter being referred to a non statutory public inquiry. Whilst this is a potential option for Committee as part of the process of considering this report it is worth noting that public inquiries are usually reserved for instances where conflicting or differing evidence has been presented in relation to an application being submitted and advertised and that then needs to be tested in an inquiry before an independent inspector.
- 11.4 In respect of this application it is considered by officers that it would be appropriate for an Independent Expert to determine whether or not to hold such an inquiry by reference to the representation received to the application and the large amount of evidence has been presented in support of the application which, when considered by officers potentially satisfies the first 2 elements in Section 15(2) of the Commons Act 2006 and the issue being as to whether the 3rd element is satisfied.
- 11.5 A draft copy of the report has been circulated to the Applicant for them to review and check for accuracy.

12 **Access to Information**

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

Officer: James Felton

Tel No: 01270 686526

Email: james.felton@cheshireeast.gov.uk