

WILTSHIRE COUNCIL

WESTERN AREA PLANNING COMMITTEE

6 MARCH 2019

**COMMONS ACT 2006 – SECTION 15(1) AND (2) APPLICATION TO REGISTER
LAND AS A TOWN OR VILLAGE GREEN – CHURCH FIELD, HILPERTON**

Purpose of Report

1. To seek approval to appoint an independent Inspector to hold a non-statutory Public Inquiry and provide an advisory report for the Western Area Planning Committee on the application to register land as a town or village green at Church Field, Hilpertont.

Relevance to Council's Business Plan

2. Working with the local community to maintain an up-to-date register of town and village greens to make Wiltshire an even better place to live, work and visit.

Background

3. Wiltshire Council received an application to register land at Church Field, Hilpertont as a town or village green on 24 April 2017. The application was made under Section 15(1) and (2) of the Commons Act 2006 which requires the applicant to demonstrate, on the balance of probabilities, that the land has been used by a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, and that they have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.
4. The application was accepted and duly advertised on 21 July 2017 for a period of 42 days. During this time three objections and one representation in support were received. One of the objectors was the owner of the land. He has since died and the objection is being maintained by his estate.
5. Full details of the application and all relevant submissions are appended to this report at **Appendix A**.

Main Considerations for the Council

6. Wiltshire Council is the Registration Authority and has a statutory duty to determine the application. However, there are no regulations in force at the moment which set out the process by which the authority should determine applications of this type.
7. The application is disputed. The objections raise a number of matters that must be addressed by the council including:

- (i) Can the evidence of multiple family members be taken into account?
- (ii) Is the number of people who have submitted evidence of use sufficient to be taken as a significant number of the inhabitants?
- (iii) Was use by permission?
- (iv) Was use by right owing to the presence of four rights of way in the field?
- (v) Are some of the claimed activities (for example socialising, creating dance routines and creating memories) lawful sports and pastimes?
- (vi) Is use of the land for grazing cattle and taking an annual silage crop fatal to the registration of the land?
- (vii) How were the witnesses motivated?
- (viii) How credible is some of the evidence?
- (ix) Is the evidence sufficient to demonstrate use of the whole field and not just the public rights of way?

8. Section 15 of the Commons Act 2006 provides that to register land as a town or village green it must be shown that:

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 20 years.

9. The registration of land as a town or village green is no trivial matter. Although the inhabitants of the parish of Hilperton would have a right to use the land for lawful sports and pastimes at all times and forever, land that is so registered is protected by Victorian statutes against harm or damage to the extent that any control of future activities on the land is largely taken from the landowner. The most obvious loss is that the land may not be developed but it may also not be ploughed, used for arable crops, divided for grazing of, say, horses or any other alteration that a landowner may reasonably expect to be able to do.

10. The responsibilities of the council in this regard were recognised by the justices in the Court of Appeal in the case of *R(Christopher John Whitmey) v The Commons Commissioners [2004] EWCA Civ. 951*. Arden LJ at paragraphs 28 and 29:

“28.the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by a judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs....However, the registration authority must act reasonably. It also has power under section 111 of the Local Government Act 1972 to do acts which are calculated to facilitate, or are incidental or conducive, as to the discharge of their functions. This power would cover the institution of an inquiry in an appropriate case.

29. In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the land...likewise if it wrongly rejects the application, the rights of the applicant will not receive the protection intended by parliament. In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry.....”

11. At paragraph 66 Waller L J agreed:

“66. I make these points because the registration authority has to consider both the interest of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration.”

12. Officers have considered the evidence both in support and in objection to the application at **Appendix A**. Whilst some points raised may simply be dealt with by the council it is clear that there are matters of serious dispute in the evidence. Officers consider that the four main points of dispute are:

- Is there sufficient evidence from a significant number of inhabitants?
- Has use been by permission?
- Have the agricultural activities prevented registration?
- Is the evidence sufficient to demonstrate use of the whole field for lawful sports and pastimes and not just the public rights of way?

13. It is considered unreasonable to all parties to make a decision without further testing of the evidence in front of an expert in this area of law.

Overview and Scrutiny Engagement

14. The determination of town and village green applications is governed by statutory regulations, relevant case law and non-statutory guidance.

Safeguarding Implications

15. There are no safeguarding implications arising from this report.

Public Health Implications

16. There are no public health implications arising from this report.

Corporate Procurement Implications

17. The procurement implications of processing the application are dealt with under the Financial Implications given below.

Equalities Impact of the Proposal

18. There are no equalities impacts of the proposal.

Environmental and Climate Change Considerations

19. There are no known environmental and climate change considerations arising from this report.

Risk Assessment

20. The financial and legal risks to the council arise from the council reasonably proceeding with the application (where financial risks are limited to costs detailed below) or in acting unreasonably whereby risks relate to the cost of legal challenges through the courts. A challenge to the council's decision in the High Court where it is decided against the council may result in expenses of around £50,000 or more if resort is made to the higher courts.

Financial Implications

21. There is no mechanism by which a Registration Authority may charge the applicant for processing an application to register land as a town or village green and all the costs are borne by the council for which there is no budgetary provision.
22. A recent estimate for an inquiry lasting four to five days and for the production of the Inspector's report was £15,000 plus VAT.

Legal Implications

23. The committee's attention is brought to the High Court decision in the case of *Somerford Parish Council v Cheshire East Borough Council (1) and Richborough Estates (2) [2016] EWHC 619 (Admin)* where the High Court quashed the local borough council's decision not to register land as a new town or village green on the basis of procedural error. The case highlights a number of practical points to note regarding privilege, equity and the importance of the Public Inquiry in determining an application to register land as a town or village green. The court's decision also reinforces the findings in *Whitney* and the need for Registration Authorities to hold a non-statutory Public Inquiry where there are sufficient disputes over factual issues.
24. Where a town or village green application is refused, the course of appeal for the applicant is by way of judicial review to the High Court. Applications of this nature usually, as can be seen from paragraph 23 above, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council and to avoid the serious financial costs of defending an action for judicial review it is imperative that the proper procedure is followed by the council in the decision making process. Likewise, the registration of the land may result in a similar High Court action instigated by the landowner, again underlining the need for the council to follow correct procedure.

Options Considered

25. Members of the committee must consider the following possible decisions open to them:
 - (i) To appoint an independent Inspector to hold a non-statutory Public Inquiry and produce an advisory report with his findings and recommendations for the council's consideration.
 - (ii) To determine the application.

Reasons for Proposal

26. There is a serious dispute regarding the evidence and the application is of great local interest. In paragraph 23 above the committee's attention was brought to the *Cheshire East High Court Judgement*. The case was brought to the High Court on the basis of procedural error by the borough council. The case highlights a number of practical points for the committee to note and consider regarding privilege, equity and the importance of Public Inquiries in determining an application to register land as a town or village green in disputed cases. The court's decision also reinforces the findings in *R (Whitmey) v Commons Commissioners* and the need for Registration Authorities to hold a non-statutory Public Inquiry where there are sufficient disputes over factual issues.
27. Where the Registration Authority decides not to register land as a town or village green there is no right of appeal to the council or for example to the Secretary of State as there is with a planning application. The applicant's course for redress is by way of judicial review to the High Court. Applications of this nature usually, as can be seen in paragraph 23 above, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council, and to avoid the serious financial costs of defending an action for judicial review, it is imperative that the council adopts the proper decision making process in dealing with this application.

Proposal

28. To seek approval to appoint an independent Inspector to hold a non-statutory Public Inquiry and provide an advisory report for the Western Area Planning Committee on the application to register land as a town or village green at Church Field, Hilperton.

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The following unpublished documents have been relied on in the preparation of this Report:

None

Appendices:

Appendix A - Officers' Interim Decision Report

This report has 4 appendices:

- A1 Summary of user evidence
- A2 Landowner's objection to the application
- A3 Applicant's response to objections
- A4 Landowner's response to applicant's response