

Scrutiny Board (3)  
Cabinet

22<sup>nd</sup> July 2009  
28<sup>th</sup> July 2009

**Name of Cabinet Member:**  
**Cabinet Member (City Development) - Councillor Ridley**

**Director Approving Submission of the Report:**  
Director of City Development

**Ward(s) Affected:**  
Whoberley, Earlsdon

**Title:**  
**Hearsall Common - Response To Petition To Voluntarily Register Hearsall Common As A Village Green**

---

**Is this a key decision?**  
**Yes**

The proposal in the Report is a key decision because it would have a marked effect on communities living or working in an area of two wards or more.

---

**Executive Summary:**

This Report is brought to Cabinet because it concerns a request to change the status of land in the Council's ownership which straddles two electoral wards, Whoberley and Earlsdon and it involves a number of Council functions (including parks and open spaces, land ownership, planning and highways).

In the past, the land has been subject to two separate applications for registration as a Village Green, both of which were rejected on legal grounds, and the matter of its future status is now brought before Cabinet on behalf of the Council as landowner as it is the subject of a petition. The petition is presented by Councillor Bailey and contains 1,292 signatories. The petition calls on the Council to preserve Hearsall Common "as a green space for sports, recreation, community events, visual amenity and wildlife habitat, and to protect it from any future development, by voluntarily registering it as a Town or Village Green".

The report sets out for Cabinet the consideration of two options, either to leave Hearsall Common as it is currently held with its statutory protection as public open space and with the retention of the powers of management by statute, or if lawful, apply to change its status to a Town or Village Green and restrict its powers of management so that they are consistent with a Town or Village Green.

Officers consider the second option to be unlawful because it would involve the Council fettering the powers given to it by Parliament, and thus making a decision which no reasonable authority would make.

Officers' recommendation to Cabinet is to reject the request made in the petition for this reason and because the petitioners request to preserve Hearsall Common as a green space for sports, recreation, community events, visual amenity and wildlife habitat and to protect it from any future development, is achieved by virtue of the statutory protection it already enjoys.

**Recommendations:**

Scrutiny Board (3) is recommended to consider the report and refer any comments to the Cabinet for their consideration.

Cabinet is recommended to:

- (1) Consider any recommendations from Scrutiny Board (3)
- (2) Reject the request in the petition to voluntarily register Hearsall Common as a Town or Village Green and
- (3) Leave the land as it is currently held, namely subject to statutory protection as 'a place of public resort and recreation' with the benefit of statutory powers of management.

**List of Appendices included:**

Map of Hearsall Common.

**Other useful background papers:**

DEFRA The Commons Act 2006 and a voluntary dedication of land as a town or village green. December 2007 [www.defra.gov.uk](http://www.defra.gov.uk)

**Has it or will it be considered by Scrutiny?**

Yes. Scrutiny Board 3 will have considered the report at its meeting on 22<sup>nd</sup> July, 2009.

**Has it or will it be considered by any other Council Committee, Advisory Panel or other body?**

No.

**Will this report go to Council?**

No.

**Report Title:**

**Hearsall Common - Response To Petition To Voluntarily Register Hearsall Common As A Village Green**

**1. Context (or background)**

- 1.1 This report is brought to enable Cabinet to consider and determine the petition lodged by Councillor Bailey on 16th September 2008 in respect of land known as Hearsall Common ("the Land") requesting the Council to voluntarily register it as a Town or Village Green. The Land measures approximately 32.3 hectares, is shown on the attached plan (Appendix 1) and is mainly located in Whoberley Ward, with a small section in Earlsdon Ward. Planning Committee, acting for the Council in its capacity as registration authority under the Commons Registration Act 2006, has rejected two previous applications by users of the Land to register it as a Town or Village Green on a point of law.
- 1.2 The request in the petition is distinguished from these previous applications because it is asking the Council itself, as landowner, to voluntarily register the Land. In the consideration of the previous applications, the Council, as landowner, objected to the proposal to register the Land as a Town or Village Green. The applications and request to register the Land as a Town or Village Green were made shortly after the Council had issued proposals for consultation on PrimeLines improvements involving the construction of an inbound bus lane and cycle track on the Land on Hearsall Lane and the creation of an outbound bus lane at the junction of Hearsall Lane and Earlsdon Avenue North. In November 2007 Cabinet approved the inbound proposals and abandoned the contentious outbound proposals in response to a petition opposing these proposals. The inbound works have been partially completed.

**2. Options Considered And Recommended Proposal**

2.1 Cabinet Has Two Options To Consider:-

- a. Leave the land as it is currently held, namely subject to statutory protection as 'a place of public resort and recreation 'with the benefit of statutory powers of management, or
  - b. If lawful, recommend the land for voluntary registration as a Village Green, which is irrevocable and will restrict powers of management for ever.
- 2.2 In order to determine which is appropriate, Cabinet needs to consider the current nature of the land holding and its protection, its statutory powers as registration authority and as local authority as landowner, the effect of registration of land as a Village Green, and the legal and practical issues including the lawfulness of registration that will need to be addressed prior to any registration.
- 2.3 Officers are recommending option a, to leave the land as it is currently held, namely subject to statutory protection as a place of public resort and recreation, with the benefit of statutory powers of management.

## Current Status Of The Land

- 2.4 The Land is a large area of open space owned by the Council and managed by the Council's Culture, Leisure and Libraries function as part of its portfolio of public parks and open spaces. Byelaws regulate the use of the land by the general public. The Land was acquired by the Council under the Coventry Corporation Act 1927 and is currently held under section 96 of the West Midlands County Council Act 1980. Throughout this 82 year period the Land has been used for public recreation for the benefit of all the residents of Coventry. The 1980 Act requires the Council to maintain the land as a place of "public resort and recreation". Only an Act of Parliament could take away this requirement.
- 2.5 In addition to requiring the Council to maintain the Land as a place of public resort and recreation, the 1980 Act gives the Council the following powers of management with regard to the Land:-
- *The same powers it has to manage a park, including the power to make byelaws.*
  - *Allowing sports or recreational lettings by clubs and individuals for up to one year.*
  - *Using any part of the Land for street creation or widening or improvement as may be necessary.*
  - *In certain cases to promote the recreational use of the Land by enclosing it by way of fencing.*
  - *If no longer in substantial use for public resort and recreation, and only with the Government's approval, to exchange or sell the land.*
- 2.6 The Land is further regulated by the provisions of the Public Health Acts relating to public parks and pleasure grounds. The Acts give the powers to include closing the Land for the purposes of an agricultural show, setting aside part of the Land for the purpose of football, cricket or other recreation and to provide refreshment rooms.
- 2.7 The Land is also protected by the Council's own planning policies. The Council's existing planning policies (Coventry Development Plan 2001) protect existing urban green space from development except when they are subject to specific plan proposals. These policies apply to the Land. The bus priority measures at the junction of Hearsall Lane and Earlsdon Avenue North were specific plan proposals in policy AM15 of the 2001 Plan. Further protection is afforded to part of the Land by virtue of its designation as a Local Nature Reserve under the 2001 Plan.
- 2.8 As regards emerging policy, it is proposed under Policy EQ4 (Parks, Open Space, Outdoor Sports, And Recreational Facilities) of the draft Core Strategy submitted to examination by an independent Inspector, that the Land should be designated as a Principal Open Space. Under this policy, development would not be permitted unless it could be demonstrated that there was no longer demand for the recreational space or green space; and a deficiency would not be created through its loss, as measured against Coventry Green Space Standard.
- 2.9 The Land is therefore subject to considerable statutory protection, but significantly, the Council has important statutory powers to manage and maintain the Land, which also gives flexibility to the Council. This is considered of critical importance in the recommendations given by officers later in this report.

## Statutory Powers

- 2.10 Section 15(8) of the Commons Act 2006 allows a landowner to 'dedicate' land voluntarily as a Town or Village Green by applying to the Registration Authority. This is the basis on which the City Council is currently being asked to register the land by the petitioners.
- 2.11 This is a different basis to the two previous applications which have been dealt with the City Council as Registration Authority. In those cases, the applicants had to establish recreational use of the Land for 20 years 'as of right'. Both such applications were rejected by the City Council on legal grounds.
- 2.12 The City Council is both the owner of the Land and also the Registration Authority. This report has been prepared for the City Council's consideration in its capacity as landowner. If the decision were made by the City Council to apply for voluntary registration, the matter would need to be considered by the Council's Planning Committee to whom Commons Registration matters have been delegated. However, the Planning Committee would have no discretion to reject an application for voluntary registration if it were made, subject to any issues as to the lawfulness of the registration. The lawfulness aspect will be addressed later in this report.

## The Effect Of Registration Generally

- 2.13 The Department for Environment, Food and Rural Affairs' Guidance sets out the legal effect of voluntary registration, as follows:

*'... once a green has been registered voluntarily it will be subject to the same statutory protections as all other registered greens and local people will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. Generally speaking, causing damage to village greens is a criminal offence under two nineteenth century acts: greens are protected by Section 12 of the Inclosure Act 1857 against injury or damage and interruption to their use or enjoyment, and Section 29 of the Commons Act 1876 against encroachment or inclosure of a green. Registration as a town or village green is irrevocable and so land must be kept free from development or other encroachments.....'*

- 2.14 For this reason it advises:

*'Therefore, before embarking on the registration of land as a town or village green, you are advised to consider carefully the implications.'*

- 2.15 If the Land were to be registered, it would be necessary first to revoke the present byelaws. Once registered, the power to make new byelaws would be lost.
- 2.16 In addition it would restrict the Council's powers of management (referred to earlier in the Report) in respect of the Land so that they are consistent only with legal rights of local people to indulge in sports and pastimes on a permanent basis on any part of the Land. It is significant that once land is registered as a Village Green, any attempt to alter the character or nature of the land, even if such work would be regarded by some as improvements, could be an infringement of the above statutes and render the Council liable to prosecution.

- 2.17 The Council could not therefore fence or enclose the land for any purpose and would not be able to undertake any highway work ever on the Land after registration. The City Council would not be able to exercise many of the powers under the Public Health Acts if they involved interfering with the right of local people to go onto the Land. For example, if the Council wanted to construct changing facilities on the Land after registration, it could not do so. The letting of part of the Land for cycle speedway purposes or any other sporting activity would not be lawful as it would interfere in the use of the Land by local people for recreation.
- 2.18 Similarly, the letting of part of the Land for fairs, circuses and other events would be unlawful and would have to cease on registration because it would interfere with the legal right of local people to use the land for recreation.
- 2.19 A number of easements and wayleaves cross the land in favour of electrical power supply cables. The excavation, repair and movement of these cables would be unlawful after registration as a Town or Village Green because it would interfere with the legal right of local people to use the land for recreation.

### **Legal And Practical Issues Going Forward**

- 2.20 In considering whether to meet the petitioners' request, Cabinet needs to consider:
1. Whether the Council should further restrict its powers and
  2. Whether, as a matter of law, the Council has the legal power to restrict its powers.
- 2.21 Officers consider it would not be appropriate for the Council to divest itself of its current management powers in respect of the Land. Many of the powers currently enjoyed are not used on a daily basis. Nonetheless, it is difficult to say that the Council would never wish to exercise any of these powers.
- 2.22 More specifically, the revocation of the present byelaws is not a straightforward exercise. These byelaws apply to many other parks and open spaces within the City of Coventry and what would be required would be the creation of a new set of byelaws excluding the Land. In practice, there would need to be full consultation, and the issues raised would not necessarily be limited to the Land the subject of this report.
- 2.23 Over and above what officers perceive to be the disbenefit of registering the Land as a Town or Village Green, they do not consider that registration confers any substantial benefit. If the Land was in private ownership, dedication of it would ensure that it would be preserved as an open space available for recreational use by people. However, the Land is held by the Council under the terms of an Act of Parliament, which specifically require it to preserve it as a place of public resort and recreation. The Council is not free to deal with the Land as it wishes. Moreover, the Land is protected by planning policy.
- 2.24 Accordingly, subject to the management powers referred to earlier, the Land is already preserved as a "green space for sports, recreation, community events, visual amenity and wildlife habitat and protected from future development" as the petitioners request. Therefore the, voluntary registration would not make any significant difference in this regard.

- 2.25 Registration, would, however, prevent the exercise of many of the Council's management powers and restrict what could be done to improve the Land in the future or the discharge of other duties that the Council has, for example as the Highway Authority. Officers do not consider that this would be a benefit. Parliament has conferred these powers on the Council and other local authorities managing parks as being appropriate managing powers.
- 2.26 Further, for the Council voluntarily to seek to divest itself of its management powers in relation to the Land gives rise to a separate and distinct legal issue as to whether or not to do this would be lawful. As a general legal principle, a local authority cannot lawfully fetter its discretion i.e. it cannot undertake that it will not in the future exercise a power it currently enjoys. Therefore, the Council needs to consider the application of this principle in the present case, because the effect of registration will be to prevent the Council in the future from exercising the management powers which Parliament has conferred on it and which it is currently able to exercise. The Courts have ruled that it is ultimately a question of fact for the Council to decide i.e. whether they consider as a matter of fact it is reasonably foreseeable that, in the future, the Council might wish to exercise some of the powers it currently enjoys.
- 2.27 If so, there would be a conflict between the exercise of those powers and the status of the Land as a Village Green and the registration of the Land would not be lawful. Although this question is one of fact for the Council, there is a risk that, if the Council were to decide there was no conflict, its decision might be subject to a successful legal challenge on the basis that it was unreasonable i.e. a decision which no reasonable authority could take.
- 2.28 If Cabinet decided on the facts that it still wanted to proceed with the registration, then the following will be necessary.
- 2.29 Private legislation would have to be promoted through Parliament by the Council to amend the provisions of the 1980 Act. This process is expensive and could take a minimum of approximately 12 months to conclude and with no certainty of success. However, officers do not consider that private legislation just for this purpose, namely to facilitate registration of the Land as a Village Green, could be justified.
- 2.30 If the Land or any part of it ceases to be of substantial use for public resort and recreation, then under the 1980 Act it could be sold or exchanged for other land which might be of substantial use for such purpose. Officers are aware that, since acquisition in 1927, the Land has been consistently used by the public, and therefore it is foreseeable that this part of the 1980 Act is unlikely to be utilised.

### **Recommended Proposal**

- 2.31 For the reasons set out above, officers consider that voluntary registration of the Land would secure no substantial benefits and would interfere with the ongoing management of the Land by the Council.
- 2.32 Accordingly, they consider that it would be inappropriate to voluntarily register the Land and that the Land continue to be held in its current form with the statutory protection given by the 1980 Act and the Public Health Acts.

2.33 If, notwithstanding the recommendation of officers, Members wished to consider recommending the Land for voluntary registration, then such a recommendation could only be lawful if the Council considered that it was reasonable foreseeable that it would never use any of the management powers it currently has under the 1980 Act and the Public Health Acts and amending existing byelaws. If Cabinet came to this conclusion, then the only way it could achieve the change of status of the land is by promoting private legislation in the Houses of Parliament.

**3. Results Of Consultation Undertaken**

Not required.

**4. Timetable For Implementing This Decision**

Not appropriate.

**5. Comments from Director of Finance and Legal Services**

**5.1 Financial Implications**

In the event the City Council decided to promote a private act of parliament to facilitate any voluntary registration of the land, the cost is estimated to be a minimum of £100,000. This would not represent a good use of Council funds in the current climate and there is no budget provision for this expenditure.

The land produces nominal income of approximately £10,000 per annum arising from fairs and a circus held upon it and would be lost if the land were to be registered.

**5.2 Legal Implications**

The legal implications have been applied throughout section 2 of this report. However, the principal areas of legislation are as follows.

The Land is currently held under Section 96 of the West Midlands County Council Act 1980 with requisite management powers. The land is further regulated by Section 164 of the Public Health Act 1875, Section 44 of the Public Health Acts Amendment Act 1890 and Section 76 of the Public Health Acts Amendment Act 1907.

Towns and Village Greens are governed by the Commons Registration Act 2006. Section 15(8) of this Act enables a landowner to voluntarily dedicate land as a Town/Village Green.

Once land is registered as a Town/Village Green is protected against injury, damage or interruption of its use for enjoyment and cannot be encroached upon or enclosed – Section 29 of the Commons Act 1876 and Section 12 of the Inclosure Act 1857 refer.

## **6. Other Implications**

### **6.1 How Will This Contribute To Achievement Of The Council's Key Objectives / Corporate Priorities (Corporate Plan/Scorecard) / Organisational Blueprint / LAA (Or Coventry SCS)?**

Officers do not consider there are any adverse implications in respect of any of the Council's key objectives.

The Land is designated as a Principal Open Space within the Parks Strategy and as such was included in the green space audit carried out when developing the new Green Space Strategy (adopted by the Council in September 2008)

### **6.2 How Is Risk Being Managed?**

The normal risks apply in respect of legal challenge to a public body's decision. Also, should Cabinet decide that the Land be voluntarily registered as a Town/Village Green, there is no guarantee that the promotion of a private act of parliament will be successful in amending the provisions of the 1980 Act under which the Land is currently held.

### **6.3 What Is The Impact On The Organisation?**

If Cabinet chose to pursue registration, there would be a resource impact to revoke, draft and consult on new byelaws and in promoting private legislation through Parliament.

### **6.4 Equalities / EIA**

There are no equalities issues for the way the land is currently managed as the requirement to hold the land for public resort and recreation benefits all Coventry residents. The Council as landowner however, as part of registration, needs to identify the inhabitants of the 'locality or neighbourhood within that locality' that would benefit from the newly created Town or Village Green rights. The Defra guidance on locality or neighbourhood within locality is referred to a small area such as a street, an estate, a village or an electoral ward. The two previous applications identified the residents of Whoberley as the beneficiaries of these rights. If Cabinet chose to register the land as a Town or Village Green, then officers would recommend that the whole of Coventry was designated the locality in the application, to ensure that the application was not divisive between different parts of the city.

If Town or Village Green registration were approved, some people who use the showground site would be adversely affected, in the main young people and families attending fairs, circuses and other events.

### **6.5 Implications For (Or Impact On) The Environment**

None.

### **6.6 Implications For Partner Organisations?**

None.

**Report author(s):**

Nigel Clews

**Name and job title:**

Head of Property Management

**Directorate:**

City Development

**Tel and email contact:**

024 76832745

Enquiries should be directed to the above person.

<b>Contributor/approver name</b>	<b>Title</b>	<b>Directorate or organisation</b>	<b>Date doc sent out</b>	<b>Date response received or approved</b>
<b>Contributors:</b>				
Christine Forde	Head of Legal Services	Finance and Legal Services	12-6-09	26-6-09
Lesley Wroe	City Planning Manager	City Development	12-6-09	19-6-09
Ces Edwards	Head of Parks and Open Spaces	Culture, Leisure and Libraries	12-6-09	19-6-09
Nick Richards	Team Leader Transport Delivery Group	City Development	12-6-09	19-6-09
Other members				
<b>Names of approvers: (officers and members)</b>				
Finance: Barry Hastie	Head of Financial Management	Finance & legal	19-6-09	26-6-09
Legal: Christine Forde	Head of Legal Services	Finance & legal	12-6-09	26-06-09
Director: John McGuigan	Director City Development	City Development	26-6-09	1-7-09
Members: Cllr Gary Ridley	Cabinet Member (City Development)		29-6-09	1-7-09

This report is published on the council's website:

[www.coventry.gov.uk/cmis](http://www.coventry.gov.uk/cmis)

thurs\180609-cg

Appendix 1

