

## KENT COUNTY COUNCIL

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### REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Shepway District Council on Tuesday, 12 July 2011.

PRESENT: Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr T Gates, Mr S J G Koowaree Mr R J Lees

ALSO PRESENT: Mr T Prater

IN ATTENDANCE: Mr C Wade (Countryside Access Principal Case Officer), Mrs L Wilkins (Definitive Map Team Leader) Mr A Tait (Democratic Services Officer)

### UNRESTRICTED ITEMS

#### **14. Claimed Public Footpath from Valebrook Close to Public Footpath HF43, Folkestone**

*(Item 3)*

(1) The Panel Members visited the site prior to the meeting. This visit was also attended by Mr T Prater (applicant) and by Mr T Boxell (landowner).

(2) The Countryside Access Principal Case Officer set out the legal tests for the application. Section 53 of the Wildlife and Countryside Act 1981 enabled the County Council to add a route to the Definite Map and Statement when it had evidence to show that a public right of way either subsisted or was reasonably alleged to subsist.

(3) Section 31 of the Highways Act 1980 stated that in order for the land in question to be dedicated as a public footpath, it needed to have been actually enjoyed by the public as of right and without interruption for a full period of 20 years unless there was sufficient evidence that there was no intention during that period to dedicate it. The qualifying period for this application was from 1988 to 2008, which was the year that the landowner had erected barbed wire fencing around the perimeter of the land.

(4) The Countryside Access Principal Case Officer then said that there was also a Common Law provision if it could be demonstrated that the public had used the route for so long and in such a manner that the landowner must have been aware that that the public were acting in the belief that the right of way had been dedicated but had taken no steps to disabuse them. He explained that the word "disabuse" meant informing the public that they had no such right. This could be done verbally or through the erection of notices and fences.

(5) The Definitive Map Team Leader set out the documentary evidence she had examined in order to fully investigate the application. This consisted of the Tithe Maps (@ 1840), The First Edition Ordnance Survey Map and book of Reference (@ 1860), the Finance Act 1910 and Valuer's Field Book, Borough Maps and Draft Maps, the Provisional Maps for Hythe and Folkestone, the Definitive Map (1952), the Draft Revised Map (1970), the Definitive Map (1987), Ordnance Survey Maps, and

numerous aerial photographs. None of these documents had been of any assistance as they did not record the claimed route.

(6) The Definitive Map Team Leader said she had consulted Shepway DC, Folkestone TC, Local District Councillors (except for Mr Prater, the applicant), the Ramblers' Association, the Open Spaces Society and the British Horse Society. None of these had replied except for the Open Spaces Society, who strongly supported the claim on the grounds that the area had been walked for many years by local people and others.

(7) The Definitive Map Team Leader went on to summarise the content of the 14 user evidence forms. These had set out their various reasons for use and the frequency. They also referred to the natural obstructions and the clearance of the land by the landowners in 2006 when new drainage ditches had been installed. Despite the appearance of rubble on the land, most people had claimed that they had continued to walk the route until 2008, when a barbed wire fence was erected to prevent access from Valebrook Close. Nearly all the witnesses referred to the fingerpost, which one witness claimed had been erected by Shepway DC between 20 and 25 years earlier (at a time when the District Council had responsibility for the maintenance of public rights of way).

(8) The Definitive Map Team Leader had also contacted all the registered landowners, including Mr T Boxell who had spoken on all their behalves. He had informed her that he had checked with his solicitor whether any rights had been recorded. When this proved not to have been the case, he had fenced the land in order to claim adverse possession over the unregistered section (adjacent to No 65 Valebrook Close). He had also confirmed that none of the landowners had ever put up any notices or taken other action to deter public use; nor had they ever given anyone permission to use the claimed route. He had also provided the County Council with an EDF Map and Land Registry Plan (2006), neither of which recorded a right of way along the claimed route – but which did show the recorded footpaths.

(9) The neighbouring landowners had also been consulted by the Definitive Map Team Leader. Mr and Mrs Wilson, the owners of 65 Valebrook Close had stated that they had last attempted to use the claimed route some twenty years earlier. They had commented that since that time, they had been unable to recall much use of the route, which had been boggy and overgrown.

(10) The Ministry of Defence (MoD) owned the land south of 65 Valebrook Close (taking in the first part of the claimed route). They had confirmed that the first section adjacent to no. 65 had been the subject of a Deed of Grant with GHS (Contractors) Ltd in 1964 in respect of a private right of way on foot and with vehicles for agricultural purposes.

(11) The Definitive Map Team Leader referred to the Common Law provisions and said that in her view, although a fingerpost had been erected by Shepway DC, this had been in error and could not be seen as a dedication of the way by the landowner.

(12) The Definitive Map Team Leader then moved on to consider the statutory and legal tests. She said that the year 2008 should be used as the “date of challenge” because this was the year when the landowner had put up the fencing around the site. The material period was therefore 1988 to 2008.

(13) The Definitive Map Team Leader said that use of the claimed route had not been with force, in secret or with permission, and therefore had been “as of right”. However, an analysis of the user evidence forms indicated that there was no actual defined route. Instead, a variety of routes had been used, depending on the ground conditions and destination. Only two users had stated that they had used the claimed route, and their use was stated as rarely and occasionally. In support of this view, she quoted Ross Crail QC who had said “If people have crossed land in the same general direction but by varying routes, their uses can not be aggregated and attributed to a single route.”

(14) The Definitive Map Team Leader then explained that the law required a right of way to have a fixed terminus. This could be a public highway/ footpath or a public place. In the case of the claimed route, it was evident that the section adjacent to 65 Valebrook Close was just one small part of a multitude of different routes taken by the public.

(15) The Definitive Map Team Leader concluded her presentation by saying that although the landowner had not taken steps to disabuse the public of their right to walk the route, the fact that only two witnesses had given evidence that they had walked the actual route in question had led her to recommend that the claimed path should not be added to the Definitive Map.

(16) Mr T Boxell (landowner) said that had there been a route, he would have erected a stile. The reason he had put up the fence in 2008 had been in order to prevent fly tipping on his land as well as to challenge public use of it. This was necessary because he had applied for permission to build houses on it.

(17) Mr T Prater addressed the Panel in his capacity as the applicant rather than as the Local Member. He said he had brought the application forward on behalf of a number of residents of Valebrook Close. In support of his application, he referred to the plans produced in support of the Deed of Grant between the MoD and GHS (Contractors) Ltd in 1964. These had marked the claimed route as “Right of Way”. He believed that this was the reason that the fingerpost had been erected at a later stage.

(18) Mr Prater then said that Public Footpath HF43 did not appear to lead anywhere. He accepted the possibility that it might have led to the former Rectory, but said that this was unlikely as it could not be defined as a public place. It seemed more probable that HF43 was intended to link up with Valebrook Close.

(19) The Countryside Access Principal Case Officer replied to Mr Prater by saying that public footpaths had indeed led to rectories in the 17<sup>th</sup> Century.

(20) The Chairman noted Mr Prater’s view that the claimed route would link HF43 with Valebrook Close but pointed out that prior to the latter’s construction in the 1960s there would have been no obvious destination.

(21) Both parties were invited to sum up their cases. Mr Boxell had nothing further to add. Mr Prater asked the Panel to bear in mind that the fingerpost had been in existence for some twenty years without challenge and that the paperwork relating to

the claimed route might have been lost. Local people believed that the path had existed and it seemed logical to believe that it was connecting Valebrook Close and HF43.

(22) On being put to the vote, the Head of Countryside Access' recommendations were carried unanimously.

(23) RESOLVED that the applicant be informed that the County Council is not prepared to modify the Definitive Map and Statement by adding a Public Footpath running between Valebrook Close and Public Footpath HF43 as shown in Appendix A of the report.