

## REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Hythe Town Hall, High Street, Hythe CT21 5AJ on Tuesday, 17 July 2012.

PRESENT: Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr I S Chittenden, Mr H J Craske and Mr R A Pascoe

ALSO PRESENT: Mr C J Capon, MBE

IN ATTENDANCE: Mr C Wade (Countryside Access Principal Case Officer), Miss M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

### UNRESTRICTED ITEMS

#### **8. Application to register land known as The Former Airfield at Aldington Road in the parish of Lympne as a new Village Green** (Item 3)

(1) The Panel Members visited the application site prior to the meeting. The visit was attended by the applicant, Mr D Plumstead, Mr P Jones from the Somerston Group of Companies (Landowner), Mr J Burrows (Chairman of Lympne PC) and some half dozen members of the public.

(2) The Commons Registration Officer introduced the application which had been made by Mr David Plumstead on behalf of the Shepway Environment and Community Network under Section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008.

(3) The Commons Registration Officer explained that the task for the Panel was to consider whether it could be shown that a significant number of the residents of a locality or of any neighbourhood within a locality had indulged as of rights in lawful sports and pastimes on the land for a period of at least 20 years. This meant that the Panel had to consider whether every single test contained in the Commons Act 2006 had been met. It was not open to the Panel to consider the suitability or desirability of registering the land. Nor was it entitled to consider the application in the light of any other possible uses to which the land might be put in the event that registration did not take place.

(4) The Commons Registration Officer said that the applicant had stated that the application site had been used as an airfield before the First World War and had been a frontline operational airfield during the Second. The land had continued to be used as a civilian airfield until the mid 1970s. During this time and until November 2010 access had remained freely available to local residents, without challenge, for recreational purposes.

(5) The Commons Registration Officer then said that the application site was owned by Phides Estates (Overseas) Ltd. Their solicitors, McGrigors LLP had

objected on their behalf on the grounds that informal use had not been “as of right” because until 2006 the landowners had erected and maintained notices and fencing, whilst after that year access had been provided on a permissive basis. Between 1995 and 2006, express revocable permission had been granted to local residents in neighbouring properties. McGrigors had also argued that use by walkers should be discounted, that any recreational use had been interrupted by extensive engineering and infrastructure works, and that the qualifying area had not been properly defined by the applicant, who had been unable to demonstrate significant use.

(6) The Commons Registration Officer went on to consider the legal tests for registration. The first of these was whether use had been “as of right.” All parties were in agreement that there had been no question of secrecy. The main area of dispute was whether use had been by force (i.e. whether use of the land had been contentious). The landowner had claimed that fencing had been in place along the boundaries of the site, together with various notices throughout the entire qualifying period (1990 to 2010). The applicant, on the other hand considered that recreational use had been the subject of neighbourly toleration, as evidenced by the landowner’s relaxed attitude towards the maintenance of fencing.

(7) The Commons Registration Officer said that, having considered the evidence provided, it was possible that the landowner had overstated the commitment to the maintenance of fencing and notices prior to 2006 and that there had been periods when use had been unchallenged. Nevertheless, the landowner had written to a local farmer (who had been permitted to use the land for grazing) in 1995 to warn him of the need to check whether fencing had been torn down in order to satisfy himself that the land was secured. A statutory declaration made in 2002 had referred to “No trespassing” signs and to the fencing along Aldington Road being intermittently torn down or damaged. Her conclusion, therefore was that there would have been times when the fencing was complete and access closed off. Use of the application site would, therefore, have been contentious, against the landowner’s wishes and not “as of right.”

(8) The Commons Registration Officer then referred to the erection of the notice accompanying the stile on the south east corner in 2006 as well as to the letters written to local residents in 1995. These clearly expressed the intention of the landowner to permit access and to be in a position to withdraw that permission at any time. This rendered use of the site “by right” rather than “as of right.”

(9) The Commons Registration Officer then explained that, despite the landowner’s comments, walking was considered to be an example of a lawful sport or pastime. She therefore considered that this test was met (subject to the landowner’s challenges to use).

(10) The Commons Registration Officer also accepted that Lympe qualified as a locality as it was a recognised administrative area. Use seemed to have been by a sufficient number of people from Lympe to indicate to the landowner was in general use by the community. However, when considering whether use had been by a “significant number” this needed to be set against the likelihood that use had been more sparse during the early years of the qualifying period and that use during the later years had either been contentious or permissive.

(11) The Commons Registration Officer said that alleged “as of right” use had clearly ceased in November 2010 due to the removal of the stile and the erection of the notice. The application had been made in February 2011, which was within the two year grace period provided for by Legislation.

(12) The Commons Registration Officer said that the landowner claimed that the gas main installation in 2008 had involved the closure of the whole of the site. This claim was supported by evidence from several of the applicant’s witnesses. The period of closure had been in the region of two months. The *Betterment Properties 2012* case had led to the failure of an application as a result of a four month closure for drainage works. This suggested that it might be concluded that recreational use had not continued uninterrupted for the necessary 20 year period.

(13) The Commons Registration Officer concluded her presentation by confirming that the application could not succeed if it failed any one of the legal tests. In this case, there was sufficient evidence for her to conclude that use of the site had been either contentious or with permission. It could not, therefore have been “as of right.” Consequently, she was in a position to recommend to the Panel that the application should not be accepted.

(14) Mr John Burrows (Chairman of Lympe PC) referred to the four grounds for objection set out paragraph 13 of the report. He said that it was clear from the Officer’s report that two of these objections were invalid as the applicant had sufficiently described the qualifying locality and had also mistakenly assumed that walking was not a lawful sport or pastime.

(15) Mr Burrows then said that paragraph 47 of the report stated that all parties agreed that use “as of right” had expired in November 2010. He suggested that use of the site before that date must surely have been “as of right.” He considered that the *Betterment Properties 2012* case did not apply in this instance because the works on the site had not restricted the use of the land “as of right” for the majority of local residents. This meant that there had not been an interruption to such use in 2008 during the qualifying period. The effect had been the same as having remedial work undertaken on a footpath and then restoring it a short while later. Such work did not render the footpath any less a footpath and the same principle needed to be applied in this case.

(16) Mr Burrows disputed that use of the site had not been as of right. He said that it was the view of the Parish Council that the owner had done nothing to discourage use of the application site during the 20 years in question and had even installed a stile to assist entry. The site had been used extensively by local residents even before 1990 for dog walking, sports and pastimes. Minor restrictions for Health and Safety reasons such as engineering and environmental works had been nothing more than inconveniences, which had not prevented residents from gaining access to the site. The proposal for a skateboard park (referred to in paragraph 18 of the report) had in reality been nothing more than a scoping exercise by a local group from the village. They had approached the Parish Council to determine the viability of a skateboard park in the village.

(17) Mr Burrows summed up by saying that the Parish Council did not agree with the Officer’s recommendations. He therefore suggested that, in the light of the diametrically opposed views on the question, a non-statutory Public Inquiry would be the fairest way to resolve the anomalies between the opposing sides.

(18) Mr John Simpson, a local resident said that he had moved in to the parish in 1999 and that he had always been aware of the integral role played by the Airfield in village life. He had personally walked on the site and made many friends.

(19) Mr Simpson went on to describe the history of the Airfield in both war and peace time. This description covered its construction in 1916, the air races in the 1920s and 30s, the Cinque Ports Flying Club, its role during the Second World War (including Dunkirk, Dieppe, D Day and combating the V1 menace), early jet flights, Skyways, and the 6 lives lost during a parachute club accident in the 1980s. He said that many famous people had had connections with the Airfield, including Winston Churchill, Noel Coward, Roy Orbison, Edward Heath and Lawrence of Arabia. He asked the Panel not to allow such a glorious history to be buried beneath a housing estate.

(20) The Chairman thanked Mr Simpson for his presentation. He said that it was essential to understand that the Panel was not legally permitted to consider either the history of the application site or any alternative use to which it might be put in the event that registration did not take place.

(21) Mr Peter Gaston, a local resident said that he had lived in Lympne since 1980. He said that flying had ceased at the Airfield in 1981/82 and that since then it had been used for dog walking and other leisure activities. In fact the land had been freely used since the end of the Second World War.

(22) Mr Gaston then said that Lympne was witnessing increasing industrial development, including an expanding industrial estate. The Airfield represented a buffer zone between this estate and the village and needed to be maintained as an open area rather than becoming swallowed up for housing and other economic development planned by Shepway DC.

(23) Mr David Plumstead from *Shepway Environmental Community Network (SECN)* (applicant) said that he had lived in Lympne for 45 years and that he had witnessed the destruction of important buildings, fields and wildlife. The SECN had come together in order to put a stop to the destruction of this part of the world. He quoted from Article 1 of the KCC Constitution: "The overriding role of the County Council is to improve the quality of life of the people of Kent." The most appropriate way of achieving this role in Lympne would be to register the application site as a Village Green.

(24) Mr Plumstead then referred to paragraph 51 of the report which described a significant conflict of evidence, absence of evidence and considered the possibility of reference to a Public Inquiry. He said that the sentiments of this paragraph called the integrity of the people of Lympne into question.

(25) Mr Plumstead then turned to paragraph 52 of the report. He said that the *Beresford 2003 Case* had established that the mere management of the land did not imply that use had not been as of right. It was necessary, instead, for the landowner to show that use had been contentious. He questioned the significance of sheep grazing on the land as this activity had not prevented access. He also disputed that the erection of signs by the landowner was in any way relevant. This was because

use by force would only have been demonstrated if they had been torn down and damaged.

(26) Mr Plumstead also disagreed with the interpretation placed in the report on the evidence given to the 2000 Public Inquiry on a contested planning application. Although there had been only one recorded reference to recreational use of the site, this was because the Planning Inspector had not asked questions about it.

(27) Mr Plumstead continued by saying that the report used the words “would have materially interrupted...” when analysing the impact of various works, including the installation of a gas main in 2008. He commented that this was mere surmise. He believed, on the other hand, that because only 7 people had mentioned this in their statements, the general use of the site would have continued uninterrupted at all times.

(28) Lastly, Mr Plumstead said that the erection of the stile by the landowners should be seen as an inducement to local residents to the south east of the site to take advantage of a commonly used facility – rather than as an indication of permissive use.

(29) The Commons Registration Officer commented on Mr Plumstead’s presentation by saying that the installation of the stile had been accompanied by a notice, which had definitely indicated that the landowner was permitting use. She did not consider that local expectations should be raised by holding a Public Inquiry because the landowner had already provided sufficient evidence to demonstrate that use of the land had been contentious before the stile was put up.

(30) Mr Philip Jones from the Somerstone Group of Companies addressed the Panel as the landowner. He said that it had always been the intention Phides Estates to develop the land for residential purposes. The land had always been maintained for this very reason. The fences had been maintained through the qualifying period, although he accepted that this work had not been consistently carried out. However, he had been able to provide the officers with sufficient evidence of bills and invoices to demonstrate the point. “No Trespassing” signs had been in place throughout the 1990s and people had needed to break down the fencing in order to gain access. He therefore believed that there was ample evidence to prove that use had not been “as of right”. He agreed with the conclusions in the report and also believed that there was no need for a Public Inquiry as this would needlessly raise people’s hopes and involve his group of companies in a great deal of unnecessary energy, effort and expense.

(31) Mr Pascoe asked whether there was any confirmation of the existence of a “No Trespassing” sign. The Commons Registration Officer replied that this had taken the form of a Statutory Declaration in 2002.

(32) Mr Craske said that this was clearly an important historical site and that the carefully constructed report had given the application full and appropriate consideration. He considered that the critical question was whether use of the site had been “as of right.” The application failed because of the fencing and signs (and their remains) that had been put up and also because the installation of the stile proved that later use had been with permission.

(33) On being put to the vote, the recommendations of the Head of Regulatory Services were carried unanimously.

(34) RESOLVED that the applicant be informed that the application to register land known as the former Airfield at Aldington Road in the parish of Lympe as a new Village Green has not been accepted.

## **9. Application to register land known as Fisherman's Beach at Hythe as a new Town Green**

*(Item 4)*

(1) Members of the Panel visited the application site before the meeting. The visit was attended by Mr D Plumstead (the applicant), Councillors Mrs R Griffith and A Mayne accompanied by the Clerk, Mrs M McCormick from Hythe TC, Mr C J Capon (Local Member) and some 10 local residents.

(2) The Commons Registration Officer introduced the application which had been made under Section 15 of the Commons Act 2006. She confirmed that it was possible in Law to register a beach as a new Town Green, provided that the application passed all of the legislative tests. She confirmed that the Registration Authority could not take amenity or desirability criteria into account when deciding whether to register.

(3) The Commons Registration Officer confirmed that the consultation arrangements had been correctly carried out. Hythe TC had stated that it neither supported nor opposed the application but that it wished for a non-statutory Public Inquiry to be held in order to give the residents the opportunity to make their views known. Mr C J Capon (Local Member) had expressed his support for the application, as had the Hythe Neighbourhood Forum.

(4) The Commons Registration Officer went on to describe the application site. The land had been acquired by Shepway DC in 1984 and had been used as a working beach for local fishermen. The site was now set out differently to the way it had been before. Formerly there had been 30 huts, but the beach was now used less intensively.

(5) At this point, Mr J Chambers from Shepway replied to questions by the Chairman and other Members by saying that an area of the site had been fenced off to enable Channel contractors to deal with cyanide contamination on the beach. The area in question would be capped and have its shingle levels raised. A number of huts had been demolished and tenancies had not been renewed since March 2010. This was because the District Council intended to develop the land north of the track. This meant that they could only provide huts for 9 fishermen and the Seabrook Sea Angling Association.

(6) The Commons Registration Officer resumed her presentation by outlining the objections from Shepway DC. These were that the site had not been in continuous use for twenty years as some parts of it had been permanently occupied by huts and boat berths for all or part of the qualifying period; that use had not been by a significant number of local residents; and that use had not been "as of right" as the Council had made intensive use of the land for other purposes.

(7) Shepway DC had included 3 statutory declarations in support of its objections. These included the District Council's Estate Management Officer (Mr P Marshall) who had made many visits to the beach to carry out site inspections. He had stated that a heavy duty metal gate (with padlock) had been installed in 2002 next to Griggs Fishmongers on Range Road. This had been accompanied by a notice reading "No Unauthorised Access". Three further notices had been erected in 2003. These read "Caution – Working Beach Beyond This Point – Be Warned of Possible Dangers Surrounding Boat Winching Operations – This Beach is not Recommended for Bathing."

(8) The Commons Registration Officer moved on to consider the legal tests. The first of these was whether use of the land had been "as of right." She considered that this test had been met because the area of land had not been fenced off and the wording of the signs neither contested recreational use nor signified that such use was permissive.

(9) The Commons Registration Officer briefly set out that the evidence submitted in support of the application suggested that the land had been used for the purposes of lawful sports and pastimes; that it had been used by a significant number of inhabitants of the electoral ward of Hythe Central in Hythe; and that application date of August 2010 was well within the two year grace period prescribed by Law after use of the land became contentious in May of that year.

(10) The Commons Registration Officer then turned to the question of whether use had taken place over a period of twenty years or more. The qualifying period was 1990 to 2010. Shepway DC claimed that since 1984, significant areas of the beach had been used by its tenants for fishing activities. The fishermen's huts would have prevented public access to those portions of land on which they were sited. Shepway DC also believed that large portions of the rest of the site had often been temporarily unavailable for recreational use due to the launching of boats and storage of fishing equipment. These activities had created numerous interruptions to use throughout the relevant period.

(11) The applicants, however, maintained that there had always been recreational use of those areas occupied by boat berths, fishing nets and equipment. This was because they were continually on the move and did not remain in the same position for long or return to the same spot on the beach after each landing.

(12) The Commons Registration Officer summed up her presentation by saying that due to the conflicting nature of the evidence before her, she was unable to determine whether recreational use had continued uninterrupted throughout the relevant twenty year period. For this reason, she was recommending the setting up of a non-statutory Public Inquiry to clarify the issues.

(13) Councillor A Mayne from Hythe TC said that there was overwhelming support for the application in the Town. Councillor Mrs R Griffith said that in her view all the legal tests had been met and the application should be accepted.

(14) Mrs M McCormack (Clerk to Hythe TC) said that the Town Council believed that most of the tests had been met. However, as there was an element of doubt in respect of the 20 year period, the best way to proceed was through the holding of a

Public Inquiry. This would give everyone the opportunity to give their evidence and make their views known.

(15) Mr D Plumstead (applicant) began his presentation by saying that Fisherman's Beach had been home to the Lifeboat Service in the 1800s. The Wakefield family had replaced the original self-righting lifeboat shortly before the Second World War. The beach was an important part of Hythe's heritage and local people felt very protective about their long-established rights to it.

(16) Mr Plumstead then said that the local residents placed far greater value on Fisherman's Beach for its history and ability to attract visitors than on the returns from any future development. Local people enjoyed the disparate collection of pots and nets. This was particularly true of the school children who loved to draw the interesting shape and colours.

(17) Mr Plumstead drew attention to the gradual whittling down of the number of fishing licences issued by Shepway DC, before saying that nobody paid any attention to the notices put up by the District Council as they were not sure what their purpose was supposed to be.

(18) Mrs C Chivers (Head Teacher of Hythe Bay CEP School) said that her school was no more than 50 metres from Fisherman's Beach. The children had no play spaces apart from the Beach and needed the opportunity to visit it as often as possible. KCC's Outdoor Education Unit encouraged the School's pupils to visit Fisherman's Beach and it had become the hub of its curriculum delivery (particularly in respect of artwork). If the Town Green application succeeded, it would enable many more generations of pupils to learn to understand the heritage, beauty and heart of Hythe.

(19) Mrs Z Kenyon (local resident) said that she had lived in Hythe since 1959 and visited Fisherman's Beach at least once a month. This was true of a number of her friends.

(20) Mr K Jones (local resident) said that he was able to confirm that the fencing that Members had noted before the meeting had been put up 2 ½ years earlier. He also said that Shepway DC had proposed moving the fishermen towards the Rifle Ranges and that they had been threatened with losing their licences if they objected.

(21) Timothy Morshead QC spoke on behalf of Shepway DC. He said that it was Shepway DC's ambition to preserve Fisherman's Beach in order to maintain the certainty of continuing fishing in Hythe. He then asked the applicant to consider whether he had fully realised the potential consequences of registration. For example, there would be no possibility of preventing exercise and recreation in any lawful form, whilst erecting a building or disturbing the beach would be an offence under the Victorian statutes which protected Village Greens.

(22) Mr Morshead asked whether the applicant would be prepared to withdraw his application and produce a revised version which only included the area of shingle and the beach. This was because the application as it stood was too ambitious and could also put fishing at risk.



(23) The Chairman asked Mr Plumstead whether he wished to withdraw the application. Mr Plumstead replied that he wished to continue with it.

(24) Mr Chambers (Shepway DC) said that the District Council's plans for Fisherman's Beach had involved relocating the fishermen and Griggs Fishmongers to the west end of the site. To achieve this they had offered them the western huts which had stood empty. They had been happy with the new arrangement.

(25) Mr C J Capon (Local Member) said that he was the Chairman of the Hythe Neighbourhood Forum, which fully supported the application. He had on numerous occasions invited Shepway DC to send representatives to these meetings, but so far no one had come. If they had done so, they would have realised the strength of feeling in support of registering the application site as a Village Green.

(26) Mr Capon then said that he was very disappointed that rather than come to the Neighbourhood Forum to discuss local concerns, the District Council had chosen to come to the Panel meeting accompanied by a Barrister. Mr Morshead's contribution had possibly put doubts in the applicants' minds, whilst making them an offer (that should have been made much earlier) to enter into discussions.

(27) Mr Capon concluded his remarks by repeating his invitation for Shepway DC to come to meetings of the Hythe Neighbourhood Forum and to listen to its views and those of the Town Council.

(28) Mr Pascoe said that he had personally used Fisherman's Beach as a photographer. He had not been prevented from doing so. He then asked Mr Morshead for clarification of his remarks regarding the future of the fishing activities on the land.

(29) Mr Morshead replied that if Fisherman's Beach were registered as a Town Green, there was a risk of moving from a position of certainty about the site's future to a position of quite considerable uncertainty.

(30) Mr Craske said that the Panel's only consideration had to be the application itself, rather than any possible consequences. He believed that four of the legal tests had been passed but that the fifth test needed further examination. He therefore moved the recommendations, seconded by Mr I S Chittenden.

(31) On being put to the vote, the recommendation set out in paragraph 57 of the report was carried unanimously.

(32) RESOLVED that a non-statutory Public Inquiry be held into the case to clarify the issues.

## **10. Application to register land known as Round Wood in the parish of Boxley as a new Village Green** (Item 5)

(1) The Panel considered a report by the Head of Regulatory Services concerning an application by Boxley Parish Council to register land known as Round Wood as a new Village Green.

(2) The Commons Register Officer explained that the Parish Council now wished the application to be withdrawn as the Landowner, Kent County Council had offered to voluntarily dedicate a much larger parcel of land. This land included all of the area of the application with the exception of the parcel of land next to Windfell Close, which was being considered for development.

(3) The Commons Registration Officer recommended to the Panel that it would be fair and reasonable under the circumstances to allow the Parish Council's original application to be withdrawn in favour of the determination of the new application.

(4) RESOLVED that the applicant's request for the withdrawal of the application to register land known as Round Wood in the parish of Boxley as a new Village Green be agreed.

#### **11. Application to register a new Right of Common at Southborough Common** *(Item 6)*

(1) The Committee considered a report by the Head of Regulatory Services concerning an application by Dr P Stookes to amend the Register of Common Land for unit CL35 to enable him to exercise the right of estovers (the right to collect firewood) over the whole of Southborough Common.

(2) The Commons Registration Officer informed the Panel that based on the evidence provided, she was satisfied that the applicant was entitled to make the application and that the owner had consented to the creation of the new right of common.

(3) RESOLVED that:-

(a) the applicant be informed that the application to amend the Register of Common Land to register a new right of common has been accepted; and

(b) the Register of Common Land for Unit CL35 be amended accordingly.