REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the The Large Hall, Swalecliffe and Community Association, 19 St John's Road, Herne Bay CT5 2QU on Tuesday, 26 February 2013.

PRESENT: Mr M J Harrison (Chairman), Mr R A Pascoe (Vice-Chairman), Mr H J Craske and Mr R J Lees

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

UNRESTRICTED ITEMS

7. Application to register land at Ursuline Drive at Westgate as a new Village Green

(Item 3)

(1) The Panel Members visited the application site before the meeting. This visit was attended by Mr Graham Rickett (applicant) Mr Tony Skykes (Westgate Residents Association), Mr Tom King (Local Borough Councillor) and Mr R G Burgess (Local Member).

(2) The Commons Registration Officer introduced the application which had been made under Section 15 of the Commons Act 2006 by Mr G Rickett. The application had been accompanied by 71 user evidence questionnaires, a petition containing 177 signatures and a letter of support from the Westgate and Westbrook Residents Association. During the consultation period, Thanet DC had raised no objection, whilst the local District Councillor had written to express her full support for the application.

(3) The Commons Registration Officer then said that the landowner was the Dane Court Grammar and King Ethelbert School Trust. Their solicitors (Winckworth Sherwood LLP) had written on their behalf to object to the application. Their grounds for objection were that the use of the site had not been “as of right” because verbal challenges had been made by the landowner; that such use had been insufficient to indicate to a reasonable landowner that a continuous right was being asserted; that the evidence provided was “skeletal and deficient”; that the overgrown state of the site supported the contention that use of the site had been minimal; and that the neighbourhood identified by the applicant was insufficiently cohesive to qualify as such. The solicitors had also suggested that the application should be referred to a Public Inquiry before a decision was made.

(4) The Commons Registration Officer then went on to consider the legal tests. The first of these was whether use of the land had been “as of right.” She said that there was a conflict of evidence in that the supporters of the application had given no indication of having been challenged and that there had been no prohibitive notices or other restriction to use of the site during (and beyond) the period in question. The

landowner, on the other hand, contended that use of the land by students would have been by implied licence; that a number of events had been given specific permission; and that verbal challenges had been made to dog walkers. Three members of staff had provided statements to this effect.

(5) The Commons Registration Officer gave her view that the evidence as a whole suggested that use had taken place "as of right" but that further investigation would be needed on the question of verbal challenges before an informed conclusion could be reached.

(6) The second test was whether use of the land had been for lawful sports and pastimes. The user evidence suggested that the land had been used for a wide range of recreational activities. The landowner, however, contended that use had been skeletal and deficient and that it was not clear whether such use as had been attested had actually taken place on the site itself (as opposed to the wider area).

(7) The landowner had suggested that the overgrown nature of the site indicated that use must have been limited. The applicant's response was that the long grass referred to by the landowner had occurred during the wet summer of 2012 (outside the period in question).

(8) The Commons Registration Officer said that there was a clear conflict in evidence, giving rise to two different versions of events. As such, it would require further investigation.

(9) The Commons Registration Officer then turned to the test of whether use had been by a significant number of inhabitants of a particular locality or neighbourhood within a locality. She said that the applicant had identified an area of housing in the vicinity of Ursuline Drive as a neighbourhood within the locality of Westgate-on-Sea Ward. The landowner had challenged this on the grounds that the area in question lacked the cohesiveness and collective facilities necessary for it to be described as a neighbourhood. This aspect of the test would need to be further tested as it could not be resolved based on the paper evidence.

(10) The Commons Registration Officer said that it was also impossible to come to an informed conclusion as to whether a significant number of people had used the land. The applicant had provided 71 user evidence forms, whilst the landowner contended that there had only be occasional use. The differences in recollection could only be resolved by further testing the evidence.

(11) The Commons Registration Officer then said that use had clearly taken place up to the date of the application. It had also taken place over a period of twenty years (although this had to be taken in the light of the landowner's comments.)

(12) The Commons Registration Officer concluded her presentation by saying that in the light of the numerous conflicts of evidence, her recommendation was that there should be a non-statutory public inquiry in order that the issues could be clarified.

(13) In response to questions from Mr Pascoe, the Commons Registration Officer said that although the neighbourhood claimed by the applicant was a small area, there was no case law setting a lower limit on the size that a neighbourhood had to

be. The footpath that went around the land in question was not recorded as a Public Right of Way.

(14) Mr Graham Rickett (landowner) provided the Panel with a document which addressed the question of neighbourhood. He then addressed the objections to the application made by the landowner (summarised in paragraph 16 of the report). He said that although the landowner's solicitors had provided evidence of verbal challenges to dog walkers, these statements had not actually specified which field these had been issued on. From some of the descriptions given, he considered that the most likely venue for these challenges had been the Pavilion Field rather than the application site itself.

(15) Mr Rickett then said that the existence of 71 user evidence forms, together with the statements contained within them adequately demonstrated that there had been sufficient use to indicate to a reasonable landowner that local residents were asserting a continuous right. The evidence given was, in his view, far greater than "skeletal and deficient" and the statement made by the landowner about the overgrown state of the site was not relevant because it related only to the year 2012 which was outside the application period.

(16) Mr Rickett went on to say that the landowner was wrong to rely on the implied licence for students, as their circumstances were completely different from the public who were claiming to have used the land "as of right."

(17) Mr Rickett referred to both the *Beresford* and the *Barkas v North Yorkshire County Council* cases which, he said, had established that informal recreation on land owned by a local authority could not be considered as use "by right."

(18) Mr Rickett then said that the landowner's representations about the overgrown nature of the site were contradicted by photographs of the site taken in October 2011, showing the site with the grass having been cut. He said that the School always cut the grass and had continued to do so until the wet summer of 2012.

(19) Mr Rickett said that the reason he had put forward the area of housing in the vicinity of Ursuline Drive was because he had been advised to do so by KCC and also because it was a Neighbourhood Area which contained a pub, hardware store, fish and chip shop, Chinese takeaway. It also had a shared general space, which taken together with the local shops ensured that it was a cohesive unit.

(20) Mr Rickett said that the report quoted the judgement in the *R v Suffolk County Council, ex parte Steed* case. This judgement had been widely criticised as being "judge-made law." *The Commons Registration Officer explained that, although the judgement had been overturned, the particular quotation that appeared in paragraph 49 was still commonly quoted to demonstrate the need for the legal testes to be "properly and strictly proved."*

(21) Mr Rickett concluded his presentation by saying that he believed that the Panel had sufficient evidence to agree the registration. This would be beneficial to both the School and the community. The local residents would share the costs of upkeep and would always defer to School use. The area was full of natural beauty, which was the reason that the application enjoyed the support of Thanet DC, Westgate and Westbrook Residents Association, the Kent Wildlife Trust, the Thanet

Countryside Trust as well as the local residents both through the 71 user evidence questionnaires and the 177 signature petition.

(22) The Countryside Access Principal Case Officer clarified that the land would continue in the School's ownership if registration took place. However, it would not be able to take any action on its land to disrupt its use by local people for lawful sports and pastimes.

(23) Mr Tony Sykes (Westgate and Westbrook Residents Association) said that the Residents Association fully supported the application and would consider it to be a great loss if the land were to be developed. He considered that an unnecessary cost would be incurred if the County Council decided to refer this matter to a Public Inquiry. English Nature recommended that there should be 2 hectares of open space per 1,000 head of population. This part of Thanet had half that amount.

(24) Mr Tom King (Thanet District Councillor) said that Westgate was the second most deprived area in the County. In addition, the 2010 National Health reports showed Thanet faced with 50 deprivation indicators. Registration of the land as a Village Green would be of great benefit as an aid to inclusiveness. The land was used for picnicking and had always been well kept up until the wet summer of 2012.

(25) The Commons Registration Officer confirmed in response to a question from Mr Craske that the case of need for a Village Green was not one which the Panel was legally entitled to consider.

(26) Ms Collette McCormack (Winckworth Sherwood LLP) said that the lack of objection to the application from Thanet DC was due to the fact that it was within the Green Wedge. The District Council would therefore have no objection on planning grounds. It could not, though, be surmised that the District agreed with the legal case for registration. She added that if land was held under statute for certain purposes, it must follow that use by the public must be "by right" rather than "as of right." The land in question had a hardstanding and had also been the subject of lettings during the school holidays for such activities as police dog training. No charge had been made for these lettings. She concluded by saying that the application should be refused as it was clear that the required tests had not been met.

(27) Mr Luxmore (Executive Head Teacher) said that of the land were registered as a Village Green he would not be able to allow the pupils to use it. If this happened, the School would still need to maintain it. In effect, this would lead to the children paying for the upkeep of a Village green with no benefit to them. He added that people had been ejected from the land on occasions such as Sports Days.

(28) The Commons Registration Officer commented that the effects of registration were not a matter that the Panel could take into account in reaching its decision. She considered that there was a conflict of evidence and that the landowner's claim to have asserted his right to the land by ejecting people on occasions was not supported by any evidence at this stage. A Public Inquiry was the only way of testing the evidence provided by all parties.

(29) Members of the Panel commented that the evidence provided by each party was disputed by the other, and that there was no possibility of coming to a safe conclusion at this point. The only tests that had clearly been met were that the land

had been used for twenty years up to the date of the application. The question of whether the land had been used as of right for lawful sports and pastimes by a significant number of residents of a neighbourhood within a locality could not be definitively answered.

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

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

8. Application to register land known as Grasmere Pastures at Whitstable as a new Village Green
(Item 4)

(1) The Panel visited the application site before the meeting. This visit was attended by Mr Paul Watkins (landowner) and Mr Michael Lewer (Objector).

(2) The Chairman informed the Panel that he was the Local Member for the site in question. He had not discussed the Grasmere pastures issue with the applicant Mrs Watkins. Nor had he given any help or advice to any supporter of the application. He was therefore free to approach its determination objectively and impartially. He asked whether anyone present had any objection to him chairing the meeting for this item. As no one did raise any objection, the meeting continued with Mr Harrison in the Chair.

(3) The Commons Registration Officer introduced the application which had been made under Section 15 of the Commons Act 2006. The land in question was owned by OW Prestland Ltd (represented by Mr Watkins). This company was, in turn owned by Kitewood Estates (represented by Mr Michael Lewer.)

(4) The Commons Registration Officer continued by saying that the application had been considered by a Panel in February 2011 and that the decision had been taken to refer the case to a non-statutory Public Inquiry. The Inspector had produced a 350 page report in November 2012.

(5) The Commons Registration Officer went on to summarise the Inspector's findings. She had firstly considered the question of whether use had been "as of right." She had heard a great deal of evidence in relation to the taking of the annual hay crop and had concluded that (whilst the landowner had tolerated public use outside the growing season between May and September each year) use by the public during the growing season had largely been confined to the footpaths and their perimeters. Such usage had been discounted by the Inspector for the purposes of considering whether the applicant had been able to demonstrate sufficient qualifying use.

(6) The Inspector had also considered a considerable amount of evidence in respect of fencing, notices and mounds dug around the perimeter. Even though the small area in the north west corner had been excluded from the application, the Inspector had concluded that a locked gate had been erected at this potential entrance. She had also found that two "Private Property No Trespassing" notices had been put up in September 2004 at the earliest. She had accepted that the fencing

and mounds had not been in place after the qualifying period had ended (i.e. 14 September 2004).

(7) The Inspector's overall conclusion had been that the landowner had taken sufficient action to convey to a reasonable user that his use had become contentious. As a result, she had found that use had not been "as of right" during the growing period or during the latter part of the twenty year period.

(8) The Commons Registration Officer went on to consider the Inspector's findings in respect of whether the land had been used for the purposes of lawful sports and pastimes. The Inspector had concluded that the level of use of the site had been restricted at the beginning of the relevant period during the growing season. Had any other activities taken place at this time, they would have damaged the crops and would need to be viewed as criminal damage rather than as a lawful sport or pastime. She had therefore made the determination that the use during the growing season during this period had been associated with the public rights of way rather than as an assertion of a general right to recreate over the whole of the land.

(9) The Inspector had accepted that South Tankerton and Chestfield were qualifying neighbourhoods within the locality of Canterbury City Council's administrative area. She had, however, decided on the evidence provided that whilst there had been a significant level of use during the latter part of the qualifying period she could not agree that a significant number of inhabitants from the neighbourhood had used the whole site during the growing season in the early part of the qualifying period.

(10) The application had been made on 14 September 2009. In order for it to be able to succeed, use would have needed to continue for a 20 year period up to five years before the application had been made. This would have required use to have continued until 15 September 2004. The Inspector had found that use had ceased to be "as of right" on the day that the "no trespassing" signs had been erected on 8 September 2004. For this reason, the application had failed (albeit by only one week) to meet the required test. The Inspector had also found that use had not taken place over a 20 year period (as a result of her findings in respect of the growing season during the early part of the application period.)

(12) The Inspector's overall conclusion had been that the application should fail because the applicant had been unable to satisfy her that there had been sufficient use of the land between 1984 and 2004 to have given the appearance of the assertion of a right to use the whole of the site for lawful sports and pastimes; and because the landlord had taken steps to communicate to a reasonable that use was contentious shortly before the end of the qualifying period on 15 September 2004.

(13) The Commons Registration Officer said that the Inspector's full findings had been sent to interested parties for comment. The applicant had commented that the Inspector had made a number of fundamental errors in her approach. These had been, firstly that she had applied her own "reasonableness" test in deciding whether use had been "as of right" instead of simply considering whether use had been without secrecy, force or permission. The second perceived flaw was that the Inspector should not have discounted use of the tracks across and around the application site. The third was that there was no evidence that anyone had knowingly caused damage to crops during the growing season. A certain amount of wear and

tear had nevertheless occurred as a result of the lawful sports and pastimes that had taken place. The applicant also considered it to be wrong in law to exclude hay meadows from registration as a village green merely because people kept off the crop whilst it was growing. The final criticism was that the erection of two signs when there were six entrances should not be seen as an attempt by the landowner to take all reasonable steps to contest use by the public.

(14) The Commons Registration Officer said that the applicant's criticisms had been submitted to a different Counsel for further comment. His advice had been that there had been little substance to the applicant's criticisms and that there was no reason to depart from the Inspector's findings.

(15) The Commons Registration Officer said that in the light of the findings of the Inspector and the second Counsel, she took the view that registration of the land should not take place. She therefore recommended accordingly.

(16) Ms E Sherratt (Kent Law Clinic) addressed the Panel on behalf of the applicant. She said that the Inspector had found (in paragraph 17.45 of her report) that substantial use had taken place, but had moved on to had misdirect herself by applying the "reasonableness" test, as the *Lewis* case had superseded this approach.

(17) Ms Sherratt then said that use of two entrances was insufficient to convey to the public that use of the land was contentious. Most of the public entered via The Ridgeway, where no sign existed. This indicated that the efforts of the landowner to stop use were not proportionate to the level of use taking place and were therefore insufficient to indicate that a challenge was being made.

(18) Mr Michael Lewer addressed the Panel in opposition to the application. He referred to Ms Sherratt's quotation of paragraph 17.45 of the Inspector's report and asked the Panel to note that the "significant number of local residents" who had used the site had done so "outside the growing season." Her previous paragraph (17.44) had indicated that she was "not satisfied that the level of use of the land at the beginning of the relevant period during the growing season was such that it would have appeared to a reasonable landowner to have the character of the assertion of a public right to use the whole of the application land for recreation rather than the assertion of a public right of way across the tracks." Mr Lewer said he considered the Inspector's comments in these two paragraphs to be entirely consistent with her findings.

(19) Mr Paul Watkins (landowner) said that he disagreed with Ms Sherratt's view that the erection of the two signs had not been sufficient to indicate that a challenge was being made to local use. The applicant's bundle had referred to a local Parish Council meeting shortly after the signs had gone up. The minutes from that meeting had recorded that lots of local residents had come to this meeting in order to give their views about the erection of these signs.

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

(21) RESOLVED that, for the reasons set out in the Inspector's report dated 11 November 2012 and the further advice from Counsel dated 31 January 2013,

the applicant be informed that the application to register land known as Grasmere Pastures at Whitstable has not been accepted.