# REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Lympne Village Hall, Aldington Road, Lympne CT21 4LE on Tuesday, 3 December 2013.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mrs V J Dagger and Mrs E D Rowbotham

ALSO PRESENT: Miss S J Carey

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer) and Mr A Tait (Democratic Services Officer)

## UNRESTRICTED ITEMS

**20. Application to register land at Folkestone Racecourse in the parish of Stanford as a new Town or Village Green**
*(Item 3)*

(1) The Panel Members visited the site of the application prior to the meeting. This visit was attended by the applicant, Mr D Plumstead; Mr K Bultitude, Chairman of Stanford PC; and the landowner's representatives, Mr R Mr S Charles and Mr R Longstaff-Tyrell.

(2) The Commons Registration Officer began her presentation by saying that the application had been made by Mr D Plumstead under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 30 user evidence questionnaires and various plans and photographs showing the application site. The site itself was some 9 acres in size and was bounded on its northern side by a public footpath. Access to the site was through the main entrance to the racecourse on Stone Street.

(3) The Commons Registration Officer then described the responses from consultees. Stanford PC had written in support of the application. Shepway DC had written in opposition, as it considered that the application was without merit and stating that it wished to see the area developed in future.

(4) The Commons Registration Officer continued by saying that the landowners were Folkestone Racecourse Ltd. They were represented by K&L Gates LLP who had objected to the application on the grounds that use of the site had not been by a significant number of the residents of the locality; that a number of the recreational uses referred to by the users had not taken place on the site, as this would have been impossible due to the use of the land for car parking; that use for formal events had been with the permission of the landowner; that informal use had been contentious by virtue of various challenges; and that use had taken place in the evenings and at weekends when the landowner would not have had the opportunity to challenge it.

(5) The landowner had also provided a statutory declaration from Mr R Longstaff-Tyrell, who had been responsible for maintenance of the site and had visited it monthly between 1997 and 2005. He had challenged access to the racecourse made by local residents via the rear access gates and had challenged a jogger in the mid 2000s. He had also stated that gates had been erected in 2006 together with signs prohibiting dog walking.

(6) The Commons Registration Officer moved on to consideration of the individual tests for registration to take place. The first of these was whether use of the land had been "as of right". She said that although the landowner contended that use of the land for formal events had been permissive, it was the applicant's contention that this use was not relied upon for the purposes of establishing "as of right" use. There was in fact no evidence to suggest that the landowner had granted permission to anyone to engage in *informal* recreational activities on the site.

(7) The Commons Registration Officer then referred to Stanford PC's newsletter of December 2009 which referred to the landowner's change in attitude towards informal use. It noted that "*the racecourse has for many years been used by residents to walk, jog or exercise their dogs but in recent months this has been prevented*." Whilst this clearly demonstrated that by late 2009 the landowner had communicated his clear resistance to that use, it also appeared that use of the land in question had indeed taken place "as of right" until mid 2009 when the landowner's change of approach had taken place.

(8) The Commons Registration Officer turned to the question of whether use of the land had been for the purposes of lawful sports and pastimes. She said that the user evidence forms gave evidence of blackberrying and ball games. She noted that the landowner claimed that many of the witnesses were unclear as to the boundary of the application site and had given evidence of activities which could not have taken place on the application site itself. She had, nevertheless, concluded that there was sufficient evidence to indicate that the application site had been used by local residents for the purposes of lawful sports and pastimes.

(9) The next test was whether use had been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality. The Commons Registration Officer said that this test had been met because Westenhanger qualified as a neighbourhood within the administrative parish of Stanford, and the user evidence provided by 30 local residents was sufficient to indicate to the landowner that the land was being used for recreational purposes.

(10) The Commons Registration Officer had previously referred to the Stanford Parish newsletter of December 2009 which had accepted that informal use of the site had begun to be challenged (and therefore become contentious) in the middle of that year. She then said that the date of application (shown at Appendix B to the report) was 6 June 2012. This meant that the application had been made outside of the two-year period of grace set out in section 15 (3) of the Commons Act 2006. This meant that the application had failed the test of *"whether use of the land "as of right" by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application."*

(11) The Commons Registration Officer briefly confirmed that the evidence submitted in support of the application demonstrated that use had taken place over the twenty year period between 1989 and 2009.

(12) The Commons Registration Officer concluded her presentation by saying that the application had to pass all of the tests set out in the Commons Act 2006 in order to succeed. As the application had not met the test of having been made within the required two-year grace period, it had failed to do so. She therefore recommended that registration should not take place.

(13) Mr K Bultitude (Chairman of Stanford PC) said that the Parish Council had challenged the landowner's change of attitude to recreational use of the site in November 2009. The landowner had confirmed that there would be no softening of its position. The purpose of the newsletter of December 2009 had been to urge restraint whilst the PC looked for lawful means to enable the residents to regain their lost rights. The Parish Council had then decided to begin the process of registration as a village green and had asked Mr Plumstead of the Shepway Environmental and Community Network to manage the process on its behalf.

(14) Mr Bultitude went on to say that Mr Plumstead had organised the compilation of evidence and had contacted him in August 2011 to conform that the application was ready for despatch and requesting a letter of endorsement. Mr Bultitude had written this on 1 September 2011 and addressed it to the Commons Registration Officer. As far as Stanford PC was concerned, the application was therefore ready by that date.

(15) Mr Bultitude continued by saying that it now appeared (to the surprise of the Parish Council) that the application had not been submitted until June 2012. This was well after two years after 2009 which was believed to be the time when the racecourse had imposed a ban on public recreation. This was the only reason why the application appeared to have failed.

(16) Mr Bultitude questioned whether the date of November 2009 had been established within law as the beginning of the prohibition. The issue had certainly become contentious at that time and the parish council had accepted it in the spirit of conciliation and because it felt powerless to confront the resources of Arena Leisure. He asked whether this was sufficient proof in law to establish that use of the land was no longer "as of right." He added that no formal notification had been on display at that time, declaring that use was now prohibited.

(17) Mr Bultitude commented that notices prohibiting dog walking had been displayed in 2009, but that the report made it clear that this was not sufficient to prevent other forms of recreation. No other public notices had been displayed until the last few days and no notice had been given in public places such as the local media. Indeed, the report made no mention of the racecourse asserting that it had done so. He therefore submitted that Arena Leisure had not established a watertight legal prohibition on public recreation in 2009 and had not done so since. If this was the case, the application would not be out of date and ought to be allowed.

(18) Mr Bultitude concluded his presentation by saying that the report accepted every aspect of the applicant's case with the exception of the time lapse between the date of the ban and the date of submission. Accordingly, he asked the Panel to

accept the application or, failing this, to adjourn the meeting so that the timing and legal reality of the ban could be professionally evaluated.

(19) In response to Mr Bultitude, the Commons Registration Officer said that the Parish newsletter of December 2009 had not only referred to dog walking, but also to walking and jogging. The Law did not insist on the landowners putting up notices and placing advertisement in the local media. It only required them to take sufficient action to demonstrate to the public that informal use was being challenged. The text of the December 2009 Parish newsletter proved that this had been achieved.

(20) Miss S J Carey (Local Member) said that it was sad to see that the case was likely to fail on a technicality. She could understand that the landowners would wish to stop dog walking but this seemed to be the only activity that had been challenged.

(21) The Chairman noted that there had been a challenge to blackberrying in 2007.

(22) Mr D Plumstead (applicant) said that the relationship between the landowners and the Parish Council had always been comfortable and that the Parish Council had taken pains to ensure that this continued. He accepted that challenges had taken place in 2009 but noted that there had been no record of any formal prohibition. It would not create any material difficulty if the Panel adjourned to look into the legal position as requested by Mr Bultitude.

(23) Mr R Longstaff-Tyrrell (Arena Racing Company) made representations on behalf of the landowner, Folkestone Racecourse Ltd. He said that he was a building surveyor and property executive, responsible for general estate management issues and had been associated with Folkestone Racecourse since 1983.

(24) Mr Longstaff-Tyrell said that Arena had sought advice from the law firm K&L Gates in the preparation of its representations, and in opposing this application. He had made two statutory declarations, both dated 1 March 2013 which were submitted as part of the representations of the landowner opposing the application.

(25) One of the statutory declarations included the draft declaration of the racecourse manager at Folkestone Racecourse from June 2003 until December 2012. She had been responsible for the everyday running of the racecourse until being made redundant in December 2012 on the closure of the racecourse. It had become evident in February 2013 that she no longer wanted to assist Arena in respect of the application. However, having referred to e-mails that she had sent over the preceding three years, he was able to confirm that the contents of her draft declaration were correct to the best of his knowledge.

(26) Mr Longstaff-Tyrell then said that Arena agreed with the recommendation that the application should be refused. Section 15(3) of the Commons Act 2006 provided that an application could only be made if the use of the land 'as of right' had ended no more than two years prior to the date of the application. He referred to the extract form the Parish Council's December 2009 newsletter in Appendix D of the report. The Parish Council in this newsletter accepted that local people did not have a right to go onto the Folkestone Racecourse site. It stated that "*health and safety complicates all our lives and we have had to accept the new regime*". it was Arena's view that local people had never had a right to go onto the site, and that the "new regime" was just an enforcement of Arena's existing position.

(27) Mr Longstaff-Tyrell then refered to Appendix B of the report where the application form was set out, dated 1 June 2012. As the Parish Council accepted that informal public use of the site had ceased by December 2009 and the application form was dated more than 2 years after this, failure to submit an application within the statutory time period allowed was certainly a “knock out blow” to their application, and to allow this application would be contrary to the Commons Act 2006. He noted that the applicant had stated in Box 4 of the application form that the application was made under section 15 (2) of the Commons Act. If the Parish Council accepted that its use had ceased by December 2009, then an application made under that section could not succeed.

(28) Mr Longstaff-Tyrell went on to say that Arena did not accept the Officer’s view, that each of the criteria necessary for a site to be registered, had been satisfied. This was because the burden of proof rested with the applicants to show that each of the legal tests had been satisfied. K&L Gates had referred in their statement to a Court of Appeal judgement dealing with a village green application. The Case Judge had stated that "*it is no trivial matte*r" for a landowner to have land registered as a village green, and that accordingly all criteria had to be "*properly and strictly proved*". The designation of this area of the racecourse as a village green would restrict the options for the future use of the racecourse, greatly reducing any development options or relocation of racecourse facilities.

(29) Mr Longstaff-Tyrell said that the standard of proof that the applicant had to reach was that "*on the balance of probabilities*" all of the necessary criteria had been satisfied. The representations submitted by Arena set out in detail, why each of the criteria had not been “*properly and strictly proved*.” He then highlighted a few key points in support of his view.

(30) Mr Longstaff-Tyrell said that clearly some of the witnesses in Appendix C did not know which area of land was the subject of the application, as several references had been made to gates at the end of their garden opening onto the racecourse.

(31) Mr Longstaff-Tyrell added that reference has also been made to a number of activities that could not have taken place without the knowledge of landowner. These were a boot fair, the East Kent Show, annual village cricket matches, the pony club, pigeon racing, use by Brownies and Guides, camping, a scout jamboree, a jazz festival, fireworks on bonfire night, a circus, an antiques market, a spanish horse exhibition, stock car racing, a fun fair and a car show. These were events that local people would have been invited to attend and access would have been by the permission of Arena. Therefore the use was not “as of right”, and did not satisfy that criterion. He said that many of the witnesses were clearly under the misapprehension that attending such events constituted “as of right” use, whereas it was, in fact with consent, payment or invitation.

(33) Mr Longstaff-Tyrell then said that if the representations that referred to use on other parts of the racecourse were ruled out, together with those which Arena had given permission for, then the remainder of witnesses did not constitute a significant number of residents from a neighbourhood within a locality. He referred to Appendix C of the report and said that if similar names were grouped together as representing one household, the number of dwellings represented stood at 15. A further three

names had moved away during the relevant period, giving a net figure of 12 (or perhaps 13). As there were approximately 60 dwellings in Stone Street, this represented some 21% of the community. He added that 50% of the entries were by dog walkers who had the opportunity of using a public footpath, but evidently preferred the car park.

(34) Mr Longstaff-Tyrell turned to the question of whether use had been contentious. He said that Folkestone Racecourse employees had over the years told local people on all parts of the racecourse to leave. He added that some of the respondents to the applicant's questionnaires referred to being challenged by the Racecourse. One witness had written "*saw a resident of Westenhanger being stopped and verbally challenged when he was jogging in the green area in, I believe, 2009*", and another had written "*I was yelled at (from a distance) in 2008*". A third witness had written "*a man in a range rover informed me that Arena Leisure did not carry public liability insurance if I injured myself*". It was therefore clear from the applicant's own evidence that informal use of the site had been challenged and contested by Arena, and therefore such use could not be considered "as of right".

(35) Mr Longstaff-Tyrell said that the application site had been without a formal fenced enclosure, both for the convenience of the racecourse residents and in order to retain the open nature of the landscape. Access to Westenhanger Castle and Farm Cottages could not be restricted. The gates fronting Stone Street had been erected in 2007, partially in order to welcome racegoers to Folkestone Racecourse but, equally, so that the site could be securely closed down if required.

(36) Mr Longstaff-Tyrell said that there was a public footpath which passed through the racecourse and Westenhanger Castle. At the start of the footpath adjoining Stone Street there were two signs stating that there should be no dogs on the racecourse. These signs had been there for a considerable time. Taking account of the now redundant corporate colours and the condition of the signs, he was of the opinion that they had been erected in the late 1990s. They were still quite legible and in a prominent position. They had simply been ignored.

(37) Mr Longstaff-Tyrell added that from about 2007 to the present time, signs had been put up on the Stone Street gates specifically aimed at dog walking, because it had become a problem.

(38) Mr Longstaff-Tyrell concluded his presentation by saying that Arena did not believe that the applicant had established on the balance of probabilities that each element necessary to satisfy the tests for registration of land as a village green had been satisfied. None of the criteria had been properly and strictly proved. Although Arena did not accept the report's conclusion that village green use had been established, it agreed that the applicant's failure to submit the application within the correct period was a "knock out blow". Arena therefore requested that the Panel should refuse the application because the applicant had not proved all of the criteria necessary to establish the existence of a village green and because, in any event, the application had been submitted out of time.

(39) The Chairman advised that the evidence from the former manager of Folkestone Racecourse was inadmissible as it had not been signed.

(40) Mr M Woolford (a local resident) said that he could not recall when the signs had gone up. However, they referred to dogs not being permitted on the racecourse and he had understood this to mean the actual track itself.

(41) Mr Longstaff-Tyrell said that "the racecourse" meant the entire area owned by Folkestone Racecourse, including the application site.

(42) The Commons Registration Officer agreed with Mr Longstaff-Tyrell that the user evidence forms indicated that the witnesses also understood that the prohibition on dog walking referred to the entire area.

(43) Mr Bultitude asked what the Commons Act had to say about publicity for a prohibition on recreational use. The report indicated that the December 2009 Parish newsletter had the force of Law. He considered that something more was that required and that there were legal precedents which suggested that notices were needed to establish the fact.

(44) The Commons Registration Officer replied to Mr Bultitude by saying that the "as of right" test consisted of three elements. These were that use had to be without force, stealth or permission. Use by force did not necessarily have to be physical force. If the landowner had done enough to clarify to the public that informal use was contentious, it was considered that such use was by force. Rights could only be acquired if the landowner did nothing to assert his right to prevent it. Case Law had established that there was no requirement to put up notices to prevent use by force and use could become contentious by other means. Notices were only necessary if the landowner wished to indicate that use was with permission, and that this permission could be revoked.

(45) The Chairman asked whether there had been a special car parking charge to get into the application site on race days. Mr Longstaff-Tyrell replied that parking had been free for race patrons. The entry fee had been for the entire racecourse, regardless of whether they brought their cars onto the site.

(46) Mr Plumstead said that he had personally taken part in an afternoon-long formal cricket match on the site during the period in question. Mr Longstaff-Tyrell replied that this must have been in 1987 when the pitch had been cut by the landowner's groundsman. This use would have been with permission.

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

(48) RESOLVED that the applicant be informed that the application to register land at Folkestone Racecourse in the parish of Stanford has not been accepted.