REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Council Chamber, Sessions House, County Hall, Maidstone on Tuesday, 19 May 2015.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mrs V J Dagger, Mr A D Crowther and Mr T A Maddison

ALSO PRESENT: Mrs T Dean, MBE

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

UNRESTRICTED ITEMS

4. Application to register land known as The Glebe at Goudhurst as a Village Green

(Item 3)

(1) The Chairman informed the Panel that the Local Member, Mr A J King had sent his apologies owing to a clash with other Council business. He had expressed his support for the application.

(2) The Commons Registration Officer began her presentation by saying that the application had been made by Mr E Bates under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. Objection had been received from the Landowner (Canterbury Diocesan Board of Finance). The Panel had considered the application in September 2013 and had referred the matter to a non-statutory Public Inquiry. The Inspector had produced a detailed report dated 25 September 2014.

(3) The Commons Registration Officer went on to summarise the Inspector's findings in respect of the tests that had to be met in order for registration to take place. The first of these was whether use had been "as of right."

(4) The Inspector had examined the landowner's contention that use of the land had been by force because two of the entrances had been created by users creating a hole in the hedge. The Inspector's conclusion on this point was that although this may well have been the original method of entry, those who had used it afterwards had done so without knowledge of the original damage and that the gaps were sufficiently wide for them to have continued to use these entry points without force.

(5) The Inspector had also considered whether use had been with permission. The landowner had contended that (as in the *Barkas* case) the land had been set aside for the purposes of public recreation and was therefore incapable of registration. The Inspector had concluded on this point that there had been no power conveyed by statute upon which the landowner was seeking to rely in this case (section 507A of the Education Act 1996) to allow local authorities to make playing

fields available other than to those receiving primary or secondary education. The *Barkas* case therefore did not apply in this instance.

(6) The Inspector had also considered another point raised by the landowner that the village fete had been held on the site every summer. This had involved people gaining admission by buying a programme. On one occasion, the Parish magazine had advertised the event as taking place "*by kind permission of the head teacher.*" The Inspector's conclusion had been that the fete committee had been acting in the same way as any other local inhabitant and that (crucially) permission to hold the fete had not been sought from the landowner. It could not, therefore, be inferred that use had taken place through implied permission. Use of the land had consequently been "as of right" up to the fete in June 2011.

(7) The Commons Registration Officer then informed the Committee that the Inspector had concluded that there was a great deal of evidence to demonstrate that use of the land had been for the purposes of lawful sports and pastimes.

(8) The Inspector had considered the test of whether use had been by a significant number of inhabitants of a particular locality or neighbourhood within a locality. The applicant had relied on the parish of Goudhurst as the locality and the Inspector had agreed that this was correct. She had also agreed that the land had been in general use by the community throughout the period in question and that this use had increased after the construction of a gravel path along the northern and western edges of the site in 1998.

(9) The Inspector had also found that the date when use had ceased to be as of right was June 2011. The application had been made in November 2011, well within the two year period of grace which had applied at the time. Use of the land had taken place well in excess of the necessary twenty period.

(10) The Inspector's overall conclusion had been that all of the necessary tests had been met. She had, however, recommended that it would be prudent to await the conclusion of the *Newhaven* case, as this would have a bearing on the question of "statutory incompatibility." The reason for this was that the landowner held the land under powers contained in the "*Endowments and Glebe Measures 1976.*" The landowner contended that registration as a village green would prejudice the execution of the landowner's duties under the Measures. Following the judgement of the Supreme Court, the Inspector had concluded that registration would not be incompatible with the landowner's statutory duty as set out in the Measure because that duty was not dependent on the land being free from constraint to any potential future development.

(11) The Commons Registration Officer said in conclusion that she had carefully considered the Inspector's findings and that she recommended that registration should take place.

(12) Mr E Bates (applicant) briefly expressed his gratitude to the many local residents who had formed a residents group in support of the application and given evidence at the Public Inquiry. He also wished to thank the Inspector and the Commons Registration Officer for their helpfulness and patience throughout the process.

(13) On being put to the vote, the recommendations of the Commons registration Officer were carried by 4 votes to 0.

(14) RESOLVED that for the reasons set out in the Inspector's reported dated 25 September 2014, that the applicant be informed that the application to register land known as Glebe Field at Goudhurst has been accepted and that the land subject to the application be registered as a Village Green.

5. Application to register land known as Whitstable Beach as a Village Green

(Item 4)

(1) The Chairman informed the Panel that he was the elected Member for Whitstable. He had not taken part in any debate or discussion on this item and was able to approach its determination with a completely open mind.

(2) The Commons Registration Officer began her presentation by saying that the application had been made by under section 15 of the Commons Registration Act 2006 by Mr P McNally on behalf of the Whitstable Beach Campaign.

(3) The Commons Registration Officer went on to say that the majority of the application site had been the subject of an application submitted in 1999 under rg Commons Registration Act 1965. This application had been refused following a Public Inquiry on three grounds. Two of these grounds were no longer applicable because the land which had become available for use as a result of the sea defence works of 1988/89 had now been in existence for well over the necessary 20 year period; and because it was no longer necessary to be able to demonstrate that use had been *predominantly* by residents of the neighbourhood or locality.

(4) The Commons Registration Officer then said that the third reason for rejecting the original application had been that a letter from the landowner had been published in the local newspaper in 1993 stating that the Whitstable Oyster Fishery Company had "*always encouraged people to use the beach*" and that "*dog-owners are welcome to use the beach..*" The question as to whether this letter was relevant to the present application needed to be explored further.

(5) The Commons Registration Officer continued that the Whitstable Oyster Fishery Company had objected to the application on seven grounds which included that of statutory incompatibility. The Company had been created by statute. Its view was that unlimited access to the beach by local people would be incompatible with its statutory functions.

(6) A further objection had been received from Canterbury CC (which owned a small part of the land). The main grounds were that registration would impede its ability to undertake coastal protection works under section 4 of the Coast Protection Act 1949. The City Council was therefore relying on the argument of statutory incompatibility as established in the *Newhaven* case.

(7) The Commons Registration Officer then turned to the legal tests, The first of these was whether use of the site had been "as of right." The applicant disputed the relevance of the April 1993 letter because it pre-dated the 20 year period of the

current application and because the original decision had, in any case, pre-dated the outcome of the *Beresford* case, which it had been held that permission had to be communicated and irrevocable. The landowner, on the other hand, contended that the effect of the April 1993 letter had continued after that date and that it would be wrong to consider that the permission conveyed within that letter had expired as soon as it was written. The Commons Registration Officer added that there were a number of issues in dispute, including whether the effect of the landowner's objection to the 1999 application had been sufficient to render any subsequent use as contentious (and therefore not as of right).

(8) The Commons Registration Officer then said that there was also a dispute between the landowner and the applicant over the identity of the locality. The applicant had originally named Whitstable as the locality but had then sought to amend the application so as to rely on four different neighbourhoods within this locality. The landowner considered that permitting the applicant to amend the application in this way was detrimental to the landowner. This view was disputed by the applicant.

(9) The Commons Registration Officer moved on to give greater detail of the objections relating to the "statutory incompatibility" question, which had been informed by the outcome of the *Newhaven* case. The landowner's position was that it wished to invest in new infrastructure, but that this would be rendered impossible if registration took place because they would be prevented from erecting the necessary small structures on the beach. The City Council contended that it had a statutory to carry out coastal protection work and that this would be rendered impossible due to the Victorian statutes that protected Village Greens, and would also leave the City Council vulnerable to any injunction taken out by a local person who objected to such works taking place.

(10) The applicant argued that there was no case of statutory incompatibility because the *Newhaven* case was not concerned with an outside body (such as Canterbury CC) which might wish to exercise statutory powers on the land in question.

(11) The Commons Registration Officer then turned to the overarching question as to whether the County Council was able to consider the application at all, given that it had already made a judgement on this matter. This was on the common law principle of *res judicata (a matter already judged).* The applicants did not believe that this principle applied in this case because the application differed from the original one; because "issue estoppel" (which prevented a litigant from raising an issue already raised in a previous case between the same parties) did not apply; and because the law itself had evolved considerably since the 1999 application.

(12) The Commons Registration Officer explained that she had sought advice from Counsel on this case, asking whether the application ought to be rejected without further consideration in the light of the landowner's comments. Counsel had replied that no "knockout blow" had been delivered to the application. She had shared this advice with both the applicants and the landowner who had each concurred with that advice.

(13) The Commons Registration Officer concluded her presentation by saying that, owing to the many areas of legal complexity and dispute, the most effective way of

determining the application was to refer the matter to a Public Inquiry in order to clarify the issues. She recommended accordingly.

(14) On being put to the vote, the recommendations of the Commons Registration were agreed by 4 votes to 0.

(15) RESOLVED that a Public Inquiry be held into the case to clarify the issues.

6. Application to register land at Langney Drive at Kingsnorth as a Village Green

(Item 5)

(1) The Commons Registration Officer briefly explained that the application had been made by Kingsnorth PC under section 15 of the Commons Registration Act 2014. During the consultation process, Ashford BC had provided evidence which demonstrated that the land in question was held in part under the provisions of section 10 of the Local Government Act 1976 (which gave power to a local authority to provide such recreational facilities as it saw fit); and in part under section 9 of the Open Spaces Act 1906 (which gave power to a local authority to acquire and maintain land as open space). The Borough Council had consequently contended that recreational use had taken place "by right" and not "as of right."

(2) The Commons Registration Officer then said that Kingsnorth PC fully accepted Ashford BC's position. She had informed the applicants that the County Council ought still to formally to determine the application. She therefore recommended that the application should be refused. This was agreed unanimously.

(3) RESOLVED that the applicant be informed that the application to register land at Langney Drive at Kingsnorth as a Village Green has not been accepted.

7. Application to register land known as Marlowe Road Green at Larkfield as a Village Green

(Item 6)

(1) The Commons Registration Officer briefly reported that the application for voluntary registration had been made under section 15 (8) of the Commons Act 2006 by East Malling and Larkfield PC. As such, the legal tests which needed to be met were far less onerous than was normally the case.

(2) The Commons Registration Officer confirmed that the necessary legal tests had been met in that a Land Registry search had confirmed that the application site was wholly owned by the Parish Council and that the qualifying locality was the civil parish of East Malling and Larkfield.

(3) Mrs T Dean was present for this item under Committee Procedure Rule 2.27. She said that the application was a very straight forward matter and that there had been no local objection to the principle of registration.

(4) RESOLVED that the applicant be informed that the application to register the land known as Marlowe Road green at Larkfield has been accepted and that the land subject to the application be registered as a Town or Village Green.

8. Application to register land known as Coldblow Woods and Sports Ground at Ripple as a Village Green

(Item 7)

(1) Mr S C Manion informed the Panel that he was the Local Member for this application. He had taken no part in any discussions of the application except to advise the applicants who to contact within KCC. He was therefore able to approach the determination of the application with a completely fresh mind.

(2) The Commons Registration Officer began her presentation by saying that it had been made by Mr R Chatfield under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The site consisted of two plots of land. The northern section had been owned by the MoD until it was sold to Ledger Farms in the 1970s. The southern section had also been owned by the MoD until being sold to a local family in 1992.

(3) The Panel had considered this application on 26 November 2013 and had decided to refer it to a Public Inquiry in order to clarify the issues. The Public Inquiry had been held in June 2014. The Inspector had produced a report in October 2014. Following consideration of comments made by both parties, a revised, final version was issued on 30 March 2015.

(4) The Commons Registration Officer moved on to describe the Inspector's findings in respect of the individual tests for registration to take place. The first of these was whether use of the land had been "as of right". The main issue had been whether use had taken place by force. In this instance, the pertinent question was whether the use had been contentious. The Inspector had accepted the previous landowner's evidence that he had erected fencing in 1992 and had also put up notices, but had considered that these had been "feeble" and insufficient measures to deter walkers from recreating on the site. She had concluded, accordingly that this test had been met.

(5) The Commons Registration Officer turned to the question of whether use of the land had been for the purposes of lawful sports and pastimes. The Inspector had decided to discount evidence of fruit picking as it had not been possible to determine whether this activity had taken place for commercial purposes. She had nevertheless concluded that, generally speaking, lawful sports and pastimes had taken place to some degree.

(6) The Inspector had also considered whether the walking activities which had taken place constituted "rights of way type use" or lawful recreation. The distinction between the two was whether people were walking between two points or generally recreating. There were three paths on the site, two of which did not have specifically defined routes or destinations. The third path did, however, fulfil the "rights of way criteria." The Inspector had therefore discounted use of that particular path. Her overall conclusion was that the overall usage could be considered as qualifying use for Village Green registration.

(7) 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 Inspector had found that the ecclesiastical parish of Walmer was a legally recognised administrative unit which was capable of registration.

(8) The Inspector had heard evidence that Travellers had gained unpermitted entry onto the site in 1999. They had left by August 2000 at the latest. During this period, a number of anti-social activities had taken place, including the burning of cars, raves, human waste and household rubbish. She had also considered contemporaneous newspaper articles which had described the site as a "rubbish tip" and had suggested that people were not going to the area at the time. As a result of the evidence given during the Public Inquiry, she had concluded that the number of people on site during this period (both in the area of the Traveller encampment and the woodland) had diminished to such an extent that it could not be considered that a significant number had recreated on the site.

(9) The Commons Registration Officer briefly explained that the application had been made in November 2012. Use had been challenged in August of that year in the northern section and in October 2012 in the southern section by prohibitive notices and the erection of barbed wire fencing. The Inspector had therefore agreed that the application had been made within the two year grace period as set out in the Commons Registration Act at that time.

(10) The Commons Registration Officer then said that the Inspector had concluded that the final test of whether use had taken place over a period of twenty years or more had not been met due to the interruption of use in 1999/2000 as described in (8) above. As a result, the application had failed, in her view to meet all the legal tests required for registration to be able to take place.

(11) The Commons Registration Officer concluded her presentation by saying that she had carefully considered the Inspector's findings and that she had agreed with her conclusion that the tests had not been met. She therefore recommended accordingly.

(12) The Chairman asked whether, in the light of the recommendation, any of the parties wished to address the Panel.

(13) Mr Roger Chatfield (applicant) addressed the Panel. He said that the Inspector's report had failed to acknowledge a number of witnesses. He accepted that New Age Travellers had used the site from 1996 to 2000 but added that, in his view, the period of disruption by other Travellers had only taken place for a few weeks in the summer of 1999. He then referred to paragraph 185 of the Inspector's report in which the Inspector had inferred that a number of witnesses had not been on the site during the period of disruption. This had been disputed by one of the witnesses herself, who had said that she had been present during that time and had seen the burnt out cars, which had not interfered with her use of the area. All in all, there were 7 witnesses who had testified to their presence for recreational purposes during this period, although the Inspector had decided they had not been there.

(14) Morag Ellis QC spoke on behalf of the landowners. She said that the reasons for rejection of the application set out in paragraph 191 of the Inspector's report referred to the meadow part of Site A where the encampment had been. The usage

that Mr Chatfield had described had taken place in the woodland area and had no bearing on this aspect of the findings because the Inspector had found other reasons for discounting the woodland itself. She then said that paragraph 200 of the Inspector's report clarified that the witnesses Mr Chatfield had referred to were all describing the New Age Travellers rather than the disruptive Travellers. She urged the Panel to accept the Inspector's findings as they had been reached following a great deal of detailed consideration of a great deal of evidence.

(15) Mr Chatfield asked the Panel to note that four witnesses had testified that the disruptive Travellers had only been at the site for a very short period and that this had not deterred them from using the site. This contrasted with the Inspector's assumption that the Travellers had been there for a much longer time.

(16) Mr Manion paid tribute to Mr Chatfield's work in preparing and promoting the application. He added that whilst it was clear that there had been a great deal of use of the site for recreational purposes, the Panel had to act according to the Law which required this use to be uninterrupted.

(17) On being put to the vote, the recommendations of the Commons Registration Officer were carried unanimously.

(18) RESOLVED that for the reasons set out in the Inspector's report dated 30 March 2015, the applicant be informed that the application to register land known as Coldblow Woods and Sports Ground at Ripple as a new Village Green has not been accepted.