

KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Hythe Sports Pavilion, South Road, Hythe CT21 6AR on Wednesday, 27 February 2019.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr P M Harman, Mr J M Ozog and Mr R A Pascoe

ALSO PRESENT: Mr R C Love, OBE and Mr M E Whybrow

IN ATTENDANCE: Mr C Wade (Principal Legal Orders Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

1. **Application to register land known as Hythe Green at Hythe as a new Town or Village Green**
(Item 3)

(1) The Panel Members visited the application site prior to the meeting in order to familiarise themselves with the land in question. This visit was also attended by a small number of residents and representatives from Hythe TC. The Principal Legal Orders Office pointed out the cast iron plaque which detailed the gift of the land covenant in 1862 to the Town Council and that the land was reserved for public recreation.

(2) The Principal Legal Orders Officer introduced his report by saying that the application to register Hythe Green at Hythe as a new Town or Village Green had been received from Mr D Plumstead on behalf of the Shepway Environment and Community Network on 11 March 2016. The application had been made under Section 15 of the Commons Act 2006 which allowed any person to apply to the Commons Registration Authority to register land as a Village Green where it could be shown that a significant number of inhabitants of any locality, or any neighbourhood had indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. The application also had to demonstrate that use of the land had continued as of right until at least the date of application.

(3) After briefly describing the consultation arrangements and the layout of the site in question, the Principal Legal Orders Officer said that the application had included 44 user evidence questionnaires in support. Further support had been received from the Local Member, Mr M J Whybrow. Hythe TC (the Landowner) had objected by stating its view that the Legal Tests for registration had not been met.

(4) The Principal Legal Orders Officer moved on to consideration of the legal tests themselves. The first of these was whether use of the land had been “as of right.” He said that the House of Lords’ judgement in the *Sunningwell* case had defined this term as meaning that people had used the land without force, secrecy or permission. In this case, there was no question of force or secrecy having been used. It was therefore crucial to establish whether use of the land had taken force with permission, which would mean that use had been “by right” rather than “as of right.”

(4) The Principal Legal Orders Officer said that when considering a Village Green application in relation to local authority owned land, it was important to identify the powers under which it was held. If it was held specifically for the purposes of public recreation, then use of the site would usually be by virtue of an existing permission. In this case, the Town Council had objected on the grounds that the users of the site had been doing so by virtue of a historical covenant. It also considered that by hosting events on the site and asserting a right to exclude the public from the land or parts of it, use of the site had been interrupted, whilst the Landowner had also evidenced its intention not to dedicate it for use as a Town or Village Green.

(5) The Principal Legal Orders Officer then said that the land had originally been sea before silting up and becoming a beach. In 1853, land adjoining the application site was sold by the Town Council’s predecessor (The Corporation) to several private individuals who were subject a Covenant ensuring observance and compliance with certain conditions. One of these stated that the application site was *reserved by the Corporation for those purposes or other similar uses for the benefit of the public in perpetuity ...No part of that piece of land is to be hereafter applied to building purposes.*” This condition had been strengthened by a specific covenant in 1862.

(6) The Principal Legal Orders Officer said that it seemed clear that the application site had been historically owned by the Town Council and its predecessors who had ensured recreational use by the public at that time. The site continued to be provided by the Town Council as a recreation ground and there was nothing to suggest that it was no longer held by the Council for this purpose.

(7) The Principal Legal Orders Officer then referred to the judgement of Lord Neuberger in the 2011 *Barkas* case which set out that a local authority had the power to provide a recreation ground and that if it did so, it would be absurd to regard the public as trespassers under those circumstances.

(8) The Principal Legal Orders Officer concluded in respect of the test that there was little doubt that the site had originally been acquired and that it continued to be held by the Town Council for the purpose of recreation. Thirty-three of the witness statements had attested to knowledge of the cast iron plaque erected at the boundary of the site. He therefore concluded that use of the land had taken place “by right” and not “as of right.” This conclusion was supported by the fact that the Corporation of Hythe had made specific Byelaws in 1883 under

Section 59 of the Hythe Improvements and Waterworks Act 1974 with respect to Public Pleasure Grounds, of which the application site was a part.

(9) The second test was whether use of the land had been for the purposes of lawful sports and pastimes. The Principal Legal Orders Officer referred to the activities claimed to have taken place on the site. These included dog walking, playing with children, kite flying, ball games, cycling, picnics and jogging. This indicated that the land appeared to have been used for a range of lawful recreational activities.

(10) The third test was whether use had been by a significant number of a particular locality or a neighbourhood within a locality. The Principal Legal Orders Officer said that the applicants had relied on the electoral South Ward of Hythe. The majority of the witnesses came from this area and case law had established that a "locality" should consist of some legally recognised administrative division.

(11) The Principal Legal Orders Officer then said that 35 of the users had attested to using the land on a regular basis and that there were nearly always other people on the site at the same time. This meant that the number of people using the land in question had been sufficient to indicate to the landowner that the land was in general use by the community. Therefore, the site had been used by a significant number of inhabitants from within Hythe and/ or the electoral ward of South Ward, Hythe.

(12) The Principal Legal Orders Officer briefly informed the Panel that use of the application site (whether "By right" or "as of right" had continued up to and beyond the date of the application. He then asked the Panel to note that the year 2017 which appeared in paragraph 39 of the report should read "2016." Use of the site had indeed taken place for a period of well over 20 years.

(13) The Principal Legal Orders Officer concluded his presentation by saying that the crux of the matter was whether use of the site had taken place "as of right" or "by right." The evidence strongly suggested that the site was under the ownership of Hythe TC and had been reserved for public recreation. The current Registered Title showed that Hythe TC owned the land and the provision of Byelaws was further strong evidence to prove that the land had been held for the purpose of public open space. This represented a "knock-out blow" to the possibility of registering the land as a Village Green. He therefore recommended that the application for registration should not be accepted.

(14) Mr Adan Ewart-James (Hythe TC) said that he had lived in Hythe for 40 years. During this time, he had seen improvements to the site being put in place by Hythe TC. These had included the creation of paths, hardstanding and floodlights, a gate on the southern boundary, an extension to the car park and portable toilets. The land was used for boot fairs, circuses, Hythe Festival Week and dog shows. All of these activities required an application to be made to the Town Council. He added that the application had been triggered by Shepway DC's application to construct a swimming pool. This had been withdrawn because the District Council had chosen not to challenge the Covenant. All the evidence pointed to use of the land being "by right" rather than "as of right."

(15) Mr R Love (KCC Member for Cheriton, Sandgate and Hythe East) said that he considered Hythe Green to be a recreation ground for the whole of Hythe rather than simply its South Ward. He added that he had used the site as a child in the 1970s because of the play equipment installed by the Town Council. This demonstrated that use had always been with permission. He believed that the application should be rejected to enable the continuation of its use by the community as a whole.

(16) In response to a question from the Chairman, Mr Love said that he had never considered that he was technically trespassing on the land because of the equipment that had been installed there by the Town Council.

(17) Mr M Whybrow (Local Member) said that the application had arisen due to the application by Shepway DC to erect a swimming pool and leisure centre on Hythe Green. Hythe TC had supported the plan when it came forward. They were now saying that Village Green status would prevent the Town Council from holding boot fairs. He had checked with KCC whether this was correct and now believed that this was not the case as the judgement in the *Lewis v Redcar 2010* case was that events that whatever events took place prior to registration could continue to do so. He then suggested that the best course of action would be for Hythe TC and the local residents to seek a mutually-agreed solution. This had recently happened in Dymchurch under similar circumstances.

(18) The Principal Legal Orders Officer commented on the question of whether boot fairs could continue as before following registration. He explained that this question had not been specifically considered by the courts, although various Judges had looked at it in part. The *Lewis v Redcar* case had seen the Judges deciding that local residents recreating on the golf course could co-exist with the golfers and that this would be able to continue as a matter of “give and take.”

(19) Cllr Keith Miles (Hythe TC) said that he had marshalled many events on Hythe Green. He concurred that it was used by all the people of Hythe and not just from South Ward.

(20) Mr Robert Bartlett (Local Resident) said that he used Hythe Green on a daily basis. He added that Hythe TC had indicated to him that the Covenant on Hythe Green was worthless. He was therefore determined that it should be protected and not disappear. He did not believe that the Town Council cared about the Green. It was the local residents who ensured that it was kept clean whilst the Town Council did not even empty the bins.

(21) Mr John Skinner (Hythe Green Preservation Society) said that he had spoken to a Hythe Town Councillor who had told him that the covenant was worthless. The Town Council itself had sought to discredit it but was now using its existence as an argument against registration.

(22) The Principal Legal Orders Officer replied to questions from Mr Pascoe by saying that it would be difficult legally to charge the public for events held on a Village Green. The Inclosure Act 1857 prohibited wilful damage to a Village

Green. He added that there were many matters that the Courts had not had the opportunity to rule upon and explained that KCC was not an enforcement authority for Village Green.

(23) The Principal Legal Orders Officer replied to a question from the Chairman by saying that KCC would not be able to consider a new application to register part of Hythe Green as a Village Green. Alternatively, Hythe TC had the option of applying for Voluntary Registration under Section 15 (8) of the Commons Act 2006. The tests needing to be met would be far less strenuous.

(24) On being put to the vote, the recommendations contained in paragraph 45 were unanimously agreed.

(25) RESOLVED that the applicant be informed that the application to register land known as Hythe Green as a Town or Village Green has not been accepted.

2. Application to register land known as Oakwood Park at Maidstone as a new Town or Village Green

(Item 4)

(1) The Principal Legal Orders Officer briefly set out that the application to register land known as Oakwood Park in Maidstone as a new Town or Village Green had been received on 25 January 2017.

(2) The Principal Legal Orders Officer explained that as part of the recent *R (Cotham School) v Bristol City Council 2018* case it had been established that there was no statutory incompatibility involved in registering a school playing field as a Village Green.

(3) The Principal Legal Orders Officer went on to say that the western part of the application site was owned by Kent County Council and leased to the St Augustine Academy. The eastern part was owned by Oakwood Park Grammar School, the land having been transferred to it by Kent County Council in 2011.

(4) The Principal Legal Orders Officer then said that responsibility for determining Village Green applications normally rested with KCC. There were, however, circumstances when it was not appropriate for County Council to do so. In such cases, the application had to be referred to the Planning Inspectorate for determination. This was a legal requirement rather than a matter for the registration authority's discretion. The circumstances when referral had to take place were set out in Regulation 26 (3) of the Commons Registration (England) Regulations 2014. Referral had to occur where:

“the registration authority has an interest in the outcome of the application or proposal such that there is unlikely to be confidence in the authority's ability impartially to determine it.”

(5) The Principal Legal Orders Officer continued by explaining that DEFRA had issued guidance to Commons Registration Authorities on how to interpret this legal requirement. This stated that:

“the registration authority should not refer a case simply because it has an interest in the outcome, but where the interest would seriously call into question the registration authority’s ability to determine it impartially...”

(6) The Principal Legal Orders Officer then set out the previous two instances when the Panel had referred cases to the Planning Inspectorate. In February 2011, the application at The Long Field at Cranbrook had been referred as KCC owned the land and it had been the subject of a planning application for a new care home. Similarly, in March 2013, the Panel had referred an application of land at Bishop’s Green in Ashford because KCC (the landowner) had applied for residential development of the site.

(7) The Principal Legal Orders Officer said that the landowner had erected fencing which, through the exclusion of the public, benefitted the County Council’s use of the land for other purposes. This, in turn, meant that there was a clear conflict between the County Council’s positions as landowner and Commons Registration Authority.

(8) The Principal Legal Orders Officer informed the Panel that the objectors (including the County Council’s Property Team) had been actively engaging with the applicants in an effort to seek alternative access arrangements. Even if the applicants were to agree to withdraw the application, there was no absolute right for them to do so. The County Council would need to advertise the proposed withdrawal and the Panel would be faced with a decision on whether to permit withdrawal under circumstances which would be substantially to KCC’s advantage.

(9) The Principal Legal Orders Officer said that a precedent had been set in 2018 in the case of land known as Moorside Fields at Lancaster. This application had been referred to the Planning Inspectorate by Lancashire County Council who had objected as landowners because they wished to use part of the site as an extension to the school building. The fact that the Planning Inspectorate had gone on to determine the application meant (by inference) that they agreed that there was a sufficiently serious conflict between Lancashire CC’s function as the Commons Registration Authority and its capacity as landowner and Local Education Authority.

(10) The Principal Legal Orders Officer concluded by saying that it was his firm view that it would not be appropriate under the circumstances for the application to be determined by KCC and that the correct course of action would be to refer it to the Planning Inspectorate. He added that if the Panel disagreed with the recommendation, a further report would be presented to a future meeting of the Panel with a view to determining it.

(11) Mr Henry Clark (Gen2) said that he had been representing KCC and the two Schools involved in this matter. Fencing had been erected because the fields

constituted a safeguarding risk. The landowners had no problem in making a “by right” agreement outside school hours and would be writing accordingly to the local community.

(12) On being put to the vote, the recommendation set out in paragraph 33 of the report was unanimously agreed.

(13) RESOLVED that the application be referred to the Planning Inspectorate for determination.