**KENT COUNTY COUNCIL**

# 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 Wednesday, 21 November 2012.

PRESENT: Mr M J Harrison (Chairman), Mr A D Crowther (Vice-Chairman), Mr M J Angell, Mr S J G Koowaree and Mr R A Pascoe

ALSO PRESENT: Mr T Prater

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

**16. Application to register land known as Sandgate Escarpment in the parish of Sandgate as a new Village Green**
*(Item 3)*

(1) The Panel Members visited the application site prior to the meeting. This visit was also attended by Mr T Prater (Local Member), some 15 local residents, the landowner, Mr G Forge and his representative, Mr R Stevenson.

(2) The Commons Registration Officer introduced the application which had been made under section 15 of the Commons Act 2006. She confirmed that all the required consultation arrangements had been complied with before explaining that the original application had been amended by the applicant to exclude the areas owned by the MoD. The revised application area was shown on the map at Appendix C to the report.

(3) The Commons Registration Officer then said that 13 letters of support for the application had been received following consultation, together with 25 standard response form letters. Further support had been received from Shepway DC and Sandgate PC as well as Mr Prater, the Local Member.

(4) The Commons Registration Officer then set out the grounds for objection received from John Bishop Associates on behalf of Mr G Forge, the landowner. These were that the user evidence was insufficient to show that the land had been used by a significant number of residents of the locality; that use had been restricted to the Public Footpaths that crossed the application site; that parts of the land had been inaccessible to the public during all or part of the qualifying period; that prohibitive notices put up by the MoD rendered use of the site contentious; and that Military Byelaws provided a right of access for the public at large, rendering use of the site "by right" rather than "as of right."

(5) The Commons Registration Officer then 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 right in lawful

sports and pastimes on the land for a period of at least 20 years up to the date of application. This meant that the Panel had to consider whether every single test contained in section 15 of the Commons Act 2006 had been met.

(6) The first test was whether use of the site had been "as of right"; i.e without force, secrecy or permission. The landowner had produced a copy of the Shorncliffe and District Military Byelaws 1976 which gave the public permission to use all parts of the military lands which were not specially enclosed. Further research had, however, revealed that the byelaws had been made in exercise of the powers contained in the Military Lands Act 1892. This Act had specified that any byelaws made under its provisions had to be made publicly known locally. No evidence had been produced to demonstrate that this had been the case. Consequently, the existence of the byelaws could not be relied upon as proof that use had been with permission.

(7) The Commons Registration Officer turned to the question of use of the Public Rights of Way. She said that they had been provided in 1992 by the MoD and that there were also a number of defined tracks which were used in the same way (although not recorded as such). She said that the *Laing Homes* case had established that any use that was in exercise of the Public Rights of Way or otherwise had the appearance of being a public rights of way type use could not also be used to confer "as of right status" on land which was the subject of a Village Green application. In this instance, most of the evidence indicated that the claimed use had been walking. This, together with the generally overgrown nature of the site (apart from the clearing which Members had seen before the meeting) indicated that the claimed use had largely been restricted to walking along a handful of defined, linear tracks rather than general wandering across the whole of the application site.

(8) The Commons Registration Officer then examined the question of whether use had been "with force". She explained that signs at the western end of the application site had been erected by the MoD (probably in the 1970s). These read: "Danger Military Ranges Keep to the Path" and "MoD Property Danger Keep Out." This indicated that use of the site (especially in the earlier part of the application period) had been contentious, in clear defiance of the landowner's wishes, and therefore "with force."

(9) The Commons Registration Officer summed up her conclusions on the test by saying that use had been with force in some areas and by an existing right near the footpaths. Consequently, it had not been "as of right."

(10) The Commons Registration Officer went on to consider whether use of the land had been for the purposes of lawful sports and pastimes. As the majority of claimed use had been walking (which was an activity undertaken by the right to use the Public Footpaths) she explained that this use could not be identified as a lawful sport or pastime for the purposes of a Village Green application. Several of the witnesses had referred to use of the land as a shortcut to Sandgate High Street which was not a qualifying use. Blackberrying had taken place from the footpaths and was therefore associated with use of the public rights of way. Again, the heavily overgrown nature of the application site and steep incline made large areas of the application site inaccessible for the purposes of lawful sports and pastimes.

(11) The Commons Registration Officer then examined 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 specified Sandgate as the locality. Sandgate PC was a legally recognised administrative unit which meant that part of the test had been met.

(12) The term "significant number" simply meant whether there had been enough users to demonstrate that the land was in use. The number of people who had claimed to have used the land had certainly been sufficient for that purpose. However, this had to be set in the context of her comments about "by right" use of the Public Footpaths.

(13) The Commons Registration Officer said that the final two tests were whether use of the land had continued up to the date of application (June 2011); and whether this use had taken place over a period of twenty years or more. Whilst it was probable that the use had continued up to this point, the application date was June 2011. The user evidence, however, stopped at summer 2010. This meant that there was a one year gap when no one had claimed to have used the site. It was not open to the Authority to simply assume that the use had continued.

(14) The Commons Registration Officer then considered the question of whether any individual parcel of land was capable of registration. In her judgement none of them were because the western part of the site contained the "keep Out" signs erected by the MoD; the reservoir was unusable; the land between the Martello Towers was too overgrown for lawful sports and pastimes to have taken place; the allotment areas were inaccessible; and the northern spur unusable. This left the clearing area by the pillbox where there was insufficient evidence to demonstrate that use had been by a significant number of people from the locality.

(15) The Commons Registration Officer concluded her presentation by saying that the absence of user evidence for the last year of the claimed 20 year period was itself a conclusive reason to reject the application. Whilst this omission could be rectified, there was little point in doing so as the application failed to meet all the necessary tests to enable registration of the application site to take place in whole or in part.

(16) Mr David Cowell addressed the Panel as the applicant. He said that the tree covered hill sitting above the village of Sandgate was (with the coastline) an essential part of the geophysical features that defined the very essence of the community and its environment. It was the heart, soul and lungs of the community.

(17) Mr Cowell went on to say that he had applied to Kent County Council to register the land as a Village Green and had submitted evidence showing that a significant number of the inhabitants of Sandgate had indulged in lawful sports and pastimes on the land for a period of at least 20 years and that this use had continued 'as of right'.

(18) Mr Cowell then addressed the areas of disagreement that he had with the conclusions of the report. He said that the report's conclusions failed to take into account established case law with regards to contentious usage and the question of restricted access due to vegetation. He said that he would do this by examining the individual conclusions set out in paragraph 54 of the report.

(19) The first officer conclusion was that the use of the western end of the application site (beyond Martello tower 7) was in defiance of the clearly displayed

prohibitive notices erected by the MOD and that such use was contentious and could not be 'as of right'. Mr Cowell referred to the 2010 village green appeal *Betterment Properties (Weymouth) Ltd v Dorset County Council and Taylor*. The High Court had considered the effect of contentious use in the round, taking into account the effect of signs erected by the landowner, warnings off, and breaking down of fences. The judge had reviewed the law as to contentious use and had adopted the following test:

*"Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."*

(20) Mr Cowell said that the MoD had stated that they did not even know when the signs were erected. He asked the Panel to agree that the usage was not contentious because the owner of the land was not doing everything, consistent with his means and proportionately to the user, to contest and endeavour to interrupt the user during the twenty year period.

(21) The second officer conclusion was that the reservoir adjacent to Martello tower 7 was physically inaccessible and incapable of being used for lawful sports and pastimes, and that this had been the case throughout the relevant period. Mr Cowell said that he did not understand the relevance of this point as the reservoir was a covered water tank, with the land above it being accessible. This land had been used as of right by a significant number of people for the required twenty year period.

(22) Mr Cowell then said he would take the third, sixth and seventh officer conclusions together as they all related to vegetation and accessibility. These were:-

- Firstly, that the strip of land between the Martello Towers was densely covered with vegetation with access to it being largely restricted to walking along the Public Footpath, in exercise of an existing right and not 'as of right';

- Secondly, that the northern spur of the application, west of Military Road, consisted of a single defined path through a heavily vegetated area; such use being consistent with a rights of way type use rather than a wider recreational use; and

- Thirdly, that there was evidence that the remaining area of land had been used by children on rope swings or playing in the pill box, but that the area also included a steep slope and some densely vegetated areas which limited the scope of other recreational activities on this area. The evidence provided on the user evidence forms was non-specific (as it related to the whole of the application site) and, whilst there was some physical evidence of use, it was not clear that this area had specifically been used by a significant number of the local residents for recreational purposes.

(23) Mr Cowell said that (as the owner of a piece of land on the lower escarpment) he could assure the Panel that nature very quickly reclaimed what it considered its own and what was visible on this day was not what it would have looked like during the previous month or the previous year, let alone over the twenty year period.

(24) Mr Cowell said that, in the *Trap Grounds* village green application in Oxford which went before the House of Lords in 2006, the land was described as:

*"…….. nine acres of undeveloped land in North Oxford……The other two thirds ['the scrubland']…are much drier and consist of*
*some mature trees, numerous semi-mature trees and a great deal of high scrubby undergrowth, much of which is impenetrable by the hardiest walker.…Off this circular path there are numerous small paths through the undergrowth. Some peter out after a few yards. Some lead to small glades and clearings. I estimate that a total of about 25% of the surface area of the scrubland is reasonably accessible to the hardy walker. Not idyllic."*

In delivering the judgement in favour of the village green application, Lord Hoffman had quoted Mr Vivian Chapman, a member of the Bar and an expert in the law of commons and greens, who had said:

*"The city council argue that the scrubland is now so overgrown that the majority of it is inaccessible and that this in itself precludes registration as a green. As noted above, my estimate is that about 25% of the total area is reasonably accessible, the rest consisting of trees and scrub. In my view, the question whether land has become a town or village green cannot be determined by a mathematical assessment of the amount of the land which is open to recreation. Where the recreational use is informal and consists of activities such as walking, with or without dogs, children's play, exploring and watching wild life, I do not see why much more densely vegetated land should not be capable of being subject to recreational rights, either by custom or prescription. In my view, it is necessary to look at the words of the statutory definition and to ask whether the scrubland, considered as a whole, is land which falls within that definition. In my view, the evidence proves that the recreational use of the scrubland is, and has been over the relevant 20 year period, sufficiently general and widespread, by way of use not only of the main track but also of minor tracks, glades and clearings, to amount to recreational use of the scrubland viewed as a whole."*

(25) Mr Cowell said that he had visited the escarpment on the previous day and estimated that between 40% to the west and 80% to the east of the escarpment was useable. He therefore asked for the conclusion in the *Trap Ground* case to be applied to the Sandgate escarpment.

(26) The fourth officer conclusion was that the area surrounding Martello Tower 6 consisted of a Public Footpath and that such use was in exercise of an existing right (or was an activity associated with that right, such as blackberrying) and not 'as of right'. Mr Cowell said that although the importance of this land had been recognised by the establishment of rights of way, his evidence showed that the land in its entirety was used over the twenty year period. The rights of way merely provided some, but by no means the only ways of access.

(27) The fifth officer conclusion was that the area of land on the eastern boundary of the application site included some allotments which would not have been available for recreational use during the relevant period. Other parts were heavily vegetated and inaccessible. Mr Cowell said that the existing allotment had been excluded from his application and that his earlier comments applied to the reference to vegetation and inaccessibility. The Panel had a discretionary right to exclude the old, defunct

allotment land if it so wished.

(28) Mr Cowell then turned to the question of the twenty year rule, which the officer report suggested constituted a “knock out blow”. He said that he had explained in his application why there had been a delay in submitting the application. This explanation had been that a meeting had been held in August 2010 in the light of the likely challenged by the owner of the land, who had purchased it in 2004/5 from the MoD. This meeting had been attended by the owner, (who had called the meeting) who had made certain undertakings to allow the Sandgate community rights to a large part of the land and Martello Tower no 6. This had been confirmed in the minutes of that meeting (with full agreement from all parties). These promises had not materialised despite the Village Green application being delayed in good faith.

(29) Mr Cowell continued by saying that although the collection of evidence had started in mid July 2010, he had delayed filing the application (much against the advice of other residents) because he was awaiting the delivery of the promise from the landowner, which had not subsequently been forthcoming. He said that it was quite apparent that a new questionnaire would achieve the required outcome and asked for natural justice to prevail on this question or for the Panel to use its discretion to allow the evidence to be collected again.

(30) Mr Cowell concluded by asking the Panel to consider the legal tests in the light of the information he had provided. He believed that this showed (beyond the required balance of probabilities) that usage “as of right” had taken place for over twenty years. Granting village green status would therefore be a totally safe outcome.

(31) The Commons Registration Officer commented on Mr Cowell’s presentation by saying that whilst it was a matter of judgement for the Panel, it had been her view that signs reading “Danger Keep Out”, etc gave a sufficient indication that use of the land was against the landowner’s wishes and therefore contentious. In relation to the changing nature of the vegetation, she also said that she had visited the site in May and had found it more overgrown than at present. She showed the Panel photographs of the site taken during this visit and then commented on Mr Cowell’s views on the *Trap Ground* case by saying that that particular judgement had been made over an application where there had been no public footpaths. This had meant that there had been no confusion on the question of “by existing right” in that respect.

(32) Mr Robert Stevenson from John Bishop Associates spoke on behalf of Mr Forge, the landowner. He said that Mr Forge completely supported continued use of the land by the community and did not wish to restrict local use of the site in any way. Activities such as dog walking would continue as before. He added that the application could not succeed because there was insufficient evidence for it to do so. The application lacked credibility and integrity in that parcels of land had been omitted from it, whilst areas such as the reservoir (which, contrary to the applicant’s assertions, was not a covered tank and was extremely dangerous) and the private allotments (which were fenced off) had not been used at all during the 20 year period. He also asked the Panel to note that the vegetation it had seen that morning was less than there had been in the summer.

(33) Mr Stevenson then said that he disagreed with the officer conclusions on the Military Bylaws. He believed that the reason that it could not be proved that consultation had taken place was that the MoD was unlikely to have kept records of

its publicity arrangements. He was of the view that the legal presumption that all things had been done correctly should prevail.

(34) Mr Stevenson turned to evidence from two witnesses which had not been included with the papers. One of them had never seen anyone venturing away from the footpath. The other, Mr Newcombe had been (amongst other things) a Wildlife Management Consultant. He had carried out professional surveys of flora and fauna on the land. He had never seen anyone deviate from the footpath except for the clearing area by the pillbox.

(35) Mr Forge (Landowner) confirmed that he had purchased the site in 2005 with the intention of restoring Martello Tower No 6. He was aware that local people were concerned that developments such as were taking place to the east of the site and had therefore sought to reassure them by offering land at both entry points to the Parish Council.

(36) Mr Prater (Local Member) spoke in favour of the application. He said that he believed the "Keep Out" signs put up by the MoD in the 1970s were not a significant indication that use of the land was still contentious in the 1990s. He asked the Panel to bear in mind that the MoD was very thorough when it really wished to prevent access.

(37) Mr Prater went on to say that there were very clear precedents for registering land as a village green even if parts of it were inaccessible.

(38) Mr Prater presented evidence from Mr Finnis, the local Scout Group leader who had confirmed that the site was used three times each year by his Group for backwoods activities outside the scope of walking the footpaths.

(39) Mr Prater asked the Panel not to treat the absence of user evidence for the final year of the application as a reason for turning the application down. The Panel would surely accept another set of questionnaires if the other tests were met.

(40) In respect of Mr Prater's last point, the Chairman clarified that the Panel had no legal option but to consider whether each individual test had been met. The Commons Registration officer added that the user evidence difficulties could have been rectified prior to the Panel meeting if there had been a likelihood of the application succeeding. This, however, had not been the case.

(41) In response to a question from the Chairman, Mr Forge said that the Scout Group was welcome to continue using the site.

(42) The Chairman allowed Mr Ewan Williamson, a local resident to address the Panel. Mr Williamson said that he was the president of The Sandgate Society and had also been a Security Specialist. He also regularly walked in the Sandgate escarpment. He said that the MoD signs had been in place for 25 to 30 years, which was before the Orders confirming the Public Footpaths had been made to compensate for others which had been closed because of a stated IRA threat. The signs should have been removed once this had happened, and they were only still there because of an oversight. He went on to say that the site was widely used, including by children.

(43) The Commons Registration Officer commented that the effect of the signs remained as a statement that use was contentious.

(44) Mr R A Pascoe moved, seconded by Mr S J G Koowaree that the recommendations of the Head of Regulatory Services be agreed. In moving the motion, Mr Pascoe clarified that he accepted all the conclusions of the report with the exception of those relating to the significance of the gap between the user evidence being compiled and the application being made.

(45) On being put to the vote, the motion set out in (43) above was carried unanimously.

(46) RESOLVED that the applicant be informed that the application to register land known as the Sandgate escarpment in the parish of Sandgate as a Village Green has not been accepted.