

KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Kingsmead Leisure Centre, Kingsmead Road, Canterbury CT2 7PH on Tuesday, 26 November 2013.

PRESENT: Mr M J Harrison (Chairman), Mr S C Manion (Vice-Chairman), Mr M Baldock and Mr C W Caller

ALSO PRESENT: Mr G K Gibbens

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

UNRESTRICTED ITEMS

18. Application to register land known as Kingsmead Field in Canterbury as a new Town or Village Green

(Item 3)

(1) Members of the Panel visited the application site before the meeting. This visit was attended by Ms S Pettman and Mr B Gore on behalf of the applicants and Mr R Griffith from Canterbury City Council.

(2) Before making her presentation, the Commons Registration Officer noted that the applicants had very recently sent representations individually to Members of the Panel. In the light of the comments contained within them, she had sought further advice from Counsel. This advice had been received within the previous 12 hours, and supported the conclusions set out in the report.

(3) The Commons Registration Officer began her presentation by saying that the application had been made by Ms A Bradley, Ms S Langdon and Mr M Denyer under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008. The application had been accompanied by 335 user evidence forms and other evidence (including maps showing the site and relevant localities, photographs of the site, extracts from Canterbury CC's register of Council-owned land, and various statements from local students). Documents relating to the City Council's proposal to dispose of the land for development purposes had also been included, and the Commons Registration Officer explained that they needed to be disregarded by the Panel for the purposes determining whether to register the land in question as a Village Green.

(4) The Commons Registration Officer went on to set out the case put forward by the applicant. This was that the site had been used by local inhabitants for a range of activities "as of right" for more than 20 years.

(5) The Commons Registration Officer then described the responses from consultees. Over 100 supporting messages had been received including a letter from the Local Member, Mr G K Gibbens.

(6) The Commons Registration Officer continued by saying that the site was owned by Canterbury City Council apart from a small section on the northern boundary, which was owned by Berkeley Homes PLC.

(7) Canterbury CC had objected to the application on the grounds that it held the land under their power to provide public recreational facilities, which meant that use of the land by the public had been “by right” rather than “as of right.” No objection had been received from Berkeley Homes.

(8) 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 use had clearly not been by force or stealth. In this case, however, the land had been held by the City Council as land appropriated for public recreation in 1967 for “use as a playing field” under section 163 of the Local Government Act 1933 (replaced by section 144 of the Local Government 1972 and then by section 19 of the Local Government (Miscellaneous Provisions) Act 1976).

(9) The Commons Registration Officer referred to case law. Lord Walker had noted in the *Beresford* case that it would be very difficult to regard people who used land appropriated for public recreation as trespassers. This had been supported in the *Barkas* case by Sullivan LJ who had ruled that when an application site had been appropriated for the purposes of public recreation under an express statutory power, the local inhabitants would have indulged in lawful sports and pastimes on that land “by right” and not “as of right.”

(10) The Commons Registration Officer noted a secondary issue in relation to the fact that the land had been hired out for formal events such as circuses and funfairs. The City Council had relied on the *Mann* case in support of its view that occasional exclusion from part of the land was sufficient to communicate to users that their use of the whole land at other times was with the landowner’s permission. The applicants, however, disputed this view, pointing out that the City Council had never attempted to exclude people from the site and that no charges had ever been made for entry to the funfair. The charge for admission to the circus had been in respect of the performance rather than for admission onto the land itself. In their view, the use of the land for formal events had coexisted peacefully with the concurrent use of the application site for lawful sports and pastimes.

(11) The Commons Registration Officer said that it was unnecessary to consider the question of formal events on the site in detail because the appropriation of land issue was, in itself, sufficient to demonstrate that use had been “by right” and not “as of right.”

(12) The Commons Registration Officer then briefly turned to the other tests. She said that all parties agreed that the land had been used for the purposes of lawful sports and pastimes. The evidence also suggested that a significant number of residents of the neighbourhoods of Northgate and St Stephen’s within the City of Canterbury locality had used the site. Use of the land had continued up to and beyond the date of application over the required period of twenty years.

(13) The Commons Registration Officer summed up by saying that regardless of her view that all the other tests appeared to have been met, the application had failed

to meet the “as of right” test because it had been held by the City Council for the purposes of public recreation, representing a “knock out” blow to the application. She therefore recommended accordingly.

(14) Mr Baldock asked whether at any stage during the requisite period, the land in question had been used for any other purpose apart from public recreation. The Commons Registration Officer confirmed, in reply, that it had always been held for recreational purposes during the 20 year period.

(15) In response to a question from Mr Baldock, the Commons Registration Officer said that Village Green rights could not be acquired in any way whilst the land in question was statutorily held by a local authority for recreational purposes.

(16) Mr Barrie Gore addressed the Panel as a supporter of the application. He said that the *Barkas* case had been considered by the Court of Appeal but that it was now due to be considered by the Supreme Court in April 2014. Its eventual verdict would clarify the legal position in respect of this particular application. He considered it very possible that the Appeal Court judgement would be reversed and suggested that consideration of this application should be delayed pending the Supreme Court judgement.

(17) Mr Gore said that following receipt of the agenda papers, Counsel’s opinion had been sought and sent to some of the Panel Members. He believed that this opinion should be a part of the evidence base for consideration of the application. He stressed the argument made by the applicants’ counsel that the Local Government (Miscellaneous Provisions) Act 1976 did not enable Canterbury CC to appropriate land at all and that it simply enabled it to provide recreational facilities. It was on this basis that the *Barkas* case had been given leave to proceed to the Supreme Court. The most equitable course of action would be to delay the decision because it had a direct bearing on the outcome of this case. It would clarify the position in respect of “as of right” use, which was the only test that this application was currently considered to have failed to pass.

(18) The Commons Registration Officer advised that the Panel should deal with the application on the basis of the law as it stood. To do otherwise would be prejudicial to the landowner who was entitled to a timely decision. She added that her recommendation did not rely on the *Barkas* case so much as the *Beresford* case which was most pertinent.

(19) Mr Gore said that the comments made by Lord Walker in *Beresford* were not, in fact, a part of the judgement in this case. This was a further complication in what was already a very complex area of law which the Supreme Court would be able to resolve.

(20) Mrs Sue Langdon (applicant) said that she agreed with Mr Gore’s view that the decision should be delayed pending the outcome of the *Barkas* case in the Supreme Court. This was the only fair course of action, particularly as the decision could be expected in June 2014. Given the likelihood that *Barkas* would finally clarify the legal position and enable the Panel to be fully confident that its decision was both fair and lawful, natural justice demanded that the requested delay should be granted. Should the Panel decide to turn down this request, the applicants would seek to judicially review the decision.

(21) The Commons Registration Officer said that *Barkas* related to a provision within the Housing Acts. Its significance in this case was that Sullivan L J's ruling had approved Lord Walker's statement in *Beresford* as part of the judgement, confirming the law in respect of "as of right" use.

(22) Ms Janet Taylor (Canterbury CC) said that she had received Counsel's opinion in response to the late submission provided direct to the Panel Members by the applicants. This set out that the City Council could not hold land by virtue of a legal vacuum. The land had been acquired in 1967 under section 163 of the Local Government Act 1933. This Act had been modified and replaced and was currently held under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 which gave very wide powers to a local authority to provide land for recreational purposes in such a way as it deemed fit. This meant that use of the land had been with permission and invitation.

(23) Mr Alex Davies (Berkeley Homes PLC) said that he did not wish to comment.

(24) The Chairman invited comments from the public. One comment was made in respect of the sign put up on the site by Canterbury CC. The ruling in *Beresford* had been that permission had to be communicated and revocable to indicate that use of the land was by licence.

(25) The Commons Registration Officer replied to the previous point by saying that the sign did not convey permission but was consistent with the fact that the City Council had provided the land for public recreation.

(26) Mr G K Gibbens (Local Member) said that Kingsmead Field sat in the middle of his electoral ward. Its status had been one of the two main issues during the Local Government elections in May 2013.

(27) Mr Gibbens went on to say that the field was widely used by local residents for relaxation, dog walking and games. It was the only green space for some considerable distance, which was important in the context of Northgate, one of the most deprived wards in Kent.

(28) Mr Gibbens noted that four of the required tests had been met and that the only area of dispute was whether use had been by right or as of right. This issue was a key point in the *Barkas* case which was going forward to the Supreme Court in April 2014.

(29) The "as of right" test was very contentious and the subject of substantial case law. However, he did not believe that there was any case law which specifically related to the provisions of section 19 of the Local Government (Miscellaneous Provisions) Act 1976 within Village Green law at present. The *Barkas* case was expected to clarify a number of outstanding issues in relation to Village Greens and publicly owned land, including the status of the Local Government (Miscellaneous Provisions) Act. He therefore believed that it would be prudent for the Panel to defer taking a decision until the Supreme Court had considered the *Barkas* case and given its ruling.

(30) Mr Gibbens concluded his remarks by saying that the residents had already been very clear in their views and hoped that in due course Village green status would be granted. They would be surprised and disappointed if the Panel were to reject the application whilst the outstanding case was being considered in the Supreme Court and very shortly before that court had given its ruling. Postponing the decision seemed to be the only fair and reasonable thing to do, and would have no cost implications for either KCC or Canterbury CC.

(31) Mr Baldock suggested that a Public Inquiry could be held in accordance with the applicants' request. The Commons Registration Officer advised that a Public Inquiry would only be appropriate if there was a serious factual dispute, but in this case the City Council accepted that the land had been used for recreational purposes and the case turned on an interpretation of the Law. As such, it was not necessary to hold a Public Inquiry.

(32) Mr S C Manion moved and it was duly seconded that the recommendations of the Head of Regulatory Services be agreed.

Lost 3 votes to 1

(33) Mr M J Harrison moved, seconded by Mr C W Caller that consideration of this application be adjourned pending the judgement of the Supreme Court in respect of the *Barkas* case.

Carried 3 votes to 1

(33) RESOLVED that consideration of this application be adjourned pending the judgement of the Supreme Court in respect of the *Barkas* case.