

KENT COUNTY COUNCIL

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, 8 April 2014.

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

ALSO PRESENT: Mr C P Smith

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

UNRESTRICTED ITEMS

3. Application to register land known as Masefield Way at Tonbridge as a new Village Green
(Item 6)

(1) The Commons Registration Officer informed the Panel that the application had been made by Mr R Hewitt under section 15 of the Commons Act 2006. It had been accompanied by 18 User Evidence Questionnaires.

(2) The site in question consisted of an open area of land, some 0.4 acres in size with a grassed surface. Access to this land was along surfaced pathways, which were estate paths rather than recorded public rights of way.

(3) The Commons Registration Officer reported that the site was owned by Russet Homes Ltd. They had made no representations regarding the application despite having been informed of it.

(4) The Commons Registration Officer went on to briefly consider each of the legal tests. She said that there had been no evidence of any challenge having been made to recreational use and that therefore such use appeared to have taken place "as of right." The evidence also strongly suggested that the site had been used for lawful sports and pastimes such as ball games and general play on a daily basis.

(5) The Commons Registration Officer turned to the question of whether use had been by a significant number of inhabitants of a particular locality or neighbourhood within a locality. In this instance, the neighbourhood was Brook Street Estate within the locality of Judd Ward in Tonbridge. The evidence provided indicated that the land had been in general use by the Brook Street Estate community (particularly children) on a regular basis. This test had therefore been met.

(6) The Commons Registration Officer concluded her presentation by saying that the evidence clearly suggested that use of the land had taken place over a period of twenty years and that it had continued up to and beyond the date of application. She

recommended that, as all the legal tests had been met, registration should take place.

(7) Mr C P Smith (Local Member) was present for this item pursuant to Committee Procedure Rule 2.27. He said that he had been surprised to receive the report as neither he nor Mr Long, his fellow Local Member had been aware of the application. He accepted the Commons Registration Officer's assurance that she had written to him in June 2013 when the application had been made and in December 2013 to say that it was under consideration. He agreed that the land was well used and said that he had no objection to registration. He also noted that there was another identical patch of land nearby which could also be registered.

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

(9) RESOLVED that the applicant be informed that the application to register the land at Masefield Way in Tonbridge as a new Village Green has been accepted and that the land subject to the application be formally registered as a Village Green.

4. Application to register land known as The List at Littlebourne as a new Village Green

(Item 3)

(1) The Panel Members had visited the site of the application on 8 March 2014. This visit had been attended by Vivian Chapman QC, Ms N Morris and Mr E Newlyn (Rydon Group Ltd) and by Mr F Newing (Landowner).

(2) The Commons Registration Officer reported the views of the Local Member, Mr M J Northey. He had written to her to say that there was very strong local feeling in favour of the application and that, in his view the issues were so complex that they should be resolved by holding a non-statutory public inquiry in order that they could be clarified.

(3) The Commons Registration Officer began her presentation by saying that the application had been made by Littlebourne PC under section 15 of the Commons Act 2006. The site in question consisted of some 22.5 acres of grassland. It was crossed by a public footpath, and access to it was via two other public footpaths which abutted the site. The application had been accompanied by 45 user evidence questionnaires. A further 36 forms had subsequently been submitted in support.

(4) The Commons Registration Officer went on to say that the land in the north eastern section of the site was owned by Littlebourne PC itself. The rest (apart from the PROWs and a tiny parcel of land owned by Canterbury CC) was owned by the Newing family. Rydon Homes Ltd had an option to buy this land, and it was they who had objected to the application. Their grounds for objection were that the land had been in continuous arable use until 2005 and that it could not, therefore have been used for lawful sports and pastimes; that the land had not been used by a significant number of local residents; that there was no evidence to demonstrate that Littlebourne was either a locality or a neighbourhood within a locality; and that a prohibitory notice had been erected on the land in 2006, bringing any "as of right" use to an end.

(5) The Commons Registration then considered the legal tests, all of which needed to be passed in order for registration to take place. The first of these was whether use of the land had been “as of right.” She said that use of the land had not been with secrecy or permission. There had also been no use of physical force. The objectors had, however, provided colour photographs of signs erected at seven parts of the site in 2006. In their view these notices were sufficient to render use of the site contentious.

(6) The Commons Registration Officer said that the applicants had pointed out that none of the user evidence forms had mentioned the notices and that none of the current Parish Council Members could recall their existence. On their view, these notices must have been taken down very quickly, if they had ever been put up. The objectors had agreed that the signs had been torn down very soon after being erected. It was therefore quite possible that the majority of local residents had never seen them.

(7) The Commons Registration Officer then said that, on balance, the fact that the landowner had provided photographs of the signs, and that they had been erected at numerous locations around the site demonstrated that the landowner had made a reasonable attempt to challenge general use of the land. She therefore concluded that use following the erection of the notices had been contentious and therefore by force, and that consequently this test had not been met.

(8) The second test was whether use of the land had been for the purposes of lawful sports and pastimes. The Commons Registration Officer said that the majority of use had been for walking but that there was also evidence of blackberrying, kite flying, ball games and birdwatching. The objectors claimed that most of the use had taken place on the public footpaths or other defined tracks. She said that it was not possible to reach a definitive conclusion on this question and that, if this had been the only point of contention, the correct approach would have been to seek to test the evidence through a non-statutory public inquiry.

(9) The Commons Registration Officer briefly explained that she believed that use had been by a significant number of inhabitants of a particular locality. This was because the evidence user forms indicated that use had been by people from the entire parish of Littlebourne and that the 81 user evidence questionnaires (many of which confirmed that use had been on a daily basis) demonstrated that there had been sufficient use to indicate to the landowner that the land was in general use for recreation.

(10) The fourth test was whether use of the land had continued up to the date of application or, if not, ceased no more than two years prior to the making the application. The Commons Registration Officer said that the application date was 16 April 2013. However, it was arguable that use had ceased to be “as of right” when the “private property” notices had been erected in 2006. If this was the case, the application would have to have failed this particular test.

(11) The Commons Registration Officer then moved on to consider the final test, which was whether use had taken place over a period of twenty years or more. The applicants had claimed that use had been continuous between 1993 and 2013. The objectors had claimed in response (supported by photographs taken during the

1990s) that between 1993 and 2005 the land had been used for arable farming with oil seed rape, barley and wheat all being grown. Some of the user evidence questionnaires had explained that the farming activities had, indeed had an impact on informal recreational use.

(12) The applicants had referred to the recent *Newhaven Beach* case where registration had taken place even though the land had been covered by sea water for 42% of the time. The Commons Registration Officer said that this, was not an analogous case to the one under consideration by the Panel because recreational activities such as swimming and paddling had continued to take place at Newhaven whilst the land had been under water. In this particular case, however, the farming activities had actually interfered with recreational usage. She added that even if local residents had trampled over the crops during this period, this would not have qualified as a lawful sport or pastime. She concluded that this test had not been met because the crop planting activities had created a physical restriction to recreational use during significant periods of the twenty year qualifying period.

(13) The Commons Registration Officer summarised her presentation by recommending that the application should fail because the photographic evidence of the “private property” notices strongly suggested that use had been contested in 2006 and because (even if this evidence were discounted) the agricultural use of the land for significant periods during the qualifying period demonstrated that use of the land had not been continuous.

(14) Mrs Vivienne Spratt (Chairman of Littlebourne PC) said that the local villagers felt very strongly about this application and that use of the land had been by more local residents than had actually completed the user application forms.

(15) Mrs Spratt then said that the issues were not clear and that the only way to resolve them would be to hold a non-statutory public inquiry. The Commons Registration Officer’s report had focussed on the crop planting activities on the land, but had not taken account of the poor crop yield or the bare patches within the areas where this was taking place. Dog walkers allowed their animals to roam the entire field at will. No one had seen the signs which the landowner claimed to have put up in 2006, and the photographs provided were very unconvincing. In any case, they had never been replaced.

(16) Ms Cate Reid (Littlebourne PC) commented on the photographs of the signs by saying that all of them were one dimensional, front-facing only. She noted that the landowner had stated that they had been taken down within 48 hours of being erected. This suggested that, not content with tearing down the signs, the people responsible for doing so had also taken them off the site rather than simply leaving them lying on the ground.

(17) Mr F Newing (Landowner) said that the signs had simply disappeared within 48 hours of being put up.

(18) Mr David Milne addressed the Panel on behalf of the applicants. He said that, as he understood it, the Commons Registration Officer had not seen the need to ask for legal advice. He then referred to the *Newhaven Beach* case where the entire application site had been covered by the sea during 80% of the days in question. Village green status had nevertheless been granted in respect of that application

because recreational activities such as paddling and swimming had taken place on a regular basis. This cast sufficient doubt on the conclusions of the officer's report to merit full testing by a legally qualified individual in respect of this particular application.

(19) Mr Milne then referred to the notices. He said that, by the landowner's own admission, these had only been put up for a period of 48 hours. Case Law did not support the conclusion that this represented a genuine challenge to recreational use by the public. He urged the Panel to take note of the large amount of evidence in support of registration and to submit it for thorough examination at a non-statutory public inquiry.

(20) Vivian Chapman QC addressed the Panel on behalf of the Rydon Group. He said that he agreed with the conclusions of the report because arable farming had taken place on the land in question for 12 years out of the 20 year qualifying period and because of the 7 signs which had been erected as a challenge to recreational use in 2006.

(21) Mr Chapman then referred to a letter from Mr Twyman, the tenant farmer in which he had set out the crops grown on the land between 1993 and 2005. The activities had included ploughing, rolling, cultivating and harvesting, and had taken place from September to August each year. This meant that recreational use of the site would have effectively been interrupted for 11 months each year.

(22) Mr Chapman continued by referring to the photographs of agricultural use set out in Appendix of the report. These, he said, showed the whole land being cropped, with no evidence of it being bare or overgrown. This evidence was supported by numerous statements from people whose evidence was summarised at Appendix C. He quoted from evidence given by 10 of these witnesses and commented that they all accepted that the arable farming had affected the recreational activity and said that this was fatal to the application as it demonstrated that the land could not have been used continuously for a twenty year period for the purposes of lawful sports and pastimes.

(23) Mr Chapman concluded his presentation by saying that the seven photographs of the signs erected in 2006 clearly refuted the applicant's claim that the landowner had known about and acquiesced to public use of the land.

(24) The Commons Registration asked the Panel to note that she was legally trained. She then commented that the Judge in the *Whitney* case had said that a non-statutory public inquiry was an appropriate mechanism for examining a case where there was a dispute of fact. She believed that such circumstances did not fully apply in this case and that it would therefore not be appropriate on this occasion.

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

(26) RESOLVED that the applicant be informed that the application to register land at The List in the parish of Littlebourne as a Village Green has not been accepted.

5. Application to register land known as Fisherman's Beach at Hythe as a new Town or Village Green

(Item 4)

(1) The Commons Registration Officer tabled a revised Appendix D, showing an amended plan of the beach huts, which were recommended for exclusion from the proposed registration.

(2) The Commons Registration Officer reported that the application had been made by Mr D Plumstead on 12 August 2010 under section 15 of the Commons Act 2006. The application had been reported to the Regulation Committee Member Panel meeting on 17 July 2012 where the decision had been taken to refer the case to a non-statutory public inquiry in order to clarify the issues.

(3) The Commons Registration Officer went on to explain that the reason for reference to a non-statutory public inquiry had been that Shepway DC as the landowner had objected on the grounds that the land in question was a working fishermen's beach. The District Council had, however, decided not to attend the public inquiry, which had nevertheless needed to be held in order to establish the facts of the case. The Inspector had subsequently produced a report on her findings in February 2014.

(4) The Commons Registration Officer briefly summarised the Inspector's findings. She had been satisfied that use of the land had been "as of right" because, although the landowner had erected signs, their content had not been sufficient to cause informal recreational use to become contentious. Nor was there any evidence that the landowner had either expressly or implicitly given permission for such use. The Inspector had also considered that there was sufficient evidence to demonstrate that the land in question had been used for the purposes of lawful sports and pastimes. She had also concluded that the application land had been used extensively used by inhabitants of the locality of South Ward in Hythe throughout the relevant period (up to May 2010) for informal recreation. The application had been made in August 2010, well within the two-year period of grace. The Inspector's conclusion had therefore been that the majority of the land should be registered.

(5) The Inspector had, however, exempted the fishermen's huts and winch casings as these had been uses for purposes which were not compatible with recreational use. As a consequence, she had recommended that no part of the application site upon which a hut or winch casing had stood at any time during the twenty year period to May 2010 would qualify for registration.

(6) The Commons Registration Officer concluded her presentation by saying that she had carefully considered the Inspector's report and considered that all the necessary tests had been met in respect of the application land (except for the huts and winch casings). She therefore recommended accordingly.

(7) Mr D Plumstead (applicant) submitted a written rebuttal of a statement made by Mr Chambers on the Shepway DC Facebook page. He then thanked the Inspector and Commons Registration Officer for the immense trouble they had gone to in order to ensure that the right decision was made.

(8) On being put to the vote, the Panel voted 4 to 0 (Mr Manion having left the meeting) in favour of the recommendations of the Head of Regulatory Services.

(9) RESOLVED that for the reasons set out in the Inspector's report dated 21st February 2014, the applicant be informed that the application to register land known at Fisherman's Beach at Hythe has been accepted (with the exception of the fisherman's huts and winch casings) and that the land shown in the updated version of Appendix D to the report be registered as a new Village Green.

6. Application to register land known as The Warren at Brabourne as a new Village Green

(Item 5)

(1) The Commons Registration Officer briefly reported that Brabourne PC had submitted an application for a voluntary registration of the site under section 15 (8) of the Commons Act 2006. She added that the land in question was wholly owned by the applicant and that there were no other leaseholders or owners of relevant charges. There had also been no objections to the registration. Consequently, all the necessary criteria for voluntary registration of the land had been fulfilled.

(2) RESOLVED that the applicant be informed that the application to register the land known as The Warren at Brabourne Lees has been accepted and that the land subject to the application be formally registered as a Village Green.