

## Update from the Commons Registration Team

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A report by the Head of Regulatory Services to Kent County Council's Regulation Committee on Tuesday 3<sup>rd</sup> September 2014.

### **Recommendation:**

**I recommend that Members consider this report and note its content**

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### **Progress with Village Green applications**

1. Members have requested that a summary of the current position of applications to register Town and Village Greens be provided at meetings of the Regulation Committee. A copy of the Schedule of Village Green applications is therefore attached at **Appendix A**.
2. Since the last meeting, two Member Panel meetings have taken place resulting in final decisions on three applications, one of which resulted in the registration of a new Village Green. Members will note that that decision is the subject of an appeal (see below).
3. Also since the last meeting, two Public Inquiries have been held into applications at Goudhurst and Ripple. The Inspector's reports are awaited in respect of these cases and, once they have been received, the matters will be referred back to a Member Panel for final decision. A further Public Inquiry is being arranged for the Chaucer Fields at Canterbury application and this is likely to be held either later this year or early in 2015.
4. There are currently eight applications awaiting determination. No new applications have been received since the last Committee meeting.

### **Village Green VG277 at Westgate**

5. On 3<sup>rd</sup> June 2014, the Member Panel considered an application to register land at Ursuline Drive at Westgate-on-Sea as a new Village Green. Due to an objection received from the landowner (King Ethelbert School) at the consultation stage, a Public Inquiry had been held in November 2013, at which an independent Barrister appointed by the County Council ("the Inspector") heard evidence both in support of and in opposition to the application. The Inspector had subsequently prepared a report setting out her findings and had recommended that, on the basis that it appeared that all of the relevant legal tests had been met, the County Council should register the land as a Village Green. That recommendation was approved by Members and, accordingly, the land was entered onto the County Council's Register of Village Greens (with the reference number VG255).
6. On 15<sup>th</sup> July 2014, the County Council received notification that the landowner was making an application to the High Court seeking permission for a Judicial Review of the decision to register the land as a Village Green. The permission application for Judicial Review was made on the basis that the County Council erred in law in respect of the test to be applied in respect of the 'neighbourhood'. The landowner's position is that the neighbourhood relied upon by the applicant (and accepted by the Inspector) was not a qualifying neighbourhood for the purposes of Village Green registration. The landowner further submits that the applicant failed to demonstrate that there was a sufficient 'spread' of users throughout the qualifying neighbourhood.
7. The County Council has sought further legal advice and, on the basis of this advice, is defending the decision to register the land. Accordingly, the Council's Grounds of Defence were lodged with the High Court on 5<sup>th</sup> August 2014. A decision is now awaited from the High Court as to whether or not permission to appeal will be granted. If permission to

appeal the decision is granted, a full hearing is likely to be held in the High Court later this year or early next year. Members will of course be kept updated on progress.

## Recent case law

8. On 21<sup>st</sup> May 2014, the Supreme Court handed down its judgement in the case of *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31 (“the Barkas case”). The Barkas case concerned a Village Green application for an area of land known as Helredale Playing Field in Whitby, which had been acquired by the local Council and maintained as a recreation ground. The key issue in this case was whether, where land has been specifically provided by a local authority for recreational purposes, use of that land is considered to be ‘as of right’ for the purposes of Village Green registration.
9. The Supreme Court decided unanimously that where land is provided by a local authority for the purposes of public recreation the ‘obvious and natural’ conclusion is that members of the public using the land do so by virtue of an existing public right to do so and, as such, they cannot be regarded as trespassers and their use of the land is not ‘as for right’.
10. Lord Neuberger, delivering the leading judgement, concluded that<sup>1</sup>:

*“so long as land is held under a provision such as section 12(1) of the [Housing Act 1985], it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore use the land ‘by right’ and not as trespassers, so that no question of user ‘as of right’ can arise. In Sunningwell at pp 352H-353A, Lord Hoffman indicated that whether user was ‘as of right’ should be judged by “how the matter would have appeared to the owner of the land”, a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.*

...

*I agree with Lord Carnwarth that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land ‘as of right’ simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different to that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights”.*
11. This case law has already been applied by the Member Panel in respect of the recent decision on the application to register Kingsmead Field at Canterbury as a Village Green.
12. Two further cases of interest are due to be heard in the Courts later this year; the Supreme Court will be hearing the final appeal in the Newhaven Beach case in November (which deals with the issue of incompatibility of statutory functions and Village Green registration) and the Long Live South Bank case (which deals with the issue of whether planning permission that does prevent recreational use is sufficient to prevent a Village Green application) is due to be heard by the High Court this month.

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<sup>1</sup> At paragraphs 21 and 24 of the judgement

13. Members will be provided with an update as to the outcome of these cases at the next Committee meeting.

### **Commons Act 2006 – implementation update**

14. DEFRA has advised that the current Commons Registration (England) Regulations 2008 will be revoked within the next few months in order to provide for the two new authorities (Cumbria and North Yorkshire) that are due to join the pioneer implementation later this year. The new Regulations will be substantially the same, albeit with a few modifications that are intended to improve the current procedures for dealing with applications to amend the registers of Common Land and Village Greens. One such modification will be the removal of the requirement to advertise an application in the local newspaper, in favour of a new duty to advertise the application by way of notices erected on or around the application site.

15. The new Regulations are expected to be published and take effect within the next three months (precise date yet to be confirmed). There will not be any changes to the manner in which the Member Panel currently considers and determines applications.

### **Recommendation**

16. I RECOMMEND that Members consider this report and note its content

### **Background documents:**

Appendix A – Schedule of Village Green applications

### **Contact Officer:**

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**APPENDIX A:  
Schedule of Village Green applications**

**Applications resolved by the Regulation Committee (Member Panel) since last report (13<sup>th</sup> May 2014)**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Outcome</b>
The Cricket Field	Marden	Mrs. P. Stockell	Rejected
Land at Ursuline Drive	Westgate	Mr. J. Elenor	Accepted and registered as a Village Green (but decision subject to appeal)
Kingsmead Recreation Ground	Canterbury	Mr. G. Gibbens	Rejected

**Forthcoming Public Inquiries**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Details</b>
Chaucer Field (at the University of Kent campus)	Canterbury	Mr. G. Gibbens	Details TBC

**Outstanding applications to be resolved**

<b>Description</b>	<b>Parish</b>	<b>Member(s)</b>	<b>Status</b>
The Downs	Herne Bay	Mr. N. Bond Mr. B. MacDowall	On hold pending Newhaven Beach judgement
The Glebe Field	Goudhurst	Mr. A. King	Awaiting Inspector's report following Public Inquiry
Land at Coldblow Woods	Ripple	Mr. S. Manion	Awaiting Inspector's report following Public Inquiry
Whitstable Beach	Whitstable	Mr. M. Harrison Mr. M. Dance	Under investigation
Recreation Ground	Hildenborough	Mrs. V. Dagger	Under investigation
Land at West Wood	Hildenborough	Mrs. V. Dagger	Under investigation
Land known as the Old Putting Green	Ramsgate	Mr. A. Terry Ms. Z. Wiltshire	Under investigation