KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Bobbing Village Hall, Sheppey Way, Bobbing, Sittingbourne ME9 8PL on Tuesday, 18 June 2019.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr M A C Balfour, Mr I S Chittenden and Mr J M Ozog

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

UNRESTRICTED ITEMS

3. Application to register land at Cryalls Lane at Sittingbourne as a new Town or Village Green
(Item 3)

(1) The Panel Members visited the site before the meeting. The visit was attended by Mr Mike Baldock applicant, Mr Clive Sims (Borden PC) and Mr M J Whiting (Local Member).

(2) The Commons Registration Officer introduced the report by saying that the application to register the land had been made on 30 October 2015 by Mr Mike Baldock under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014. A report on the application had been considered by a Regulation Committee Member Panel on 23 October 2017 where the decision had been taken to refer the matter to a Public Inquiry to clarify the issues.

(3) The Commons Registration Officer said that the Public Inquiry had been held in June 2018. The applicant had agreed at this point to amend the application by excluding the area in the north-eastern part of the site which was owned by SEPN as well as a further strip of land owned by Ward Homes Ltd that was subject to rights to lay cables. The Inspector had produced her findings on 27 November 2018.

(4) The Commons Registration Officer moved on to consider the Inspector's findings on the legal tests. The first of these was whether use of the land had been as of right. It was clear that use had taken place neither secretly nor by the use of force. There had, however, been a question as to whether as to whether it had been with permission. The objectors had stated that notices had been erected by Ward Homes in 2003 and 2006 explaining that the land was owned or managed by Ward Homes and that use of the land was with the consent of the owner. The Inspector had concluded that as no member of the public had seen

the notices and as the applicants had been unable to provide photographs and could not recollect the wording on them, use had been of right.

(5) The second test was whether use of the land had been for the purposes of lawful sports and pastimes. It had become apparent during the Inquiry that the predominant use of the land had been for walking, leading to the question of whether this was walking in a general fashion or walking a defined linear route. The latter was generally regarded as a "rights of way type use" which case law (*Laing Holmes*) had established needed to be discounted for the purposes of Village Green registration. The Inspector had concluded that as the land had become ever more overgrown during the period on question, nearly all of the walking would have been along the main paths. This, taken together with the insufficiency of the evidence given to have persuaded the landowners that the site was in regular use by the local community for lawful sports and pastimes throughout the relevant period had led her to conclude that the test had not been met.

(6) The third test was whether use had been by a significant number of inhabitants of a particular locality or neighbourhood within a locality. The Inspector had concluded that the New Zealand Estate within the ecclesiastical parish of Borden qualified as a description of a neighbourhood within a locality. The Inspector had, however, concluded that qualifying use had not been by a significant number of inhabitants because most of the use had been "rights of way type use" which could not be considered to be "as of right" use for Village Green purposes. The remainder had been insufficient to indicate to the landowner that a Village Green right was being asserted. The test had therefore not been met.

(7) The Commons Registration briefly set out that the Inspector had concluded that the two remaining tests (whether use of the land had continued up to the date of application and whether use had continued for a period of twenty years or more) had both been met in themselves. The Inspector had, however also noted that she did not consider that use had taken place with the requisite sufficiency, particularly during the latter part of the material period.

(8) The Commons Registration Officer then said that the Inspector had also considered representation made by SEPN that registration should not take place due to statutory incompatibility. This argument had been based on the *Newhaven* case where the Supreme Court had ruled that even though the claim had satisfied the legal tests, the land was not capable of registration as a village green as it formed part of the operational land of the port of Newhaven. The Inspector had concluded in respect of the Cryalls Lane site that SEPN's duties would not be as clearly impeded by registration as had been the case at Newhaven. Furthermore, SEPN did not hold the land for statutory purposes. It merely had the benefits of certain rights which could be terminated at any time by the landowner.

(9) The Inspector's overall conclusion was that the application should fail because the applicant had failed to demonstrate that there had been qualifying use by a significant number of local inhabitants throughout the relevant period and that a Town or Village Green was being asserted.

(10) The Commons Registration Officer then said that she had asked all parties to comment on the Inspector's report. The applicant had argued in response that the main objector had deposited a statement with KCC in 2008 under section 31 (6) of the Highways Act 1980 confirming that no additional rights of way could be dedicated for public use. The applicant claimed that, as a result, any subsequent use of the paths across the site could not be relied on to acquire public rights of way and that such use therefore had to be considered as qualifying use for the purposes of village green registration.

(11) The Inspector had written a response to this representation stating that the fact that footpath use was highly unlikely to result in the acquisition of PROW rights did not mean that it could be considered as village green use. She had therefore confirmed her original conclusions.

(12) The Commons Registration Officer concluded her presentation by saying that she had carefully considered the Inspector's report and that she was in agreement with its conclusions. She therefore recommended that the application should be rejected.

(13) Mr Clive Sims (Borden PC) said that the east-west paths were in constant agricultural use and could not possibly qualify as a public right of way. The circular path was widely used and site-specific. He believed that this should be sufficient to enable registration. He noted that there was no clear definition of the word "significant." The word was used in s31 of the Children and Young Persons' Act 2008, proving that a minimal amount could also be significant. Mr Sims also stated that Borden PC would be happy to pay for the maintenance and upkeep of the site of it was registered as a Village Green.

(14) Mr Mike Baldock (applicant) referred to the *R v. Oxfordshire County Council, ex parte Sunningwell* case. He said that the judgement confirmed that the status of the land was independent in that registration simply confirmed that it was a village green.

(15) Mr Baldock then turned to Section 31 of the Highways Act 1980. He said that the general assumption was that if the landowner lodged a statement together with a map of the land, no further rights of way could be created. Section 31 (6) stated that the act of doing so did not prevent the landowner himself from dedicating any other way as a highway. In this instance, the landowner had provided a map and statement without lodging any land at all as a public right of way.

(16) Mr Baldock continued by saying that he believed that the Inspector had misunderstood the full implications of the user qualifications for Rights of Way and Village Greens. He said that there could be no doubt that use had taken place over a 20-year period. In the event that the evidence was ambiguous, the Courts had established that the tests for Village Greens were less onerous than those for Public Rights of Way. As no rights of way existed on the site, and as the landowner had stated his intention that no rights of way could be claimed on the site, it could only be that any potentially qualifying use had to be for a Village Green – where the tests were less onerous. Furthermore, use of the track, dog

walking or the pushing of prams could all be activities which could be treated as recreational use.

(17) Mr Baldock went on to say that the critical matter in determining whether use had been by a significant number of people was how the landowner would perceive such use. Justice Lightman had ruled that if the land was in general use, this would qualify as "significant" in this regard. Use of the tracks and paths had certainly been general, and the landowner would have known that members of the public could not be seeking to establish a public Right of Way. Therefore, they could only be seeking to establish Village Green rights and the use was sufficient to draw to the landowner's attention that they were doing so.

(18) Mr Baldock then said that he did not agree with the Inspector's view that the site had not been used for the entire 20-year period. This was because aerial photographs taken during this period showed that the network of usable paths was ever-changing. By 2015 for example, the circular path was being used less frequently than other paths, whilst the second east/west path had been created later during the period.

(19) Mr Baldock concluded his remarks by saying that the site was set aside as Local Green Space in the Swale Borough Local Plan. In other words, it was identified as appropriate for recreation. The site had been used extensively for lawful sports and pastimes throughout the period and the implication of the various aerial photographs was that this use must have been constant. The whole site had been used for a variety of purposes and should consequently be registered.

(20) The Commons Registration Officer replied to some of the points made by Mr Baldock by saying that the people using the path were exiting the site onto agricultural land. In doing so, they were using it in a Public Rights of Way manner. There was no legal definition of the word "significant" in the context of section 15 of the Commons Act 2006, although case law had provided some guidance. The fact that the landowner did not intend any part of his land to be designated as a Public Right of Way did not mean that any such use automatically became a Village Green recreational activity. Village Green legislation did not contain a rebuttal presumption, so the landowner would simply not have been able to take the same action in this respect as he had done under Section 31 (6) of the Highways Act.

(21) On being put to the vote, the recommendations contained in the report were carried by 4 to 1.

(22) RESOLVED that for the reasons set out in the Inspector's report dated 27 November 2018, the applicant be informed that the application to register land at Cryalls Lane in Sittingbourne has not been accepted.

4. Application to register land at Grove Park Avenue in the parish of Borden as a new Town or Village Green
(Item 4)

(1) Members of the Panel visited the application site prior to the meeting. The visit was attended by Mr Mike Baldock (applicant), Mr M J Whiting (Local Member), Mr Clive Sims (Borden PC) and Mr Hamish Buttle (Quinn Estates).

(2) The Commons Registration Officer briefly confirmed that the application had been made by Mr Mike Baldock under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.

(3) The Commons Registration Officer explained that the majority of the application site was owned by Taylor Wimpey UK Ltd and that a rectangle of land in the north western corner was registered to the Highways England Company.

(4) Following consultation, objections had been received from Swale BC and Mulberry Estates Sittingbourne. The Borough Council had argued that a Village Green would have a negative impact on development needs and supporting infrastructure. Mulberry Estates Ltd Sittingbourne had objected on the grounds that the site had been identified as highway land and was therefore not capable of registration.

(5) The application had been considered at a meeting of the Regulation Committee Member Panel on 23 October 2017 where the decision had been taken to refer it to a Public Inquiry for further consideration. This Inquiry had taken place in April 2018.

(6) The Commons Registration Officer then set out the Inspector's findings which set out her findings and conclusions in a report dated 8 July 2018. The Inspector had considered the legal tests, the first of which was whether use of the land had been "as of right." She had found that use had not taken place secretly or forcibly.

(7) The Inspector had then considered the question of whether the application site was highway land. She had noted that deed dated 28 January 1969 in which KCC had agreed to take over the road now known as Grove Park Avenue and all the verges as a highway maintainable at the public expense. Although there was no proof that this adoption had taken place, there was sufficient circumstantial evidence that the entire site including the narrow rectangle of land should be considered as highway land.

(8) The Commons Registration Officer then said that the Inspector had approached the "as of right" question by taking into account that the two Acts had never expressly precluded highway land from being registrable as a Village Green. Case Law had, however, established that qualifying use could not occur when the landowner had given permission. She had then studied the implications of the *DPP v Jones 1999* case and concluded that as the whole of the land was highway land, the use which took place was carried out lawfully by virtue of the public's right to use the land as highway land, and was consequently not "as of right" but "by right."

(9) The second test was whether use of the land had been for the purposes of lawful sports and pastimes. The Inspector had seen evidence that the site was used for a range of recreational activities including ball games, hide and seek,

barbecues, frisbee, picnics and golf practice. She had nevertheless concluded that the test had not been met because all of these lawful sports and pastimes were lawful uses of the highway verge and had therefore been undertaken by virtue of a pre-existing right.

(10) The Commons Registration Officer then turned to the question of whether use had been by a significant number of inhabitants of a particular locality or a neighbourhood within a locality. The Inspector had agreed with the applicant that Grove Park Avenue constituted a neighbourhood because although, as the objector had pointed out, this was a small road, she had found it to be a cohesive area which was bounded and where the houses had been built at the same time. She had also agreed that the evidence before her would have been sufficient (if the "as of right" test had been met) to be considered a significant number as the land was in general use by the community.

(11) The Inspector had also concluded that use of the land had continued up to the date of application and that it taken place for the entire 20-year qualifying period between May 1996 and May 2016.

(12) The Commons Registration Officer said that the Inspector's overall conclusion had been that the application should fail because the evidence indicated that the land was highways land. Consequently, all lawful recreational use had taken place lawfully by virtue of the public's right to use it and could not therefore lead to the acquisition of a prescriptive right.

(13) The Commons Registration Officer said that she had forwarded a copy of the Inspector's report to the applicant and objector. The applicant had disputed the Inspector's findings in respect of the small rectangle of land owned by Highways England, arguing that it was a matter of opinion whether it was Highways land or not. The Inspector's response to this was that she had reached her decision on the balance of probabilities on the basis of the evidence presented to her.

(14) The Commons Registration Officer then said that the applicant had also disputed the Inspector's interpretation of the House of Lords' decision in *DPP vs Jones*. He had argued that although it was widely believed that the decision was that the public had a wide-ranging right of access on highway land, the decision had not been unanimous. Two judges had dissented had formed the view that the public's rights to use the highway were limited to passage, re-passage and anything else related to that right. For this reason, the judgement should be understood as meaning that activities that took place on the highway were not undertaken "by right" but rather on the basis that they would not be unreasonable in certain circumstances. Thus, the decision did not create any right to use the highway for recreational purposes. Most of the use of the site was therefore of a nature that was tolerated rather than in exercise of a legal right.

(15) The Commons Registration Officer moved on to set out the Inspector's rebuttal of the applicant's representations. She had based her decision on the *ratio decidendi* (i.e. the passage which set the legal precedent.) She had agreed that the test to be applied depended on the individual circumstances of each case and that there had been no binding court judgement dealing with the recreational

use of highway land in the context of village green legislation. Her task had been to make a recommendation based on the view that the courts were most likely to take. She had therefore remained of the view that the application should be refused.

(16) The Commons Registration Officer concluded her presentation by saying that she agreed with the Inspector that the application site was highway land. She also agreed with her that the majority judgement in *the DPP vs Jones* case had the effect of making any lawful use of highway land for recreational purposes part of an existing right and that it's use had consequently not been "as of right." She therefore recommended accordingly.

(17) Mr Clive Sims (Borden PC) said that everything in this particular case depended on legal terminology and interpretation. In respect of the Inspector's conclusions in relation to the nature of the land, he said that he had asked Swale BC which legislation they used for the purposes of parking enforcement on the land. They had informed him that they used a by-law. He asked why Swale BC would need to resort to such measures if the site was highway land.

(18) Mr Mike Baldock (applicant) began his presentation by referring to the *Eyre vs New Forest Highway Board 1892* case where the judgement had been that all highways had their actual or presumed origin in a dedication (either by design or by inference). The Inspector had not addressed this in her report. As there was no record of the land in question being dedicated in such a way, he believed that it could not be categorized as "highway land" unless those claiming it to be highways land could actually verify it; nor did the land appear on the list of streets. The fact was that neither KCC nor Swale BC had been able to provide any documentation (although several documents ought to exist). This included the period when it was claimed that KCC and passed responsibility to Swale BC. The fact that Swale BC was maintaining the land did not imply that it had rights to it.

(19) Mr Baldock then addressed the question of whether the land should be registered even if it were to transpire that it was highway land after all. He said that the comments that he had made in respect of differing verdicts to that reached by Lord Irwin related to two judges who were in fact part of the majority verdict rather than dissenting judges as the Inspector had believed. The majority had simply ruled that a peaceful assembly on a highway which did not unreasonably interfere with or obstruct it, was not a trespassory assembly. Lord Irvine's judgement had applied this to all lawful activities whereas Lord Hutton had limited it to the right of assembly and Lord Clyde had stated that it needed to be a case-by-case decision. The two dissenting judges had been Lord Slynn and Lord Hope. The *DPP vs Jones* decision did therefore not have the effect of creating the right to use highways for any lawful purpose, so even if this was highway land, lawful sports and pastimes carried out on it could not be automatically disqualified as not being "as of right."

(19) The Commons Registration Officer commented on the representations made by saying that a local authority needed to pass a by-law if it wished to make parking illegal. It was permissible to park on highway land unless such an

enactment was made. She added that the list of streets was a maintenance record that was far vaguer than the Village Green Register.

(20) The Commons Registration Officer then said that the 1969 Deed specified that the road and all verges was to be forever open to the public. This meant that there had been a clear intention to dedicate the land to public use.

(21) In respect of Mr Baldock's comments on *DPP vs Jones,* the Commons Registration Officer said that the terms of the judgement had been framed in such a way as to clarify the relationship between the House of Lords judgement in that case and the *Attorney General vs Antrobus 1905* judgement.

(22) On being put to the vote, the recommendations contained in the report were carried unanimously.

(23) RESOLVED that for the reasons set out in the Inspector's report dated 8 July 2018, the applicant be informed that the application to register land at Grove Park Avenue in the parish of Borden has not been accepted.

5. Application to voluntarily register land at Spires Ash at Headcorn as a new Town or Village Green
(Item 5)

(1) The Commons Registration Officer introduced the report by saying that Headcorn Parish Council had applied to register land known as Spires Ash in Headcorn as a Village Green. This application had been made under s 15 of the Commons Act 2006 which permitted landowners to apply to voluntarily register their land.

(2) The Commons Registration Officer briefly explained that the both tests for voluntary registration had been met in that the land in question was wholly owned by the applicant and was in the locality of the civil parish of Headcorn.

(3) On being put to the vote, the recommendations contained within the report were carried unanimously.

(4) RESOLVED to inform the applicant that the application to register land known as Spires Ash at Headcorn has been accepted and that the land subject to the application (as amended and shown at Appendix A to the report) be formally registered as a Town or Village Green.