

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, 3 December 2019.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr P M Harman and Mr R A Pascoe

ALSO PRESENT: Mrs C Bell, Mr G K Gibbens and Mrs T Dean, MBE

IN ATTENDANCE: Ms M McNeir (Public Rights Of Way and Commons Registration Officer), Mr C Wade (Principal Legal Orders Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

6. Application to register land known as Hospital Field at Brabourne as a new Town or Village Green

(Item 3)

(1) The Panel Members visited the site before the meeting. This visit was attended by Mr Alan Day (Gladman Developments Ltd) and some 8 members of the public.

(2) The Public Rights of Way and Commons Registration Officer introduced the application which had been made by Brabourne PC under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014. Section 15 of the Commons Act enabled any person to apply to the Commons Registration Authority to register land as a Village Green where it could be shown that a significant number of the inhabitants of any 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.

(3) The Public Rights of Way and Commons Registration Officer continued by saying that an objection had been received from Gladman Developments Ltd on the grounds that the neighbourhood relied upon was not a qualifying one; that the use relied upon was predominantly referable to the Public Footpaths on the application site and insufficient to indicate that the land was in general use by the community; that the land was not available for recreational use for long periods due to the presence of crops; and that any wider recreational use was either challenged or with permission.

(4) The application had been considered on 18 March 2018 by a Regulation Committee Member Panel which had referred it to a Public Inquiry for further consideration.

(5) The Public Rights of Way and Commons Registration Officer said that the Public Inquiry had taken place in February 2019. She went on to summarise the Inspector's findings and conclusions which had been produced on 22 July 2019.

(6) The Inspector had first considered whether use of the land had been "as of right." All parties had agreed that use had been without force. The objector had given evidence that some of the activities relied upon by the applicants had either been challenged (in the case of horse riding) or been with permission (metal detecting). The Inspector had, however, concluded that as these two activities had not constituted a major proportion of the evidence relied upon by the applicant, use of the site had been "as of right."

(7) the Inspector had then considered whether use of the site had been for the purposes of lawful sports and pastimes. Her findings had regard to the physical state of the site during the relevant 20-year period, when it had been in arable production for crops including wheat, barley and rapeseed. The tenant farmer's records only went back as far as 2005, but the Inspector was satisfied that the general pattern of agricultural use before then would have been similar. During those years when the field was left fallow (2006, 2010 and 2012), it would have been possible for the whole of the application site to be used for recreational purposes. During other years, however, the pattern of use would have been different. The Inspector found that people would have needed to stick to the public footpaths as the opportunity to carry out activities other than walking and dog walking would have been limited due to the crops. This would have been for particularly lengthy periods, especially when fast-growing, thick crops such as rape had been planted. The Inspector had found that it would have been very rare indeed during these periods (sometimes lasting for several months) for people to use the land off the public footpaths.

(8) The Inspector had concluded that, whilst being satisfied that the application site had indeed been used for lawful sports and pastimes, such use would have been dependent on the agricultural state of the land.

(9) The Public Rights of Way and Commons Registration Officer turned to the Inspector's findings on whether use had been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality. She had been satisfied that use had taken place by residents of the neighbourhood of Brabourne Lees within the localities of the civil parishes of Brabourne and Smeeth. She had also concluded that use of the land had been sufficiently significant for it to be apparent to the tenant farmer that it was taking place. This conclusion was, however, closely linked to the question of whether this significant recreational use could have taken place throughout the twenty-year period.

(10) The Public Rights and Commons Registration Officer informed the Panel that the Inspector had concluded that use of the site had continued up to and beyond the date of application.

(11) The final test was whether use had taken place over a period of twenty years or more. The qualification period for this test was 1 February 1996 to 1 February 2016. The Inspector's conclusion was that this test had not been met because use had been interrupted by the physical growing of crops and associated agricultural activities during those years when the land had not lain fallow. Any use during these

periods would have been sporadic and necessarily limited to the Public Footpaths and small portions of the site.

(12) The Public Rights and Commons Registration Officer informed the Panel that in the light of the findings she had described, the Inspector had concluded that the site was incapable of registration as a Village Green.

(13) The Inspector's report had been forwarded to both the applicant and objector. The objector had responded that the Inspector's report was both comprehensive and correct. The applicant had disagreed, claiming that recreational use had continued at a significant level in co-existence with agricultural use, even during the periods when crops were grown. They had also asked for further consideration to be given to the registration of the small portion of land at the southern end of the site known as the "bottom wedge."

(14) The Public Rights of Way and Commons Registration Officer briefly summarised her own conclusions which were set out in greater detail in the report. In respect of the applicant's request to consider registration of "the bottom wedge," she explained that the evidence (in the form of aerial photographs) had shown that crops had been planted in this part of the land between 2013 and 2016. She then said that she was in agreement with the Inspector's conclusions in every respect and that she consequently recommended that the land should not be registered.

(15) Mrs C Bell (Local Member) addressed the Panel. She said she was in agreement with the Parish Council's response to the Inspector's report because she believed that significant recreational use of the land had co-existed with agricultural use on a sufficiently large area of the site for registration to take place.

(16) On being put to the vote, the recommendations of the report were unanimously agreed.

(17) RESOLVED that for the reasons set out in the Inspector's report dated 22 July 2019, the applicant be informed that the application to register the land known as Hospital Field at Brabourne as a new Village Green has not been accepted.

7. Application to divert part of Public Footpath WC108 and create an additional Public Footpath at Cranbrook

(Item 4)

(1) The Panel Members visited the site before the meeting. This visit was attended by Mr Steve Kelsey (landowner), Mr Michael Wood (ET Landnet), Mr Brian Swann (Cranbrook and Sissinghurst PC), Mr John Donaldson and Mr Graham Smith (Ramblers) and some 8 members of the public. The Panel inspected the current route and the proposed new route.

(2) The Principal Legal Orders Officer introduced his report on the application to divert parts of Public Footpath WC108 which had been received from the owners of Great Swifts Manor at Cranbrook. The applicants had also offered to create an additional length of path around the edge of an adjoining field to benefit users of the existing PROW network.

(3) The Principal Legal Orders Officer then explained the reasons given by the applicants for the path to be moved. The current route ran down a busy driveway used daily by some 50 to 80 vehicles. It also ran across on land fronting the property where children and dogs played. Moving the route would overcome the resultant Health and Safety concerns. Dog excrement contaminated the machinery used to cut the grass and the resultant hay crop. Some members of the public also tended to attempt to force their way through the main gates, resulting in damage to the motor which was expensive to repair.

(4) The Principal Legal Orders Officer went on to set out the relevant Legal Tests.

(5) The Legal Tests for the diversion of a public path were contained within section 119 of the Highways Act 1980. These enabled the County Council to make an Order to divert a public path if it was satisfied that it was expedient to do so, either in the interests of the owner, lessee or occupier of the land crossed by the path in question, or if it was expedient in the interests of the public. It could not be diverted if the end of the path was not on another highway. The Order could not be confirmed by the Secretary of State when objections had been received unless the Council was satisfied that the route would not be substantially less convenient to the public as a result of the diversion, and that confirmation of the Order was expedient having regard to the effect of the diversion on public enjoyment of the route as a whole.

(6) Legislation relating to the creation of a Public Footpath by Order was contained within Section 26 of the 1980 Act which provided that the authority could create a public path over the land if it appeared to the Council that there was a need for a public path and if it was satisfied that it was expedient to do so after having regard to:

(a) the extent to which the path would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and

(b) the effect which the creation of the path would have on the rights of persons interested in the land.

(7) The Principal Legal Orders Officer also set out the County Council's own criteria for promoting a Public Path Change Order. These were:-

" (a) The status of the route must not be in dispute at the time of the application, unless the Public Path Order is being implemented concurrently with an application under Section 53 of the Wildlife and Countryside Act 1981;

(b) The applicant must agree to meet the County Council's costs of promoting the Order and bringing the new path into a fit condition for public use (as set out within section 3 of the Policy);

(c) The applicant must also agree to defray any compensation which may become payable as a result of the proposal;

(d) The definitive line should, where it is considered by the County Council to be reasonably practicable be open, clear and safe to use.

However, nothing in this policy is intended to prevent the County Council promoting a Public Path Change Order in any case where it considers it appropriate in all the circumstances to do so.”

(8) The Principal Legal Orders Officer turned to the responses to consultation. He said that Tunbridge Wells BC had written that it did not support diversions of PROWs especially in the High Weald as this was contrary to its Landscape and AONB Management Plan unless there were compelling safety or security reasons or if a satisfactory alternative of at least equal value could be provided. The Borough Council did not consider this to be the case. It had made no comment about the proposed additional route.

(9) Cranbrook and Sissinghurst PC had initially supported the proposal but had then reconsidered and objected on the grounds that the route was some 400m longer than the original; that the current line was well used and pivotal in picking up the path to Sissinghurst; that the applicant’s claim to the taking of a hay crop was inaccurate; that there was historical evidence that the path had been used for at least 250 years; that important views of Cranbrook would be lost; and that in the context of the emerging National Development Plan and the draft Local Plan, there could be large developments at Wisley, necessitating the provision of footpaths providing cohesion between settlements.

(10) The Ramblers had objected on the grounds that the path ran parallel to the drive and crossed at a point with excellent visibility. They claimed that the driveway was not busy driveway and that they did not believe there have been near accidents; that the path was nowhere near the house so there was no significant security aspect; that the perceived danger of farm machinery was wildly exaggerated; that the footpath did not use the electric main gate and they could not believe that a walker had damaged it; and that the reasons given were fabrications on the part of the owner who had purchased the land with the PROW and now wished to change it.

(11) The High Weald AONB Unit had submitted several historical maps in support of its comments that Kent County Council had a statutory duty to have regard to the purpose of conserving and enhancing the natural beauty of the High Weald AONB. This duty included the determination of applications for the diversions of PROWs. Objective R1 of the Management Plan stated an objective of maintaining the basic pattern and features of routeways. The current alignment of WC108 was of historic importance serving not only Great Swifts but historically Moat Farm (now gone). It had been used for the local movement of people stock and farm vehicles over 250 years between the farms, green and common and for access around Swifts Park. The diversion would therefore be damaging to the High Weald AONB and impact upon public enjoyment of the route by those who appreciated walking in the footsteps of their ancestors. The High Weald AONB Unit therefore objected to the diversion of the footpath.

(12) The Principal Legal Orders Officer moved on to consideration of the criteria for diversion set out section 119 of the Highways Act 1980. The first of these was whether it was expedient in the interests of the landowner or the public. He said that he considered that although not all the grounds put forward by the applicant would individually be sufficient to divert the footpath, the concerns of security and privacy were convincing. He drew attention to the gate some metres away from the main gate which varied from the legally- defined path and was used by the public. If the

Council were to strictly apply the Law and insist on the use of the main gate, it would pose significant security and privacy problems. Recent Case Law in Somerset had confirmed that this was a valid consideration. He therefore concluded that this test had been met.

(13) The Principal Legal Orders Officer then said that the remaining tests were to be applied at the confirmation stage if the first test was met (resulting in an Order being made). He then said that the path was to be diverted to reconnect with the same highway at the same points as currently existed. This meant that the application met the test on whether the points of termination would be as convenient.

(14) The Principal Legal Orders Officer pointed out the subjective nature of the remaining tests and the understandable difficulties this caused. He did not believe that the right of way would become substantially less convenient to the public. This was because it was an amenity path that was mainly used for recreational purposes. The diversion might increase the travelling distance for some users whilst reducing it for others. The headland path subject to the Creation Order was currently enjoyed by the public on an informal basis and the Order would formalise this arrangement.

(15) The Principal Legal Orders Officer did not consider that the diversion would be any less enjoyable to use, in terms of its physical nature, than the current route. Although the path was old, he did not consider it to be of intrinsic or specialist historic interest. He therefore did not consider that the proposed diversion would have any negative impact upon public enjoyment of the path as a whole, albeit that others might hold a different opinion.

(16) The Principal Legal Orders Officer said that there would be no detrimental effect on other land served by the existing path. There would also be no detrimental effect on other land served by the proposed new right of way.

(17) The Principal Legal Orders Officer said that the creation of the proposed new Public Footpath would add to the convenience and enjoyment of path users as well as providing a useful addition to the local rights of way network.

(18) The Principal Legal Orders Officer concluded his presentation by saying that he recommended that the proposed Public Path Diversion Order should be made as the legal tests for the making of the Order had been met. However, because of the subjective nature of the other tests (where many different views had been expressed), the County Council ought to take a neutral stance at any subsequent Public Inquiry.

(19) Mr John Donaldson (Ramblers) said that beauty was a subjective quality. In his opinion the public footpath was a historical route which afforded a fabulous view overlooking the Weald. Cranbrook and Sissinghurst PC had nominated the views of the windmill and of Benenden as *Protected Views*.

(20) Mr Donaldson went on to say that the current route of the Public Footpath WC108 was more convenient for walkers because it linked to WC103 at a much better point than the proposed diversion.

(21) Mr Donaldson then said that main electric gate was blocking the right of way. This problem could have been addressed by an application for diversion of the footpath to the side of the vehicular gate entrance.

(22) Mr Donaldson continued by saying that the current route was not a busy route and that it was nowhere near the landowner's home. The concerns about hay gathering were very unconvincing as there was very little dog excrement off the path. Any excrement that was on the path itself was irrelevant as far as hay gathering was concerned.

(23) Mr Donaldson added that the proposed new route would not be used by many people to walk into Cranbrook as they would continue to use Quakers Lane. The current dry route was much shorter than the proposed new one and would also be wet and muddy. Therefore, the proposed diversion was substantially less convenient for the public.

(24) Mr Brian Swann (Cranbrook and Sissinghurst PC) said that there should be no diversion. Any confusion over its route should be ameliorated by improved way marking. The path had never been used for hay production. The proposed new route was 400m longer than the current one, which was kept dry by the sunshine. The new route, by contrast would involve walking two sides of a triangle instead of directly. It was neither as convenient nor as enjoyable as the current route.

(25) Mr Swann then said that the historical value of the current path had been noted by both the Local History Society and the Cranbrook Preservation Society. It also enabled people to enjoy the perfect beauty of the countryside. It would be an absolute tragedy if it were lost.

(26) Mr Swann concluded by saying that the landowner could address the health and Safety concerns by creating an entrance to the left of the main gate and creating a new path from this entrance point to the north of the drive. He could then no longer be accused of blocking the PROW.

(27) Ms Claire Tester (Kent High Weald AONB Unit) said that the High Weald AONB Management Plan, which had been adopted by KCC, made the High Weald a homogenous area of beauty. This designation included its paths, roads and tracks. The aim was to avoid diverting routes unless absolutely necessary. This particular route had significant historical importance as it had been used by people and animals for 250 years. She concluded by saying that it was incorrect to say that the diversion would have no impact on the AONB.

(28) Mr Michael Wood (ET Landnet Ltd) said that the new route that would arise from the Creation Order would be to the same standard as the current route. He added that the diversion was in the Landowner's interest when all of the factors that had led to the application were treated as a whole.

(29) Mr Wood noted that some of the objectors had suggested creating a new entrance and diverting the path to the north of the drive. He said that, in practice, this was the route that many walkers used. In 2018, a walker had wandered off the official path and had been attacked by the landowner's dog, leading to a significant insurance payment. There had been other incidents in recent years, although these had been less serious in nature.

(30) Mr Wood said that the current loss of revenue from the taking of a hay crop due to the presence of dog excrement stood at £10k per year. The proposed new route would enable people who walked their dogs to Cranbrook to use the land on the other side of the fence and away from the road. Overall, the new route would certainly be less convenient for some and more convenient for others.

(31) Mr Wood said that when balancing the landowner's interest against loss of enjoyment, the Panel should take into account that there were very good views from the proposed new path. He added that he could not understand how objectors could claim that the current route had no impact on the landowner's property and its privacy. He asked the Panel to make both Orders

(32) The Principal Legal Orders Officer referred to correspondence from the Open Spaces Society that had previously been circulated to the Panel Members. This had claimed that the style of the report had been "tendentious." He said that all reports were written in the same style and that any perceived tendentiousness had not been intended.

(33) During discussion of the report, Members of the Panel raised concerns that there would be a considerable loss of amenity and enjoyment for walkers if the diversion were made, and that the diversion was in reality a very different path with a very inferior view.

(34) On being put to the vote, the proposed diversion was unanimously rejected whilst the proposed new length of Public Footpath was unanimously agreed.

(35) RESOLVED that:-

- (a) the application to make a Public Path Diversion Order to divert part of Public Footpath WC108 at Cranbrook be not approved on the grounds that there would be a considerable loss of amenity and enjoyment for walkers if the diversion were made, and that the proposed diversion is in reality a very different path with a very inferior view;
- (b) the application for the County Council to make a Public Path Creation Order to create a new length of Public Footpath in the vicinity of Great Swifts Manor at Cranbrook be approved; and
- (c) in the event of objections to the Order approved in (b) above, the matter be referred to the Planning Inspectorate, with the County Council retaining a neutral stance in respect of the proceedings thereafter.

8. Application to register land known as Hillminster Green at Minster-in-Thamet as a new Town or Village Green

(Item 5)

(1) The Public Rights of Way and Commons Registration Officer introduced the report on the application which had been made by Minster-in-Thamet PC under section 15 of the Commons Act 2015 and the Commons Registration (England) Regulations 2014. The Parish Council had acquired the land after the application had been made in October 2017. This meant that it would have been possible for it

to be treated as a voluntary dedication. As the investigation had nearly been completed, and it appeared that the legal tests under section 15 (2) were capable of being met in any event, it was decided to proceed with the application as it stood.

(2) The Public Rights of Way and Commons Registration Officer went on to briefly summarise the tests that all needed to be met in order for registration to take place. She said that use of the land had been “as of right” because it had taken place without force, secrecy or permission enabling rights to be acquired. The user evidence forms demonstrated that use of the land had been for the purposes of lawful sports and pastimes. The application site had been used by residents of the neighbourhood of Hillminster within the locality of the parish of Minster-in-Thamet. The user evidence forms evidenced that the land in question was used as a local focal point on a daily basis by a significant number of these residents. Use of the land had continued up to and beyond the date of application for the required 20 year period of 1997 to 2017. She therefore recommended that the land should be registered as a new Village Green.

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

(4) RESOLVED to inform the applicant that the application to register the land known as Hillminster Green at Minster-in-Thamet as a new Village Green has been accepted and that the land subject to the application be formally registered as a Village Green.

9. Application to register land known as Kingsmead Recreation Ground at Canterbury as a new Town or Village Green

(Item 6)

(1) The Public Rights of Way and Commons Registration Officer introduced the report on an application by Canterbury CC under section 15(8) of the Commons Registration Act 2006 to voluntarily register the land in question as a new Town or Village Green. The tests for applications of this nature required the County Council to be satisfied that the applicant was the owner of the land and that any necessary consents had been obtained. The County Council’s investigations had confirmed that this was the case. She therefore recommended that registration should take place.

(2) Ms Rebecca Booth (Canterbury CC) confirmed that the City Council was very content to accept the recommendations.

(3) Mr G K Gibbens (Local Member) said that no one had objected to the application and that Canterbury CC and the local community had worked together to bring this application about. This would enable the local residents to enjoy an area of green space in the urban centre of Canterbury.

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

(5) RESOLVED that the applicant be informed that the application to register the land known as Kingsfield Field at Canterbury has been accepted and that the

land subject to the application be formally registered as a Town or Village Green.

10. Application to register land known as Whimbrel Green at Larkfield as a new Town or Village Green

(Item 7)

(1) The Public Rights of Way and Commons Registration Officer introduced the report on an application by East Malling and Larkfield PC under section 15(8) of the Commons Registration Act 2006 to voluntarily register the land in question as a new Town or Village Green. The tests for applications of this nature required the County Council to be satisfied that the applicant was the owner of the land and that any necessary consents had been obtained. The County Council's investigations had confirmed that this was the case. She therefore recommended that registration should take place.

(3) Mrs T Dean (Local Member) was present for this item. She indicated that she did not consider it necessary to address the Panel.

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

(5) RESOLVED that the applicant be informed that the application to register the land known as Whimbrel Green at Larkfield has been accepted and that the land subject to the application be formally registered as a Town or Village Green.