KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the Swale 3 - Sessions House on Wednesday, 28 March 2018.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr I S Chittenden, Mr P J Homewood and Mr R A Pascoe

IN ATTENDANCE: Mr C Wade (Principal Legal Orders Officer) and Mr A Tait (Democratic Services Officer)

UNRESTRICTED ITEMS

3. Application to register land known as Hospital Field at Brabourne as a new Town or Village Green
(Item 3)

(1) The Principal Legal Orders Officer introduced the application by saying that it had been made by Brabourne Parish Council on 1 February 2016 under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014.

(2) The Principal Legal Orders Officer referred Appendix A of his report which showed the layout of the application site. He added that the applicants had included 61 user evidence questionnaires which were summarised at Appendix C of the report.

(3) The Principal Legal Orders Officer then said that the vast majority of the application site was owned by Mr. R. Johnson and Ms. C. Johnson and was currently let under an agricultural tenancy to a local farmer. A small slither of land in the south-western corner (abutting Lees Road) was registered to the Kent County Council whose Property Team had been consulted but had not yet responded.

(4) The Principal Legal Orders Officer continued that an objection to the application had been received from Gladman Developments Ltd who had made an application for planning permission to develop the land for residential development. This application was the subject of a separate process and could have no bearing upon the determination of the Village Green application.

(5) The objection had been made on the grounds that the applicant needed to provide strict proof as to the status of the alleged neighbourhood and the boundaries of the localities relied upon; that use of the site consisted primarily of walking the existing Public Footpaths, which was not a qualifying use for the purposes of the Village Green application. Any wider recreational use was insufficient to demonstrate that the land had been in regular usage by the local

community. The objectors also claimed that the site had been used for the growing of crops on a five-year rotation, which meant that the site as a whole had not been available for recreational use; and that some use had been challenged by the tenant farmer or had taken place with the landowners' permission. The objector had also provided 13 witness statements from people familiar with the application site, including both landowners and the tenant farmers. These claimed that any use of the site had been predominantly along the existing Public Footpaths and that any wider recreational use that may have taken place would necessarily have been interrupted by the agricultural use of the site (predominantly for wheat and barley crops). It was also suggested that claims of recreational use had only recently arisen, apparently in response to proposals to develop the land. In the objector's view, the only just way to resolve the serious dispute about the application would be to hold a Public Inquiry.

(6) The Principal Legal Orders Officer then turned to consideration of the legal tests which all needed to be passed for the application to succeed. The first of these was whether use of the land has been "as of right." This meant that use needed to have taken place without force, secrecy or permission. In this case, there was no evidence or suggestion that access to the application site had been gained forcibly or secretly.

(7) The Principal Legal Orders Officer said that the objectors had asserted that equestrian use of the application site has been challenged by the tenant farmer, and that metal-detecting had been expressly permitted. If this were the case, those uses would need to be discounted as they would not have taken place "as of right".

(8) The Principal Legal Orders Officer then said that an issue that needed to be carefully considered related to the public rights of way that crossed the site, and the degree to which the "walking" activities cited in the user evidence forms related to those rights of way. Walking along a Public Footpath would be an exercise of an existing right, and therefore "by right" instead of "as of right." He explained that this was because users had to initially be using the land as trespassers in order for a right to be acquired after twenty years of unchallenged use.

(9) The Principal Legal Orders Officer said that a large amount of the user evidence referred to walking. A small number of users claimed to have enjoyed unrestricted use across the whole field. It was, however, almost impossible on paper to differentiate for the majority between general recreational walking over a wide area and walking on the public rights of way on and around the application site. He added that it seemed likely that at least some of the use of the application site for walking, jogging and cycling would not be use that would qualifying as being "as of right", so the degree of general recreational use needed to be properly established before any firm conclusion could be reached on the "as of right" test.

(10) The second test was whether use of the land had been for the purposes of lawful sports and pastimes. The Principal Legal Orders Officer said that the user evidence provided by local residents gave a range of activities on the application

site including walking, playing with children, fruit picking, nature observation and kite flying. Once again, it would be necessary to differentiate between walking in exercise of an existing public rights of way right and walking at will over a wider area. The objector's position was that the majority of use had taken place on the Public Footpaths. This was disputed by the applicant. It was unfortunately not possible to reach any conclusion on the basis of the evidence currently available.

(11) The Principal Legal Orders Officer explained that another conflict of evidence arose in that some of the activities cited were at odds with the objector's evidence regarding the intensive agricultural use of the application site. Activities such as kite flying, ball games or frisbee could not have taken place during periods when it was alleged that the land was being used for crops such as wheat, barley or oilseed rape.

(12) The objector's evidence was that the land was used annually for high-density crops which, at their peak during summer months, would reach 1 to 2 metres in height. In this case, it would have been impossible for anyone to walk through or recreate on the land without causing substantial damage to the crops. No such damage had been observed. The applicant did not accept that the application site had been farmed in the manner described and suggested instead that the land has been left fallow for many years, with a large area on the western side of the site set aside and uncropped. He added that case law had established that low-level agricultural use was not inherently incompatible with Village Green registration.

(13) In the light of the unresolved conflict of evidence he had described, the Principal Legal Orders Officer said that it was not possible to conclude, without further investigation, whether the land had been used in the requisite manner.

(14) The next test was whether use had been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality. The applicant relied on "the neighbourhood of Brabourne Lees in the localities of the civil parishes of Brabourne and Smeeth." The Principal Legal Orders Officer said that the civil parishes of Brabourne and Smeeth were both legally recognised administrative areas capable of constituting qualifying localities for the purposes of Village Green registration. The objectors had stated that the applicant needed to prove that Brabourne Lees was a qualifying neighbourhood for the purposes of Village Green registration. They had not, however, given any evidence as to why Brabourne Lees could not be a neighbourhood for this purpose. A large number of the witnesses had identify themselves as living in Brabourne Lees. One of them had described it as having "a local reputation for being a close-knit community, good for families with a shop, post office, pubs etc." Several others had also referred to community facilities. The village was shown on maps as Brabourne Lees, forming a discrete and identifiable residential area in an otherwise rural location. For these reasons he said that it would appear that the application site had been used by the residents of a cohesive neighbourhood within two legally recognised localities.

(15) The Principal Legal Orders Officer said that a total of 61 witnesses had submitted evidence in support of the application and that 25 of them had used the

land on an at least weekly basis. This seemed to be sufficient to indicate that the land was in general use by the community, although this evidence had to be viewed in the context of the exercise of existing rights through use of the public footpaths and the extent to which the land was capable of being used for recreational purposes in the light of its claimed agricultural use.

(16) The Principal Legal Orders Officer said that the final two tests had been met in that there was no evidence that use of the land had ceased prior to the application being made. It also seemed to be the case that the application site has been used for a period in excess of the required twenty year period, although this was subject to whether this use qualified for the purposes of Village Green registration.

(17) The Principal Legal Orders Officer concluded his presentation by saying that there were serious disputes of fact between the applicant and the objector, particularly in respect of the degree to which use has been confined to the rights of way crossing the site and the impact upon recreational use of the agricultural operations taking place on the application site. These opposing views could only properly be reconciled by way of a hearing at which both parties could have the opportunity to give oral evidence and challenge each other's evidence in respect of the disputed points. Both the applicant and the objector agreed that a Public Inquiry was the most appropriate way to proceed in this case, as the County Council's Officers were unable to make a sound recommendation on the basis of the information currently available. He explained that Officers were not empowered in Law to critically test the evidence themselves, but that the Courts had established that the appropriate mechanism in such circumstances was for the County Council to appoint an independent Inspector (normally a Barrister) to hear the relevant evidence and report the findings back to the County Council. The final decision regarding the application nonetheless remained with the County Council in its capacity as the Commons Registration Authority. He recommended accordingly.

(18) In response to a question from Mr Chittenden, the Principal Legal Orders officer confirmed that there had been no trigger event affecting this application.

(19) The Chairman commented that documentation should have been submitted to the Rural Payments Agency if agricultural activity had taken place on the land. This would be a productive line of inquiry for the Inspector to follow.

(20) The Chairman proposed, seconded by Mr R A Pascoe that the recommendations of the of the PROW and Access Manager be agreed.

Carried unanimously.

(21) RESOLVED that a Non Statutory Public Inquiry be held into the case to clarify the issues.