

KENT COUNTY COUNCIL

REGULATION COMMITTEE MEMBER PANEL

MINUTES of a meeting of the Regulation Committee Member Panel held in the The Peter Sloper Room, Dymchurch Village Hall, 6 Orgarswick Avenue, Dymchurch TN29 0PA on Wednesday, 23 May 2018.

PRESENT: Mr A H T Bowles (Chairman), Mr S C Manion (Vice-Chairman), Mr M A C Balfour (Substitute for Mr P J Homewood), Mr I S Chittenden and Mrs L Hurst (Substitute for Mr R A Pascoe)

ALSO PRESENT: Mr M E Whybrow

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

UNRESTRICTED ITEMS

4. **Application to register land known as the Recreation Ground at Dymchurch as a new Town or Village Green**
(Item 3)

(1) Members of the Panel visited the before the meeting. The visit was also attended by Mr M J Whybrow (Local Member), representatives from Friends of Dymchurch Rec and some 60 members of the public.

(2) The Principal Legal Orders Officer began his presentation by saying that the County Council had received an application to register land known as Dymchurch Recreation Ground as a new Town or Village Green from Ms. Deana Coker on behalf of the Friends of Dymchurch May 2017. The application had been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2014. It had been accompanied by 47 user evidence questionnaires in support.

(3) The Principal Legal Orders Officer then explained that Section 15 of the Commons Act 2006 enabled any person to apply to a 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, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.*” The application also needed to have continued “as of right” until at least the date of application or to have ended no more than one year prior to the date of application.

(4) The Principal Legal Orders Officer described the area of land subject to the application as a recreation ground of approximately 9.9 acres (4 hectares) in size situated off St. Mary's Road in the village of Dymchurch. Access to the site was via a shared pedestrian and vehicular entrance from St. Mary's Road

adjacent to the Romney, Hythe and Dymchurch railway line. Sections of the Recreation Ground (the northern corner and the area along the eastern boundary of the site, including the pavilion) had been excluded from the application site at the applicant's request. The multi-user games area on the western side of the site has also been excluded because it was affected by planning consent and therefore incapable of registration.

(5) The Principal Legal Orders Officer then said that the application site was owned by Dymchurch Parish Council which had opposed the application on the grounds that it would preclude the democratic right of residents to consider an option to develop part of the site for housing in order to raise funds for improved amenities in the parish. The application site had originally been acquired by the Parish Council for the purpose of sport and recreation in the village and it continued to be used for that purpose. A pavilion had been constructed in 1931 and had been used by football and cricket clubs as changing rooms until 2006. This use had ceased due to its decaying condition and the cost of adapting the building to meet current standards and legislative requirements. It had not been possible to secure external funding for a new pavilion. The Parish Council had responded to the situation by consulting local residents on various options for raising funds for improved amenities generally. One option put forward was to use some 2 acres of the recreation ground for housing. Village Green status would impose restrictions on the land that would ultimately preclude this. The Parish Council firmly believed that it was the parishioners' democratic right to be able to consider all available options in order to decide what was best for the parish.

(6) The Principal Legal Orders Officer explained that whilst the Parish Council's concerns were noted, Village Green applications had to be determined solely on the basis of the legal tests set out in section 15 of the Commons Act 2006. Any concerns about amenity, suitability, desirability or future use were not issues that the County Council could take into account when determining the application.

(7) The Principal Legal Orders Officer then moved on to consider the legal tests, all of which had to be met for registration to take place. The first of these was whether use of the land had been "as of right." The definition of this phrase had been considered by the House of Lords. The *Sunningwell* case had established that rights were acquired if a person used the land for a required period of time without force, secrecy or permission, and the landowner neither stopped him nor advertised the fact that he had no right to be there.

(8) The Principal Legal Orders Officer continued that the application site formed part of an established recreation ground. For this reason there was no suggestion that any use of the land has been with force or in secrecy. In cases where land was owned by a local authority, it was important to determine whether recreational use of the application site by the local inhabitants had been by virtue of any form of permission. This was because use which was by virtue of any permission (whether express or implied) would not be "as of right". Local authorities had various powers to acquire and hold land for a number of different purposes to assist in the discharge of their statutory functions. The mere fact that a local authority owned land did not automatically mean that the

local inhabitants were entitled to conduct informal recreation on it. On the other hand, local authorities also had powers to acquire land for the purposes of public recreation. In those cases, the land was provided specifically for the purposes of public recreation. Additionally, land was often donated or gifted to Local Authorities for the same purpose.

(9) The Principal Legal Orders Officer then explained that when a Village Green application local authority owned land was being considered, it was necessary to identify either the powers under which the land was held, or the terms of any gifted or donated land. If the local authority held the land specifically for the purposes of public recreation, then its use was generally considered to be by virtue of an existing permission and, hence, “by right” rather than “as of right”.

(10) In order to establish the facts, the County Council had directed the Parish Council to provide further information regarding its acquisition of the application site and how and for what purpose it considered it held the land. The Parish Clerk had set out this process on behalf of her Council and also attached photocopied evidence of extracted Parish Council Minutes and other relevant information. Her letter set out that it had been reported to the parish council meeting of 22 November 1927 that 6 acres of land had been offered as a gift to the parish council to be used for sport and recreation on the basis the parish council undertook future maintenance and the cost of laying out the field in a condition fit for sports. The acceptance of the gift as a public recreation ground had been agreed at the parish council meeting in December 1927. The southern part of the application site had been acquired by the Parish Council by way of a conveyance dated 4th March 1929 which included a clause specifically requiring the Parish Council *“for ever hereafter to use the said property for the purposes of a Recreation Ground”*. Bye laws had then been introduced which were still in use. A small additional plot of land had been purchased by the Parish Council in 1934 to overcome difficulty of access to the recreation ground.

(11) The Principal Legal Orders Officer went on to say that the 1929 conveyance also included an option for the Parish Council to purchase additional land in the vicinity for recreation purposes. This appeared to have been taken forward when a further piece of land was purchased to provide greater space for sports and recreation. The Parish minutes of July 1975 to this effect had been supplied by the Clerk. She had asserted the view that this purchase had specifically been made in order to provide recreation facilities for residents and that in consequence, any use would have been “by right” and not “as of right”.

(12) The Principal Legal Orders Officer said that the minutes and other attachments provided made it clear that the application site had originally been acquired by the Parish Council specifically for the purposes of public recreation. The applicant had been given the opportunity to address the evidence provided by the Parish Council. Whilst raising several points in her letter of response, there was nothing within it germane to the tests of registration that needed to be considered by the Panel.

(13) The Principal Legal Orders Officer referred to the *Beresford* and *Barkas* cases which had been considered by the House of Lords and High Court respectively. The conclusion in each of them had been that no matter under which Act a local authority owned and administered land for public recreation, public users could never be regarded as trespassers at any stage. The public could only have used the land with permission. He therefore concluded that any recreational use of the land had taken place had been “by right” and not “as of right”.

(14) The Principal Legal Orders Officer said that although he had concluded that the “as of right” test had not been met, he nevertheless needed to consider the other tests. The next test was whether use of the land had been for the purposes of lawful sports and pastimes. He said that the summary of evidence of use by local showed the activities claimed to have taken place on the application site, including dog walking, kite flying, ball games, picnics and jogging. It therefore appeared that the land had been used for a range or recreational activities.

(15) The third test was whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality. Although the applicant had not stated the locality relied upon in support of the application it would not be unreasonable to assume that the relevant locality in this case was the civil parish of Dymchurch, particularly as the land had been provided by the local Parish Council for its residents and as the user evidence questionnaires all come from residents of the parish. The evidence of use indicated that the land had been in regular usage for recreational purposes. Eleven of the users attested to having used the land on a daily basis, whilst several others (including people whose properties overlooked the land) referring to having observed daily use by others. The general impression from the evidence as a whole was that the land had been used in a manner entirely consistent with its status as a recreation ground. There was therefore little doubt that the land had been used by a significant number of the residents of Dymchurch.

(16) The Principal Legal Orders Officer said that use of the land had continued up to the date of application and had never ceased. This test had therefore been met except for the fact that the use had been “by right” rather than “as of right.” The same applied to the test as to whether use had taken place over a period of twenty years or more.

(17) The Principal Legal Orders Officer summarised his findings by saying that there appeared to be no dispute between the parties that the application site has been used for recreational purposes, without challenge, for a period in excess of twenty years continuing until (and beyond) the date of the application. The crux of the matter, however, was whether that use amounted to trespass by local residents or whether it took place in exercise of an established right. In this case, the evidence very clearly suggested that the application site had always been provided for recreational use by the landowner and that the residents had, in turn, used the land “by right.” He therefore concluded that the tests had not been met and recommended accordingly.

(18) Ms Deana Coker (applicant) said that recreational grounds were a crucial part of any community because they had a significant impact on the development of children and the happiness of everyone in the neighbourhood. She added that she was immensely passionate about the village of Dymchurch and felt compelled to protect it for future generations. She had applied for Village Green status for this reason.

(19) Ms Coker showed the Panel a map of Dymchurch. This, she said was the locality that the application pertained to. The village was boarded by the sea and farming land. There was a wonderful sandy beach which disappeared completely at high tide. This was one of the reasons why the Recreation Ground was so important. Dymchurch was a deprived area and it was costly to travel the distances to other recreational facilities.

(20) Ms Coker then said that the Recreation Ground was used by a significant number of people for activities such as children's parties, family picnics, football, netball, tennis, rounders and cricket. The brownies and Scouts used it for their activities and the area was also popular with dog walkers and joggers. Local charities used the Recreation Ground for fund raising, and it had also been used by the villagers since the 1960s for their "Day of Syn" activities.

(21) Ms Coker asked the Panel to bear in mind that recreation was essential for child development as well as physical and mental health. Councils needed to play their part on providing facilities or the general economy and welfare of the country would suffer from days off work, overcrowded surgeries and hospitals and broken lives. She quoted the Prime Minister's statement that the Government would aim to make the current generation the first one to leave the natural environment in a better state than they had found it.

(22) Ms Coker then referred to the Dymchurch Parish Council meeting of 22 November 1927 where it had been reported that 6 acres of land had been offered to it as a gift to be used for sport and recreation in the village on the understanding that the Parish Council would undertake the future maintenance and costs of laying out the field in a fit condition for sport. This act of generosity had saved future Councils a great deal of money in respect of providing recreational land. Recently, though, parts of the Recreation Ground had been neglected. Families had been unable to use it for prolonged periods due to the Council's policy of not opening the toilets. The pavilion had been allowed to fall into disrepair by the very body of people which should have ensured its upkeep.

(23) Ms Coker said that the village had been let down by the Parish Council which should have maintained and safeguarded Dymchurch's open space but had instead used words such as "burden" and "disrepair" in order to hide their intention to sell off the Rec for development. Just over a year earlier, the Parish Council had started enquiries into seeking planning permission for housing on the Rec. This had been done without consultation and by expending a large amount of time and money from the Village Precept in support of this goal.

(24) Ms Coker concluded her remarks by saying that she fully understood that the Panel had to consider strict criteria before deciding whether to register the land as a Village Green. She asked how the Rec could be saved as there appeared to be no protection for applications that sought to protect land which had been used solely for the recreational purpose it had been intended for from local parish councils who wished to sell off the land for development. She asked

the Panel to approve the application in the interests not only of the Rec but also every other recreation ground that was in the same danger.

(25) Mrs Vanessa McCreedy addressed the Panel in support of the application. She said that the evidence showed that there had been a requirement for a Village Green in Dymchurch ever since 1927 when 6 acres of land had been gifted to the village for sports and recreation. This need had been underlined when the Parish Council had bought additional land in 1933 and 1976 in order to extend the facility.

(26) Mrs McCreedy then said that she had been one of the authors of the adopted Parish Plan in 2006. She could attest that the villagers had supported the need for a recreation ground. Funding to the tune of £147,000 had been raised for improvements with the full support of the Parish and District Councils.

(27) Mrs McCreedy then said that in response to the plan put forward by the Parish Council to sell some of the land for housing, the Friends of Dymchurch Recreation Ground had conducted a survey. There had been no evidence of support for housing development within the 966 surveys returned. The reason this meeting was taking place because the open space, developed by previous Parish Councils was now under threat from the present Parish Council which was looking for sources of funding by selling off part of the Recreation Ground for housing.

(28) Mrs McCreedy said that the *Friends of Dymchurch Recreation Ground* understood that people would have needed to have been trespassing on the land for its use to have been “as of right.” They were concerned that although use was currently “by right” this status would be lost if the land was sold off for private development. If the Panel turned down the application, the villagers stood to lose part of their open space, setting a precedent for more space to be taken at a later stage.

(29) Ms McCreedy concluded by saying that it was impossible to predict what would happen in the future. The unique landscape of Romney Marsh was in danger of being lost. If, however, the application were to succeed there would be one protected area that would continue to be enjoyed by all. She appealed to the Panel to help protect the Recreation Ground. If this one could not be saved, no recreation ground in the country would be safe from development.

(30) Ms Sally Cook from *Friends of Dymchurch Recreation Ground* spoke in support of the application. She said that the Parish Plan had been adopted by the Parish Council in 2006. It represented the manner in which the community wanted the village to develop contained suggestions for the development of the Recreation Ground including money making activities.

(31) Ms Cook then said that members of the community had been successful in fund raising, including the building of the Village Hall. The Parish Council, however, had not been as successful. According to newspaper reports, it was asking for fund raising suggestions. Advice had been given to the Parish Council at its 2017 AGM on the type of evidence required to support successful funding applications. At that meeting, the retired Parish Plan representatives had been

asked to raise funds for a new pavilion, but she had needed to decline this request. The Parish Council had then informed the local community that it would need to sell off part of the Recreation Ground for housing. Not a single hand had been raised in support of this proposed plan. This had motivated a group of local residents to form the *Friends of Dymchurch Recreation Ground*.

(32) Ms Cook said that one of the suggestions within the Parish Plan was to incorporate a tearoom at the Recreation Ground that would also serve train spotters and users of the nearby Romney Hythe and Dymchurch Railway. The area suggested had not been included in the Village Green application, which meant that this option remained open and also that a new pavilion could be constructed.

(33) Ms Cook continued that there had been no evidence of an up-to-date survey or business plan at the AGM. The *Friends of Dymchurch Recreation Ground* had therefore sent a survey to every home within the parish, including questions on potential use of the recreation ground and the future of the pavilion. Space had also been left for parishioners to include additional information and comments. More than 680 completed surveys had been collected from Dymchurch residents and another 280 online responses had also been received. Over 100 of these responses had included detailed comments.

(34) Ms Cook then said that the application had been made to protect the land. The Parish Council had argued that the application would have a negative impact and that current activities would not be permitted if it became a Village Green. She hoped that the Panel could provide reassurance that this would not be the case and that everyone could work together for a successful outcome. She wanted to work with the Parish Council to improve the lives and economy of the residents, although at this point there had been no response to the *Friends of Dymchurch Recreation Ground's* offer of assistance. Indeed, it was understood that the Parish Council had set aside £15k to facilitate the sale of the land. The hope remained that they would see that there were other ways to produce what the village needed and that the community was passionate about it.

(35) Ms Cook finished by reading out a message from the Wraight family (which had originally donated the land. It read:

“As direct descendants of Morris and Daisy Wraight (our grandparents), we strongly believe their gift of the ground was given with the ongoing intent for its use to be as a place of recreation for the population of the village of Dymchurch and its surrounds. The wording of the deeds states this and should the recreation ground be used for development or use other than stated in the deeds, we believe is breaching the true intent and wishes of our grandparents. As members of the Wraight family we have no hesitation in saying that we will continue to fight for its use remaining as a place of joy and pleasure for everyone. We have many, many memories of playing as a child on this ground, watching cricket matches and taking the oranges out at half time for the football players. Wishing everyone who supports this cause well and good luck for the meeting.”

(36) Mr Ian Meyers (Chairman of Dymchurch PC) thanked the officers for an excellent and well-briefed report. He said he had served on the Parish Council for

25 years and that it was now necessary for everyone to work towards reconciliation. The intention of the Parish Council had been to undertake a feasibility study if this was merited by the outcome of consultation.

(37) Mr Russell Tillson (Chairman of the Dymchurch PC Assets and Amenities Group) said that he was the author of the options paper that had been considered at the Parish AGM in 2017. Dymchurch PC had the obligation to protect open spaces and to work to extend them. Each of the options put forward for consultation (of which the development was only one) had sought to protect the Recreation Ground for the purposes for which it had been donated.

(38) Mr M E Whybrow (Local Member) said that he had supported the application from the outset. Open land was very scarce in his constituency and the Recreation Ground was the only such area within the parish of Dymchurch.

(39) Mr Whybrow then said that he recognised that the Panel had no leeway to consider morals or public opinion and that it had to carry out a tick box exercise in order to comply with the Law.

(40) Mr Whybrow continued by saying that the application would not have come forward if the Recreation Ground had not been under threat. It needed to be kept in its entirety solely for recreational purposes for the village. He added that the Parish Council had omitted the word “solely” when writing to the County Council concerning the nature of the donation of the gift as recorded in the 1927 Minutes. He also noted that the land had been donated as a free gift to the parish. If this was the case, then how could use be “by right” if the Parish Council was not in a position to grant permission?

(41) The Principal Legal Orders Officer said that he had previously considered Mr Whybrow’s question. For the purposes of Village Green registration, use would still be “by right” because the people using the land could not be doing so as trespassers.

(42) Mrs Gill Smith (Clerk to Dymchurch PC) informed the meeting that the results of the survey on the options report contained within the Spring edition of the Dymchurch Parish Council newsletter had very recently been adjudicated. The outcome indicated that the residents wished to continue to use the site for recreational purposes as set out in 1929. The Parish Council would continue to facilitate this. She then gave the results to the Chairman who read out the following responses:

“Q2: Would you support the construction of new houses on the unused area of the Bull’s Field car park? Yes 46%, No 54%.

Q4: Would you support the construction of ten houses on the recreation ground as a means of financing the construction of a new pavilion and provision of improved facilities? Yes 48%, No 53%.”

(43) Before moving on to the commencement of the Panel’s decision-making, the Chairman thanked everyone at the meeting for their eloquence, good behaviour and forbearance.

(44) The Principal Legal Orders Officer responded to Members' questions by saying that it was open to anyone to challenge the Panel's decision if they believed that it had erred in Law. He conformed that if the Panel turned down the application, it would still be open to the Parish Council to seek to voluntarily register the land under Section 15 (8) of the Commons Act 2006. The *Beresford* and *Barkas* cases were accepted within the Legal profession as "the authorities" in terms of Case Law. The Panel could have confidence in the safety of these judgements.

(45) On being out to the vote, the recommendations of the Public Rights and Access Manager were agreed unanimously.

(46) RESOLVED that the applicant be informed that the application to register the land known as Dymchurch Recreation Ground as a Town or Village Green has not been accepted.