Application to register land known as Whitstable Beach as a new Town or Village Green

A report by the Head of Public Protection to Kent County Council's Regulation Committee Member Panel on Tuesday 19th May 2015.

Recommendation: I recommend that a Public Inquiry be held into the case to clarify the issues.

Local Members: Mr. M. Harrison and Mr. M. Dance Unrestricted item

Introduction

1. The County Council has received an application to register land known as Whitstable Beach in the town of Whitstable as a new Town or Village Green from Mr. P. McNally on behalf of the Whitstable Beach Campaign ("the applicant"). The application, made on 30th September 2013, was allocated reference number VGA658. A plan of the site ("the application site") is shown at **Appendix A** to this report.

Background

2. Members should be aware that land forming the majority of the current application site has already been the subject of a previous application submitted to the County Council under section 13 of the Commons Registration Act 1965. That application ("the 1999 application") was submitted on 14th December 1999 by local resident Mrs. A. Wilks and was made on the basis that the application site had become a Town or Village Green by virtue of its use by local people for lawful sports and pastimes for a period in excess of 20 years.

3. Following a Public Inquiry held in August 2001, the 1999 application was rejected by the County Council (at a meeting of the Regulation Committee Member Panel held on 1st March 2002) on the basis that:
   i. The application site included a significant area of land that only became available for public use after the execution of sea defence works in 1988/1989;
   ii. Use of the application site was not 'as of right' after April 1993 [that being the date upon which a letter ("the April 1993 letter") from the landowner was published in the local newspaper stating that the Whitstable Oyster Fishery Company had always "*encouraged people to use the beach*" and that "*dog-owners are welcome to use the beach*" provided they clear up any mess]; and
   iii. Use of the application site was not predominantly by the residents of the locality relied upon (i.e. Harbour Ward).

4. The first and third reasons for the rejection of the 1999 application are unlikely to be relevant in the current case because the 1988/1989 sea defence works which had the effect of enlarging the beach took place well before the twenty-year period relied upon in the current case, and because it is no longer necessary to demonstrate that use of

the application site has been predominantly by the residents of the neighbourhood or locality[1] (as opposed to the public at large).

5. There is, however, a dispute between the applicant and the objector as to whether the issue of the April 1993 letter remains relevant in respect of the current application and this is considered in further detail below.

Procedure

6. The current application has been made under section 15 of the Commons Act 2006 and the Commons Registration (England) Regulations 2008[2].

7. Section 15(1) of the Commons Act 2006 enables any person to apply to a Commons Registration Authority to register land as a Town or Village Green where it can 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;

8. In addition to the above, the application must meet one of the following tests:

   • **Use of the land has continued** 'as of right' until at least the date of application (section 15(2) of the Act); or

   • **Use of the land 'as of right' ended no more than two years prior to the date of application**[3], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

9. As a standard procedure set out in the Regulations, the Applicant must notify the landowner of the application and the County Council must notify every local authority. The County Council must also publicise the application in a newspaper circulating in the local area and place a copy of the notice on the County Council's website. In addition, as a matter of best practice rather than legal requirement under the 2008 Regulations, the County Council also placed copies of the notice on site to provide local people with the opportunity to comment on the application. The publicity must state a period of at least six weeks during which objections and representations can be made.

The application site

10. It should be noted that the area of land originally applied for was larger than that shown on the plan at **Appendix A**, in that it extended beyond the southern boundary of the land shown on the plan. However, following consultation with Canterbury City Council in its capacity as the local planning authority, it transpired that the southern section of the original application site had been subject of planning permission for the construction of new timber groynes and an increase in level of the beach (reference

[1] See *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin)

[2] Note that the 2008 Regulations have now been replaced by the Commons Registration (England) Regulations 2014 ("the 2014 Regulations") and the application falls to be determined under the 2014 Regulations.

[3] Note that from 1st October 2013, the period of grace was reduced from two years to one year (due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013). This only applies to applications received after that date and does not affect any applications received before that date.

CA/04/01797/WHI), thereby constituting a 'trigger event' for the purposes of Schedule 1A to the Commons Act 2006. As no corresponding 'terminating event' had taken place on the land, it was concluded that the right to apply in respect of the southernmost section of the original application site had been excluded, and the applicant was notified to that effect.

11. The application site covers an area of approximately 6.7 acres consisting of a shingle beach situated in the town of Whitstable. The application site includes the area between the sea wall and the high water mark, and extends from a groyne adjacent to the property known as 'The Ness' on the road known as 'Sea Wall' (in the north) to an area of beach to the west of the road known as 'West Beach' (just south of 'Daniels Court'). Two small areas of land are excluded from the application site, namely an area of beach to the west of the Royal Native Oyster Stores Restaurant and another area of beach around the Old Neptune Public House.

The case

12. The application has been made on the grounds that the application site has become a Town or Village Green by virtue of the actual use of the land by the local inhabitants for a range of recreational activities 'as of right' for more than 20 years.

13. In support of the application, the applicants have provided various plans showing the application site, as well as a total of 386 user evidence questionnaires[4]. The applicants also rely (as noted at part 11 of the application form) on the evidence of use of the beach that was submitted in respect of the 1999 application.

Consultations

14. Consultations have been carried out as required and no adverse comments, other than those from the landowners as set out below, have been received.

Landowners

15. The vast majority of the application site is owned by the Whitstable Oyster Fishery Company ("the landowner") and is registered with the Land Registry under title number K781262. A small section of the application site north of Terrys Lane is owned by Canterbury City Council ("the City Council") and registered with the Land Registry under title number K781174. The City Council also has a leasehold interest in a piece of the foreshore lying to the north-west of Island Wall (title number K696903).

<u>The Whitstable Oyster Fishery Company</u>

16. An objection to the current application (under cover of a letter dated 29th May 2014) has been received from the landowner's solicitor, Mr. G. Crofton-Martin of Furley Page Solicitors. The original objection was supplemented by way of a further submission from the landowner dated 4th December 2014.

[4]163 evidence questionnaires were provided with the application form on 30th September 2013, a further 216 questionnaires were provided by cover of a letter of 16th February 2014 and a further 7 were submitted by cover of letter dated 20th March 2014.

17. The landowner's grounds of objection can be summarised as follows:
    - Many parts of the application site have been physically unavailable for recreational use during at least part of the relevant 20 year period by virtue of the fact that they have been built upon, enclosed or otherwise closed off (e.g. to allow filming);
    - It is denied that any recreational use of the application site by local people has taken place 'as of right', because any use of the application site following publication of the April 1993 letter was permissive in nature;
    - The Inspector's finding of fact on the above point in respect of the 1999 application, which was accepted by KCC, gives rise to an issue estoppel point which precludes the County Council from reversing its finding on this point;
    - The locality relied upon is not a qualifying one since the 'town of Whitstable' is not an administrative district, nor an area with legally significant boundaries, and it ceased to become a local government area in 1974;
    - The fact that the landowner successfully opposed the 1999 application demonstrates that any subsequent use of the beach for recreational activities was not 'as of right';
    - Since 1999, the landowner has erected numerous signs on the application site which would have brought to that attention of users the fact that the land was private property and any recreational use was with the permission of the landowner; and
    - The Whitstable Oyster Fishery Company is created by statute and unlimited access to the beach by local people for recreational purposes would be incompatible with the statutory functions of the Company.

18. In support of the objection, the landowner has provided written opinions from Counsel as well as a number of documents, including plans showing areas of the beach that, from time to time have been inaccessible to the public (e.g. due to sea defence works), publicity surrounding the 1999 application, as well as photos and plans showing signage on the application site.

    Canterbury City Council

19. A second objection to the application (by way of a statement dated 22nd May 2014) has been received from the City Council.

20. The City Council's objection is made on the basis that a previous application for the registration of Whitstable Beach as a Town or Village Green has already been refused and the applicant in the current case has not been able to demonstrate why the facts and legal framework have changed such that a different conclusion might now be reached on the matter. As such, the City Council's position is that the County Council is entitled to apply the principle of issue estoppel to the current application.

21. The City Council further adds that registration of the application site as a Town or Village Green would impede its ability to undertake coastal protection works in accordance with powers available to it under section 4 of the Coast Protection Act 1949. In this regard, the City Council relies upon the Supreme Court's recent judgement in the Newhaven[5] case.

[5] *R (Newhaven Port and Properties Ltd.) v East Sussex County Council* [2015] UKSC 7

Legal tests

22. In dealing with an application to register a new Town or Village Green the County Council must consider the following criteria:
    (a) Whether use of the land has been 'as of right'?
    (b) Whether use of the land has been for the purposes of lawful sports and pastimes?
    (c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?
    (d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or meets the criteria set out in section 15(3)?
    (e) Whether use has taken place over period of twenty years or more?

Discussion

23. There can be no dispute that the town of Whitstable has well-known reputation for its beachfront setting and the beach itself has been, for many years, a popular attraction for both local people and those coming from further afield. Indeed, the applicant's case is that the application site has been in regular usage by local people for a wide range of recreational activities for a period well in excess of twenty years, and such use was continuing as at the date of the application in September 2013 (thereby making the relevant twenty-year period 1993 to 2013). The large number of user evidence questionnaires submitted with the application, on the face of it, would appear to support this proposition and suggest that recreational use of the application site has taken place by a significant number of local people on a more than trivial or sporadic basis.

24. However, the land can only be registered as a Village Green if each and every one of the legal tests set out above is met. In this case, there are a number of issues, as raised by the landowner, which cast some doubt as to whether such use has been of a sufficient nature and quality so as to make the land capable of registration as a Town or Village Green under the 2006 Act. The main issues in this case (but not all of them) are set out below.

    <u>'As of right'</u>

25. One of the legal tests (as set out at paragraph 22) requires that recreational use of the application site must have taken place 'as of right'. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). In this context, force refers not only to physical force, but to any use which is contentious or exercised under protest[6]: "*if, then, the inhabitants' use of the land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious*"[7].

26. As is noted above, one of the reasons for the rejection of the 1999 application was that the Inspector conducting the Public Inquiry into that application had concluded that use of the application site had not taken place 'as of right' because, in April 1993, a letter from the landowner was published in the local newspaper stating that the Whitstable Oyster Fishery Company had always "*encouraged people to use the beach*" and that "*dog-owners are welcome to use the beach*" provided they clear up

[6] *Dalton v Angus* (1881) 6 App Cas 740 (HL)
[7] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

any mess. This conclusion was reached on the basis that '*a reader of the newspaper would have realised that if he wished, he was permitted to use the beach*'.

27. The applicant's position is that the publication of the April 1993 letter pre-dated the commencement (in September 1993) of the relevant twenty-year period relied upon in the current application. Furthermore, it is said that the Inspector conducting the Public Inquiry into the 1999 application did not have the benefit of the decision of the House of Lords in the Beresford[8] case (in which it was held that permission must be communicated and revocable), and indeed a subsequent application to record a Public Footpath across the beach was successful, the Inspector in that case finding that the April 1993 letter amounted merely to toleration rather than express permission. Even if the April 1993 letter were to be considered sufficient to amount to an effective permission, it is not at all clear that it was sufficiently communicated to all of the inhabitants of the locality and, even if it was, it still falls to be determined whether the communication of that permission, prior to the commencement of the twenty year period, is sufficient to render all subsequent use permissive.

28. The landowner contends that the effect of the letter was plainly to convey a general permission to use the application site and, although the April 1993 letter was published prior to the commencement of the relevant twenty-year period, it had continuing effect following its publication, on the basis that it would be wrong to consider that the permission conveyed within the letter expired as soon as it was written.

29. There are also a number of other issues in dispute, and unresolved, with regard to whether use of the application site in this case has taken place 'as of right'. In particular, whether the landowner's objection to the 1999 application was sufficient to render any subsequent use of the application contentious (and therefore not 'as of right') and the effect of various notices that have been erected on the application site by the landowner.

Neighbourhood and/or locality

30. Another one of the legal tests set out in the 2006 Act requires that use of the application site has taken place by a significant number of the residents of a particular neighbourhood, or a neighbourhood within a locality. It is generally accepted that a locality (in this context) must be a legally recognised administrative unit[9]. On the subject of neighbourhood, the Courts have held that '*it is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood… The Registration Authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness; otherwise the word "neighbourhood" would be stripped of any real meaning*'[10].

31. At part 6 of the application form, the applicant originally specified the locality relied upon as being the town of Whitstable. Subsequently, the applicant sought an amendment so as to rely on four alternative localities/neighbourhoods as follows:
    - The locality of the town of Whitstable;

[8] *R v City of Sunderland ex parte Beresford* [2003] UKHL 60
[9] See *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[10] *ibid* at 92

- The locality of the ecclesiastical parish of Whitstable;
- The locality of the Canterbury City Council electoral ward of 'Harbour Ward'; and
- The neighbourhood within the boundaries of Harbour Ward within the locality of the town or ecclesiastical parish of Whitstable.

32. The landowner's position on this is that the applicant has no absolute right to unilaterally amend the application and, in this case, the proposed amendment is likely to result in unfairness to the landowner. The landowner adds that, whilst it is accepted that an ecclesiastical parish and an electoral ward are both capable of constituting a qualifying locality, the applicants have not provided any evidence to demonstrate that the ecclesiastical parish has existed with substantially the same boundaries throughout the 20 year period, or that the electoral ward relied upon comprises either a 'community of interest' or possesses the necessary degree of cohesiveness to amount to a qualifying neighbourhood.

33. The applicant's case is that, on the contrary, there is no unfairness to the landowner as the reliance on alternative localities is unlikely to involve significant additional research on the part of the landowner as the burden of proof is on the applicant to demonstrate that the test has been met. Rather, substantive prejudice would be caused to the applicant if no amendment were to be allowed and the applicant were to be restricted to a single locality (because the application could fail simply by virtue of the applicant having chosen to rely on the wrong locality).

The Newhaven case

34. The Newhaven case concerned a Village Green application made in respect of a tidal beach owned by Newhaven Port and Properties Ltd. but that had been used for recreational purposes by local residents for a period in excess of twenty years. The case was recently considered by the Supreme Court, which concluded that the land in question was not capable of registration as a Village Green on the basis that the Commons Act 2006 provisions do not enable the public to acquire by user rights that are incompatible with the continuing use of land that has been acquired for defined statutory purposes (also known as the 'statutory incompatibility' issue).

35. In this case, the landowner's position is that registration of the application site as a Village Green would give rise to a statutory incompatibility. The current Whitstable Oyster Fishery Company ("the Company") was created (following various previous incarnations dating back to the 1500s) by the Whitstable Oyster Fishery Company Act 1896 and it is submitted that the statutory objects and powers of the Company are to run the oyster fishery which it owns. In this regard, the Company wishes to increase the efficiency of its operations by investing in new infrastructure which will require the erection of small structures on part(s) of the beach. However, if Village Green status is granted for the application site, it would not be possible to do this and the registration of the land would therefore be incompatible with the statutory purposes for which the land is held by the Company.

36. The City Council has made similar representations, although its concerns relate to the Council's ability to undertake coastal protection works as part of its powers under the Coast Protection Act 1949. Those works may, from time to time, involve the occupation of substantial parts of the beach as well as the installation of new structures (e.g. groynes) and/or the large-scale movement of shingle. The works can,

in some cases, be quite radical in nature but they are essential to prevent flooding as much of the town lies below sea level. The City Council's position is that, should Village Green status be granted, this will create an obvious incompatibility because such works would inevitably be unlawful (by virtue of the Victorian statutes that protect Village Greens) and it also would give local residents who happened to disagree with the works the ability to apply for an injunction to prevent them from taking place altogether.

37. The applicant's position in this regard is that no statutory incompatibility arises; the Newhaven case was concerned with the landowner's future use of the land and not to an outside body that might wish to exercise statutory powers with regard to the land. Furthermore, whether or not the statutory regimes relied upon are incompatible is a case specific matter of statutory construction and therefore the decision in the Newhaven case is of no assistance in determining whether any statutory incompatibility arises in the current case.

Res judicata

38. Finally, there is an overarching legal question as to whether the County Council is able to consider the application at all, given that a previous application for what is predominantly the same area of land has already been considered and rejected by the County Council (albeit some thirteen years ago).

39. Under normal circumstances, the County Council would not entertain repeated applications for the same site, on the common law ground of *res judicata*. *Res judicata* means, literally, '*a matter [already] judged*' and is a legal principle that, in general terms, either prevents the re-litigation of an identical issue that has already determined by a Court or tribunal (known as 'cause of action estoppel') or prevents a litigant from raising an issue that has already been decided in a previous case between the same parties (known as 'issue estoppel').

40. The landowner's view on this matter (which is supported by the City Council) is that issue estoppel applies in this case and precludes the matter of Village Green status for the application site from being reconsidered. In this case, it was determined in the disposal of the 1999 application that the April 1993 letter resulted in use of the beach after that date not being 'as of right'; that determination was reached following full evidence and argument at a public hearing and the applicant is therefore precluded from seeking to re-open that issue for the purposes of the current application. Furthermore, none of the new evidence submitted addresses the legal effect of the April 1993 letter and there has been no statutory change in so far as the requirement for use to be 'as of right' is concerned.

41. The applicant's position is that they do not consider that the doctrine of *res judicata* applies in this case. Their position is that the current application is substantially different to the 1999 application in that it relies upon a different locality, includes evidence from a far wider range of local residents and is based upon a different twenty-year period. It is also submitted that issue estoppel applies only in proceedings which involve the same parties (which is not the case here). Furthermore, circumstances and case law have evolved considerably since the previous application, meaning that the previous reasons for rejecting the application are no longer relevant.

Counsel's advice

42. In light of the very complex factual and legal issues in this particular case, advice has been sought from Counsel as to how best to proceed with this matter. In particular, Counsel was asked to advise whether, in light of the comments made by the landowner, the application ought to be rejected without further consideration, or whether the matter ought to be referred to a Public Inquiry for further consideration. A copy of the advice received is attached for reference at **Appendix B**.

43. In summary, Counsel's advice is that, in her view, there is no clear cut basis upon which the application could properly be rejected without convening a Public Inquiry to investigate the facts and appraise the legal arguments. It is not considered that the 'knock-out blows' relied upon by the landowner would justify rejecting the application on paper consideration, nor is it considered that the issues raised in the Newhaven case afford grounds to defeat the application (on the information currently available).

44. Indeed, as set out in the advice, the issue of whether the doctrine of *res judicata* applies to Village Green applications and, if so, how, are both complex and unresolved as a matter of judicial authority, and the arguments raised by the landowner do not make it plain and obvious that issue estoppel presents a knock-out blow to the application. It would appear that a full exchange of oral submissions is required before the County Council can reach a sound conclusion on this point.

45. With regard to the opposition to the 1999 application, Counsel notes that the landowner seeks to rely on the proposition that use was both permissive (as a result of the April 1993 letter) and contentious (as a result of the opposition to the 1999 application), but it is difficult to see how the use could be both permissive and against the landowner's wishes. This issue is clearly fact-sensitive and can only be answered in the context of further examination of all relevant evidence.

46. Counsel further notes, in relation to the Newhaven case, that the issues raised by the landowner and City Council with regard to potential statutory incompatibility are legally complex and potentially fact-dependent. Submissions regarding questions of construction of the specific statutes on which the landowner and the City Council seek to rely, as well as the hearing of oral evidence, will be required to establish whether there is, as a matter of fact, an incompatibility.

47. As such, Counsel's opinion is that the matter should be referred to a Public Inquiry.

Conclusion

48. As has been noted above, there is clearly a serious dispute in this case both in terms of the factual matters and the legal issues. It does not appear, on the basis of the information currently available, that this is a matter which can (or indeed should) properly be determined purely on the basis of the written submissions; more detailed oral evidence is required on the factual issues and oral submissions on the complex legal issues would also assist in reaching a firm conclusion on how the application should be determined.

49. In cases which are particularly emotive or where the application turns on disputed issues of fact, it has become commonplace for Registration Authorities to conduct a Public Inquiry into the application; there is no legal requirement to do so, but provision

for such Inquiries is made in the 2014 Regulations. The holding of a Public Inquiry involves the County Council appointing an independent Inspector to hear the relevant evidence both in support of and in opposition to the application, and report his/her findings back to the County Council. The final decision regarding the application nonetheless remains with the County Council in its capacity as the Commons Registration Authority.

50. Such an approach has received positive approval by the Courts, most notably in the Whitmey[11] case in which Waller LJ said this: '*the registration authority has to consider both the interests of the landowner and the possible interest of the local inhabitants. That means that there should not be any presumption in favour of registration or any presumption against registration. It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration*'.

51. It is important to remember, as was famously quoted by the Judge in another High Court case[12], that '*it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green... [the relevant legal tests] must be 'properly and strictly proved'*. This means that it is of paramount importance for a Registration Authority to ensure that, before taking a decision, it has all of the relevant facts available upon which to base a sound decision. It should be recalled that the only means of appeal against the Registration Authority's decision is by way of a Judicial Review in the High Court.

52. Therefore, for the reasons given above, and having regard to the advice received from Counsel, it would appear that the most appropriate course of action in this case would be for this matter to be referred to a Public Inquiry for further consideration.

Recommendation

53. I recommend that a Public Inquiry be held into the case to clarify the issues.

Accountable Officer:
Mr. Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

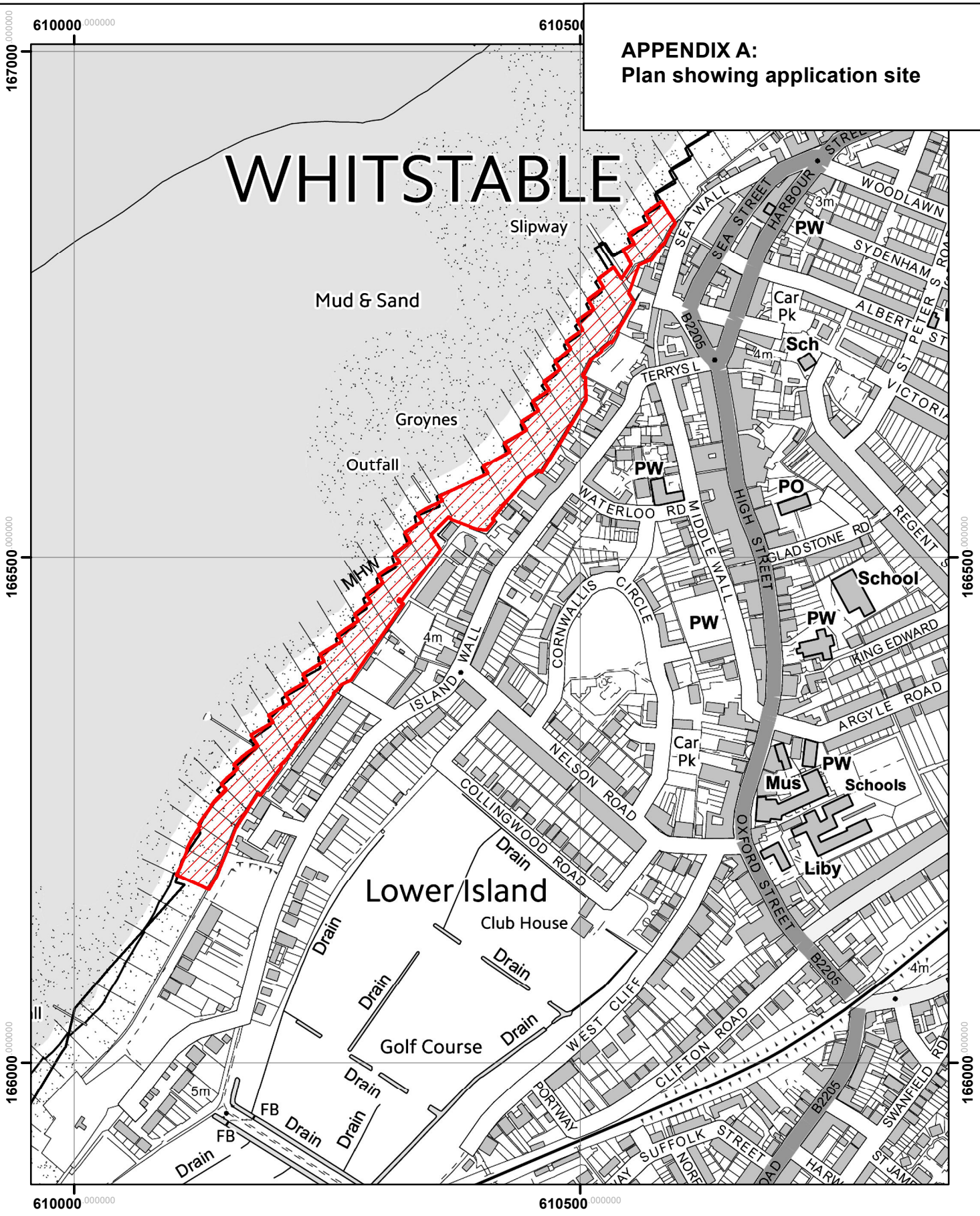
The main file is available for viewing on request at the PROW and Access Service, Invicta House, County Hall, Maidstone. Please contact the Case Officer for further details.

Background documents

APPENDIX A – Plan showing the application site
APPENDIX B – Advice from Counsel dated 24th April 2015

[11] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66
[12] *R v Suffolk County Council, ex parte Steed* [1997] 1EGLR 131 at 134

APPENDIX A:
Plan showing application site



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Land subject to Village Green application at Whitstable Beach in Whitstable

Kent County Council
kent.gov.uk

APPENDIX B:
Counsel's advice dated 15/04/15

IN THE MATTER OF APPLICATION NO. VGA658
FOR THE REGISTRATION AS A NEW TOWN OR VILLAGE GREEN
OF LAND KNOWN AS WHITSTABLE BEACH

ADVICE

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1. I am asked to advise Kent County Council as commons registration authority ("the Registration Authority") whether this application ought properly to be referred to a public inquiry for further consideration, or could be rejected on the papers so far submitted (subject, of course, to complying with its obligation first to offer the applicant an opportunity to make oral representations, and taking any such representations into account before coming to a final decision).

2. The short answer is that - without in any way prejudging the merits of the parties' respective cases - I do not consider there to be a clear-cut basis upon which the application could properly be rejected without convening an inquiry to investigate the facts and appraising the parties' legal arguments in the light of the evidence adduced. It is unnecessary for me to set out the history of the matter, or summarise the parties' contentions, with which Instructing Solicitor is familiar; and my reasons for reaching that conclusion can be quite shortly stated, although I will elaborate on them if and insofar as that would be of assistance to the Registration Authority.

3. The major landowner, the Whitstable Oyster Fishery Company ("the Company"), has submitted that it has two "knock-out blows" either of which would justify rejecting the application on paper consideration:

    (i) the finding on the 1999 TVG application that recreational use of the application land was not "as of right" after April 1993, as having given rise to an issue estoppel according to the doctrine of res judicata;

(ii) its successful opposition to the 1999 TVG application.[1]

Canterbury City Council has made submissions to similar effect.[2]

4. As to the first of those points, the questions whether the doctrine of res judicata applies at all to town/village green registration applications, and if so how it applies, are both complex and unresolved as a matter of judicial authority. Where applicable, it of course precludes the parties from disputing the correctness of a decision, except on appeal (cause of action estoppel), and may also prevent the parties from re-litigating in proceedings on a different cause of action "*some question of fact or law that was necessarily decided as part of* [the decision's] *legal foundation*"[3] (issue estoppel). The criteria for its applicability include requirements that the decision be "*judicial in the relevant sense*", be final and on the merits, and have been pronounced by a tribunal with jurisdiction over the parties and the subject matter.[4]

5. Assuming in the objectors' favour that the doctrine is in principle applicable, they have not addressed the implications of the difference between the parties to the 1999 and present applications. The former was made by the late Mrs Anne Wilks, on behalf of the Whitstable Society.[5] The present application was made by Mr Paul McNally, on behalf of the Whitstable Beach Campaign. According to Mr McNally's summary statement in support of the present application, that organisation was only formed in 2002 (i.e. after the disposition of the 1999 application) and "*works in partnership with other local organisations including … the Whitstable Society*" (which implies that they are two separate bodies, albeit ones that co-operate with one another).

6. A judgment binds strangers only if it is a "judgment in rem". Assuming in favour of the objectors that the relevant provisions of the Commons Registration Act 1965 and the Commons Registration (New Land) Regulations 1969 together conferred on

[1] Paragraph [33] of its Further Representations dated 4 December 2014.
[2] Paragraph 3 of its Objection Statement dated 22 May 2014 (and its Further Representations dated 16 April 2015).
[3] In the words of the leading textbook on the subject, Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 1.06.
[4] See e.g. *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] 2 AC 146.
[5] According to paragraph 1 of Mr Petchey's Report.

commons registration authorities jurisdiction to determine whether land was or was not registrable as a new town or village green pursuant to those provisions with the intention that their adjudications upon that issue should bind the world at large, such as to operate in rem,[6] what follows? In the words of Jowitt's Dictionary of English Law, 2nd ed (1977), quoted with apparent approval by Lord Mance in *Pattni v Ali*:[7]

> "*A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication.*"

So no one could now be heard to say that Whitstable Beach qualified for registration as a new town or village green under the 1965 Act and 1969 Regulations as at the date of Mrs Wilks's application.

7. However:

> "*a judgment in rem is conclusive as to the status of the person or thing but, except in prize cases, is not conclusive in rem as to the grounds of the decision*."

See Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 10.04, and the cases there cited. In the most recent of those cases, *Burden v Ainsworth*,[8] it was held that while an order of the New South Wales Licensing Court granting a poker machine dealer's licence to Mr Ainsworth's company operated in rem, the finding on which it was based that Mr Ainsworth was a fit and proper person to be interested in or associated with the holder of such a licence did not, and could be contested in defamation proceedings:

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[6] See e.g. *Wakefield Cpn v Cooke* [1904] AC 31, *Pattni v Ali* [2007] 2 AC 85.
[7] Paragraph 21.
[8] [2004] NSWCA 3, (2004) 59 NSWLR 506.

"*The only relevant order the Licensing Court made on 25 June 2001 was that granting a poker machine dealer's licence to Ainsworth Game Technology [Pty Ltd]. The finding as to the fitness of the respondent that it made in the course of its judgment was not an order of the court. Only the order of the court constitutes a judgment in rem. The finding does not.*"

8. On that footing, strangers to the 1999 application would not be precluded from disputing any of the grounds on which Mr Petchey recommended rejection of that application, as adopted by the Registration Authority, including the "as of right" ground. The question of status raised on the present application is an entirely different one: did the application land qualify for registration under section 15(2) of the Commons Act 2006 as at the date of that application (30 September 2013)? The criteria for registrability have been substantially changed since 1999 and the user periods (albeit overlapping) are not the same. Accordingly, as the objectors accept, it is the principle of issue estoppel (not cause of action estoppel) on which they rely; and on the above footing, that does not affect strangers to the 1999 application.

9. Even if there is an answer to that point which I have overlooked on this preliminary consideration, there is *prima facie* another difficulty for the objectors, as follows. Mr Petchey gave three reasons for rejecting the 1999 application all of which were, as I understand it, adopted by the Registration Authority:

    (i) the application included a substantial area which had not been available for lawful sports and pastimes for the whole 20 year period, and the Registration Authority had no power to accept an application in part;[9]

    (ii) use after April 1993 was not "as of right";[10]

    (iii) use had not been predominantly by the inhabitants of Harbour Ward (as the relevant locality), as required by section 22 of the 1965 Act in its original form.[11]

[9] Report paragraphs 76, 80, 142(7).
[10] Report paragraphs 119, 142(10).

Where a court finds on alternative grounds in favour of the successful party:

> "*Those findings do not create issue estoppels because the defendant could not effectively appeal against any of them separately, and if one was upheld the appeal would fail. There is a cause of action estoppel but no issue estoppel because no single finding could be 'legally indispensable to the conclusion' or 'the essential foundation or groundwork of the judgment, decree or order' as Dixon J said in Blair v Curran.*"

See Spencer Bower & Handley, *Res Judicata* (4th ed), paragraph 8.25.

10. In short, I do not consider it to be plain and obvious that this application should be rejected on estoppel grounds. If that line of argument is to be pursued by the objectors then there will need to be a full exchange of oral submissions on the subject, with potentially copious citation of judicial authority.[12]

11. Leaving estoppel aside, the underlying question of mixed fact and law (whether Mr Green's April 1993 letter to the *Whitstable Times* did amount to an effective grant of permission) falls to be reconsidered in the light of subsequent caselaw (including the *Beresford*, *Barkas* and *Newhaven* cases)[13] and also of its factual matrix (perhaps informed, for example, by evidence as to the content of the reader's letter to which it was a reply, the circulation of the newspaper, or other contemporaneous conduct of the Company vis à vis use of the beach by local people/the public generally).

12. With regard to the second claimed "knock-out blow", that too is not an issue which I consider capable of resolution without full evidential material. The structure of section

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[11] Report paragraphs 131, 142(11).

[12] The applicant has, of course, advanced additional arguments for the non -applicability of issue estoppel in the present circumstances: see paragraph 80 of his Reply to Objections dated 29 July 2014 and paragraphs 26-27 of his Reply to the Company's Further Representations dated 17 April 2015.

[13] *R(Beresford) v Sunderland City Council* [2004] 1 AC 889; *R(Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2014] 2 WLR 1360; *R(Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7; [2015] 2 WLR 601.

15(4) of the Commons Act 2006 (which is materially indistinguishable from section 15(2)) was analysed by Lord Hope DPSC[14] as follows:

> "*The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word 'lawful' indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see Fitch v Fitch (1797) 2 Esp 543. And they must have been doing so 'as of right': that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see R (Beresford) v Sunderland City Council [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it - unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way - either because it has not been asked, or because it has been answered against the owner - that is an end of the matter. There is no third question.*"

13. Paragraph [18] of the Company's initial Representations dated 29 May 2014 does not identify which particular one of the "three vitiating circumstances" (*vi*, *clam*, and *precario*) is claimed to apply by virtue of its successful opposition to the 1999 application (nor does the City Council's Objection Statement). The invocation of the *Cheltenham Builders* case implies "*vi*" (in the sense of contentiousness).[15] However, it would appear to be the Company's case that during the currency of and/or after the 1999 application use was *precario* (including by virtue of the April 1993 *Whitstable Times* letter and/or signs erected in 2001 and/or periodic closures).[16] It is difficult to see how use could be simultaneously *precario* and *vi.* It seems to me that the question whether the Company's conduct of the 1999 application (including the way in which it presented its case at the public inquiry) had the effect of rendering user on the ground *vi, precario,* or neither can only be answered in the context of all relevant evidence

[14] In *R(Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 70, paragraph 67.
[15] See [2004] JPL 975 at paragraphs 62-71.
[16] See Representations paragraphs [19]-[23] for the latter two categories.

relating to the period between the making and the refusal of the 1999 application, looked at in the round. Morgan J's rejection in *Betterment Properties (Weymouth) Ltd v Dorset County Council*[17] on the facts of that case of the proposition that the landowner's objection to, and registration authority's refusal of, an earlier application had rendered user on the ground contentious indicates that opposition to a previous application does not *ipso facto* doom a later application to failure; the question is fact-sensitive.[18]

14. In their respective Further Representations dated 16 April 2015, the objectors have submitted that the recent decision of the Supreme Court in the *Newhaven* case affords additional grounds to defeat the application. They do not, however, submit that any of those grounds is a "knock-out blow" such as to justify its summary rejection on paper consideration: rightly so, in my opinion, for the issues they raise - while seriously arguable - are legally complex and potentially fact-dependent.

15. In *Newhaven*, the first of the three issues considered by the Supreme Court[19] was whether use of the application site had not been "as of right" on the ground that it was part of the foreshore and the public had an implied licence to use the foreshore for recreational purposes. Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed) explained that the proposition that there was a rebuttable presumption that public use of the foreshore was by permission of the owner had been rejected by Ouseley J at first instance and by the majority of the Court of Appeal (Richards and McFarlane LJJ), albeit accepted by Lewison LJ.[20] They went on to discuss three possibilities: (i) that members of the public have a right to use the foreshore for recreation; (ii) that there is a rebuttable presumption of implied permission for public recreation; (iii) that members of the public using the foreshore for recreation are trespassers and their use is "as of right".[21] However, they concluded that since the appeal could be allowed on other grounds, "*this Court ought not to determine*" the question which of those three possibilities was correct in circumstances where no

[17] [2010] EWHC 3045 (Ch), paragraphs 130-140.
[18] It is fair to say that Morgan J also doubted the correctness of Sullivan J's conclusion on the point in *Cheltenham Builders* : paragraph 139.
[19] As defined in paragraph 24.
[20] Paragraph 27.
[21] Paragraphs 29-49.

party was arguing for the correctness of the first, and "*we proceed on the assumption that the majority of the Court of Appeal and Ouseley J were correct*."[22] Lord Carnwath agreed that it was unnecessary to reach a conclusion on that ground, but discussed the alternative possibilities at considerable length and said that he saw "*no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that* [public use of beaches], *if not in exercise of a public right, is at least impliedly permitted by the owners.*"[23]

16. The City Council is advocating the first possibility, i.e. a general common law right to use the foreshore. The Company advocates the second. *Prima facie*, the Registration Authority is bound to follow the majority judgments of the Court of Appeal in favour of the third possibility. However, it seems that the objectors may seek to rely on the factual distinction between *Newhaven* and this application in as much as it relates to land which is above mean high water mark and not technically part of the foreshore to justify a different conclusion. In any event, the Supreme Court's dicta fall to be taken into account in evaluating the evidence and submissions going to the Company's contention that there was implied (if not express) permission to use this particular beach (irrespective of whether there is or is not a presumption affecting beaches generally).

17. One of the two grounds on which the Supreme Court allowed the landowner's appeal in the *Newhaven* case was that section 15 of the 2006 Act does not apply to land which has been acquired by a statutory undertaker and is held for statutory purposes that are inconsistent with registration as a town or village green.[24] The Company as landowner relies directly on the decision, contending that there is incompatibility between its statutory objects and powers[25] and registration as a green. The City Council relies on the decision by analogy, contending that its scope could be extended to cover incompatibility between registration and statutory functions that might be exercised by it in its capacity as coast protection authority under the Coast Protection Act 1949 (albeit not the landowner). Apart from the preliminary legal question whether such an extension would be consistent with *Newhaven*, both objectors' arguments will involve

[22] Paragraphs 50-51.
[23] Paragraphs 105-135.
[24] Paragraph 93.
[25] As conferred by the Whitstable Oyster Fishery Company Acts of 1793 and 1896.

questions of construction of the specific statutes on which they rely and the leading of evidence to establish the potential for incompatibility in fact.

18. If Instructing Solicitor has any queries about the above or requires any further assistance, she will please let me know.

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24 April 2015