AGENDA

Kent County Council

REGULATION COMMITTEE MEMBER PANEL

Friday, 15th September, 2023, at 10.00 am
Darent Room, Sessions House, County Hall, Maidstone

Ask for: **Hayley Savage**
Telephone **03000 414286**

Membership

Mr S C Manion (Chairman), Mr M Baldock, Mr I S Chittenden, Mr M C Dance and Mr H Rayner

UNRESTRICTED ITEMS

(During these items the meeting is likely to be open to the public)

1. Membership and Substitutes

2. Declarations of interest for items on the agenda

3. Application to register land known as The Downs at Herne Bay as a new Town or Village Green (Pages 1 - 32)

4. Application to register land known as Whitstable Beach as a new Town or Village Green (Pages 33 - 60)

5. Application to register land known as Bunyards Farm at Allington as a new Town or Village Green (Pages 61 - 88)

6. Other items which the Chairman decides are urgent

EXEMPT ITEMS

(At the time of preparing the agenda there were no exempt items. During any such items which may arise the meeting is likely NOT to be open to the public)

Benjamin Watts
General Counsel

Thursday, 7 September 2023

Please note that any background documents referred to in the accompanying papers maybe inspected by arrangement with the officer responsible for preparing the relevant report.

Application to register land known as The Downs at Herne Bay as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Friday 15th September 2023.

Recommendation: I recommend, for the reasons set out in the Second Inspector's report dated 7th April 2022, that the Applicant be informed that the application to register the land known as The Downs at Herne Bay as a new Village Green has not been accepted.

Local Member: Mr. D. Watkins (Herne Bay East) Unrestricted item

Introduction

1. The County Council has received an application to register land known as The Downs at Herne Bay as a new Town or Village Green from Mr. P. Rose ("the Applicant").

2. The application has been made under section 15 of the Commons Act 2006, which enables any person to apply to a Commons Registration Authority to register land as a 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;

3. There was no dispute in this case that access to the Application Site had continued up until the date of the application and the twenty-year period under consideration in this particular case was therefore 1989 to 2009.

The Application Site

4. The piece of land subject to this application ("the Application Site") is situated on the seafront, to the east of the town centre, at Herne Bay. It consists of a long strip of land, totalling some 57 acres (23 hectares) in size, comprising (in the west) an area of grassed open space and (in the east) coastal scrub which slopes steeply from its border with the residential area known as Beltinge down to the promenade abutting the beach. The area is largely unenclosed and access to it is easily gained via the footways of adjoining roads and the promenade, as well as the various informal paths which criss-cross the site.

5. The Application Site is shown in more detail on the plan at **Appendix A**.

6. The vast majority of the Application Site registered with the Land Registry (under various title numbers) to Canterbury City Council ("the City Council"). The Application Site also includes some smaller areas for which there are no known landowners.

Background

7. During the consultation period, an objection to the application was received from the City Council on the basis that the Application Site is held by it under section 164 of the Public Health Act 1875 for the purposes of 'public walks and pleasure ground', such that any use of the site by local residents has taken place 'by right' (i.e. with permission) and not 'as of right'.

8. The matter was considered at a Regulation Committee Member Panel meeting on 13th June 2011[1], at which Members accepted the recommendation that the matter be referred to a Public Inquiry for further consideration.

9. As a result of this decision, Officers instructed a Barrister ("the First Inspector") experienced in this area of law to hold a Public Inquiry and to report her findings back to the County Council. A Public Inquiry took place in 2011/2012, during which time the First Inspector heard evidence from witnesses both in support of and in opposition to the application. Following the Inquiry, the First Inspector produced a written report dated 11th November 2012 ("the First Inspector's report") setting out her findings and conclusions. Her advice was that the County Council should register the Application Site as a new Village Green, with the exception of two small areas that had been enclosed by fencing during part of the twenty-year period (such that access had been restricted).

10. Having carefully considered the First Inspector's report, the County Council's Officers had some concerns regarding the advice contained therein, and in particular, the First Inspector's conclusions regarding the manner in which the land was held by the City Council. Due to the First Inspector moving on to a judicial appointment, it was no longer possible to seek further advice or clarification from her. The County Council therefore sought further advice from another Barrister experienced in this area of law ("the Second Inspector").

11. The Second Inspector noted that the First Inspector had been unable to determine on the balance of probabilities under which statutory power the land was held during the relevant period, but considered that she had wrongly determined the burden of proof in favour of the Applicant and advised[2] that "*the [First] Inspector's recommendation [to register the Application Site] does not in law follow from her findings of fact and evaluation of the balance of evidence*".

12. At around the same time, in the background, there were also major developments taking place in relation to the law governing the registration of new Village Greens. In 2012 (i.e. a few months prior to the publication of the First Inspector's report), judgement was handed down in the High Court in relation to a case known as Newhaven Beach[3] which introduced the completely new concept of 'statutory incompatibility' and effectively imposed an additional test to be considered in relation to Village Green registration. That case went all the way to the Supreme Court[4] (in 2015) and went on to generate further litigation seeking to clarify the interpretation of 'statutory incompatibility' (by way of the conjoined

[1] The minutes of that meeting are available at: https://democracy.kent.gov.uk/mgAi.aspx?ID=17414
[2] See paragraph 44 of Miss Ross Crail's advice to the County Council dated 12th February 2013
[3] Newhaven Port and Properties Ltd. v East Sussex County Council [2012] EWHC 647 (Admin)
[4] R (Newhaven Port and Properties Ltd.) v East Sussex County Council [2015] UKSC 7

appeals in the Lancashire[5] and NHS Property Services[6] cases, for which judgement was handed down in 2019, and the TW Logistics[7] case in 2021). In addition, the law was also evolving in relation to the question of public authority-owned land, with the Supreme Court's judgement in the Barkas[8] case in 2014 and again in the Lancashire and NHS Property Services cases (2019). Thus, it was not until 2021 that the law in relation to the registration of new Village Greens became more settled following the 2012 judgement in the Newhaven Beach case.

13. During that period, the matter was initially placed on hold pending clarification of the law and to allow exploration of the potential for legislative reform in an attempt to reconcile the parties' opposing views on the matter. The Applicant also took the opportunity to amend the locality relied upon following new information that had come to light. In 2018, the Second Inspector re-opened the Inquiry for the purpose of receiving new evidence which the parties wished to adduce, and hearing fresh submissions taking into account the changes in case law since the First Inspector's report. The re-opened Inquiry sat for a further eight days. Following the close of the Inquiry, it was agreed that the Inspector would defer publication of her report until the cases which (at the time) were being heard by the Supreme Court had been determined; this would allow the relevant case law to be authoritatively declared at the highest level, thereby enabling the County Council to take a sound decision on the matter.

14. The Second Inspector published her 435-page report ("the Second Inspector's report") on 7th April 2022, and her findings are discussed below. Members are encouraged to read the Second Inspector's report in full and it should be noted that this Officer's report is provided as a summary of the pertinent points in respect of the Second Inspector's findings, but is not intended to be a comprehensive account of every submission made by the parties to the First and Second Inspectors in relation to this matter.

The First Inspector's findings

15. The First Inspector conducted an Inquiry over a period of over a period of eight days in November 2011 and March 2012, during which time she heard evidence from the Applicant and 35 other witnesses in support of the application, as well as from 5 witnesses on behalf of the Objector. In addition, she also took into account further written statements from 28 people as well as 1119 user evidence questionnaires in support of the application, and a further two written statements on behalf of the Objector. A large number of documents were also produced by both parties relating to the status of the land.

16. The First Inspector was satisfied that:
    - Herne Bay is a qualifying locality for the purposes of the 2006 Act on the basis that it is a legally recognised administrative unit (although the First Inspector did not provide any explanation as to how that conclusion had been reached);

[5] R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58
[6] R (NHS Property Services Ltd.) v Surrey County Council [2019] UKSC 58
[7] TW Logistics v Essex County Council [2021] UKSC 4
[8] R (Barkas) v North Yorkshire County Council [2014] UKSC 31

- The use of the Application Site had predominantly been by the residents of Herne Bay;
- A significant number of the residents of Herne Bay had used the Application Site for recreation;
- The Application Site had, substantially as a whole, been used by local people for a variety of recreational uses, including, principally, walking, but also for jogging, running, kite flying, picnicking, picking wild fruit, children's games, cycling, sledging, drawing, painting and wildlife observation;
- There was no evidence to suggest that the nature of the land or the use made of it had changed over the material period;
- There were two parts of the Application Site that were incapable of registration on the basis that they had been fenced off and inaccessible to the public for a substantial period of time during the material period (notably the area of the "Queens Avenue works" and the "sand wick drains"); and
- The remainder of the Application Site should be registered as a Village Green on the basis that the First Inspector had not been persuaded by the City Council's submissions that recreational use of the land had not taken place 'as of right'.

17. It is the latter (hugely complex) issue that gave rise to Officers' concerns and ultimately resulted in the re-opening of the Inquiry, which was conducted by the Second Inspector.

The acquisition of the Application Site by the City Council

18. It is helpful at this point to consider the manner in which the City Council came to acquire the Application Site. Local authorities have various powers to acquire, appropriate and hold land for a number of different purposes in order to assist in the discharge of their statutory functions. For example, a local authority may acquire land specifically for the purposes of providing housing or constructing a new road. Similarly, a local authority has powers to acquire and/or provide land for the purpose of recreation, such as playing field and parks. In those situations, the land is offered specifically for the purposes of public recreation and those using it are normally considered, in law, to be doing so by invitation of the local authority. Accordingly, where land is within the ownership or control of a local authority, it will be necessary to establish the powers under which the land is held by that authority in order to determine whether use of the land has taken place 'as of right'.

19. The situation in this case is much complicated by the fact that the land is registered with the Land Registry in a large number of parcels, each with different title numbers, and was acquired on a piecemeal basis by the City Council (and its predecessors, the Herne Bay Urban District Council and the Herne Bay Urban Sanitary Authority) over a period dating back to the late 1800s. The various parcels are shown on the plan attached at **Appendix B** to this report.

20. The Application Site (moving broadly from west to east) comprises the following land:
    - A triangle of land at the westernmost end comprising part of Land Registry title number K912449 (shown shaded light green on the plan at **Appendix B**), which was acquired by the Herne Bay Urban Sanitary Authority on 15th July

1881 in return for covenanting to "*keep the… land… as a public promenade and Recreation Ground for the use of the Residents in and Visitors to Herne Bay… and for no other purpose*";

- A small rectangle of land abutting Beacon Hill and comprising part of Land Registry title number K911306 (shown dark purple), which was gifted to the Herne Bay Urban District Council on 3rd July 1901 subject to it being kept "*as an open space and pleasure ground for the use and enjoyment of the public for ever*";
- Two large sections of land comprising Land Registry title numbers K901348 (shown beige) and K912167 (shown lilac), which were acquired by the Herne Bay Urban District Council on 20th March 1901 in return for covenants to keep the land "*as an open space and pleasure grounds for the recreation and use and enjoyment of the public for ever*";
- A small strip of land separating title numbers K901348 and K912167 (and running between the promenade and the junction of Beacon Hill with The Lees and Sea View Road) which is unregistered with the Land Registry (shown yellow);
- Various parcels of land of differing sizes acquired by the Herne Bay Urban District Council in several transactions pursuant to a Compulsory Purchase Order confirmed by the Minister of Health on 15th August 1936 and expressly stated to be "*for the purpose of Public Walks and Pleasure Grounds*", registered with the Land Registry under title numbers K925790, K847057, K925692, K925751, K926058, K926367 (all shown blue);
- A tiny triangle of land (shown pink) abutting Cliff Cottage acquired by the Herne Bay Urban District Council on 30th December 1968 by deed of gift for coast protection purposes (Land Registry title number K925752);
- A parcel of land to the north of Rand View (just west of Cliff Cottage), acquired by the Herne Bay Urban District Council on 23rd July 1971 and registered under Land Registry title number K365182, with a restriction that no disposition be made "*unless made in accordance with the Public Health Act 1875*" (shown grey);
- A parcel of land to the east of parcel K365182 and comprising Land Registry title number K33973, acquired by the Herne Bay Urban District Council on 8th January 1969 and registered with a restriction that no disposition be made "*unless made in accordance with the Public Health Act 1875*" (shown brown);
- A parcel of land abutting Little Court (dark green) acquired by transfer dated 16th June 1972 expressed to be pursuant to section 165[9] of the Public Health Act 1875 and registered with the Land Registry under title number K381623 with a restriction that no disposition be made "*unless made in accordance with the Public Health Act 1875*"
- A parcel of land (shown dark blue) at the northern end of Conyngham Road comprising Land Registry title number K336885
- Two unregistered strips of land following the southern boundary of the Application Site, from the eastern end of The Lees to an area just east of the northern end of Conyngham Road (shown yellow)
- A parcel of land at the eastern end of Reculver Drive (shown red) comprising Land Registry title number K310865 acquired by Herne Bay Urban District

[9] Section 165 of the Public Health Act 1875 refers to the provision of clocks; given that the land appears to have been acquired for the purpose of public walks, the Inspector took the view (and no objection was raised by the parties) that this must have been a typographical error intended instead to refer to section 164.

Council on 16th July 1968, subject to a restriction not to dispose of the land "*unless in accordance with the Coast Protection Act 1949…*"

- A parcel of land (shown turquoise) adjacent to the above parcel acquired on 4th February 1970 pursuant to the Herne Bay Urban (East Cliff Stage II Coast Protection) Compulsory Purchase Order 1966 and registered with the Land Registry under title number K339127 subject to the same restriction as K310865 above.
- A parcel of land (shown violet) adjacent to the above parcel acquired on 9th April 1968 pursuant to the Herne Bay Urban (East Cliff Stage II Coast Protection) Compulsory Purchase Order 1966 and registered with the Land Registry under title number K307189 subject to the same restriction as K310865 above.
- A parcel of land (shown orange) situated at the easternmost end of the Application Site comprising Land Registry title number K923930 and acquired by Herne Bay Urban District Council on 18th April 1935, subject to a covenant to "*hold the… land for the use of the public pursuant to the Council's statutory powers governing the use and maintenance of pleasure grounds*"
- Four pieces of unregistered land, including a triangle of land north of 187 Reculver Road, an irregular-shaped piece of land to the rear of 15 to 23 Reculver Drive, a parcel of land to the north of 27 – 33 Reculver Drive, and a strip of land between title numbers K307189 and K847057 (shown yellow).

21. The First Inspector made the following factual conclusions regarding the manner in which the land had been acquired by Canterbury City Council:

Satisfied that the land was acquired under section 164 of the Public Health Act 1875	K925790, K381623, K847057, K925692, K925751, K926058, K926367
Satisfied, *on a balance of probabilities*, that the land was acquired under section 164 of the Public Health Act 1875	K912449, K901348, K923930, K911306, K912167
Satisfied that the land was acquired under the Coast Protection Act 1949	K925752, K310865, K339127, K307189
Not satisfied as to how the land was acquired	K365185, K33973

22. In addition, she also concluded that parts of the unregistered land had been acquired by the Herne Bay Urban District Council for the purposes of section 164 of the Public Health Act 1875, namely the strip of land separating title numbers K901348 and K912167, and the parcels of land to the south and east of title number K926058.

23. With regard to the remainder of the unregistered land, the First Inspector concluded that this land had obviously, as a matter of fact, been within the occupation of the City Council for some time, but that insufficient evidence was available to conclude under which statutory power the land had been acquired (if at all) by the City Council.

The First Inspector's conclusions in respect of 'as of right' use

24. The Applicant's case before the First Inspector was that, given the nature and extent of the coastal protection works that took place on the land, the parts of the Application Site acquired for the purposes of section 164 of the Public Health Act

1875 must, as some stage prior to the start of the material period, have been appropriated to a different use, namely for the purposes of coast protection under the Coast Protection Act 1949.

25. The First Inspector accepted that the nature and extent of the works raised some inference that the land might have been appropriated to coast protection purposes, but there was simply no evidence available to indicate that the formal steps necessary to effect an appropriation had taken place. She said[10]:

> *"It is possible that the situation is that the land continues to be held for the purposes for which it was acquired, but has been treated by the Council as being held for different purposes without an effective appropriation having taken place… I find myself unable to determine on the balance of probabilities under which statutory power the application land was held during the relevant period. I am not satisfied that there is sufficient evidence to demonstrate on the balance of probabilities that any part of the application land, other than the parcels which were expressly acquired for coast protection purposes, was held during the relevant period for coast protection purposes."*

26. Accordingly, the Inspector considered that the City Council had failed to demonstrate that the land acquired for the purposes of section 164 of the Public Health Act 1875 (i.e. conferring a right of recreation upon local inhabitants) continued to be held for such purposes during the material period. In relation to the parts of the application acquired by the City Council under the Coast Protection Act 1949 powers, she rejected the City Council's submission that there was a statutory right of recreation conferred by the 1949 Act, on the basis that any use of the land by the public would necessarily have been limited by, and subservient to, the use of the land for coast protection purposes.

Subsequent legal advice

27. On receipt of the First Inspector's report, and the parties' comments upon it, further legal advice was sought from the Second Inspector. The advice received was that, in deciding the 'as of right' issue on burden of proof in favour of the Applicant, the First Inspector appeared to have erred in two respects. Firstly, having been satisfied that most of the Application Site had been acquired by the City Council under section 164 of the Public Health Act 1875, unless she was able to make a positive finding that a change to this status had occurred (i.e. by way of appropriation to a different purpose), she should have found that the status quo prevailed (i.e. that the land continued to be held for such purpose). Secondly, the incidence of the burden of proof appeared to have been misplaced, and there was no legal burden of proof upon the party denying a right to show that use had not been 'as of right'. Accordingly, the Second Inspector's view was that the First Inspector's recommendation to register the majority of the Application Site did not follow from her findings of fact.

28. In light of the passage of time since the publication of the First Inspector's report and the various changes in case law that had followed, it was considered that the fairest and most appropriate way to proceed would be to re-open the Public Inquiry to enable the parties to produce the new evidence that they wished to

[10] Paragraph 15.8 of the First Inspector's report

adduce and to hear fresh submissions on the relevance of the case law developments. The Second Inspector therefore held a Public Inquiry which sat for a further 8 days in October 2018, and January and May 2019.

29. Although no formal concession was made by the City Council in relation to the legal tests at the re-opened Inquiry, no additional evidence or further argument was offered by the City Council to suggest that the First Inspector's findings in relation to the following points was wrong:

    - That a 'significant number' of the residents of Herne Bay had used the Application Site;
    - That recreational use had predominantly been by the residents of Herne Bay;
    - That the Application Site had been used as a whole for the purposes of lawful sports and pastimes; and
    - That (with the exception of the two areas subject to works) such use had taken place throughout the twenty-year period preceding the application.

30. Similarly, the Applicant did not seek to dispute the First Inspector's findings that the site of the works at Queens Avenue and the sand wick drains were not capable of registration.

31. The Second Inspector therefore defined the following issues upon which further evidence and submissions were to be considered:

    1) Whether the use of the Application Site during the material period had taken place 'as of right';
    2) Whether registration of the Application Site as a Village Green is precluded by statutory incompatibility with the provisions of the Coast Protection Act 1949; and
    3) Whether use of the Application Site had taken place by a significant number of the residents of a qualifying locality, or neighbourhood within a locality.

32. The Second Inspector's findings are considered in more detail below.

Legal tests and Inspector's findings

33. 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, if not, has ceased no more than one year prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

I shall now take each of these points and elaborate on them individually:

(a) Whether use of the land has been 'as of right'?

34. In order to qualify for registration as a Village Green, recreational use of the Application Site needs to have taken place 'as of right' throughout the relevant twenty year period. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*'). In this case, access to the Application Site as a whole has been unrestricted by way of any fencing[11] or prohibitive notices, and there is therefore no suggestion that any use of it has taken place either in exercise of force (i.e. contentiously) or in a secretive manner. However, there is an issue as to whether the use of the Application Site has taken place in exercise of some form of permission.

35. The granting of permission can take different forms: it can be direct and communicated (for example, verbally by the landowner or by way of a notice erected on site), or indirect and uncommunicated (for example, by way of a private deed or other document). For the purposes of Village Green registration, the law does not require permission to be expressly communicated to users and there are some situations - especially where the land is owned by a local authority - where recreational users are using a piece of land entirely unaware that their use is in exercise of some form of permission.

Summary of the City Council's submissions in relation to 'as of right'

36. The City Council's primary case has been that recreational use of the vast majority of the Application Site had not taken place 'as of right' because the land had been held under section 164 of the Public Health Act 1875 ("the 1875 Act"). This section provided that:

> "*Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds… Any urban authority may make byelaws for the regulation of any such public walk or pleasure ground…*"

37. In addition, it was submitted that, in respect of the parts of the Application Site held for coastal protection works, section 22(2) of the Coast Protection Act 1949 provided that:

> *"any power of the council… under any enactment… to lay out public parks, pleasure grounds or recreation grounds on such land… shall be exercisable in relation to any land acquired by them under this Part of this Act for the purpose of carrying out thereon any coast protection work, notwithstanding that the land continues to be required for that purpose, or for works constructed in the course of carrying out the work; but the said power shall not be exercised so as to interfere with the use of the land for the said purpose, or with the maintenance or repair of such works, so long as it is required for the said purpose or so long as such works are required to be maintained"*

38. The City Council's position was that, as a matter of principle, if land was found to have been acquired for a particular purpose, then it must also be found that the land had continued to be held for that purpose unless and until an appropriation

[11] With the exception of two small areas that were fenced off for the purposes of works, discussed later in this report.

was found to have been occurrent. In the current case, there was a total absence of evidence to suggest that either the City Council or its predecessor had undertaken a conscious deliberative process leading to a decision that the Application Site was no longer required for public recreation. The land had been used for recreational purposes prior to its acquisition by the City Council's predecessor authorities and, rather than precluding the land from being held for recreational purposes, the coastal protection works were necessary to render the land suitable for public use. It was submitted that the mere fact that such works were carried out could not be the basis of an inference that an appropriation to coastal protection works had taken place.

39. The City Council's default position was that, even if an appropriation could be inferred from the evidence available (which it could not), then the power under section 22 of the Coast Protection Act 1949 specifically provided for land to be held for recreational purposes, such that any recreational use made of it by the local inhabitants was 'by right'. Indeed, there had been clear acts of encouragement of public recreational use (e.g. the laying of paths to facilitate access and the provision of benches and dog bins), such that it would be absurd to regard members of the public using the land as trespassers. Policy documents produced by the City Council also served to demonstrate that the Application Site was treated as an area to be enjoyed by the public for recreation.

Summary of the Applicant's submissions in relation to 'as of right'

40. The Applicant's case is that all those parts of the Application Site acquired under section 164 of the Public Health Act 1875 had been appropriated to the purposes of the Coast Protection Act 1949 prior to the start of the material period. Although there is no documentary evidence of any such appropriations having taken place (e.g. in Council minutes), the Applicant's position is that appropriations can and should be inferred from the totality of the documentary evidence available. The documentary evidence[12] comprises Byelaws relating to the Application Site, a previous application to register part of the land as a Village Green in 1970, City Council documents (including Council minutes and plans), and local publications (e.g. Herne Bay Press).

41. The Applicant also submitted that the City Council had produced no documentary evidence that the land continued to be held for recreation during the decades in which it was not used for recreation but was instead the subject of extensive coast protection works. Recreational use had not been possible until after radical coast protection work had taken place in the 1960s and 1970s to stabilise the land and make it safe. Moreover, the City Council had not demonstrated that there was never any decision to appropriate the land for coast protection purposes; rather, there was sufficient evidence as to the intentions of the Council and the use to which the land was put to reach a finding that an appropriation had taken place without any evidence of the precise mechanism of the appropriation. Such an appropriation had likely taken place prior to the transfer of property and functions from Herne bay Urban District Council to the City Council on 1st April 1974, and this proposition is supported by the City Council having consistently treated the Application Site as a coastal defence, as opposed to a recreational asset.

[12] Set out at paragraphs 35 to 66 of the Second Inspector's report

42. The Applicant did not suggest that an appropriation was to be inferred merely from the carrying out of coastal protection works on the land and it was accepted that such works could lawfully have been carried out under the Coast Protection Act 1949 on land that was held for some other purpose. However, the works carried out on the Application Site, which radically regraded and reshaped the land, were clearly well beyond the scope of the provision under section 164 of the Public Health Act 1875 (to provide public walks and pleasure grounds). The exclusion of the public from large swathes of the land for a number of years would have been unlawful under the 1875 Act.

43. In respect of the land held for coast protection works, the Applicant adopted the First Inspector's reasoning in relation to section 22(2) of the Coast Protection Act 1949, namely that this provision did not render recreational use 'by right' because such use was subsidiary in nature to the primary purpose of coast protection.

Summary of the Second Inspector's findings

44. The Second Inspector confirmed that she had reviewed all of the evidence on this issue that was before the First Inspector, in addition to also considering the much broader range of further evidence adduced at the re-opened Inquiry (which the First Inspector had not had the benefit of seeing).

Land held under section 164 of the Public Health Act 1875

45. In respect of the sections of the Application Site acquired by the City Council's predecessor authorities under section 164 of the Public Health Act 1875, the Second Inspector found[13]:

> *"I have come to the clear conclusion on the totality of the evidence now available that, on the balance of probabilities, those parts of the Application Land that were acquired under section 164 of the 1875 Act continued to be so held at the date of the Application and had not been appropriated to the purposes of the 1949 Act or any other statutory purposes prior to that date."*

46. She was sceptical, in the absence of any documentary trace, that any such appropriations had occurred. Extensive research had been undertaken by the parties in relation to Council minutes and although it was possible that something had been missed, the Second Inspector considered this unlikely. She found the proposition that no entry had simply been made in the minutes equally unlikely, given that minutes show that even minor matters were discussed and recorded. Moreover, Council proceedings were the subject of extensive coverage by the Herne Bay Press and it would have been, in the Second Inspector's view[14], *'very surprising if withdrawal of public recreational access to the Application Land and its status as public open space had passed without report or comment'*.

47. On the other hand, there was convincing evidence to indicate that the land continued to be held for recreational purposes. An application to record a substantial part of the Application Site had previously been made in 1970

[13] Paragraph 443 of the Second Inspector's report
[14] Paragraph 445

pursuant to the Commons Registration Act 1965, and the Herne Bay Urban District Council had advised the County Council, in objection to that application, that[15] the "*The land is… owned by my Council and held by them for the purposes of section 164 of the Public Health Act 1875*". The Second Inspector rejected the Applicant's suggestion that this statement had been made in error, noting that it had not been made in isolation and was repeated in a subsequent Council meeting and correspondence with the Applicant for the 1970 application.

48. The Second Inspector also found the existence of Byelaws, made in 1964 and 1969, relevant to the question of how the land was held by the then Herne Bay Urban District Council. Those Byelaws were expressly made in exercise of the power conferred by section 164 of the Public Health Act 1875; that Byelaw-making power would simply not have been available to the Council had it been appropriated to the purposes of the Coast Protection Act 1949. This, the Second Inspector said[16], clearly presented *'a considerable difficulty for the Applicant's theory that the whole of the Application Land (insofar as acquired under section 164) was appropriated to the 1949 Act purposes by Herne Bay UDC before 1974'*.

49. Indeed, the Second Inspector found[17] that the reputation of the Application Site as public land which had been given to the people of Herne Bay for their use and enjoyment was '*still current when the evidence in support of the application was gathered*': a number of witnesses, when asked about the ownership of the land on evidence questionnaires, gave replies such as 'the people of Herne Bay' and 'it is public land'.

50. The Second Inspector was not persuaded, on the evidence available, by the Applicant's submission that the Application Site had not been available for public recreational use until after major coast protection works during the 1960s and 1970s. She noted that several of the Applicant's witnesses had claimed to be using the Application Site prior to those works[18] and that there was documentary evidence available[19] to indicate that the land was usable – and used – by the public for recreation before the 1960s/1970s. On this basis, she concluded that the Application Site was used for recreation both before and after the major coastal protection works of the 1960s and 1970s. Consequently, this would have made it much more difficult for the City Council and its predecessor to decide that the land was not needed for recreational use, and makes it unlikely that any such decision was reached[20].

51. The Second Inspector was also unable to agree with the Applicant's submission that the undertaking of coastal protection works (especially those as large in scale as took place in the 1960s/1970s) would have been unlawful had the land continued to be held under section 164 of the Public Health Act 1875. It was common ground between the parties that works could lawfully be carried out under the Coast Protection Act 1949 on land that was held for some other

[15] Quoted at paragraph 448 of the Second Inspector's report from a letter dated 9th February 1970 from the Clerk to Herne Bay Urban District Council to the Clerk to the County Council.
[16] Paragraph 452
[17] Paragraph 454
[18] Summarised at paragraph 457
[19] Summarised at paragraph 463
[20] Paragraph 465

purpose. The practical reality, said the Second Inspector[21], was that the Application Site *'was at risk of slipping into the sea if nothing was done, rendering valueless the public's right to have free and unrestricted use of it'*. The short-term exclusion of the public for the duration of the works, meant that, in the long term, the land could be preserved in a form which the public could safely use and enjoy, such that, overall, the coastal protection works cannot be said to have been detrimental to recreational use.

52. In this regard, the Second Inspector found[22]:

> *"Even if I am wrong about that, and it would have been [unlawful] for the UDC/Objector to execute all or any of the coastal protection works without appropriating the whole of the Application Land to 1949 Act purposes, it does not automatically follow that such an appropriation or appropriations actually occurred… In my opinion, there is sufficient evidence in this case to show, on the balance of probabilities, that no such appropriation(s) did occur, before or after 1 April 1974…"*

53. The Second Inspector's conclusions on this point are summarised at paragraph 507 of the report.

Land held under the Coast Protection Act 1949

54. The Second Inspector said that, if her conclusions above were wrong and it could be inferred or presumed that all or some the Application Site had been appropriated to coast protection purposes under the 1949 Act, *"on the totality of the evidence I consider it to be more probable than not that use of those parts of the Application Land was nevertheless by right rather than as of right… by reason of the engagement of section 22(2) of the 1949 Act".*

55. As is noted at paragraph 37 above, section 22(2) of the 1949 Act provides a Coastal Protection Authority with a power to '*lay out public parks, pleasure grounds or recreation grounds*' over land held by it for coast protection purposes. The Second Inspector's interpretation[23] was that this section empowers a local authority to:

> *"devote 1949 Act land for public recreational use, subject to the authority's powers to place conditions on the use and to withdraw the public's licence temporarily or permanently. It cannot be correct that members of the public taking advantage of the land would thereby be trespassing… The obvious and natural conclusion is that members of the public enjoy a (qualified and revocable) public right or licence to recreate there, and their use is not as of right"*

56. The Second Inspector agreed[24] with the City Council's submission that the reference to laying out 'public parks, pleasure grounds or recreation grounds' in section 22(2) should not be taken too literally or narrowly, and that it was reasonably obvious that land held for coastal protection purposes was likely to be subject to ongoing maintenance, such that it might not be practicable to install the kind of ornamental features (e.g. flowerbeds) or recreational

[21] Paragraph 481
[22] Paragraph 485
[23] Paragraph 509
[24] Paragraph 512

equipment that might normally be associated with a formal park. However, the City Council had taken steps to make the land more attractive for recreation, and to provide maintenance (e.g. mowing of the flat areas), such that there was never any suggestion that recreational use should cease.

57. In respect of the land originally acquired under the Coast Protection Act 1949, the Second Inspector considered that there was no evidence to suggest that it had since been appropriated to a different purpose, and that the land had been made available for public use and treated (in terms of maintenance, for example) in the same manner as adjoining land. As such, the same principle applies and any recreational use during the material period took place by virtue of the power in section 22(2).

58. Accordingly, the Inspector concluded that recreational use of the parts of the Application Site which are registered with the Land Registry was not 'as of right'.

Unregistered land

59. As far as the unregistered areas were concerned, there were four areas which did not appear to have been the subject of any formal acquisition by the City Council.

60. The first was the strip of land to the west of title number K847057, which appeared to have been the site of an old road prior to the regrading of the land. The Second Inspector suggested that this strip would be subject to the legal presumption that its soil belonged to the owners of the adjoining land (known as *ad medium filum*), such that the half-strip adjoining the land in title number K307189 would have been acquired by the City Council under the 1949 Act and the remaining half-strip under section 164 of the 1875 Act. The Inspector's conclusions regarding use having taken place 'by right' would therefore apply to this strip of land.

61. The other pieces of land comprised two blocks of land to the rear of Reculver Drive, a very small triangle north of the path opposite the end of Beltinge Drive and a strip of land of variable width running along the northern side of The Lees. The First Inspector concluded[25] that it was 'obvious as a matter of fact' that the Objector had been in occupation of the land 'for some considerable time', but had been unable to determine on what basis the land had been occupied or the power under which it had been acquired (if at all).

62. The Second Inspector considered[26] that there were three possibilities in respect of these lands. Firstly, that in undertaking coastal protection works (and associated maintenance) on it, the City Council had committed repeated acts of trespass. Secondly, that the City Council had acquired the lands but that such records had been lost. Thirdly, that the City Council had acquired title by adverse possession.

[25] Paragraph 14.156 of the First Inspector's report
[26] Paragraph 530

63. Having considered the evidence in relation to the use of the land by the City Council and other documents, the Second Inspector concluded[27] that the City Council 'could claim to have acquired title by adverse possession' on the basis of the extensive coastal protection works that had taken place on those areas. It was likely that the City Council (and its predecessor) had entered into possession of the unregistered areas during the course of the East Cliff II [coast protection] Scheme between 1968 and 1971, retained possession and then acquired title after the required 12 years. In terms of how the land was currently held, the Second Inspector took the view[28] that it was *'logical that where entry into possession is effected for a particular purpose, that is prima facie the purpose of acquisition. On that basis, the unregistered areas would largely have been acquired for the purposes of the 1949 Act [and] the same reasoning would apply… so far as the exercise of the section 22(2) power'*.

64. In the circumstances, the Second Inspector concluded[29] that any recreational use of the unregistered areas had not taken place 'as of right' (but rather, was 'by right') and added that, in any event, each of the unregistered areas viewed as a separate entity did not qualify for registration on the basis that there was no evidence that these areas had, individually, been in recreational use by a significant number of the local inhabitants during the material period.

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

65. The term 'lawful sports and pastimes' comprises (for the purpose of Village Green registration) a composite class that can include commonplace activities such as dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. Indeed, the Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[30].

66. As is noted at paragraph 16 above, the First Inspector had already reached the conclusion that the Application Site had been used for a range of recreational activities. This was not in dispute between the parties and it was not necessary to consider this issue further at the re-opened Inquiry. On the evidence available, the Second Inspector agreed that the land had been used for 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?

67. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

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[27] Paragraph 534
[28] Paragraph 540
[29] Paragraph 544 (6) and (7)
[30] R v Suffolk County Council, ex parte Steed [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385

68. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[31] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

69. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible that that of a locality, and need not be a legally recognised administrative unit. 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*'[32].

The locality

70. In this case, the Applicant initially sought to rely upon Herne Bay as the qualifying locality. The First Inspector was satisfied that Herne Bay (as defined in the application) was capable of being a locality for the purposes of section 15 of the 2006 Act. However, it subsequently came to light that the plan upon which the Applicant relied upon at the original Inquiry was a 2009 proposals map in relation to the Local Plan, and it had been assumed – rather than demonstrated – that the urban boundary of Herne Bay as depicted on that plan was a qualifying locality. Consequently, the Applicant subsequently applied[33] to amend his application to rely instead upon three alternative propositions:

    - Herne Bay (as defined on the proposals map for the Local Plan as at 2009) as a neighbourhood within the locality of Canterbury;
    - The locality of the current electoral ward of Beltinge;
    - The locality of the electoral ward of Reculver (as it was at the date of the application).

71. The Applicant submitted that Herne Bay was a town that was capable of constituting a recognised locality for the purposes of the Village Green application. In the alternative, it should be found to be a neighbourhood within the District of Canterbury (which is clearly an administrative area). The urban area of Herne Bay has all the characteristics of a neighbourhood, it being a cohesive area with clear boundaries and all of the facilities that one would expect in a neighbourhood (e.g. schools, shops etc). In the further alternative, it was suggested that an electoral ward was capable of constituting a qualifying locality, and that either Beltinge or Reculver would satisfy the legal test in this regard.

[31] R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90
[32] ibid at 92
[33] This amendment was approved by the Regulation Committee Member Panel on 17th July 2018

72. The City Council did not submit any further evidence on this issue.

73. The Second Inspector concluded[34] that it was evident that the City Council has recognised Herne Bay as one of three distinct communities in its area, along with Whitstable and Canterbury. These three towns have in common the fact that, prior to local government reorganisation in 1974, they had been independent, self-governing bodies, and the Second Inspector agreed with the Applicant's assertion that Herne Bay retains a cohesive community within the legally recognised district of Canterbury. The town also has a distinct identity and is capable of meaningful description in terms of identifying its boundaries.

74. The Second Inspector was also satisfied[35] that the electoral ward of Reculver (as per the Applicant's alternative submission) was capable of constituting a qualifying locality, although she had reservations about whether the electoral ward of Beltinge – which had not come into existence until after the Village Green application had been made – would be admissible in this case.

"a significant number"

75. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[36]. Thus, it is not a case of simply proving that 51% of the local population has used the Application Site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the Application Site.

76. In this regard, the Second Inspector was satisfied[37] that a significant number of the inhabitants of each of the neighbourhood of Herne Bay and the electoral ward of Reculver throughout the material period.

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

77. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within two years from the date upon which use 'as of right' ceased[38].

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[34] Paragraphs 547 to 549
[35] Paragraph 551
[36] R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council [2002] EWHC 76 at paragraph 71
[37] Paragraph 553(b)
[38] Note that the period of grace was reduced to one year from 2013, but that applies only to subsequent applications and therefore the original two year period of race applies in respect of the current application.

78. In this case, the application was made under section 15(2) of the 2006 Act on the basis that use of the Application Site had not ceased at the time of making the application. There has been no suggestion that access to the Application Site as a whole ceased prior to the making of the application (and indeed access to it remains possible to this day), such that it appears that this test has been met.

(e) Whether use has taken place over a period of twenty years or more?

79. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use 'as of right' continued until the date of the application – i.e. 1st September 2009. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 1st September 1989 to 1st September 2009.

80. As discussed above, whilst the majority of the Application Site was available for public use throughout the material period, some sections were closed off (and therefore unavailable for public use) for significant periods of time during that period. These areas are described below and show in more detail on the plan at **Appendix C**.

The Queens Avenue works

81. The First Inspector heard evidence[39] that works, described by the City Council as a major coast protection scheme, took place over a large area to the north of Queens Avenue (extending from the beach to the cliff top) between about May 1989 and March 1990. The works comprised improvements to the slope drainage, construction of a new promenade with wave walls, and raising of the groynes to provide a new beach. The City Council described this as a large heavy construction site with deep excavations, such that it would have been fenced off in its entirety for the purpose of public safety.

82. The Applicant submitted that it would have been physically impossible to fence the site in its entirety due to the gradient, but the First Inspector nonetheless concluded that, on a balance of probabilities, it was likely that public access to the site would have been precluded by fencing for the duration of the works.

Sand wick drains works

83. The First Inspector also accepted[40] that during the summer of 1991, cliff stabilisation works took place on an area of land at the eastern end of Reculver drive, comprising the installation of sand wick drains and monitoring equipment. A drawing produced by the City Council showed the area affected and the nature of the works (which involved drilling deep holes in the sandstone and inserting a geofabric tube filled with sand). The accompanying site plan indicated that a two metre high security fence was to be installed around the perimeter of the work area, along with 'danger' notices warning the public of the construction work. At the original Inquiry, a number of witnesses recalled the works and the need to avoid the area.

[39] Paragraphs 10.10 to 10.24 of the First Inspector's report
[40] Paragraphs 10.25 to 10.36 of the First Inspector's report

Second Inspector's conclusions

84. At the re-opened Inquiry, the Applicant did not seek to challenge the First Inspector's findings in relation to the works described above and her recommendation that these areas were not capable of registration as a Village Green.

85. The Second Inspector (in common with the conclusions of the First Inspector) was satisfied that the Application Site had been used for a period of at least 20 years, with the exception of the two areas described above. She concluded[41] that:

> *"The sites of the Queens Avenue works and the sand wick drain works… do not qualify for registration on the ground (among others) that they were each closed to the public by fencing for a substantial period during the 20 years immediately preceding the date of the Application and accordingly were not used for lawful sports and pastimes for the whole of that 20 year period…"*

Statutory incompatibility

86. In addition to the legal tests set out in section 15 of the Commons Act 2006, the County Council is now also required to consider whether the issue of 'statutory incompatibility' applies. The concept of 'statutory incompatibility' arose as a result of a case (known as Newhaven[42]) involving registration of a tidal beach at Newhaven, where the landowner challenged a decision to register the beach as a Village Green on the grounds that such registration would be incompatible with the landowner's statutory role as a Port Authority (which included powers to govern the area and develop the land for use as a port).

87. The Supreme Court held[43] that:

> *"The question of incompatibility is one of statutory construction… The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."*

88. In respect of the land that had been acquired by the Port Authority, the Court determined that *"there is a clear incompatibility between [the landowner's] statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green".*

89. The conjoined appeals in the Lancashire[44] and NHS Property[45] cases took this concept further, and the Supreme Court allowed the appeals of both landowners.

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[41] Paragraph 574(1) of the Second Inspector's report
[42] R (Newhaven Port and Properties Ltd.) v East Sussex County Council and another [2015] UKSC 7
[43] Paragraph 93 of the Newhaven judgement

The former case involved land adjoining a Primary School for which Lancashire County Council (in its capacity as the Local Education Authority) was the landowner, whilst the latter involved land adjoining Leatherhead Hospital which was under the control of NHS Property Services Ltd. Here, the Supreme Court found[46] that:

> *"In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in Newhaven, [the landowners] can show that there is statutory incompatibility in each of their respective cases. As regards the land held by [Lancashire County Council] pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of [part of the Application Site] as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use… takes place. Secondly, however, and more generally, such rights are incompatible with the use of [any part of the Application Site] for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see Newhaven, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law."*

90. However, in a subsequent case involving a stretch of quayside within the working port of Mistley (known as TW Logistics[47]), the Supreme Court dismissed the landowner's submission that its commercial activities on the Application Site had effectively been criminalised by the registration of the land as a Village Green. It held[48] that:

> *"Registration of land as a [Village Green] has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime… However, the exercise of that right is subject to the 'give and take' principle… This means that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner… The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities around which the local inhabitants were accustomed to mould their recreational activities during the qualifying period.*
>
> *The application of this standard means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public. It has the legal right to continue to undertake activities of the same general quality and at the same general level as before, during the qualifying period… [and] the landowner*

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[44] R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another [2019] UKSC 58
[45] R (NHS Property Services Ltd.) v Surrey County Council and another [2019] UKSC 58
[46] At paragraph 65
[47] TW Logistics Ltd. v Essex County Council and another [2021] UKSC 4
[48] Paragraphs 65 and 66 of the TW Logistics judgement

has some leeway to intensify… The landowner also has the right to undertake new and different activities provided they do not interfere with the rights of the public to use the land for lawful sports and pastimes."

The Applicant's position

91. In the current case, the Applicant noted that the City Council had past experience of undertaking coast protection works on registered Village Greens elsewhere in the district. He submitted that there was no statutory incompatibility between coast protection and registration of the land as a Village Green. In the Newhaven case, the Port Authority had been given its own powers under a special Act of Parliament, which was different to the current case which related to powers conferred under a general Act. Indeed, there was no inherent incompatibility between recreational use and the Coast Protection Act 1949, because the Act made specific provision (in section 22) for the recreational use of coastal protection land.

92. Furthermore, it was not at all obvious that any future works would be incompatible with Village Green registration; the major works of regrading, installation of drainage systems, building a sea wall, addition of rock armour and beach replenishment had all been done, such that the City Council would have no future need to undertake any further coast protection work that was more substantial or radical than had already taken place during the material period.

The City Council's position

93. The matter of statutory incompatibility was key to the City Council's opposition to the registration of the land as a Village Green. Although public recreational use of the land was facilitated, and indeed encouraged, by the City Council, there were serious concerns regarding the drainage and other infrastructure contained in the land, upon which, it was submitted, the safety of the town depended. If the land were to be registered as a Village Green, then the land would become subject to the statutes that protect Village Greens (such as the Inclosure Act 1857, which makes it a criminal offence to undertake any act which causes injury to the green, or interrupts the use and enjoyment of it as a place for exercise and recreation). Sooner or later, essential coast protection works would inevitably infringe these provisions, and any aggrieved residents would be able to apply for an injunction to restrain proposed alterations to the land with which they disagreed. This would, in turn, severely compromise the City Council's coastal protection functions.

The Second Inspector's conclusion

94. The Second Inspector agreed with the Applicant that there was no genuine expectation that Application Site would collapse imminently; but she also accepted the City Council's evidence[49] that constant vigilance would be needed to keep the slopes in place and prevent slippage, and that that would inevitably entail replacing the existing drains at some point within the next 30 years when they become beyond economic repair. Additional drainage might also be required, as well as replacement of the monitoring equipment. There was considerably less certainty about what other measures might also be desirable in the future.

[49] Paragraph 557

95. The Second Inspector also said[50] that "*it seems to me that works of the kinds mentioned [above] would involve exclusion of the public from more than de minimis parts of the Application Land for more than de minimis periods of time. The extent and length of the closures would obviously vary considerably depending on the location of the problem being addressed, the type of remedial work selected and the methods of work employed*". She added[51] that "*it also seems clear that works of those kinds… would go beyond anything done during the [material period] on the Application Land outside the specific areas of the Queens Avenue and sand wick drains works*".

96. The Second Inspector referred to the Supreme Court judgement in TW Logistics, in which it had been intimated that the principle of 'give and take' would afford a landowner some leeway to intensify or add to the range of activities undertaken on an Application Site during the material period. However, in this regard, she concluded[52] that "*I consider the differences in kind and scale between the works which will or might have to be carried out under the 1949 Act on the Application Land in the future…, and the maintenance-type works that were carried out on the Application Land (excluding the Queens Avenue and sand wick drains works areas) during the 1989 – 2009 application period, would be too great for the [City Council] to take advantage of that concession, or to plead a "give and take" defence to a charge of breaching either of the Victorian statutes by excluding local inhabitants from other parts of the Application Land post-registration and carrying out those works*".

97. It had been suggested by the Applicant that the City Council might be able to rely upon other defences to charges under the Victorian statues, such as the power to undertake coast protection work under section 4 of the 1949 Act. However, the Second Inspector's view[53] was there was nothing in the Act to exempt the City Council from any civil or criminal actions, or to warrant the undertaking of work which would constitute interference with recreational rights arising from Village Green registration.

98. The Second Inspector added that, in her view[54], section 22(2) of the 1949 Act confirmed the incompatibility between the coastal protection powers conferred under the 1949 Act and registration as a Village Green. That section prohibits exercise of the ancillary power (to make the land available for recreation) if such exercise would interfere with the primary purpose of coastal protection; any use of the power to make the land available for recreation is discretionary and can be revoked. Village Green registration, on the other hand, would reverse those priorities and any exercise of recreational rights would be subordinated to the local inhabitants' recreational rights. She said[55]:

> *"The purposes of the 1949 Act are good public purposes and there is an important public interest in their being fulfilled. In my opinion, Parliament cannot be taken to intend use for those purposes of land being held by a coast protection authority for those purposes to be stymied by registration*

[50] Paragraph 560
[51] Paragraph 561
[52] Paragraph 562
[53] Paragraph 564
[54] Paragraph 569
[55] Paragraph 570

as a green. Accordingly, I advise that no part of the Application Land which is held by the [City Council] for 1949 Act purposes is registerable."

The Second Inspector's overall conclusion

99. It is to be noted that, at the start of the reopened Inquiry, the Applicant made submissions to the effect that the County Council was not permitted to overturn the First Inspector's findings of fact unless they were 'plainly wrong'. In her report[56], the Second Inspector expressed her disagreement with this proposition on the basis that it is the County Council (in its capacity as the Commons Registration Authority) that ultimately has the responsibility of determining applications under section 15 of the Commons Act 2006, and not an Inspector appointed to hold a Public Inquiry to consider the evidence. In determining an application for registration of land as a Village Green, the County Council is required[57] to "take into account" the report and recommendation of an Inspector appointed to hold a Public Inquiry. However, this provision does not relieve the County Council of its duty to determine the application itself, or compel the County Council to adopt the findings and recommendations contained in the report. The Second Inspector said:

"I consider that the Registration Authority was entitled to admit the additional evidence relied on by both parties and to re-open the inquiry, and that it may – and indeed should – depart from [the First Inspector's] findings if on the totality of the evidence now available to it, and as the law now stands, it considers that it would be appropriate to do so."

100. Having carefully considered the substantial volume of evidence before her, the Second Inspector's overall conclusion[58] was that the application should be rejected for the following reasons:
    a) The sites of the Queens Avenue works and the sand wick drain works do not qualify for registration on the ground that they were closed to the public by fencing for a substantial period;
    b) The western half of the Application Site (inter alia) does not qualify for registration on the basis that the land was acquired by the Herne Bay Urban District Council for the purposes of section 164 of the Public Health Act 1875, such that recreational use has taken place 'by right';
    c) Alternatively to (b), if any part(s) of the land was appropriated to the purposes of the Coast Protection Act 1949, use of that land was also 'by right' (it being referable to the power in section 22(2) of the 1949 Act to make land available for public recreation);
    d) The eastern half of the Application Site (inter alia) does not qualify for registration on the basis that, having been acquired for the purposes of the Coast Protection Act 1949, the land was made available for public recreation 'by right' under section 22(2) of that Act;
    e) In relation to any parts of the land not covered by (b) or (d), either the existence of agreements with the relevant landowners in relation to coastal protection works is to be presumed, or they have been acquired by adverse possession by the City Council and made available for public recreation;

[56] Paragraphs 365 to 370
[57] Under Regulation 27(1) of the Commons Registration (England) Regulations 2014
[58] Paragraph 574

f) The parts of the Application Site that were acquired for the purposes of the Coast Protection Act 1949 do not qualify for registration on the grounds of statutory incompatibility.

Subsequent correspondence

101. On receipt, the Second Inspector's report was forwarded to the Applicant and to the City Council for their comments.

102. No comments were received from the City Council.

103. The Applicant wrote to express his disappointment regarding the Second Inspector's findings and conclusions. He reiterated his concerns that the County Council appointed as an Inspector for the re-opened Inquiry a Barrister that had previously advised the County Council that the application should not be approved, which left the Applicant in the position of having to persuade the Second Inspector to change her position completely. It is suggested that the Second Inspector has worked 'inventively to find evidence to support her initial view', without giving the Applicant an opportunity to comment upon her interpretation.

104. In respect of the latter point, the Applicant was given the opportunity to comment upon any errors of fact or interpretation contained in the Second Inspector's report, but instead took the view that "*there is no value in the Applicant preparing a detailed critique of the Inspector's findings of fact, given her findings on the law*" and "*it is absolutely clear that it would be a waste of my time, and of the Registration Authority's, to attempt to deal with her various presumptions and assumptions about the evidence in a bid to persuade her to overturn her recommendation to you*".

105. It is unfortunate that recent changes in case law have meant that the legal position has moved on considerably since the publication of the First Inspector's report in 2011. However, it is wholly wrong to suggest that the Second Inspector was biased from the start; even prior to the involvement of Second Inspector, the County Council's Officers had concerns regarding the content of the First Inspector's report (upon its receipt), and the City Council (when invited to comment upon the report) also made submissions (prepared by independent Barristers) regarding what it considered to be 'legal errors'. The Second Inspector was asked to review the report, and she too expressed doubts regarding the First Inspector's recommendations. That advice, which was made without the benefit of seeing or hearing the evidence first-hand, did not make any firm conclusions and, in some respects, the views expressed differ from her final report.

106. Moreover, the Second Inspector has no personal interest whatsoever in the outcome of this matter and her only interest – which is in a professional capacity – is to reach the truth of the matter and to assist the County Council is making the correct decision in relation to this application. Indeed, the Applicant's assertion presupposes that, in light of all of the new evidence considered at the re-opened Inquiry and the substantive changes in case law, the First Inspector would not have departed from her original views. That, however, cannot be assumed. Nor can it be assumed that, had an entirely different Barrister been appointed to hear

the re-opened Inquiry, that Barrister would not have reached the same conclusions as the Second Inspector.

107. The Public Inquiry sat for a total of 16 days (longer than any other Village Green Public Inquiry in the county) and heard a vast amount of oral and documentary evidence, as well as legal submission from the parties, such that it is considered that all parties have had ample opportunity to make their respective submissions on the matter. It now falls to the County Council to take a view, one way or another, as to how the application should be determined.

Conclusion

108. As is noted above, the County Council is not bound by the First Inspector's report, which was prepared without the benefit of the additional evidence adduced by the parties and clarification by the Supreme Court of the relevant case law.

109. Having carefully considered the very lengthy and thorough report prepared by the Second Inspector in this matter, the County Council's Officers are of the view that the advice contained therein is sound, and the Second Inspector's approach correct.

110. Accordingly, it is considered that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

111. It is to be noted that, if Members were to approve the recommendation set out below, and the Applicant remained aggrieved, it is open to the Applicant to apply for a Judicial Review of the decision in the High Court.

Recommendation

112. I recommend, for the reasons set out in the Second Inspector's report dated 7th April 2022, that the Applicant be informed that the application to register the land known as The Downs at Herne Bay as a new Village Green has not been accepted.

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

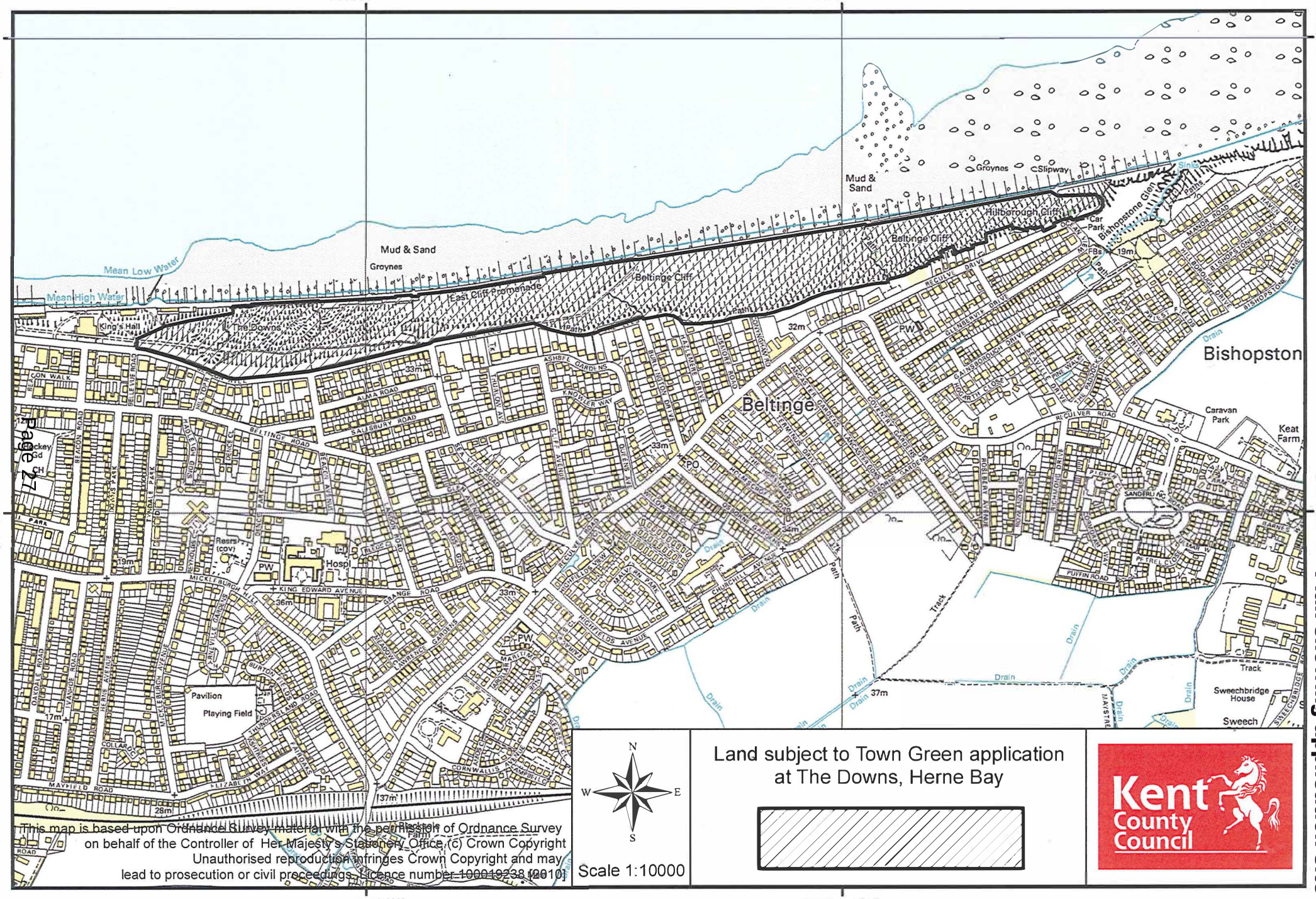
Appendices

APPENDIX A – Plan showing Application Site
APPENDIX B – Plan showing land ownership of the site
APPENDIX C – Plan showing areas subject to major works

Background documents

First Inspector's report dated 11th November 2012
Advice of Miss Ross Crail to the County Council dated 12th February 2013
Second Inspector's report dated 7th April 2022
Applicant's comments on the Second Inspector's report (received on 21st July 2022)

Background documents may be inspected by arrangement at the PROW and Access Service. Please contact the Case Officer for further details.



APPENDIX A: Plan showing application site

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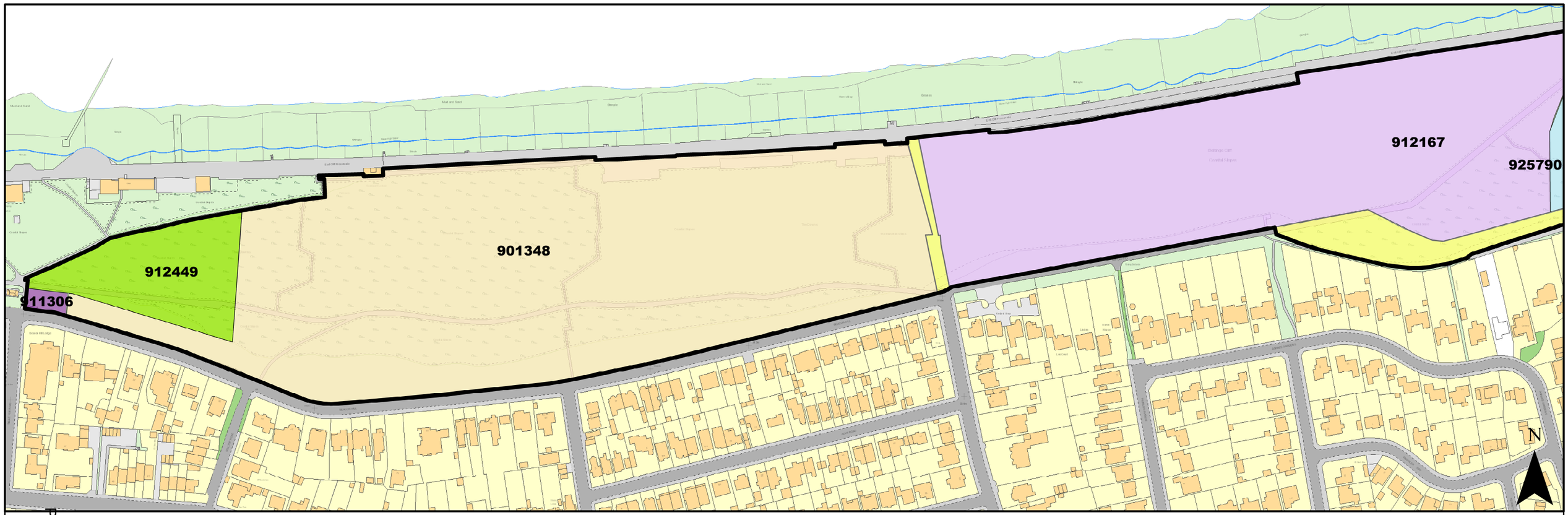
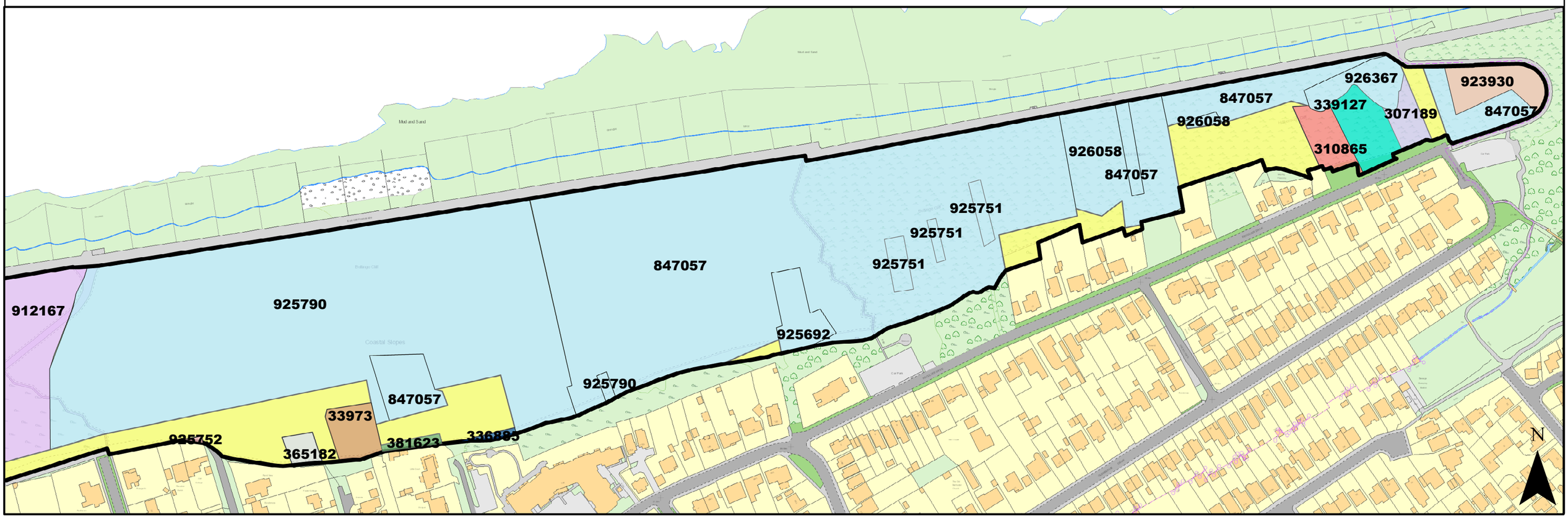


APPENDIX B: Plan showing ownership of the application site (western half of the site above and eastern half below)
Numbers shown relate to the Land Registry Title numbers, whilst land shaded yellow is unregistered with the Land Registry
[NB For illustrative purposes only, for precise boundaries please see Land Registry Titles]



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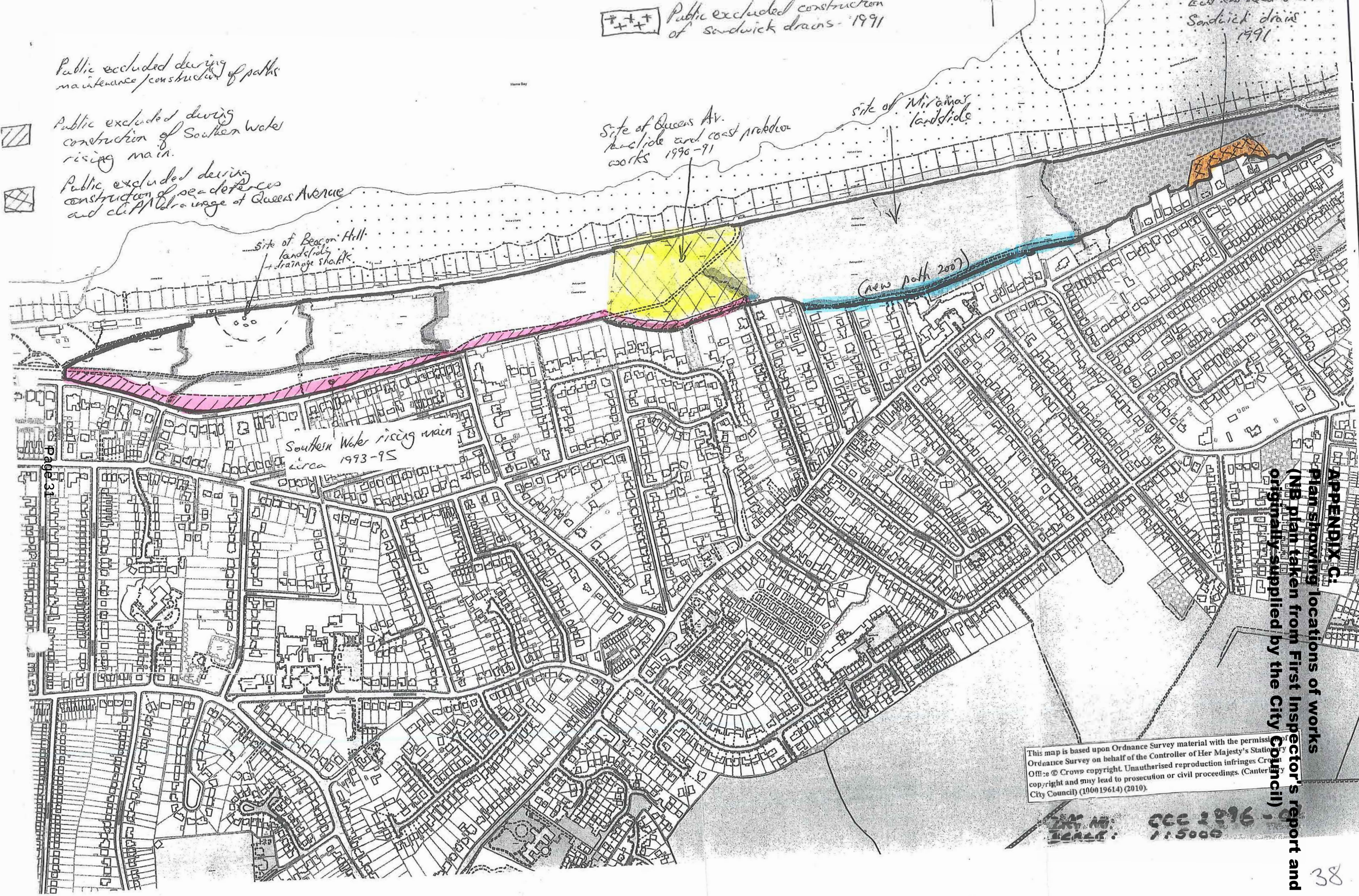

APPENDIX C:

Plan showing locations of works

(NB plan taken from First Inspector's report and originally supplied by the City Council)

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

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Friday 15th September 2023.

Recommendation: I recommend, for the reasons set out in the Inspector's report dated 7th April 2022, that the applicant be informed that the application to register the land known as Whitstable Beach as a new Village Green has not been accepted.

Local Member: Mr. M. Dance (Whitstable West) Unrestricted item

Introduction

1. The County Council has received an application to register land known as Whitstable Beach as a new Town or Village Green from Mr. P. McNally ("the Applicant") on behalf of the Whitstable Beach Campaign.

2. The application has been made under section 15 of the Commons Act 2006, which enables any person to apply to a Commons Registration Authority to register land as a 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;

3. The application was supported by 163 user evidence questionnaires, which were subsequently supplemented by a further 222 user questionnaires. The application was made on the basis that recreational use of the land in question was continuing as at the date of the application, such that the relevant twenty-year period to be considered was September 1993 to September 2013.

The Application Site

4. The piece of land subject to this application ("the Application Site") is situated on the seafront at Whitstable and comprises a shingle beach, extending broadly from Wilks Way in the south to the public highway known as Sea Wall in the north. The size, shape and profile of the Application Site have been the subject of change over the years as a result of wave action and work undertaken by the City Council in its capacity as the coast protection authority. The seaward boundary of the Application Site is therefore defined as the mean high water mark as it was in 2007. The landward boundary is the sea wall.

5. The Application Site is shown in more detail on the plan at **Appendix A**.

6. Members should be aware that the Applicant originally applied for a larger area of land, which included a section of beach to the south of the Application Site. However, following consultation with the Local Planning Authority it transpired that the right to apply was excluded in relation to this southern section by virtue of the

occurrence of one of the 'trigger events' set out in Schedule 1A of the Common Act 2006: this area had in 2004 been the subject of an application for planning permission (in respect of the provision of new timber groynes and the re-levelling of the beach) that had been granted and implemented. This meant that the County Council was not able to consider that part of the land as part of the Village Green application, and the application proceeded on the basis of the land that was unaffected by the planning application (referred to as the Application Site).

Background

7. Two objections to the application have been received.

8. The first objection is from the Whitstable Oyster Fishery Company ("the WOFC"), which is the owner of the entirety of the Application Site. The objection is made on the grounds that:
   - The town of Whitstable does not constitute a qualifying locality;
   - Any use of the Application Site has been permissive by virtue of a letter written to the Whitstable Times by Mr. Barrie Green (on behalf of the Company) published in April 1993;
   - The County Council is bound by the finding of the Inspector in relation to a previous application that any use after 1993 had been permissive by virtue of that letter (in accordance with the legal doctrine of *res judicata*);
   - Use of the site has not been 'as of right' by virtue of the WOFC's opposition to the previous application and various signs erected on the site since 1999;
   - Permission to use the Application Site was to be inferred from the WOFC's periodic closures of parts of the land for the purposes of other uses;
   - Parts of the Application Site had been built upon or physically enclosed at times during the relevant period, thereby precluding recreational use;
   - Registration of the land as a Village Green would be incompatible with the statutory powers of the WOFC; and
   - Public recreational use has been by virtue of an implied permission relating to public use of the foreshore generally.

9. The second objection is made by the Canterbury City Council ("the City Council") on the basis that the doctrine of *res judicata* applies, recreational use of the beach was referable to an unqualified common law right to use the foreshore (and therefore not 'as of right'), and there is statutory incompatibility between registration of the Application Site as a Village Green and the performance of the City Council's functions as the Coast Protection Authority for the area under the Coast Protection Act 1949.

10. The County Council sought legal advice on the matter, the substance of which was that (on the evidence available at the time) there was no clear-cut basis upon which the application could be rejected, and that a Public Inquiry would be required to enable further evidence and submissions to be considered. The matter was considered at a Regulation Committee Member Panel meeting on 19th May 2015[1], at which Members accepted the recommendation that the matter be referred to a Public Inquiry.

[1] The minutes of that meeting are available at: https://democracy.kent.gov.uk/ieListDocuments.aspx?CId=182&MId=6045&Ver=4

11. As a result of this decision, Officers instructed a Barrister ("the Inspector") experienced in this area of law to hold a Public Inquiry and to report her findings back to the County Council. A Public Inquiry took place over 16 days between April and December 2016 at which the Inspector heard evidence from witnesses both in support of and in opposition to the application.

12. Following the Inquiry, there followed some delay in the publication of the Inspector's report, partly due to a desire of ensure a consistency of approach with another case (The Downs at Herne Bay (VGA614)) in which similar issues had been raised by the City Council, but also as a result of various changes in case law arising from the Supreme Court's decisions in Lancashire[2], NHS Property Services[3] and TW Logistics[4].

13. The Inspector published her 480-page report ("the Inspector's report") on 7th April 2022, and her findings are discussed below. Members are encouraged to read the Inspector's report in full and it should be noted that this Officer's report is provided as a summary of the pertinent points in respect of the Inspector's findings, but is not intended to be a comprehensive account of every submission made by the parties to the Inspector in relation to this matter.

Previous Village Green applications

14. It is relevant to note that the Application Site has previously been the subject of two applications for registration as a Village Green, both made under section 13 of the Commons Registration Act 1965 (which was the predecessor to section 15 of the Commons Act 2006).

15. The first application ("the 1969 Application") was made on 24th September 1969 by local resident Mrs. Wilks and related to a more extensive area of the beach. The former Whitstable Urban District Council objected to the 1969 Application, and the matter was referred to the Commons Commissioners (as was the process at that time). The Chief Commons Commissioner refused to confirm the registration on the basis that the Application Site had been used by the public at large rather than by the residents of a particular locality.

16. The second application ("the 1999 Application") was also made by Mrs. Wilks, but this time on behalf of the Whitstable Society, on 14th December 1999. The 1999 Application included all of the Application Site, as well as that section of the beach to the south of it that was excluded from consideration as part of the current application by virtue of the 'trigger event'.

17. As a result of objections to the 1999 Application from the WOFC and the City Council, a Public Inquiry was held in August 2001. The Inquiry generated a large amount of publicity locally, with various articles appearing the local press at the time. The then Inspector published his report in December 2001, recommending rejection of the application on the basis that part of the land had only become available for recreational use following the execution of sea defence works in 1988/1989, that use of the site had not been predominantly by the residents of the

[2] R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58
[3] R (NHS Property Services Ltd.) v Surrey County Council [2019] UKSC 58
[4] TW Logistics v Essex County Council [2021] UKSC 4

specified locality, and that recreational use had been permissive following the publication in April 1993 of a letter from the landowner in the Whitstable Times.

18. The 1999 Application was considered at a meeting of the Regulation Committee Member Panel on 1st March 2002, at which Members accepted the Inspector's advice that the application should be rejected. That decision was reported in the following week's editions of the Whitstable Times and the Whitstable Gazette.

Legal tests and Inspector's findings

19. 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, if not, has ceased no more than one year prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

I shall now take each of these points and elaborate on them individually:

(a) Whether use of the land has been 'as of right'?

20. In order to qualify for registration as a Village Green, recreational use of the Application Site needs to have taken place 'as of right' throughout the relevant twenty year period. This means that use must have taken place without force, without secrecy and without permission ('*nec vi, nec clam, nec precario*').

21. In this case, there was no suggestion that access to the Application Site had taken place in a secretive manner, or that (as a whole) it had been physically restricted in any way (other than for the temporary purposes discussed further below). However, there was much debate as to whether recreational use of the land by local residents had taken place as a result of some kind of express or implied permission. In addressing the matter of whether use of the Application Site had been permissive in nature the Inspector heard submissions about, and made findings upon, the following issues.

    Does the public have a common law right of access to the foreshore?

22. One of the City Council's submissions in objection to the application was that there is already a common law right to enjoy open air recreation over both the foreshore and the upper beach, such that any recreational use of the Application Site took place in exercise of that right and therefore was not 'as of right'.

23. The current legal position regarding public access to the foreshore in England and Wales is not clearly established, although the generally accepted principle is that, following the 1821 decision in Blundell v Catterall[5], there is no common law right

[5] Blundell v Catterall (1821) 5 B & Ald 268

of public access to the foreshore for recreational purposes. That position has prevailed ever since, but the matter was reconsidered more recently in the Newhaven[6] case.

24. In Newhaven, the Supreme Court considered three possibilities in this regard: firstly, that public access to the beach was the subject of a common law right; secondly, that public access was the subject of an implied license; and, thirdly, that members of the public indulging in recreational activities on the beach were doing so as trespassers. There was some detailed discussion on the topic but, having noted that the choice between the options was 'difficult and important', the Court ultimately decided that it was not necessary to determine the issue in that particular case.

25. During the course of that discussion, there was some disapproval in respect of the third option, particularly from Lord Carnwarth, who noted that: '*to say that those who use beaches for recreation without specific authorisation to do so as mere trespassers defies common sense*.'. It is primarily this dicta from which stems the City Council's submissions in this regard, and the City Council's position was that the Supreme Court's reluctance to reach an authoritative view on this point left free the County Council (as Registration Authority) to decide this issue for itself.

26. The WOFC submitted that the County Council had no scope to treat previous judicial decisions as not binding on them, and that it was not for Registration Authorities to revisit the legal position. Although Lord Carnwarth in Newhaven had expressed the view that the public should have some form of recreational right, he concluded that the Blundell case must be assumed to have been correctly decided. That is the law, which is binding on the County Council, and Newhaven did not change the established position in this regard.

27. The Inspector preferred the submissions of the WOFC in this regard. She noted that the Supreme Court had had the opportunity to overrule previous authorities on the matter – but chose not to – and it was not for the County Council to decide that Blundell had been wrongly determined. She said[7]: "*In my opinion, the Registration Authority must determine the Application on the basis that at common law, the public have no rights to go on the foreshore for purposes other than navigation and fishing*".

Permission

28. The WOFC's case was that recreational use of the Application Site had always taken place with the WOFC's permission and that permission had never been brought to an end, either before or after the County Councils determination of the 1999 Application. It was submitted that express permission to use the Application Site had arisen as a result of the publication of two documents.

29. Firstly, on 2nd December 1983, an article was published in the Whitstable Times ("the 1983 Article") entitled 'Keep off the beach! Oyster company is preparing to keep out public – and yacht club will be asked to quit'. The article reported on the

[6] R (Newhaven Port and Properties Ltd.) v East Sussex County Council [2015] UKSC 7
[7] Paragraph 664 of the Inspector's report

Annual General Meeting of the WOFC shareholders, at which the then Company Secretary Mr. Barrie Green referred to what he described as the company's right to fence off parts of the beach for the purpose of growing oysters. Mr. Green is quoted in the article as having said that '*If we want to fence in parts of the beach to grow oysters, we can insist on our right to do that and nobody could argue*' and '*At the moment, people are allowed to walk upon that beach with our permission only*'.

30. Secondly, in March 1993, an article appeared in the Whitstable Times – in reference to a customer of the Royal Oyster Stores Restaurant arriving by helicopter and landing on the beach – which prompted subsequent discussion on the newspaper's letters page as to public access to the beach. In response, Mr. Barrie Green wrote to the newspaper, in a letter that was published in April 1993 ("the April 1993 Letter") under the heading 'Oyster company does own beach' stating:

> *"WITH reference to a reader's letter (Whitstable Times, April 1), the Whitstable Oyster Fishery Co has always encouraged people to use the beach. Last year, we worked on the Water Safety Committee which campaigned for new by-laws to protect sea bathers from dangerous jet skiers etc. Currently, we have had discussions and site meetings with the Whitstable Improvement Trust and the Canterbury City Council, as we are backing the Helen's Walk scheme. This will give access to the beach from Keam's Yard to Reeves Beach for disabled people. As regards your nameless correspondent, yes, we do own the beach and adjacent land around the Oyster Stores. Anybody may make an appointment with Furley Page Fielding and Barton of 39 St Margaret's Street, Canterbury, to view the 1916 Goldfinch maps which define the land belonging to the Oyster Co. This bulky set of maps which have recently been restored by the Canterbury Cathedral's archive department are uniquely valuable and a charge is made for supervised viewing. Finally, dog-owners are welcome to use the beach but some are still not clearing their dogs' mess into the waste bins. Please take some old newspapers with you.*
> *BARRIE GREEN, Director, The Whitstable Oyster Fishery Company."*

31. The Applicant refuted the suggestion that any recreational use of the Application Site had taken place with the WOFC's permission and instead submitted that the Public Inquiry Inspector in respect of the 1999 Application had correctly declined to construe the 1983 Article as communicating a licence to users of the dry beach, and it had merely signalled the scope for conflict with users of the water. In relation to the 1993 Letter, which was 'tucked away' on the letters page, this could be read consistently with the existence of a right of access to the beach, in light of the history of 200 years' unchallenged use.

32. The Inspector's view[8] in this regard was that recreational use had taken place with the WOFC's permission: "*I agree with [the previous Inspector] that Mr Barrie Green's April 1993 letter to the Whitstable Times was an effective communication of permission*". She set out her reasoning as follows.

[8] Paragraph 694

33. Firstly, the language used in the letter was such that the landowner was not simply tolerating or acquiescing to use, and users that are 'welcomed' and 'encouraged' cannot be considered as trespassers. Nor can the letter be considered as an acknowledgement of the existence of a pre-existing public right of access, because the wording of the letter is consistent with the landowner having a choice in the matter. Indeed, as the Inspector put it[9], "*the language of encouragement and welcome was reassuring in tone, but still carried the implication that the Company could withdraw the invitation and clear the public off if it so wished*".

34. It was also relevant that the letter had been published in the town's 'best-selling local paper' (according to its own masthead). Publication in the Whitstable Times meant that, in the Inspector's view[10], "*the letter was addressed through the local newspaper to the public at large and to the local public in particular. It seems to me that as a general proposition, a landowner who wished to communicate a message to the local public in 1993 (in the pre-internet age…) was entitled to rely on its publication in the local press as an effective means of doing so*".

35. It was suggested by the Applicant that the WOFC's ownership of the beach was not a matter of common knowledge in Whitstable (such that they did not accept that the Company could grant or refuse them access), but the Inspector disagreed[11] with this proposition, instead finding as a fact that there was already by 1993 widespread local knowledge of the Company's claim to own the beach, '*albeit that many chose (mistakenly) to disbelieve or disregard it*'.

36. The Applicant also submitted that, having been published more than twenty years prior to the current Village Green application, the April 1993 letter could not be relied upon as a grant of permission. In this regard, the Inspector considered[12] that it is a question of fact as to whether a prior grant continues to be effective and, in this case, the WOFC had re-published or renewed the permission more than once during the material period. For example:
    - On 9th October 1997, the Whitstable Times published on its front page an article entitled 'Whose beach is it anyway?' in which Mr. Green was quoted as "*confirm*[ing] *the company would not deny access to anybody using the beach for pleasure pursuits but… warn*[ing] *jet skiiers would not be welcome…*" (thereby implying that it could deny access if it so wanted).
    - On 19th April 2001, a report in the Whitstable Times regarding the 1999 Application included the quote from Mr. Green "*We don't see the logic of the [1999 Application]. We allow and encourage people to use the beach anyway*" (another reference to use not being trespassory in nature)
    - The 2001 Public Inquiry into the 1999 Application was attended by 65 members of the public, with coverage also appearing in the both the Whitstable Times and the Whitstable Gazette, and permissive access to the beach was publicly reaffirmed at that time by way of submissions made on behalf of the WOFC to the Inquiry.

[9] Paragraph 697
[10] Paragraph 698
[11] Paragraph 703
[12] Paragraphs 706 and 707

37. The Inspector was therefore satisfied that there had been a grant of express permission from the WOFC to the recreational users of the beach. However, she also said[13] that "*if for any reason I am wrong about the Company having effectively granted express permission for recreational use of the Application Land by Whitstable inhabitants, I am of the opinion that an inference of implied permission is justified by evidence of things done and said by the Company*". In this regard, she relied upon a number of acts[14] undertaken by the WOFC that both encouraged public access (e.g. giving permission for public events and agreeing to the placement of benches on the land) and restricted public access (e.g. occupying parts of the land for oyster-fishing operations and hiring out parts of the land for filming and photoshoots) as well as, on occasion, threats by the WOFC to further restrict public access (for example, Mr Barrie Green telling the Whitstable Gazette, as published in its 2nd August 2011 edition, that the Company planned to fence off certain areas of the beach to harvest oysters).

Contentiousness

38. In determining whether use of the Application Site took place 'as of right', it will also be necessary to consider whether use took place in exercise of force. 'Force' in this context refers not only to physical force, but to any use which is contentious or exercised under protest[15]: "*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*"[16].

39. In this case, the was much debate at the Inquiry regarding the presence (or absence) of signs on the Application Site during the relevant period.

40. Some signs had been erected by the City Council and these read 'THESE GROYNES PROTECT THE TOWN FROM FLOODING. PLEASE DO NOT LIGHT FIRES OR BARBEQUES ON THEM. BURNING THE TIMBER WILL BE TREATED AS CRIMINAL DAMAGE'. The City Council had also erected other signs stating 'NO CYCLING', 'ADOPTED BEACH' and some providing instructions for sea rescue. However, it was not suggested that any of the City Council's signs had the effect of challenging general recreational use or rendering it contentious in any way (except for the specific activities of fires and barbeques).

41. The WOFC had also erected a number of signs, with the largest in number erected on most of the groynes and stating 'PRIVATE LAND. DO NOT TAKE SHELLFISH. NO RIGHT OF WAY SEAWARD' ("the no right of way seaward signs"). Other company signs on the Application Site, which all bore the company's name, took the following forms:
    - 'NO COMMERCIAL ACTIVITIES ALLOWED ON THIS BEACH'
    - 'DO NOT REMOVE OYSTERS FROM THIS BEACH'
    - 'OYSTERS ARE CULTIVATED OPPOSITE HERE FROM INSHORE TO DEEP WATER'

[13] Paragraph 766
[14] Summarised at paragraph 762
[15] Dalton v Angus (1881) 6 App Cas 740 (HL)
[16] R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 at paragraph 92

- ‘NOTICE FOR DOG WALKERS. BECAUSE WHITSTABLE BEACH IS PRIVATELY OWNED DOGS ARE WELCOME ON IT THROUGHOUT THE YEAR. PLEASE RESPECT THIS UNUSUAL PRIVILEGE BY CLEARING UP AFTER YOUR PET’ (“the dog walking signs”)
- ‘PRIVATE LAND. NO RIGHTS OF WAY. ONLY PERMITTED ENTRY SUBJECT TO WHITSTABLE OYSTER FISHERY COMPANY’S DISCRETION’ (“the only permitted entry signs”)

42. In respect of the ‘no right of way seaward’ signs, there was some disagreement between the parties as to the date of their erection, with the Applicant suggesting that they were put up in early 2012 and the WOFC asserting an earlier date of 2009/2010. There was no contemporaneous documentary evidence to ascertain the precise date of their erection, but the Inspector found, on the basis of the photographic evidence available at the Inquiry, that they had been put up some time between 22nd July 2011 and 3rd November 2011 (i.e. a short time prior or immediately following the date of the Village Green application). In any event, the Inspector’s view[17] was that they were entirely consistent with the WOFC’s grant of permission to use the land (and not, therefore, contentious).

43. As far as the various signs prohibiting commercial activities and oyster removal, the Inspector[18] did not consider these to have the effect of impliedly licencing public recreation, and in any event the prohibited activities did not constitute a subset of the recreational activities relied upon by the Applicant in support of the application.

44. The Inspector considered[19] that the ‘dog walking’ signs did not specifically operate to convey permission, noting instead that ‘*permission for dog walking was already subsumed within the general permission for public use of the beach…*’. However, she did consider that the wording of the signs was sufficient to reaffirm the permissive nature of dog walking on the land, on the basis that they were “*directly addressed to that class of users (“Notice for dog walkers”); identify the land to which they apply (“Because Whitstable Beach is privately owned…”) and the private owner (“Whitstable Oyster Fishery Company”); and invite that class of users onto that land (“… dogs are welcome on it throughout the year”) as a favour, not a right (“Please respect this unusual privilege by cleaning up after your pet”)*”. At least one of the signs was photographed in position and visible from the Application Site in April 2009 (i.e. during the material period).

45. Finally, in relation to the ‘only permitted entry’ signs, the WOFC’s evidence was that the company commissioned a number of these signs (evidenced by an invoice dated 29th January 2001) and Mr. Green had personally attached six to groynes on the beach shortly afterwards. On balance, the Inspector was satisfied[20] that the said notices had been erected, but did not consider their effect to be sufficient to render use contentious: firstly, they were too short lived to give the local residents a reasonable opportunity of seeing them and, secondly, in the Inspector’s view[21], it was unlikely that a reasonable user would have understood

[17] Paragraph 748
[18] Paragraph 755
[19] Paragraph 756
[20] Paragraph 741
[21] Paragraph 742

the signs to mean 'keep out', especially in the context of the WOFC's public statements that it permitted, allowed and encouraged public use of the beach.

46. Accordingly, although a number of signs were erected on and around the Application Site during the material period, the Inspector was not satisfied that any of the signs were sufficient to render use of the Application Site contentious.

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

47. The term 'lawful sports and pastimes' comprises (for the purpose of Village Green registration) a composite class that can include commonplace activities such as dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. Indeed, the Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[22].

48. However, in cases where the use predominantly comprises walking, it will be necessary to differentiate between use that involves wandering at will over a wide area and use that involves walking a defined linear route from A to B. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[23] case, falls to be discounted. In that case, the judge said: '*it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields*'..

49. In this regard, the Inspector found[24] that the Application Site had been used for a wide range of recreational activities, including walking (with and without dogs), swimming, sailing or boating, picnics, kite flying, sunbathing, playing with children, beach games, photography, beachcombing, barbeques and family parties. She was satisfied that these were the kinds of activity that one would expect to find in a beach setting and she had no difficulty in accepting that they took place[25]. Aside from bonfires and barbeques, which would have been contrary to the City Council's signs and liable to cause damage, the other activities were all lawful in nature.

50. The Inspector considered whether some of the use ought to be discounted on the basis that it was more akin to a public rights of way type of user, rather than the exercise of a general right to recreate over a wider area. She concluded[26] that:

> *"The actual amount of footpath-type user is unquantifiable. However, looking at the totality of the evidence in the round, it is my impression that it was heavily outweighed by general recreational use, including walking*

[22] R v Suffolk County Council, ex parte Steed [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in R v. Oxfordshire County Council, ex parte Sunningwell Parish Council [1999] 3 All ER 385
[23] R (Laing Homes) v Buckinghamshire County Council [2003] 3 EGLR 70 at 79 per Sullivan J
[24] Paragraph 628
[25] Paragraph 629
[26] Paragraph 630

(with and without dogs) of a less structured kind, and that while the Application Land was sometimes used as a thoroughfare…, the preponderant use was as a destination in its own right".

51. It is also relevant to note that the fact that the Application Site was regularly covered by water is not considered a bar to registration: section 61 of the Commons Act 2006 confirms that "land" includes land covered by water. The Inspector found[27] that a number of the recreational pursuits referred to in the user evidence involved activity near or at the water's edge and/or crossing over into the water itself (such as swimming, paddling and crabbing).

(c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?

52. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

53. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[28] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

54. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also be necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible that that of a locality, and need not be a legally recognised administrative unit. 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*'[29].

The locality

55. In this case, the application was originally made on the basis of a claimed locality described as "*the Town of Whitstable (as defined by the boundaries of Whitstable Urban District Council immediately before the local government reorganisation in 1974)*". However, the Applicant subsequently sought to amend the application to rely upon three further claimed localities/neighbourhoods, such that the amendment read:

[27] Paragraph 634
[28] R (Cheltenham Builders Ltd.) v South Gloucestershire District Council [2004] 1 EGLR 85 at 90
[29] ibid at 92

a) The Town of Whitstable (as defined by the boundaries of Whitstable Urban District Council immediately before the local government reorganisation in 1974);
b) The locality of the ecclesiastical Parish of Whitstable;
c) The locality of Harbour Ward, an electoral ward of Canterbury City Council (as defined by its boundaries before 1st May 2003);
d) The neighbourhood within the boundaries of Harbour Ward (as these existed before 1st May 2003) within the localities described at (a) and (b) above and also situated within the locality of Canterbury City Council.

56. The Applicant submitted that an administrative area that had ceased to exist following a local government reorganisation could nonetheless still be a qualifying locality as it was defined area known to the law. Alternatively, the ecclesiastical parish of Whitstable would qualify, as would the electoral ward. In respect of the suggested neighbourhood, this was an area that incorporated the historic seafaring part of the town as well as the main shopping area and community facilities, such that the area had a strong sense of community and the required quality of cohesiveness.

57. Neither the City Council nor the WOFC made any substantive submissions on this issue.

58. The Inspector did not consider that the locality originally relied upon by the Applicant was capable of constituting a 'qualifying' locality for the purposes of Village Green registration. Although the Urban District Council of Whitstable was clearly once a legally recognised administrative district, it ceased to have any existence in law on 1st April 1974 when it was abolished pursuant to the Local Government Act 1972. However, the Inspector was satisfied[30] that the Applicant's alternative submission of the ecclesiastical parish of Whitstable – which has existed in unchanged form since 1984 – would be a qualifying locality for the purposes of the application.

"a significant number"

59. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[31]. Thus, it is not a case of simply proving that 51% of the local population has used the Application Site; what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the Application Site.

60. In this regard, the Inspector was satisfied[32] that "*there is a substantial body of evidence of use of the Application Land for a variety of sports and pastimes by*

[30] Paragraph 622
[31] R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council [2002] EWHC 76 at paragraph 71
[32] Paragraph 609

local residents which in my judgement is sufficient to establish satisfaction of the "significant number" test…".

61. In arriving at this view, the Inspector had regard to the large amount of oral evidence that she heard from the Applicant's witnesses, which she said also encompassed evidence of recreational use throughout the relevant period by persons other than the witnesses (such as family members, neighbours and acquaintances) whom they could identify as local residents. She also considered the written evidence of use submitted in support of the application, upon which she commented[33] that "*the content of these documents is consistent with and corroborative of (and corroborated by) the oral evidence given at the Inquiry to the effect that the Application Land was habitually and extensively used for a wide range of recreational pursuits by local people at all times of the year…*".

62. The Inspector also pointed to other factors that made it likely that the Application Site had been in regular recreational use. The first was the lack of physical barriers (other than seasonal closure of the floodgates). The second was the fact that the WOFC did not dispute that the Application Site had been extensively used for recreational purposes, and had made various public statements in the local press recognising public access to the land for recreational purposes.

63. Taken in the round, the evidence demonstrated, in the Inspector's view[34], that the Application Site had been in general use by the local community for recreational purposes during the relevant years.

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than two years prior to the making of the application?

64. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within two years from the date upon which use 'as of right' ceased[35].

65. In this case, the application was originally made on reliance upon section 15(2) of the 2006 Act – i.e. on the basis that use of the Application Site had not ceased at the time of making the application (on 30th September 2013). However, the Applicant subsequently amended the application to rely upon the provision in section 15(3), in the event that the Inspector found that use of the Application Site 'as of right' had ceased prior to the making of the application.

66. In this regard, the Inspector said[36]: "*I have reached the conclusion that the Company [WOFC] granted express permission for public recreational use of the beach (including the Application Land) at the latest during the 2001 inquiry in August 2001… On that basis neither section 15(3) or section 15(7) would avail*

[33] Paragraph 611
[34] Paragraph 614
[35] Note that the period of grace was reduced to one year from 1st October 2013 (by virtue of the coming into effect of section 14 of the Growth and Infrastructure Act 2013), but that applies only to subsequent applications and therefore the original two-year period of race applies in respect of the current application.
[36] Paragraph 767

the Applicant". The Inspector added that, even taking into account the instances of implied permission, the WOFC had already done enough (including acts of a recurring nature) to demonstrate to the local inhabitants that their use of the Application Site depended upon the WOFC's permission well before 30th September 2011 (if the two-year period of grace were to apply).

(e) Whether use has taken place over a period of twenty years or more?

67. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, the relevant twenty-year period ("the material period") is to be calculated retrospectively from the date of the application, and is therefore 30th September 1993 to 30th September 2013.

Interruptions to use

68. The Inspector considered whether the recreational use of the Application Site had been interrupted at any time during the material period. She heard evidence regarding various situations in which access to parts of the Application Site might have been restricted to the public in some way. These included instances such as the placement of a storage container on the beach in connection with building works in an adjacent property[37], fencing off of the proposed replacement 'Red Spider Café' site[38], installations relating to the Whitstable Biennale[39] and other festivals[40], as well as filming and photoshoots[41]. However, there was some uncertainty regarding the precise location and duration of physical obstructions, and the Inspector was not satisfied that the other examples were either incompatible with, or sufficient to interrupt, the use of the Application Site for lawful sports and pastimes. Although filming of larger projects taking place on the land are unlikely to have been compatible with informal recreation, the Inspector considered that any breaks in such use would have been insufficient to interrupt the overall continuity of use during the material period.

69. In addition to the events mentioned above, the WOFC indicated that it had closed parts of the beach from time to time for the purposes of the Company's oyster farming operations. The exclusion did not involve fencing but was effected by way of banksmen telling the public to keep away. The Applicant accepted that oyster cultivation activities had taken place on the land but disputed the amount of equipment used to undertake those activities. In this regard, the Inspector was unable to reach any firm conclusions, noting[42] that the absence of information regarding the frequency and duration of such activities, or the positioning of the relevant equipment, made it impossible to reach any detailed findings on those points, '*or to conclude that they were sufficient to interrupt the overall continuity of use for lawful sports and pastimes of any part of the Application Land*'.

70. Finally, the Inspector heard evidence of coast protection works undertaken by the City Council on the Application Site in 2006. At the previous Public Inquiry into the 1999 Application, the then Inspector had reached a finding that coastal protection

[37] Paragraphs 641 - 642
[38] Paragraph 643
[39] Paragraphs 644 - 645
[40] Paragraphs 646 - 647
[41] Paragraphs 648 - 650
[42] Paragraph 653

works undertaken in 1988-89 (involving the construction of new groynes that were infilled with shingle) had not so affected the Application Site as to amount to an interruption to use. At the Inquiry into the current application, the prevalent view was that the subsequent 2006 works had involved considerably less interference with public access to the land and were limited to shingle replenishment and repair of some of the groynes. Closures were effected by temporary fencing or tape where necessary, but predominantly by the use of portable 'Beach Closed' signs and banksmen. However, the Application Site as a whole was never closed off. The Inspector concluded[43] that, whilst the public were temporarily excluded from certain parts of the land from time to time between May and August 2006, "*it is clear that the 2006 coast protection works on the Application Land were planned so as not to cause a material interruption to recreational use, and did not have that effect*".

71. As such, the Inspector was not able to identify any activities that would have resulted in a substantive interruption to the informal recreational use of the land during the relevant material period (September 1993 to September 2013).

Statutory incompatibility

72. In addition to the legal tests set out in section 15 of the Commons Act 2006, the County Council is now also required to consider whether the issue of 'statutory incompatibility' applies. The concept of 'statutory incompatibility' arose as a result of a case (known as Newhaven[44]) involving registration of a tidal beach at Newhaven, where the landowner challenged a decision to register the beach as a Village Green on the grounds that such registration would be incompatible with the landowner's statutory role as a Port Authority (which included powers to govern the area and develop the land for use as a port).

73. The Supreme Court held[45] that:

> *"The question of incompatibility is one of statutory construction… The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."*

74. In respect of the land that had been acquired by the Port Authority, the Court determined that *"there is a clear incompatibility between [the landowner's] statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green".*

75. The conjoined appeals in the Lancashire[46] and NHS Property[47] cases took this concept further, and the Supreme Court allowed the appeals of both landowners.

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[43] Paragraph 658
[44] R (Newhaven Port and Properties Ltd.) v East Sussex County Council and another [2015] UKSC 7
[45] Paragraph 93 of the Newhaven judgement

The former case involved land adjoining a Primary School for which Lancashire County Council (in its capacity as the Local Education Authority) was the landowner, whilst the latter involved land adjoining Leatherhead Hospital which was under the control of NHS Property Services Ltd. Here, the Supreme Court found[48] that:

> *"In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in Newhaven, [the landowners] can show that there is statutory incompatibility in each of their respective cases. As regards the land held by [Lancashire County Council] pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of [part of the Application Site] as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use… takes place. Secondly, however, and more generally, such rights are incompatible with the use of [any part of the Application Site] for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see Newhaven, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law."*

76. However, in a subsequent case involving a stretch of quayside within the working port of Mistley (known as TW Logistics[49]), the Supreme Court dismissed the landowner's submission that its commercial activities on the Application Site had effectively been criminalised by the registration of the land as a Village Green. It held[50] that:

> *"Registration of land as a [Village Green] has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime… However, the exercise of that right is subject to the 'give and take' principle… This means that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner… The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities around which the local inhabitants were accustomed to mould their recreational activities during the qualifying period.*
>
> *The application of this standard means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public. It has the legal right to continue to undertake activities of the same general quality and at the same general level as before, during the qualifying period… [and] the landowner*

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[46] R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another [2019] UKSC 58
[47] R (NHS Property Services Ltd.) v Surrey County Council and another [2019] UKSC 58
[48] At paragraph 65
[49] TW Logistics Ltd. v Essex County Council and another [2021] UKSC 4
[50] Paragraphs 65 and 66 of the TW Logistics judgement

has some leeway to intensify… The landowner also has the right to undertake new and different activities provided they do not interfere with the rights of the public to use the land for lawful sports and pastimes."

The City Council's position

77. In the current case, the City Council's position was that registration of the Application Site as a Village Green would bring the land within the protection of the Inclosure Act 1857 and the Commons Act 1876 ("the Victorian statutes"), which make it an offence or a public nuisance (amongst other things) to undertake any act which causes injury to the green, to erect structures, or to interfere with the use of the land as a place for recreation. The concern was that this could preclude the City Council from undertaking coastal protection works on the Application Site in accordance with its status as a coastal protection authority under the Coast Protection Act 1949 ("the 1949 Act").

78. The City Council noted that there was the potential for conflicts to arise between its coastal protection functions and the registration of the Application Site as a Village Green. It presented evidence that beach replenishment had to be undertaken repeatedly (because an estimated 30000 cubic metres of shingle was being lost every year from the beach) and structures (such as groynes) required constant maintenance; both activities would necessarily interfere with recreational use. There would also be a requirement for larger scale schemes involving more intensive works at twenty year intervals and, at some point, someone would oppose such works and be able to rely upon the Victorian Statutes to frustrate the City Council's plans.

79. It was contended that although section 4 of the 1949 Act conferred on the City Council the power to undertake coast protection works with the agreement of the relevant landowner, there was nothing in the 1949 Act to authorise interference with other rights. The City Council would also be open to prosecution on the basis that the aim of any works would not be improving the beach as a place for recreation, but rather for more general coast protection purposes.

The WOFC's position

80. The WOFC's position was that, in the Newhaven case, the doctrine of statutory incompatibility had been applied notwithstanding that there had been no factual incompatibility between past port operations and recreational activities (such that the WOFC did not need to demonstrate such incompatibility). Although the WOFC was not a 'statutory undertaker' (as per the Port Authority in Newhaven), there was no basis for limiting the application of the doctrine if registration as a village green would be incompatible with the specific purposes for which the WOFC held the land pursuant to the 1793 Act which incorporated the Company ("the 1793 Act") [51]. The purpose of that Act was to manage the oyster fishery (including the beach) and it was obvious that registration of the land as a village green would hinder those statutory purposes.

[51] The Act for incorporating the Company of Free Fishers and Dredgers of Whitstable, in the County of Kent, and for the better Ordering and Government of the Fishery (33 Geo III c42)

81. In respect of the 1949 Act, the WOFC suggested that everyone agreed that Whitstable was at risk of flooding and submitted that the Application Site was an important location for coast defence work, which was more likely to be required in the future. Were the land to be registered as a Village Green, the City Council would be prevented from undertaking such works in the future (due to the conflict with the Victorian statutes), and there was no power in the 1949 Act which would authorise any interference with public rights.

Southern Water Services Ltd.

82. Southern Water Services ("SWS") lodged a late representation to the application (made following commencement of the Public Inquiry), but did not call any witness evidence or make oral submissions to the Inquiry.

83. SWS submitted that registration of the Application Site as a village green would be incompatible with its statutory functions as a water and sewerage undertaker, and in particular its duties under the Water Industry Act 1991 ("the 1991 Act") which include a general duty to develop and maintain an efficient and economical water supply system in its area, and a general duty to provide, maintain and improve such a system of public sewers as to ensure the effectual drainage of its area. Exercise of those functions in relation to the Application Site (were it to be registered as a village green), would be likely to contravene the Victorian statutes (described above), and failure to do so, on the other hand, could expose SWS to civil or criminal liabilities under other statutory provisions, as well as causing the company to breach its obligations under the 1991 Act.

The Applicant's position

84. The Applicant's case was the submissions of the WOFC went beyond the scope of the decision in the Newhaven case. In the current case, the WOFC was not a statutory undertaker or public authority and it had no public functions at all; it was simply a company that happened (due to its early formation) to have been incorporated by a special Act, which gave it no powers or duties of a public nature. The Company was given powers to purchase and enjoy the royalty of fishing or oyster dredging, along with the associated ground and soil, but there was nothing in the 1793 Act to say that the Company's land was held for specific defined statutory purposes (as was the case in Newhaven).

85. Furthermore, it is not at all clear from the 1793 Act that the beach comprising the Application Site falls within the scope of the Act. The Application Site is very largely above the mean high water mark (i.e. not part of the fishery), and the 1793 Act did not (on its face) authorise the WOFC's acquisition of the beach or establish that the beach was held for any specific defined statutory purpose. Indeed, the beach comprising the Application Site appears to have been acquired later.

86. The Applicant submitted that the WOFC could not point to any 'particular statutory purposes' for which the Application Site had been acquired and was held during the relevant period, let alone demonstrate that such purposes would be incompatible with its registration as a village green. In Newhaven, the port authority had been under a duty to keep open a working harbour for the public and to maintain it accordingly, but in the current case there was no public benefit

in the exploitation of the resources of the fishery; indeed, the Company was under no statutory obligation to operate a fishery and any such operation was purely for private profit.

87. In respect of the claims made by the City Council and SWS, the Applicant's view was that there was nothing in Newhaven or any subsequent case to suggest that a statutory incompatibility argument could be run by a third party with no legal interest in the Application Site. There was a clear distinction between a landowner with statutory functions in respect of its own land, and other bodies (such as the City Council or SWS) who might wish to exercise statutory functions in respect of land outside of their ownership. Indeed, on the City Council's case, the entire coastline would be exempt from registration as a village green. Equally, on SWS's case, it could not be correct that all land upon which a statutory undertaker had, or might wish to locate, infrastructure or apparatus, would be exempt from registration as a village green. There was no reason why, applying the principle of 'give and take', the WOFC, the City Council and SWS could not continue to carry out the activities of a kind already undertaken on the Application Site; this would permit much, if not most, of what they might wish to do over the coming years.

The Inspector's conclusion

88. The Inspector noted that there was no evidential basis for doubting the WOFC's intentions or sincerity regarding the proposed expansion of its oyster cultivation operations on the land, and she could see no reason to doubt the proposition that the most convenient and cost-effective way to do this would involve some form of development on part of the Application Site. However, she said that ultimately the matter turns not on the actual current or proposed future uses of the land, but rather the issue of statutory incompatibility has to be determined by reference to the statutory purposes for which the land is held. Accordingly, the Inspector undertook a meticulous review of the wording and provisions of the 1793 Act and subsequent enactments and conveyances[52].

89. The preamble to the 1793 Act explains that there had, from time immemorial, been an oyster fishery within the bounds of the Manor of Whitstable, and there had arisen a need to unify the ownership, regulation and management of the previously unincorporated company responsible for the fishery's activities. Thus, the 1793 Act incorporated the WOFC's predecessor, known as the 'Company of Free Fishers and Dredgers of Whitstable, in the County of Kent'. The Act did not directly vest any land in the Company, but did confer powers to 'have, purchase, receive, take, and enjoy' land formerly comprising part of the Manor of Whitstable. It also provided powers for the management and regulation of the fishery, as well as the appointment of representatives.

90. The preamble to the 1793 Act also explains that the Act was not enacted for private gain but because 'the good Order and Government of the said Fishery is of great publick concern [sic]'. The Inspector considered that there was seemingly perceived, at the time, to be a public interest in the Company being incorporated for the purpose of acquiring the fishery and associated freehold, and to improve its management and regulation. As such, she said[53] "*I think the Registration*

[52] Set out at paragraphs 780 to 798
[53] Paragraph 783

Authority must proceed on the basis that the powers conferred by the 1793 Act served a public purpose and their exercise by the Company benefitted the local public at least".

91. In 1896 a subsequent Act was passed ("the 1896 Act"), which was concerned with 'the better development improvement management and maintenance of the said fishery'. The Inspector said[54] that this was entirely consistent with the purposes of the 1793 Act and merely updated the methods by which the public interest in the regulation and management of the fishery was to be achieved. Her overall conclusion was that:

> "*The purposes of the 1793 and 1896 Acts are broad enough to encompass any level and any type of activity on the Application Land that is ancillary to oyster cultivation on the maximum scale that the tidal parts of the Company's land will accommodate… It seems to me that registration as a town/village green would have the potential to stymie future use of the Application Land in ways that – to borrow the words of the 1896 Act – would conduce to the better development, improvement, management and maintenance of the oyster fishery, and that would be contrary to Parliament's intentions. I think that Parliament would not have intended the Company to be inhibited from locating boats, equipment, infrastructure and operations anywhere on its land that it finds convenient for the better management of the fishery as often and for so long as it wants at any time.*"

92. It is to be noted that there was some debate at the Inquiry as to whether the provisions of the Acts applied to the Application Site. The Applicant's case was that the reference to 'sea beach' in the 1793 Act applied to land comprising the foreshore (i.e. below the mean high water mark). However, the Inspector was satisfied[55], having regard to the language used in various subsequent conveyances, that "*the expression 'sea beach'… was used to mean the beach above, not the foreshore below, mean high water mark*".

93. Accordingly, the Inspector concluded[56]: *"I advise that the Application Land (if and to the extent that it would otherwise be registrable) should not be registered on the ground that registration would be incompatible with the statutory purposes of the 1793 and 1896 Acts"*.

94. However, the Inspector was less convinced in respect of the case for statutory incompatibility on the parts of the City Council and SWS, and considered that the sphere of operation of the statutory incompatibility doctrine is restricted to land that is specifically held for purposes that would be incompatible with registration as a village green. By way of example, she said[57]: *"The fact that a local authority might in future wish to appropriate land to use for educational purposes will not protect it from registration under section 15 [of the 2006 Act]; but if the authority acquired, or has in the past appropriated, the land for educational purposes, it will be protected even if it has never actually been used for educational purposes and the authority has no present intention of so using it. That is where the Supreme Court has drawn the line"*. In the same vein, the fact that a coast protection

[54] Paragraph 785
[55] Paragraph 795
[56] Paragraph 799
[57] Paragraph 805

authority might in the future wish to exercise its powers in relation to land owned by a third party will not protect the land from registration, and only if the authority had acquired or appropriated the land for the purposes of exercising its functions under the 1949 Act will the doctrine of statutory incompatibility apply.

95. In reaching this conclusion, the Inspector noted[58] that, if the submissions of the City Council and SWS were correct, then:

> *"the statutory incompatibility doctrine would confer immunity from registration on large swathes of land that would in practice never be required for the purposes of discharging the City Council's functions under the 1949 Act, or Southern Water's functions under the 1991 Act, as the case might be. Indeed, the functions of water and sewerage undertakers are potentially exercisable pretty much anywhere within the particular geographical areas for which they have statutory responsibility. Section 159 of the 1991 Act… confers power to lay and keep water and sewage pipes in (or on) any land not being in, under, or over a street. The 1949 Act powers are geographically more limited in the sense that they can only be exercised to protect land against erosion or encroachment by the sea, but there is still scope for considerable uncertainty as to what land might in the future be earmarked for coast protection works."*

96. Therefore, whilst the Inspector considered that the doctrine of statutory incompatibility could be said to apply to the WOFC (as landowner), she rejected the arguments put forward by the City Council and SWS in this regard.

The doctrine of *res judicata*

97. Since the Application Site had been the subject of an application for Village Green registration previously, the Inspector heard submissions on the issue of whether the County Council was able to consider the current application. *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').

98. The City Council's position was that the application could and should be rejected on the simple basis that the issue of whether use had taken place 'as of right' had already been decided in the context of the 1999 Application (where the County Council had accepted the Inspector's recommendation that use had not been 'as of right' after April 1993). The 1999 Application was virtually co-extensive with the current Application Site, and there was a cross-over between the qualifying periods. Moreover, it was suggested that it was clearly wrong and undesirable for a landowner to be vexed by repeated applications in respect of the same piece of land relying on the same period and the same facts; that landowner would be left in a position where there was no certainty as to the status of the land on the basis of which future decisions could be taken.

99. The WOFC also submitted that the County Council's previous decision on the 1999 Application had created an 'issue estoppel' – to the effect that use of the

[58] Paragraph 806

land by the public from April 1993 had been permissive in nature – which was binding upon the County Council when considering the current application.

100. However, the Applicant argued that 'issue estoppel' did not apply in the current case because the current Applicant was not party to the 1999 Application and there was insufficient nexus between him and the applicant to the 1999 Application. Moreover, the two applications had been made under different statutory provisions (one under the Commons Registration Act 1965 and one under the Commons Act 2006) with each concerning different land, different material periods, and different neighbourhoods/localities. As such, there could be no effective *res judicata* in a changing situation, and the status of the Application Site had not, therefore, been permanently declared.

101. The Inspector found[59] that, in her view, *"a determination regarding the registrability of land as a green is a determination regarding its status… the [1965 Act legislation] created machinery for the determination by registration authorities of the question of whether parcels of land were registrable as new town/village greens. If successful, the 1999 Application would have resulted in an entry on the register of town and village greens maintained by the Registration Authority that would have constituted "conclusive evidence" of the Application Land being a green at the date of entry… It seems to me that a determination of non-registrability was none the less of a determination of status, albeit not for all time."*.

102. Although the decision in respect of the 1999 Application did not prevent a fresh application from being made in reliance upon a different material period and altered statutory criteria – indeed the relevant DEFRA Guidance acknowledges this possibility – the requirement for use to have been 'as of right' throughout the twenty year period is common to both sets of statutory criteria.

103. Accordingly, the Inspector ultimately accepted[60] the objectors' submission that the County Council was "*bound by the doctrine of issue estoppel to hold that Mr. Barrie Green's 1993 letter to the Whitstable Times operated as a grant of permission for recreational use of the Application Land which had lasting effect until at least 14 December 1999 (the date of the 1999 Application).*".

104. As it transpired, the Inspector's views on this issue were not, in any event, determinative of the application because she also reached the view that the use of the Application Site by the local residents had been with the express permission of the WOFC.

The Inspector's overall conclusion

105. Having carefully considered the substantial volume of evidence before her, the Inspector's overall conclusion[61] was that the application should be rejected for the following reasons:

i. The Registration Authority's decision on the 1999 Application created an issue estoppel binding on the parties to the Application

[59] Paragraph 684
[60] Paragraph 692
[61] Paragraph 815

to the effect that use of the Application Land for lawful sports and pastimes from April 1993 to December 1999 was not as of right, but permissive, by virtue of the letter written on behalf of the Company by Mr Barrie Green and published in the Whitstable Times in April 1993;

ii. Irrespective of whether there is such an issue estoppel, use of the Application Land for lawful sports and pastimes throughout the period from April 1993 to 30 September 2013 (the date of the Application) was not as of right, but pursuant to express permission communicated to the public by Mr Barrie Green's April 1993 letter to the Whitstable Times, subsequent statements made by Mr Barrie Green on behalf of the Company and published in that newspaper on 9 October 1997 and 19 April 2001, and in the Whitstable Gazette on 2 August 2001, and evidence and submissions on behalf of the Company at the public inquiry held in August 2001 for the purpose of determining the 1999 Application;

iii. Alternatively to (ii), use of the Application Land for lawful sports and pastimes during the 20 year period preceding the date of the Application was not as of right, but pursuant to permission implied by express statements, acts encouraging public access, acts restricting public access, and threats to further restrict public access, on the part of the Company;

iv. Registration as a town or village green would be incompatible with the statutory purposes of the 1793 and 1896 Acts pursuant to which the Company acquired and holds the Application Land.

Subsequent correspondence

106. On receipt, the Inspector's report was forwarded to the Applicant, the WOFC and the City Council for their comments.

107. No comments were received from the WOFC or the City Council.

108. The Applicant was disappointed that the Inspector did not find in favour of registration of the land as a Village Green, particularly in the context of the public having accessed the beach as an amenity for centuries and the Applicant's concerns regarding threats to continued access by the WOFC. The Applicant did not dispute the Inspector's findings insofar as they supported the case for registration (for example, the findings that the land had been used by a significant number of local inhabitants and for the purposes of lawful spots and pastimes), however he did make the following submissions in connection with the report:

- It was recognised that the Newhaven case had reopened the opportunity for debate as to the extent of the public's rights over the beach, but it was accepted that the Inspector was bound to determine the application on the basis that there was no such Common Law right of access. The Applicant's position in this regard is that if any such rights were found to exist, they would not have the effect of rendering use permissive because they would comprise an 'enduring and irrevocable' form of permission (as opposed to a revocable form that could be withdrawn by the landowner at any time).
- The finding that the previous decision in respect of the 1999 Application created an issue estoppel was contested on the basis that there is nothing to preclude the consideration and determination of a fresh application

made a number of years later involving a slightly different parcel of land, a different user period and a different statutory regime. The proper approach in this regard is to consider whether reconsideration of the previous application would amount to an abuse of process, and this would only arise where it was manifestly unfair to a party that the same issues should be relitigated, or that such reconsideration would bring the administration of justice into disrepute (neither of which applies in this case).

- Although the Applicant has some disputes regarding the Inspector's findings of fact, it is not suggested that her overall conclusion is perverse. The Inspector's comments regarding the credibility of the some of the Applicant's witnesses is unfair on the basis that, in the same way that the WOFC is entitled to assert that public use is by virtue of a revocable permission, the Applicant's witnesses were equally entitled to assert their belief that they have a right of access irrespective of any permission. Also, the Inspector has approached the issue on the basis of ownership and the powers that the WOFC claim to have, but the matter should also be viewed from the public's understanding of the rights exercisable on the land.
- The Applicant does not contest the Inspector's findings of an inference of implied permission from the actions of the WOFC when they are viewed in the whole factual context found in the report.
- The Applicant disputes the Inspector's findings in respect of statutory incompatibility. It is suggested that the Inspector has not fully engaged with submissions previously made on behalf of the Applicant and the County Council is asked to have regard to those submissions in reaching a decision on the matter.

109. Although the Applicant's comments are noted, it is not considered that they raise any issues that would be sufficient to call into question the validity of the Inspector's conclusions.

110. The question of whether there exists a common law right of access over the beach does not assist the Applicant, because even if it was open to the County Council to determine that a pre-existing right at common law existed, the implication of this would be that users could not be regarded as trespassers – which is the starting point for the acquisition of prescriptive rights – such that the Application Site would not be capable of registration as a Village Green under section 15 of the Commons Act 2006.

111. Insofar as viewing the issue estoppel matter instead as an abuse of process is concerned, it is not considered that this is the correct approach and, arguably, it is manifestly unfair for a landowner to have to deal with repeated applications on his land. Although there are some minor differences between the tests to be applied under the former legislation and those relevant to the Commons Act 2006, the requirement for use to have taken place 'as of right' is common to both pieces of legislation and therefore central, both in the 1999 Application and the current application, to the determination of the application.

112. In respect of statutory incompatibility, the Applicant's previous submissions were provided to the Inspector, who had regard to them when preparing her report. Nonetheless, they have been reviewed in light of the Inspectors report, but it is not considered that the matters raised are sufficient to alter the conclusion reached.

Conclusion

113. In this case, there can be no debate on the evidence presented to the Inquiry that the Application Site has been used by local residents (and indeed others) for recreational activities over a period substantially in excess of twenty years. However, in order for the application to succeed – and the land to be registered as a Village Green – it is necessary for the applicant to be able to demonstrate that every part of the test in section 15 of the Commons Act 2006 has been properly and strictly proved.

114. As is noted above, after very careful and thorough examination of the evidence, the Inspector in this case has expressed concerns in respect of several areas of the application, notably whether an issue estoppel applies, whether an issue of statutory incompatibility applies and whether use of the Application Site has taken place 'as of right'. Although the Applicant takes issue with some aspects of the Inspector's report, his response to it does not expressly deal with the substantive matter of the April 1993 Letter (which, the Inspector says, amounts to communication of permission to use the Application Site). Regardless of any debates around the topics of issue estoppel and statutory incompatibility, the crux of the matter is that use of the Application Site does not appear to have taken place 'as of right' (as is required in order for the land to be capable of registration as a Village Green). Indeed, the Applicant concedes in his response to the report that the Inspector's overall conclusion regarding express permission is 'not perverse' and also that he 'do[es] not contest' the Inspector's findings of an inference of implied permission from the actions of the WOFC as landowner.

115. The Officer's view is that the Inspector has conducted a very thorough examination of all of the evidence and the parties' submissions – heard over a period of 16 days – and her report accurately represents both the evidence/ submissions before her, and the law as it currently stands. Accordingly, it is considered that the legal tests in relation to the registration of the land as a new Town or Village Green have not been met, such that the land subject to the application (shown at **Appendix A**) should not be registered as a new Village Green.

116. It is to be noted that, if Members were to approve the recommendation set out below, and the Applicant remained aggrieved, it is open to the Applicant to apply for a Judicial Review of the decision in the High Court.

Recommendation

117. I recommend, for the reasons set out in the Inspector's report dated 7th April 2022, that the applicant be informed that the application to register the land known as Whitstable Beach as a new Village Green has not been accepted.

Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

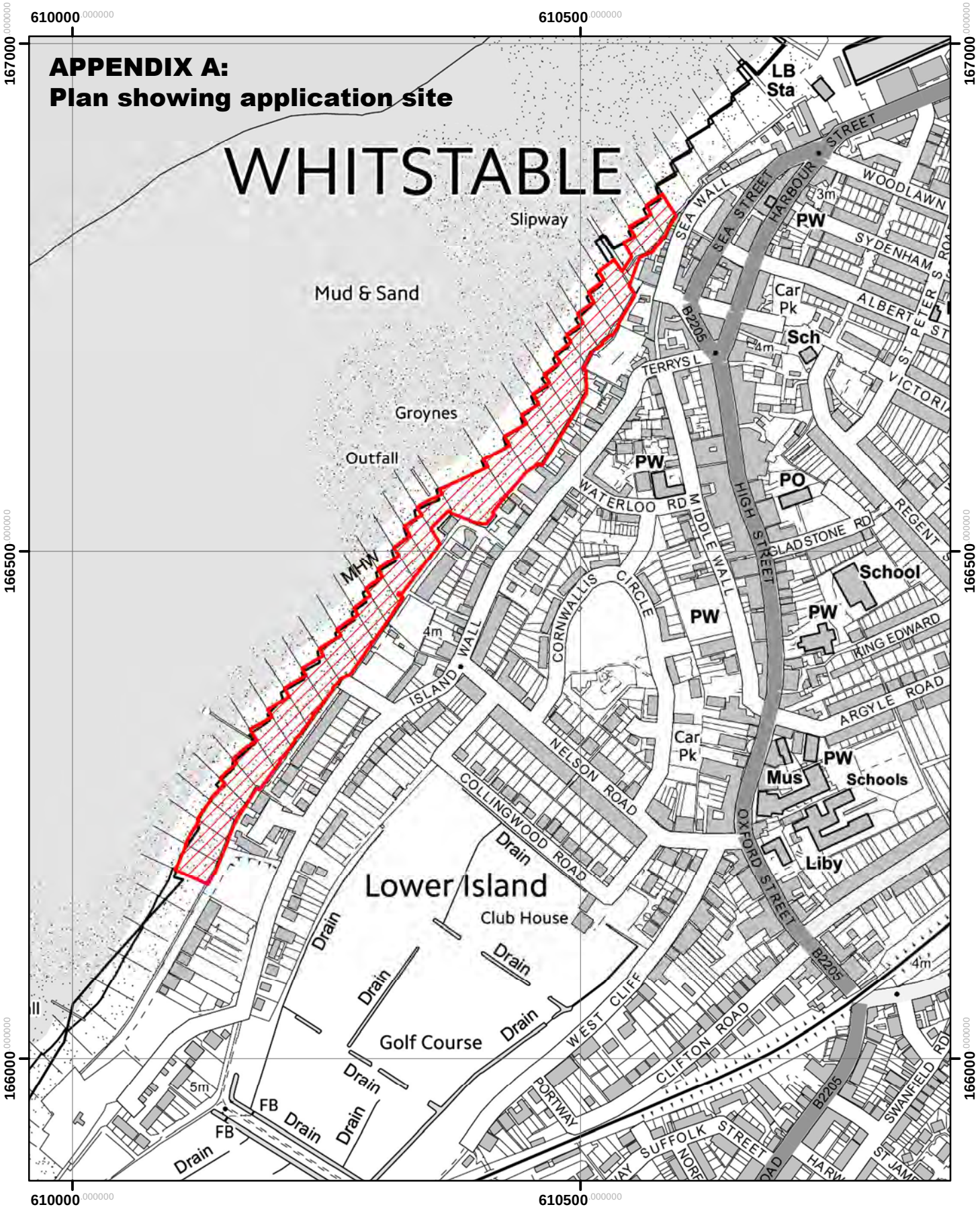
Appendices

APPENDIX A – Plan showing Application Site

Background documents

Advice of Miss Ross Crail to the County Council dated 24th April 2015
Inspector's report dated 7th April 2022
Applicant's comments on the Inspector's report dated 9th August 2022

Background documents may be inspected by arrangement at the PROW and Access Service. Please contact the Case Officer for further details.



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Land subject to Village Green application at Whitstable Beach in Whitstable

Kent County Council
kent.gov.uk

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Application to register land at Bunyards Farm, Allington as a new Town or Village Green

A report by the PROW and Access Manager to Kent County Council's Regulation Committee Member Panel on Friday 15th September 2023.

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

Local Member: Mr. A. Kennedy Unrestricted item

Introduction

1. The County Council has received an application ("the Application") to register an area of land at Bunyards Farm at Allington as a new Town or Village Green from Mr. C. Passmore, Mr. J. Willis, Mr. T. Wilkinson, Cllr. P. Harper, Mr. T. Walker and Mr. D. Edwards ("the Applicants"). The Application, made on 14th June 2021, was allocated the application number VGA687.

Procedure

2. The Application has been made under section 15 of the Commons Act 2006 ("the 2006 Act") and the Commons Registration (England) Regulations 2014 ("the 2014 Regulations").

3. Section 15 of the 2006 Act enables any person to apply to a Commons Registration Authority to register land as a 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'

4. 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 one year prior to the date of application**[1], e.g. by way of the erection of fencing or a notice (section 15(3) of the Act).

5. As a standard procedure set out in the 2014 Regulations, the County Council must publicise the application by way of a copy of the notice on the County Council's website and by placing copies of the notice on site to provide local people with the opportunity to comment on the application. Copies of that notice must also be served on any landowner(s) (where they can be reasonably identified) as well as the relevant local authorities. The publicity must state a period of at least six weeks during which objections and representations can be made.

[1] Reduced from two years to one year for applications made after 1st October 2013, due to the coming into effect of section 14 of the Growth and Infrastructure Act 2013.

The application site

6. The land subject to the Application ("the Application Site") consists of an area of land of approximately 37.5 acres (15 hectares), comprising formerly arable farmland, situated between Beaver Road at Allington and the Maidstone railway line.

7. There are no public rights of way crossing the Application Site, but the Applicant's case is that access to it has been available from a number of points around the site.

8. It is to be noted that the Application Site shares its southern boundary with the administrative boundary between the boroughs of Tonbridge and Malling and Maidstone, albeit the site itself sits entirely within Tonbridge and Malling. Administratively, the site is situated within the parish of Aylesford (some distance away from the village of Aylesford itself), but geographically it adjoins to the residential area known as Allington (and indeed the use of the site has been almost exclusively by the residents of Allington).

9. The Application Site is shown in more detail on the plan at **Appendix A**. Photographs of the site are attached at **Appendix B**.

10. Members should be aware – for information only – that the entirety of the Application Site is the subject of a separate outline planning application for a large residential development (reference 22/00409/OEAO). That application is currently under consideration by the Tonbridge and Malling Borough Council (in its capacity as the Local Planning Authority). However, the planning application was submitted after the Village Green application, and has no bearing whatsoever upon the consideration of the Village Green application by the County Council.

The case

11. The Application has been made on the grounds that the Application Site has become a Town or Village Green by virtue of the recreational use of the land by local residents for a period in excess of twenty years.

12. Included with the original application were 10 user evidence questionnaires from local residents setting out their use of the Application Site. A further 53 user evidence questionnaires in support of the application were subsequently provided by the Applicants. A summary of the user evidence submitted in support of the Application is attached at **Appendix C**.

13. The Application is made under section 15(2) of the 2006 Act (i.e. on the basis that recreational use of the Application Site has continued up until the date of the application) such that the relevant twenty-year period for the purposes of the Application is June 2001 to June 2021.

14. At the time of making the Application, the Applicants relied upon the "*Allington neighbourhood in the parish of Aylesford south of the railway line*" as the relevant 'neighbourhood within a locality' (as required by section 15 of the 2006 Act). However, an amendment was subsequently sought by the Applicants in this

regard, such that the "*Allington ward within the borough of Maidstone*" is now relied upon.

Consultations

15. Consultations have been carried out as required.

16. The Aylesford Parish Council wrote to express its full support for the application.

17. Mr. Andrew Kennedy (County Councillor for Malling North East), reported that, having spoken to local residents who have used the space for over 20 years, as well as Parish Councils and others about the application, he was convinced that there is a strong case to support the application. The nearby pub/restaurant is called 'Poppy Fields' in memory of the poppies that would cover this area, and it is an important green space in an overly developed area with poor infrastructure.

18. In addition, six messages of support were received from local residents.

Landowner

19. The entirety of the Application Site is registered to the Trustees of the Andrew Cheale Will Trust under Land Registry Title number K436532 ("the Landowners"). BDW Trading Ltd. have a legal interest in the land in the form of an option to purchase.

20. Objection to the Application has been received from DAC Beachcroft LLP on behalf of the Landowners and BDW Trading Ltd. ("the Objectors") on the basis that the application fails to meet the requirements of section 15 of the 2006 Act for a number of reasons, and therefore should be refused on the following grounds:
    - The application does not properly define the relevant neighbourhood/locality and is defective in this regard because it refers to administrative areas that lie within different districts;
    - The Applicants have only submitted 10 user evidence questionnaires in support of the application and have therefore failed to demonstrate use of the application site by a 'significant number' of local residents;
    - Throughout much of the relevant period, the application site was fenced and in active agricultural use (for the grazing of cattle, taking of a hay crop and grazing by horses) such that the land was securely fenced and any use of it has been in exercise of force;
    - Since agricultural use ceased, the land has become overgrown to the extent of making it unsuitable for recreational purposes;

21. The objection is supported by three statutory declarations, from the Farm Manager (1998 to 2013), the former landowner's son, and an agricultural contractor employed to undertake various activities at Bunyards Farm. The thrust of those declarations is that:
    - The former Farm Manager states that, during the 1990s, the application site was used as a temporary holding facility for cattle and pigs for the Cheale Meats abattoir. This took place until 1998, from which time the land was used on an ad hoc basis for cattle grazing. In August 2003, approximately 25 to 30 cows were moved onto the land due to a grass fire at their previous location and they were there for approximately 4 weeks (during which time they were

visited daily for welfare checks) before being moved on. There was a fenced boundary along Beaver Road that was subject to frequent vandalism, and a secondary (inner) fence boundary that was kept secure to ensure the safety of the cattle (and their containment).

- The former landowner's son recalls that Bunyards Farm was acquired by the family in the 1970s as part of a wider network of farms involved in the breeding and sale or slaughter of cattle. His father was forced to give up farming in 2012 due to ill health and regular use of the land ceased from that time, after which it was used for the occasional grazing of horses. Between 2002 and 2006, this witness regularly drove along the boundary fence to tip/store horse manure; this provided a good opportunity to inspect the mainly post and barbed wire fence, which it was necessary to keep in good repair to prevent cattle straying. In 2014, the yard area and access road were sold for residential development; until this time it had not been possible to access the application site from this area because it was securely fenced.
- The agricultural contractor notes that he was employed by the former landowner on a daily basis to undertake field maintenance. In 2006, he took a hay crop from the land (which would not have been possible had use been as alleged by the Applicants) and in 2017 he applied heavy fertilizer and a thick mulch to the land (to control weeds) which would have lain on the surface for some time and been difficult and unpleasant to walk on.

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, if not, has ceased no more than one year prior to the making of the application?
    (e) Whether use has taken place over period of twenty years or more?

I shall now take each of these points and elaborate on them individually:

(a) Whether use of the land has been 'as of right'?

23. The statutory scheme in relation to Village Green applications is based upon the English law of prescription, whereby certain rights can be acquired on the basis of a presumed dedication by the landowner. This presumption of dedication arises as a result of acquiescence (i.e. inaction by the landowner) and, as such, long use by the public is merely evidence from which a dedication can be inferred.

24. In order to infer a dedication, use must have been '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[2]: "*if, then,*

[2] *Dalton v Angus* (1881) 6 App Cas 740 (HL)

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"[3]. As such, if a landowner takes steps to indicate that he objects to informal use of his land (i.e. by disproving any acquiescence to the use), then that use will not be considered 'as of right'.

25. In this case, there is no suggestion that general recreational use of the application site took place secretively or in exercise of any specific permission granted by the landowner. However, the Objectors' submission is that use of the Application Site has been in exercise of force, and therefore not 'as of right'.

26. The Applicants' evidence is that it has been possible to access the Application Site from multiple points throughout the relevant period due to the poor maintenance of the fencing around the site. It is suggested that the landowner was clearly aware of public use of the application site because, by the Objectors' own acknowledgement, the fencing was frequently vandalised, and this supports the contention that local residents had unrestricted access to the Application Site.

27. However, the Objectors' position is that whilst the fencing was latterly not always kept in good repair, that was certainly not the case throughout the relevant period and the condition of the fencing only began to deteriorate after the land ceased to be used for the grazing of cattle from approximately 2012 (i.e. at least half way through the material period of 2001 to 2021). Until that time, the land was enclosed and fences were maintained when vandalised. Moreover, a 2009 Google Streetview image clearly shows an intact fence along Beaver Road at that time and any use of this 'access point' would therefore have been in exercise of force during the qualifying period.

28. It is to be noted that there is some suggestion from the Applicants that the cattle grazing took place on land to the north of the Application Site, close to the farm buildings where loading and unloading took place. The Objectors dispute this and contend that grazing took place over the whole of the Application Site and adjoining land. Indeed, one of the Applicants' own witnesses appears to confirm this, stating that *"farmer had cattle grazing on the land until the new Castor development commenced construction"* [NB the Castor Park development (situated to the north-east of the Application Site) was completed in late 2017]. Furthermore, aerial photography from the County Council's own records, attached at **Appendix D**, also appears to depict the presence of animals on the land in 2000 (one year prior to the start of the relevant period). On balance, therefore it appears probable that the Application Site was used for grazing during the material period.

<u>Access to the application site from Beaver Road</u>

29. Access to the application site from Beaver Road has been via a gap in the fence just to the south-west of the junction with Juniper Close. A Google Streetview image from August 2012[4] shows this access point as a gap between a fairly

[3] *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 at paragraph 92 per Lord Rodger

[4] https://www.google.com/maps/@51.2856003,0.4874027,3a,75y,256.04h,79.11t/data=!3m7!1e1!3m5!1sGXnAEQjspCerVJhbb9qndA!2e0!5s20120801T000000!7i13312!8i6656?entry=ttu

substantial chain-link fence and an adjacent post and barbed wire fence that is comparably more flimsy in appearance; the barbed wire is missing on one section of fence between two wooden posts and it appears from this image that it would have been possible for pedestrians to access the site at this point. However, the same Google Streetview image at this location dated April 2009 (mentioned above) shows several strands of barbed wire extending between the wooden posts, such that access is unlikely to have been readily available and, at the very least, a reasonable person approaching the land should have understood that the landowner was seeking to assert the boundaries of the land. A copy of the 2009 Google Streetview image is attached at **Appendix E**.

30. The Applicants' position is that, although this photograph purports to show the fence 'intact', it is clear that it would not have been sufficient to contain cattle, nor would it have been a barrier to access. However, the law does not require landowners to erect substantial fencing in order to keep the public out, and indeed this would be largely unachievable on agricultural land which often extends to hundreds of acres. Rather, the question is whether the landowner took any steps at any point during the relevant period to deter public access: where a landowner contests and attempts to interrupt such access, then he will not be acquiescing to recreational use. Indeed, as is noted above, for recreational use by local residents to qualify for the purposes of Village Green registration, it must have taken place in a 'peaceable and non-contentious' manner.

31. Further guidance on this particular issue is available in Gadsden and Cousins on Commons and Greens[5] (the leading reference book on this area of law), which states that the erection of fencing is normally an indication that the landowner is attempting to prevent access, and that any person who crosses or breaks a fence is undertaking a forceful act that is not consistent with use being 'as of right'. It is suggested that "*subsequent users of the land, who may themselves have entered without direct force through a broken opening, will nevertheless also enter forcibly to the extent that they have knowledge that their entry is contested*".

32. In this case there is a very strong argument that the erection of barbed wire across a gap in the fence, at what appears to be waist height, ought to have been sufficient to indicate to anyone seeking access that such use was not being tolerated by the landowner. Indeed, a number of the Applicants' witnesses appear to accept that this was not a formal access to the land, noting: *"there was a wire fence that was continually broken down", "through the broken fence", "Beaver road broken fence",* and *"via gap in fence along Beaver Road… the fence was down every time I wanted access".* This is consistent with the recollections of one of the Objectors' witnesses who states that "*The Beaver Road boundary was always fenced but the fence was frequently vandalized and pulled down, it was usually the same part of the fence that was pulled down. I remember on numerous occasions having to pull the fence back up to maintain the boundary*".

33. The Applicants' submission is that "*residents were sometimes aware that there were remnants of a fence in places, but they took this as a boundary marker rather than something that was intended to restrict access to the public*". Aside from being an assumption in relation to the state of mind of the users, the

[5] Cousins, E and Honey, R (2020) *Gadsden and Cousins on Commons and Greens* (3rd Ed.) Sweet and Maxwell (quote from paragraph 15.61)

Applicants' suggestion cannot be correct because it is clear that the action of stepping over 'remnants of fencing' cannot be considered 'peaceable and non-contentious'. That proposition might, potentially, be arguable had the position prevailed throughout the entirety of the relevant period, but in this case there is independent evidence available (in the 2009 Google Streetview image) to verify that the landowner made at least one documented attempt to secure the site during the relevant period.

34. Figures provided by the applicant suggest that 39 of the 63 users predominantly used the Beaver Road access point, with another 10 users relying on the Beaver Road access point in addition to another access point. It is considered that use of the land via this access point cannot be considered 'as of right', because it was facilitated as a result of repeated vandalism to the fencing and in obvious defiance of the landowner's attempt to secure the land. Accordingly, the use of the application site by these 39 witnesses is not considered to be qualifying use for the purposes of the Village Green application, and there is a question regarding the degree to which the use by the other 10 witnesses using the Beaver Road access point can be considered 'as of right'.

Access from other points

35. Unlike the Beaver Road access point (where a Google Streetview image is available), there is no independently verifiable evidence available in relation to the other alleged access points onto the Application Site.

36. The Applicants' case is that, in addition to Beaver Road, access to the Application Site was also available at various points via land (comprising pear orchards) to the south-west of the application site, and also from the north-eastern side of the application site (now the Godwin Road development). Those access points are shown on the plan at **Appendix F**. However, there also is some suggestion in the additional evidence provided by the Applicants' witnesses that some of these access points bore the remains of fencing, although it is not clear at what point in time these descriptions applied (i.e. whether the situation prevailed throughout the material period). For example, one witness describes the access point in the southern corner as "fence dilapidated chain link", whilst another notes that there was "trodden barbed wire" at the south-western gap, and a further witness recalls a "single strand barbed wire lying on ground" at the western access point (close to the railway line).

37. The Objectors' case is that the Applicant's evidence in relation to fencing appears to relate entirely to the period once use of the land for cattle grazing had ceased. During the period that the land was used for cattle grazing, the boundaries were securely fenced with cattle-proof fencing consisting of 3 or 4 strands of barbed wire (which is consistent with the references to barbed wire in the Applicants' evidence). It is not disputed that the fencing has been allowed to fall into disrepair following the cessation of use of the land for grazing in 2012, however this is during the latter part of the material period. One of the Objectors' witnesses, who refers to maintenance of fencing until 2013, does not recall any damage to the fence along the south-western boundary (in contrast to the Beaver Road access point which required frequent repair). The Objectors' position is that there was no access to the application site from the southern corner (close to Corben Close), or from Godwin Road (on the north-eastern side), until those developments were

completed during the latter part of the material period. The only access to the land in the vicinity of Goodwin Road prior to its development was via a farm access track, along which (according to the Objectors) there were locked gates and a 'private' notice.

38. After very careful and thorough consideration of the evidence provided by the parties, it has not been possible to reconcile the varying accounts and positions of the Applicants and the Objectors. Logic very much dictates that if, as the Objector suggests, the Application Site was used for grazing cattle (albeit on an ad hoc basis) until around 2012, then there would certainly have been periods - at least during the first half of the material period - when the land was securely fenced in its entirety. There is mention in the Applicants' evidence of cattle escaping on occasion, which suggests that the fencing did fail at times, but had the land not been secure during the times that the cattle were grazing then such escapes would have been a daily occurrence, which does not seem plausible. Moreover, during the periods of time when the Goodwin Road and Castor Park developments were in progress, those sites would necessarily have been securely fenced; none of the witnesses refer to this and it is unclear what the resultant impact was upon access to the application site.

39. Accordingly, there are a number of unanswered questions relating to access to the Application Site along the south-west and north-east boundaries. The conflict within the evidence provided by the parties, and the lack of independently verifiable evidence in relation to the other entrances, means that it is not possible to reach a definitive conclusion on whether the use of the Application Site made via access points other than Beaver Road can properly be considered 'as of right' throughout the material period (2001 to 2021).

(b) Whether use of the land has been for the purposes of lawful sports and pastimes?

40. Lawful sports and pastimes can be commonplace activities including dog walking, children playing, picnicking and kite-flying. Legal principle does not require that rights of this nature be limited to certain ancient pastimes (such as maypole dancing) or for organised sports or communal activities to have taken place. The Courts have held that '*dog walking and playing with children [are], in modern life, the kind of informal recreation which may be the main function of a village green*'[6].

41. The summary of evidence of use by local residents at **Appendix C** shows the activities claimed to have taken place on the Application Site. The overwhelming majority use of the Application Site has been for dog walking, but evidence questionnaires submitted in support of the application also refer to use of the site activities such as family walks, wildlife observation, fruit-picking, cycling and running.

42. The Objectors' position is that the overgrown nature of the site more latterly would necessarily have prevented some of the activities (e.g. running and cycling) from taking place, but this assertion is disputed by the Applicants.

[6] *R v Suffolk County Council, ex parte Steed* [1995] 70 P&CR 487 at 508 and approved by Lord Hoffman in *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All ER 385

43. In any application where walking is alleged to be the predominant recreational use of the application site, it will be important to be able to distinguish between use that involves wandering at will over a wide area and use that involves walking a defined linear route. The latter will generally be regarded as a 'rights of way type' use and, following the decision in the Laing Homes[7] case, falls to be discounted. In that case, the judge said: '*it is important to distinguish between use that would suggest to a reasonable landowner that the users believed they were exercising a public right of way to walk, with or without dogs... and use that would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of the fields*'.

44. Indeed, the term 'walking' may connote a variety of different uses, not all of which (as noted above) may be qualifying use for the purposes of the Village Green application. Accordingly, it is not possible to conclude definitively on this point on the basis of the written evidence available.

(c) Whether use has been by a significant number of inhabitants of a particular locality, or a neighbourhood within a locality?

45. The right to use a Town or Village Green is restricted to the inhabitants of a locality, or of a neighbourhood within a locality, and it is therefore important to be able to define this area with a degree of accuracy so that the group of people to whom the recreational rights are attached can be identified.

46. The definition of 'locality' for the purposes of a Town or Village Green application has been the subject of much debate in the Courts. In the Cheltenham Builders[8] case, it was considered that *'…at the very least, Parliament required the users of the land to be the inhabitants of somewhere that could sensibly be described as a locality… there has to be, in my judgement, a sufficiently cohesive entity which is capable of definition*'. The judge later went on to suggest that this might mean that locality should normally constitute '*some legally recognised administrative division of the county*'.

47. In cases where the locality is so large that it would be impossible to meet the 'significant number' test (see below), it will also necessary to identify a neighbourhood within the locality. The concept of a 'neighbourhood' is more flexible than that of a locality, and need not be a legally recognised administrative unit. 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*'[9].

48. In this case, the Application was originally made in reliance upon the "Allington neighbourhood in the parish of Aylesford south of the railway line". Following a submission from the Objectors that the locality relied upon was defective (because it referred to two different administrative areas that lie within different

[7] *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 EGLR 70 at 79 per Sullivan J
[8] *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council* [2004] 1 EGLR 85 at 90
[9] ibid at 92

districts), the Applicants subsequently sought to amend the locality to rely upon the "Allington ward in the borough of Maidstone".

49. The electoral ward of Allington is clearly a legally defined administrative unit and would therefore be a qualifying locality for the purposes of this application. The Objectors accept that the locality, as amended, has now been correctly identified.

"a significant number"

50. The County Council also needs to be satisfied that the Application Site has been used by a 'significant number' of the residents of the 'neighbourhood within a locality'. The word "significant" in this context does not mean considerable or substantial: '*a neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to properly be described as a considerable or a substantial number… what matters is that the number of people using the land in question has to be sufficient to indicate that the land is in general use by the community for informal recreation rather than occasional use by individuals as trespassers*'[10]. Thus, what constitutes a 'significant number' will depend upon the local environment and will vary in each case depending upon the location of the application site.

51. In this case, the test in relation to 'significant number' needs to viewed in the context of usage that was 'as of right' (because use that was not 'as of right' will not be qualifying use for the purposes of the Village Green application). As is noted above, a large proportion of the user evidence is considered to have taken place in a contentious manner, such that it is not 'as of right'. As it has not been possible to reach a conclusion in respect of the degree to which access to the site took place 'as of right', this necessarily leaves a question as to whether the remaining qualifying use would have been sufficient to indicate to a reasonable landowner that the land was in general use by the community.

(d) Whether use of the land 'as of right' by the inhabitants has continued up until the date of application or, if not, ceased no more than one year prior to the making of the application?

52. The Commons Act 2006 requires use of the land to have taken place 'as of right' up until the date of application or, if such use has ceased prior to the making of the application, section 15(3) of the 2006 Act provides that an application must be made within one year from the date upon which use 'as of right' ceased.

53. In this case, the Application is made under section 15(2) of the 2006 Act on the basis that use of the application site continued 'as of right' until the date of the application in 2021 (such that the relevant twenty-year period is 2001 to 2021).

54. Taking the witness questionnaires at face value, there is evidence of recreational use of the application site continuing until the date that the Application was made. However, as noted above, there is an unresolved question as to whether any access to the Application Site has taken place 'as of right', and the answer to that question is intrinsically linked to this particular test.

[10] *R (Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 at paragraph 71

(e) Whether use has taken place over a period of twenty years or more?

55. In order to qualify for registration, it must be shown that the land in question has been used for a full period of twenty years. In this case, use 'as of right' did not cease prior to the making of the application in 2021. The relevant twenty-year period ("the material period") is calculated retrospectively from this date and is therefore 2001 to 2021.

56. The user evidence submitted in support of the Application (and summarised at **Appendix C**) demonstrates that the recreational use is alleged to have taken place for a period in excess of twenty years. Of the 63 witnesses, one third claim to have used the Application Site for the full twenty-year period.

57. However, there is a question as to whether the land has been used in the requisite manner *throughout* the material period. As discussed previously, if the land was used for grazing cattle or horses (as is alleged by the Objectors) during any part of the material period, then any fencing secured for this purpose would necessarily have interrupted access to the Application Site (or parts of it).

58. There is also the matter of a hay crop referred to in the Objectors' evidence that is alleged to have been taken in 2006. The Objectors' suggestion is that if the land had been used as alleged, then the taking of a hay crop would not have been possible because the crop would have been trampled and ruined. However, the Applicants say that there is no evidence that the taking of the hay crop (or storing of bales) restricted access to the site or interfered with recreational use.

Conclusion

59. In order for the Application to succeed, all five of the legal tests set out above must be met; if one test fails, then the application as whole falls to be rejected.

60. As is noted above, there is a serious dispute in this case as to the nature of the access to the Application Site. Although it seems clear that access to the application site via Beaver Road was contentious (and therefore not 'as of right'), there is insufficient evidence available regarding the other access points to the site and therefore the matter of whether access to the site as whole has been 'as of right' remains unresolved. Common sense dictates that, if the Application Site was used for grazing – even for only short periods during the relevant twenty-year period – then it seems probable that recreational use would inevitably have been interrupted (such that an application for Village Green status could not succeed). However, the Applicants dispute this and there does not appear to be any independently verifiable evidence available to resolve the questions of fencing and grazing. It would appear that the only way in which the application can be properly determined, is to consider in more detail the oral testimony of the relevant witnesses. This would also allow other issues, such as the impact of the hay crop, to be explored in further detail.

61. Indeed, in cases where there are conflicts in the evidence, there has been judicial support for the holding of a Public Inquiry: '*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'[11].

62. Provision for holding a Public Inquiry is made in the 2014 Regulations; the process involves the County Council appointing an independent Inspector (normally a Barrister) 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.

63. Accordingly, is considered that the most appropriate course of action in this case is for the matter to be referred to a Public Inquiry for further consideration of the outstanding issues.

Recommendation

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

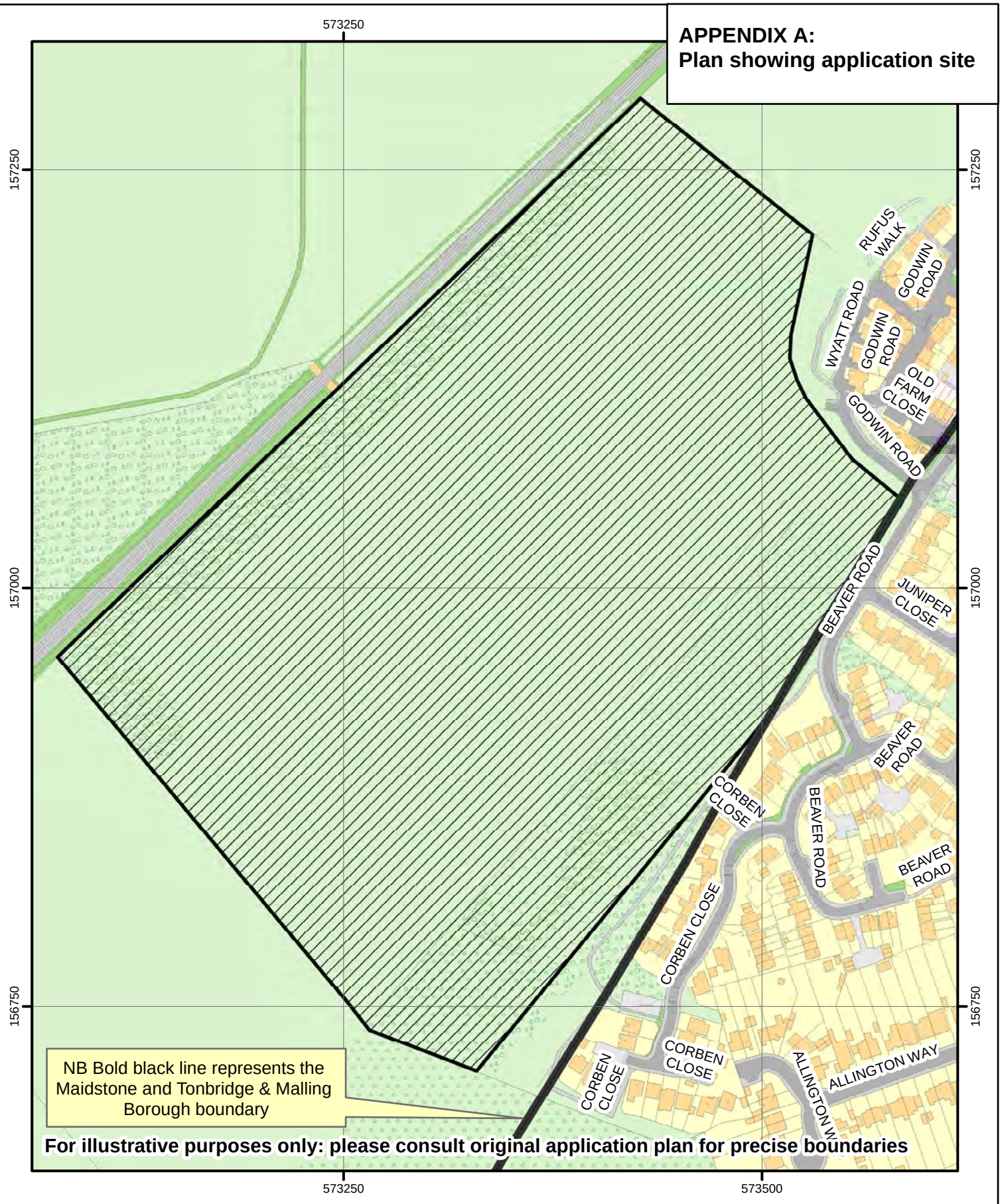
Accountable Officer:
Mr. Graham Rusling – Tel: 03000 413449 or Email: graham.rusling@kent.gov.uk
Case Officer:
Ms. Melanie McNeir – Tel: 03000 413421 or Email: melanie.mcneir@kent.gov.uk

Appendices

APPENDIX A – Plan showing application site
APPENDIX B – Photographs of the application site
APPENDIX C – Summary of the user evidence
APPENDIX D – Aerial photograph of the application site dated 2000
APPENDIX E – Google Streetview image of Beaver Road access point from 2009
APPENDIX F – Plan showing alleged access points onto the application site

[11] *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 at paragraph 66

APPENDIX A:
Plan showing application site



NB Bold black line represents the Maidstone and Tonbridge & Malling Borough boundary

For illustrative purposes only: please consult original application plan for precise boundaries

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Land subject to Village Green application at Bunyards Farm in the parish of Aylesford (VGA687)

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APPENDIX B:
Photographs of the application site (taken August 2023)

Photo 1: View from Godwin Road development looking south-west

Photo 2: Beaver Road 'entrance' as it is today (August 2023)

APPENDIX B:
Photographs of the application site (taken August 2023)

Photo 3: Path from Beaver Road (right fork) looking north towards Godwin Road development

Photo 4: Path from Beaver Road (left fork) looking south-west

APPENDIX B:
Photographs of the application site (taken August 2023)

Photo 5: Path leading from south-west boundary (near orchards) looking north-east

Photo 6: Continuation of path from SW boundary looking NE over the site

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APPENDIX C:
Summary of user evidence

User	Period of use	Frequency of use	Type of use	Access	Comments
1	2002-2021	Occasionally	Dog walking	Not stated	*"not for summer walks because of adders"* *"we saw folk in there walking from Beaver Road through a gap in the boundary"*
2	1981 - present	Twice daily	Dog walking, wildlife observation, fresh air, meet others	Via pear orchard	
3	2002 – 2021	Daily	Dog walking, playing as a child, bike riding, shortcut to orchards	Via entrance opposite Juniper Close and opposite P+R by old barn	
4	2007 – 2021	Daily	Played as a child, dog walking, route to Hermitage Lane	Via entrance opposite Juniper Close	
5	2003 – present	Daily	Dog walking	From pavement in Beaver Road	
6	1998 – present	Occasionally	Walking alone or with dog	*"a fence that was down, alongside Beaver Road"*	*"there was a wire fence that was continually broken down"*
7	2001 – present	Varying times, weather dependent	Dog walking, children playing, fruit picking, nature walks	*"opening from Beaver Road or from top of field by Corben Close"*	
8	2012 – present	Weekly/daily	Dog walking	Various access points	
9	2000 – present	Occasionally	Dog walking, blackberrying	Via Beaver Road	
10	2000 – present	Occasionally	Dog walking, blackberrying	Via Beaver Road	
11	2017 – present	Weekly	Dog walking	Access from Beaver Road	
12	2010 – present	Daily with dog, now occasionally	Walking	Via A20, more recently via Godwin Road	
13	2012 – present	Monthly	Dog walking and leisure	Via A20 and footpath from Howard Drive to Hermitage Lane	Also used for playing as a child, 1970 - 1993
14	1999 – present	Monthly until 2011, now daily	Walking to Barming Train Station, riding bike, walking for exercise	"access from Beaver Road, near Juniper Close entrance"	
15	2015 – present	Variable, more in summer	Dog walking	"from Beaver Road opposite junction with Juniper Close and two other points"	
16	2002 – present	Daily	Dog walking, exercise	"from the field next to the orchard or from Beaver Road"	

17	2020 – present	Daily	Dog walking, nature spotting with children	“off Beaver Road and we use the field off Castor Park”	
18	2006 – present	Daily	Dog walking	“walked onto it”	Have lived in Maidstone for 30 years and used land as a child to play
19	1980 – 2002		Dog walking, ball games with children	“over fence”	
20	2004 - present	At least weekly	Walking with children, nature trails	“opposite Juniper Close”	
21	2002 – present	Daily	Dog walking	“from Beaver Road”	
22	2004 – 2021	Weekly	Walking dog or for pleasure	“path from land near Barming station”	
23	2003 – present	Weekly	Walking, dog walking, bike riding	*“via gap in fence along Beaver Road” “the fence was down every time I wanted access”*	*“I do remember hearing cattle from time to time although never saw any. From memory, these seemed to be coming from some distance and to the right of where I accessed the land”*
24	2000 – present	Weekly	Dog walking, blackberrying, nature observation	*“through break in fencing opposite ‘T’ junction (Beaver Road/Juniper Close)”*	
25	1956 – present	Daily	Dog walking, nature spotting with children	*“Beaver road broken fence or via pear orchards rear hermitage lane”*	
26	2002 – 2021	Daily	Dog walking, playing with children, birdwatching, wellbeing	*“through opening in fences to main field or via path from Beaver Road”*	
27	2002 – present	Occasionally	Dog walking, walking alone for exercise	*“from Beaver Road pavement unobstructed into the area”*	*“grass sometimes too wet and too long for dog”*
28	2014 – present	Monthly	Walks with pets, family and children	*“from Beaver Road”*	
29	2013 – present	Weekly	Walking and exploring with children, bird watching	*“a gap in the fence off Beaver Road/Juniper Close junction”*	
30	2017 – present	Thrice weekly	Dog walking	*“from the hole in the fence on Beaver Road and from the southern corner of the field”*	*“at times (summer) the vegetation becomes overgrown making access difficult”*
31	2000 – present	Weekly/ monthly	Dog walks and runs, nature observation with children, fruit picking	*“either opposite junction of Beaver Road at Juniper Close or via wooded area near pear orchard”*	
32	2000 – 2019	Variable – daily/ weekly	Played as children	*“woods near orchard and through fence in Beaver Road”*	
33	2001 – present	Bi-weekly	Walking	*“off Beaver Road (nr. Juniper Close) opening in fence”*	
34	2019 – present	Daily	Walking and health	*“it is open land”*	

35	2007 – present	Several times per week	Dog and general walks	*"gap in fence or via orchard"*	
36	2002 – present	Monthly	Dog walking, walking with children, blackberrying, bird watching	*"off Beaver Road"*	
37	1996 – present	Daily	Dog walking	*"through the broken fence"*	
38	2012 – 2021	Infrequently	Walking	*"walked"*	Used *"infrequently – very overgrown"*
39	2005 – present	Weekly	Dog walking, blackberrying, family walks	*"footpath from Beaver Road"*	
40	2019 – present	Occasionally	Family walks	*"footpath from Beaver Road"*	
41	2021 – present	Weekly	Walking, cycling	*"through the trodden path near the alleyway to Beaver Road"*	
42	2002 – present	Regularly	Dog walking, bird watching	*"open access – no fencing to rear"*	
43	2001 – present	Monthly	Dog walking	Via Juniper Close and orchard	
44	2010 – present	Daily	Dog walking, walking	Beaver Road	
45	2006 – present	Weekly	Walking, running, dog walking	From Beaver Road	
46	2016 – present	Daily	Walking, running, dog walking	"walking"	
47	2000 – present	Occasionally	Dog walking, walking with children	Access from various points	
48	1999 - ?	Not stated	Not states	Not stated	*"when I moved here in 1999 we used to use the land for bonfires and celebrations, some children's parties"*
49	1993 – present	Weekly	Dog walking, wildlife watching	*"through several gaps in the perimeter fence on the SE and SW sides"*	Between 1992 – 2000, top field was used for cow pasture but cows frequently escaped due to poor condition of fencing. Met the landowner whilst dog walking a few times and spoke to him; he seemed happy the locals were taking an interest in the area.
50	2016 – present	Not stated	Teaching grandchildren about wildlife and nature	Beaver Road	
51	1998 – present	Weekly	Walking	*"small access on Beaver Road"*	
52	2011 – present	Occasionally	Dog walking	*"large gap in hedge"*	

53	1998 – present	Weekly	Walking	*"track"*	
54	2011 – present	Daily	Dog walking, bird watching, mindfulness	*"the field below the orchard from Beaver Road"*	
55	2007 – 2020	Daily	Dog walking	*"there is a gap around the edge, from the path or through orchards"*	
56	2001 – present	Daily	Dog walking, playing with friends	*"through the fence that was open"*	
57	1998 – present	Daily/ monthly	Family walks, dog walking	*"walked through gap in the fence opposite Juniper Close entrance"*	
58	1976 - present	Monthly	Dog walking	*"via gap in fence"*	Not resident in the area – moved away 1993.
59	1998 – present	Weekly	Walking	Not stated	
60	2012 – present	2/3 times weekly	Dog walking	*"along the footpath on Beaver Road near the top of Beaver Road on the right"*	
61	2000 – 2020	Weekly	Dog walking, kite flying, cycling, fruit picking"	*"various access points at top of field, lower field and directly off Beaver Road"*	*"farmer had cattle grazing on the land until the new Castor development commenced construction"* [NB Castor Park development completed late 2017]
62	2001 – present	Once/twice weekly	Birdwatching, foraging and recreational walking	*"from Beaver opposite Juniper Close"*	
63	2001 – present	Once/twice weekly	Birdwatching, foraging and walking	*"from Beaver Road opposite Juniper Close"*	

Notes:

User evidence questionnaires were completed in 2021; therefore, where 2021 is stated above it does not mean that users have ceased using the land, but simply replicates the wording on the evidence questionnaire.

The twenty-year material period is 2001 to 2021.

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APPENDIX E:
Google Streetview image (2009)

Image taken from Google Streetview showing the access point onto the land on Beaver Road (opposite the junction with Juniper Close)

The image is dated April 2009, which is approximately half way through the material period (2001 – 2021)

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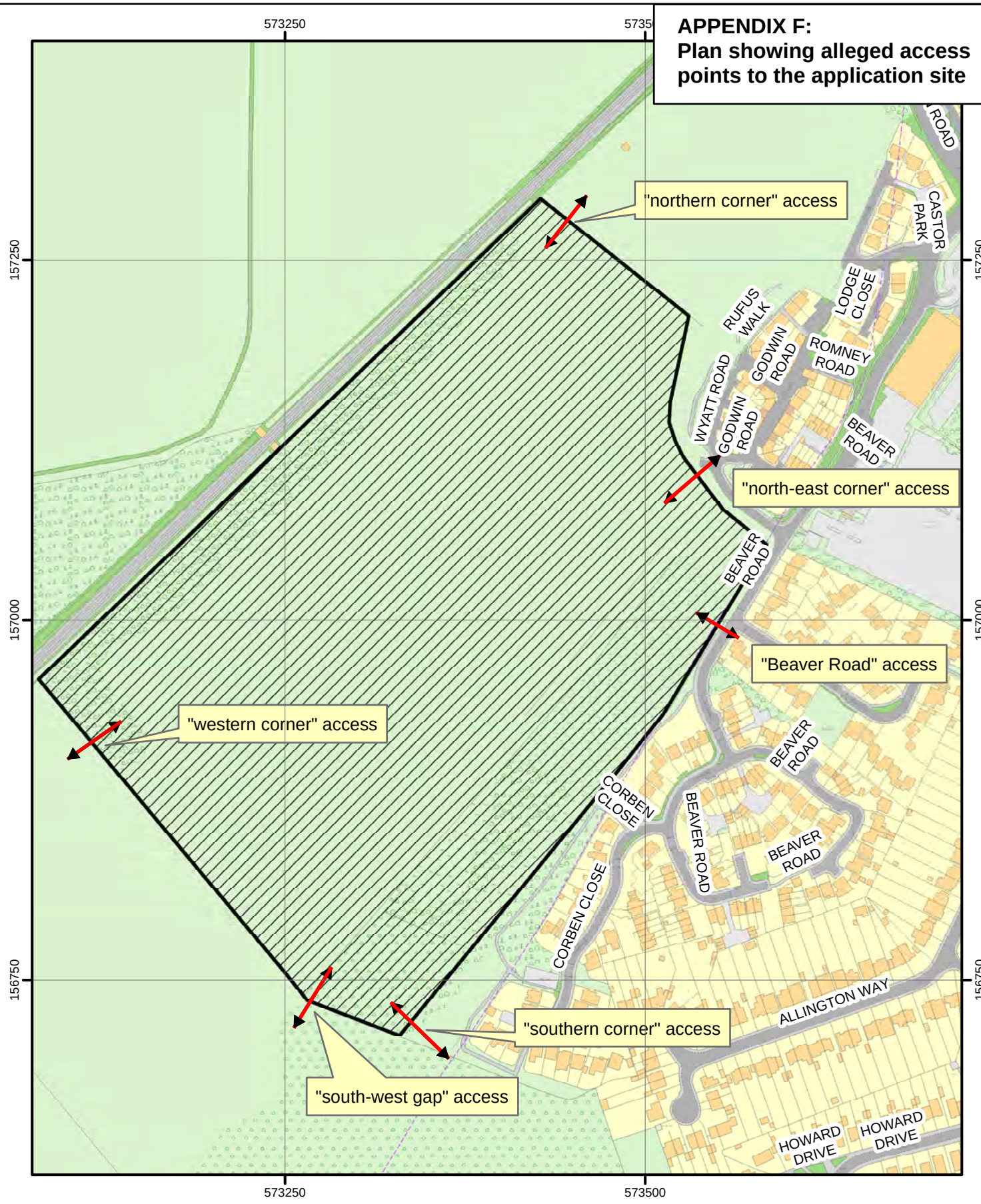
APPENDIX F:
Plan showing alleged access points to the application site



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Land subject to Village Green application at Bunyards Farm in the parish of Aylesford (VGA687)

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