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'

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[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*

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[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:

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[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*

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[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.

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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.