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

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[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

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[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.

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[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:
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Case Officer:
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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.