Committee: Commons & Village Green Registration Panel

Date: 22 December 2010

By: Director of Governance and Community Services

Title: Application for land known as West Beach, Newhaven to be registered as a town or village green

Applicant: Newhaven Town Council

Application No: 1353

Contact Officer: Chris Wilkinson x35744

Local Member: Councillor David Rogers

RECOMMENDATION: To accept the Application pursuant to section 15 of the Commons Act 2006 of Newhaven Town Council to have land known as West Beach, Newhaven registered as a town or village green.

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1 The Site

1.1 The Application Land is identified on the map submitted with the Application on which it is shaded in yellow. The Land comprises an area of sandy beach enclosed within the harbour wall and extends seawards to the south, to the mean low water mark. It is an inter-tidal area bound by the breakwater to the west, the West Wall to the north, and the approach channel to the Port and the River Ouse to the east. It is some 60,796 square metres in area. A copy of the application with the plan of the area is attached at **Appendix 1**.

2 The Law

2.1 The relevant statutory provision is Section 15 Commons Act 2006 ('the Act') which is attached at **Appendix 2**. The relevant legal framework is set out in section 5 of the Inspector's Report into this Application. A copy of that Report is at **Appendix 3**. In essence, an applicant must prove that the land has been used by a significant number of local inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes 'as of right' for a period of twenty years. The Commons (Registration of Town and Village Green)(Interim Arrangements)(England) Regulations 2007 apply to all applications made under the 2006 Act and govern how village green applications should be processed by Local Authorities. A guide to the application process is also attached at **Appendix 2**.

3 The Application

3.1 The Application was made by Newhaven Town Council on 18 December 2008.

3.2 The Application was made under section 15(4) of the Commons Act 2006 as the use of the Land had ceased before 6 April 2007.

3.3 Where the cessation of use occurs before 6 April 2007, such as in this case, the application must be made within five years of the date when the land ceased to be used in a qualifying manner, ie as of right for lawful sports and pastimes for at least twenty years.

4 Consultation and representations

4.1 The Application was duly advertised in the Sussex Express on 16 January 2009. Lewes District Council and landowners were notified and notices were put on site. A copy of the Application was kept on deposit for public consultation at County Hall, Lewes and The Town Hall, Newhaven.

4.2 The landowner, Newhaven Ports and Properties Limited, objected to the Application. No other objections were received.

5 The merits of the Application

5.1 The Applicant asserted that the Land had become a village green on the basis that the Land had been used by a significant number of the local inhabitants for lawful sports and pastimes as of right for not less than 20 years, and that this use had been continuous up to April 2006. In order for the Application to succeed, the Applicant must establish on the balance of probabilities that the qualifying use has continued from April 1986 until April 2006.

5.2 With the Application the Applicant provided some 1115 evidence forms and a further 60 detailed evidence questionnaires in support. A large number of photographs, taken by various compliers of the evidence questionnaires, were also submitted. These documents are available in the Members' Room.

5.3 The landowner, Newhaven Ports and Properties Limited, objected to the Application principally on the basis that the Applicant had failed to prove twenty years use as of right up to 2006. The evidence to support this contention was that due to the tidal cycle the Land is rarely completely uncovered and then only for a few minutes, it is part of the working area of Newhaven Port, there are byelaws regulating its use and there has been a "pay and display" car park for users, operating seasonally from April to September, since 1979.

5.4 Given the clear conflict in the evidence provided, and the volume of public interest, it was decided that the best way to determine the Application was by means of a non-statutory public inquiry. Counsel was instructed to act as an Inspector and a local public inquiry was convened at Meeching Hall on 6-8 July 2010. The Inspector was provided with all the background documents which have been set out above, and are available in the Members' Room. Evidence was given before Miss Stockley of Kings Chambers by witnesses on behalf of both sides who were cross examined.

5.5 The Inspector provided the County Council with a Report into the Application, together with a recommendation. In summary, having applied the law to her findings of fact based on all the evidence, her overall conclusions were that:-

- the Application Land comprises land that is capable of registration as a town or village green in principle;
- the relevant 20 year period is April 1986 until April 2006;
- the Application Land has as a matter of fact been used for some lawful sports and pastimes throughout that 20 year period, but that swimming, fishing and other water-based activities must be discounted from that qualifying use;
- the use of the Application Land for lawful sports and pastimes has taken place throughout the relevant 20 year period to a sufficient extent and continuity;
- the administrative area of Newhaven town council is a locality;
- the Land has been used throughout the relevant 20 year period for lawful sports and pastimes by a significant number of the inhabitants of Newhaven;

- the use of the Land throughout the relevant 20 year period for lawful sports and pastimes has been as of right;
- such use ceased in April 2006 and accordingly ceased prior to 6th April 2007;
- the Application was made within 5 years of the cessation of such use; and
- the lack of a definitive right of public access to the Land is not a ground on which registration should be refused.

5.6 Therefore, she concluded that the statutory criteria contained in section 15(4) of the Commons Act 2006 had been established in relation to the Application Land, namely a significant number of the inhabitants of the locality of the Parish of Newhaven had indulged as of right in lawful sports and pastimes on the Application Land for a period of at least 20 years, they ceased to do so before 6th April 2007, and the Application was made within 5 years from that cessation.

5.7 Given those conclusions, she recommended that the Application be accepted and the Application Land be registered as a town or village green.

5.8 The Objector and Applicant were made aware of the Inspector's recommendation and provided with a copy of the Report. The Registration Authority invited the Objector and Applicant to make any observations or comments on the Report. A twenty-one day limit was imposed for any comments to be received by the Registration Authority.

5.9 The Applicant, in a letter dated 25 October 2010, welcomed and endorsed the Inspector's recommendation. The Objector, in a letter dated 21 October 2010, requested that the deadline be extended because material had recently come to light that, it believed, needed investigating. This request was forwarded to the Inspector. It was agreed between the Inspector and Registration Authority that an extension would be given until 18 November 2010. Any comment made by the Objector would then be forwarded to the Applicant who would have until 1 December 2010 to respond. The Inspector would then consider the further representations. No further extensions were to be given.

5.10 The Objector made representations in response to the Inspector's Report, and submitted two further witness statements, made by Stephen Buhlman and Wayne Streeter with seventeen exhibits. These are attached at **Appendix 4**.

5.11 In response to those representations made by the Objector, the Applicant submitted comments. The Applicant's response can be found at **Appendix 5**.

5.12 The Registration Authority submitted to the Inspector the representations of both the Applicant and the Objector and invited her to make any observations. Her addendum report is available at **Appendix 6**.

5.13 Upon consideration of the further representations and evidence, the Inspector repeated her conclusions made in her Report at paragraph 7.1 and her Recommendation made at paragraph 7.2; to accept the Application.

5.14 The Inspector also commented on the suggestion of re-opening the Inquiry to consider the additional evidence of Mr Sreeter. At paragraph 6.3 of her addendum, the Inspector states that Mr Streeter's evidence does not materially affect her overall findings and so it would be neither proportionate nor necessary to re-open the Inquiry.

6 Conclusion and reason for Recommendation

6.1 The recent decision in *R (Chaston) v Devon County* Council[1] makes it clear that the Registration Authority should accept the recommendation of the Inspector, unless there are "persuasive grounds to support" departing from it.[2]

6.2 The Application has been subject to a public inquiry and the Inspector has reached conclusions and a Recommendation.

6.3 The Inspector has considered the additional comments made by both the Objector and the Applicant, which the Inspector has addressed in the addendum to her report, and has decided to affirm in full her initial conclusions and Recommendation .

6.4 The Panel is recommended to accept the Application for the reasons set out in the Inspector's Report, namely that the Land has been used throughout the relevant twenty year period for lawful sports and pastimes as of right by a significant number of the residents of Newhaven.

Philip Baker
Assistant Director
Legal and Democratic Services

BACKGROUND DOCUMENTS: Evidence Forms, Questionnaires, Applicant's supporting evidence at the Public Inquiry, Objector's supporting evidence at the Public Inquiry, Correspondence between parties extending the deadline to comment on the Inspector's report, post inquiry correspondence

[1] *R (Chaston) v Devon County Council* [2007] EWHC 1209 (Admin), paragraph 53 (a)
[2] *Ibid* (n5) [at paragraph 53 (a)]

FORM 44

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:

COMMONS REGISTRATION ACT 1965
EAST SUSSEX COUNTY COUNCIL
REGISTRATION AUTHORITY
18 DEC 2008

Application number: 1353

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

Note 1
Insert name of registration authority.

To the

EAST SUSSEX COUNTY COUNCIL
COUNTY HALL
LEWES
BN7 1AL

Note 2
If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

2. Name and address of the applicant

Name: NEWHAVEN TOWN COUNCIL

Full postal address:

TOWN COUNCIL OFFICES : 18 FORT ROAD
NEWHAVEN EAST SUSSEX BN9 9QE

Postcode

Telephone number: (incl. national dialling code) 01273 516150

Fax number: (incl. national dialling code) 01273 611175

E-mail address: admin@newhaventowncouncil.gov.uk

3. Name and address of solicitor, if any

Note 3
This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

Name: R.S. TAYLOR

Firm: HEDLEYS SOLICITORS LLP

Full postal address:

6, BISHOPSMEAD PARADE : EAST HORSLEY
SURREY

Post code KT24 6SR

Telephone number: (incl. national dialling code) 01483 - 284567

Fax number: (incl. national dialling code) 01483 - 284817

E-mail address: r.taylor@hedleys-solicitors.co.uk

Note 4
For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**: ☐

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies: ☐

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*

Section 15(3) applies: ☐

Section 15(4) applies: ☑

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

APRIL 2006

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

5. Description and particulars of the area of land in respect of which application for registration is made

Note 5
The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable to it to be clearly identified.

Name by which usually known:

WEST BEACH, NEWHAVEN

Location:

WEST BEACH, FORT ROAD, NEWHAVEN

Only complete if the land is already registered as common land.

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

Note 6
It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

THE ADMINISTRATIVE AREA OF NEWHAVEN TOWN COUNCIL

Tick here if map attached:

7. Justification for application to register the land as a town or village green

Note 7
Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

SEE ATTACHED

Note 8
Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

NEWHAVEN PORTS & PROPERTIES LIMITED
PORT ADMINISTRATION OFFICE
COMMERCIAL FREIGHT TERMINAL
EAST QUAY : NEWHAVEN : EAST SUSSEX
BN9 0BN

LAND REGISTRY TITLE NUMBERS ESX 185484 and ESX 252873

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 9
List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

10. Supporting documentation

Note 10
List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

See Schedule

11. Any other information relating to the application

Note 11
If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

Note 12
The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date:

Signatures:

REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I..IAN EVEREST...,[1] solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if applicable*

1.[2] I am ((the person (~~one of the persons~~) who (has) (~~have~~) signed the foregoing application)) ((~~the solicitor to (the applicant)~~) (~~[3] one of the applicants~~)).

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

~~4.[4] I hereby apply under section 15(8) of the Commons Act 2006~~ to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

(i) a declaration of ownership of the land;
(ii) a declaration that all necessary consents from the relevant ~~leaseholder or proprietor of any relevant charge over the land~~ have

Cont/

[4] *Continued*

been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said
IAN EVEREST

at BARWELLS SOLICITORS
10 SUTTON PARK ROAD
SEAFORD. EAST SUSSEX BN25 1RB
this 10th day of December
2008

J.E.

Signature of Declarant

Before me * CLAIRE SUSANNE MEWITT

Signature:

Address: 10 SUTTON PARK ROAD
SEAFORD
EAST SUSSEX
BN25 1RB

Qualification: ASSISTANT SOLICITOR

*** The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

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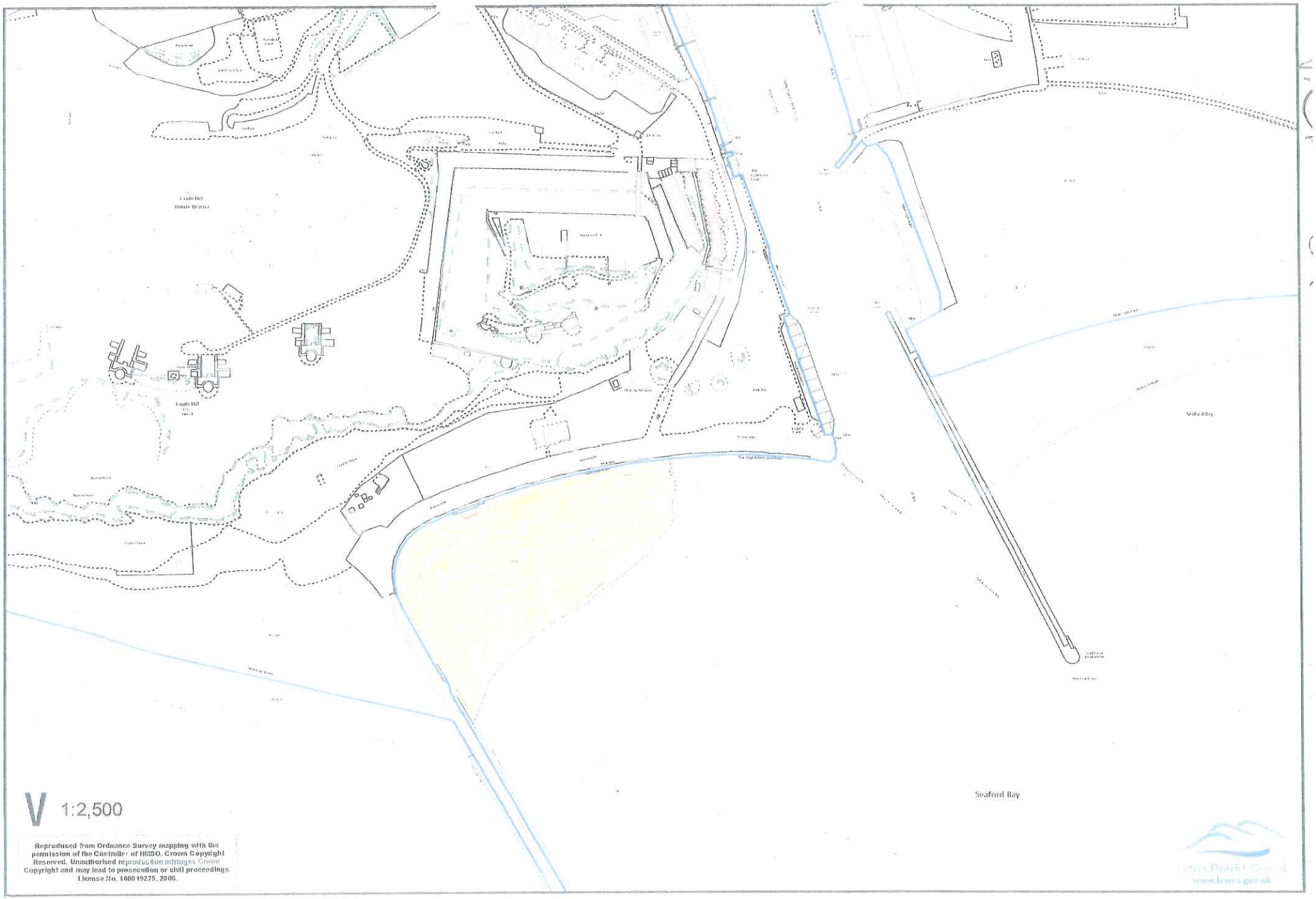

1:2,500

East Sussex County Council	West Beach, Newhaven - Aerial Photo c2005	
County Hall St Anne's Cresent Lewes	Date : 11 May 2009	Map No :
	Scale : 1: 7000	Author : Simon Bailey

Appendix 2

Village Green Applications

Guide to the law

East Sussex County Council are under a statutory duty to maintain a register of village greens as the common registration authority. This duty includes determining applications in whether land should be included on the register.

The registration of land as a village green is governed by the Commons Act 2006, section 15. It states:

15 Registration of greens

(1) Any person may apply to the commons registration authority to register land to which this part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where-

(a) 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; and

(b) they continue to do so at the time of the application.

(3) This subsection applies where-

(a) 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; and

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where-

(a) 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; and

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where-

(a) planning permission was granted before 23 June 2006 in respect of the land;

(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and

(c) the land-

(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or

(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a), (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied-

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

(8) The owner of any land may apply to the commons registration authority to register the land as a village green.

(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.

(10) In subsection (9)-

"relevant charge" means-

(a) in relation to land which is registered in the register of tite, a registered charge within the meaning of the Land Registration Act 2002 (c.9);

(b) in relation to land not so registered-

(i) a chare registered under the Land Charges Act 1972 (c61); or

(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c.20), which is not registered under the Land Charges Act 1972;

"relevant leaseholder" means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted.

The application process

The process begins with the applicant completing and submitting a CR44 Form and evidence to the County Council. There is a review of the application and then a notification exercise and objection period. The evidence is weighed up and a decision taken.

The determination of the application for a new village green is based on a consideration at the outset of the application form. An application can be rejected if the application is not properly made, or is technically deficient. An opportunity to address such a defect should be afforded to the applicant if the defect is easily remedied.

When an application is submitted it is usually accompanied by user evidence that the applicant has gathered. Sometimes this is in the form of historical research, setting out the history of the land, and sometimes this is in the form of questionnaires completed by users of the land.

If an application is initially accepted then the appropriate District and Parish Councils are notified and the application is advertised by way of notices on the site and public notices in the relevant local newspaper. Anyone identified as a landowner in the application is also notified. This gives an opportunity for objections to the application to be raised and also further support to be submitted during a six week notification period.

All the information is then considered. Often the evidence is overwhelmingly one-sided and the recommendation is an obvious one. If the evidence is finely balanced then a public hearing before an expert or a planning inspector is organised. A report following the hearing is written by the expert/inspector with a recommendation. This forms the basis of the report to the Committee with a recommendation, which is usually accepted by the Committee.

There is no set method by which an application has to be determined. Some authorities use delegated officer powers; others use a Committee or Lead Member resolution. In reaching a decision on the evidence, again there is no set process. Some authorities rely on officer judgement, others will hold a hearing before Members while others will hold a non-statutory public inquiry into the application in order for a planning inspector or an expert to hear the evidence before coming to a conclusion, which the party determining the application can accept or reject.

Rights of Appeal

When the County Council decides to accept an application the land is entered on the Council's register of town or village greens. It is then open to the landowner to make an application to the Secretary of State under the Commons Act 2006, section 16 to have the land de-registered, provided the land is less than 200 square metres. If the land is over 200 square metres the application to the Secretary of State must include a proposal that alternative land is registered in its place. The County Council is not involved in this process.

If the County Council declines to accept the application the only right of appeal is a judicial review.

Outline

An outline of the application process as exercised by the County Council at present is set out below.

Step No.	Event	Action to be taken
1	Application received	Stamp/Date it
2	Preliminary matters	o Give it an application number o Letter to applicant stating application number o Open file o Land Registry search
3	Preliminary examination of Application	o Ensure Application is "duly made" o If "no" then go to step 4 o If "yes" then go to step 6
4	Return Application to applicant	Letter explaining why Application is not duly made, giving time-period for remedying defect
5	Rejection of Application	Letter to applicant rejecting Application
6	Secondary examination of Application	o Prepare Notification to: o Site Notice o Interested councils o Local newspaper o Owners o Potential objectors o Local ESCC Member
7	Statutory six week objection period	
8	Receipt of objections	o Acknowledge receipt o Forward objection to applicant for comment/rebuttal evidence
9	Receipt of rebuttal comments	Acknowledge receipt
10	Consideration of Application	o Consider evidence provided by applicant and objections o Determine best way to proceed o If evidence is finely balanced go to step 11 o If evidence is obvious go to step 12
11	Set up a public hearing	o Contact either PINS or a barrister to hear the evidence in person o Hold hearing o Consider report
12	Report to Committee	o Write report in draft o Submit for approval o Write final report with recommendation o Send report to applicant
13	Determination by Committee	May accept or reject recommendation
14	Notify applicant of outcome	
15	If successful amend the register of town or village greens	

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WEST BEACH, NEWHAVEN AS A TOWN OR VILLAGE GREEN

REPORT
of Miss Ruth Stockley
06 October 2010

East Sussex County Council
County Hall
St Anne's Crescent
Lewes
East Sussex
BN7 1UE
Ref: EE/CR/011

Application No: 1353

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WEST BEACH, NEWHAVEN AS A TOWN OR VILLAGE GREEN

REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application made under Section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land known as West Beach, Newhaven and located at Fort Road, Newhaven ("the Land") as a town or village green ("the Application"). Under the 2006 Act, East Sussex County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 3 days, namely between 6th and 8th July 2010. I also undertook an accompanied site visit on 7th July 2010 during low tide and then an unaccompanied site visit later that day around high tide.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicant produced five bundles of documents containing its witness statements and documentary evidence in support of the Application and upon which it wished to rely. In this Report, I shall refer to documents in the Applicant's bundles as "AB* tab X" where * is the number of the bundle and X is the relevant tab within that bundle. In addition, the Objector produced six bundles of documents containing its witness statements and documentary evidence in support of its Objection and upon which it wished to rely. I shall refer to documents in the Objector's bundles as "OB* tab X" where * is the number of the bundle and X is the relevant tab within that bundle. I have read all the documents contained in both sets of bundles and taken their contents into account in this Report.

1.4 I emphasise at the outset that this Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application nor any substantive matters relating thereto. Therefore, provided it acted lawfully, the Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

2. THE APPLICATION

2.1 The Application was received by the Registration Authority on 18th December 2008 and was made by Newhaven Town Council whose offices are located at 18, Fort Road, Newhaven, East Sussex BN9 9QE ("the Applicant"). Part 5 of the Application Form states that the Land sought to be registered is usually known as "*West Beach, Newhaven*" and its location is "*West Beach, Fort Road, Newhaven*". A map was submitted with the Application which shows the Land subject to the Application shaded in yellow. In part 6 of the Application Form, the relevant "locality or neighbourhood within a locality" is identified as "*the administrative area of Newhaven town council*".

2.2 The Application is made on the basis that Section 15(4) of the 2006 Act applies which contains the relevant qualifying criteria. The date on which use as of right is claimed to have ended is stated to be "*April 2006*". A statement of the facts supporting the Application was attached to it.[1]

2.3 The Application was verified by a statutory declaration in support made by Mr Ian Everest, the Town Clerk, on 10th December 2008. It was also accompanied by some 1115 evidence forms[2] and a

[1] It is contained at AB1 tab 2.

further 60 detailed evidence questionnaires in support.[3] A large number of photographs taken by various compliers of the evidence questionnaires were also submitted.[4]

2.4 The Application was duly advertised in accordance with the statutory requirements, and a detailed Objection was received from Newhaven Port and Properties Limited, the owner of the Land and the port authority for the port of Newhaven.[5] The Applicant subsequently submitted a Response to the Objection.[6]

2.5 I have been provided with copies of all the above representations in support and objecting to the Application which I have read and the contents of which I have taken into account in this Report.

2.6 Having received all such representations, the Registration Authority sought my advice as to the preferable way forward in order to proceed to determine the Application. By an Advice dated 4th August 2009, I advised the Registration Authority that a non-statutory inquiry ought to be held given the extent of the factual and legal disputes between the Applicant and the Objector. A copy of that Advice was provided to both Parties.[7] Consequently, the Registration Authority determined that a non-statutory public inquiry into the Application ought to be held.

2.7 At the Inquiry, the Applicant was represented by Counsel, Mr Edwin Simpson, and the Objector was represented by Counsel, Mr Philip Petchey. Any third parties who were not being called as witnesses by the Applicant or the Objector and wished to make any representations were invited to speak, and four additional persons did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on the map submitted with the Application on which it is shaded in yellow.[8]

3.2 The Land comprises an area of sandy beach enclosed within the harbour wall and extends seawards to the south to the mean low water mark. It is an inter-tidal area bound by the Breakwater to the west, the West Wall to the north, and the approach channel to the Port and the River Ouse to the east. It is some 60,796 square metres in area. It came into existence as a result of the construction of the Breakwater wall around 1883.

3.3 The Land is located in the south of Newhaven. It is accessed by two sets of steps, one set leading down from the Promenade which runs along the harbour wall and one set leading down from the Breakwater. Access onto the Breakwater and onto the steps leading down from the Promenade is currently blocked by means of fencing. There are no other means of access onto the Land other than from the sea. There are no signs or notices on the Land itself.

3.4 To the west of the Breakwater is a shingle beach. To the north is the Promenade which comprises a car park also owned by the Objector. Along the harbour wall railings are a number of sets of two prohibition signs prohibiting fishing, diving and swimming and warning of deep water. In addition, close to the top of the steps leading down to the Land are two byelaw notices, one of which is no longer legible.

3.5 The Promenade is accessed via Fort Road, an adopted public highway for most of its length. It then becomes a private road, passes the Hope Inn and leads to the car park on the Promenade.

4. THE EVIDENCE

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[2] They are contained in AB2 and AB3.
[3] AB1 tab 3.
[4] They are contained in AB1 tab 4.
[5] OB1 tab 7.
[6] AB4 tab 4.
[7] AB4 tab 5.
[8] OB1 tab 2.

4.1 I would like to record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the evidence given by any witness, and I regard each and every witness as having given credible evidence.

4.2 The following is not an exhaustive summary of the evidence given by every witness to the Inquiry. However, it purports to set out the flavour and main points of each witness's oral evidence. I assume that copies of all the written evidence will be made available to those members of the Registration Authority determining the Application and so I shall not rehearse their contents herein in detail. I shall consider the evidence in the general order in which each witness was called at the Inquiry.

CASE FOR THE APPLICANT

Oral Evidence in Support of the Application

4.3 **Mrs Jacky Cole**[9] is the Assistant Town Clerk of Newhaven Town Council and has worked for the Applicant since 1996. She gave evidence in accordance with her witness statement, setting out the circumstances which led to the making of the Application. She noted that of the 1115 positive responses initially received supporting the Application, some 929 responses were from residents of the Parish of Newhaven and some 186 responses were from non-residents. Some 61 people subsequently provided more detailed evidence questionnaires.[10]

4.4 She had prepared a plan of the locality of Newhaven as part of her evidence which was referred to throughout the Inquiry ("the locality plan").[11] The red line identifies the boundary of the Town Council's administrative area. The ten red dots show the location of the 10 witnesses who gave user evidence on behalf of the Applicant and the dark dots show the location of the other persons who provided the more detailed written evidence. She indicated that Newhaven is not a huge tourist area. There are some tourist attractions, particularly Paradise Park and Newhaven Fort, but there are not many tourists to the area.

4.5 She referred to a survey that had been undertaken of people "on the beach" during the week ending 5th August 2007 in relation to whether it needed to be closed on health and safety grounds. That survey showed a large number of people on the beach.[12] She acknowledged that was done after the end of the relevant 20 year period when the Objector had re-opened West Beach due to public pressure after its previous closure. Further, in cross examination, she accepted that the survey included people not only on the Beach, but also on the Breakwater and generally in the area and so was not a count of people solely on the Application Land.

4.6 In terms of the history of the Land, West Beach came into existence as a result of the construction of the breakwater wall around 1883.[13] The Beach was closed during the First World War and was slow to re-open thereafter as evidenced by a 1921 press report.[14] A similar situation arose during the Second World War when all beaches in the south east were closed to the public because of the fear of invasion. Regulations were therefore made to keep the beaches closed.[15] They were lifted on 16th May 1945.

4.7 She had obtained a copy of the relevant extract from the Definitive Map and Statement from the East Sussex County Records Office.[16] Footpath 16 was shown by means of a thick line along the full width of the Promenade on an extract from the Definitive Map dated 17th March 1953. However, she acknowledged in cross examination that the copy of the current Definitive Map shows the Footpath running along the back of the Promenade. She was unaware why the position had changed between the

[9] Her witness statement is at AB4 tab 1.
[10] There are only 60 such questionnaires in AB1 tab 3 rather than 61, but nothing appears to turn on that minor discrepancy.
[11] At the end of AB4 tab 1.
[12] At AB4 tab 7.
[13] Photographs at AB4 tab 14 show the breakwater under construction.
[14] At AB4 tab 14.
[15] Copies are at AB4 tab 14.
[16] At AB4 tab 6.

two extracts from the Definitive Map. She noted that the Applicant had received notification from the Registration Authority that the Objector had made a statutory deposit of a statement and plan pursuant to Section 31(6) of the Highways Act 1980 showing ways across its land which it recognised as being public rights of way but stating that no other ways had been dedicated as public rights of way.[17] That deposit was made on 21st October 2008 and the statutory declaration in support was dated 11th December 2008 which she pointed out was outside the relevant 20 year period for the purposes of the Application.

4.8 In relation to byelaws relating to the Land, she referred to an e-mail dated 17th April 2009 in which Lewes District Council confirmed that there were no byelaws in force.[18]

4.9 An example of a beach that is currently registered as a village green is Kingston Beach at Shoreham-by-Sea in West Sussex which she had visited on 28th June 2010 when she took a number of photographs.[19] The seaward boundary of that village green is the low water mark. Most of that beach is covered at high tide as illustrated by the photographs. That beach was registered without an inquiry being held as there was no objection to the application that was maintained. A small part of that area has subsequently been deregistered to permit the construction of a lifeboat station.

4.10 **Mrs Alison Thomas**[20] has lived at 54, Hillcrest Road since 1983. She gave evidence in accordance with her witness statement. She has used the Land since 1977, particularly regularly when her children were young up until 1996. They were born in 1981, 1983 and 1986. After around 1996, she used the Land about two or three times a year to walk. She also saw many others using the Land for various activities as identified in her evidence questionnaire.[21] The use was of the area marked yellow on the Application map. The Land was very busy, particularly at weekends and during school holidays. When the tide was high, people went onto the grassy area. However, children and teenagers would then use the Land to swim and to play on their dinghies. Local people are very aware of the times of the tide. There was a seasonal variation to the use of the Land. It was used more during the summer, but was still used in the winter. During the colder months, she was more aware of it being used for fishing, kite flying and dog walking, as well as for football and bike riding. There was less use of the water during those months. She and her family themselves used the Land during the winter to ride bicycles, fly kites and play football. Fishing took place from the Promenade and from the harbour arm until it was closed and also, to a lesser extent, from the Beach itself. The use of the Beach itself for fishing was not extensive, though. She had also seen people prawning on the Beach.

4.11 She gained access to the Land by going down Fort Road onto the Promenade and going down the steps off the Promenade, not via the steps off the Breakwater. She lived within walking distance of the Land and on the west side of the River. Others walked to the Land whilst others came by car from further afield. She knew quite a lot of the people she saw on the Land as they were mostly Newhaven families. On a typical weekend, about 60% of those using the Land would be local people from Newhaven. Over a very popular bank holiday weekend, there would be a lot of new faces. Prior to 2006, she was never stopped from using the Land nor was she ever given permission to use the Land.

4.12 She recalled seeing a warning sign near to the steps on the railings on the Promenade about the ferry when it was going in and out due to the wash. She did not recall seeing the particular warning sign shown in the Objector's photograph 22, though.[22] She did not remember having seen the sign about the byelaws to the right of the top of the steps nor the one located at the middle of the steps shown in the Objector's photographs 11 and 12 respectively.[23] However, she recalled having seen the signs prohibiting

[17] At AB4 tab 3.
[18] At AB4 tab 9.
[19] At AB4 tab19.
[20] Her witness statement is at AB5 tab 7 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 51.
[21] At question 25.
[22] At OB6 tab 4 page 240.
[23] At OB6 tab 4 pages 229 and 230.

fishing, diving and swimming and warning of deep water on the Promenade rails as shown on the Objector's photograph 13.[24] She was unaware when they were put up, although they were not in situ when she took her young family to the Beach.

4.13 She was unaware of the car park being closed on 20th August 1995 during a beach rave party and of concrete blocks being placed across the car park entrance during March 2000 to prevent a car rally and of the car park gates being locked on 28th March 2003 to prevent access by gypsies. She did recall travellers coming into Newhaven at one point, but she was unaware of the date. She was also unaware of the car park being closed on 14th May 2004 or on 26th November 1995. However, she pointed out that as she did not use the car park but walked, such occurrences would not have prevented her access onto the Beach.

4.14 **Mr Ian Everest**[25] has been the Applicant's Town Clerk since 2001. Prior to that, between 1987 and 2001 he had worked for Lewes District Council as the manager of Newhaven Fort. He referred to a number of brown tourist road signs in the area which had been erected around the Newhaven ring road in around 1995. The signs were for West Beach, Paradise Park and the Fort. They had been funded by East Sussex County Council. There was major refurbishment of the area round the ring road at that time by the County Council.

4.15 **Mrs Vera Young**[26] has lived at 30 Norman Road since 1972, but she has used the Land from 1933, having been born in 1930. She was born and brought up in Newhaven, but lived away from Newhaven between 1959 and 1972. She has always lived on the west side of the River. She has three children born in 1959, 1962 and 1965, and five grandchildren born between 1987 and 1998 who visit but live outside Newhaven. She has been down to the Beach with them in recent years. She has used the Land at all times of the year during most days in the summer holidays and once or twice a week during the rest of the year. She always walked to the Land and gained access to it via the steps on the Promenade. She has not been a dog owner. She has seen other recreational activities taking place on the Land. During the middle of the day, there would be a lot of people using the Land. She often went there early in the morning when there were not so many people around and she would almost have the Beach to herself. Attached to her witness statement are a number of photographs showing her and her family and friends on the Land at different times. They also went onto the sand, but would sit on different parts of it. She confirmed that the car park on the Promenade had been there since around the 1950's, but she was unaware when charging started.

4.16 When younger, she had gone to the Land when the tide was in and swum from off the steps nearly every day after school. There was always quite a crowd of people swimming from the steps when the tide was in. She would sometimes go to the Land because the water was deeper and so allowed swimming and diving. She had only used the Land for fishing once or twice, but had seen others doing that. Most of the fishing was from the sea wall or from the Breakwater when the tide was in. It was a very popular activity. She had not seen fishing from the Beach itself, but shrimping and prawning were carried out on the Beach. She had not seen any surfing. During adverse weather conditions, the Land would not be used around high tide. It would not even be possible to fish off the Promenade then.

4.17 She knew most of the other people she saw on the Land. Around 60% to 70% of them were from Newhaven. During the week, mostly local people used the Land apart from people who were on holiday. There were more visitors to the Land at weekends and on bank holidays when it was busiest, but there were more locals on the Land then too. She agreed with Mrs Thomas that at weekends approximately 60% were locals whilst 40% were visitors. That would change to about half and half on bank holidays. She indicated that many people do travel to the Land to use it. The use of the Land was much less during the winter and most of the people using the Land then would be from Newhaven. Like other local people,

[24] At OB6 tab 4 page 231.
[25] He did not produce a witness statement.
[26] Her witness statement is at AB5 tab 10 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 61.

she was aware when the tide was in or out as she always had a timetable, and she would plan her visits to the Land around the tide. She was never given permission to use the Land, and she was never prevented from using it after the Second World War until April 2006. She recalled the Beach being closed off during the War.

4.18 The only sign she recalled having seen was one relating to the wash from the ferry which was near to the steps. That sign was present during the 1970's and probably for a period after then. She had not seen the byelaw notice on the railings going down the steps as shown on the Objector's photograph 11 nor the one at the top of the steps at photograph 12 nor any of the sets of prohibition signs shown on photograph 13.[27] She had not used the Beach since April 2006, though, which is when the signs may have been put up. She was never aware of any byelaws governing the Land.

4.19 She did not recall the car park being closed on 20th August 1995 for a beach rave nor the locked gates and concrete blocks for the car rally on 8th March 2000 nor the closure of the car park in 2004 for the car cruise. They would not have prevented pedestrian access to the Land, though. She did have a recollection of the Objector taking steps to prevent use of the car park in 2003 in relation to gypsies.

4.20 **Mr Michael Beach**[28] has lived at 79 Hillcrest Road since 1985 and has lived in Newhaven all his life. He has always lived west of the River. He has used the Land since around 1950, visiting it at least once a month for leisure activities including fishing, bait digging and dog walking at all times of the year. He always walked to the Land. He used the Land for baiting at low tide as it had a sandy surface and was not stony. Others baited on the Land in connection with a business. He has had three dogs, having a dog most of his life since he was a child until around 2000. As the wind was usually from the south west, the Breakwater kept the wind off and so one would walk on the Land even on windy days. He fished off the Breakwater until it was fenced off some 2 or 3 years before the closure of the Beach in April 2006, and sometimes from the Promenade when the tide was in. He preferred to fish from the Breakwater as that would be the deepest area. He never fished off the Beach and did not see others fishing off the Beach. It would be too shallow. He would sometimes swim on the Land at high tide. At low tide, the Land was very safe for youngsters to learn to swim. Like most of the locals, he was aware of the tide patterns. He agreed that the sand would be covered by the tide for approximately 42% of the time. He acknowledged that the use of the Land was significantly less during the winter months than the summer. Further, he agreed that at high tide during adverse weather conditions, it was not really possible to use the Land. However, at low tide, even in adverse weather conditions, the Land could be used as the prevailing wind is from the south west and so there would not be very big waves breaking on the Beach making it dangerous to use.

4.21 He knew a lot of those using the Land, but not all of them. He agreed with the proportions of use by locals and visitors given by Mrs Thomas, namely about 60% locals and 40% visitors at weekends, and that the proportion of visitors would increase at bank holiday weekends to a 50% split.

4.22 Prior to 2006, he was never told that he should not be on the Land nor was he ever given permission to be on the Land. He never saw any signs apart from one close to the top of the steps on the Promenade relating to the wash as shown in the Applicant's photographs.[29] He was unaware when it was removed. He did not recall seeing the wave wash sign that is still in situ on the far side of the Breakwater shown on the Objector's photograph 22.[30] He also did not recall seeing the byelaw signs shown on the Objector's photographs 11 and 12 nor the signs on the Objector's photograph 13.[31] Since April 2006, he has continued to walk along the Promenade but was still unaware of any signs. As to the closure of the car park on 20th August 1995 for the beach rave party, he did not recall that, nor its closure in March 2003 to prevent access by gypsies, nor the concrete blocks across the road for the car cruise. However, he

[27] At OB6 tab 4 pages 229 to 231.
[28] His witness statement is at AB5 tab 1 and his evidence questionnaire is at AB1 tab 3 exhibit 10.
[29] At AB1 tab 2 page 13 of 14.
[30] At OB6 tab 4 page 240.
[31] At OB6 tab 4 pages 229-231.

remembered people talking about the car rally on 8th March 2000 when the car park was locked and concrete blocks were placed across the entrance. Pedestrian access to the Land would not have been affected, though.

4.23 **Mrs Rosemary McIntosh**[32] has lived at 84 Fort Road since 1971 when she moved from London. Since then, she used the Land up to every week during the summer and more occasionally during the winter and she saw others using the Land. She referred to family photographs of her and her family and her friends' use of the Land over the years attached to her witness statement. She has three children born in 1965, 1969 and 1973, and three grandchildren born in 1992, 1997 and 1999, so she has always had children around. She has regular visitors with children most weekends and they would go down to the Beach until it was closed. The Beach would be crowded on a sunny summer's day, but there were not so many on the Land during the winter when the main uses would be dog walking and football playing. On Christmas Day and Boxing Day, though, she would see up to 20 or 30 people on the Land, particularly walking dogs. She had dogs from around 1972 until around 1985/1986, and then again from around 2006 having been travelling in between. When she had dogs, she frequently went on the Beach. The Land is very safe for children and for dogs as it is enclosed by the wall and the only means off the Land is via the steps. She swam on the Land, but only when the tide was out. Her son and his friends swam there, though, when the tide was in. All the Breakwater was popular for fishing when it was open and her son fished off that wall for many years. She also saw people fishing off the Promenade. She could not recall people fishing from the Beach itself, but baiting took place there. She has not been to the Land since it was closed in 2006.

4.24 She agreed with the view of other witnesses that the balance of users of the Land was around 60% locals and 40% visitors at weekends. However, it is a sandy beach and local people used it all the time. It was very significant that it was sand as nowhere else in the area was there sand rather than, for example, shingle. For that reason, people in Newhaven and further afield, such as in Seaford, knew about it.

4.25 She was never given permission to use the Land and she was never told not to use it. She had seen the sign warning of the wash that is shown in her photograph from 1973. She recalled that being there when she arrived in the area in 1971. It was located at the top of the steps and was on wooden legs concreted into the Promenade. It disappeared probably around the early 1980's. She did not recall seeing either of the signs about the byelaws shown on the Objector's photographs 11 and 12 nor the prohibition signs in photograph 13, but she had not been down to the Land since it was closed in April 2006. She did not recall the beach rave party in August 1995, the car cruise in 2004 nor having seen concrete blocks across the car park. Those actions would not have stopped people from walking to the Beach, though. Most people who lived in Newhaven walked to the Beach. However, local people would come in cars if they were fishing or had young children. The car parking was always on the Promenade. It was probably around 15 or 20 years ago when car parking charges began to be imposed.

4.26 **Mrs C. Vale**[33] has lived at 15 Beresford Road since 1988. She was born in 1944 and has lived in Newhaven all her life. She lives east of the River. She has used the Land regularly all year round, including during the winter, and she has seen many others using the Land. She referred to photographs of herself, family and friends using the Land in 1970 attached to her witness statement. She has four children born between 1968 and 1976 and eight grandchildren aged between 1 and 10. She also went to the Beach with her Mother and Grandmother who lived in Newhaven, so she has always used the Land. She would use it at least once every week. She would walk to the Land, or drive and park at the Recreation Ground to avoid car parking charges and then walk the remaining distance. The only access to the Beach was via the steps on the Promenade, and the only access to that point was via Fort Road and through the car park. At high tide, she would swim from one set of steps to another with friends as a race. Many of her neighbours on the east side of the River used the Land. People who live at Denton used the Land.

[32] Her witness statement is at AB5 tab 5 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 38.

[33] Her witness statement is at AB5 tab 8 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 54.

4.27 She also recalled Tideway School taking canoes down to the Land and canoeing at high tide when her children attended the School.

4.28 She never had permission to use the Land and she was never told she could not use the Land. The only sign she ever saw was the one referring to danger from the wash which is shown on Mrs McIntosh's photograph[34] which she recalled was to the left of the steps on the Promenade. She was unaware when it was removed. She did not recall the byelaw signs nor the prohibition signs shown in the Objector's photographs 11, 12 and 13. She also did not recall the beach rave in August 1995 nor the concrete blocks to prevent gypsies accessing the car park in 2003 nor the car cruise in 2004, but she vaguely remembered concrete blocks being placed to prevent access to the car park around 2000 and also some gates being erected, although she would merely have walked round them to access the Beach.

4.29 **Mr Raymond Everson**[35] has lived at 17 South Road since 1981 and has used the Land since that time until it was closed. He visited the Land, often with his family, about six or seven times a year, mainly in the summer and particularly during the easter and summer holidays, but occasionally in the winter. He used it less once his two children, born in 1977 and 1981, were old enough to go themselves. He did not use it when it was covered by the tide. With his children, they swam in the water, had barbecues and picnics, and kicked a ball around. He had not swum there very much himself as it was very shallow and it was necessary to go out quite a long way to swim. For that reason, it was particularly safe for children to be in the water. The part of the Land he used mostly was the area close to the steps by the harbour wall. However, he saw many others using the Land and their use was spread all over the Land as shown in the family photograph he had taken around 1987/1988 from the top of the steps on the Promenade attached to his witness statement. Fishing in the area took place from along the Breakwater and not just at its end, and from the Promenade, but not from the Beach. He had seen dog walkers using the Land, but he had not seen them regularly. He usually walked to the Land down Fort Road and down the steps, and occasionally cycled, but had never driven there.

4.30 He never saw any signs save the one warning about the wash from the ferry which was around the top of the steps. He had not seen either of the byelaw signs nor the prohibition signs shown in the Objector's photographs 11 to 13. He had been regularly on the Promenade, though, since April 2006. In re-examination, he referred to the Risk Assessment of the Land commissioned by the Objector shortly after access was closed. In the photographs in that Assessment showing the rails along the Promenade where the signs shown on the Objector's photographs 11 to 13 are now located, no signs are shown.[36] Similarly, no signs are shown in photograph 10 of the Condition Assessment of the West Wall dated November 2007 commissioned by the Objector.[37] He therefore suggested that the reason he may not have seen the signs was because they were not there. He did not recall the beach rave in 1995, the concrete blocks for the car rally in 2000 nor in relation to the gypsies in 2003. He vaguely recalled the car cruise in 2004 as cars came past his house, but he did not go down to the car park then.

4.31 **Mrs Gillian Carver**[38] has lived at 36 Norman Road since 1958 and has used the Land since around 1961. She mainly used it between April and October each year, but not when it was covered by the tide. She went to the Land several times a week with her family to engage in activities including paddling, swimming, playing cricket and playing tennis. Attached to her witness statement are photographs of her family using the Land between 1967 and 1975. She has four children born in 1962, 1964, 1966 and 1970, and nine grandchildren aged between 12 and 19. She has used the Land more recently with her grandchildren for swimming and surfing. It is safe because it is flat. She always walked to the Land and accessed the Beach via the steps. She would look for a space near to the wall but could

[34] At AB1 tab 2 page 13 of 14.
[35] His witness statement is at AB5 tab 3 and his evidence questionnaire and evidence form are at AB1 tab 3 exhibit 26.
[36] OB5 tab 11 pages 63 and 64.
[37] OB5 tab 13 page 111.
[38] Her witness statement is at AB5 tab 2 and her evidence questionnaire is at AB1 tab 3 exhibit 15.

not always find one as there were sometimes quite a few people on the Land. People would move back as the tide came in. She had not used the Land for fishing and had not particularly noticed others fishing, although that activity tended to be done at high tide when she was not at the Land.

4.32 She did not recall seeing any of the signs shown in the Objector's photographs 11 to 13 save one relating to "deep water". None of those signs are visible on photograph 10 of the Condition Sssessment of the West Wall dated November 2007 commissioned by the Objector.[39] She did not remember the beach rave, car rally, concrete blocks across the car park access or the car cruise. She recalled being told about gypsies around 2003, but she did not see them or the concrete blocks.

4.33 **Mrs Sylvia Woolford**[40] lives at 30 First Avenue, and prior to that she lived at 79 Chapel Street and prior to that at 106 Gibbon Road. She has lived in Newhaven for over 40 years. She gained access to the Land from the steps off the Promenade and from the steps off the Breakwater. She would use the Land to play on the sand, sunbathe, picnic, walk her dog and play ball games. She has had two dogs, one between 1985 and 1988, and her current dog since 2000 which enjoyed paddling on the Beach. She attached photographs of her dog on the Land in 2007 to her witness statement. She went to the Land almost daily to walk her dog. Between 1988 and 2000 when she did not have a dog, she still went to the Land often when her children were young and always at the weekend. Her frequency of visits was at least once a week during the winter, mainly at weekends, and more often during the summer when she would walk on the Land almost daily. She saw other people enjoying various activities on the Land, including dog walking, team games, ball games, kite flying and picnicking. She went to the Land all year round. She usually walked and came down Fort Road, but occasionally took the car. She had also scrambled down the cliffs to get there.

4.34 When she was younger, she went canoeing on the Land with Tideway School weekly or fortnightly in the early 1970's for between 6 and 12 months. They went as a class and it was when the tide was coming in. She was unaware whether it had continued or whether other years did that. Her two sons attended Tideway School during the 1990's but she did not remember them going canoeing. As a teenager in the late 1970's, she used to swim between the Promenade steps and the Breakwater steps with her friends at high tide. They did that often as there was no swimming pool in the town then. She had not seen anyone doing that more recently, but she had seen people swimming at high tide on many occasions. Her own children would swim there at high tide. There is now a town swimming pool which opened around 1984, but people continued to go to the sea to swim. It is an indoor swimming pool and there is a charge to go into it.

4.35 She did not recall seeing any of the signs shown in the Objector's photographs 11 to 13. None of those signs are visible on photograph 10 of the Condition Assessment of the West Wall dated November 2007 commissioned by the Objector.[41] She was unaware of the beach rave party, car rally and car cruise. She heard about the problem with gypsies but she did not go down to the Land then. Her access to the Beach was not affected by concrete blocks.

4.36 **Mr Laurie Stonehouse**[42] has lived at 20 First Avenue since 1996 and has continually lived in Newhaven since 1994. He was born in Newhaven in 1968 and lived at 7 Elm Court until 1983 when he moved to Peacehaven until 1994. He used the Land about 40 times a year to play games on the beach, paddle, sunbathe and swim at high tide, particularly at weekends and during school holidays. He has seen other people using the Land for similar activities and also for fishing, dog walking, picnicking and kite flying. He also used the Land when he lived at Peacehaven, albeit less frequently. More recently, he used the Land with the eldest of his two children at low tide as shown on the photographs attached to his

[39] OB5 tab 13 page 111.
[40] Her witness statement is at AB5 tab 9 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 59.
[41] OB5 tab 13 page 111.
[42] His witness statement is at AB5 tab 6 and his evidence questionnaire and evidence form are at AB1 tab 3 exhibit 50.

witness statement taken in 2005. At high tide, he has seen people jumping off the wall, swimming and coming back up the steps. They were mainly youths, and he had done that himself a few times in the early 1980's when he was still at school. At high tide, it was not possible to stand up in the water. On the few occasions he went onto the Breakwater, he always saw fishermen all along there. He attended Tidewell School but did not do any canoeing there. He was unaware whether others at the School did any.

4.37 The only sign he remembered having seen was one at the top of the steps relating to wash from the ferries which was along the lines of the sign shown in Mrs McIntosh's photograph.[43] That was probably there when he was diving off the wall in the early 1980's. It gradually faded and disintegrated. It is not shown in Mrs Giles's photograph taken in summer 1996.[44] There are no signs shown on that photograph at the top of the steps, although there are two black pillars there which a sign may previously have been attached to. He did not recall having seen any of the photographs shown in the Objector's photographs 9 to 11. He had been to the steps since the access was blocked off. He vaguely recalled there being a beach rave in 1995 but he did not go to it and did not know anything about access to the car park being restricted. He was also unaware of the concrete blocks in 2000, the gypsies in 2003 and the car cruise in 2004. He could not recall how long the current barriers at the car park entrance had been in position.

4.38 **Mrs Ann Giles**[45] has lived at 41 Arundel Road since 1964, which is located east of the River, having previously lived in Gibbon Road from 1948. She has used the Land since 1948, having been born in 1944. She used the Land all year round for activities such as picnics, playing games, swimming, walking and meeting friends. The area on the left hand side of the steps was the best spot as it was the first area uncovered and the last area covered by the tide so it allowed you to have the longest possible time on the sand. She used the Land when it was covered by the tide for swimming, paddling and playing ball in the water. She would leave the sea before high tide, though, as she was not a very confident swimmer. There was a period of about 3.5 to 4 hours whilst she could touch the bottom and so was happy to be in the water. However, her cousins would then go in for a swim as well as other confident swimmers. That would be for a similar period of 4 hours during which they had the Land to themselves. Some members of her family specifically waited for high tide so that they could go swimming properly. There has been a swimming pool in the town since 1984. However, there is a great difference between swimming in an indoor pool and swimming in the sea. It is more buoyant in the sea; there is no charge; it is outside; it is more sociable; and you are able to play other games. There are three photographs attached to her witness statement of her and her family and friends using the Land in the summers of 1989, 1996 and 1997. She has two children born in 1965 and 1970, and four grandchildren aged 14, 10, 4 and 2, the two youngest of whom have not been to the Land. She used the Land with her children when they were young, but she continued to use the Land when they got older. She also used the Land with her grandchildren who live outside the area but visit her in the holidays. She is in the middle of five generations who have used the Land. She used the Land until it was closed in 2008.

4.39 As to the frequency of her use, once her children were older, she used the Land approximately two or three times per month on average. She used it more during holiday periods, and used it about once a week in the summer. She sometimes walked to the Land, and at other times she drove but parked at the Recreation Ground and walked the remainder of the distance. Car park charging on the Promenade commenced at some time before 1979. She also used a local bus that was running when she had small children. She saw other people on the Land enjoying similar activities and other pursuits such as dog walking, kite flying, shrimping and bait collecting. She was also aware of others from the east of the River using the Land. Her niece and great nephew live in Denton and used the Beach, as did other of her neighbours from the east of the River.

[43] At AB1 tab 2 page 13 of 14.
[44] At AB5 tab 4 and there is also a better copy at AB1 tab 3 exhibit 31 at the end of the evidence questionnaire.
[45] Her witness statement is at AB5 tab 4 and her evidence questionnaire and evidence form are at AB1 tab 3 exhibit 31.

4.40 The only sign she could recall was the one about the wash. It looked like the one shown in Mrs McIntosh's photograph.[46] There was no longer any evidence of that sign in her photograph taken in the summer of 1996 save that the two darker posts at the top of the steps could have been the posts from the sign. At some point, it just gradually disintegrated and then disappeared. The only other time she had been aware of a notice was when she went to the Land in 2008. It was a small sign positioned near to where the access had been shut and it referred to the closure of the Beach. It sought to explain to the public why it had been closed. It also had some reference to byelaws and to health and safety. It was not any of the signs shown in the Objector's photographs 10 or 11.[47] Instead, it was on the "barricade" itself to stop people from using the Beach. She had never seen any other signs. She was unaware of the car park being closed for the beach rave in 1995 or for the car rally in 2000 or in relation to gypsies in 2003 or for the car cruise in 2004. There has been a control at the car park entrance since 1979. There are occasions when the car park is blocked due to bad weather at which times she would go back to park in the Recreation Ground and then walk to the Beach.

Written Evidence in Support of Application

4.40 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to the extensive written evidence submitted in support of the Application. Some 1115 evidence forms have been produced[48] and a further 60 detailed evidence questionnaires in support.[49] However, whilst the Registration Authority must also take into account such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination save insofar as it includes evidence questionnaires and forms compiled by witnesses who gave oral evidence. Hence, particularly where it is in conflict with oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

CASE FOR THE OBJECTOR

Oral Evidence Objecting to the Application

4.41 **Mr Richard Marks**[50] is the Business Development Director of Haskoning UK Limited and a member of the team preparing a Masterplan for the Port of Newhaven. He has 40 years experience in the Port and Maritime industries. His qualifications and experience are detailed in section 1 of his Proof. His evidence described the physical characteristics of the Land with specific reference to the tidal movements and the extent to which the Land is covered with water.

4.42 The Newhaven Breakwater was constructed in the 1880's. It is due to its construction that the Application Beach was formed.

4.43 There are approximately two tidal cycles a day resulting in two high tides and two low tides each day. The tidal height varies depending on the phase of the moon and the annual movement of the earth around the sun. The highest tides are known as "Spring tides" whilst the lowest tides are known as "Neap tides". In a 28 day period, the tidal heights range from Spring to Neap to Spring. The tidal cycle is approximately 12 hours and 35 minutes from high tide to high tide, or from low tide to low tide. He calculated that, on average, the Beach is completely covered by water for 42% of the time. For 58% of the time, it is uncovered to some extent. The Application Land is rarely completely uncovered and then only for a few minutes.

4.44 He produced a helpful 14 day tidal model showing the tidal movements on the Land and the extent and frequency of the Land being covered by water. The average period of time between low tide to when the tide covers the Application Land over a 14 day period is 3.6 hours. It is a similar 3.6 hours period between the beach first being uncovered to low tide. The line of the low tide is dependent upon the tidal differences. The highest low tide on the Beach will be around 20 to 30 metres closer to the sea wall

[46] At AB1 tab 2 page 13 of 14.
[47] At OB6 tab 4 pages 228 and 229.
[48] They are contained in AB2 and AB3.
[49] At AB1 tab 3.
[50] His Proof of Evidence is at OB6 tab 6 with a further Note at OB6 tab 7.

than the lowest low tide. At high tide, the water will always reach the sea wall, even during Neap tides. At low tide, the Application land will not all be uncovered during Neap tides, whereas all the Land and an additional area of the Beach will be uncovered during Spring tides. The mean low water line will always lie somewhere between the mean low water Neaps and the mean low water Springs, but it will always be changing because the beach is dynamic.

4.45 He also noted that a study of the condition of the West Wall was previously carried out in October 2007 by Royal Haskoning with a report being issued in November 2007.[51] He was not involved with that study. However, he confirmed that the photographs within it would have been taken at the time of the survey in October 2007.

4.46 Although his evidence was subject to questions of clarification, none of its contents were challenged. An issue was subsequently raised on behalf of the Applicant over the graph[52] indicating that none of the beach is exposed for 58% of the time and the conclusion below that stating that the beach is completely covered for 42% of the time which was suggested were inconsistent. However, Mr Marks had left the Inquiry at that stage and no response was able to be sought from him.

4.47 **Captain Francois Jean**[53] is employed by the Objector as the Port Manager, a post he has held since 16th July 2007. He holds a Merchant Sea Navy Captain Certificate (Extra Master) issued by the French Government. His further qualifications are set out in section 1 of his first witness statement.

4.48 He indicated that the Objector has been the registered proprietor of the land known as Newhaven Port since 1991 when it became the statutory harbour authority. Newhaven is recognised by the British Ports Association as being one of the 16 major ports in the Country. The Port includes the Application Land in addition to surrounding areas. The extent of the Objector's ownership is shown in the relevant Land Registry plans.[54] "West Beach" is in fact the area on the west side of the Breakwater whereas the Application Land is correctly termed the "Spending Beach". He pointed out that the Land covers a larger extent of land than that owned by the Objector on its seaward boundary as illustrated on his overlay plan.[55] The Land is part of the official area of the harbour and the Port, and is regarded by the Health and Safety Executive as part of the working area of the Port.

4.49 The Land is also part of the area of land subject to the Newhaven Byelaws. The Objector is the regulatory and enforcement body for those statutory Byelaws. The specific area subject to the Byelaws is the "*Newhaven Harbour Undertaking*" which is identified on the Plan in the Schedule to them.[56] In particular, Byelaw 68[57] precludes fishing in that area without the permission of the Harbour Master. In addition, it precludes bathing "*in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse*". Therefore, that part of Byelaw 68 covers a more limited area than the other byelaws rather than the entire Harbour. Horse Shoe Sluice lies at the northern boundary of the Objector's Land. In Captain Jean's view, Byelaw 68 covers the Application Land. That specified area in the Byelaw has a northern and a southern boundary and all the water in-between is covered by the Byelaw which includes the Land.

4.50 Access to the area is via a publicly adopted road known as Fort Road. That Road terminates to the east of the Fort as shown on the plan provided by the local highway authority.[58] Beyond that, the road leads to the Objector's Car Park. It charges for parking between April and September each year. He had no reason to doubt the indication that such charging started around 1979. There is a height restriction

[51] It is contained in OB5 tab 13.
[52] In the Note in OB6 tab 7 page 265.
[53] His two witness statements are at the beginning of OB5.
[54] At Exhibits FJ1 and FJ2 at OB5 tabs 1 and 2.
[55] At Exhibit FJ3 at OB5 tab 3.
[56] At OB6 tab 3 page 218.
[57] At OB6 tab 3 page 213.
[58] At OB5 tab 4 page 17.

barrier across the entrance to the car park where a sign is located stating that it is a pay and display car park and that the area is governed by the Newhaven Harbour Byelaws. He was unaware when that particular sign was erected. There is also a public footpath to the north of the car park leading to the West Beach. There is no public access to the steps leading down to the Land either from the Harbour Wall or the Breakwater. A statutory deposit was made under Section 31(6) of the Highways Act 1980 confirming the extent of public rights of way over the Objector's land and the intention that no others be dedicated. That deposit was made in 2008 after the end of the relevant 20 year period.

4.51 He had no reason to dispute that the Breakwater was closed in January 2006 and the Beach was closed in April 2006. The Beach was subsequently re-opened in April 2007, but was then permanently closed around March or April 2008. Health and safety issues relating to the inner port area and the Breakwater have become an increasing concern to the Objector. He set out a number of incidents arising between October 2005 and July 2006 in a table at paragraph 8.2 of his first witness statement.[59] Following an incident in May 2006 where a piece of the sea wall had fallen and narrowly missed hitting a child, the Objector commissioned a Risk Assessment Report from MB Health and Safety. Following its review, the Breakwater and then the Beach were closed. A further risk assessment and structural report about the sea wall was then commissioned from Royal Haskoning in 2007. Due to the concerns arising from that report, the Beach remained closed to the public.

4.52 **Mr David Collins-Williams** also submitted a witness statement but, due to unavoidable circumstances, was unable to attend the Inquiry.[60] Nonetheless, Captain Jean was in a position to adopt the contents of that witness statement as his own and such evidence was thereby subject to cross examination. Mr Collins-Williams has been the Harbour Master since January 2009. It was acknowledged that he did not have direct knowledge of many of the matters raised. The previous Harbour Master had sadly died in 2008. One of the Harbour Master's key responsibilities was to police and enforce the Byelaws. He set out from the Log Book various instances when the car park had been closed and when people had been removed from the Breakwater, albeit the latter circumstances were post the closure of the Breakwater in January 2006.[61]

4.53 Having reviewed the survey results of people "*on the beach*" during the week ending 5th August 2007 conducted as part of the Risk Assessment report produced by MB Health and Safety, Mr Collins-Williams contacted the person who had carried it out as he was surprised by the high numbers shown.[62] He was informed that the count included people on the Beach but also, despite the title of the survey, those on the Breakwater and generally in the area. It therefore did not accurately represent the number of people on the Land. Nonetheless, Captain Jean acknowledged that as he was not employed by the Objector during the relevant 20 year period, he was unable to comment upon the Applicant's position that there had been a very considerable use of the Land by local people over that period.

4.54 The entirety of Newhaven Port, including the Application Land, is governed by the Newhaven Byelaws. Mr Collins-Williams suggested that the Byelaw notice sign shown in the Objector's photograph 11[63] at the top of the steps was put up around 2004/2005. However, Captain Jean indicated that it had previously been located in a different position, namely on the western side of the River, because people were swimming there and crossing the River. That was very dangerous due to vessels using the River. The Objector was therefore using that particular sign in 2004/2005, but it was not then in its current position at the top of the steps. He accepted that neither that sign nor the one shown in the Objector's photograph 12 were near to the Beach at that time nor in 2007 when the Risk Assessment was undertaken, and he was unaware when they were placed in their current positions. He was also unaware how long the prohibition signs shown in the Objector's photograph 13 had been in place. He acknowledged that they were not in their present locations in 2007 when the Risk Assessment was undertaken as they were not

[59] OB5 pages 6-7.
[60] His witness statement is at the beginning of OB6.
[61] At OB6 pages 3-5.
[62] The survey is at OB5 tab 11 page 80.
[63] At OB6 tab 4 page 229.

shown in any of the photographs taken then with the exception of the sign shown in the photograph at page 66 which was present during the site visit.[64] The Byelaws have been enforced in the past and the Objector has called the police on several occasions in that regard. He was unaware whether there had been any enforcement of the prohibition of swimming in the Port.

THIRD PARTY EVIDENCE

4.55 During the Inquiry, I invited any other persons who wished to give evidence to do so. Four individuals did so and their evidence was open to cross examination.

4.56 **Daly Tucknott** lives at18 Second Avenue and was born on 4th January 1996. He is the current Young Mayor of Newhaven having been elected on 2nd July 2009 to represent the views of young people. His evidence was given on behalf of Newhaven's young people. He gave evidence in support of the Application. He used the Beach with family and friends prior to its closure for activities such as football, kite flying and sunbathing. The closure of the Beach has had a significant effect on the young people of Newhaven who are being denied access to the Beach that had been freely used by the people of Newhaven. Young people would previously walk or cycle to the Beach from all over Newhaven. He led a march by young people to the Beach last year attended by hundreds of young people and there was a supporters' concert by young people held at Newhaven Fort in 2008 to highlight the need to re-open the Beach. The young people of Newhaven want the Beach back for themselves and for future generations. He is currently a pupil at Tidewell School. Canoeing only recently took place at the School from 2007 and so has not taken place on the Land.

4.57 **Mr George Child** lives at 18 Houndene Rise, Lewes. He came to Lewes in 1966 and retired in 1988. He was the County Secretary of East Sussex County Council for most of that time. One of his jobs was as Clerk to the Planning Committee. He gave evidence in support of the Application.

4.58 He is married with children, but he and his family had only made occasional use of the Land. He has not lived in Newhaven. However, having heard the evidence from local people at the Inquiry, he was able to indicate that everything he knew about the Land and his experience of the Land was consistent with what local people had stated. It was a grievous loss when the Land was fenced off. It is the only sandy beach over a significant area. He indicted that he had a tendency to look at byelaws and legal notices. The first time he was aware of any byelaws was when the "cage" was erected and notices were then inside the "cage". He had seen the signs shown in the Objector's photograph 13, but he could not recall when he first saw them. He also recalled the sign about the wash that others had referred to. He expressed surprise at the reference to the Beach being completely covered with water for 42% of the time. He would have expected the Beach to have been available for use up to 2 hours before high tide and again around 2 hours after high tide. His overall position was that he supported the view that the Beach had been used over a long period even though he had no detailed user evidence himself.

4.59 **Mr Michael Taylor** currently lives at 1, Phoenix Mews, Seaford, having moved there in July 2010. He previously lived in a hotel in Newhaven for lengthy periods both during the 1980's and 1990's and became familiar with the area. Having heard all the evidence presented to the Inquiry by local residents, he was able to confirm that it was all consistent with his own experience.

4.60 **Mr Christopher Whittick** is the Senior Archivist at the East Sussex Record Office where he has been employed since 1977. He gave evidence to assist the Inquiry in relation to the available documentation relating to footpaths along the Promenade in the vicinity of the Land.

4.61 Having considered the County Secretary's file number C/C44/42 from the County Archives in relation to the way in issue that was produced during the process which led to the first Definitive Map, he ascertained that a proposal was made by one Mr Robinson and one Mr Bennett to claim an additional path at the foot of the cliff with a terminus at the shingle below Castle Hill. Consideration of the 1954 user

[64] OB5 tab 11.

forms in support of the claimed route revealed that a number of persons stated they were going to "West Beach" and that was their purpose for using the route. It was recorded that there appeared to be a wealth of evidence that "*vast numbers of the public*" had for years travelled on foot from Fort Road to the beach both east and west of the Breakwater, although there may be difficulties in establishing the precise routes taken. There was a summary of the County Secretary's summary of two objections to that path. The recommendation to Committee was that the footpath claimed be not added to the Definitive Map, but that a footpath nonetheless be added from Fort Road southwards to the Promenade "*and then along the promenade to the foreshore west of Newhaven breakwater*", namely Footpath 16. It is assumed that recommendation was accepted by the Committee.

4.62 The Definitive Map was adopted on 29th May 1956 with a "*relevant date*" of 17th March 1953. The next revision of the Definitive Map dates from 1963 but is not held in the Archives. It is a reasonable assumption that plan 5 is the County Council's current working version of the Definitive Map. There are no files held in the Archives relating to the 1963 reiteration of the Map. However, a file had been located maintained by the County Surveyor who undertook the survey for that 1963 review process. That revealed a reference to an agreement dated 3rd May 1928 between the then Urban District Council and the Southern Railway Company relating to rights of access to the beach and foreshore. That agreement had not been obtained.

4.63 Given the potential materiality and significance of that agreement, both the Applicant and the Objector were given an opportunity to submit further written representations in relation to it once it had been located and duly considered by each Party. Both the Applicant and the Objector provided such further representations which I shall refer to later and which I have taken into account.

5. THE LEGAL FRAMEWORK

5.1 I shall set out below the relevant basic legal framework within which I have to form my conclusions and the Registration Authority has to reach its decision. I shall then proceed to apply the legal position to the facts I find based on the evidence that has been adduced as set out above.

Commons Act 2006

5.2 The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

5.3 The Application seeks the registration of the Land by virtue of the operation of Section 15(4) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-

"*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b)."

5.4 That subsection is subject to subsection (5) by virtue of which it does not apply to any land in respect of which planning permission was granted before 23rd June 2006 and other related criteria are satisfied. However, no reliance was placed on that provision and it is not relevant to the Application. Further, subsection (6) provides that in the determination of the relevant 20 year period, any period during which access to the land was prohibited to members of the public by reason of any enactment must be disregarded. However, no reliance was placed on that provision either which is again not relevant to the Application.

5.5 Therefore, for the Application to succeed, it must be established that:-

(i) the Application Land comprises "land" within the meaning of the 2006 Act;

(ii) the Land has been used for lawful sports and pastimes;

(iii) such use has been for a period of not less than 20 years;

(iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
(v) such use has been as of right; and
(vi) such use ceased prior to 6th April 2007 and the Application is made within 5 years of the date of the cessation of the use.

The Burden and Standard of Proof

5.6 The burden of proving that the Land has become a town or village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. That is the approach I have used.

5.7 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[65] where, at paragraph 2, he noted as follows:-

"*As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green …". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met.*"

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

Statutory Criteria

5.8 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to in turn below.

Land

5.9 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

5.10 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[66] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered. In that case, the Trap Grounds application site did not fit the traditional image of a village green. Part of it comprised reed beds and a significant part of the remainder consisted of scrubland. It was thus "*not idyllic*" in the words of Lord Hoffmann. The majority view given by Lord Hoffmann was that the physical characteristics of land could not in themselves preclude it from being a village green. In justifying that view, he noted in particular that there was no authority, either at common law or in statute, which supported the proposition that the definition of a village green should be so restricted, and further, that any test to that effect would be inherently uncertain and too vague.[67] It is also relevant to note that the Commons Act 2006 passed subsequently did not seek to further restrict the definition of a village green in that regard.

5.11 An alternative minority view was expressed by Lord Scott who noted that some new village greens registered did appear to be stretching the concept of a village green beyond the limits which Parliament intended. He noted the ordinary dictionary meaning of a "*green*" as being "*a piece of public or common grassy land*" which ought to be applied in constructing section 22(1) of the Commons

[65] [2004] 1 AC 889.
[66] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[67] At paragraph 39.

Registration Act 1965, the predecessor to Section 15 of the 2006 Act, rather than land being registered that no one would recognise as a town or village green.[68]

Lawful Sports and Pastimes

5.12 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[69] that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

5.13 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way.[70]

Continuity and Sufficiency of Use over 20 Year Period

5.14 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[71]

5.15 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[72]

Locality or Neighbourhood within a Locality

5.16 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[73] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[74] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[75] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[76]

5.17 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. A housing estate can be a neighbourhood: ***R. (McAlpine) v. Staffordshire County Council***.[77] However, a neighbourhood cannot be any area drawn on a map. Instead, it must have a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[78]

Significant Number

5.18 "*Significant*" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: ***R. (McAlpine) v. Staffordshire County Council***.[79]

As of Right

5.19 Use of land "*as of right*" is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire County Council ex parte***

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[68] See paragraphs 71 to 83.
[69] [2000] 1 AC 335 at 356F to 357E.
[70] See Sullivan J. in ***R. (Laing Homes Limited) v. Buckinghamshire County Council*** [2004] 1 P & CR 573 at 598.
[71] (1884) 13 QBD 304.
[72] [2010] UKSC 11 at paragraph 36.
[73] [1995] 4 All ER 931 at page 937b-e.
[74] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[75] [2004] 1 P & CR 573 at paragraph 133.
[76] At paragraphs 41 to 48.
[77] [2002] EWHC 76 (Admin).
[78] At paragraph 85.
[79] [2002] EWHC 76 (Admin) at 77.

Sunningwell Parish Council[80] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.20 "Permission" can be expressly given or be implied from the landowner's conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: ***R. v. Sunderland City Council ex parte Beresford***.[81]

6. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

6.1 The impression which I obtained of all the witnesses called at the Inquiry is that they were entirely honest and transparent witnesses, and I therefore accept for the most part the evidence of all the witnesses called for both Parties and as Third Parties.

6.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the statutory criteria in Section 15(4) of the 2006 Act being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

6.3 I shall now consider each of the elements of the Section 15(4) criteria in turn and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above and also to the more detailed legal position referred to below where relevant to specific issues raised. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the criteria in Section 15(4) must be established by the Applicant on the evidence adduced on the balance of probabilities.

The Land

6.4 The land sought to be registered is shaded in yellow on the map submitted with the Application. It comprises the area of sandy beach known as West Beach that is described in more detail in section 3 above. It is bounded to the north and west by the harbour wall and to the south and east by the mean low water mark.

6.5 An issue was raised by the Objector as to whether in principle an area of beach is capable of registration as a town or village green on the basis that it is not "green" and was never intended by the draftsman to have been the type of area that was properly registrable. Reliance was placed upon the observations of Lord Scott in the ***Oxfordshire*** case referred to at paragraph 5.11 above.

6.6 I acknowledge the instinctive unease at the lack of resemblance between a beach and a traditional village green. However, that issue was specifically considered by the House of Lords in ***Oxfordshire***, albeit on an *obiter* basis, and the majority view expressed by Lord Hoffmann was that elements of the traditional village green ought not to be implied into the statutory definition. He gave eight specific reasons for that in paragraph 39 of his Judgment. Although those observations are not strictly binding upon myself or the Registration Authority as they were *obiter dictum* and were reached without full argument on the point, the majority view is nonetheless highly persuasive given the high authority at which it was made and that Lord Hoffmann specifically set out reasoning for that view. I further note that in the 2006 Act passed subsequently, the drafters did not choose to import any elements of a traditional village green into the statutory definition, despite Lord Hoffmann's observation that "*if Parliament thinks that the definition needs to be narrowed, it will have an immediate opportunity to do so.*"

6.7 In those circumstances, for the reasons set out in paragraph 39 of Lord Hoffmann's Judgment in ***Oxfordshire*** which I regard as highly persuasive authority, it seems to me that it would be inappropriate

[80] [2000] 1 AC 335.
[81] [2004] 1 AC 889.

for me to import elements of a traditional village green into the statutory definition and I do not do so. Instead, if the Beach satisfies all the elements of the statutory definition, then it ought to be registered.

6.8 In that regard, I have noted the two examples referred to of beaches having been registered as greens previously, namely Kingston Beach at Shoreham-by-Sea and Praa Sands in Cornwall, the seaward boundaries being the low water mark and the high water mark respectively. However, each application for land to be registered must be assessed on its own circumstances and I do not regard either of those examples as any form of precedent in relation to the present Application.

6.9 A further and linked issue raised by the Objector over the principle of the Beach being land capable of being registered is that a beach is in the nature of a public and not local use and so no customary rights would have been capable of arising in respect of a beach before 1965. Hence, it is contended that the Beach is not in the nature of a village green which is appropriate to be registered.

6.10 In terms of the evidence in that regard, Mrs Young pointed out that the Beach was a destination to which people travelled. Mr Everest referred to the brown tourist road signs erected around the Newhaven ring road in around 1995 which were for West Beach as well as other attractions. Indeed, I saw such signs on my unaccompanied visit around Newhaven. I also note and accept the evidence of Mrs Cole that although there are tourists who come to Newhaven and there are some tourist attractions, it is not a huge tourist area. It is also significant that a number of witnesses confirmed, and no one disputed, the evidence of Mrs Thomas that on a typical weekend, in the order of 60% of users of the Beach would be local people and 40% visitors, which would change to about a 50% split on bank holidays. I accept that undisputed evidence.

6.11 It seems to me from the evidence that there is a material amount of public use of the Beach, albeit the majority is a local one. That may well have affected the Land's registration under the Commons Registration Act 1965 prior to its amendment in 2001 and the abolition of the "*Predominance Test*", namely whether the land sought to be registered was used predominantly by inhabitants of the locality. However, the law as it currently stands, and which I and the Registration Authority must apply, no longer involves the application of any such predominance test. HHJ Waksman QC in ***R. (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[82] specifically stated in relation to Section 22(1A) of the Commons Registration Act 1965 that:-
"*I reject the notion that the Predominance Test has been carried forward into s22 (1A). That provision is clear in its terms and provided that a significant number of the inhabitants of the locality or neighbourhood are among the users it matters not that many or even most come from elsewhere.*"
Similarly, applying Section 15(4) of the 2006 Act, the relevant legal requirement in that regard is whether a significant number of the inhabitants of the locality or neighbourhood have used the land sought to be registered and that is the requirement I shall consider below.

6.12 Another issue raised by the Objector in relation to the Application Land itself is that it has no fixed seaward boundary in that the extent of the beach exposed at low tide varies over the tidal cycle.

6.13 As noted in paragraph 5.9 above, any land registered must be clearly defined. It is necessary to be able to identify the area over which the rights flowing from registration attach. There is no difficulty in relation to the northern and western boundaries of the Land which are fixed by the harbour wall. The issue arises over the southern and eastern boundaries which are the mean low water mark.

6.14 In terms of the coverage of the Application Land by the sea, according to the undisputed evidence of Mr Marks which I accept, the Application Land is not all uncovered during Neap tides, but is all uncovered together with an additional area during Spring tides. The mean low water mark, namely the Land's boundary, will always lie between the mean low water Neaps and the mean low water Springs. As the Beach is dynamic, it will necessarily always be changing to an extent.

[82] [2010] EWHC 530 (Admin) at paragraph 71.

6.15 It seems to me that the mean low water mark is a sufficient boundary for the purposes of registered land. Although it is not precisely fixed in the sense that it is dependent upon the tide, the changes in the line from time to time will be relatively minor. In essence, it is the best representation of the average position of the low tide and hence, the average extent of the uncovered beach at low tides. I also note that both Newhaven Town Council's administrative area and the Objector's registered land ownership are fixed in that particular area by reference to the mean low water mark. The mean low water mark is thus regarded as an acceptable boundary for administrative and ownership purposes. Similarly, it is my view that it would be an acceptable boundary in principle for a registered town or village green and I so find. I deal below with whether the statutory criteria have been satisfied in relation to that extent of the Application Land.

6.16 Consequently, I find that the Application Land comprises "land" within the meaning of Section 15(4) of the 2006 Act and is capable of registration as a town or village green in principle.

Relevant 20 Year Period

6.17 Turning next to the identification of the relevant 20 year period for the purposes of Section 15(4) of the 2006 Act, it is stated in the Application that the claimed use as of right ceased in April 2006. That was the date when the use of the Land was initially prevented by the erection of fencing at the steps leading down to the Beach by the Objector. Captain Jean indicated that he had no reason to doubt that date. I therefore find that the use of the Land was initially prevented and thereby ceased for the purposes of Section 15(4) of the 2006 Act in April 2006.

6.18 It follows that the relevant 20 year period for the purposes of Section 15(4) is April 1986 until April 2006.

Lawful Sports and Pastimes

6.19 All the Applicant's witnesses who were called to give evidence of their use of the Land referred to having used it for various informal recreational activities. Typical activities were sunbathing, beach games, picnicking, paddling, swimming, fishing, bait digging, walking with and without dogs and kite flying. That was supported by the photographic evidence I have seen. The use of the Land for such recreational activities was also mentioned in the written evidence forms and evidence questionnaires. Although the latter evidence was not subject to cross examination, I nonetheless give it material weight in relation to that particular issue given that it was consistent with the Objector's case. It is stated in the initial Objection at paragraph 19 that it is common ground that the Land has been used for lawful sports and pastimes.[83] Further, Captain Jean fairly acknowledged that he was unable to dispute the Applicant's position that there had been a considerable use of the Land for recreational activities, and no other evidence was adduced to the contrary.

6.20 Therefore, it is apparent that the Land has been used for various recreational activities and I so find.

6.21 However, only *lawful* sports and pastimes can be taken into account and it is necessary to discount from consideration any that are not lawful. In that regard, it was contended by the Objector that Byelaw 68 of the Newhaven Harbour Byelaws prohibited fishing and swimming making any such activities unlawful. Those Byelaws were made by the Southern Railway Company on 20th February 1931 and came into operation on 6th March 1931. I note that there was no suggestion that those Byelaws had not been properly made nor that they had been subsequently revoked. Therefore, applying the presumption of regularity, it is appropriate to presume that they were properly made in the absence of any evidence to the contrary.

6.22 Byelaw 68 states:-

[83] At OB1 tab 7 page 648.

"*No person, without the permission of the Harbour Master, shall fish in the harbour; and no person shall bathe in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse*".[84]

6.23 As to fishing, that Byelaw precludes that activity "*in the harbour*" unless the permission of the Harbour Master has been obtained. The "*harbour*" is defined at the beginning of the Byelaws and its extent is delineated by red lines on the Plan in the Schedule to the Byelaws. That Plan[85] clearly includes the Land as being within "*the harbour*". It follows that all the fishing referred to was in contravention of Byelaw 68 and therefore unlawful save where the Harbour Master's permission had been obtained. There was no evidence that any of those fishing had obtained such permission. In the absence of such evidence, and given that the burden of proof is on the Applicant, I find that the fishing referred to was not lawful and so should be discounted from the qualifying lawful sports and pastimes.

6.24 As to swimming, that restriction relates to a more limited area than the entire harbour. Instead, it applies to "*that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse*". There was a dispute as to the correct construction of that part of the Byelaw and whether or not it included the Land. Horse Shoe Sluice lies at the northern boundary of the Objector's land. If a line is drawn between the East Pier Lighthouse and the Breakwater Lighthouse, then the Land is included if the Byelaw applies to all the water in-between Horse Shoe Sluice and that line, as advocated by Captain Jean. In my view, as the Byelaw expressly applies to "*that part of the harbour*" lying between those two points, there is no reason to exclude the Land which is part of the harbour. Indeed, to do so would be to imply the inclusion of a further line between the end of West Pier and the Breakwater Lighthouse and to exclude that part of the harbour to the west of that line. In the absence of any such wording, it seems to me that the preferable construction of that part of the Byelaw is that it prohibits bathing in the area of the Land. That interpretation is also consistent with the purpose of that part of the Byelaw as indicated by Captain Jean, namely to preclude swimmers from being anywhere near to the boats coming in and out of the harbour and to the resulting swell of water for safety reasons. Consequently, it follows that swimming and other water-based activities on the Land were contrary to that Byelaw and thus, unlawful. For that reason, I find that the use of the Land for swimming and other water-based activities were unlawful and so must also be discounted from the lawful sports and pastimes undertaken on the Land.

6.25 The land-based activities, however, were not prohibited by the Byelaws and were all lawful sports and pastimes within the meaning of Section 15(4) of the 2006 Act. Byelaw 70 precludes the playing of any sport or game, but only if it obstructs or impedes the use of the harbour. There was no suggestion that the informal sports and games relied upon had any such effect. Further, Byelaw 71 precludes the bringing of any dog within the harbour, but only insofar as it is not under proper and sufficient control. There was no suggestion that any of the dog walking relied upon was in contravention of that Byelaw.

6.26 Therefore, I am satisfied from the evidence that on the balance of probabilities the Land has been used for some lawful sports and pastimes during the relevant 20 year period, but that it is necessary to discount from the qualifying use all the fishing, swimming and other water-based activities that took place on the Land.

Extent and Continuity of Use for Lawful Sports and Pastimes

6.27 In order for the statutory criteria to be met, the use of the Land for lawful sports and pastimes must have been with a sufficient degree of frequency and to a sufficient extent throughout the relevant 20 year period to show the landowner that rights were being asserted. Therefore, it is necessary to assess the extent of the use over that period.

6.28 Ten of the witnesses called on behalf of the Applicant gave evidence of their individual use of the Land together with Daly Tucknott as a third party. Each of them were inhabitants of the locality of

[84] At OB6 tab 3 page 213.
[85] At OB6 tab 3 page 218.

Newhaven and used the Land over some or all of the relevant 20 year period for land-based recreational activities with varying degrees of regularity. They each referred to others using the Land for similar activities. I also note the extensive written evidence in support and the frequent references to recreational land-based activities on the Land in the 929 completed evidence forms from inhabitants of Newhaven. As against such evidence, there was no evidence to the contrary from the Objector in the form of such use not having occurred. On the contrary, Captain Jean fairly acknowledged that as he was not employed by the Objector during the relevant 20 year period, he was unable to dispute the Applicant's contention that there had been a very considerable use of the Land by local people over that period. No witness was called on behalf of the Objector who had any specific knowledge of the Land over that period. Nonetheless, despite the absence of any such conflicting evidence, it is necessary to ascertain whether the evidence adduced establishes on a balance of probabilities that the use of the Land for lawful sports and pastimes was with a sufficient degree of frequency and to a sufficient extent and of such a nature throughout the relevant 20 year period to show the landowner that rights were being asserted.

6.29 Firstly, in considering that evidence, the water-based activities must all be discounted as they were not lawful for the reasons given above.

6.30 Secondly, given the evidence of Mr Beach that some people baited on the Land in connection with a business, it is necessary to discount that activity save where it was specifically established that users were baiting on the Land as a recreational activity. Lawful sports and pastimes must be recreational in character in order to be part of the qualifying use.

6.31 Thirdly, it is necessary to discount any use by visitors or any other persons who lived outside the locality of Newhaven. Therefore, although I acknowledge that each of the witnesses who gave user evidence saw others using the Land for recreational purposes, I am only able to take into account such use insofar as the users were inhabitants of Newhaven. In that regard, though, I note the uncontested and consistent evidence of witnesses that at weekends, approximately 60% of users were locals whilst 40% were visitors, whilst at bank holidays that would change to around a 50/50 split.

6.32 Fourthly, I note that given the nature of the Land, namely a beach, its use would inevitably be more seasonal than some other pieces of land. In that regard, Mrs Thomas expressly pointed out that there was a seasonal variation to the use of the Land in that it was used more during the summer, albeit it was still used during the winter. Mrs Young commented that the use of the Land was much less during the winter, but that most of the users then were from Newhaven, and Mr Beach confirmed that the use was significantly less during the winter months. Similar observations were made by Mrs McIntosh, Mr Everson, Mrs Carver and Mrs Woolford.

6.33 Fifthly, and particularly significantly, as the Land comprises a tidal beach, it is not available for lawful land-based activities for significant periods dependent upon the state of the tide. The unchallenged expert evidence of Mr Marks was that, on average, the Land is completely covered by water for 42% of the time and is uncovered to some extent for 58% of the time. It is only completely uncovered for a few minutes. Putting that into actual times, he indicated that the average period of time between low tide to when the Land is covered by water is 3.6 hours. It is then a similar 3.6 hour period between the Land first being uncovered to low tide. The tidal cycle from high tide to high tide or from low tide to low tide is approximately 12 hours and 35 minutes. Therefore, in round terms, in every 12½ hour tidal cycle, the Land is uncovered to some extent for 7¼ hours and is completely covered for 5¼ hours. Given that water-based activities are not lawful sports and pastimes, the Land is not usable for lawful sports and pastimes for around 5¼ hours in every tidal cycle and then is usable to variable extents for around 7¼ hours.

6.34 Sixthly, and linked to the above, an effect of the tidal cycle is that parts of the Land, namely those parts nearest to the mean low water mark, would not be usable for the majority of the time for lawful sports and pastimes as they would only be available for a limited part of each 7¼ hours of each tidal cycle to a decreasing extent the nearer the area was to the mean low water mark.

6.35 Taking all the above matters into account, my findings and conclusions on this issue are as follows. From all the evidence I heard and read, the clear impression I gained was that there has been considerable use of the Land for lawful sports and pastimes, namely excluding the water-based activities, throughout the entire period from April 1986 until April 2006. The evidence of the various witnesses called by the Applicant who had used the Land and seen others using the Land together with the written evidence of those inhabitants of Newhaven indicated a regular use of the Land for land-based recreational activities during that period. That evidence was supported by photographic evidence taken over different times in that period and by the evidence of third parties. Moreover, there was no evidence from the Objector or otherwise to suggest that the indicated extent of user had not taken place.

6.36 I bear in mind that in relation to others seen using the Land, it cannot be assumed that they were inhabitants of Newhaven. Their use of the Land can only be taken into account insofar as they were inhabitants of that locality. However, having gained an impression of the overall use of the Land for lawful sports and pastimes, I take into account the uncontested evidence that on a typical weekend, approximately 60% of the users were locals, which reduced to approximately 50% over bank holidays. In doing so, it seems to me that 50% to 60% of the overall use for lawful land-based recreational activities would remain a use of such a nature that was far more than trivial or sporadic.

6.37 Having said that, the evidence was also consistent that the use was greater during the summer months than the winter months. Mrs Thomas continued to use the Land during the winter, but noted that the nature of the recreational uses changed during that season to activities such as dog walking, kite flying, football and bike riding. Mrs Young continued to use it all year, such use being reduced from most days during the height of the summer to once or twice a week at other times. Mr Beach used it at least once a month at all times of the year. Mrs McIntosh used it every week during the summer and more occasionally during the winter. Mrs Vale used the Land regularly all year round, including during the winter. Mr Everson, though, used it mainly in the summer and only occasionally during the winter whilst Mrs Carver mainly used it between April and October. Mrs Woolford used the Land almost daily during the summer which use reduced to once a week during the winter. Mrs Giles used the Land all year round, but more during holiday periods.

6.38 From such evidence, it seems to me that although the use of the Land was materially less during the winter months, it remained in use throughout the year. Such seasonal use of a beach is unsurprising. Moreover, seasonal use of land used for recreational activities is generally not unusual, with increased use during the summer, at weekends and outside working hours being commonplace. Ultimately, the issue to be determined is whether the use is of such a nature that it would show to the landowner that a right was being asserted. In my view, although the use of the Land was less during the winter, it remained in use all year round to an extent that was more than trivial or sporadic even at such times of the year.

6.39 Turning to the tidal effects, the expert evidence of Mr Marks which I accept is that the Beach is entirely covered by the sea for 42% of the time. Given my finding that all water-based activities were unlawful, lawful sports and pastimes could only take place on the Land for a maximum of up to 58% of the time. Further, different parts of the Land would be available for such lawful sports and pastimes for only a limited part of that 58% of the time, such periods decreasing the nearer the area of the Land is to the mean low water mark. In considering that evidence, the fundamental issue remains whether, in the light of such circumstances, the use of the Land was of such a nature that it would show to a landowner that rights were being asserted. Although the Land was only available for use for a maximum of 58% of the time, gradually reducing towards the mean low water mark, as there are just short of two tidal cycles in every 24 hours, the Land was nonetheless available for use for land-based recreational activities for a material period of time each day. Further, I note the evidence that local people tended to be aware of the times of the tides and so knew when the Land would be available for such uses. My impression of the evidence was that although the Land was not available for such uses for material periods, its use at other times was of such a nature and with such regularity that it was sufficient to indicate to a landowner that rights were being asserted. The mere fact that, due to natural causes, the Land was not available for lawful sports and pastimes for material periods of time would not seem to me to be a reason in itself for the Land being incapable of registration.

6.40 Further, I recognise that some parts of the Land were unavailable for use for lawful sports and pastimes for substantial periods in that they are covered by water for the majority of the time. Nonetheless, it seems to me that it is necessary to apply the same consideration, namely whether the use of the Land as a whole was of such a nature and extent that it would show to a landowner that rights were being asserted over the Land as a whole. In that regard, I accept the unchallenged evidence of users that the Land was used generally. It was evident that if users went to the Land to sit and/or sunbathe, they would generally seek to find a spot close to the harbour wall if possible as that would be available for the longest period before the tide covered that area. However, if those areas were not available, other areas would be used. Hence, Mrs Young indicated that when she and her family and/or friends went to the Land, they would sit on different parts of it. Mr Everson stated that the area he used mostly was that close to the steps by the harbour wall. However, he pointed out that he saw many others using the Land spread over its entirety. Similarly, Mrs Carver would look for a space near to the wall but could not always find one whilst Mrs Giles always sought the area near to the steps which was the first area uncovered and the last area covered by the tide. Moreover, for the more active pursuits, the area seems to have been used generally, such as for dog walking, beach games and kite flying. It therefore appears to me that the Land in its entirety has been used for lawful sports and pastimes, albeit some areas have been used more frequently than others, namely those areas closest to the harbour wall. Nonetheless, the impression I gained from the user evidence was that when it was available, the area of the Beach that was uncovered by water was used for lawful sports and pastimes. Further, it seems to me that the use was such that it would have been apparent to a landowner that the Beach as a whole was used for lawful sports and pastimes as and when it was uncovered.

6.41 Consequently, for the above reasons, I find that the use of the Land for lawful sports and pastimes has been with a sufficient degree of frequency and to a sufficient extent throughout the relevant 20 year period to appear to the landowner, or if there was an absentee landowner, to a reasonable owner who was on the spot, that rights were being asserted.

Use by a Significant Number of the Inhabitants of any Locality or of any Neighbourhood within a Locality

6.42 In order to determine this next issue, it is firstly necessary to identify the appropriate locality or, alternatively, neighbourhood within a locality for the purposes of Section 15(4) of the 2006 Act.

6.43 The locality or neighbourhood within a locality identified in the Application is "*the administrative area of Newhaven town council*". A plan outlining that area in red was attached to Mrs Cole's witness statement.[86]

6.44 The Applicant contends that that area amounts to a "*locality*" within the meaning of Section 15(4). The Objector did not dispute that such an area was capable of being a locality.

6.45 That identified area is a recognised administrative area known as Newhaven Parish which has recognised and established boundaries. In those circumstances, it seems to me that such an area is a "*locality*" for the purposes of Section 15(4) and I so find.

6.46 The next question is whether a significant number of the inhabitants of Newhaven Parish have used the Land for lawful sports and pastimes over the relevant 20 year period.

6.47 Each of the ten witnesses who gave user evidence on behalf of the Applicant were inhabitants of Newhaven, as was the third party, Daly Tucknott. They referred to others using the Land for land-based recreational activities and I have referred above to the extent of such use that was by Newhaven inhabitants in contrast to visitors and others from outside Newhaven. In addition, as pointed out by Mrs Cole, some 929 out of the 1115 evidence forms were from residents of Newhaven Parish whilst the 60 evidence questionnaires were compiled by Newhaven residents. Although I give such written evidence

[86] At AB4 tab 1.

less weight than the oral evidence that was subject to cross examination, save that compiled by those who also gave oral evidence, I nonetheless give it material weight in relation to the specific issue of the use of the Land for land-based recreational activities by local inhabitants taking into account that such evidence was not materially contrary to any oral evidence. Indeed, it was stated in the original Objection at paragraph 19 that it was common ground that the Land "*has been used for lawful sports and pastimes by local people*",[87] and there was no evidence to the contrary given by the Objector. Instead, Captain Jean did not dispute that there had been a very considerable use of the Land by local people over the relevant 20 year period.

6.48 Taking all the evidence into account, it is my view that the Land has been used by many of the inhabitants of Newhaven over the relevant 20 year period. Indeed, that is not surprising given that at low tide, it is a flat area of sandy beach of a reasonable size and which is particularly safe for use by children and dogs off the lead. It is located within reasonable walking distance for Newhaven residents, and for those who drove there was a large car park on the Promenade. I also note the evidence of Mrs McIntosh that it was the only sandy beach in Newhaven as opposed to shingle. Those factors themselves support the evidence that the Land was likely to have been used by many of the Newhaven residents. Consequently, I find that the Land has been used throughout the relevant 20 year period by a significant number of the inhabitants of Newhaven to a sufficient extent to signify to the landowner that it was in general use by the local community for informal recreation rather than merely occasional use by individuals.

6.49 Before leaving that issue, it is also necessary for the Applicant to establish that the users of the Land originated from the locality as a whole rather than merely from a limited part of it. If the users originated only from a section of the locality, that would not be sufficient to establish the requisite statutory criteria. There must be a proper distribution of users such that it can properly be said that the use has been by the inhabitants of that locality.

6.50 In that regard, I note from the locality plan the identification of the location of the addresses of those who gave user evidence on behalf of the Applicant and those who completed the more detailed evidence questionnaires. To the west of the River Ouse, those users seem to me to be reasonably spread over the residential areas. The number of such users are less to the east of the River, although there are far fewer residential areas in that area and more industrial areas. The residential areas are focused to the north east of that area extending out to Denton where a number of users resided. I also note that two of the witnesses who lived east of the River gave user evidence, namely Mrs Vale and Mrs Giles, both of whom stated that others living on the east side of the River and out to Denton used the Land. In addition, I take into account that a material number of the initial evidence forms are compiled by inhabitants of that side of the River, namely of the 929 compiled by Newhaven residents, 136 were from inhabitants east of the River. From such evidence, I find that the users were reasonably spread throughout the residential areas of Newhaven as a whole to a sufficient extent that the Land was in use by a significant number of the inhabitants of that locality generally.

Use as of Right

6.51 Turning next to whether the qualifying use of the Land was "*as of right*", there was no suggestion that any of the use was by stealth, such as under cover of darkness or otherwise. Therefore, I find that the use was *nec clam*.

6.52 As to whether it was without force, there was no suggestion that any of the users forced their way onto the Land such as by breaking down fences. On the contrary, for land-based activities, the oral user evidence was consistent that users accessed the Land by walking down the steps from the Promenade to which there was open and unrestricted access until April 2006.

6.53 Nonetheless, in order for use to be *nec vi*, that does not merely require the use to be without physical force being used. Instead, it seems to me that if use is contentious in that it is carried out despite

[87] At OB1 tab 7 page 648.

the landowner's protest, such use would be *vi* and thus not "as of right". In that regard, I note the observations of Lord Rodger in the ***Lewis*** case in which he stated, albeit *obiter*, that:-
"*If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him…In short, as Gale on Easements 18th ed, (2008), para 4-84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.*"[88]

6.54 However, there does not seem to me to have been any such contentious use of the Land during the relevant 20 year period. None of the witnesses were informed at any time that they were not entitled to use the Land. Further, in relation to the use of the Land for lawful sports and pastimes, namely the land-based recreational activities, there is no evidence that such use was contrary to any signs or notices during the relevant 20 year period. Therefore, I find that the use was also *nec vi*.

6.55 Turning then to whether the qualifying use was *nec precario*, it was firstly contended by the Objector that the use was pursuant to an express permission by virtue of the Agreement dated 3rd May 1928 ("the 1928 Agreement") between the Southern Railway Company and the Newhaven Urban District Council. The Objector's detailed submissions on that issue and the Applicant's response are contained in the Additional Submissions submitted by both Parties after the close of the Inquiry which I have read in detail and taken into account.

6.56 Having read those submissions and considered the 1928 Agreement, together with the three other related agreements made on the same date, my findings are as follows. The 1928 Agreement created a highway maintainable at the public expense between points A and C on the plan attached to the Agreement, namely along Fort Road ending to the north of the Hope Inn. No other public rights of way were created by that Agreement. The Agreement was expressed as concerning "*rights of access to the beach and the use of the foreshore*". However, it did not specifically identify "*the beach*" or "*the foreshore*" being referred to. It appears relatively clear, and both Parties agree, that the reference to "*the foreshore*" was a reference to the eastern side of the harbour where the Agreement provided for the construction of huts, stalls and lavatories. Yet, the identification of "*the beach*" being referred to is less clear, namely whether it was the sandy beach that is the subject of the Application, the shingle beach further west or the beach on the eastern side of the Ouse.

6.57 After reading all four agreements made on that same date, it seems to me that the most likely interpretation of the 1928 Agreement is that its references to rights of access being provided to "*the beach*" were references to the beach on the eastern side of the harbour. I note that Point C where the right of way extended to is in fact the embarkation point for a ferry across to the eastern side of the harbour. Another of the four agreements then goes on to create a permissive footpath from the eastern end of that ferry crossing to the beach on that eastern side. Therefore, it is my view that the right of way created by the 1928 Agreement between points A and C was not created for the particular purpose of providing access to the Beach which is the subject of the Application.

6.58 In those circumstances, I find that the 1928 Agreement did not confer express permission to local inhabitants to use the Land for lawful sports and pastimes. It was not created for the purpose of enabling access to the Land; it did not connect with that Land; and it made no reference to the use of the Land. Although I acknowledge that the right of way was subsequently used to gain access to the Land, and indeed to the stony beach to the west of the Breakwater, that is not a basis on which I am able to find that any express permission was thereby given to use the Land for lawful sports and pastimes.

6.59 Secondly, it is necessary to consider whether the use of the Land was pursuant to an implied permission and thereby not "as of right". In that regard, I shall consider the effect of the Byelaws and whether their existence resulted in the use being pursuant to an implied permission to use the Land. In doing so, I note at the outset that I shall also go on to consider subsequently the effect of the existence of

[88] [2010] UKSC 11 at paragraphs 89-90.

the Byelaws in the context of whether the use was "as of right" but aside from whether they amounted to an implied permission.

6.60 In terms of implied permission, it was made clear in ***Beresford*** that an implied permission could arise where a landowner's conduct was such that it made it clear to inhabitants that the use of his land was pursuant to his permission. However, permission cannot be implied from the mere inaction of the landowner with knowledge of the use to which his land was being put. Instead, the landowner has to do something positive to make the public aware that their use of his land is by his licence so that they ought to know that the land is being used by them only with his permission and not as of right. Conduct amounting to positive encouragement to use the land is not in itself sufficient to amount to an implied permission. Instead, examples given in that case of circumstances where an implied consent may well arise on the facts included where the landowner made a charge for entry to the land or where the owner occasionally closed the land to the general public or where appropriate signs were erected. Each of those examples would amount to an overt act communicating to the public that their use of the land was subject to the landowner's permission and was not as of right.

6.61 Hence, Lord Bingham stated at paragraph 5 that:-
"*A landowner may so conduct himself **as to make clear**, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and **so makes plain** that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.*" (My emphasis).
Lord Rodger stated at paragraph 59:-
"*The grant of such a licence to those using the ground **must have comprised a positive act by the owners**, as opposed to their mere acquiescence in the use being made of the land.*" (My emphasis).
Lord Walker said at paragraph 75 that there must be:-
"*a **communication by some overt act** which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass.*" (My emphasis).
He further stated at paragraph 83:-
"*In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) **overt conduct** of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and **demonstrate** that their access to the land, when they do have access, depends on the landowner's permission.*" (My emphasis).

6.62 Therefore, applying that legal position to the existence of the Byelaws, it seems to me that in order for the use of the Land to have thereby been pursuant to an implied permission, some overt act must have been communicated to inhabitants to demonstrate to them that their use of the Land was pursuant to such permission. That could have arisen, for example, by means of appropriate notices and/or by the active enforcement of the Byelaws in relation to the Land.

6.63 In terms of notices, the two byelaw notices shown in the Objector's photographs 11 and 12 were in situ during the Site Visit along the promenade near to the steps. The one at photograph 11 which remains legible sets out Byelaw 68. They serve to indicate that the harbour, including the Land, is regulated by such Byelaws. However, none of the witnesses who gave evidence on behalf of the Applicant saw those notices in situ during the relevant 20 year period. That evidence is supported by the photographic evidence contained in both the Risk Assessment and the Condition Assessment commissioned by the Objector and dated August 2006 and November 2007 respectively in which those two signs are not shown to be in place at either of those times. Further, although Mr Collins-Williams had stated in his written statement that the notice shown in photograph 11 was put up around 2004/2005, Captain Jean indicated in his oral evidence that it was then put up in a different position, namely on the western side of the River where people were swimming and crossing the River which was particularly

dangerous. He accepted that the notices shown in photographs 11 and 12 had not been put up in their current positions as of 2007 when the Condition Assessment was undertaken.

6.64 Given such consistent evidence, it seems to me that neither of the Byelaw notices were in situ near to the steps leading down to the Land during any part of the relevant 20 year period.

6.65 The position is similar in relation to the sign currently at the Car Park entrance shown on the Objector's photograph 4.[89] Although it refers to the Byelaws, none of the users recall having seen it during the relevant 20 year period and Captain Jean was unaware when it was put up. Therefore, I am unable to find that it was in place at any time during that period.

6.66 As to the prohibition signs shown in the Objector's photograph 13, the evidence was similar. The only witness called on behalf of the Applicant who recalled having seen them was Mrs Thomas, but she was unaware when they were put up. The photographs in the 2007 Condition Assessment do not show those signs in place in 2007. Further, Captain Jean acknowledged that they were not in place at that particular time. The only sign he indicated appeared to be in place in 2007 was that shown in the photograph at page 66 of the Condition Assessment.[90] However, given the angle of that photograph, although there appears to be a sign in place at that location, no details of its wording or nature can be seen. I acknowledge that it is in the location of one set of the prohibition signs that are currently in situ, but given that none of the Applicant's witnesses recall having seen it during the relevant 20 year period, that none of its details can be seen on the photograph, and that no evidence was given on behalf of the Objector as to when it was put up, I am unable to find on the balance of probabilities that that sign was a prohibition sign that was in place at some point during the relevant 20 year period.

6.67 Instead, the only sign that witnesses on behalf of the Applicant recall having seen was the one relating to the wash from the ferry shown in Mrs McIntosh's photograph from 1973.[91] However, that was merely a warning sign and not a sign indicating that the landowner was regulating the Land or was in any other way granting implied permission to use the Land. Further, that sign appears from the evidence of Mrs McIntosh to have disappeared prior to the start of the relevant 20 year period in April 1986 in any event.

6.68 Therefore, from all the evidence, I find on the balance of probabilities that there were no signs in place during the relevant 20 year period that would have indicated to users of the Land that their use was regulated by Byelaws or otherwise by the Landowner.

6.69 As to active enforcement of the Byelaws, there was no evidence that such had occurred in relation to the use of the Land during the relevant 20 year period. Indeed, Captain Jean was unaware whether there had been any enforcement of the prohibition of swimming on the Land and there was no other evidence on behalf of the Objector that any such enforcement of the Byelaws had taken place.

6.70 Moreover, there was no other suggestion of any other overt act on the part of the Landowner to demonstrate that he was granting an implied permission for local inhabitants to use the Land. Consequently, applying the law as set out in ***Beresford***, it is my view that the mere existence of the Byelaws which governed the Land without any indication of that fact being communicated to users at any time during the relevant 20 year period was insufficient to result in the use being carried out with implied permission and I so find.

6.71 Finally in relation to implied permission, I note the references in the evidence to the Car Park having been closed on a few specific occasions during the relevant 20 year period in relation to a beach rave party, a car rally and to preclude access by travellers. However, such incidents involved the closure of the Car Park rather than access to the Land, and the various users who gave evidence indicated that

[89] OB6 tab 4 page222.
[90] At OB5 tab 11 page 66.
[91] At AB5 tab 5.

their access to the Land would not have been prevented by such measures in any event. Therefore, I do not find that any of such actions by the Landowner would have been capable of amounting to a demonstration that local inhabitants had implied permission to use the Land.

6.72 Aside from implied permission, the Objector further contended that the mere existence of the Byelaws resulted in the use of the Land being regulated and such use was consequently not "as of right" on that basis. As Mr Petchey succinctly put it in his Closing Submissions at paragraph 13, "*regulation of a use is inimical to that use being as of right*".

6.73 In that regard, I acknowledge that regulation of land is capable in principle of preventing the use of land from being "as of right" as use "as of right" is, by definition, unregulated. Nonetheless, it seems to me that the mere existence of the 1931 Byelaws is insufficient in itself in this case to preclude the use from being "as of right" for two particular reasons.

6.74 Firstly, although I accept that regulation of the use of land is inconsistent with the use being "as of right", it is my view that on the basis of the evidence, the use of the Land was not regulated as a matter of fact at any time during the relevant 20 year period. For a use to be regulated, it seems to me that it must be actively controlled in some way, such as by the erection of appropriate signs or notices or by active enforcement. In contrast, the mere making of byelaws nearly 80 years ago without any notice being erected informing the public of their existence or any active enforcement of those byelaws or any other indication being given to the public that those byelaws existed does not appear to me to amount to a regulation of the use of land to which they related. On the contrary, it seems to me that the use of the Land was not in fact being regulated. Although it was capable of regulation given the making of the Byelaws, no such regulation of the use in fact took place during the relevant 20 year period.

6.75 Secondly, and even if I am incorrect in relation to the first ground, it is my view that on the basis of the law as it stands, the regulation of the Land could only preclude the use from being "as of right" if it resulted in the use being not either *nec vi nec clam* or *nec precario*, or if it resulted in the use being "of right" or "by right" rather than "as of right". I am not aware of any authority, and none was referred to during the Inquiry, to justify the addition of another separate basis on which a use is not "as of right". Indeed, such an approach would seem to be contrary to the recent decision of the Supreme Court in ***Lewis*** in which Lord Walker stated at paragraph 20:-
"*The proposition that "as of right" is sufficiently described by the tripartite test nec vi, nec clam, nec precario (not by force, nor stealth, nor the licence of the owner) is established by high authority.*"

6.76 In relation to the use being *nec vi nec clam* or *nec precario*, I have considered those elements above. In particular, it seems to me that if the use of land is regulated, then that is indeed a basis in appropriate cases for finding that such use is pursuant to an implied permission. Indeed, that was the way in which regulation was referred to in the ***Beresford*** case itself, specifically by Lord Rodger who concluded at paragraph 68 that:-
"*in the absence of any act on the owners' part to regulate the activities on the land or otherwise to show that the inhabitants were disporting themselves only by the owners' revocable leave or licence, it is proper to infer that the owners had acquiesced in the inhabitants' use of the land as of right.*"
Hence, regulation of the activities on the Land would have been sufficient to preclude the use being "as of right" if such regulation was of such a nature that it showed to the local inhabitants that their use of the Land was subject to the owner's revocable licence. However, in the absence of such an overt act communicating that fact to users, I am unable to find that the use of the Land was other than *nec precario*.

6.77 As to whether the use was "of right" or "by right", there was no such contention made in this case. The Land was not held under any form of statutory trust nor on any other basis which would give the public an existing right to use the Land and no such suggestion was advanced.

6.78 In that regard, I note that specific reliance was placed by the Objector on the observations of Lord Scott in ***Beresford*** at paragraph 30 when he stated that:-

"*It is, I think, accepted that if the respondent council acquired the Sports Arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965.*"
However, the reference to that use being subject to regulation by the council and not being a use "as of right" must be read in the context of the previous sentence which referred to the land in question having been acquired under the Open Spaces Act 1906 and thereby being held under a trust by virtue of Section 10. In contrast, there was no such trust in existence in relation to the Land.

6.79 It does not seem to me that Lord Scott's observations can be interpreted as meaning that any land that is subject to extant byelaws, irrespective of when they were made, whether they have been published, whether they have been enforced and whether the public have any indication that they exist, is not capable of being used "as of right" merely because those byelaws have been made at some point in the past. Lord Scott limited his observations to the context of a regulated use where land was subject to a statutory trust or was otherwise similarly held. He did not go on to indicate that regulation in itself merely to the extent that byelaws existed would be sufficient to prevent use being "as of right" nor did any other of the Law Lords do so. On the contrary, Lord Rodger went on to refer to regulation in the specific context of implied permission which I have addressed above.

6.80 Therefore, for all the above reasons, it is my view that the qualifying use was "as of right" and I so find.

Cessation of Use and Making of Application within 5 Years
6.81 There is no dispute that the use of the Land ceased in April 2006 when access to the steps was initially fenced off. Hence, I find that it is established that the qualifying use ceased prior to 6th April 2007.

6.82 Further, the Application was received by the Registration Authority on 18th December 2008 and so the Application was clearly made within 5 years of the cessation of the use and I so find.

6.83 In relation to that element of Section 15(4), the Objector raised the issue as to the compatibility of the Commons Act 2006 with the Human Rights Act 1998.[92] As the Land would not have been registrable under the Commons Registration Act 1965 in relation to an application made after it had been fenced, the effect of Section 15(4) was to make the Land then potentially registrable once the Commons Act 2006 came into force on 6th April 2007. It was contended that such retrospective operation of the 2006 Act is contrary to the 1998 Act.

6.84 No further argument was advanced by the Objector in support of that contention. Assuming that the concern relates to a contravention of Article 1 of the First Protocol to the European Convention, I acknowledge that the effect of the retrospective application of the 2006 Act would prima facie engage the right of a landowner to the peaceful enjoyment of his possessions and would be in contravention of that right. However, I assume that in passing the 2006 Act, Parliament took the view that such conflict was in the public interest and I have no reason to take a different view.

Public Access to the Land
6.85 A further issue raised by the Objection relates to the lack of any public access to the Land. The starting point in that regard is the current Definitive Map which identifies a public footpath along the Promenade, namely Footpath 16. The Definitive Statement specifies that the Footpath is some 0.35 miles long and runs from Fort Road to the Beach west of the Breakwater. It gives no further indication as to its specific route nor its width. Moreover, in contrast to the 1953 earlier version of the Definitive Map which marked Footpath 16 as extending across almost the full width of the Promenade, albeit with what appears to be a gap between its southern edge and the harbour wall, the current Definitive Map shows the route along the northern part of the Promenade with no indication as to its width.

[92] At paragraph 10 of the Objector's Skeleton Argument.

6.86 By virtue of Section 56(1)(a) of the Wildlife and Countryside Act 1981, the Definitive Map is conclusive evidence that there was at the relevant date a public right of way on foot along the route of Footpath 16. On the current Definitive Map, the line of Footpath 16 is shown along the back of the Promenade with a material gap between its southern edge and the harbour wall. Unfortunately, the Definitive Statement does not indicate its width. No justifiable explanation has been able to be identified as to the reason for the 1953 version of the Definitive Map showing Footpath 16 across most of the width of the Promenade and the current version not doing so. Nonetheless, my interpretation of the current Definitive Map is that it shows Footpath 16 as passing along the back of the Promenade only and leading to the shingle beach to the west of the Breakwater. It follows that it does not appear to identify a definitive right of way to the steps leading down to the Land.

6.87 The 1928 Agreement between the Southern Railway Company and Newhaven Urban District Council created a highway maintainable at the public expense along Fort Road to a point to the north of the Hope Inn. Nonetheless, it did not create any public right of way leading to the steps on the Promenade or to any other point of access to the Land.

6.88 Therefore, it seems to me that there is not currently a definitive public right of way leading to the Land and I so find.

6.89 The question then arising concerns the implications of that finding to the registration or otherwise of the Land. It is contended by the Applicant that irrespective of the lack of any definitive right of way, it may be that a public right of way has nonetheless been created pursuant to implied dedication at common law or by virtue of the presumption in Section 31 of the Highways Act 1980 which would enable a successful application to be made to modify the Definitive Map accordingly. The Objector on the other hand contends that such an application would be likely to fail given, inter alia, the apparent lack of intention by the landowner to dedicate such a right of way. However, neither I nor the Registration Authority have the power to determine any such application, nor am I able to reach any form of definitive view as to its prospects of success in the absence of consideration of all the evidence of relevance to its determination and I do not do so.

6.90 In those circumstances, I must consider the Application on the basis that there is currently no definitive public right of way to the Land. The effect of that is that unless and until such a public right of access is established, access to the Land could be prevented even it was registered as a town or village green. However, that does not seem to me to be a reason to reject the Application. Registration of the Land should occur if all the relevant statutory criteria are met. The requirement for a public means of access to the Land is not one of those criteria. It would be inappropriate for me to imply a further requirement into the statutory criteria and I do not do so. Therefore, although such circumstances could result in practical difficulties in the exercise of rights over the Land if it was registered, they are not, in my view, a justifiable basis on which to reject the Application.

6.91 In any event, given my findings that local inhabitants have in fact used the Land for lawful sports and pastimes over the relevant 20 year period, and given that the only means of access to the Beach itself was via the steps on the Promenade, there may well be grounds for an application to modify the Definitive Map to be made. Having said that, I acknowledge that such an application may well be successfully resisted by the Objector. For completeness, I also note in passing that there are powers available to a local authority in Section 26 of the Highways Act 1980 to compulsorily make an Order creating a public footpath in appropriate cases. However, irrespective of such matters, I do not find that the current lack of a definitive public means of access to the Land is a ground to reject the Application.

7. CONCLUSIONS AND RECOMMENDATION

7.1 My overall conclusions are therefore as follows:-

7.1.1 That the Application Land comprises land that is capable of registration as a town or village green in principle;

7.1.2 That the relevant 20 year period is April 1986 until April 2006;

7.1.3 That the Application Land has as a matter of fact been used for some lawful sports and pastimes throughout that 20 year period, but that swimming, fishing and other water-based activities must be discounted from that qualifying use;
7.1.4 That the use of the Application Land for lawful sports and pastimes has taken place throughout the relevant 20 year period to a sufficient extent and continuity;
7.1.5 That the administrative area of Newhaven town council is a locality;
7.1.6 That the Land has been used throughout the relevant 20 year period for lawful sports and pastimes by a significant number of the inhabitants of Newhaven;
7.1.7 That the use of the Land throughout the relevant 20 year period for lawful sports and pastimes has been as of right;
7.1.8 That such use ceased in April 2006 and accordingly ceased prior to 6th April 2007;
7.1.9 That the Application was made within 5 years of the cessation of such use; and
7.1.10 That the lack of a definitive right of public access to the Land is not a ground on which registration should be refused.

7.2 In view of those conclusions, it is my recommendation that the Registration Authority should accede to the Application and should add the Application Land to its register of town and village greens. The grounds for the registration should be that the statutory criteria contained in Section 15(4) of the Commons Act 2006 have been established in relation to the Application Land, namely a significant number of the inhabitants of the locality of the Parish of Newhaven have indulged as of right in lawful sports and pastimes on the Application Land for a period of at least 20 years, they ceased to do so before 6th April 2007, and the Application was made within 5 years from that cessation.

8. ACKNOWLEDGEMENTS

8.1 Finally, I would like to thank the Applicant and the Objector for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear, succinct and frank manner. I would further like to express my gratitude to the representatives from the Registration Authority for their administrative assistance prior to and during the Inquiry.

8.2 I am sure that the Registration Authority will ensure that both Parties are provided with a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

RUTH A. STOCKLEY

06 October 2010

Kings Chambers
36 Young Street Manchester M3 3FT and

5 Park Square East Leeds LS1 2NE

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WEST BEACH, NEWHAVEN AS A TOWN OR VILLAGE GREEN

REPRESENTATIONS BY NPP ON THE INSPECTOR'S REPORT DATED 6 OCTOBER 2010

1. Introduction

1.1. The Inspector recommends in her Report the registration of land which is completely covered by water for 42% of the time. This means, of course, that it is only completely available for use by local people for a very limited time. This makes its registration very odd. It is odder still when it is recalled that the Inspector discounts swimming as a lawful sport and pastime which "counts" towards registration (because, in this particular case, it is contrary to the byelaws).

1.2. And the oddity is not reduced when one reflects that if this tidal beach is registrable as a town or village green, so will many, if not, most beaches around the coast of England and Wales.

1.3. Thus the owner of beach is bound to surprised if it be registered. *Why*, he can ask, *if beaches be registrable, were not all beaches registered in 1965 after the Commons Registration Act 1965 was passed*? The answer of course is that no one imagined that they were registrable.[1]

1.4. The Inspector acknowledges *an instinctive unease at the lack of resemblance between a beach and a traditional village green*. However she meets the point by relying on considered *obiter dicta* of Lord Hoffmann in the Trap Grounds case, where what was being considered was land which was extensively overgrown and to which access was therefore limited.

1.5. If it be necessary, NPP do not shy away from saying that registration of a tidal beach is a complete nonsense, and goes well beyond anything Parliament could have intended. It is submitted that on close examination Lord Hoffmann's eight reasons for upholding the registration of the Trap Grounds were less than wholly convincing and that, in this regard, the dissenting speech of Lord Scott is much to be preferred.

1.6. However it is not necessary to go so far.

2. Tidal beach not registrable

2.1. The Inspector failed to engage adequately with two linked issues which distinguish it from other unlikely situations where registration of a town or village green has been sought.

2.2. First, the land that is used by local people has no fixed boundary.

2.3. Second, the fact that the tide goes in and out affects the use of the land in such a way that it is not possible to say that **the land** (as opposed to parts of it) has been used throughout the relevant 20 year period.

[1] The identification of cases where such registration went ahead on the basis of the absence of objection does not meet this point. Evidently there was no widespread registration of beaches following the enactment of the 1965 Act. Note that the land at Praa in Cornwall was above high water mark (Applicant's Bundle 4, Divider 15).

2.4. As regards the first point, it is possible for an applicant to draw a line on a map which may not physically exist on the ground and seek to justify an application by reference to it. This may give rise to issues, but it is essentially a matter of proof.[2] This is not the objection here.

2.5. Nor is the objection the low water mark actually varies from day to day, and that only occasionally does actual low water and mean low water coincide. Insofar as there is a point here it could be addressed by taking the highest low water mark as the line.

2.6. The objection is that the reality "on the ground" is that, necessarily, the area of land that is being used by local people varies with the tide. The area of land being used is constantly changing. In reality, the land that is being actually used and to which the application must have reference does not have a fixed boundary. Land which cannot be defined by reference to a fixed boundary is not properly registrable.

2.7. The second point, looks at the matter from the other point of view. It says, *Ok, we'll take as a reference point the boundary shown on application map. How is the land enclosed by that land used by local people?*

2.8. What of course the observer sees is no use for 42% of the time. And then, if we start with high tide, what we see is that gradually the tide goes out, and the entirety of the site becomes exposed for use. And as this happens the use by local people will gradually extend over the whole of the site until, for a very short time, the whole of the site is available for use. Then the tide comes in, and gradually the part of the site that is available gets less and less. This process happens twice a day.

2.9. There is evidently an argument that the outer edges of the site will not have been used by a significant number of local people. But this is again not the point. What one is seeing in the constantly fluctuating use of the site is a quality of use which has no parallel in any other putative village green scenario. A reasonable landowner looking down on this idiosyncratic use of his land would not reasonably suppose that a right was being asserted in respect of the entirety of the site – which is not being used at all for 42% of the time and, as to the remainder, for decreasing periods of time (from 42% > 0%) and never – for more than a very short time – in respect of the same piece of land.[3]

3. Regulation of the land by byelaws

Introduction

3.1. It was, and is, NPP's case that the fact that the application site was regulated by byelaws means that use of it was not as of right. The Inspector rejected that argument (see paragraphs 6.73 to 6.80 of her Report).

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[2] One issue might be if the application only related to one field of two, where it was evident by reference to notices that use of one field was not *as of right*. It might not be possible to argue on the facts that use of the other field was *as of right.*

[3] Note that in considering the reasonable landowner, one must have regard to the interaction between use by local people and the landowners' own use. In the present case there has been use by the landowner as illustrated by Section 5 of Mr Streeter's *Statement.* There would have been nothing to alert the reasonable landowner from these situations that rights were being asserted.

3.2. NPP make further submissions on this point below (see paragraphs 5.1 to 5.6 below).

3.3. However the Inspector evidently envisaged that the byelaws might be relevant to the issue of whether use was as of right. She took the view that if NPP had displayed appropriate notices which drew to the attention of users of the application site that its use was subject to byelaws, then use would not have been as of right. This would be because NPP would be making it clear that the use by local people was regulated by the landowner, and thus permissive (see paragraph 6.62 of her Report).

3.4. Thus, in her view, the existence of signs about the byelaws having reference to the application site becomes critical to the whole application. Quite simply, if there were such signs, the land would not be registrable. Unfortunately, her approach to this critical matter was flawed.

4. The existence of signs about the byelaws having reference to the application site

4.1. It is accepted that it falls to NPP to show the existence of such signs.

4.2. What NPP were able to do is to show by means of a photograph the existence of a sign which was in place in 2007: the sign shown in the Condition Assessment photograph in Bundle 5 at p66.

4.3. It is obvious that this sign is one that said (by reference to two "pictograms")

No fishing diving or swimming Warning Deep water.

4.4. This is because such a sign is there at the moment and there is no suggestion that such a sign was put up **after** 2007, replacing some earlier sign, the wording of which we do not know. Thus the fact that *none of its details can be seen on the photograph* is no a significant matter.

4.5. The fact however that such a sign was in place in 2007 does not necessarily mean that it was in place on or before 6 April 2006.

4.6. The fact that local people don't remember it is a matter of no weight, because they had such limited recollection of signs generally, and of the *No fishing diving or swimming Warning Deep water signs* in particular.

4.7. 2006 is only a very short time before 2007. There is no evidence that the *No fishing diving or swimming Warning Deep water* signs (and the one in Bundle 5 at p66 in particular) were put up between April 2006 and 2007. The fact that *no evidence was given on behalf of the Objector as to when it was put up* does not tell against it having been put up before 6 April 2006, but is only a neutral matter. It was a reasonable conclusion on the facts that the *No fishing diving or swimming Warning Deep water signs* were in place on 6 April 2006.

4.8. However, on the face of it, now that the critical importance of the signs has become apparent, it ought to be possible to address the matter directly and for the Registration Authority to be provided with positive evidence that the signs were in place on or before April 2006. Accordingly NPP have been investigating the position further. The difficulty has been in finding anyone who can speak to the position at the critical time: Captain Jean, the current Port Manager, and Mr Collins-Williams, the current Harbour Master both started work for NPP after 2007. Moreover, the Harbour Master at the relevant time has died.

4.9. However, a Statement has been taken from Mr Streeter, which does advance an understanding of the position.

4.10. Mr Streeter dates the *No fishing diving or swimming Warning Deep water signs* from after the date of Mr Savage's accident. However in the light of the fact that it could post date the Health and Safety Report, it may not be possible to conclude from the material currently available that it was put up on or before April 2006.

4.11. It will however be possible to conclude that the WS13 and WS14 byelaw signs were put up on or before 6 April 2006. It is accepted that Mr Streeter cannot be *one hundred per cent certain of this.* However, the Inspector is looking to be satisfied upon the balance of probabilities.

4.12. Note that Mr Streeter's draft witness statement in respect of the Savage action was being prepared in the context of litigation which had nothing to do with the current issue, and where the focus was evidently on whether particular signs pre-dated or post-dated the accident on 6 October 2005. Mr Streeter evidently went through the draft with some care, and picked up the fact that he thought the *No fishing diving or swimming Warning Deep water signs* post dated the accident. He expressed no such reservation about WS13.There is no reason to link WS13 with Mr Savage's accident, and, as Mr Streeter observes, it would be strange to put up a byelaw sign regulating use of the land at a time when access to the application site was being closed off altogether. Captain Jean was thus wrong to accept that WS13 and WS14 were not in their current positions in 2007 when the Condition Assessment was made.

4.13. It is evident from Mr Streeter's Statement that the sign referred to at Paragraph 6.65 of the Inspector's Report has been in place for many years.

5. **Regulation of a use is inimical to that use being as of right**

5.1. Here the Inspector takes a number of points against NPP's succinct point that regulation of a use is inimical to that use being as of right.

5.2. The first point (paragraph 6.74) is that the use has not been regulated by the byelaws. It is accepted that there was no evidence of action being taken by NPP to enforce the byelaws, either by way of prosecution or otherwise. However, this is not a matter of significance, there being no evidence of any breaches which caused concern to NPP.

5.3. But there is a more fundamental objection to the point. The use of the application site was regulated by the byelaws – this flows, as a matter of law, from the fact that the byelaws were validly made. As well as being subject to the general laws of England, every local person who took his or her dog down to the beach was subject to the byelaws. If he had not kept it *under proper and sufficient control* he would have committed an offence under byelaw 71.

5.4. The second point (paragraph 6.75) is that *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* suggests that unless one can bring oneself within the tripartite test of *nec vi nec clam nec precario*, then use will be as of right. If this were literally the position it would mean that use that was *by right* would be *as of right*: but this is what *Beresford* tells us is not the case; and the Inspector here accepts that such use would not be *as of right* (see paragraphs 6.78 and 6.79 of her Report). The Inspector's rebuttal of NPP's point proves to much. NPP say that, as always, broad sounding statements have to be read in context.

5.5. The third point is that the existence of the byelaws was not communicated to local people. As to whether this was a correct conclusion on the facts, see paragraphs 4.1 to 4.12 above. However it is NPP's point that it is the **existence** of the byelaws and not their **communication** that is key.

5.6. If one asks the question of *How did the use appear to the reasonable landowner standing in the shoes of the landowner?* the answer is that it appeared to be a permitted use that he was regulating by byelaws and which could not reasonably be taken to be the assertion of a right to use the land.

6. The 1928 Agreement

6.1. Point C where the right of way extended to is not the embarkation for a ferry across to the eastern side of the harbour which is shown in the 1928 ferry agreement.[4] Nor is this is a mistake: the routes to points B and C in the ferry agreement are clearly marked.

6.2. Moreover, we know that the 1928 agreement was against the background of recent disputes about the access from Fort Road being restricted; and that when the existence and route of a footpath from Fort Road was being considered in the context of the recording of footpaths under the National Parks and Access to the Countryside Act 1949, it was considered a relevant document. No-one was then saying that *the 1928 Agreement is irrelevant because it was providing for access to the eastern beach via a ferry.* Accordingly NPP repeat their post-inquiry submissions in this matter dated 9 August 2010.

7. **No access**

7.1. If there is no public access to a claimed town or village green – ie there is no legal entitlement to get to it – then use by local people of that claimed town or village green is *precarious* and not *as of right.* In the present case there is no public footpath to the land, nor could there be (there being no intention to dedicate, the land being subject to byelaws).

8. **Human rights**

8.1. The argument *simpliciter* that the registration of town and village greens on the basis of 20 years use without payment by the state of compensation is offensive to Article 1 of the First Protocol has force but was rejected by the House of Lords in the *Trap Grounds* case. In the present case it is not necessary to argue so much. The position in the present case is that from April 2006 until 6 April 2007 (ie when section 15 of the Commons Act 2006 came into force) the beach was not registrable as a town or village green because, under the terms of the Commons Registration Act 1965, relevant use could not have continued until the date of the application (access having been physically prevented). With the enactment of section 15, on the face of it, the land did (all other things being equal) become registrable and NPP were retrospectively deprived of a vested defence. Such a deprivation **retrospectively** of a vested defence to a claim is different to **prospectively** providing that after 20 years land may be registered as a town or village green.

8.2. The Inspector says (paragraph 6.84 of her Report) that there is nothing wrong with the retrospective application of the 2006 Act because she **assumes** Parliament took the view that

[4] This appears from an examination of the plans attached to the access and ferry agreements respectively. It might appear at a glance that they are the same, but this is not in fact the case.

the conflict between the rights of those having a vested defence under the First Protocol and the public interest in the preservation of open space was resolved in favour of the public interest.

8.3. It is submitted that the interpreter of legislation cannot assume in this context a result which does not necessarily flow from the terms of the legislation itself. The legislation does not **have** to be read retrospectively. It is submitted that, applying section 3 of the Human Rights Act 1998, it should indeed be read prospectively. Read prospectively, NPP are not deprived of their vested defence. It is submitted that the Inspector/Registration Authority needs to engage with this issue. If she does, it is submitted she will find that she should read section 15 of the Commons Act as having prospective application.[5]

9. **The way forward**

9.1. The Registration Authority will obviously wish to consider these further representations, together with any response which the Town Council may wish to make.

9.2. Of course, for reason which are set out above, NPP consider that the Inspector has erred in her application of the law to the facts that she has found and that, properly directing herself, her recommendation would have been that the application site should not be registered as a town or village green.

9.3. It may be that the Inspector, on further reflection, or the officer of the Registration Authority giving that Authority legal advice, agrees with NPP and decides to recommend that the application site be not registered as a town or village green.

9.4. Alternatively, the Inspector, or the officer giving the Authority legal advice may decide to endorse the view of the law as set out in the Inspector's Report. However this would not mean that the land should be registered as a town or village green. It is NPP's case that the land would not be registrable because the land was subject to byelaws which had been drawn to the attention of local people by way of notices. It is possible that the Town Council will accept this – it is possible that their own independent research will serve to confirm what Mr Streeter says. If what he says is in dispute it will be appropriate for the inquiry to be re-opened. On the view of the law which – in this scenario – the Registration Authority would be accepting, it is critical whether there was publication of the byelaws. There is now material from which the Inspector/Registration Authority can reasonably conclude that there was such publication. If the Registration Authority, for whatever reason, felt not able to make that conclusion "on paper", it is both fair and proportionate that the Inquiry be re-opened.

17 November 2010

[5] NPP reserve their position on the wider issue, but of course it is hard to see circumstances where it would be necessary to argue it: ie if section 3 has operation in the way contended for, if rights are engaged and if no justification is forthcoming.

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WEST BEACH, NEWHAVEN AS A TOWN OR VILLAGE GREEN

RESPONSE ON BEHALF OF THE APPLICANT (NEWHAVEN TOWN COUNCIL) TO THE REPRESENTATIONS BY NPP DATED 17 NOVEMBER 2010 ON THE INSPECTOR'S REPORT OF 6 OCTOBER 2010

The Town Council does not consider that the further representations of 17 November 2010 ("The NPP Representations") made on behalf of NPP raise issues of any particular significance capable of affecting the conclusions and recommendations contained in the Inspector's Report dated 6 October ("the Inspector's Report"). It nevertheless comments briefly upon them as follows, adopting the headings and paragraph numbering of the Representations.

1. Introduction

1.1 - 1.3 These paragraphs add nothing to submissions already made on behalf of NPP at the Inquiry. They were met at the Inquiry by the obvious point that the registration of this unusual beach (unusual because within a harbour wall and located within a tightly-knit community) does not in any sense suggest that all beaches are today registrable. Only those beaches that can meet the requirements of user for a sufficient period of time by the inhabitants of an appropriate neighbourhood or locality are capable of being registered. This will clearly not include the vast majority of 'tourism' beaches around the coast line of England and Wales, nor those with no closely-associated neighbourhood or locality, nor indeed those that are simply not sufficiently used at all (because too small, insufficiently attractive, too remote, or for whatever other reason).

1.4 - 1.6 The Registration Authority is clearly bound by the law as set out by Lord Hoffmann in the *Trap Grounds* case.

2. Tidal beach not registrable

2.2 and 2.4 - 2.6 “The First Point”. The question of the proper boundary of the registrable land was fully considered at the Inquiry. The Inspector is correct to have advised the Registration Authority that land is registrable if it meets the statutory user requirements. She rightly finds that those user requirements (even ignoring the swimming user, as to which the Town Council reserves its position) were satisfied as far as the mean low water mark line. There is no need for any ‘gloss’ to the statutory requirements of the sort for which NPP now contends. Any such gloss would be wholly inconsistent with the approach of the House of Lords in the *Trap Grounds* case.

2.3 and 2.7 - 2.9 “The Second Point”. It is of course the case that the area of any registered village green that is actually in use at any particular time of day varies constantly, but this does not prevent registration. Equally no part of such a green may be in use at all during the hours of darkness, but this does not prevent registration (the pattern of night and daytime use is perhaps the closest analogy to tidal interruption of user and clearly shows that it cannot be fatal to registration – an analogy that was fully explored at the Inquiry). Use of even a conventional village green may be somewhat ‘tidal’ in nature: with use all over at dog-walking times of day (in the early morning and evening); use focused around a café or public house in the early evening; different when a cricket match is being played; distinct patterns of use generally in Summer and Winter, in poor weather and in fine; and so forth. All of this was fully explored at the Inquiry, and none of it prevents registration.

3. Regulation of the land by byelaws: Introduction

3.1 - 3.2 The Inspector was right to conclude that the mere existence of byelaws did not prevent user from being as of right. There is no reason why further submissions should be permitted on this point at this stage. The matter was fully considered at the Inquiry.

3.3 - 3.4 The communication to users of the fact that their use was subject to regulation by byelaw (whether by notices or otherwise) is indeed crucial. NPP was unable to provide evidence to the Inquiry of any such communication (whether by notices

of otherwise); but – and even more significantly – the large body of user evidence before the Inquiry was absolutely consistent to the effect that nobody knew anything about any such byelaws.

4. The existence of signs about the byelaws having reference to the application site

4.1 - 4.10 Again, there is no good reason why NPP should have a further bite at this cherry. They had ample opportunity to adduce relevant evidence at the Inquiry, and the Town Council is most reluctant to countenance the delay and expense that would inevitably result from any reopening of the Inquiry at this stage. The Registration Authority is entitled to determine the matter on the material made available to it by the parties: it is not under any obligation to investigate the matter further.

But in any event it appears to be conceded at paragraph 4.10 of the NPP Representations that it is not possible for the Inspector to conclude that the "*No Fishing diving or swimming Warning Deep Water*" sign (which of course does not refer explicitly to the existence of byelaws in any case) was in existence prior to April 2006 (and it is rightly accepted on behalf of NPP, at paragraph 4.1 that it fall to it to convince the Registration Authority on the balance of probability that there were such signs in existence).

These paragraphs in the NPP Representations clearly cannot affect the Inspector's existing conclusions and recommendations in any way.

4.11 - 4.13 These paragraphs concern the so-called WS13 and WS14 byelaw signs, and the sign referred to at paragraph 6.65 of the Inspector's Report. (It is not entirely clear what is meant by the WS13 and WS14 signs, but the Town Council takes it to be the sign actually labeled WS3 in Mr Streeter's Witness Statement and shown in a photograph at page 13 of Exhibit WS13; and the sign (almost entirely torn away) shown at Exhibit WS14).

The significance of these signs was fully explored at the Inquiry. The new evidence from Mr Streeter adds nothing capable of altering the existing conclusions of the Inspector. It is hedged around with doubts ("I cannot be one hundred per cent certain"; "A number of colleagues think that the sign was put up after the accident and the MBHS risk assessment"; "I cannot be certain of this and have been unable to find any evidence to support this": all taken from the third column in the Witness Statement of Mr Streeter at paragraph 4.1, pages 4-6; and see Mr Streeter's annotation at the time his original Witness Statement was being prepared to the photograph at WS13: "*possibly* 2004/5" [*italics* added for emphasis]). It certainly does not advance the matter beyond the absolutely clear evidence given by users that these signs were not in place until access to the beach was prevented.

Accordingly Captain Jean was not wrong to accept that WS13 and WS14 were not in place when the Condition Assessment was made in 2007; he was right to do so in the face of the overwhelming user evidence and the photographs contained in that Assessment, which did not show the signs (see the Inspector's Report at paragraph 6.63).

As for the sign referred to by the Inspector at paragraph 6.65 (and in the NPP Representations at 4.13) (and by Mr Streeter as WS4) it can have no relevance to regulation by byelaw of use of the beach (it refers only to regulation by byelaw of the pay and display area of the car park). The evidence of users was also that a sign with this exact wording was very recent, and Mr Streeter accepts in his third column on page 6 of his Witness Statement that this sign "has been repainted and replaced". It is overwhelmingly likely (and if necessary the Inspector should so conclude) that wording concerning byelaws has been added to this sign since April 2006 – reflected perhaps by the different and smaller font at the very bottom of the sign evidenced in the photograph at WS4.

Accordingly the evidence of Mr Streeter cannot alter the Inspector's existing conclusions as to signage. (If the Inspector were to feel otherwise, then the Town Council reserves its position as to whether it might be necessary to reopen the Inquiry - which, as the Town

Council has already indicated it is most reluctant to countenance - in order for Mr Streeter to be cross-examined: see further at part 9 below.)

Finally on this point, even if it were possible to conclude that the WS13 existed some few short months before April 2006, the effect would only be to move back the relevant 20 year period accordingly, and the user evidence would remain every bit as convincing in respect of any such marginally earlier period.

5. Regulation of a use is inimical to that use being as of right

5.2 - 5.3 NPP contradicts itself. There *must* have been occasions when dogs were not kept under proper and sufficient control on the beach, and yet no action was ever taken during the relevant 20 years by or on behalf of NPP in respect of use of the beach to enforce byelaw 71 (or any other of the byelaws).

5.4 - 5.5 The Inspector is quite correct that that lack of enforcement (or of any other form of communication of their existence) is fatal to NPP's reliance on the byelaws. Byelaws are capable of rendering user permissive and so *precario* (but not capable of rendering it by right – *Beresford* and by right user is an entirely separate issue); but the *Redcar* case clearly binds the Registration Authority to the proposition that rendering user *precario* requires communication. The Inspector's conclusions and recommendations on this point cannot be faulted.

5.6 The Town Council disagrees. A reasonable landowner would not have thought that user by persons quite unaware of the existence of any byelaws (he having observed the swimming, dog-walking, fishing, diving-in from breakwaters and so forth, and the fact that there were no signs or other steps being taken by him or on his behalf to bring to users' attention the existence of the byelaws) was in fact regulated by such byelaws; he would have realised that it was an assertion of user as of right.

6. The 1928 Agreement

6.1 – 6.2 The Town Council has nothing to add to its earlier written submissions on these documents. The Inspector's conclusions concerning them are clearly correct.

7. No access

7.1 The Town Council has nothing to add to its existing submissions on this point. The Inspector's existing conclusions on the point are clearly correct.

8. Human rights

8.1 – 8.3 The Inspector was right to conclude that Parliament must have determined that the balance between those with a vested defence under the First Protocol and the public interest in the preservation of open space came down in favour of the public interest. It is just not possible to confine the language of section 15(4)(b) and (c) of the 2006 Act to prospective application only, of the sort contended for on behalf of NPP.

9. The way forward

9.1 – 9.4 The Town Council has already indicated its reluctance to see the Inquiry reopened. It is firmly of the opinion that the late evidence now produced on behalf of NPP is incapable of altering the existing findings and recommendations contained in the Inspector's Report (which is to say, even if Mr Streeter's evidence, which has not been subject to cross-examination, is taken at face value it is not of sufficient probative value to alter the Inspector's existing findings on the evidential matters it addresses). Nevertheless, the Town Council inevitably reserves its position as to whether the Inquiry would need to be reopened, should the Inspector feel that there is any greater significance to Mr Streeter's evidence, in order for that evidence to be cross-examined.

Edwin Simpson

Counsel for Newhaven Town Council

1 December 2010

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS WEST BEACH, NEWHAVEN AS A TOWN OR VILLAGE GREEN

ADDENDUM TO REPORT IN RESPONSE TO FURTHER REPRESENTATIONS

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1. INTRODUCTION

1.1 This Addendum to my Report dated 6 October 2010 addresses the representations made upon my Report insofar as they require further observations to be made.

1.2 The Objector made such representations dated 17 November 2010 supported by two witness statements of the same date from Stephen Buhlman, a Consultant employed by the Objector from March 2001 until September 2002, and from Wayne Streeter, an Operations Supervisor employed by the Objector, having worked at the Port continually from 1981 onwards. The Applicant responded to those representations in a response dated 1 December 2010. I have read and considered all those further representations and evidence in support.

1.3 I set out below my additional observations in the light of those further representations.

2. REGISTRATION OF A TIDAL BEACH

2.1 The Objector firstly contends that a tidal beach is not registrable as a town or village green as a matter of principle. That issue was specifically raised at the Inquiry and is identified as such an issue in paragraph 6.5 of my Report. I refer to my findings and conclusion in relation to that issue which are set out in paragraphs 6.6 and 6.7 of my Report and to which I make no changes in the light of the further representations.

2.2 In particular, I emphasise two points in that regard. Firstly, that very issue as to whether the physical characteristics of land could preclude it from being registered as a town or village green was raised before the House of Lords in ***Oxfordshire County Council v. Oxford City Council***.[1] As set out in paragraph 5.10 of my Report, the majority view given by Lord Hoffmann, albeit on an *obiter* basis, was that the physical characteristics of land could not in themselves preclude it from being a village green. The Objector acknowledges that legal position, but invites myself and the Registration Authority to prefer the dissenting view of Lord Scott. For the reasons expressed in my Report, I regard the majority view as highly persuasive authority which I follow and I invite the Registration Authority to do likewise.

2.3 Secondly, I do not accept the view expressed by the Objector that if the Land is registrable, then "*so will many, if not, most beaches*" in England and Wales be similarly registrable.[2] As with any other parcel of land, a beach will only be registrable if all the relevant statutory criteria are established by an applicant on a case

[1] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.
[2] At paragraph 1.2 of the Objector's representations.

by case basis. If all the criteria are met, a beach should be registrable in the same way as any other parcel of land; on the contrary, if the criteria are not all met, it should not be registrable. The findings in my Report are based on the very specific evidence adduced in relation to this Application, both in support and in objection to it, and in relation to any other application involving a beach, it would need to be assessed on its own merits on the basis of the relevant information available. It does not follow that merely because all the criteria are established in relation to this Application, they will equally be found to be established in relation to all or most applications involving a beach. Ultimately, the fundamental question for myself and the Registration Authority in this instance is whether each and every element of the statutory criteria contained in Section 15(4) of the Commons Act 2006 has been established on the basis of all the evidence adduced. I regard it as inappropriate to import any additional elements into the statutory criteria.

2.4 The second point raised by the Objector is that the Land should not be registered as it has no fixed boundary. As the Land comprises a tidal beach, the area of land being used for lawful sports and pastimes is constantly changing and so there is no fixed boundary.[3]

2.5 Again, that submission was raised at the Inquiry as identified in paragraph 6.12 of my Report and my findings and conclusion are set out in paragraphs 6.13 to 6.15 thereof to which I make no changes in the light of the further representations.

2.6 The third related matter raised in relation to the registration of a tidal beach is that the use of the Land is necessarily constantly fluctuating given its tidal nature which is "*a quality of use which has no parallel in any other putative village green scenario*".[4]

2.7 That may be so; nonetheless, the same statutory criteria is to be applied to the Land as a tidal beach as to land with any other particular physical characteristics. Further, the same legal principles must be applied to the Land as a tidal beach as to land with any other particular physical characteristics. Hence, as identified in paragraph 6.40 of my Report, the fundamental consideration in relation to the extent and quality of the use of the Land is whether the use of the Land as a whole was of such a nature and extent that it would show to a landowner that rights were being generally asserted over the entire Land. That is acknowledged by the Objector to be the correct approach. Whether that element is satisfied is then a matter for assessment on the basis of all the evidence. For the reasons given in paragraph 6.40 of my Report, on the basis of all the evidence, I am of the view that such is established and I make no changes to those findings and conclusion.

2.8 It is also worth pointing out that it is not necessary for it to be established that land is used 24 hours a day or even every day for 20 years; nor is it necessary for it to be established that every blade of grass or every square inch of land has been used in order to justify registration. Instead, it is how the use would have appeared to the landowner that is critical and whether the use is of such a nature that the landowner on the spot, or a reasonable landowner in the case of an absentee landowner, would have

[3] See paragraph 2.6 of the Objector's representations.
[4] Paragraph 2.9 of the Objector's representations.

been aware that rights were being asserted over the land generally rather than merely over a smaller part of it. That is the approach I have used in my Report and which the Registration Authority should use. As noted by the Applicant in its response to the Objector's further representations on this issue, the use of land sought to be registered will generally be of a fluctuating nature. Hence, such land will rarely be used during hours of darkness; the recreational use will often be seasonal; and it will often be greater outside working hours and during the weekends. Such fluctuations do not in themselves preclude the registration of land. Similarly, provided the approach set out above is followed, it does not seem to me that the fluctuating nature of the tide, thereby affecting the area of the Land available for use at any particular time, in itself precludes registration.

3. EFFECT OF THE BYELAWS

3.1 In relation to the byelaws, the first issue raised by the Objector in its further representations is that signs drawing attention to users that the Land was subject to the byelaws were in fact in existence during the relevant 20 year period. I noted in my Report that the use of the Land would have been *precario* and thus not as of right if it was subject to regulation and users were made aware that their use was subject to the landowner's permission, such as by the existence of signs indicating that the use of the Land was subject to the byelaws. However, I found on the evidence in paragraph 6.68 of my Report that there were no such signs in place during the relevant 20 year period.

3.2 The Objector acknowledges that the onus of proof is upon itself to establish the existence of such signs.[5] It then goes on to refer to the sign shown in the photograph at page 66 of the 2007 Condition Assessment which was referred to by Captain Jean in his evidence and which is addressed in paragraph 6.66 of my Report. For the reasons given in that paragraph, I concluded that I was unable to find on the balance of probabilities that that sign was a prohibition sign that was in place at some point during the relevant 20 year period.

3.3 As against that, the Objector points out that the lack of evidence given on its behalf as to when the sign went up is only "*a neutral matter*" rather then evidence that it only went up post the end of the relevant 20 year period.[6] That is so but, as acknowledged by the Objector, the burden of proof is upon the Objector and so some material evidence is required to establish that the sign was in place during that period. Moreover, I disagree with the Objector's contention that the evidence of local people that they do not recall any such sign is "*a matter of no weight*" as they had limited recollection of signs generally.[7] Such oral evidence of local people, which was subject to cross examination, is of material weight and relevant to whether any signs were in situ during the relevant period and I have assessed it accordingly.

3.4 As against that evidence, the Objector relies in its further representations upon the fact that as that sign shown in the photograph at page 66 of the Condition Assessment was in place in 2007 and there is no evidence of any sign having been erected during the short period between the end of the 20 year period and 2007, then it can be reasonably inferred that it was in situ prior to April 2006. However, taking all

[5] At paragraph 4.1 of Objector's representations.
[6] At paragraph 4.7 of Objector's representations.
[7] At paragraph 4.6 of Objector's representations.

the evidence into account, including the extent of the oral evidence from the Applicant's witnesses that they had not seen such a sign as well as the other matters referred to in paragraph 6.66 of my Report, it is my view that any such inference is insufficient to establish on the balance of probabilities that that particular sign was in situ during the relevant 20 year period, and I therefore make no changes to my findings and conclusion in paragraph 6.66 of my Report as a result of that issue raised.

3.5 The Objector then refers to additional evidence obtained post the close of the inquiry, particularly that contained in the witness statement of Mr Streeter. In relation to the sign referred to above, it is acknowledged in paragraph 4.10 of the representations that from Mr Streeter's evidence, "*it may not be possible to conclude from the material currently available that it was put up on or before April 2006*". I concur with that view. Indeed, Mr Streeter states at paragraph 4.1 of his statement in relation to Exhibit WS2 and the "no fishing, diving or swimming signs" that "*I think that the signs may have post-dated that report – ie were put up after August* 2006". I therefore again repeat my findings and conclusion in paragraph 6.66 of my Report in relation to that sign which are confirmed by that subsequent evidence of Mr Streeter.

3.6 Nonetheless, it is suggested in the Objector's representations that the two signs displaying the byelaws may have been erected during the relevant 20 year period. These are the two signs referred to in paragraphs 6.63 and 6.64 of my Report, and which Mr Streeter refers to as WS13 and WS14 at pages 4 to 6 of his statement. I note that he states that when he prepared a draft witness statement in relation to an ongoing personal injury claim, he "*believed that a sign like this was erected in 2004-2005*". However, he goes on to note that he "*cannot remember exactly when or the reason why*". Moreover, he indicates that he has discussed the issue with colleagues subsequently and that "*a number of colleagues think that this sign was put up after the accident and the MBHS risk assessment was carried out in 2006*". Although he suggests that it seems strange to him that the signs would be put up at the time fencing was erected to prevent public access, no evidence is provided to support that view.

3.7 It seems to me that the evidence provided by Mr Streeter in relation to the views of his colleagues supports that given by Captain Jean and the Applicant's witnesses and also the photographic evidence in the Risk Assessment and the Condition Assessment as referred to in paragraph 6.63 of my Report. I note his expressed views to the contrary, but they are unsubstantiated by any evidence and are contrary to the above evidence. Therefore, taking all the evidence into account in relation to those signs, including that now provided in Mr Streeter's statement, I remain of the view that, on the balance of probabilities, those signs were not in situ during the relevant 20 year period, and I make no changes to my findings and conclusion in paragraphs 6.63 and 6.64 of my Report.

3.8 The other sign referred to in the Objector's representations is the one at the Car Park entrance referred to at paragraph 6.65 of my Report. Mr Streeter refers to this sign as WS4 at page 6 of his statement and indicates that it has been in place for at least 10 years. However, he acknowledges that it has been repainted, and in my view there remains a lack of any evidence as to when the sign as currently worded, and particularly with the reference to the Byelaws, first existed. Further, and in any event, I noted that sign on my site visit which is located at the entrance to the car park

and specifically refers to the car park. It makes no reference to the beach and no similar sign is located near to the beach itself. I therefore conclude that it only indicates that the car park is regulated by the Byelaws, and not the Land itself, and so it would not have indicated to users of the Land that their use of the Land itself was subject to such regulation.

3.9 Consequently, in relation to the issue of the signs, having taken into account the further representations and evidence submitted, particularly the witness statement of Mr Streeter, I make no changes to my finding at paragraph 6.68 of my Report.

4. REGULATION OF USE

4.1 The Objector then raises the issue addressed in my Report from paragraph 6.72 onwards relating to the regulation of a use precluding such use being "as of right". Three particular matters are identified.

4.2 Firstly, it is accepted by the Objector that there was no evidence of any action being taken by the Objector to enforce the Byelaws, but the reason for that is asserted to be that there was no evidence of any breaches of the Byelaws having occurred. I do not concur with that latter contention. By way of example, the clear and undisputed evidence at the Inquiry as referred to in my Report is that swimming regularly took place on the Land which, as I found in my Report, was contrary to the Byelaws. Yet, such regular breaches of the Byelaws were never enforced. That example relates to a use that I have found is not part of the qualifying use. Nonetheless, had the Objector enforced against such breaches, that would have amounted to conduct on the part of the landowner capable of indicating to users that their use of the Land was pursuant to the Objector's implied permission.

4.3 Related to that first point, the Objector repeats the contention raised at the Inquiry that the mere fact that the use of the Land was subject to the Byelaws which had been validly made, the use was thereby regulated and thus not capable of being "as of right". I repeat my findings and conclusion in relation to that contention in paragraphs 6.72 to 6.80 of my Report to which I make no changes.

4.4 Secondly, the Objector repeats its contention raised at the Inquiry that if a use is *nec vi nec clam nec precario*, it is not automatically "as of right". If that were the position, use that has found to be "of right" could not preclude registration. I addressed that issue in my Report in the above paragraphs which I do not change in that regard either. I emphasise that the Objector's submission that a use which is *nec vi nec clam nec precario* and not "of right" may nonetheless still not be "as of right" goes further than any of the legal authorities, and there is no authority that I have been referred to, nor that I am aware of, to the effect that a use that is subject to valid byelaws but is carried out *nec precario* as I have found is nonetheless not "as of right" merely due to the factual existence of such byelaws.

4.5 Thirdly, the Objector contends that the existence of the Byelaws precludes the use being "as of right" rather than their communication. I again repeat the above paragraphs of my Report in that regard. As to the issue as to how the use would have appeared to the reasonable landowner in relation to the Byelaws raised in paragraph 5.6 of the Objector's representations, I concur with the Applicant's response at paragraph 5.6 that a reasonable landowner would have been aware that the extent of

use being undertaken in breach of the Byelaws of which users were wholly unaware of due to the lack of any signs or enforcement or any other means of being made aware of their existence amounted to an assertion of a right to use the Land.

4.6 Consequently, I make no changes to my Report in relation to that issue.

5. 1928 AGREEMENT / PUBLIC ACCESS / HUMAN RIGHTS

5.1 I have addressed the issues raised in the further representations in relation to these matters in my Report to which I have no further observations to make.

6. THE WAY FORWARD

6.1 Turning to the way forward, I agree with the Objector's paragraph 9.1 of its further representations that the Registration Authority ought to take into account all those further representations, the further evidence submitted and the Applicant's response in reaching its decision upon this Application.

6.2 I have done so, and those additional matters do not cause me to make any changes to any of the findings or conclusions in my Report. I therefore repeat my conclusions in paragraph 7.1 of my Report and my overall recommendation in paragraph 7.2.

6.3 Finally, it is my view that the Inquiry should not be re-opened in the light of the further evidence that has been submitted. For the reasons set out above, Mr Streeter's evidence does not affect any of my findings in relation to the publication of the Byelaws nor any other issue. Even if his evidence was given the full weight that would be attributed to it had it been given orally and been made subject to cross examination, my overall findings would not be materially affected for the reasons given above. In those circumstances, it would not be proportionate nor necessary to re-open the Inquiry.

RUTH A. STOCKLEY

14 December 2010

Kings Chambers
36 Young Street Manchester M3 3FT and

5 Park Square East Leeds LS1 2NE