ISLE OF ANGLESEY COUNTY COUNCIL	
COMMITTEE	PLANNING AND ORDERS
DATE	1st March, 2017
TITLE OF REPORT	An application to register land as a Town or Village Green (TVG) at Newry Beach and Greens, Holyhead (Application reference GTP/TVG01/2014)
PURPOSE OF REPORT	For the Council, acting as Registration Authority, to determine application reference GTP/TVG01/2014
REPORT BY	Head of Function (Council Business) and Monitoring Officer
ACTION	To determine the TVG application reference GTP/TVG01/2014

1 INTRODUCTION

1.1 The Isle of Anglesey County Council (the Council) is the Registration Authority for its area for the purposes of the Commons Act 2006 (the Act). The Registration Authority is responsible for determining applications to register land as new town or village green (TVG) under the Act. Under the Constitution, full Council has allocated the responsibility to determine TVG applications to the Planning and Orders Committee – paragraph 3.4.3.16.

1.2 In June 2014 the Registration Authority received an application (dated April 2014) on behalf of the Waterfront Action Group to register land as a TVG at Newry Beach and Greens, Holyhead. That application was registered and given reference GTP/TVG01/2014 (the Application) and then duly given the required statutory publicity. Observations and objections were received including objections from Stena Line Ports Limited (Stena) and Conygar Stena Line Limited (CSL). There followed a lengthy period when further submissions were made by the Applicant and Stena and CSL as principal objectors.

1.3 As the of law of TVG is specialised and complicated, officers of the Registration Authority took advice from Mr Jeremy Pike a barrister with expertise in the subject. On 31 March 2016 Mr Pike provided written advice to the Registration Authority on the Application, the objections made to it and the further submissions received. This advice was published in full by the Registration Authority on the Council's website in May 2016 and the advice remains available online. Mr Pike advised, amongst other things, that the Registration Authority should not determine the Application until evidence and argument had been heard on certain matters as detailed in his advice. In accepting this advice, officers of the Registration Authority instructed Mr Pike to act as Inspector at a non-statutory public inquiry into the Application and then to prepare a report with a recommendation as to how the Registration Authority should determine the Application. The Registration Authority informed the principal parties accordingly.

1.4 A publicised pre-inquiry meeting was held on 30 June 2016 to which all principal parties were invited. Thereafter a public inquiry was held at Holyhead Town Hall between 3 and 7 October 2016 at which the Applicant and the principal Objectors were legally represented and at which both evidence was heard and arguments made on the Application. Mr Pike has now delivered his Report and this is attached in full. The Report has also been published on the Council's website as part of the Agenda papers for this meeting. The Applicant, Stena and CSL (the latter two through their lawyers) received a copy of the Report on 15 February.

1.5 The Report is substantial and comprehensive and deals at length with the evidence heard and the arguments made at the Inquiry and also the issues engaged by the Application. Mr Pike summarises his conclusions at page 72 and then makes a clear recommendation to the Registration Authority that the Application be rejected.

1.6 Please note that no Welsh language translation of the Inspector's Report will be prepared. This follows the practice publicised on the publication of Mr Pike's advice in May 2016. All the parties to this matter have chosen to use English, the Pre-Inquiry Meeting and the Inquiry were conducted through English (although translation facilities were available). The Report is the personal work of the Inspector and has been written in his language of choice. This is a complicated and technical area of law all of which exists in English and the Report quotes at length from English-only sources. The only person who can verify an accurate translation of the Report into Welsh is the Inspector and that cannot be done. Finally, of course, the Committee is sitting in a quasi-administrative capacity and the chosen language of the parties involved is English.

2 RECOMMENDATION

2.1 Having considered the comprehensive Report prepared by Mr Pike, Officers of the Registration authority recommend that Application reference GTP/TVG/01/2014 to register land at Newry Beach and Greens, Holyhead as town or village green should be rejected by the Committee acting on behalf of the Council as Registration Authority, and for the reasons stated by Mr Pike.

Appendix – Report dated 14 February 2016 of Mr Jeremy Pike, barrister, acting as Inspector at an Inquiry into an Application to register land at Newry Beach and Green, Holyhead as a Town or Village Green.

SECTION 15 OF THE COMMONS ACT 2006

ISLE OF ANGLESEY COUNTY COUNCIL

APPLICATION TO REGISTER LAND AT NEWRY BEACH AND GREEN, HOLYHEAD, ANGLESEY AS A TOWN OR VILLAGE GREEN

REPORT

to the Isle of Anglesey County Council

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SECTION 15 OF THE COMMONS ACT 2006

ISLE OF ANGLESEY COUNTY COUNCIL

APPLICATION TO REGISTER LAND AT NEWRY BEACH AND GREEN, HOLYHEAD, ANGLESEY AS A TOWN OR VILLAGE GREEN

REPORT

to the Isle of Anglesey County Council

INTRODUCTION

1. I am instructed to write a report and make a recommendation to the Isle of Anglesey County Council ("the Council"), as to whether the Council should accept or reject an application to register land at Newry Beach and Green, Holyhead ("the Land") as a town or village green, under section 15 of the Commons Act 2006. In a written Advice dated 31 March 2016 ("the 2016 Advice") I advised the Council as to whether the Application made a prima facie case for registration of the Land as a green.

2. An application was first made to the Council on 5 February 2014, by Mrs K E Balfour on behalf of the 'Waterfront Action Group' ("the Applicant"). In correspondence the Council pointed out to the Applicant that the application was not in order. Subsequently Mrs Balfour submitted a revised application form with certain matters corrected. The revised Application, dated 22 April 2014 and stamped as received by the Council on 6 June 2014, is hereafter referred to as "the Application".

3. The Application was advertised by the Council in the usual way, and objections to the Application were received from Stena Line Ports Ltd ("Stena") and Conygar Stena Line Ltd ("CSL"). Representations in relation to the Application were also received from the Association for Gaff Rig Sailing, Holyhead Maritime Museum, Ramblers Cymru (North Wales

Area), and Holyhead Town Council. Further representations were subsequently received from the Applicant, and from Stena and CSL. A schedule of the various documents and representations received by the Council before I provided the 2016 Advice is appended to that Advice.

4. In the 2016 Advice I advised the Council as to whether the Application made a prima facie case for registration. My advice was that it did not, but the Council decided that it would not determine the Application until a public inquiry had been held to consider evidence presented by the Applicant and the Objector. I was therefore instructed to hold a public inquiry, and provide a Report and a Recommendation to the Council in light of the evidence and arguments presented at the public inquiry.

5. I held a public inquiry between 3 and 7 October 2016, at Holyhead Town Hall, Newry Street, Holyhead. The Applicant was represented by Ms Constanze Bell, Counsel; the Objectors were represented by Mr Douglas Edwards, Queen's Counsel.

6. I am grateful to Ms Bell and Mr Edwards for their clear and helpful submissions.

7. The Land subject to the Application, which is shown on the plan at 'Exhibit C(ii)' included with the Application, comprises an area of beach in the north west of the town of Holyhead called Newry Beach, together with a promenade, and several grassed areas adjacent to the promenade. The approximate southern boundary of the land is formed by the boundaries of gardens of numerous residential properties on (in particular) Tan-y-Bryn Road and St David's Road. The Land is bounded on its western side by the Holyhead Marina Limited boatyard, and on its eastern side by the Holyhead boat yard. The northern boundary of the land is, according to the Application, the mean low tide mark.

8. The grassed areas within the Land are divided from each other by various public roads, including Beach Road and Prince of Wales Road. Those two roads are adopted highways. They have been excluded from the Land which is the subject of the Application.

9. The freehold reversion of the Land is owned by Stena. CSL has a 999 year lease of the Land, which began on 3 December 2007, but that lease is in turn subject to a further lease of the Land to the Council. The Council's lease, granted to the Council's predecessor in title by Stena's predecessor in title, is for a term of 99 years from 25 December 1926.

10. It is common ground that for the whole of the relevant qualifying period the entirety of the land which is the subject of the TVG application was in the possession of the Council pursuant to a lease of 26 September 1927, entered into between the Minister of Transport and Holyhead UDC, save in respect of the slipway located to the south-west of the Sailing Club, which is located within the claimed Land but is outside the leasehold interest of the Council (shown on the plan at page B121). It is also common ground that the Council is successor in title to the UDC, and that Stena Line Ports Limited is successor to the Minister of Transport.

11. The Application is made on the basis that section 15(2) of the Commons Act 2006 ("the 2006 Act") applies.

12. Section 15 of the 2006 Act provides, so far as material:

"(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)….. 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."

13. Section 61(1) provides that in the 2006 Act:

"..."land" includes land covered by water".

14. It is said by the Applicant that a significant number of inhabitants of the electoral ward of Porth y Felin ("the Locality") have used the Land for lawful sports and pastimes for at least 20 years, as of right, and that such use was continuing on the date the Application was made. The relevant period is 20 years running back from the date of the Application, namely 5 February 1994 to 5 February 2014 ("the Relevant Period").

15. The matters raised in the Objectors' objections, and the Applicant's initial responses to the objections, are summarised in the 2016 Advice, and I do not repeat them here.

16. There are four main issues which must be considered, in light of the evidence and submissions made by the parties. They are, in summary:

(i) whether there was use of the Land for lawful sports and pastimes by a significant number of inhabitants of the Locality throughout the Relevant Period, and without any interruption to that use;

(ii) whether use of the Land by local inhabitants was 'as of right' or not, in light of the fact that the Council made the Land available for public recreation and maintained it accordingly; and also in circumstances whereby there were certain signs situated on the Land, and whereby the Council gave permission for various public events to take place on the Land from time to time;

(iii) the effect, if any, of Byelaws made by the First Objector affecting land in its ownership; and also the fact that the First Objector had granted a lease of the Land to the Council for the latter to make the Land available for public recreation; and

(iv) whether the doctrine of 'statutory incompatibility' applied to some or all of the Land, meaning that some or all of the Land could not be registered as a town or village green.

EVIDENCE

The Applicant's Evidence

17. I have been provided with four bundles of evidence, containing some 125 evidence forms completed by residents of the Porth y Felin Locality. I have taken all of that evidence into account. I also heard oral evidence from 31 witnesses. Of those, all except five had lived within the Locality for all, or some, of the Relevant Period. Necessarily, I must give greater weight to the evidence of those witnesses who attended the public inquiry and could be asked questions about their evidence, than to the evidence which was in written form only. The evidence of those witnesses who attended the public inquiry is summarised below.

Terry Looker

(Statement App p2333)

18. Professor Looker lives within the Locality. He moved to his present address in 2009 and did not know the Land before that time. He and his wife were at the forefront of preparing the Application, for the Waterfront Action Group ("the WAG"), although neither were named on the original application form (which was later corrected and resubmitted to the Registration Authority).

19. He drafted the evidence form template which was used by many Application supporters and witnesses (including the evidence form he himself completed at App p2336). When giving evidence he raised an issue concerning the numbers of people who had completed evidence forms and who lived within the Locality: the Applicant considered the number of such people was 125 (and a shopkeeper whose shop was within the Locality but who did not live in the Locality), whereas the Objectors had the number at 116. This matter was later resolved by discussion between the parties, who agreed that the number was 125. Prof. Looker told me that approximately 7.5% of those on the electoral register within the electoral ward had completed evidence forms. Of those who were provided with the evidence forms, only 5 people did not complete and return them.

20. Professor Looker referred to a new Note he had written, at App p2332, which was an analysis of responses to the evidence forms in the Applicant's Bundle.

21. There was some debate as to question 22e of the evidence form, and the manner in which it had been phrased, and the potential for uncertainty or ambiguity in the answers which could be given. Ultimately I do not consider that anything in my recommendation to the Council on that matter.

22. Professor Looker accepted in cross examination that, as far as evidence form question 22 was concerned, one could not discern the number of users, where in the locality they came from, or whether those persons had filled out evidence forms themselves, or the frequency of their visits to the Land.

23. Professor Looker agreed that the sign/notice shown in the picture on Obj Vol B p689, at the top of the slipway at the north western edge of the Land, adjacent to the Sailing Club, had been in place since at least 2009. He agreed that there was a chain at the top of the slipway but he had never seen it fixed across the slipway to prevent access.

24. Concerning the fenced enclosure adjacent to the Yacht Club (photographs at Obj Vol A p149-151; photo map at p122), he agreed that the enclosure had been in place since at least 2009 and that there could not have been access by the public to that area once the enclosure was in place. As to the area to the north of the yacht club, surfaced with hardstanding, that had been used for car parking and storing dinghies since at least 2009, although Prof Looker said he had seen people in that area sitting in or on cars and watching sailing in the harbour.

25. Professor Looker agreed that since the Sunken Garden area on the Land had been renewed in 2011 the signs at the perimeter of that area (Obj Vol B p692) were likely to have been in place. He agreed that the area for car parking – surfaced with concrete cubes – at the west end of the Land by the access road to the Yacht Club, had been used for parking since at least 2009 and that recreational use of that area would have been limited.

26. Professor Looker accepted on behalf of the Applicant that for periods of time during the Relevant Period the Land had been used for a circus, fairs and festivals, and that permission was sought for those events from the Council, and permission was given. He did not accept, however, that the Council had the power to grant permission or require that it be requested. The Circus was an annual event, sited on Green 3, and people would have to pay to enter the Big Top. The Fair was shown in photographs at bundle Vol A p 169 and

onwards. Fencing could be seen in the photographs but Professor Looker considered that the fencing was to prevent people from straying onto the public road. The perimeter of the fair, sited on Green 2, was not fenced in its entirety. People would go in and then pay to enjoy particular rides. The Festival took place annually and was sited mainly on Greens 2 and 3

27. I found Professor Looker to be a generally fair, and truthful, witness.

Olga Looker

(Statement App p2303)

28. Dr Looker is married to Prof Looker. She explained to me the survey exercise which was described at Bundle p2312a, and undertaken by Dr Looker and her teenage step-daughter.

29. Dr Looker referred to the groynes on the beach, their state of repair, and said they appeared to have been neglected and not maintained as per the terms of the Council's lease. She expressed the view that the state of the beach was a safety hazard. From what I have seen of the foreshore and beach following several visits, I was not entirely sure why Dr Looker was of that view.

30. She gave evidence concerning the circus, and the festival, which was consistent with Prof Looker's evidence. She said that one had to pay to enter the circus, and also a couple of the events in the festival such as evening concerts. The festival and fun fair were very well attended, in her recollection. By reference to the plan at Obj Bundle A p 14 Dr Looker told me that the circus would be held on 'green no.1', whereas the fair would be located on 'green no.2'.

31. Dr Looker accepted in cross examination that she was not aware of any action against the Council by the Objectors or their predecessors concerning breach of the lease and the maintenance (or lack of) of groynes on the beach. WAG had not made any complaint to the Council about the state of the beach.

32. I found Dr Looker to be a fair, and truthful, witness.

Beryl Jackson

(Statement App p2177)

33. Mrs Jackson lived within the Locality. She said that people who lived locally and went on to the Land tended to know the other people that they saw on the Land, but also that people from Holyhead but outside the Locality would go on to the Land.

34. She said that in a typical month in 2014 she would be on the land daily, and would see up to 10 people wandering on the land, approximately half of which would be known to her as residents of the Locality. Her daughter had used the Land when living with her in approximately 1997-1999.

35. In cross examination she accepted that of those people she saw on the Land daily she knew some of their names but could not say which had completed evidence forms. Ms Judith Pritchard, who also gave evidence, was her next door neighbour. She also remembered seeing a gentleman called Howard on the Land; he lived in Newry Street in Holyhead, outside the Locality.

36. I found her to be a fair, and truthful, witness

<u>Kate (Kathryn) Balfour</u>
(Statement App p2081)

37. Mrs Balfour was the Treasurer of WAG and had submitted the Application when first made to the Council. She said she had used the Land extensively over the years. Her son had lived with her until 2000, and then again from 2012-2016. He also used the Land at those times. She considered that the majority of her neighbours used the Land, and she knew this because she saw them walking past her house.

38. In cross-examination she was asked about her answer to question 22e in the evidence form, whereby she had written that she "did not know" whether other people she had seen recreating on the Land were residents of the Locality; this conflicted with an answer she had given in evidence in chief, whereby she said that she had seen people recreating on the Land whom she knew to be residents of the Locality.

39. In response to these questions she maintained that she had not lied and had not meant to mislead; although she accepted she had made an error in her answers on that issue, and explained that the error lay in what she had written in the evidence form. She could not explain why she had written what she did in the evidence form.

40. I found her to be a fair witness. I did not consider that Mrs Balfour had failed to tell me the truth, although I was perplexed by the difference between her answer in evidence in chief, and the answer she had originally given to question 22e in the evidence form.

David E Jones

(Statement App p2195)

41. Mr Jones was a resident of the locality, but only since 2006. He had used the harbour since childhood; he had sailed, kept a boat, and swum in the water. The 'harbour', as he regarded it, was between the breakwater to the west and the long jetty to the east – he referred to the photograph at Obj Vol A p140. He did not consider that Newry Beach was part of the operational harbour. He had never regarded the greens (within the Land) as part of the harbour.

42. He said he had used the Land with his immediate family, being his wife Marion, and elderly mother Gwinifer Jones of Gwelfor Avenue. When on the Land he had seen Kate Balfour and her children Jamie and Alex. He also gave other names of people he had seen on the Land; some were also giving evidence at the public inquiry, and others were not. As far as the latter category is concerned I note that Mr Jones said he had seen them but in the absence of direct evidence from those people I can give his evidence relatively little weight in relation to that matter.

43. Mr Jones was a member of the Sailing Club. In his recollection the fenced 'compound' adjacent to the Sailing Club had existed for approximately 10 years. The area had previously been used to store boats that were for sale. The fencing had been erected to deter theft of small dinghies and kayaks; it was usually locked. The appearance of that area now was generally the same as it had been for the previous 10 years; before the compound was fenced, the boats were more spread out, over a wider area. He said that members of the Sailing Club had erected the fence. It had been a controversial issue at the time. He did not

know whether the Council's permission had been sought. The Sailing Club kept keys for the compound. He did not know if people had to pay to keep boats there.

44. I found Mr Jones to be a fair and truthful witness.

Cadi Evanson

(Statement App p2139)

45. Mrs Evanson had lived in the Locality for 30 years, with her late husband and 2 children. Her children had moved out in 2008 and 2011 respectively. Her daughter Sara lives in the Locality at Upper Part Street. Ms Evanson goes to the Land with her daughter and granddaughter.

46. Other members of her family – her nephews Arthur Jones and Stephen Jones and their families – live within the Locality at Porth y Felin road and use the Land. Her niece also lives with her family within the Locality on Queen's Park, and they use the Land. She had seen these members of her family walking on the Land but she could not say how often.

47. Mrs Evanson referred by name to one or two other people, who she had seen using the Land.

48. I found Mrs Evanson to be a fair and truthful witness.

Alexander Balfour

(Statement App p2045)

49. Mr Balfour, who lives within the Locality, is the husband of Mrs Katherine Balfour. He clarified his evidence form, saying that he had used the Land on average 6 times per week rather than every day.

50. He had seen his immediate family and neighbours on the Land; he referred to Mr and Mrs Jones, and Mr and Mrs Stewart. He would usually see Beryl Jackson when he was on the Land. He gained access to the Land over the cinder path which runs along the southern boundary of the Land. His usual route for walking ran over the Land for a relatively short stretch; he would then go off to the west on various paths or tracks.

51. I found Mr Balfour to be a fair and truthful witness.

Judy Williams

(Statement App p2597)

52. Mrs Williams did not live in the Locality but her shop was within it. She had the shop since 1999. She would go on to the Land to walk and meet other people. She referred to her children and to step children using the Land, but they had not been residents of the locality. She said she had seen lots of people passing her shop travelling in the general direction of the Land.

53. I found Mrs Williams to be a fair and truthful witness.

Sian Tracey

(Statement App p2559)

54. Mrs Tracey (who had not completed an evidence form) had lived at three different addresses within the Locality, for the whole of the Relevant Period. She lived with her husband, 2 children, and 3 foster children; the children had lived with her for most of the Relevant Period. She described using the Land for rockpooling, crabbing, swimming, kayaking, jumping off the pier, picnicking and football. She would walk on the Land twice a day, every day, and would see lots of familiar faces there. She recited a long list of people who were said to live within the Locality, and who used the Land, but they were not people who were giving evidence at the public inquiry.

55. I found Mrs Tracey to be a fair and truthful witness.

Judith Pritchard

(Statement App p2445)

56. Mrs Pritchard had lived within the Locality for the whole of the Relevant Period. Her son and daughter had moved away from the family home in 2000, but her daughter had moved back in to the Locality, with her partner and 2 children, in 2008. They used the beach regularly.

57. Mrs Pritchard used the Land every day to walk her dogs; she had always had dogs. She would now take her grandchildren (aged 4 and 5 years) to the Land weekly, or more often if possible. She would see Beryl Jackson on the Land, and also referred to 4 or 5 other people who were not giving evidence at the public inquiry. She knew that her next door neighbours used the Land, and she saw other people from the Locality on the Land but did not know their names. She also saw people on the Land who had come by car from further away.

58. I found Mrs Pritchard to be a fair and truthful witness.

Paul Richards

(Statement App p2481)

59. Mr Richards had lived at Seaborne Road, with his wife Doreen, within the Locality for 5 years. Otherwise he had not lived in the Locality within the Relevant Period. He did not give any particular evidence of use of the Land in the previous 5 years, although he did talk about his use of and his knowledge of the Land from the 1950s to the 1970s.

60. I found Mr Richards to be a fair and truthful witness.

Mrs Joyce Stalman

(Statement App p2537)

61. Mrs Stalman (who had not completed an evidence form) lived outside the Locality. She had particular knowledge of the Holyhead Festival, which took place on the Land, because she had been involved in its organisation. She told me that 95% of the Festival was free to enter. For the last 15 years the festival had taken place over 3 days but before that it lasted 4 days. There were various events within the festival; there would be concerts in a marquee for two nights, for which an admission fee was charged. Mrs Stalman confirmed that the 2 marquees and other structures (tents and so forth) for the festival would be set up on a Thursday, would be used from Friday to Sunday, and then taken down on the Monday. The Festival always obtained the Council's permission to use the Land.

62. Mrs Stalman also told me about the funfair. It would arrive and be present for a whole week, coinciding with the Festival weekend.

63. I found Mrs Stalman to be a fair and truthful witness.

John Parry

(Statement App p2427)

64. Mr Parry, a resident of the Locality, gave relatively brief evidence. He said that he had been on the Land between 1994 and 2014 – he did not explain how often – and had seen other people from the Locality on the Land. He had a dog, which he would walk on the Land, until approximately 2006.

65. I found Mr Parry to be a fair and truthful witness.

Colin Chessell

(Statement App p2119)

66. Mr Chessell (who had not completed an evidence form) had lived in Station Street for 28 years, outside the Locality.

67. He had been closely involved in the organisation of the Festival, having held the office of Treasurer, and various other roles. His evidence as to the nature of the Festival was consistent with that of Mrs Stalman.

68. I found Mr Chessell to be a fair and truthful witness.

Clive Alder

(Statement App p2043)

69. Reverend Alder (who had not completed an evidence form) lived on Newry Street, within the Locality. He had lived there for approximately 9 years. As to his own use of the Land, he was a runner and his weekly route (on a Saturday morning) would include the Promenade within the Land.

70. He said that he was aware of people passing his house, and church, on the way to the Land. He was also aware of local schoolchildren using the Land, he said, but could not be precise as to who they were.

71. I found Rev. Alder to be a fair and truthful witness.

Carys Griffith

(Statement App p2159)

72. Mrs Griffith had lived on Min y Mor Road within the Locality for 30 years. Her children had moved out of that address by 1994. Her husband lives with her, and now her granddaughter also lives there.

73. She had seen other residents of the Porth y Felin area on the Land, and she mentioned three by name. She would walk her dog at least once a day and she saw other dog walkers.

74. I found Mrs Griffith to be a fair and truthful witness.

Janet Roberts

75. Mrs Roberts (who had not completed an evidence form) had not lived within the Locality during the Relevant Period.

76. Mrs Roberts recalled the state of the Land before the Relevant Period. There had been a swimming/paddling pool near to where the kayaking/canoeing kiosk is now situated. There had been a second sunken garden but it was filled in during the 1960s. Along the promenade nearest to the sea there had been white posts with coloured lights.

77. I found Mrs Roberts to be a fair and truthful witness.

William Jones

(Statement App p2267)

78. Mr Jones had lived in the Locality for nearly 50 years. He and his wife Linda, and their son, would go on to the land during the Relevant Period. Their use would be weekly, but in more recent years their frequency of use has declined.

79. He recalled that the circus would be sited on greens 1&2.

80. I found Mr Jones to be a fair and truthful witness.

James Balfour

(Statement App p2063)

81. Mr Balfour (who had not completed an evidence form) is the son of Kathryn and Alexander Balfour. He had lived in the Locality until 1997 and then again after 2010. He and his friend Liza Williams would use the Land regularly before 1997, for walking, playing and sailing. After 2010 they would also use it to walk, with Ms Williams' children. He referred to other friends whom he had seen on the Land regularly before 1997, although none of them gave evidence at the public inquiry.

82. I found Mr Balfour to be a fair and truthful witness.

Karl Jones

(Statement App p2213)

83. Mr Jones (who had not completed an evidence form) had lived at 81 Newry Street, within the Locality, from time to time during the Relevant Period. That was his parents' address and he would come home to stay when he was a student, and also when he was living or working abroad, or elsewhere in the UK.

84. Other members of his extended family lived within the Locality and he remembered family and community activities and gatherings on the Land.

85. I found Mr Jones to be a fair and truthful witness.

Craig Stalman

(Statement App p2519)

86. Mr Stalman had lived in the Locality for the last 7 years. He ran every day if possible, and his routes generally included parts of the Land. He remembered family events on the Land such as games of rounders. Other people from the Locality also took part on these occasions.

87. I found Mr Stalman to be a fair and truthful witness.

Edwin Owens

(Statement App p2385)

88. Mr Owens lived on Seiriol's Close, within the Locality, for 18 of the 20 years of the Relevant Period. He would use the Land approximately twice a week. His children had lived in the Locality for approximately 7 years, and they themselves had children. He would go onto the Land with his grandchildren a couple of times a week, in the school holidays. As a young man he had worked for the local authority, and recalled doing work to maintain the groynes. He considered that they had deteriorated in the intervening years.

89. Mr Owens was a keen local historian and provided me with some very interesting historical information as to the formation of the breakwater at the western end of the harbour, as well as the Land itself.

90. I found Mr Owens to be a fair and truthful witness.

Nesta Owens

(Statement App p2407)

91. Mrs Owens is married to Edwin Owens. They had lived in the Locality since 1998. She recalled seeing her friend Mrs Nichols of Lower Park Street (within the Locality) on the Land some three times a week. They would walk on the Promenade and have a coffee and a chat.

92. I found Mrs Owens to be a fair and truthful witness.

Kay Jones

(Statement App p2231)

93. Ms Jones is Karl Jones' mother. She had lived at 21 Newry Street within the Locality for 26 years. During the Relevant Period she would go on to the Land as often as she could; daily, or at least several times a week. She would see families and friends from the Porth y Felin area when she was on the Land.

94. I found Mrs Jones to be a fair and truthful witness.

Jan Rutkowski

(Statement App p2499)

95. Mr Rutkowski had lived within the Locality, on Beach Road, since 1952. He had always kept dogs and walked them frequently, sometimes 4 days a week depending on work. During the Relevant Period he would be walking on the Land on most days. He identified 5 other people that he would see on the Land; none of them were giving evidence at the public inquiry.

96. I found Mr Rutkowski to be a fair and truthful witness.

James Lacey

(Statement App p2285)

97. He and his wife Ann used to go on to the Land on average once or twice a week. He has 4 children and the youngest left home in 1997, and would have used the Land before 1997. He referred to 7 or 8 other people from the Porth y Felin Locality that he would see on the Land, but again they were not people who gave evidence at the public inquiry.

98. I found Mr Lacey to be a fair and truthful witness.

Marilyn Walsh

(Statement App p2577)

99. Mrs Walsh had lived with her husband within the Locality, on Porthyfelin Road, for 28 years. Her mother and sister had also lived within the Locality although her sister had now moved

away. Her daughter Sarah Carrington lives within the locality with her husband and 2 teenage children.

100. Mrs Walsh would mostly go to the Land on her own. During the Relevant Period she would go regularly, sometimes with her daughter. They would walk on the Land on a Saturday or Sunday afternoon. She would also take her grandchildren to the beach at summer weekends when they were younger.

101. I found Mrs Walsh to be a fair and truthful witness.

Michael Milligan

102. Mr Milligan (who had not completed an evidence form) lives in Trearddur Bay. He formerly lived in Holyhead, although not within the Locality. He had been educated in Holyhead in the late 1940s and early 1950s and knew the Land well. His family went on to the Land and there was a family business adjacent to the Land. He described the use that he and other children and families would make of the various features on and near the Land, such as the promenade, the Mackenzie Pier and so on. He also provided me with some further historical information about this part of Holyhead and some of the more notable buildings which could be seen in the area.

103. Mr Milligan was a frequent visitor to the Porth y Felin Locality in 2007 because he had an interest in a residential property on Tan y Bryn Road.

104. I found Mr Milligan to be a fair and truthful witness.

Shaun Redmond

(Statement App p2461)

105. Mr Redmond (who had not completed an evidence form) gave some evidence as to his knowledge of the Land, but he had not been a resident of the Locality within the Relevant Period.

106. I found Mr Redmond to be a fair and truthful witness.

107. Mr Redmond had earlier raised an allegation that some members of the public had been discouraged from attending the public inquiry by Council employees who told them that it was necessary to obtain in advance a ticket or a place at the public inquiry, and that no such tickets or places were now available. This information had been provided to Mr Redmond, he told me, by people in a public house. I was given no more specific information than that. The matter was not raised again by Mr Redmond or by anyone else who attended the public inquiry.

108. I made enquiries of those who instructed me at the Council, and they were not aware of any Council employees being instructed to do that which Mr Redmond alleged had been done. There was no other evidence to support Mr Redmond's allegation. I must confess that to me it sounded rather improbable. A number of members of the public, including those who gave evidence, attended the public inquiry. It was not said to me that there were any other people who wished to attend, and possibly also speak, but who had been unable to do so for one reason or another. The Applicant did not raise any such concern.

109. Ultimately, Mr Redmond did not raise the matter again with me and I was not asked to do anything in the light of that which he had alleged. Accordingly I did not take the matter any further.

Cllr Llewellyn Jones

110. Cllr Llewellyn Jones (who had not completed an evidence form) gave evidence concerning the history of the Land and the wider Harbour. He referred to a petition, in his possession, from thousands of Holyhead residents who said they had used the Land, but I reminded him that I could only consider evidence of Porth y Felin residents' use. He also referred me to the published Conservation Area Appraisal for Holyhead, which included a photograph of the Land, showing numerous people on it.

111. Cllr Llewellyn Jones had lived on Tan y Bryn Road within the Locality for 40 years, and he said he had seen all of his family, friends and neighbours on the Land in that time. He named several of them, but again it did not seem to me that they were people who

were giving evidence at the public inquiry, or if they had, I had already received that evidence.

112. I found Cllr Llewellyn Jones to be a fair and truthful witness.

Philip Tracey

(Statement App p2541)

113. Mr Tracey (who had not completed an evidence form) is married to Sian Tracey. He told of his own use of the Land, either going with his children or foster children a couple of times each week in the Relevant Period, or going on his own on a daily basis. For 13 years the family kept a dog and he shared dog walking duties.

114. I found Mr Tracey to be a fair and truthful witness.

Other written representations

115. In addition to the written material contained within the Applicant's bundle (4 volumes), I received written representations during the course of the public inquiry from Mrs Pauline Chessell, Mr Shaun Redmond (whose oral evidence is summarised above), Mr Ian Keymer, and Mrs J L Williams. I have also taken those representations into account.

The Objectors' Evidence

116. I was provided with 4 files of evidence by the Objectors (Volume A, Volume B in two parts, and Volume C), much of it documentary and photographic evidence relevant to matters raised in the objections.

117. Originally the Objector intended to call 2 witnesses, but the Applicant helpfully indicated that they did not wish to ask any questions of Mr David Jones of AXIS PED, the First Objector's planning/development consultant. I also had no questions for him. He was not therefore called to give oral evidence.

Captain Wyn Parry

(Obj Vol A p141)

118. Captain Parry was the Captain of the Port, employed by the First Objector Stena. He is a Master Mariner and Registered Harbour Master.

119. He gave evidence as to the 'Fun Days' which had taken place on the Land. These events included a number of organised activities and races which occurred occasionally or on a one-off basis, including an 'Extreme' running race known as the 'Ring of Fire' which would pass through the Land; the 'Tour de Mon' cycle race which started and finished on the Land; the Old Gaffers Boat Festival.

120. There was also the annual Sailing Club Regatta. This involved amongst other things a marquee sited on the car parking area to the north of the Sailing Club building. The road to the south of the Sailing Club would be closed for the event. There would be a temporary car parking area on the grass to the south of the Sailing Club building. There was evidence, at Obj Vol B p460, of permission being granted by the Council to the Sailing Club for this use. Captain Parry considered that the Regatta had been held for a number of years, going back to 2000/2001, and before that time, but he could not be more precise.

121. His evidence also referred to other instances of the Council giving permission for certain events on the Land, such as a Girl Guides' pet show (Obj Vol B p475); and a Celtic Goodwill Raid (Obj Vol B p510) – to my great regret no one was able to explain to me what this event involved, and so I can only speculate.

122. Captain Parry referred to several signs on the Land, which were shown in photographs: signs at the Sailing Club slipway (Obj Vol B p688-689) which he understood had been in place for 5 or 6 years; the signs at the Sunken Garden (Obj Vol B p692) which had been in place since 2011 he believed; and the notice relating to a wreck in the harbour (Obj Vol B p693); the warning concerning the bow wave generated by the now discontinued HSS ferry service (Obj Vol B p693).

123. The area to the west of the Land, south of the Sailing Club building, which was surfaced with concrete cubes and used as a car park, had been so for at least 10 years, he believed.

124. Captain Parry explained the function of the groynes on the beach, which were there to assist in retention of the material which formed the beach. He said that in his time at the harbour there had never been an instance of a commercial vessel beaching on the foreshore when in trouble. He had never inspected the groynes, although it was within his expertise to do so. He accepted that the groynes had deteriorated over time. He was not aware of any complaints as to their condition. They were, he said, a low priority for the Harbour and the First Objector Stena because the beach is not required for the operation of the Harbour.

125. Captain Parry confirmed that there had not been any operational use of the Land by the First Objector Stena since 1994, the beginning of the Relevant Period.

126. He was aware of the Byelaws but was not aware of any occasion when they had been enforced in relation to the Land, although the Byelaws covered a wider area and they had been enforced elsewhere in the Harbour.

127. Captain Parry's evidence referred to a 'public place designation order' (Obj Vol B p690) which came into force on 1 February 2005, and which prohibited the drinking of alcohol in public. That order applied to a wider area of Holyhead which included the Land

128. He was aware of a local tradition of jumping off the Mackenzie Pier. His employers did not support that activity. He had not seen people jumping off the groyne opposite the sailing club building, but he did not say that it did not happen. There was a fee for use of the slipway to launch or pull up boats but he did not know if everyone paid that fee.

129. It was put to Captain Parry that he had judged the Festival Princess competition some 25 years ago, but he could not remember. He said he had not been involved in the Festival organisation.

130. I found Captain Parry to be a fair and truthful witness

Sailing Club Lease

131. I was provided with information concerning the Sailing Club lease, by the Objectors. A lease was granted by the Council to the Sailing Club on 2 January 1957, I was told. However as far as the car parking area and the enclosed boat storage compound are

concerned, there was no formal agreement in place between the Council and the Sailing Club.

Location of signs

132. Objector Plan B (Obj Vol A) was agreed between the parties as accurate, concerning the location of signs on the Land. Captain Parry gave evidence as to those signs and I myself saw them on the Land.

Other matters arising from the evidence

133. The Applicant and the Objectors were, helpfully, able to agree the limits of the claimed Locality the electoral ward of Porth y Felin (on the "Agreed Locality Plan" dated 7 October 2016), and the number of those people (125) who had completed evidence forms and who lived within that Locality.

Areas of the Land which cannot have been subject to significant use throughout the Relevant Period

134. The area occupied by the Sailing Club building is not within the claimed Land. However the fenced boat storage compound adjacent to the Sailing Club, and the car parking area to the north of the Sailing Club building (see the areas hatched in red and orange on Objector Plan A, in Obj Vol A) are within the Land, and they could not have been used for lawful sports and pastimes at a 'significant' level for the whole of the Relevant Period. Ultimately that was accepted by the Applicant, who applied to amend the Application accordingly. I deal with that amendment below.

135. Similarly the car parking area at the west end of the Land (the area annotated as "car park" within the Land, on Objector Plan A, in Obj Vol A, immediately below the words "Trinity Marine") seems unlikely to have been subject to continuous recreational use because it would have had cars parked upon it, and no witness suggested that it had been subject to continuous recreational use for the whole of the Relevant Period. I do not therefore consider that it would fall to be registered in any event.

136. As I discuss below, the Sailing Club slipway (shown on Objector Plan A, in Obj Vol A, being a rectangular strip of land at the north-westernmost part of the Land, west of the green boundary line) could not have been subject to qualifying use for the whole of the Relevant period. This is because, first, there was a prohibitory sign at the slipway which meant that use by the public could not have been 'as of right'; and second that I did not hear evidence of significant use of the slipway for lawful sports and pastimes unconnected with the Sailing Club.

Amendment of the Application Land

137. On the fourth day of the public inquiry (6 October 2016) the Applicant asked me to consider whether the Application should be amended, so as to exclude from the Land the areas hatched in red, and orange, on 'Objector Plan A' (Obj Vol A). This was because, on the evidence, those areas could not have been subject to qualifying use and so would not fall to be registered as village green. The Objector did not resist such an amendment.

138. On 7 October 2016 I informed the parties that I saw no reason not to accept the proposed amendment to the Application, and would advise the Registration Authority accordingly.

ISSUES

139. The 2016 Advice proceeded on the basis that four principal issues were raised by the Application and the Objections to it:

i. Did the manner in which the Council held and maintained the Land mean that public use of the land could not be 'as of right'?

ii. Did the fact that the Council had permitted third parties to hold occasional events on parts of the Land, or otherwise to use parts of the Land, and also the presence of certain signs on the Land, mean that public use of some or all the Land could not be 'as of right'?

iii. Did the Holyhead Harbour Byelaws which came into force on 4 August 1971 ('the Byelaws') mean that any sports and pastimes indulged on the Land were not 'lawful'; or alternatively that any sports and pastimes which were lawful were carried out with express or implied permission and therefore were not 'as of right'?

iv. Would registration of some or all of the Land as a town or village green be incompatible with the future exercise of the statutory powers which were conferred on Stena, with the consequence that the Land was not land to which section 15 of the Commons Act 2006 could apply?

140. In addition, the Objectors also contend that (fifthly) the Applicant had failed to demonstrate that there was significant use of the Land by inhabitants of the claimed Locality for the whole of the relevant 20 year period; and (sixthly) that there were events or uses which caused an interruption to any such significant use (had it occurred) with the result that there was not continuous qualifying use for the whole of the 20 year period.

141. I have reordered these six matters, resulting in the four issues summarised at paragraph 16 above. This Report now considers those four issues in that order. I deal first with the question of significant user, because if the Applicant fails to demonstrate that matter in relation to some or all of the Land, then the Application cannot succeed.

ISSUE (I) was there use of the Land for lawful sports and pastimes by a significant number of inhabitants of the Locality throughout the Relevant Period, and without any interruption to that use?

142. The particular passage in the judgment of Sullivan J (as he then was) in *R v Staffordshire County Council ex parte McAlpine Homes Ltd* [2002] EWHC 76 (Admin); [2002] 2 P.L.R. 1, concerning the meaning of "significant number", is very well known but worth repeating:

"71...the inspector approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, **whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression**. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that **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**. "

143. The emboldened words suggest that the threshold of 'significance' is relatively low rather than high.

The Applicant's Submissions

144. The Applicant submits that the evidence demonstrates in robust terms that there was a significant number of users from the Porth Y Felin area recreating on the claimed land. All the evidence questionnaires were signed with a statement of truth. The inquiry saw, the Applicant submits, how the evidence of different witnesses interrelated. It was clear that this is a community where many people remain for many years and return to in order to start a family. Witnesses tended to have extensive experience of the land and Holyhead. Witnesses had shared memories of playing with other children from the locality, seeing neighbours and dog walkers from Porth Y Felin on the greens and attending events.

145. The decision in *McAlpine* tells us that 'significance' is a matter of impression; in both qualitative and quantitative terms the evidence was clear that 'significance' had been established.

The Objectors' Submissions

146. The Objectors took issue with the fact that in oral evidence the Applicant's witnesses referred to names of others who live or lived for some period or other in the Porth y Felin ward, as well as others from outside the ward, and who they have accompanied or seen on the land. The Objectors say that to produce evidence in this way was highly unsatisfactory and prejudicial, and it was not capable of meaningful testing at the inquiry. Very little weight should be attached to it, the Objectors say, and determination of the application to be based on use by just the 125 individuals who have given statements as to their personal use. If that is accepted the use by a significant number of local inhabitants cannot be demonstrated.

147. The Objectors however recognised that this issue is a matter of impression for the Registration Authority applying the Cheltenham Builders approach, albeit one which must be based on cogent evidence.

148. The Objectors argue that the Applicant's evidence of use, from 125 inhabitants of the locality relied upon, plus one shopkeeper from the locality, can on no reasonable basis amount to use by a "significant number" of those who live in the relevant locality. The total population of the locality comprises 2266 (B2 p683), according to the 2011 census.

Conclusion on this issue

The emergence during the public inquiry of additional evidence as to 'others' who had been seen using the Land, by those who were giving oral evidence, was not ideal. It was however far from unusual at public inquiries such as these, particularly where the evidence forms, letters and statements which typically serve as the written evidence of lay witnesses are often brief, or very brief. If advance notice of the names of family or neighbours seen by the witnesses on the Land had been provided, would it have made any real difference? Perhaps the Objectors could have challenged the Applicant's witnesses as to the very existence of the

'other' people they referred to, but in the final analysis I am not sure that one can do much more than take note of the fact that other users of the Land were referred to, and give that evidence some weight; but that such weight is inevitably limited because those named people were not present to answer questions as to the nature and frequency of their use of the Land. That is the approach I have taken to the evidence.

149. It seems to me that on the basis of the evidence from the 31 witnesses who spoke at the public inquiry, 26 of whom had lived within the Locality for all or most of the Relevant Period, and taking into account the 125 evidence forms (noting that all but five of those who gave oral evidence had also completed evidence forms), but giving that written evidence limited weight, there was enough evidence of use by inhabitants of the Locality throughout the Relevant Period to be satisfied that the Land was in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.

150. I am reminded by the Objectors that the Council took a lease of the Land, laid it out, and maintained it, for public recreational use. The Objectors' position is that the Land has been well used by the public, in circumstances whereby the Council encouraged that use and, it would appear, intended that very outcome. The evidence I have read and heard is consistent with there being substantial use of the Land by the public. The condition of the Land as I saw it does not suggest otherwise. I heard oral evidence from 26 inhabitants of the locality, as to their use and use by other local inhabitants (the latter evidence being something to which I give weight, but only limited weight). The Land appears to have been a significant feature in the daily lives of the people who lived closest to it during the relevant 20 years, not least because, as several witnesses put it they treated the Land as "their back garden" (because many of the houses in the Locality had very small gardens). Having laid out the Land for public recreation and maintained it for that purpose over many decades it would not be surprising to the Council if the community which was located closest to the Land used it for general recreation, rather than occasional trespass. As a matter of impression it is difficult therefore to see what other conclusion I should reach, in the light of all the evidence and circumstances. I do not consider that it would be irrational, as the Objectors' submissions imply, for a Registration Authority to conclude that the oral evidence of 26 witnesses, referring to their own use and use by other local inhabitants, taken together with the other written evidence of more than 100 people, disclosed an overall impression that the Land was in use by the community of Porth y Felin for general recreation. This is particularly so where the Council put the Land to the very use of public

recreation, and encouraged it by maintaining the Land in a good state for public use over a long period of time. The Objectors ask the Registration Authority to "step back" and consider all of the circumstances, and I agree that is what the Registration Authority should do, rather than concentrating on the number of 125 as a percentage of the overall population of 2266 in the Locality. My conclusion, and advice to the Registration Authority, is that there has been use of the Land by a significant number of inhabitants of the locality throughout the Relevant Period.

151. Whether such use was "as of right", and whether it was "continuous" and/or not interrupted, are of course separate matters. I turn next to the matter of whether there was any interruption of local inhabitants' use of the Land so as to prevent continuous use for a full 20 years.

152. The suggestion of an interruption of use arises from the fact that the following events in particular were present on the Land:

- the circus, which was operated commercially, and entry to the Big Top required the payment of an entry fee;

- the funfair, to which access for rides and other attractions would have required payment;

- events within the Holyhead Festival marquee, some of which also required payment; and

- the annual use of the overflow car park by the sailing club, in association with the regatta.

153. I do not consider that these events had the effect of interrupting continuous use by local inhabitants throughout the Relevant Period; or to put it another way, any such interruption was de minimis and no so significant or material that it should be taken into account in determining whether there was 20 years' continuous use. The fair lasted for a week, annually. The other events (the festival, the circus) lasted between one day and four days, depending on the event. The area of the Land occupied by these events was relatively small in relation to the Land as a whole, and the evidence I heard was that local inhabitants continued to go on to the Land unimpeded, save for having to pay to enjoy individual fairground rides or pay to go into the Big Top, or to pay to enter the marquee during evening events within the Holyhead Festival. I find that these matters were not so

significant that they caused an interruption to the overall passage of use over 20 years over the whole of the Land; or alternatively that any physical interruption they caused was de minimis in this respect. Local inhabitants went on to the Land to recreate or enjoy themselves all year round; they were enabled to do so and implicitly encouraged to do so by the Council's actions in maintaining the Land, and these particular events were consistent with that overall picture albeit they resulted in leisure or recreation which was of a different but nevertheless consistent character with local inhabitants' enjoyment of the Land during the totality of the Relevant Period. The evidence I heard did not create any impression that these events caused some sort of interruption or cessation of the use which people made of the Land; they simply gave rise to different enjoyment of the Land for very short periods of time.

ISSUE (II) whether use of the Land by local inhabitants was 'as of right' or not, in light of the fact that the Council made the Land available for public recreation and maintained it accordingly; and also in circumstances whereby there were certain signs situated on the Land, and whereby the Council gave permission for various public events to take place on the Land from time to time;

154. In *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195 the Supreme Court held that where a parcel of land is held by a local authority, and that land has been allocated and made available for public use, then the use of the land by the public, in absence of unusual or additional facts, will be 'by right', rather than 'as of right'.

155. In *Barkas* the Supreme Court considered the effect of a local authority having made that land available for public recreation. The Supreme Court concluded in particular that public use of such land could not be 'as of right' for the purposes of village greens legislation, and that the decision of the House of Lords in *R(Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 A.C. 889 was wrong and could no longer be relied upon (per Lord Neuberger PSC at paragraph 49, with whom Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreed; per Lord Carnwath JSC at paragraph 86, with whom Baroness Hale of Richmond DPSC, Lord Reed and Lord Hughes JJSC agreed).

156. I set out relevant passages from the judgments of Lord Neuberger of Abbotsbury PSC, and Lord Carnwath JSC, in the 2016 Advice and I do not repeat those passages here.

157. In his judgment Lord Carnwath did not apparently consider that evidence of acquisition or appropriation of land to open space use, under a specific statutory power, was necessary in order to found the conclusion that use of land by the public was implicitly approved by a public authority landowner (see paragraph 85). The other members of the court, apart from the President Lord Neuberger, expressly agreed with him.

158. The other members of the court also agreed, expressly, with Lord Neuberger. He referred to the fact that under section 80(1) of the 1936 Act the land in Barkas was acquired and maintained by the local authority, with the consent of the relevant minister, as public recreation grounds (see e.g. paragraph 46-47). Lord Carnwath did not refer to the need for the consent of the Minister.

159. Lord Neuberger did not address in his reasoning whether there would always be a need to identify a specific appropriation or purchase under a specific statutory power, and whether the consent of the Minister would need to be obtained (where a relevant statutory power contained reference to ministerial consent) before it would be lawful for a local authority to have made land available to the public for recreation. Lord Carnwath's reasoning appeared to go further than that of Lord Neuberger, finding that evidence of a specific appropriation under a particular power was not necessary. Where the local authority landowner had made land available for public recreation, and there had been no suggestion that to do so was unlawful, use by the public thereafter did not have the effect of putting the landowner on notice that he would need to resist that use in order to prevent a right being acquired.

160. Lord Carnwath's approach was clear, it seems to me, and a majority of the court agreed with him. The fact that Lord Neuberger did not go as far as Lord Carnwath but confined his observations to the facts of that case – and in that case the consent of the Minister had been obtained to exercise the relevant power – does not necessarily mean that there is inconsistency between his position, and that of Lord Carnwath.

161. Subsequently, in *R (Goodman) v Secretary of State* [2015] EWHC 2576 (Admin); [2016] 1 P. & C.R. 8 the High Court held that one could not infer a holding power following appropriation simply by the nature of subsequent use of land, but the fact of appropriation, or the decision to appropriate, need not be spelled out expressly in a document. Evidence of the power having been exercised would suffice (see paragraphs 20-25 of the decision).2

The Applicant's Submissions

162. The Applicant submits that *Barkas* is not authority for the proposition that local authority acts alone are sufficient to determine whether there has been an implied permission to use the land.

163. The proper approach to ascertaining whether use is "as of right" is, as suggested by Lord Carnwath in Barkas (At paragraph 61, and reiterated in Newhaven at paragraph 135) to seek "the appropriate inference to be drawn from the circumstances of the case as a whole".

164. The particular facts of this case include the difference between the freehold owner and lease holder (and their respective behaviour) and the fact that all evidence questionnaire respondents did not interpret any signs they saw on the land as permissive. The varied facts of this case need to be considered in the round before a view can be reached as to the user of the land.

165. *Barkas* and *Lancashire County Council v Secretary of State for Environment and Rural Affairs* [2016] EWHC 1238 (Admin) support the proposition that a specific statutory power must be identified to conclude that a local authority has taken land and made it available to members of the public so that use is by right. The comment in *Barkas* at [66] was case specific. Alternatively the present case has 'additional or unusual facts' which take it outside the *Barkas* 'general rule' (if such a rule exists).

166. The Registration Authority must determine whether it is satisfied, on this evidence, that a case for a specific statutory power has been made out. There is a lack of certainty regarding what statutory provision the Council intend to act under and whether they have the statutory powers necessary for their scheme. The Council's competence is questioned.

167. If the Registration Authority does not agree that a specific statutory power ought to be identified, then the issue of whether the land is made available for public use, laid out and maintained arises.

168. The Applicant has accepted that the greens and promenade have been maintained, laid out and made available for public use but does not accept that the Newry Beach has been maintained. The Objectors must prove that the beach has been laid out and made available.

169. Lack of maintenance of the beach suggests it has not been maintained for public use. The groynes have deteriorated over the years. Whilst the Objectors' witness Captain Parry explained that drifting or erosion of the beach would not be of concern to his employer, the Applicant submits that any drifting would not be compatible with the position that the beach was maintained or laid out for public use. In terms of being 'made available' if one of the groynes was unsafe (as the photograph seems to indicate) then it is submitted that the Newry beach was not made available for public recreation.

170. There is an obvious tension between the argument that the byelaws apply to all of the land and the submission that all of the land is lawfully held by the council for recreational use by right. The Applicant submits that this is the sort of inconsistency or 'additional or unusual fact' that would displace what might be one reading of Barkas (that the laying out, maintaining and making available of land alone will suffice to conclude that the land use is 'by right').

171. The number of events permitted by the Council on the Land was such that the facts of this case indicate that there was not a limited exclusion properly ancillary to the management of the land as open space under the Open Spaces Act 1906 or any other act (Burnell at 68). If that is the case then the land has not been held and made available for public use lawfully under any such act and, the Applicant submits, the unusual or additional facts alluded to in ***Barkas*** stand to be considered.

The Objectors' Submissions

172. The Objectors submit that the decision of the Supreme Court in ***Barkas*** establishes that where land is made available by a public authority as recreational open space pursuant to an express statutory power to do so, the use of that land by the public is "by right" and not therefore as of right.

173. The application site, the Objectors submit, seems to be very well used by the public in general for the very recreational activities which it is designed and maintained to accommodate. The application site, and its management, displays all the characteristics of public open space, and a well-used piece of public open space at that.

174. A local authority is a creature of statute. It may only exercise powers – including a power to acquire interests in land – where authorised by statute to do so. As such, it must be deemed that a local authority when acquiring an interest in land (and indeed in exercising any other function) is doing so pursuant to a statutory power vested in it.

175. The lease of 1927 does not recite the statutory powers under which the UDC took the land. And there is nothing unusual about that. Experience suggests very many public sector conveyances do not do so. A conveyance or lease to or from a local authority is not

required as a matter of property law or of public law to recite the power being exercised. It is now well established that the statutory power being relied upon is capable of being ascertained by consideration of the circumstances of acquisition of the interest and the intentions for and use of the land, see:

a. *R (Beresford) v Sunderland CC* [2004] 1 All.E.R.160 (AV tab 4) per Lord Scott at para.30 (citing *A-G v Poole Corp* [1938] Ch. 23 at p.27 (AV Tab 1);

b. *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 – at para. 21, where Dove J. accepted that in the context of an appropriation, there was no formal requirement to record an appropriation so long as there is evidence that the authority had directed its mind to and answered the relevant statutory test for appropriation in s.122 LGA 1972;

c. *R (Lancashire CC) v SoSEFR* [2016] EWHC 1238 (Admin) per Ouseley J. at para.57.

176. Even where the circumstances do not establish the purpose and statutory power under which an interest in land is taken by a local authority, where land is thereafter laid out and maintained for a particular purpose which the local authority has power to provide, the evidential presumption of regularity operates such that the authority is to be presumed to be acting lawfully and therefore exercising that statutory power unless there is evidence to the contrary capable of rebutting that presumption. *R (Naylor) v Essex CC* [2014] EWHC 2560 (Admin) is an example of that presumption operating in the TVG context such that a local authority who maintained as open space land belonging to another, was presumed to be doing so pursuant to an agreement entered into under the Open Spaces Act 1906 (see esp. para.44-50). Indeed, Lord Carnwath JSC made very much the same point in *Barkas* (AV 10). At paragraph 84 Lord Carnwath held, in the context of TVGs, that:

"The explanation for acts of maintenance by the authority during that period has to be found elsewhere. The reasonable inference was not that the public had no rights, but that the land had been committed to their use under other powers." (see also para.82 in this context).

177. With regard to the operation of the presumption of regularity, Ouseley J. in the *Lancashire* case also supported an approach whereby a holding power may be established

through (a) examination of contemporaneous documents and (b) as a consequence of actual use. The Inspector in Lancashire carried out precisely the same task as the Objectors invite the Registration Authority to perform, namely to examine contemporaneous material to establish whether it reveals the power of acquisition relied upon. Ouseley J. did not suggest that such an approach was in any way erroneous (see para.55 and 57 as well as other references given above) but rather he concludes that the position is quite to the contrary. In Lancashire the land in question, in substantial measure, had not in fact been used for statutory education purposes (that being the holding power there contended for by the Objectors) at any time since acquisition and the Judge recognised this in para.55.

178. The Applicant gains no support from the decision in ***Malpass***, the Objectors submit. The Deputy Judge in ***Malpass*** (see judgement para.44, adopting Mr.George QC's submissions inter alia summarised at para.31(d)), and indeed Dove J. subsequently in Goodman (see para.22), held that unless there was clear evidence that a local authority had directed its mind to the statutory test in s.122 there was no room for implying appropriation from a general resolution or from actual use. That is plainly correct. The matter in issue in both Malpass and in Goodman concerned the particular requirement for a lawful appropriation. Those conclusions are not transferrable to the question of establishing the power of acquisition of land, which does not require a local authority to meet conditions precedent such as are set out under s.122 LGA 1972

179. Dr.Looker confirmed that at no time was she aware of the Lessor taking action against the Council under the lease for breach of covenant, nor has the Waterfront Action Group or any member of the public ever made complaint as to the upkeep or condition of the groynes. The beach has at all time been a popular focus for recreational use, as the Applicant's photographs demonstrate. Nothing of materiality turns therefore on Dr.Looker's evidence in this respect.

180. The land has been laid out for, and to facilitate, recreational uses. There is a promenade and other made-up recreational routes, there is an high-quality ornamental sunken garden (renovated in 2011) (indeed there were two such gardens in times past), there are benches, shelters, lights (including coloured lights along the promenade in the past), there was formally a paddling pool, there are numerous formal pedestrian steps and other access points into the foreshore, there is car parking and public conveniences. All

these features, together with the maintenance of the greenspace, are all consistent with, and are intended to encourage, recreational use.

181. The principle in ***Barkas*** and use "by right" does not require some express statement or express recognition by the relevant local authority at the point of acquisition that the land has been acquired and would subsequently made available pursuant to an identified statutory power to provide recreation space:

a. the question as to whether such an express statement etc. is required as to the statutory basis on which land is acquired and held before use can be deemed to be by right was not in issue, was not argued nor even raised for discussion before the Court in Barkas;

b. indeed, the land in ***Barkas*** was in fact acquired expressly for "the erection of houses" pursuant to s.73 of the HA 1936 (see Lord Neuberger PSC at para.2), albeit then laid out as a recreation ground pursuant to a power under s.80 of that Act (now s.12 HA 1985). Neither the resolution nor the conveyance in ***Barkas*** recorded that the land would be made available as a recreation ground but only that it was to be acquired for housing. This fact of itself suggests that the SC did not consider that any express reference that land was to be acquired and made available for recreation purposes is a pre-condition for that land to be used thereafter "by right";

c. what the SC held was required for land to be used "by right" is expressed by Lord Neuberger PSC as follows:

"So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land by right and not as trespassers so that no question of user "as of right" can arise" (para.21).

d. what therefore is required is to establish the power under which the land is held. That may in some cases be expressed within a conveyance or a resolution. In other cases it may need to be inferred from contemporaneous documents and all the relevant circumstances. What the PSC was concluding was what follows in law from land being held pursuant to a statutory power to provide recreation space and not how that power is to be established or inferred.

e. Lord Carnwath JSC did however go some way to addressing this matter paras.82-84;

f. Lord Neuberger at para.24 referred to land “lawfully allocated” for public use; Lord Carnwath at para.64 referred to land which has been “validly and visibly committed … for public recreation, under powers which have nothing to do with the acquisition of village green right”. Neither suggest, nor is there any room for an inference that either intended, that “allocation” or “commitment” requires a particular express statement. Indeed, Lord Carnwath’s comment must be considered along side his statements at paras.82-84 and the facts in Barkas do not support such a conclusion;

g. It is notable that the SC disapproved of the outcome in ***Beresford*** where the land was acquired “under very wide powers” contained in the New Towns Act 1965 by Washington DC, for no “specific purpose” (see Lord Neuberger PSC at para.31). As such, the SC in ***Barkas*** was content that in Beresford the land was used “by right” notwithstanding the general power under which it was acquired. Use "as of right" in Beresford arose by reason essentially of subsequent management and use;

h. Indeed, were the SC in ***Barkas*** to be construed as requiring some overt statement or recognition as to the power of acquisition before use can be "by right", that would be inconsistent with:

i. the basic principle that use "as of right" must be examined from the perspective of the reasonable landowner and not the user; why should the landowners perception be influenced by whether it had expressed or not expressed the power under which the land was acquired? A landowner can be expected to know and appreciate the power under which the land was acquired and held;

ii. the fact that, in the context of publicly held land, at least, for use to be permissive, there is no requirement for the permission or the basis of the implied permission, as the case may be, needs to be communicated to the users; if there is no requirement for communication of the permissive basis

of the use why would there needs to be some express statement or recognition of the basis of acquisition?; and

iii. any basis for implied permission in the case of local authority land which, following ***Beresford***, applies to local authority land as to any other land (as indeed Lord Carnwath acknowledged in para.84.).

i. in ***Naylor***, Goodman (albeit in the context of appropriation rather than acquisition) and ***Lancashire*** the High Court has accepted and approved that a holding power can be inferred, as necessary, from documentation contemporaneous with acquisition (or indeed appropriation) and/or use (albeit not in the case of appropriation (see Goodman)). These decisions all post-date ***Barkas*** and do not support an interpretation of the Supreme Court's decision so as to require some express statement or recognition at the time of acquisition of the powers relied on. In fact, those decisions point to precisely the opposite conclusion. These decisions are binding on the Registration Authority.

182. Although the lease may not specify the statutory power under which the land was acquired (and, as already submitted, there was no reason for the lease to do so), the contemporaneous correspondence and other documentation leading up to the entering into of the lease by the UDC makes it clear – and abundantly clear - that the Council's predecessor the UDC was and can only have been exercising powers to acquire land for recreational purposes set out within s.165 of the Public Health Act 1875 and s.9 of the Open Spaces Act 1906. Secondly, this conclusion is reinforced by the documentation subsequent to the 1927 lease, by the laying out of the land for and so as to facilitate recreational use and by its maintenance for such purposes at all times since.

183. If the Objectors are wrong about the effect of the correspondence and the other documentation which pre-dates the 1927 lease then, they submit, the subsequent laying out and the management of the land at all times since 1927 for, and to facilitate, recreational use is consistent only with the exercise of such powers and, pursuant to the presumption of regularity, the local authority should be deemed to be exercising such powers (as per Naylor) and there is nothing to rebut that presumption here.

184. Nevertheless the contemporaneous correspondence and documentation, as set out in Annex A to the Objectors' closing submissions, demonstrates that the UDC took the lease in 1927 pursuant to the powers of acquisition in the 1875 and 1906 Acts:

a. the UDC had a proposal in the period between 1922 and 1927 to take a long lease of the foreshore at Newry Beach and land to the south, between the foreshore and the land it already held on an annual tenancy from the Government to the north of Beach Road (ie, greens 1,2 and 3) and to make that land available for recreational purposes;

b. it pursued this proposal with the Ministry of Transport over a five year period and had developed plans as to how the land was to be laid out, including the provision of a promenade, shelters, gardens, tennis courts, a bowling green and a swimming and paddling pools;

c. a grant was sought and granted for the delivery of the recreational scheme and ratepayers in Holyhead were consulted;

d. the motivation for the proposal on the part of the UDC was to respond to the economic decline in the fortunes of the Port of Holyhead, particularly in servicing the route from Dublin. The UDC's objective was to use the Newry recreational scheme to enhance employment and to enhance Holyhead's profile as a seaside resort. A further manifestation of this objective was a scheme to operate or offer fish curing facilities from a new facility at Salt Island – but this, so far as the Ministry of Transport was concerned, was a serous sticking point;

e. eventually, the MoT, having refused to release Salt Island to the UDC, agreed to a 99 year lease of land at Newry Beach but subject to strong covenants to permit the Government to recover possession of the land if it was required for or in connection with Port or national purposes; and

f. the lease was granted on essentially those agreed terms in September 1927.

185. It is plain therefore, the Objectors submit, that the land was sought and secured by the UDC with the intention that it be put to use for recreational purposes. As such, it is equally plain that the UDC was exercising those statutory powers available to it in 1927 to

acquire land for recreational purposes. Those powers were twofold, namely s.164 of the Public Health Act 1875 and s.9 of the Open Spaces Act 1906. The former power – to acquire a leasehold interest in land for use as public walks or pleasure grounds – is exercisable in respect of any land, and is not limited to land already in recreational use. It is this power of course which was used to deliver many of the great Victorian parks up and down the country. This power would plainly have been the power exercised by the UDC in respect of the foreshore and the whole, or the majority, of the land acquired in 1927. The alternative or additional power – s.9 of the 1906 Act – is available in respect of land which already comprises "open space" as defined in s.20 (i.e. land in recreational use or waste or unoccupied land) – when the interest is taken. As such, it empowered the UDC to acquire a lease of that part of the land which was already in use as a recreation ground in 1927 (ie. greens 1,2 and 3). As such, the power plainly being exercised in 1927 was the 1875 Act and, potentially, in addition the 1906 Act. Since the legal effect is the same – namely that any recreational use of the land by the public is "by right" rather than "as of right" – whether or not the 1906 Act was in fact relied upon matters not.

186. That the land was acquired under the 1875 Act and potentially in part the 1906 Act is reinforced by the reality of what occurred. Post 1927 the UDC developed plans and drawings for the paddling pool. Moreover, importantly, the UDC thereafter laid out the land for recreational use and the UDC (albeit not with formal playing pitches to the south of Beach Road) and latterly the the Council has maintained the land for such use. This reinforces the conclusion which follows from consideration of the contemporaneous documentation, namely that the land was acquired by the UDC under the 1927 lease expressly for recreational purposes.

187. In the alternative the Objectors rely on the presumption of regularity as used in *Naylor* for example. The point can be expressed simply. The land has been laid out essentially as a park, facilities – benches, shelters, flower beds, paddling pool, a promenade – have been introduced onto the land consistent with use as a park, and the land has been maintained at not inconsiderable expense for recreational use. The UDC and latterly the Council can only have carried out these measures pursuant to a statutory power and the only available powers are those set out within s.164 of the 1875 Act and s.10 of the 1906 Act. The presumption of regularity operates such that there is a rebuttable evidential presumption that the UDC and the Council were acting lawfully and therefore exercising powers pursuant to those statutory provisions. If this presumption is not rebutted then the

evidence of laying out, facilitation of use and management of the land must lead to a conclusion that the land was held and made available pursuant to those powers. If that is the case, use by local inhabitants will be by right and not as of right.

188. Is any evidence to rebut that presumption? The Applicant submits that the permission given by the Council to hold a circus, the Holyhead Festival and a funfair on part of the land is inconsistent with the land being held pursuant to the 1875 or 1906 Acts. That, the Objectors submit, is wrong as a matter of law. The Public Health Acts Amendment Act 1890 allows a local authority to the public any park or pleasure ground inter alia for any "show" or "public purpose" for a period not exceeding 12 days per year (and not more than 4 days consecutively). Moreover, s.145 of the Local Government Act 1972 (and its predecessor s.132 of the Local Government Act 1948) provide a wide and general power to "do, or arrange for the doing of, anything … necessary or expedient for … (a) the provision of an entertainment of any nature …". By s.145(2)(a) a local authority "may … enclose or set apart any part of a park or pleasure ground belonging to the authority or under their control". There is no temporal limit to this power. The wide application of this provision – and its scope to allow entertainment to be provided by commercial organisations – was confirmed by Supperstone J. in *R (Friends of Finsbury Park) v Haringay LBC* [2016] EWHC 1454, which concerned the Wireless Festival to be held by a commercial operator within Finsbury Park. Supperstone J. confirmed at para.48 that "the specific power in s.145(2) is also without any limitation on the period of time during which such enclosure or setting aside may continue". It follows that there was express statutory power vested in the Council to permit events such as a circus, the Holyhead Festival and funfairs on a park or other recreation ground. No inconsistency or inference of inconsistency with the land being held under the 1875 or 1906 Acts arises.

189. Secondly, if (which is not clear) the Applicant takes the same point in respect of the sailing club, car park or enclosed compound, that too is a bad point. S.76 of the Public Health Acts Amendment Act 1907 a local authority, in respect of "any public park or pleasure ground" (a) "set apart any such part of the park or ground … any part of the ground … for the purposes of any other game or recreation … and to exclude the public form the part set apart …" and (g) "to provide and maintain any … other buildings". This provides a power for the Council and the UDC to have made provision on the land the subject of the lease for the sailing club – an important an popular organization – through

the car park and compound and to provide, through the 1957 lease, for the erection of a clubhouse. There is nothing in the 1907 Act to suggest that any land so set aside or any building provided may not be used by or dedicated to a particular sports or recreational club or organisation. Nothing inconsistent with the land being held and maintained pursuant to the 1875 Act and the 1906 Act arises.

190. The Applicant has thus far offered no explanation of the legal basis on which the UDC entered into the lease in 1927 and has subsequently laid out and maintained the land for recreational purposes. The Applicant's case (as thus far articulated) amounts to a bare assertion that the UDC in 1927 entered into a lease and took the land unlawfully and by consequence has been acting unlawfully for the past 89 years.

Conclusion on this issue

191. The Applicant accepts that the Council took a lease of the Land; and that since the lease began the Council has maintained the Land and made it available for use by the public. The Applicant does not accept that the Council lawfully took the lease, and thereafter acted lawfully in maintaining the Land.

192. As noted in the 2016 Advice, it seems to me that once the Council's predecessor took a lease of the Land in 1927, and then allocated the land for public use thereafter, it would not – to adopt the terms used by Lord Neuberger in *Barkas* – be appropriate to infer that members of the public have been using the land "as of right", simply because the Council and/or its predecessor have not objected to the public using the land (see *Barkas* per Lord Neuberger PSC at paragraphs 24 & 42, and Lord Carnwath JSC at paragraphs 64 & 65). No "unusual or additional facts" have been suggested which might point to a different conclusion.

193. The High Court's decision in *Naylor* confirmed that the principle in *Barkas* applies to privately-owned land which a public authority is occupying and making available to the public.

194. As the Applicant points out, there is no record of the statutory basis for the Council taking the lease or making the land available for public use thereafter. But there are good reasons to conclude that the reasoning of the Supreme Court in *Barkas* does not depend

upon the identification of a particular statutory power under which land is acquired and then made available for public recreation. What the Supreme Court found was that where a council had made land available for public recreation, and maintained that land for that purpose, it would have no reason to object to members of the public using it for the very purpose that it had been made available and was being maintained. Accordingly no question of acquiescence to the acquisition of a prescriptive right would arise as far as the landowning public authority was concerned, because the manner in which local inhabitants had used the land was not such as to demonstrate that a right was being acquired and claimed. The landowner had made the land available for that very purpose. If the Applicant's submissions is correct then the manner in which a public authority has made the land available to the public is of no consequence if one is unable to identify, perhaps many years after the event, the precise statutory basis upon which the public authority was proceeding. I do not consider that is the correct interpretation of the Supreme Court's reasoning in *Barkas*.

195. The Applicant's submissions have not persuaded me that the approach of the Supreme Court in *Barkas* depends upon the identification of a particular statutory power under which land is acquired and then made available for public recreation. As summarised above, the Objectors set out a number of reasons why identification of a specific statutory power, and/or a record of an express decision by a public authority to commit land within its ownership to a particular use, is not necessary in this context. I accept the Objectors' submissions on that matter.

196. The presumption of regularity must also be considered in the circumstances of this case. In *Naylor* the High Court held: "As the Inspector correctly pointed out, it must be assumed, unless there is evidence to the contrary, that the District Council did what it did properly and lawfully in pursuance of some statutory power enabling it to do so" (at paragraph 27) (see also *R (Goodman) v Secretary of State* at paragraph 32). For approximately 90 years the Council (or its predecessor) has made the Land available for public recreation and has maintained it for that purpose. In the absence of any reason to consider that the Council was not acting lawfully throughout that very long period of time, it should, in my view, be assumed that the Council's conduct in that respect was lawful.

197. The Applicant accepts that use of the roadways and shelters within the Land was "permissive" and not 'as of right' - with the practical consequence that the Applicant did

not include those areas within the Land which was the subject of the Application. This may be only a forensic point, but it is difficult to see why use of the rest of the Land, which was maintained the same way by the Council, was not also 'permissive' and therefore not 'as of right', if use of the roadways and shelters was, and was understood by the Applicant to be, by permission of the Council.

198. The Applicant also argues that if the Council did permit third parties to use parts of the Land in ways which had the effect of limiting or excluding general public access, for the duration of such uses, then that would be incompatible with the proposition that the Council was in general terms permitting the public to use the Land for recreation (by right). For the reasons set out in the Objectors' submissions it seems to me that public authorities do have the power to allow such uses on land which is made available for public recreation, and I do not consider that such inconsistency as the Applicants contend for, arises.

199. In the absence of any "unusual additional facts" as contemplated by the Supreme Court in ***Barkas***, I do not consider it is appropriate to infer that members of the public were using the land "as of right", simply because the Council had not objected to their using the land. In the absence of any evidence to the contrary, I conclude that the Council lawfully took a lease of the Land – both the Inland Area (the greens, the promenades and so on) and the foreshore – and then lawfully made it available for public recreation, lawfully maintaining it thereafter. That land was allocated for public use, and there would be no reason for the Council to consider that members of the public going on to the Land were trespassers whose use must be resisted. Use by the public and local inhabitants in particular of the Land for recreation was precisely what the Council intended by taking a lease of the Land and putting it into a state, and maintaining it in that state, whereby the public were encouraged to go on to it. In the light of ***Barkas*** I see no tenable conclusion other than that use by local inhabitants was by right, and not 'as of right'. The application fails for that reason.

200. The Applicant submits the Objectors have failed to demonstrate that the Council maintained the foreshore/beach, *as well as* making it available for public use. I do not consider that this argument takes the matter any further. The foreshore is a beach. Whilst the groynes do not appear have been maintained regularly, or indeed at all, the beach is still there and has not been washed away. Local inhabitants continue to recreate on it. There is nothing in the authorities which requires that land must have been made available

for public recreation *and also maintained* for that purpose, in order that it can be concluded that the public went on to that land by right rather than 'as of right'. In all the circumstances, and the fact that the foreshore is a beach which is still in use by the public, I do not consider that a lack of active maintenance of the foreshore or beach by the Council should lead to the conclusion that, in this case, public use was 'as of right' rather than by right.

Third party use

201. Does the principle in *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin apply in this case? The court in *Mann* held that where the circumstances in which local residents used land for recreation were sometimes controlled by the landowner, because the landowner held events on the land which had the effect of excluding the general public from part of the land, there was an implied grant of permission to use the land at times when there were no events on the land. That implied permission applied to the whole of the land, rather than simply the part upon which the festival took place. The events in question were beer festivals, held within a marquee, entrance to which was conditional upon the paying of an entrance fee.

202. In this case, unlike in *Mann*, the body with control of the Land – the Council – encouraged recreational use of the Land by members of the public, by making it available and maintaining it for that purpose. The public or community events which the Council allowed to take place on the Land – in particular the Holyhead Festival, the fun fair, and the circus - were consistent with the landowner having made the land available to the public for leisure and recreation. It seems to me, therefore, that these events do not, on the facts of this case, add anything to the question of whether or not use by local inhabitants was 'by right' or 'as of right'. If the very fact of the Council having intentionally made the land open to public access, and having maintained it for public recreation, was not enough to demonstrate that the public were going on to the Land with the Council's permission, then I do not consider that the public events which the Council permitted to take place on the Land would change the situation and by themselves bring home to members of the public that their use was by permission and not 'as of right'.

Signs

203. The Objectors submit, in relation to the signs, that several of the notices have been in place for some considerable time – the "Stena" warning notices (see B693) and the notices at the sunken garden (B692). The first of these notices is expressly to warn users of the foreshore of the dangers of wake from fast ferries. Any reader of this notice would, the Objectors contend, assume that they were authorised by Stena to use the foreshore but advised to exercise caution. The second notice is plainly seeking to regulate the use of the sunken garden, they submit. This would imply that access to and use of the sunken garden was permitted. The effect of these notices (both of themselves and also when considered in conjunction with the other measures taken to facilitate use of the land referred to in the submissions on point (a) above) give rise to a further basis for implied permission.

204. I am not convinced that the 'Stena' warning notice concerning the wake from the former HSS Ferry service does convey to a reader that they are permitted to use the foreshore. It seems to me that the notice contemplates that people are on the Land and warns them of a potential hazard, rather than communicating that they have permission to be on the Land. The signs at the restored Sunken Garden may suggest that use of that area is regulated in some way, but they do not appear to me to qualify use of the wider Land. This point was not argued particularly strongly by the Objectors and my conclusion is that the whilst the signs serve to reinforce the overall picture that the Council and/or Stena have permitted – in other ways – public access to and use of the Land, those signs would not on their own make clear to users of the Land that their use was by the landowner's permission and not use 'as of right'.

205. There is one other sign which needs to be considered. The Sailing Club slipway lies within the application Land but outside the area of land demised to the Council under the 1927 lease. At the southern access point to the slipway there is a sign (Obj Vol B p689) – which states amongst other things "HOLYHEAD SAILING CLUB PRIVATE SLIPWAY ….". I did not hear evidence of significant use of that slipway by local inhabitants unconnected with the Sailing Club use, but in any event Use of the slipway for lawful sports and pastimes other than by members of the sailing club or those authorised by it was clearly prohibited by that sign. Any use of the slipway inconsistent with the prohibition conveyed by the notice would be 'vi' i.e. forceful or against the wishes of the landowner, and therefore not 'as of right'.

ISSUE (III) the effect, if any, of Byelaws made by the First Objector affecting land in its ownership; and also the fact that the First Objector had granted a lease of the Land to the Council for the latter to make the Land available for public recreation

The issue

206. By virtue of the British Transport Commission Act 1959 the First Objector Stena, as successor to the British Transport Commission, was the statutory port and harbour authority for Holyhead Harbour. The 1959 Act, in particular sections 31 and 32, conferred certain powers and duties to develop and operate and maintain a safe harbour.

207. The foreshore within the Application Land below High Water Ordinary Spring Tides ("HWOST") fell within the described harbour limits by reference to section 28 of the 1959 Act. The remainder of the Application Land (the "Inland Area") also fell within the harbour limits. The Objectors rely on the lease under which the Council had occupation and control of the Land as a whole and which included various "covenants, reservations and termination provisions" the purpose of which was to ensure that the functions of the harbour would be protected during the term of that lease. The lease also included provisions enabling Stena to determine the lease – and regain control and occupation of the Land – at any time at its absolute discretion for harbour or national purposes. Accordingly, the Objectors contend, it was to be implied from the lease, and the measure of control which Stena retained over the Land, that the Inland Area also fell within the harbour limits as defined in the 1959 Act.

208. Byelaws which came into effect on 4 August 1971 ("the Byelaws") applied to land within the harbour limits, and all of the Land was within the harbour limits. Any activity which was carried out other than in accordance with Holyhead Byelaw 41 would, the Objectors contended, be unlawful and therefore could not constitute a lawful sport and pastime for the purposes of section 15 of the Commons Act 2006. Any sport and pastime which was carried out in accordance with byelaw 41 would be lawful but must have been carried out with express or implied permission and could not be 'as of right'. Alternatively, the Objectors contended, following the decision of the Supreme Court in *Newhaven*, the fact that Byelaws had been made in relation to the harbour limits meant that any use of the Land within the harbour limits was by implied permission.

209. In *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7 [2015] A.C. 1547 the Supreme Court held that although no byelaw expressly permitted members of the public to use the West Beach in Newhaven Harbour for leisure activities, such user might be permitted by implication if such implication were necessary or obvious. The prohibitions contained in the Newhaven byelaws against bathing in a specified area of the harbour and of doing acts which might impede use of the harbour impliedly permitted bathing elsewhere in the harbour and associated activities which did not impede its use. Although section 88 of the 1847 Clauses Act required notification of the byelaws by public display, they became effective when they were confirmed, and publication and display were intended to follow such confirmation. Parliament had not intended that the byelaws would not apply if such notification were not or were no longer displayed and, while it might be necessary to show that the byelaws were displayed for the purposes of justifying prosecution for their infringement, they were nevertheless effective in that they represented local laws applicable to the harbour even though they were not displayed as required by section 88 of the 1847 Clauses Act.

210. A landowner did not have to draw to the public's attention that their use of the land was permitted in order for it to be "by right" rather than "as of right": per Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC at paragraphs 71-72.

211. It is accepted by the Applicant that Byelaws were made by the relevant authority in 1971. Of those, Byelaw 41 provides:

"Except in the exercise of a public right of way or a licence or other written permission of the Board [or its successors] no person shall enter or be without having proper business thereat or loiter upon any part of the harbour.

Every person so being or loitering shall on the reqest of the Harbour Master or other agent or servant of the Board give a satisfactory account of himself and his business and in default may be forthwith removed and excluded from the Harbour".

212. The Applicant accepts that the Byelaws apply to the foreshore below HWOST, but does not accept that the Byelaws apply to all of the Application Land i.e. not only the foreshore below HWOST but also the Inland Area.

213. In the 2016 Advice I expressed uncertainty as to whether the Inland Area is part of the harbour limits as defined in the 1959 Act. I have heard further argument on that point, which I return to below.

The Applicant's Submissions

214. The Applicant accepts that the Byelaws apply to the foreshore i.e. the land below HWOST. Whether the byelaws apply with respect to the rest of the claimed land turns on the question of whether the rest of the claimed land belongs to Stena and is 'held for harbour purposes'. It is common ground between the parties that the Land is not presently in active use for harbour purposes.

215. As far as the foreshore below HWOST is concerned, the Applicant relies upon Mr James Balfour's evidence regarding the activities of the sea cadets who used to beach boats on the Newry Beach making use of inflatable rigs.

216. It is unclear, the Applicant submits, whether such activity would fall within byelaw 41. Would the sea cadets be deemed to have 'proper business' at the harbour? Or, would they be deemed to be a nuisance disrupting harbour activity and/or loitering? If asked about their activities, would they be able to give a satisfactory account of them? It is submitted that the answer to these questions is unclear and that the byelaw is vague in respect of this activity and these questions. It follows therefore that the byelaw cannot assist with the question of whether or not the activity in question would be lawful.

217. Were the sea cadets asserting a right as trespassers on the Newry beach? It is submitted that the answer to this question is yes and that therefore the presence of other sports and pastimes (which may be unlawful) on the Newry beach falls to one side. The Applicant relies on this activity, which is said to have been lawful and continuous.

218. The Applicant accepts that 'belonging to' must necessarily mean or include 'freehold interest'. It is agreed that the lease makes provision for the use of the land by the First Objector (for example use of the beaching ground).

219. The question between the parties is therefore whether held means 'held in reserve for potential harbour purposes' as the Objectors contend.

220. The Applicant does not accept that this is the meaning of 'held', or that the lease is evidence that the land was in fact held in reserve for potential harbour purposes.

221. The ability to terminate on 6 months' notice, in the context of the harbour of refuge suggests that the land was not truly being held for harbour purposes as such a termination clause actually represents rather a long amount of time in such a context. Further, since the harbour became non-operational the prospect of it actually being needed for such a purpose was non-existent. The evidence is that the harbour has been non-operational as early as the negotiations for the 1927 lease. In that case, such a lease, whilst showing an abundance of caution, does not confirm that the land is being used for harbour purposes.

222. The concession by the Objectors that the Byelaws did not apply to the land above HWOST (i.e. to the Inland Area) after 2007 is helpful, but the date at which the byelaws ceased to apply to the non-foreshore land/Inland Area would, the Applicants submit, be the date on which Stena actually resolved to use the land for development not the date on which they signed the lease. This must, on any reckoning, been a date far earlier.

223. Finally on the suggested interpretation of 'held in reserve for potential uses for such purposes' the Applicants suggest that (as in the Lancashire case regarding educational land), the fact that the land was never in fact used for such purposes can found a conclusion that it was never truly 'held' in that way irrespective of the cautious approach in the lease. In any event, it is plain from the witness evidence, that for the 1994-2014 period the land was not held in reserve for any such purposes and was not seen as part of the harbour proper. There is a difference between held and used but it is not as extreme as is suggested by the Objectors.

<u>The Objectors' Submissions</u>

224. The Objectors' submissions were set out as follows. The first point to be considered, they submit, is whether, and if so to what extent, the 1971 byelaws – and in particular byelaw 41 - apply to the application land.

225. The second point is over what time period the byelaws applied to the land and in particular whether they apply to the whole of the land for the whole of the qualifying period or for some lesser period.

226. The third point is that, if they apply to the land in whole or in part for all or any of that qualifying period, then what is the legal consequence which arises

Spatial and Temporal Extent of Byelaws

227. Byelaw 41 applies to the "harbour", which, by byelaw 2, "means the harbour at Holyhead comprised within harbour limits". The definition of "harbour limits", within byelaw 2, engages s.28 and Schedule 3 to the BTC Act 1959 (which comprise the Schedule to the 1971 Byelaws).

228. There are two elements to the definition of "harbour limits" in section 28 of the 1959 Act and both are engaged in respect of different parts of the application land. Section 28(1)(b) provides that "the area below high-water mark ordinary spring tides ("HWOST") bounded by the limits described in the Third Schedule … and shown on the signed map" falls within "harbour limits" and therefore the "harbour" so far as the Byelaws are concerned (the signed map is at Obj Vol B p382).

229. The area proposed to be registered as a green includes the foreshore – ie. land between mean low water and mean high water ordinary tides (Obj Vol B p386). The TVG area comprising the foreshore must therefore obviously include an area of land "below high-water mark of ordinary spring tides", since a high water on an ordinary tide must be lower than high water on a spring tide. The application land includes the "foreshore", namely the area between low water mark mean ordinary tide and high water mark mean ordinary tide. As such, since the byelaws, by s.28(1)(b), extend to high water mark ordinary spring tide, it must follow logically that the part of the application land comprising the foreshore (at least) must fall within the definition of "Harbour limits" prescribed by s.28(1)(b), Sch.3 and the signed map within the 1959 Act. As such, that part of the application land comprising the foreshore (at least) must form part of the "harbour" and therefore be the subject of the Byelaws and byelaw 41 in particular by operation of s.28(1)(b) (and irrespective of any issue as to what purposes the foreshore was "held" for). Indeed, the Applicant recognises that this is the case and has conceded, as recorded in the

Registration Authority's Revised Issues Paper at para.7.2 that "byelaws applied to the foreshore".

230. The 1927 lease, in so far as it includes land to "LWMOT" (Obj Vol B p19), must also include land below HWOST and, as such, must include land within the Byelaws for precisely the same reasons as are set out above in respect of the application land. In substance, the northern boundary of the application land and the northern boundary of the leasehold interest which is the subject of the 1927 lease are one and the same.

231. With regard to the temporal extent of the Byelaws in so far as they apply to the foreshore, the area below HWOST fell within the remit of the byelaws for the whole of the qualifying period, as the Applicant has accepted. It continues to fall within the extent of the byelaws following the lease to the Second Objector CSL in 2007 and will continue into the future. The lease to Stena does not affect, plainly, the operation of the second limb of the definition of "harbour limits" within s.23(1)(b) of the 1959 Act, which does not concern whether the land is "held" by Stena but rather is dictated only by the extent of HWOST.

232. The first limb of the definition of "harbour limits" within s.28 of the 1959 Act is "Harbour works", which are, for the purposes of the byelaws, defined by byelaw 2, as including "… any lands from time to time belonging to or leased by the Board and held or used by them for any purpose in connection with the harbour". It is this element of the definition of "harbour limits" which concerns that part of the application land lying above HWOST.

233. The starting point is one of interpretation. The definition of "harbour works" refers to land (a) "belonging" to the Board (now Stena) and which (b) is "held by or used for any purpose in connection with the harbour". There are therefore two elements to the definition; part (a) concerns the fact of ownership and (b) concerns the purpose of ownership, namely whether the land is "used" or "held" for harbour purposes. As such, not all land "belonging" to Stena will fall within this element of "harbour works" but only that "held or used" for harbour purposes.

234. With regard to (a), the term "belonging" must, on any sensible basis, include the freehold interest. The term "belonging" is not defined in the Byelaws. It is notable that the

term “occupy” or “in possession” is not used. “Belonging” should be given its natural meaning as including, but not limited, to the holding of the freehold interest.

235. With regard to (b), the definition draws an express distinction between land “held” for any purposes in connection with the harbour and land “used” for such purposes. “Held” must mean something other than “used”, or else it would be superfluous. “Used” connotes land in active use; “held” connoted land “belonging” to Stena but which is not in active use for harbour purposes but rather is held “in reserve” for potential use for such purposes. The concept of a public authority or undertaker “holding” land is not an unfamiliar one. Land is often held by a local authority for “highway purposes” or for “education purposes” albeit it may not be in active use for such purposes. Indeed, such land may be (and frequently is) put to some alternative purpose in the interim period. That land “held” for a particular purposes does not require the land to be in active and operational use was recognised in *R v Minister of Fuel and Power ex p Warwickshire CC* [1957] 1 WLR 861 - see Lord Goddard CJ at p.3 .

236. The reference to land being “held” for harbour purposes (as opposed to being in active use assists in construing the terms “belonging”. The reference within the definition to land being “held” as well as “used” for harbour purposes recognises that land may fall within the definition if it is, for example, held in “reserve” for future use but not in use or required for use immediately. As such, “meanwhile uses” may be expected to be introduced onto such land and there is no reason to suppose that a meanwhile use is one which is required to be carried out by the harbour authority, as opposed to another individual or organization with the harbour authority’s consent, so long as provision is made for recovery of possession by the harbour authority as and when the land is required for a harbour purpose. If that be the case, then there is no reason why the term “belonging” must in some way impliedly require actual occupation or possession by the harbour authority, so long as such occupation and possession is capable of being straightforwardly obtained.

237. Turning to the circumstances which concern that part of the land which lies above HWOST (ie. the promenade and the land to the south), it is common ground that the freehold interest in that land is held by Stena. As such the land “belongs” to the First Objector for the purposes of s.58 of the 1959 Act.

238. The land is not and was not during the relevant qualifying period in active "use" by Stena for any purposes in connection with the harbour. As such the land was not "used for any purpose in connection with the harbour" during the qualifying period.

239. However, the land was, the Objectors submit, "held" for harbour purposes during that part of the qualifying period to 2007 before the lease to CSL was entered into. During the period from 1994 to 2007 the land was leased to the Council by Stena (and/or their respective successors) without any intervening leasehold interest. The lease to the UDC of 1927 makes extensive provision for the use of the land by Stena, if required, and for termination and recovery of possession, on six months' notice, of the whole or any part of the land from the UDC is required "for or in connection with … Holyhead Harbour or for or in connection with national purposes". The effect of this arrangement is that the use of the land for recreational purposes could be terminated by Stena on six months' notice, were the land to be required for harbour purposes. In effect the recreational use was to continue for only so long as the land was not required by Stena to be used for harbour purposes - it was, in effect, a meanwhile use. This demonstrates, the Objectors submit, that the land above HWOST was "held" for harbour purposes and therefore was within "harbour limits" and therefore was part of the "harbour" for that part of the qualifying period between 1994 and 2007. That part of the land was therefore subject to the Byelaws between 1994 and 2007.

240. The Objectors however accept that after the 999 year lease to CSLL was entered into in 2007 (without the same break provisions as are contained in the 1927 lease) the land above HWOST cannot sensibly be claimed to be "held" by Stena for harbour purposes. From 2007 therefore the land above HWOST was no longer part of the "harbour limits" or therefore the "harbour" and was not thereafter subject to the Byelaws. However the same is not the case for the area below HWOST which continued and continues to be within 'harbour limits" and subject to the Byelaws notwithstanding the 2007 lease.

241. In conclusion the Objectors submits:

- the byelaws applies throughout the qualifying period to that part of the application land which lies below HWOST; and

- the byelaws applied to that land above HWOST from that part of the qualifying period between 1994 and 2007 but not thereafter.

Effect of the Byelaws

242. The principal effect of the byelaws arises from byelaw 41.The effect of byelaw 41 is straightforward. Any person within that part of the "harbour" which comprises the application land requires permission or a licence from Stena (there being no public rights of way within the Land). If they do not have permission, their presence is contrary to byelaw 41 and unlawful.

243. If the Objectors are correct, the public (including local inhabitants) have a "right" to use the area of the TVG land deriving from the lease granted by the landowner in 1927 to the UDC. The 1927 lease in substance amounts to licence or written permission of the landowner, Stena. As such, their use is permitted and no breach of byelaw 41 arises. The Byelaw issue therefore falls away.

244. The fact that the Byelaws apply to land which was the subject of the 1927 lease does not give rise to some form of inconsistency, even when one considers the use to which the land was put pursuant to the lease. The Byelaws, by and large, seek to control use of the waterside elements of the harbour and the foreshore. However, byelaw 41 is engaged but the effect of the 1927 lease to the UDC plainly amounts to a licence or written permission from the MoT for the land to be used for recreational purposes by the public; the MoT, the contemporaneous correspondence reveals, were well aware of the UDC's intended use of the land. Byelaw 48, concerning the control of dogs, is in no way inconsistent with recreational use of the land. As such, no inconsistency arises.

245. In the alternative, if the Applicant is correct and the area of the TVG land which is the subject of the 1927 lease does not generate a right vested in local inhabitants to use that land for recreation, then such recreational use was in breach of byelaw 41, since no licence or written permission was given by Stena nor is any such licence or permission suggested by the Applicant to exist. As such, in respect of (i) the land below HWOST for the whole of the qualifying period and (ii) in respect of the remainder of the land until 2007 any sports and pastimes would not be "lawful" and, moreover, in light of a breach of byelaws made by Stena, as landowner, the use would be vi or forcible. Thus, if the Applicant,

prevails in respect of the "permission" issue (whether or not the Council had permitted recreational use of the Land by making it available for such use) the logical consequence of its success in that respect is that a breach of byelaw 41 arises and qualifying use of the Land did not occur.

246. The Applicant does not suggest that the Byelaws were not properly promulgated and the presumption of regularity would apply now to the making of the Byelaws in any event. The Byelaws are available on Stena's website. If it had been the case that the Byelaws had not been actively brought to the attention of the public, following *R (Newhaven Port and Properties) v East Sussex CC* [2015] UKSC 7, that would not result in the Byelaws having any less effect as in respect of the operation of the as of right test. That Stena has not had cause to enforce the Byelaws in respect of the application land is nothing to the point. There was no evidence of enforcement of the byelaws at issue in *Newhaven* yet those byelaws were held by the Supreme Court to have legal effect.

247. The Byelaws regulate use of the land to which they apply. In particular, byelaw 48 (Obj Vol B p69) requires controls on dogs and byelaw 46 concerns the throwing of stones (eg. on the foreshore). If the Registration Authority concludes that the Byelaws apply to the land in whole or in part and/or for the whole or part of the qualifying period, then to the extent that the Byelaws apply they give rise to an implied permission to use the land (following the principle established in *Newhaven*).

Conclusions on this issue

248. It is common ground that the Byelaws apply to the area below HWOST. Byelaw 41 provides, in particular:

"Except in the exercise of a public right of way or a licence or other written permission of the Board [or its successors] no person shall enter or be without having proper business thereat or loiter upon any part of the harbour. …".

249. On the face of it, therefore, any person who is within the harbour limits who is not exercising a public right of way, or who does not have a licence or other written permission to be there, or does not have proper business within the harbour, is in breach of that

byelaw. If a sport and pastime is being indulged in within the harbour limits in breach of that byelaw, such a sport and pastime would not be lawful.

250. Stena's predecessor granted a lease to the Council's predecessor in respect of the Land including the foreshore. That lease apparently envisaged that members of the public would enter upon the Land for open space or recreation or other similar purposes. In the 2016 Advice I expressed the view that the lease to the Council may have created a licence for members of the public to go on to that part of the Land which is within the harbour limits for recreation or open space purposes. Accordingly, sports and pastimes upon areas subject to the Byelaws might not be unlawful; but equally they may have been by permission.

251. If sports and pastimes were in breach of the byelaws, they were not lawful, and so there could not have been lawful sports and pastimes on the Land. In the absence of permission or licence to be on the Land, any sports and pastimes were not lawful.

252. If sports and pastimes were not in breach of the byelaws in the period before 2007 it would have to be because they were in exercise of a public right of way, or because they were in exercise of a licence or other written permission from Stena. There are no public rights of way within the Land. Any sport or pastime not in breach of byelaw 41 would therefore have to be by licence or other written permission from the First Objector Stena. I do not accept the Applicant's submission, if indeed the Applicant does make the submission, that under the second paragraph of the byelaw a person could "give a satisfactory account of himself or his business" and therefore not be in breach of that byelaw. A person indulging in sports and pastimes would not have "proper business" within the harbour and so could only accord with the byelaw if they had licence or permission to be there. The only manner in which it would appear that such a permission could have been granted was by virtue of the Council's lease: the First Objector leased the Land to the Council in the knowledge that the Land was going to be held by the Council for public recreation and made available for public recreation. It seems to me that by granting that Lease, the First Objector was giving permission for members of the public to go on to the Land which had formerly been part of the operational harbour.

253. The Applicant submits that the activities of sea cadets on the foreshore below HWOST was (a) not in breach of byelaw 41 because it would not be a nuisance or

inconvenience to harbour activities, and (b) sufficient to show significant qualifying use of that area. I am not persuaded by this contention. I heard evidence of some sea cadet use of the foreshore, but not enough to show "significant" use of the foreshore at any particular point in time and certainly not for the whole of the Relevant Period. In any event I do not consider that sea cadet activities would be a special case in relation to byelaw 41 and so would not be caught by it. The byelaw applies to any person who is on the Land who does not have proper business within the harbour, and who does not have licence or permission of the First Defendant. I see no reason why that byelaw would not apply to sea cadets whose presence could be, potentially, just as inconvenient or unsafe in the context of operational harbour activities as any other trespass by unauthorised members of the public. The sea cadets would not in pursuit of their own recreational activities be on "proper business" in the harbour.

254. Did the Byelaws apply to area above HWOST – the "Inland Area" – as well as the foreshore? It is common ground that the Inland Area was owned by the First Objector, even though leased to the Council. It is common ground that the Inland Area was not in use for harbour purposes. What, then, is the meaning of "held" in this context? It is not the same as "used", as the parties appear to agree.

255. If "held" is not simply "owned", and is not "used", then it must mean land which is owned but is not used, at a given point in time. It must also mean more than "owned" but less than "used". If land is owned by a body such as Stena but leased to a third party (such as the Council) on a fixed term lease with no break clauses or reservations, there would seem to be no real prospect of the Land being used by Stena for its statutory purposes before the expiry of a the fixed term lease. In those circumstances, it would appear that for the duration of such a lease the Land whilst owned by Stena is not held by Stena for its statutory purposes.

256. In the present case there is provision in the lease to the Council – namely the final reservation clause on the ninth page of the lease – which enables Stena to retake possession of the Land after 6 months' notice. It would appear that at the time the lease was granted Stena (or its predecessor) considered that such a provision was necessary, and that it might need to regain possession of the Land, for its statutory purposes, before the expiry of the lease. In 2007 however Stena was apparently of the view that there was no prospect of it requiring the Land for its statutory purposes in the foreseeable future, and

granted a head lease to the Second Objector CSL with no provisions allowing it to regain possession if needed for its statutory purposes.

257. The Objectors accept that, once the lease to CSL was granted, the Land was no longer being "held" by Stena for its statutory purposes. The Applicant agrees, but submits that the Land ceased to be "held" by Stena at some earlier point, being the point at which the decision was taken by Stena to free the Land for development (which is the reason, as I understand it, why the lease to CSL was granted). The Applicant does not say, however, when it considers that decision was taken by Stena.

258. It seems to me that, because of the terms of the lease to the Council, the Land was being "held" but not "used" by Stena's predecessor immediately after the lease was granted in 1927. That is because Stena's predecessor envisaged that it might require the Land for its statutory purposes and granted the lease expressly on the basis that it could regain possession accordingly, if it considered it necessary. The question that arises therefore is when, if at all, circumstances changed such that the land was no longer "held" by Stena. On the evidence and submissions of the parties I am not aware of any event which might constitute such a change in circumstances until the lease was granted to CSL in 2007. The Applicant submits that the passing of the years since the Council's lease was granted, without Stena seeking to make any use of the Land for its statutory purposes, demonstrates that at some point the Land changed from being "held" to being "not held". The Applicant does not however suggest when that change occurred. It seems to me that in the absence of some material change in circumstances (material in the sense of 'falls to be considered or taken into account") it would be arbitrary to conclude that after the passage of a certain number of years – whether it be one year, two years, five years, ten years, 25 years, or 50 years – the land was no longer being "held" by Stena for its statutory purposes.

259. For these reasons I accept the Objectors' submissions on this point. The Land above HWOST was, until the new lease was granted to CSL in 2007, being held by Stena for its statutory harbour purposes.

260. The Byelaws therefore applied to all of the Land until 2007. Either any use of any part of the Land for sports and pastimes was in breach of Byelaw 41 and not lawful; or it was with the licence or permission of Stena and not in breach of Byelaw 41, but by permission and not 'as of right'.

261. It seems to me that the latter position is probably the correct analysis: the lease to the Council granted permission to members of the public to go on the Land which Stena had leased to the Council for that purpose. It would seem a bizarre outcome if, having granted that lease in contemplation of that use, and the Council then having made the land available to the public in the decades since the lease was granted without any objection from Stena, any use of the Land for lawful sports and pastimes and general public recreation was nevertheless in breach of byelaw 41 after the Byelaws were made in 1971, and therefore unlawful. It is common ground between the parties that the Byelaws apply to the foreshore below HWOST; when the byelaws came into force in 1971 Stena would have been aware that those byelaws applied to the foreshore within the land leased to the Council and on which the public were recreating.

262. Whichever way one looks at it, either byelaw 41 rendered sports and pastimes unlawful on the whole of the Land until at least 2007; or sports and pastimes were not in breach of byelaw 41 and therefore lawful, but were with the permission of Stena at all times because of the lease granted to the Council in 1927, and so could not have been 'as of right'. Alternatively, as the Objectors submit, the effect of the byelaws was to regulate use of the Land, and so gave rise to an implied permission to use it, with the result that any public use could not be 'as of right'.

ISSUE (IV) whether the doctrine of statutory incompatibility applied to some or all of the Land, meaning that some or all of the Land could not be registered as a town or village green.

263. The Supreme Court held in *Newhaven* that section 15 of the Commons Act 2006 did not apply to land acquired by a statutory undertaker and held for statutory purposes which were inconsistent with its registration as a town or village green. Since powers were conferred on the claimant in that case to carry out its functions of operating and maintaining a working harbour, and since the effect of registration under the 2006 Act was to create criminal offences in respect of damage to the registered site or interruption to its use and enjoyment, there was a clear incompatibility between the 2006 Act and the statutory regime applying to the claimant's harbour. The 2006 Act did not enable the public to acquire user rights over West Beach that were incompatible with the continued use of the land for the statutory purposes on which it was held by the port authority (see paragraphs 93-97, 101, 102, 103-104).

264. The Objectors contend that the whole of the Land is within the harbour limits. They also contend that even if the Inland Area is not within the harbour limits, it is occupied by the Council under restrictive terms and in circumstances whereby Stena can determine the lease at any time if the Land is needed for harbour or national purposes. Accordingly, they argue, the doctrine of statutory incompatibility, explained by the Supreme Court in Newhaven, applies to the Land.

265. Since the Council was granted a lease in 1927 Stena has been content to allow the Council to make the land available for public recreation, and then in 2007 Stena granted a long head lease to CSL apparently in contemplation of future development proposals, whilst the lease to the Council subsisted.

266. On the basis of the evidence and submissions then presented by the Objectors, as explained in the 2016 Advice I did not consider it had been demonstrated that registration of the Land as a town or village green would be incompatible with the statutory purposes of Stena, and that therefore the land could not be registered as a green. Further submissions on this issue were made by the parties at the public inquiry.

The Applicant's Submissions

267. The Applicant does not accept that any issue of statutory incompatibility arises in this case. In *Newhaven* the Supreme Court observed that the law on prescriptive rights drawn from the creation of highways and easements needed to be approached with care. That is because in such cases the law operates on the basis that there had been presumed dedication of the easement or the public right of way. So, in such cases, where the landowner had no power to dedicate the land, there could be no presumed dedication. TVGs are different, the court held, as the law does not operate on the basis of a fiction of dedication. Instead, if the substantive conditions of the relevant sub-section in section 15 of the 2006 Act are met, the land is to be registered as a TVG. Statutory incompatibility in TVG cases had to have some other intellectual basis.

268. The Supreme Court held that the question of incompatibility was one of statutory construction and did not depend on the legal theory that underpins the rules of prescription of rights. The question was simply whether section 15 of the 2006 Act applies to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green. The Court held that it did not.

269. The *Newhaven* case made clear that the statutory incompatibility question arose when statutory ownership of the land brings specific statutory duties or functions in relation to that specific land which are prevented or hindered by its use for public recreation after registration. In *Lancashire County Council v Secretary of State* [2016] EWHC 1238 (Admin) (at [75], [76] and [80]) this point is made explicit.

270. The decision maker is concerned with the period of time after registration with reference to the state of affairs at registration. The issue of whether there might have been any statutory incompatibility in the past is not, it is submitted, relevant to the TVG criteria at the point where the decision maker must decide if the criteria are met.

271. In Newhaven, the provision which governed it as a harbour authority showed that the land or beach in question could be required for harbour works including dredging and the construction of breakwaters for a working harbour with public obligations to fulfil. Public recreational access as of right would be incompatible with that function. The land in question was obviously significant to the future performance by the harbour authority of its duties. Given the consequences of registration of land as a TVG there was a clear conflict

between the purposes of the Company and the registration of the land. Dredging of a TVG would be a criminal offence.

272. In the present case the land in question is not significant to the future performance by the harbour authority of its duties for two reasons: firstly, the acknowledgment of the land being non-operational and no evidence that that position is likely to be revisited anytime soon and secondly, the existence of the 2007 lease and outline planning permission which show that the Objectors have formed the view that there is no such conflict.

273. The evidence therefore clearly establishes that there was and is no issue with regard to a statutory incompatibility arising from harbour authority duties. In any event it is submitted that the relevant point in time at which the decision maker should ask if statutory incompatibility arises is the date of registration. This being the point at which any concern about specific duties (like dredging) being rendered illegal (and the consequences entailed therein) arises.

274. The intention of the statutory undertaker, it is submitted, must be highly relevant to the question of whether statutory incompatibility arises in any given case. If the statutory undertaker secures a planning permission for the relevant piece of land and therefore announces an intention to develop it, it flies in the face of common sense to maintain that registration will create a conflict with statutory obligations in respect of that land. Clearly in circumstances where the land owner who is a statutory undertaker has announced an intention to develop land for non-undertaker purposes the 'mischief' at which Newhaven was concerned with (making a specific necessary act illegal) does not arise.

275. The issue of statutory incompatibility is not simply a matter of purely theoretical analysis as to whether there is a conflict in the terms of any one document. It is a highly practical doctrine directed at avoiding the sort of problems in Newhaven, which do not arise in this case.

276. Further and in the alternative, where a statutory undertaker gives an unequivocal statement to the effect that a piece of land is non-operational then it is submitted that they cannot sensibly assert that there is an incompatibility arising from (on their own case) statutory provisions which do not apply to the land in question anymore. Any other approach would be ludicrous and allow a statutory undertaker to assert statutory

incompatibility on the basis of historic statute and long overtaken by other real-world events, like, for example a new housing development. Newhaven and Lancashire made clear that statutory incompatibility was not an academic discussion but rather about identifying specific problems which would actually be in issue on registration.

The Objectors' Submissions

277. Qualifying use of the Land has to be free of statutory incompatibility throughout the relevant qualifying period, the Objectors submit, and the test does not fall to be applied only at the point of registration or at the end of the qualifying period.

278. This temporal point was not addressed directly by the Supreme Court in *Newhaven*, the Objectors accept. However *Newhaven* and *Barkas* when considered together provide the answer, the Objectors submit:

a. the Supreme Court in *Newhaven* established that a village green right cannot subsist where, as a matter of statutory construction, the right is incompatible with the specific statutory powers and duties of a public authority or undertaker;

b. in *Barkas*, Lord Carnwath JSC confirmed that, in the context of town or village greens and the quality of use during the qualifying period, "the conduct must bring home to the owner, not merely that "a right" is being asserted, but that it is a village green right" (para.65);

c. it follows that if, as a matter of law, a village green right cannot subsist at any time during the qualifying period by reason of statutory incompatibility then as a matter of fact local inhabitants cannot assert such a right during the qualifying period so as to generate qualifying use.

d. Lord Neuberger PSC states as much, the Objectors submit, at paragraph 93 in *Newhaven* where, in the context of statutory incompatibility, he finds that "… the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of land for those statutory purposes". If the public cannot acquire TVG rights in such circumstances then, logically, the public cannot assert such rights during the qualifying period;

e. were the position to be otherwise the registration would be permissible on the basis of evidence of use which is said to amount to an assertion of a right but where that asserted right cannot in law exist; that plainly is a nonsense; and

f. it would be odd indeed if the Commons Act 2006 was to be construed such that land can be registered as a TVG at a point in time notwithstanding it fell into and out of registrability during the qualifying period.

279. The Objectors also submit that statutory incompatibility does not require evidence of such incompatibility arising from actual or potential future uses: in *Newhaven* Lord Neuberger PSC (at paragraph 93) concluded that "the question of incompatibility is one of statutory construction". The President held expressly that evidence of incompatibility with the port operator's future plans was not necessary (see para.96). Whether statutory incompatibility arises is a matter of law and not of evidence.

280. The statutory incompatibility argument is made by the Objectors on two bases.

281. The first, which concerns the TVG land as a whole, focuses on the period before 2007 when a 999 year lease was granted to CSL. During that period before 2007 Stena held the freehold interest of the land and retained a right to recover possession of the land from the Council for harbour related purposes on six months' notice.

282. Stena is a statutory undertaker whom, by s.30 of the British Transport Commission Act 1959, was vested with certain powers and duties.

283. By s.30(1) of the 1959 Act, the provisions of the Harbour, Docks and Piers Clauses Act 1847 is incorporated into the 1959 Act, including the duty within s.33 that the " harbour, dock and pier shall be open to all persons for the shipping and upshipping of goods, and the embarking and landing of passengers". The 1959 Act thereafter provides a series of powers to carry out works within the "harbour limits". "Harbour limits" is defined in s.28 and therefore encompasses the same area of TVG land, and for the same periods, as do the Byelaws.

284. With regard to those powers, Stena, as harbour authority "may from time to time deem necessary or convenient for any purpose for or in connection with the harbour or the accommodation of vessels and traffic thereat" (s.32(1)(a)) and "maintain and from time to time alter reconstruct renew extend and improve the harbour and the harbour works or any of them" (s.31(1)(b)). These are powers contained within the 1959 Act which are specific to Holyhead Harbour and to Holyhead Harbour only (see Part IV of the 1959 Act, which begins with s.27). Section 32 is a specific enactment and not a general one.

285. Would the assertion of a TVG right – the effect of which is to allow at all times use for the land for lawful sports and pastimes – be compatible with the exercise of these statutory powers? They are not, the Objectors submit. The harbour authority could not, for example, construct buildings on the application land compatible with a TVG right. It could not construct a pier, jetty or indeed a new groyne on the foreshore within the application land. The position is on all fours with *Newhaven* in this respect. Just as in *Newhaven*, evidence of actual future incompatibility was not necessary (see para.96), it is not necessary here. Approached as a matter of statutory construction, as is required, the incompatibility becomes clear.

286. Further and alternatively, the 1971 Byelaws applied to the TVG land below HWOST throughout the qualifying period and continued to apply now and into the future (notwithstanding the 2007 lease). The Byelaws applied to the TVG land above HWOST until 2007. Stena (and its predecessor) had power to make byelaws pursuant to s.37(1) of the 1957 Act, which incorporates s.83 of the 1847 Clauses Act. It also has power to enforce the Byelaws (see s.57(2)). If the land were registered as a green, rights would accrue and be vested in the local inhabitants. The Byelaws – including byelaw 41 and 48 (concerning control of dogs) by way of example – would not be capable of being enforced by Stena. With regard to the former, a TVG right is not a public right of way, nor is it a licence or written permission of Stena. Only those with such a right, licence or permission may be within the "Harbour" as defined. The Harbour Master may remove and exclude those who have no such right, licence or permission. Plainly, if TVG rights exist, this restriction is unenforceable.

287. It follows that TVG rights would not therefore be consistent with the statutory byelaw making powers derived from s.37 of the 1959 Act. Statutory incompatibility arises therefore for this additional reason.

288. If the submission that statutory incompatibility must not arise during the qualifying period is correct, this submission holds good in respect of all of the land (including the land above HWOST which became subject to a 999 year lease in 2007 and thereby ceased to fall within the "Harbour" from that date).

289. If however statutory incompatibility only falls to be tested at the point of registration (or indeed at the end of the 20 year qualifying period in 2014) then this point still holds good in respect of the land below HWOST which, at all times until now and into the future, it remains within the "harbour" by reason of s.58(1)(b) of the 1959 Act and therefore subject to the Byelaws, including byelaw 41.

Conclusions on this issue

I accept the Objectors' argument that, because of the powers and duties of the First Objector Stena as statutory harbour authority, had the Land been registered as a green in the period before 2007, such registration would be incompatible with the First Objector's statutory powers and duties. I have concluded that the whole of the Land was held for the First Objectors' statutory purposes during the period 1994-2007 (see the discussion concerning the Byelaws issue, above). As the Objectors observe, the assertion of a village green right – the effect of which is to allow at all times use for the land for lawful sports and pastimes – would not have been compatible with the exercise of the statutory powers in question before 2007. The harbour authority could not construct buildings on the Land, for its statutory purposes, compatible with village green rights. It could not construct a pier, jetty or a new groyne on the foreshore within the Land. The position is comparable with *Newhaven* in this respect.

290. However, no incompatibility arose in practice because although the Land was held for the First Objector's statutory purposes there was no attempt by the First Objector to use the Land for those purposes. After 2007 the Inland Area above HWOST (i.e. all of the Land except the Foreshore) was no longer held by the First Objector for its statutory purposes because it had granted a 999 year head lease to CSL with no provisions enabling it to recover possession of the Land as per the relevant clauses in the Council's lease. Since 2007 it would appear that, 'on the ground' no issue of statutory compatibility could arise at any given moment in relation to the Inland Area above HWOST.

291. The Objectors submit that because the foreshore below HWOST remains within the defined harbour limits, it is still subject to the Byelaws, and that statutory incompatibility continued to arise in relation to that area of land after 2007 , because registration of that land as a green would be incompatible with the power to make and enforce byelaws.

292. The principal matter to consider, therefore, is whether one considers whether statutory incompatibility arises at the point of the determination of the Application (i.e. as matters stand today), which is the position contended for by the Applicant; or whether as the Objectors contend one approaches the matter on the basis that there can be no statutory incompatibility arising at all during the Relevant period i.e. that in order for land to become a green, there can be no legal impediment to registration of that land at any point in the 20 year qualifying period.

293. There is no authority on this point, as far as I can discern. The decision of the Supreme Court in *Newhaven* did not deal with the issue because on the facts it did not arise; in that case the operational harbour continued to be operational throughout the 20 year qualifying period for registration as a green.

294. I see force in the Objectors' submissions to the effect that:

- if, as a matter of law, a village green right cannot subsist at any time during the qualifying period by reason of statutory incompatibility then as a matter of fact local inhabitants cannot assert such a right during the qualifying period so as to generate qualifying use;

- were the position to be otherwise the registration would be permissible on the basis of evidence of use which is said to amount to an assertion of a right but where that asserted right cannot in law exist; and

- it would be odd if the Commons Act 2006 was to be construed such that land can be registered as a TVG at a point in time notwithstanding it fell into and out of registrability during the qualifying period.

295. If it was essential for me, and for the Registration Authority, to reach a conclusion on this matter, I would be likely to agree that the Objectors' approach was correct, and

conclude that because no village green rights could have arisen in the period before 2007, for the reason that registration of the Land would have been incompatible with the First Objector's statutory powers and duties in relation to the whole of the Land, the Applicant could not show 20 years qualifying use of the Land for that reason also. I am less persuaded that the continued application of the Byelaws to the foreshore after 2007 gives rise to a separate conclusion of statutory incompatibility barring registration of that area, because the lease to CSL enables CSL the right to carry out (subject to obtaining planning permission and other regulatory consents) acts of development on the Land which would appear to be contrary to the Byelaws in any event.

296. However, because of the other conclusions that I have reached, namely:

- that use of the Land was 'by right' and not 'as of right' for the whole of the Relevant Period because the Council held it and had made it available for such use; and
- because until 2007 the whole of the Land was subject to the Byelaws, which either caused any sports and pastimes on the Land to be unlawful rather than lawful, or alternatively when considered in conjunction with the lease to the Council gave rise to the grant of permission to the public to use the Land

my overall recommendation is that the Land cannot be registered at this time and that the Application must be rejected. I do not consider, therefore, that it is necessary for the Council to reach a final conclusion on the issue of statutory incompatibility preventing registration of the whole, or any part, of the Land.

OVERALL CONCLUSIONS AND RECOMMENDATION

(1) The Application should be amended, as noted at paragraph 137 above, to exclude certain areas from the Land.

(2) The car parking area to the west of the Sailing Club, and the Sailing Club Slipway, could not have been subject to significant use for lawful sports and pastimes for the whole of the Relevant Period, and those areas could not fall to be registered (see paragraphs 135-136 above).

(3) In the light of all the evidence, the Applicant has demonstrated that there was use of the remainder of the Land (i.e. the Land, excluding the areas referred to in (1) and (2) above) by a significant number of inhabitants of the Locality, for sports and pastimes, continuously throughout the Relevant Period (issue (I)). That, however, is not on its own sufficient to warrant registration of the Land as a town or village green.

(4) In the 2016 Advice I concluded that, following the decision of the Supreme Court in *Barkas*, the manner in which the Council held and maintained the land, and made it available for public recreation, resulted in public use of the Land being 'of right' and not 'as of right'. Having considered all the evidence and received further submissions from the parties my view on that matter has not changed. I conclude that use of the Land by inhabitants of the Locality was not 'as of right' at any time within the Relevant Period (issue (II)). Accordingly the application should be rejected.

(5) The fact that the Council permitted various public events to take place on the Land within the Relevant Period tends to reinforce the conclusion and recommendation at (4) above, but that matter does not give rise to a freestanding reason to reject the application. Similarly, the signs placed on the Land do not give rise to a freestanding reason to reject the application.

(6) The whole of the Land was subject to the Byelaws between 1994 and 2007, and therefore either sports and pastimes on the Land could not have been lawful in that time, because they were contrary to byelaw 41; or alternatively the First Objector Stena had given permission for the public to recreate on the Land, by virtue of the 1927 lease to the Council, and therefore any sports and pastimes were not in breach of byelaw 41 but were by permission and not 'as of right'. Alternatively the existence of the Byelaws gave rise to an implied permission for the public to use the Land, and

therefore use could not have been 'as of right' (issue (III)). Accordingly the Application should be rejected.

(7) The objection arising from the doctrine of statutory incompatibility, as advanced on the facts of this case, is novel and is not the subject of any authority strongly supporting it or detracting from it (issue (IV)). Because of my other recommendations, above, that the Application should be rejected, I do not consider it is necessary for the Registration Authority to reach a concluded view on this point.

For these reasons the Application should be rejected.

297. I understand that this recommendation is likely to dismay those inhabitants of the Porth y Felin Locality, and others, who support the application. They have demonstrated that the Land was subject to use for sports and pastimes by a significant number of inhabitants of that Locality for the whole of the claimed 20 year period. That, however, is not enough to lead to registration of the Land as a town or village green. It must also be shown, amongst other things, that such use of the Land was 'as of right', and this is principally why the Application cannot succeed. A lease of the Land was taken by the Council in order that the Land be laid out as an area of public recreation, and it was maintained for that purpose thereafter. The Council intended to confer a right upon the public to use the Land for recreation, until circumstances changed, and Stena's predecessor the Ministry of Transport was aware that the lease had been taken in contemplation of that purpose and use. The consequence is that the public had a right to go on the Land, but that right was granted by the Council and/or its predecessor (and indeed by Stena and/or its predecessor) and could be withdrawn. Local inhabitants have never been able to use the Land 'as of right'. As matters stand the Land is not capable of being registered as a town or village green.

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14th February 2017

SECTION 15 OF THE COMMONS ACT 2006

ISLE OF ANGLESEY COUNTY COUNCIL

APPLICATION TO REGISTER LAND AT NEWRY BEACH AND GREEN, HOLYHEAD, ANGLESEY AS A TOWN OR VILLAGE GREEN

REPORT

to the Isle of Anglesey County Council

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