

Development and Regulation Committee

10:30	Friday, 25 July 2014	Committee Room 1, County Hall, Chelmsford, Essex
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Quorum: 3

Membership:

Councillor R Boyce	Chairman
Councillor J Abbott	
Councillor J Aldridge	
Councillor K Bobbin	
Councillor P Channer	
Councillor M Ellis	
Councillor C Guglielmi	
Councillor J Lodge	
Councillor M Mackrory	
Councillor Lady P Newton	
Councillor J Reeves	
Councillor S Walsh	

For information about the meeting please ask for:

Matthew Waldie, Committee Officer

Telephone: 01245 430565

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Essex County Council

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Part 1

(During consideration of these items the meeting is likely to be open to the press and public)

		Pages
1	Apologies and Substitution Notices The Committee Officer to report receipt (if any)	
2	Declarations of Interest To note any declarations of interest to be made by Members	
3	Minutes	7 - 16
4	Identification of Items Involving Public Speaking To note where members of the public are speaking on an agenda item. These items may be brought forward on the agenda.	
5	Minerals and Waste	
5a	Asheldham Quarry, Southminster Extension of time to existing quarry for an additional 15 years to 31st December 2029 and amendments to existing operation to allow for the importation of inert waste material for restoration. Location: Asheldham Quarry, Southminster Road, Asheldham, Essex, CM0 7DZ. Ref: ESS/16/14/MAL DR/24/14	17 - 62
5b	Slough Lane Gas Flare, Ardleigh Installation of a 1000 Kilowatt (kWe) environmental flare compound comprising Gas Plant, Generator, storage tanks, transformer, Switch and meter room and associated close boarded and palisade fencing. Location: Slough Lane, Ardleigh, CO7 7RU. Ref: ESS/17/14/TEN DR/25/14	63 - 72
6	Enforcement Update	

6a	A120/B1256 intersection, Braintree ENFORCEMENT OF PLANNING CONTROL - The importation, deposition and spreading of waste materials on the land, substantially raising the land levels (the unauthorised development). Location: Land at intersection of A120 and B1256 (Stortford Road), Braintree, Essex. Ref: ENF/0673 DR/26/14	73 - 74
6b	Michelins Farm, Rayleigh ENFORCEMENT OF PLANNING CONTROL - Unauthorised Development: A material change of use of the land from agricultural land to land used for the importation, deposition and spreading of waste materials, substantially raising the land levels. Location: Land at Michelins Farm, Southend Arterial Road, Rayleigh, Essex SS6 7NG. Ref: ENF/0614 DR/27/14	75 - 78
6c	Quarterly Enforcement Report To update members of enforcement matters for the period 1 April to 30 June 2014 (Quarterly Period 2). DR/28/14	79 - 82
7	Village Green	
7a	Mistley Quay, Mistley Application to register land at Mistley Quay, Mistley, Essex as a town or village green. DR/29/14	83 - 334
7b	Horsemans Green, Witham Application to register land at Horsemans Green, Witham, Essex as a town or village green. DR/30/14	335 - 350
8	Information Items	

8a Applications, Enforcement and Appeals Statistics 351 - 354

To update Members with relevant information on planning applications, appeals and enforcements, as at the end of the previous month, plus other background information as may be requested by Committee.

DR/31/14

9 Date of Next Meeting

To note that the next meeting will be held on Friday 22 August 2014 at 10.30am. Please note it will be held in Committee Room 2.

10 Urgent Business

To consider any matter which in the opinion of the Chairman should be considered in public by reason of special circumstances (to be specified) as a matter of urgency.

Exempt Items

(During consideration of these items the meeting is not likely to be open to the press and public)

To consider whether the press and public should be excluded from the meeting during consideration of an agenda item on the grounds that it involves the likely disclosure of exempt information as specified in Part I of Schedule 12A of the Local Government Act 1972 or it being confidential for the purposes of Section 100A(2) of that Act.

In each case, Members are asked to decide whether, in all the circumstances, the public interest in maintaining the exemption (and discussing the matter in private) outweighs the public interest in disclosing the information.

11 Urgent Exempt Business

To consider in private any other matter which in the opinion of the Chairman should be considered by reason of special circumstances (to be specified) as a matter of urgency.

All letters of representation referred to in the reports attached to this agenda are available for inspection. Anyone wishing to see these documents should contact the Officer identified on the front page of the report prior to the date of the meeting.

MINUTES OF A MEETING OF THE DEVELOPMENT AND REGULATION COMMITTEE HELD AT COUNTY HALL, CHELMSFORD ON 27 JUNE 2014

Present

Cllr R Boyce (Chairman)
Cllr J Abbott
Cllr J Aldridge
Cllr K Bobbin
Cllr M Ellis
Cllr C Guglielmi

Cllr J Lodge
Cllr M Mackrory
Cllr Lady P Newton
Cllr J Reeves
Cllr C Seagers
Cllr S Walsh

1. Apologies and Substitution Notices

Apologies were received from Cllr Penny Channer (substituted by Cllr Seagers).

2. Declarations of Interest

Cllr Bobbin declared a personal interest in agenda item 5a, Terminus Drive, Pitsea, as a local Basildon Councillor, and would withdraw for the consideration of this item.

Cllr Ellis declared a personal interest in agenda item 5a, Terminus Drive, Pitsea, as a local Basildon Councillor.

3. Minutes

The Minutes and Addendum of the Committee held on 25 May 2014 were agreed and signed by the Chairman.

4. Identification of Items Involving Public Speaking

Persons identified to speak in accordance with the procedure were identified for the following item:

Change of use to waste recycling and materials recovery facility and erection of buildings, containment walls, hardstanding, roadways, fencing, parking, storage areas and ancillary development (part retrospective)

Location: Land to the south of Terminus Drive, Pitsea Hall Lane, Pitsea, Essex SS16 4UH

Reference: ESS/69/BAS

Applicant: Heard Environmental

Public Speakers: Trevor Hutchinson speaking against
Russell Forde speaking for.

Councillor Bobbin left the meeting at this point

5. **Terminus Drive, Pitsea**

The Committee considered report DR/21/14 by the Director for Operations, environment and Economy.

The Members of the Committee noted the contents of the Addendum attached to these minutes.

The committee was reminded that an application had been previously considered by the Committee and Planning Permission had been issued in June 2013. However, following Judicial Review, ECC had agreed to the quashing of the permission. This was a revised application.

Policies relevant to the application were detailed in the report.

Details of consultation and representations received were set out in the report.

The Committee noted the key issues that were:

- Need, principle and location
- Highway impacts
- Impacts on public rights of way
- Design, landscape and visual impacts
- Impacts on ecology
- Impacts on local and residential amenity
- Impacts on the historic environment and viability of Cromwell Manor
- Impacts on hydrology
- Economic benefits.

In accordance with the protocol on public speaking the Committee was addressed by Trevor Hutchinson, planning agent for Cromwell Manor. Mr Hutchinson said:

- Any harm or loss to a heritage asset must be justified, and should be weighed against any public benefits of the proposal. This proposal clearly causes harm, but only brings limited benefits
- The venue is unlikely to remain attractive as a wedding venue if the proposals go through
- The test of benefit is whether a particular site is required to provide the benefit – but this site is not identified as a suitable site on any existing or emerging local waste plan
- The existing 15 jobs are outweighed by the economic benefits of Cromwell Manor as a wedding venue, with the potential loss of employment by those working at Cromwell Manor as well
- The lighting design is substandard
- The 7 pre-commencement conditions included in the previous consent have been totally disregarded.

Russell Forde, representative of Smart Planning, said:

- Permission was previously granted for this site. Following the challenge by judicial review, and subsequent agreement to have consent quashed, the operator has addressed several issues that were previously raised as having potential impact on the adjacent building
- The County Council's officers have agreed that the proposals are acceptable in terms of local and national planning policy
- The Environment Agency has issued a draft permit for the site, indicating it can operate without detriment to the environment and adjacent sites
- The operator is a responsible local employer, committed to reducing landfill by reducing waste and working within all permits and conditions
- The original decision was to grant permission and, although there have been no material changes since then, the new application answers any questions raised by Members and at the judicial review
- A conscious business decision was made at some point to develop a wedding venue next to an allocated industrial estate
- Officers can provide an accurate account of the lighting arrangements on site.

A number of concerns were raised by Members:

- The height of the building does have a visual impact; and its colour adds to this
- Although recycling does need to move up through the planning hierarchy, this is not a designated site
- The condition restricting the use of machinery to one piece at any one time may be hard to enforce – although it was noted that the applicant himself had proposed this restriction
- It is hard to assess at what point the cumulative impact of the workings on the site may become “substantial harm”

In response to questions raised by Members, it was noted:

- The five grounds for the judicial review had been covered
- The railway line to the south of the site lies approximately one metre (in altitude) below the site
- Access roads to the site will be metalled, but not necessarily all those on site
- If permission is not granted, the building on site will have to be demolished
- The 3 metre high sleeper wall to the north of the site exists to protect the public right of way; and there is also a hedge/tree screen between the wall and the right of way
- The proposed lighting scheme aims to reduce impact on the railway and residential amenity, and it is subject to assessment

After further discussion, the original resolution was proposed and seconded, with amendments relating to:

- The restricting of lighting hours and requirement for any additional, lighting to be subject of approval
- Details of dust suppression measures outside the building to be submitted
- The changing of the colour of the main building, to mitigate visual impact

- The use of plant from 8.00 am to 5.00 pm, Monday to Friday only and not on Saturday mornings.

Following a vote of six in favour and three against, with Cllrs Abbott and Lady Newton abstaining, it was

Resolved

That planning permission be granted subject to conditions covering the following matters:-

1. COM3 - Compliance with submitted details
2. COM2 – Notification of commencement within 7 days of implementation
3. WAST1 – Definition of waste materials to be imported
4. WAST5 – Restricting waste to areas as approved
5. Bespoke - no use of tracked vehicles east of the building except for construction and maintenance
6. HIGH13 – surface materials of access
7. HIGH14 – Access gates
8. HIGHWAYS - Bespoke
Linage on surface to define route, linage to be maintained. The Public's rights and ease of access over the public footpath shall be maintained free and unobstructed at all times.
9. HIGH7 – erection of warning signage for PRow Vange 136
10. HIGHWAYS - Bespoke
Each vehicular parking space shall have minimum dimensions of 2.9 metres x 5.5 metres.
11. HIGHWAYS - Bespoke
The powered two wheeler/cycle parking facilities as shown on the approved plan are to be provided prior to the first occupation of the building and retained at all times.
12. HIGH5 – restriction to 100 HGV movements [50 in and 50 out] per day (Monday to Friday) 50 HGV movements [25 in and 25 out] per day (Saturdays)
13. HIGH1– improvement to Terminus Drive access
14. HIGH2 – All Access to be via Terminus Drive
15. LAND1 – Requires submission details regarding a landscaping scheme, including preparation of appropriate ground conditions prior to planting and planting species shall include 40% flowering shrubs
16. LAND2 – Requires replacement of trees/and shrubs (if necessary) within 5 years of commencement
17. VIS 2- Restricting stockpile heights to 4m
18. HOUR1 – Restricts construction times to 07:00 to 18:30 hours Monday to Friday and 07:00 to 13:00 hours Saturdays
19. HOUR5 - Restricts hours of operation times to 07:00 to 18:30 hours Monday to Friday and 07:00 to 13:00 hours Saturdays
20. NSE3 – Requires noise monitoring to be undertaken and submitted within one month of commencing operations to validate predictions and

thereafter as required by Waste Planning Authority to demonstrate compliance .

If measured noise levels exceed those detailed proposed mitigation measures shall be submitted to and approved in writing by the Waste Planning Authority within 1 month of noise monitoring identifying noise levels greater than the maximum limits.

21. Bespoke - maintenance of sound proofing of the waste processing building through the life of development
22. Bespoke - no operation of crusher, trommel or shredder at one time, and submission and approval of management scheme to achieve this.
23. DUST1 – Implementation in accordance with approved dust suppression measures
24. Bespoke – Prior to beneficial use of waste building submission and approval of details of dust suppression mist system for main building and dust suppression for outside storage areas
25. LGHT1 - Requires submission details regarding any additional proposed lighting on site
26. ECO1- Implementation in accordance with approved Reptile Mitigation Measures
27. Light monitoring to demonstrate compliance
28. Vibration monitoring
29. POLL1 - Requires submission details regarding surface water drainage and an assessment of the hydrological and hydrogeological context of the development.
30. Bespoke – the colour of the main building shall be Goosewing Grey and the lobby Mineral Green/Moorland
31. NSE3 – Monitoring noise levels – setting maximum noise levels and approving monitoring locations
32. Bespoke – Doors in east elevation of lobby to main building to remain closed at all times and only used in case of emergencies
33. Bespoke – no more than 50,000 tonnes per annum throughput, records made available to WPA upon request.

Councillor Bobbin rejoined the meeting at this point.

6. Montgomery Infant & Junior School, Colchester

The Committee considered report DR/22/14 by the Director of Operations: Environment and Economy.

The Members of the Committee noted the contents of the Addendum attached to these minutes.

The Committee was advised that the school intended to double its intake and therefore had to build the necessary accommodation, including eight new classrooms.

Policies relevant to the application were detailed in the report.

Details of consultation and representations received were set out in the report.

The Committee noted the key issues that were:

- Need
- Policy considerations
- Impact on playing field provision
- Impact on landscape and ecology
- Impact on residential amenity
- Highways and parking

In response to questions raised by Members, it was noted:

- There was no planned mitigation for the loss of the trees to the new car parking area. This could be included
- There were no specific lighting conditions, either relating to sustainability or limiting impact on the local community; these could be added
- A requirement could be added to ensure the removal of the existing temporary classroom, when the work is complete. There is already a condition to remove the temporary classbase provided for the construction period.
- Although Sport England had requested that consideration be given to providing facilities for public use, there could be no presumption that local people would want to use these facilities; and this was beyond the scope of this application in any case
- Consideration will be given to providing some more technical details on the construction of these buildings in the circulated papers. Members were reminded that fuller details of each application are available on the planning website
- Officers will take back Members' concerns over the practicality of building on one storey only

The resolution was proposed and seconded, with the addition of conditions relating to:

- of landscaping
- The restriction of lighting
- The removal of the temporary classroom on completion of the project.

Following a unanimous vote in favour, it was

Resolved:

That pursuant to Regulation 3 of the Town and Country Planning General Regulations 1992, planning permission be **granted** subject to:

- The Secretary of State not calling in the application for his own determination and
- the following conditions:

1. The development hereby permitted shall be begun before the expiry of 5 years from the date of this permission. Written notification of the date of commencement shall be sent to the County Planning Authority within 7 days of such commencement.
2. The development hereby permitted shall be carried out in accordance with the details of application reference CC/COL/15/14 dated 10 February 2014, 16 February 2014 and 17 February 2014 and validated on 26 February 2014 together with Tree Survey, Arboricultural Impact Assessment, Preliminary Arboricultural Method Statement & Tree Protection Plan prepared by Hayden's Arboricultural Consultants (Project Number 3784) dated 18 October 2013, Extended Phase 1 Habitat Survey prepared by MLM Environmental (Document Reference ACC/771460/R1) dated 18 November 2013, Montgomery Junior School Interim Travel Plan Version 2.0 dated December 2013, Montgomery Infant School and Nursery Interim Travel Plan dated January 2014, Ground Investigation Report (13711SI) prepared by RSA Geotechnics Ltd dated December 2013, Unexploded Ordnance Desk Study prepared by MACC International Ltd (Project Number 3600) dated 5 November 2013, Design and Access Statement (Project Number 6126) dated January 2014 and Drawing numbers 6126-1102 (Proposed Site Location Plan) dated January 2014, 6126-1102-P6 (Proposed Site Plan) dated 24 January 2014, 6126-1100-P1 (Existing Site Plan) dated 24 January 2014, IG13/261/200 Revision T3 (Proposed Drainage Layout) dated 20 December 2013, 6126-1201-P5 (Proposed Ground Floor Plan) dated 10 February 2014, 6126-1202-P5 (Proposed Roof Plan) dated 10 February 2014, 6126-1221-P1 (Existing Junior School - Extract Plans) dated 24 January 2014, 6126-1222-P1 (Existing Infants School - Extract Plans) dated 24 January 2014, 6126-1230-P4 (Existing Junior School - Proposed Alterations) dated 24 January 2014, 6126-1231-P3 (Existing Infant School - Proposed Alterations) dated 24 January 2014, 6126-1304-P4 (Proposed Elevations) dated 10 February 2014, 6126-1305-P1 (Proposed Covered Canopy Elevations) dated 24 January 2014, 6126-1404-P2 (Proposed Sections A-A& B-B) dated 10 February 2014, 6126-1501-P1 (Frontage Extension Proposals) dated 24 January 2014 and 6126-1502 (Rear Entrance Proposals to Infants) dated January 2014, email from Kevin Harrison, Stanley Bragg Architects dated 29 May 2014 10:46 together with drawings HD/CRS/09 (Single Classroom 2 x UK123 Ultima Modules with WC's & Sink) dated 7 July 2009, HD/9254/03 (Plans & Elevations - Single Classroom Block with toilets - 2 x UK123) dated 2013 and Tech Turf information sheet, email from Alex Drouet, Barnes Construction dated 13 May 2014 11:08, email from Alex Drouet, Barnes Construction dated 12 May 2014 12:58 together with drawing numbers 6126-1103 (Proposed Fire Path and Sports Pitches) dated May 2014 and 6126-1105 (Existing Sports Pitches) dated May 2014 and email from Alex Drouet, Barnes Construction dated 10 June 2014 15:31 and in accordance with any non-material amendments as may be subsequently approved in writing by the County Planning Authority, except as varied by the following conditions:
3. No development shall take place until details and samples of the materials to be used on the classbase extension and covered walkway links hereby permitted have been submitted to and approved in writing by the County

Planning Authority. The details shall include the colours and finishes to be used on the building. The development shall be implemented in accordance with the approved details.

4. No development shall take place until details of the external materials and colour of the proposed extension to the northern elevation of the Infant School building have been submitted to and approved in writing by the County Planning Authority. The development shall be implemented in accordance with the approved details.
5. No development shall take place until details of all ground surface finishes, including kerbs, have been submitted to and approved in writing by the County Planning Authority. The development shall be implemented in accordance with the approved details.
6. No development or any preliminary ground-works shall take place until:
 - a) All trees/hedges to be retained during the construction works have been protected by fencing of the HERAS type. The fencing shall be erected around the trees/hedges and positioned from the trees/hedges in accordance with British Standard 5837:201 "Trees in Relation to Construction", and;
 - b) All weather notices prohibiting access have been erected on the fencing demarcating a construction exclusion zone as detailed in BS5837:2012 section 6.

Notwithstanding the above, no materials shall be stored or activity shall take place within the area enclosed by the fencing. No alteration, removal or repositioning of the fencing shall take place during the construction period without the written consent of the County Planning Authority.

7. Unless otherwise approved in writing by the County Planning Authority, no retained trees/hedges shall be cut down, uprooted or destroyed, nor shall any retained trees' branches, stems or roots be pruned
8. No development or preliminary ground-works shall take place until a written scheme and programme of archaeological investigation and recording has been submitted to and approved in writing by the County Planning Authority. The scheme and programme of archaeological investigation and recording shall be implemented prior to the commencement of the development hereby permitted or any preliminary groundworks.
9. During the construction duration of the development hereby permitted no commercial vehicle shall leave the site unless its wheels and underside chassis have been cleaned to prevent materials, including mud and debris, being deposited on the public highway.
10. Within 3 months of the completion of the development hereby permitted, or within 1 month of its first beneficial occupation, whichever is the sooner, the use of the temporary classbase provided for the duration of the construction works,

as defined on drawing reference 6126-1101-P6 Revision P6 (Proposed Site Plan) dated 24 January 2014, shall cease and thereafter shall be removed from the site within 1 month and the land reinstated to its former condition within a further 28 days.

7. Statistics

The Committee considered report DR/23/14, Applications, Enforcement and Appeals Statistics, as at end of the previous month, by the Head of Planning, Environment and Economic Growth.

The Committee **NOTED** the report.

8. Date and time of Next Meeting

The Committee noted that the next meeting will be held on Friday 25 July 2014 at 10.30am in Committee Room 1.

There being no further business the meeting closed at 12.15 pm.

Chairman

DR/24/14

committee DEVELOPMENT & REGULATION

date 25 July 2014

MINERALS AND WASTE DEVELOPMENT

Proposal: **Extension of time to existing quarry for an additional 15 years to 31st December 2029 and amendments to existing operation to allow for the importation of inert waste material for restoration.**

Location: **Asheldham Quarry, Southminster Road, Asheldham, Essex, CM0 7DZ.**

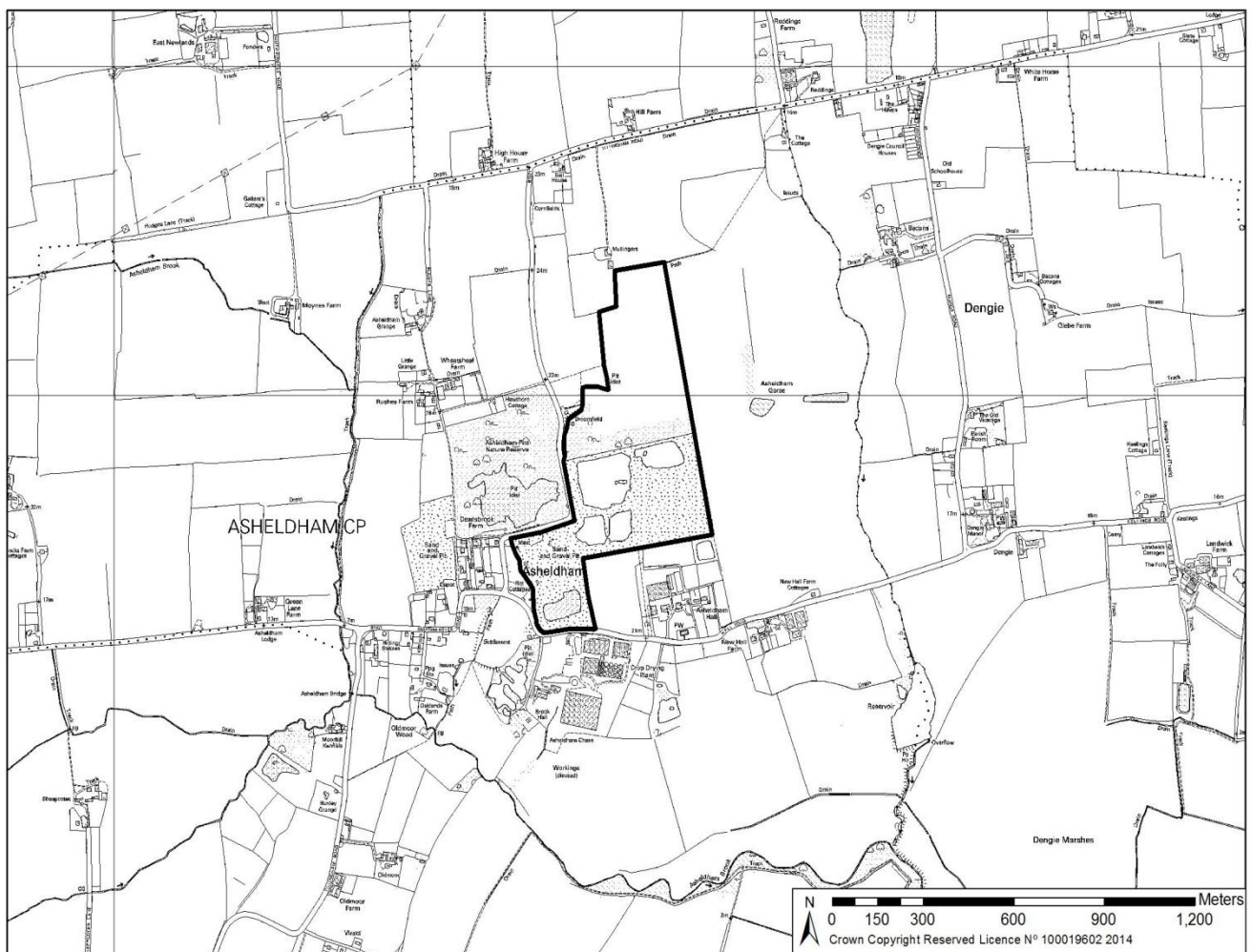
Ref: **ESS/16/14/MAL**

Applicant: **G&B Finch Ltd.**

Report by Director of Operations, Environment and Economy

Enquiries to: Shelley Bailey Tel: 03330136824

The full application can be viewed at www.essex.gov.uk/viewplanning



1. BACKGROUND

Planning permission was originally granted for mineral extraction at the application site in September 1980 under permission ref MAL/252/77. This permission, together with permissions relating to a processing plant, workshop, concrete roadway, weighbridge, office/messroom and ready mixed concrete plant, was reviewed under a Review of Mineral Permission ref ESS/14/00/MAL. The submitted conditions were accepted by Essex County Council on 31 October 2000.

Permission ref ESS/14/00/MAL requires the extraction of sand and gravel and restoration by 31 December 2014.

Prior to the current operator taking over the site in 2011, the quarry was moth-balled. Extraction of mineral has taken place on the southern section of the site and there is still approximately 16 hectares of existing permitted area yet to be worked.

Conditions 24 and 25 attached to permission ref ESS/14/00/MAL respectively required the submission and approval of final restoration and aftercare schemes by 31 March 2001.

Details were duly submitted and subsequently approved on 20 September 2001. The approved details show that the quarry was to be restored to agriculture and lakes. Importation of restoration material was not proposed or permitted.

Although the lateral extent of the quarry operations is referenced in condition 5 of permission ref ESS/14/00/MAL, the depth of working and total amount of mineral to be extracted is not defined. The original permission ref MAL/252/77 shows a maximum depth of working of 10.5m below the surface and a figure of 1,407,000m³ of total workable mineral was stated.

2. SITE

The application site is approximately 35.6 hectares in area. It is located approximately 6.5km north of Burnham-on-Crouch and 13.5km south east of Maldon.

The site is accessed via the B1021 Southminster Road/ Tillingham Road. It is largely bounded to the south and west by Tillingham Road and Hall Road. The Asheldham Pits Local Wildlife Site forms an area of scrub adjacent to the remainder of the western boundary. To the north and east there is open agricultural land.

The site is located within Flood Zone 1.

Asheldham Pits Local Wildlife Site is located to the west of Tillingham Road

and occupies the piece of land to the east of Tillingham Road adjoining the western boundary of the application site.

Asheldham Camp Local Wildlife Site is located to the south of Hall Road. A Scheduled Ancient Monument is also present at Asheldham Camp.

The nearest residential properties are Broomfield and Mullingers Cottages, located approximately 10m and 50m to the north respectively; Pitt Cottages, located approximately 175m to the west and Asheldham Hall, located approximately 110m to the south east.

The Church of St Lawrence is a Grade II Listed Building located approximately 60m to the south of Asheldham Hall, which itself is Grade II Listed.

A crop drying plant is located immediately to the south of Hall Road.

Footpaths 8, 10 and 11 follow the boundaries of the site, having been previously permanently diverted as part of the quarry operations. Footpath 5 runs along the western side of Tillingham Road.

3. PROPOSAL

The application is for an extension of time by 15 years to 31 December 2029 to extract approximately 1,165,000m³ of sand and gravel. Additionally, the application includes the proposal to import 851,829m³ of inert waste material for use in restoration.

The proposed revised restoration would incorporate areas of biodiversity and agriculture (arable and grazing pasture), as well as visitor parking and permissive footpaths for public access across the restored area.

The permitted geographical extent of the site area would not alter as a result of this application.

An Environmental Impact Assessment has been required by the Mineral Planning Authority and submitted with the application. Details of the Environmental Statement are set out at **Appendix 2**.

4. POLICIES

The following policies of the Essex Minerals Local Plan, (MLP), Adopted January 1997; the Essex Minerals Local Plan, (RMLP), Adopted July 2014; the Essex and Southend Waste Local Plan, (WLP), Adopted 2001; the Maldon District Replacement Local Plan, (MDRLP), Adopted 2005 (saved policies only); and the Maldon District Local Development Plan (Pre-Submission Draft), (MDLP), provide the development plan framework for this application. The following policies are of relevance to this application:

<u>MLP</u>	<u>RMLP</u>	<u>WLP</u>	<u>MDRLP</u>	<u>MDLP</u>
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Need	MLP2		W9B		
Access/Access and transportation	MLP3	S11	W4C		
Non-Preferred Sites/Provision for sand and gravel extraction	MLP4	S6			
Restoration and Afteruse/Mineral site restoration and afteruse	MLP8	S12			
Working and reclamation	MLP9		W10C		
Processing Plant/Primary processing plant	MLP10	DM3			
Secondary processing plant		DM4			
Programming	MLP12				
Development Control/Development management criteria	MLP13	DM1	W10E		
Best Practicable Environmental Option			W3A		
Flood Control			W4A		
Water Pollution			W4B		
Planning conditions and legal agreements/Imposition of conditions		DM2	W10A		
Hours of operation			W10F		
Public Rights of Way			W10G		
Development outside boundaries/Settlement boundaries and the countryside				S2	S8
Landscape Protection				CC6	
Presumption in favour of sustainable development/Sustainable development		S1			S1
Strategic priorities for minerals development		S2			
Climate change		S3			
Protecting and enhancing the environment and local amenity/Natural environment, geodiversity and biodiversity		S10			N2
Conservation and heritage assets					D3

The National Planning Policy Framework (NPPF), published in March 2012, sets out requirements for the determination of planning applications and is also a material consideration.

The NPPF combined and streamlined all planning policy except for Waste, so Planning Policy Statement 10 Planning for Sustainable Waste Management (PPS10) continues to apply. Additionally the National Waste Management Plan for England (NWMPE) is the overarching National Plan for Waste Management. All decisions must comply with the NPPF, while the NWMPE and PPS10 are material considerations in planning decisions.

Paragraph 215 of the NPPF states, in summary, that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. The level of consistency of the policies contained within the Essex Minerals Local Plan, the Essex and Southend Waste Local Plan and the Maldon District Replacement Local Plan is considered at **Appendix 1**.

Paragraph 216 of the NPPF states, in summary, that decision makers may also give weight to relevant policies in emerging plans according to the stage of plan preparation; the extent to which there are unresolved objections; and the degree of consistency to the NPPF.

The Maldon District Local Development Plan has been submitted to the Secretary of State but the Public Examination is yet to take place. The extent to which there are unresolved objections is unknown.

The emerging Essex and Southend Replacement Waste Local Plan is at an early stage of preparation and has not been submitted to the Secretary of State. Therefore, its policies are not considered here.

The Essex Minerals Local Plan ¹ has been Adopted by Full Council as of 08 July 2014.

5. CONSULTATIONS

MALDON DISTRICT COUNCIL – Does not state whether there is an objection to the application. Recommends conditions relating to:

- Restriction of the number of vehicular movements;
- Restriction of vehicular entering and exiting times and site opening hours;
- The maintenance of the highway free from debris;

¹ The Essex Minerals Local Plan has been adopted and is subject to a 6-week period for challenge, commencing 08 July 2014. Should a challenge arise during this period, there is a possibility that the Minerals Planning Authority may be directed to suspend the use of all or specific policies in that Plan. Therefore, it is prudent that consideration is also given to policies in the existing Essex Minerals Local Plan (1997), to ensure that the policy framework upon which to consider the planning application is robust.

- Installation of a wheel wash;
- Sheeting of vehicles;
- Preservation of vegetation adjacent the entrance;
- Screening of the site perimeter;
- Control of vehicle routeing so that North Street and Queenborough Road Southminster are not used.

Environmental Health suggests conditions as follows:

- Acoustic calculations to be carried out prior to commencement of development to ensure the proposed bund height provides sufficient attenuation, and maintenance of the bund at such a height;
- Submission of an updated noise management scheme prior to commencement of development;
- Prior notification of temporary noisy works;
- A dust management plan;
- A limit on the number of vehicles;
- A limit on site opening times and possible width restriction at entrance gates;

ENVIRONMENT AGENCY – No objection. Comments that an Environmental Permit would be required. Does not consider that the proposal is a recovery operation, for which a Waste for Recovery Permit would be suitable. A Waste for Disposal Permit may be required. No concerns relating to protected species and habitats. Concerned that there may be possible negative effects on the adjacent Asheldham Pits Local Wildlife Site.

NATURAL ENGLAND – No objection.

ESSEX WILDLIFE TRUST – No comments received.

ROYAL SOCIETY FOR THE PROTECTION OF BIRDS – No comments received.

NATIONAL PLANNING CASEWORK UNIT – No comments received.

ANGLIAN WATER – No comments received.

ESSEX AND SUFFOLK WATER – No objection.

AFFINITY WATER – No comments to make.

NATIONAL GRID – No comments received.

UK POWER NETWORKS – No comments received.

ENGLISH HERITAGE - Recommends that the application is determined in accordance with national and local policy, and on the basis of specialist local advice.

HIGHWAY AUTHORITY – No objection. Comments that the access is sufficient for the use in terms of geometry and visibility and there have been no recorded accidents within the last 3 years at this locality. Also notes that the proposal would not be detrimental to highway safety, efficiency or capacity at this location or on the wider highway network.

HIGHWAY AUTHORITY (Public Rights of Way) – No comments received.

THE COUNTY COUNCIL'S NOISE AND AIR QUALITY CONSULTANT – No objection subject to a condition relating to temporary bund construction noise and quarterly noise monitoring for the first two years, and six monthly thereafter provided there has been compliance with the noise limits. A condition relating to a Dust Management Plan is required

PLACE SERVICES (Ecology) – No objection subject to the submission and approval of an Ecological Management Delivery Plan. Requests clarification over grazing pasture establishment techniques and management objectives.

PLACE SERVICES (Trees) – Supports the application, subject to no storage of inert waste within the root protection area of retained trees.

PLACE SERVICES (Historic Buildings) – No objection. Comments that Asheldham Hall and the Church of St Lawrence would not be affected.

PLACE SERVICES (Landscape) – Supports subject to conditions relating to planting, bunds, sections and a detailed restoration plan.

PLACE SERVICES (Archaeology) - No objection subject to conditions relating to a programme of archaeological trial trenching, mitigation strategy, satisfactory completion of fieldwork, and submission of a post-excavation assessment. Comments that the initial phase of archaeological evaluation has shown that there are extensive remains of predominately Roman date surviving across the southern half of the site and further large-scale excavations will be required.

ASHELDHAM AND DENGIE PARISH COUNCIL – Objects due to the following:

- Concern over control of the type of waste and restriction of vehicles to those in the applicant's fleet;
- Hours of operation should restrict vehicles from entering no more than 30 minutes before the opening/closing times. Usually 7am to 6pm;
- Viability of the proposed restoration since it has been promised by previous owners;
- Conditions to be attached clearly to allow enforcement if necessary;
- A 3 year renewable licence would allow review.

SOUTHMINSTER PARISH COUNCIL – Raises concerns relating to:

- Appropriate systems to ensure only the applicant's vehicles enter the

- site;
- Strict hours of operation which do not allow vehicles to enter more than 30 minutes before opening time;
- Viability of reinstatement programme due to previous owners not achieving it;
- Consideration of a 3 year renewable licence as opposed to a 15 year licence;
- HGV route should be via Green Lane, not North Street, Southminster.

LOCAL MEMBER – MALDON – Southminster – Any comments received will be reported.

6. REPRESENTATIONS

31 properties were directly notified of the application. 11 letters of representation, 1 petition including 85 signatures and 1 petition in support containing 123 signatures, have been received. These relate to planning issues covering the following matters:

<u>Observation</u>	<u>Comment</u>
Existing local roads are inadequate and are being damaged. Mud is also an issue.	See appraisal.
Lorries on the public highway currently cause noise and vibration to residential properties.	Not a planning issue specific to this application.
Operating hours should be 7:30am-6pm Monday to Friday, 7:30am-12:30pm on Saturday, with no working Sundays and Bank Holidays.	See appraisal.
Operating hours should be 7:30am-5pm Monday to Friday, 8am-12:30pm on Saturdays, with no working Sundays and Bank Holidays.	See appraisal.
Lorries should not be allowed to enter or exit the site outside of the above hours.	See appraisal.
None of the applicant's vehicles to be within 10 miles of the site before 6:45am.	See appraisal.
Permitted extraction and importation of waste figures should be exact.	See appraisal.
Inert waste should be clearly defined with no changes in future to include any other waste.	See appraisal.
Inert waste should be regularly monitored.	Monitoring of the site by Planning Officers would continue under the paid site monitoring regime. The

	type of waste would be regulated by the Environment Agency.
The applicant's lorries only should be permitted to import and export. Waste should only be allowed to be imported in lorries that will be/have been exporting mineral.	See appraisal.
The operator's vehicles currently enter the site prior to the permitted opening times.	Not an issue for consideration through this application.
Local businesses and farming have expanded over the years, resulting in increased traffic and size of vehicles on the roads.	See appraisal.
The operator's drivers currently travel too fast, are inconsiderate and import waste material.	Not an issue for consideration through this application.
The proposed inert waste will inevitably turn into all sorts of rubbish.	See appraisal.
The site is of archaeological interest.	See appraisal.
The site contains Great Crested Newts.	The site has been surveyed and no Great Crested Newts were found.
The Asheldham Bends are being investigated by the Highway Authority.	See appraisal.
The length of the temporary permission should be 3 years.	See appraisal.
Regular maintenance and repair of damage to local roads should be required.	See appraisal.
A planning contribution should be sought for a community fund to recompense local residents.	See appraisal.
The maximum number of lorry movements (48 in total) should be restricted by condition.	See appraisal.
What is the date of the current approval and the area it covers?	See 'Background' and 'Site'.
What are the limits of excavation in proximity to a residential property?	See appraisal.

Will there be a need to change public rights of way?	No – see appraisal.
How will the site be safe and secure?	This is an operational requirement for the operator to follow.
Will visual impact be mitigated?	See appraisal.
Will the batching plant be moved?	No.
Will the site be used for domestic landfill in the future?	This option is not before the Mineral Planning Authority for consideration.
Will working hours be restricted?	See appraisal.
Machinery beepers and the noise from pumps could be an issue once the extraction moves closer to properties.	See appraisal.
Orange lights currently cause a problem overnight.	The operator has rectified this particular issue.
Are there any archaeological issues	See appraisal.
What is the likelihood that the currently proposed importation amounts and timescales will be kept to?	The proposed timescale is considered to be achievable – see appraisal.
Where would the sand and gravel be transported to and where would the source of inert material be?	The applicant has stated that it would generally be within the Essex region, but this is not proposed to be restricted via any planning permission granted.
People use and rely on the quarry for their livelihood.	Noted.

7. APPRAISAL

The key issues for consideration are:

- A. Need
- B. Policy Considerations
- C. Landscape and Visual Impact
- D. Ecological Impact
- E. Amenity Impact
- F. Environmental Impact

G. Traffic and Highways
H. Impact on the Historic Environment

A NEED

Need for Mineral

The application site is not identified as a preferred site for mineral extraction within the Adopted Essex Minerals Local Plan. However, planning permission exists for mineral extraction across the entire application site, with restoration required by 31 December 2014.

Since the existing permission will expire before the 15 year date when a periodic review would have been required, this application is not being considered under the Environment Act. Rather, it is a planning application for full planning permission. This means that the restrictions that would have been placed on consideration of an application under the Environment Act do not apply, i.e. that conditions should not be imposed which would prejudice adversely to an unreasonable degree either the economic viability of operating the site or the asset value of the site. The Environment Act states that restriction or reduction of the size or depth of the area which may be used for the winning and working of minerals would restrict the working rights of a mineral site.

However, the planning application must still be considered taking into account the general need to avoid undue sterilisation of mineral resources, as well as the requirement to consider economic factors as one of the three strands of sustainable development set out in the National Planning Policy Framework (NPPF).

Fundamentally, applications for mineral extraction must comply with MLP Policy MLP2 (Need). It requires that mineral working will be permitted only where there is an identified national, regional or local need for the mineral concerned.

The MLP states, in summary, that there is no need if there is an appropriate landbank of permitted sand and gravel reserves. There can be no other interpretation of need.

Similarly, MLP Policy MLP4 (Non-preferred sites), in summary, only allows sand and gravel working on non-preferred sites where the reserves comprising the landbank are insufficient or there is some other overriding benefit. The proposals must also be environmentally acceptable.

RMLP Policy S6 (Provision for sand and gravel extraction) states, in summary, that mineral extraction outside preferred or reserve sites will be resisted unless there is an overriding justification or benefit; the scale is no more than the minimum essential; and the proposal is environmentally acceptable.

As stated previously in the report, a maximum depth of working of 10.5m is currently permitted at the application site. The original application ref MAL/252/77 stated a workable mineral reserve of 1,407,000m³. Within that application, it was

stated that soft sand reserves would be left in situ, since they were considered to be uneconomic to work.

The current application proposes a maximum depth of working of 9.5m below the surface. A total of 1,165,000m³ of mineral is proposed to be extracted across the entire site. It has been estimated that approximately 650,000m³ (approximately 1million tonnes) of mineral has been extracted at the site to date. Whilst this would take the total of mineral at the site to more than the original workable reserve figure of 1,407,000m³, it is clear that the proposed extraction amount would remain within the originally permitted maximum depth of working.²

Therefore, it is not considered that need for the mineral concerned is required to be debated, since it can be said to be already permitted. The new operator is able to work the soft sand that was previously proposed to be left in situ. It is considered that refusal to allow the working of such mineral would sterilise the resource, which is not desirable given the general stance of national policy to safeguard this finite resource.

However, the removal of the soft sand reserves would result in the need for an alternative restoration scheme, hence the proposal for the importation of inert waste, which is considered further in the report. (It is noted that the extraction of such soft sand has already commenced on site).

Although, in respect of mineral extraction, this application is only for an extension of time for the removal of previously permitted mineral, the impacts of the proposed additional 15 years and compliance with this aspect of MLP Policy MLP4 and RMLP Policy S6 will be considered further in the report.

Need for Landfill

The application site is not identified as a preferred site for landfill within the Waste Local Plan. Therefore, Waste Local Plan Policy W9B (Need) applies. It states:

'Landfill, or landraising, for its own sake, without being necessary for restoration, will not be permitted. Landfill outside the boundaries of the preferred sites will not be permitted unless it can be demonstrated that satisfactory restoration cannot otherwise be achieved. Landfill will not be permitted when at a scale beyond that which is essential for restoration of the site.'

In considering this policy, it is noted that overburden, including all soil horizons, ranges from almost zero to a maximum of 3.6m across the site. A volume of approximately 187,000m³ has been calculated to be present on site.

Sand and gravel deposits have been modelled as a volume of 1,165,724m³, calculated as approximately 1.9 million tonnes using a conversion factor of 1.6t/m³.

² 'Plan G' dated March 1977 was approved as part of permission ref MAL/252/77. It authorised the extraction of sand and gravel to a maximum depth of 10.5m below the surface.

With the proposed extraction of the remaining 1,165,724m³ of mineral, restoration to the scheme permitted under ESS/14/00/MAL would now require 1.126 million m³ of material to be placed into the excavated void. This would result from the extraction of the soft sand which was previously proposed to remain in situ. With silt contributing 0.082 million m³, the required imported material would amount to 0.857million m³.

Restoration to the proposed scheme would require a similar 1.120 million m³ of material to fill the void, with a requirement for 0.851 million m³ of imported material. Therefore, the proposed scheme would not appear to require excessive amounts of imported material in comparison to the approved scheme.

The application considers alternatives to the proposed scheme, namely 'do nothing'; extend the time limit for restoration without the importation of waste/extract a lower quantity of mineral; or extend the time limit for restoration with a greater quantity of imported waste.

The 'do nothing' scenario would see the current planning permission expiring on 31 December 2014, prior to the extraction of the remaining 1,165,724m³ of mineral. It would also not be possible to achieve the permitted restoration scheme by that date. This would likely be contrary to MLP Policies MLP8 (Restoration and afteruse) and MLP9 (Working and reclamation), which respectively require the land to be capable of being restored to a beneficial afteruse within a reasonable time and the implementation of the reclamation scheme to be feasible. It would also be contrary to RMLP Policy S12 (Mineral site reclamation and afteruse), which in summary requires the land to be capable of being restored at the earliest opportunity and to an acceptable environmental condition.

The scenario of extending the time limit without importing waste would result in the site being left as a water-filled void. The base levels would be 7-8m lower than the surrounding landscape in some areas, with groundwater levels at 5.5m – 7m below the surface.

The application further states that the importation of a lower amount of waste would still result in an adverse permanent impact on the landscape.

The extraction of a lesser amount of mineral would result in the sterilisation of some mineral, as in the 'do nothing' scenario.

The scenario of importing a greater amount of waste than that proposed could result in the site being restored to its original levels, allowing the whole site to be restored to agricultural use. However, this would be beyond that essential for restoration, contrary to Waste Local Plan Policy W9B.

On balance, the proposed time limit and amount of imported material is considered to be required and acceptable in principle. However, the suitability of the specific impacts associated with the scheme will be considered further in the report.

B POLICY CONSIDERATIONS

The NPPF contains a presumption in favour of sustainable development. It states, at paragraph 7, that there are 3 dimensions to sustainable development: economic, social and environmental.

Paragraph 8 goes on to state that, to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system.

RMLP Policy S1 (Presumption in favour of sustainable development) and MDLP Policy S1 (Sustainable development) also reflect this national stance in favour of sustainable development.

The application considers socio-economic factors as follows.

The site employs a total of 15 staff, including drivers. The proposal would allow for their employment for a further 15 years. The site also supplies materials to 11 local businesses within 10 miles of the site.

Inert waste is proposed to be mostly imported from the applicant's transfer site at Great Leighs, but local construction sites are also proposed to be used as a source of suitable material. In this case, vehicles would most likely go direct to the application site and could, in most cases, still be used for back-hauling waste material.

The application states that the extracted mineral would be vital to sustain local house building activity.

The loss of agricultural land would be considered to have a temporary moderate adverse effect; however the proposed long term restoration benefits would be moderately beneficial.

In summary, the application considers that the development would have a temporary positive impact on the local economy, with a positive long-term social benefit. This is considered to be a reasonable conclusion.

The environmental strand of sustainable development will be considered throughout the report.

WLP Policy W3A (Best practicable environmental option), in summary, requires that waste development should be sustainable, should consider the best practicable environmental option, and should confirm to the proximity principle.

The issue of sustainable development has been considered above and will be discussed later in the report. The best practicable environmental option emphasises the protection and conservation of the environment. Whether this proposal meets this requirement will be considered further in the report.

The 'proximity principle' no longer exists as a recognised term in Planning policy.

Rather, Planning Policy Statement 10 has a key planning objective of allowing waste to be disposed of in one the nearest appropriate installations.

The source of waste is not specifically identified in the application, but it is suggested that it would mostly be sorted at Great Leighs. Given that there is no specific direction that waste should be derived from within the administrative boundary of the determining authority, it is not proposed that a condition should be imposed restricting the source of waste to Essex waste only, in the event that permission is granted.

A conclusion on compliance with WLP Policy W3A will be drawn later in the report.

C LANDSCAPE AND VISUAL IMPACT

The application site lies outside of the settlement boundaries.

MDRLP Policy S2 (Development outside boundaries) requires that, outside development boundaries defined in the local plan, the coast and countryside will be protected for their own sake, particularly for their landscape, natural resources and areas of ecological, historical, archaeological, agricultural and recreational value.

Emerging MDLP Policy S8 (Settlement boundaries and the countryside), in summary, supports sustainable developments within the settlement boundaries. It states that the countryside will be protected for its landscape, natural resources and ecological value as well as its intrinsic character and beauty. Outside of the defined settlement boundaries, planning permission will only be granted where the intrinsic character and beauty of the countryside is not adversely impacted upon (among other requirements).

MDRLP Policy CC6 (Landscape protection) requires that the natural beauty, tranquillity, amenity and traditional quality of the District's landscape will be protected, conserved and enhanced. Proposals for development in the countryside will only be permitted provided that:

- No harm is caused to the landscape character in the locality, and
- The location, siting, design and materials are appropriate for the landscape in which the development is proposed, and
- The development is landscaped to protect and enhance the local distinctiveness and diversity of the landscape character of the area in which it is proposed.

Whilst the above policies are not considered to be aimed at minerals development, which can only be worked where they occur, the principle of the protection of the countryside is understood.

In addition, WLP Policy W10E (Development Control) permits waste management development only where the effect of the development on the landscape and countryside has been satisfactorily provided for.

Similarly, MLP Policy MLP13 (Development Control) requires that mineral extraction will be refused where there is unacceptable impact on the visual environment or the landscape and countryside.

RMLP Policy DM1 (Development management criteria) requires there to be no unacceptable impact on the appearance, quality and character of the landscape, countryside and visual environment and any local features that contribute to its local distinctiveness.

The development during extraction and restoration would not be significantly visible from outside of the site due to the retention of vegetation on the site boundaries, which would provide screening. The impact on the landscape would be largely limited to within the site itself, except for users of the public rights of way who would have considerable views of the operations.

Following restoration, there would be a beneficial impact on footpath users due to the proposed recreational use. The northern section would have minimal impact on the landscape since it would be restored back to agriculture.

The proposed restoration scheme seeks to maintain levels on the site boundary in accordance with the approved restoration levels, in order to minimise the impact on the wider landscape.

Overall, the site is very well screened. The Landscape Officer has requested details of the proposed screening bunds, planting and section drawings. It is considered that these items could be required by condition in the event that permission is granted.

In addition, to ensure that the level of screening is not damaged, a condition could be imposed to ensure that no waste is stored within the root protection area of retained trees, as required by the ECC Tree Officer.

The application proposes retention of existing infrastructure on site, including the existing processing plant, concrete plant, workshop, concrete roadway, weighbridge and office/messroom.

MLP Policy MLP10 (Processing Plant), in summary, requires the primary processing plant to be within the limits of a mineral working and at low level or with visual and aural mitigation. Sites with their own processing plant are preferred and importation of material will not normally be allowed.

RMLP Policies DM3 (Primary processing plant) and DM4 (Secondary processing plant), in summary, respectively require that the primary processing plant should be located within the mineral site's boundary and not have unacceptable impact on local amenity or the environment and that secondary processing plant will only be permitted where there is no unacceptable impact on local amenity or the environment.

The processing plant and concrete plant would be located within the southern

area of the site and cannot be readily seen from outside of the site boundaries. Exact details of location and design of the facilities, it is considered, could be required by condition, in the event permission is granted.

It is further considered that a condition could be imposed to ensure no mineral is imported to the site for processing, for compliance with MLP Policy MLP10 and RMLP Policies DM3 and DM4.

D ECOLOGICAL IMPACT

The application proposes restoration to agriculture but also incorporates areas for biodiversity.

MLP Policy MLP8 (Restoration and afteruse), in summary, requires land to be capable of being restored within a reasonable time and to a beneficial afteruse. Where agricultural land is affected, it should be restored as nearly as possible to its former quality, but due regard will also be given to nature conservation (among other afteruses).

MLP Policy MLP12 (Programming) requires a programme for working within the site.

MLP Policy MLP9 (Working and reclamation) requires that the proposals must be satisfactory and feasible.

WLP Policy W10C (Working and reclamation), similarly requires the proposed measures for restoration to be feasible.

In order to comply with MLP Policies MLP8, MLP9 and MLP12 and WLP Policy W10C, it is considered that conditions could be imposed to ensure that restoration takes place in a phased manner and to require an agricultural aftercare period of 5 years.

It is further noted that local comments have been received asking that the proposed permission time span is revised downwards to 3 years to allow for a review of the situation at that time. This would not meet the requirements of MLP Policy MLP9 and WLP Policy W10C, or the tests for conditions set out in the NPPG, as the permission would not be long enough to fully restore the site.

The requirement for phased restoration and regular monitoring of the site by the Minerals Planning Authority is considered to be a more effective way of ensuring the development is properly carried out.

Additionally, paragraph 144 of the NPPF requires that Local Planning Authorities should: 'provide for restoration and aftercare at the earliest opportunity to be carried out to high environmental standards, through the application of appropriate conditions, where necessary. Bonds or other financial guarantees to underpin planning conditions should only be sought in exceptional circumstances'.

In the case of the current application, it is considered that a financial guarantee to

ensure the restoration of the site would be appropriate. The development is proposed on grade 2 agricultural land and it is important that the restoration is properly executed. It is also acknowledged that the proposed 15 year time extension is of local concern. Taking this into account, the applicant has agreed to enter into a legal agreement including a financial guarantee, the details of which will be defined through negotiation of the legal agreement.

Related to this point, it is noted here that a representation has been received, requesting that a local community fund is set up to recompense the local community.

In response, the Planning Practice Guidance states that 'planning obligations mitigate the impact of unacceptable development to make it acceptable in planning terms. Obligations should meet the tests that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind.'

There is no provision in minerals planning to allow funds to be collected from a developer for the benefit of the local community, or for so-called 'planning gain'. It is considered that the requirement of a community fund would not meet the above tests.

However, the provision of a financial guarantee, as referred to earlier in the report, would go some way to provide comfort that the site is capable of being properly restored within the specified time period.

RMLP Policy S12 (Mineral site restoration and afteruse) requires, among other things, biodiversity gain following restoration.

RMLP Policy S10 (protecting and enhancing the environment and local amenity) requires, in summary, appropriate consideration of the natural, built and historic environment and demonstration that opportunities have been taken to improve/enhance the environment and amenity.

RMLP Policy S3 (Climate change), in summary, requires resilience to future climatic changes and consideration of the potential benefits from site restoration and after-use schemes for biodiversity and habitat creation, flood alleviation, and provision of living carbon sinks.

MDLP Policy N2 (Natural environment, geodiversity and biodiversity) requires, in summary, that all development should seek to deliver net biodiversity gains.

The proposal includes a larger lagoon than is included in the approved scheme, in order to provide ecological benefits (and to reduce the volume of fill material required). The final water level would be approximately 17m AOD, in accordance with the approved scheme. Groundwater levels rest generally between 5.5 and 7m below the surface.

The area would provide habitats suitable for invertebrates, reptiles, plants and birds. The area would be areas of dry acidic grassland, ponds and reedbeds,

areas of exposed sand and gravel, nesting areas for bird life, insect-friendly planting and flower-rich vegetation for invertebrates, reptile refuges and islands within the lagoon to attract waders.

Natural England has raised no objection.

The ECC Ecologist supports the principle of the development and comments that it has potential to deliver significant benefits to wildlife. The Ecologist also requires the provision of an Ecological Management Delivery Plan and greater clarity on the management objectives for grazing pasture and establishment techniques.

In order to achieve this, the applicant has offered to commit to a 25 year management plan to ensure the site is restored and managed appropriately for biodiversity. It is considered that this could be required via legal obligation, in the event that permission is granted.

Therefore, the development is considered to comply with MLP Policy MLP8, RMLP Policies S3, S10 and S12 and MDLP Policy N2.

E AMENITY IMPACT

MLP Policy MLP13 and WLP Policy W10E (Development control criteria) require, in summary, there to be no unacceptable impact on the visual and aural environment, local amenity, landscape and the countryside, the highway network, water resources and nature conservation. RMLP Policy DM1 (Development Management criteria) has similar requirements and WLP Policy W10E further requires satisfactory provision to be made in respect of the loss of agricultural land, impact on historic and archaeological sites and the Green Belt.

RMLP Policy S2 (Strategic priorities for minerals development) requires, among other things, that there are no significant adverse impacts arising from proposed minerals development for public health and safety, amenity, quality of life of nearby communities and the environment.

RMLP Policy S10 (protecting and enhancing the environment and local amenity) requires, in summary, appropriate consideration of the natural, built and historic environment and demonstration that opportunities have been taken to improve/enhance the environment and amenity.

Noise

A representation has been received which asks if there is a limit for proximity of extraction areas to residential properties. The RMLP states in the supporting text that a minimum of a 100m 'buffer zone' from the extraction face to the wall of a residential property would normally be required to minimise the impact of working on local amenity.

The extent of extraction would be within this 100m distance for Broomfields and Mullingers Cottages. However, it is taken into account that the extent of mineral extraction has already been established through the grant of previous permissions

on the site.

Additionally, bunds are proposed to protect the aural amenity of Broomfields and Mullingers Cottages. The occupiers of Mullinger's Cottages have expressly requested that the bunds protecting their property are not constructed until phase 6 is commenced, in order to preserve the visual aspect for as long as possible. It is considered that a condition could be worded to require this, in the event that permission is granted.

It is noted here that the Environmental Health Officer (EHO) has requested that acoustic barrier calculations are submitted to ensure bund construction and heights are constructed and maintained to provide at least 10dBA noise reduction. This could be required by condition.

Temporary activities such as bund construction can in themselves cause noise issues. This is usually dealt with under a temporary noise allowance condition. In addition to this, the EHO has requested a prior notification of such temporary works. It is considered that this could be incorporated into such a condition.

Mitigation would be in the form of the use of a limited range of equipment and machinery; the proper maintenance of such machinery; the minimisation of the need to reverse and the use of broadband type reversing alarms; and periodic monitoring of noise emissions. All of this is proposed within a submitted noise management scheme. The EHO has requested that more detail is incorporated, and it is considered that this could be required by condition, should permission be granted.

The Noise Consultant has no objection, subject to conditions including quarterly noise monitoring for the first two years with a reduction to six monthly monitoring thereafter, provided that the noise limits have been complied with. This is considered to be a reasonable condition.

Therefore, even with the encroachment on the 100m standoff distance, there is not anticipated to be an undue adverse impact as a result of noise.

Dust

Information about the potential for dust emissions and their mitigation has been submitted with the application. Such mitigation included the seeding of soil bunds, the use of a wheel wash, dampening of surfaces and sheeting of lorries. Dust is mostly not considered to be an issue, except for Broomfields and Mullingers Cottages when the operations move to within the vicinity of those buildings. Pitt Cottages would have a high risk and Asheldham Village would have a medium-low risk.

Although mitigation is proposed within the application, it is considered appropriate that a Dust Management Plan is required by condition in the event that permission is granted. This is recommended by the County Council's Air Quality Consultant and the Environmental Health Officer.

Visual

Lighting is not proposed to change from that already on site, namely 6 lights on the plant which are sensor timed or switched off at 7pm. There is also a fuel tank security light and an office light which operate on sensors. It is considered that a condition could be imposed to ensure that no further lighting is installed without prior approval from the Mineral Planning Authority.

Therefore, subject to the imposition of conditions, the proposed development is not considered to have any significant detrimental impact on amenity, in compliance with MLP Policy MLP13, WLP Policy W10E and RMLP Policies DM1, S2 and S10.

Additionally, WLP Policy W10F (Hours of Operation) allows the Waste Planning Authority to impose a restriction on working hours for the protection of amenity. This will be considered further in section 7G of the report.

Finally, in order to ensure that the operation of the site does not unduly impact on surrounding amenity, it is considered that the applicant should be required to form a local liaison group with the Parish Council. This is a regular requirement for the larger quarries and landfill sites across Essex. It is considered that this could be required via legal obligation, in the event that permission is granted. This would be subject to the agreement of the Parish Council, which has not indicated whether this would be desirable.

F ENVIRONMENTAL IMPACT

Water Impact

The application site is located within Flood Zone 1 (the low probability zone).

WLP Policy W4A (Flood control) requires, in summary, that waste management development will only be permitted where there would not be an unacceptable risk of flooding on site or elsewhere.

WLP Policy W4B (Water pollution) requires, in summary, that waste management development will only be permitted where there would not be unacceptable risk to surface and groundwater quality or flow.

A Flood Risk Assessment (FRA) has been submitted with the application. The FRA concludes that there would no increased off-site flood risk.

As stated previously in the report, groundwater is encountered at 5.5-7m below the surface. Groundwater could affect the development during operation; however this would be controlled as part of the development.

The Environment Agency does not object to the proposals.

Therefore, it is considered that the development would comply with WLP Policies W4A and W4B.

Waste Type

There have been comments received relating to control of the type of waste proposed. The application proposes the importation of inert waste. This type of waste is considered to be acceptable and it is possible that a condition could be imposed on any permission granted to require adherence to the application details. However, the type of waste would not be specifically controlled via planning condition as this could lead to difficulties with the definition of waste allowed under an Environmental Permit. The Environment Agency has detailed definitions of waste types and it would seek to restrict any Permit to appropriate codes. The term 'inert' does not exist within these codes.

Furthermore, Planning Policy Statement 10: Planning for Sustainable Waste Management (PPS10) states that 'controls under the planning and pollution control regimes should complement rather than duplicate each other and conflicting conditions should be avoided'.

G TRAFFIC AND HIGHWAYS

MLP Policy MLP3 (access) and WLP Policy W4C (Access) principally require, in summary, access to be via a short length of existing road to the main highway network. Both policies allow access onto a secondary road if the capacity of the road is adequate and there would be no undue impact on road safety or the environment.

RMLP Policy S11 (Access and transportation) states that minerals development shall be permitted where it is demonstrated that the development would not have unacceptable impacts on the efficiency and effective operation of the road network, including safety and capacity, local amenity and the environment.

The applicant has clarified that the application contains discrepancies in the total number of vehicle movements currently utilised at the site.

The application states that the development would generate approximately 48 movements, but the applicant has interpreted this as 48 two-way movements, which is actually 96 vehicle trips per day. It is noted that this higher number corresponds with the number of vehicles permitted via permission ref ESS/14/00/MAL.

The current vehicle movements are not proposed to change, as the application states that the same vehicles would be used for importation of inert waste and removal of minerals. This is based on 8-wheeler lorries carrying 15m³ of material (8m³ 'in the ground'). Based on 305 working days per year, there would be approximately 32 vehicles (64 movements) per day.

The proposed use of the currently permitted 48 vehicles (96 movements) per day would allow flexibility for smaller vehicles to be used.

A Transport Statement has been submitted with the application. It notes that there

have been no accidents involving HGVs in the local area in the last 3 years. The report concludes that the proposals would not lead to the propensity for accidents to increase and that the development could be accommodated without detriment to highway users.

The Highway Authority has raised no objection.

Several representations and comments have been received relating to the perceived need for a restriction of the number of vehicular movements; a restriction of vehicular entering and exiting times and site opening hours; the maintenance of the highway free from debris; installation of a wheel wash; sheeting of vehicles; lorry routes; and restriction of lorries to those in the applicant's own fleet.

The opening hours suggested by the people who have made representations differ from each other. The applicant is not applying to change the existing opening hours, which are:

0700 – 1800 hours Monday to Friday

0700 – 1230 hours Saturdays

No working on Sundays or Bank/Public Holidays.

These hours are less than the standard working hours, which normally allow until 1830 hours weekdays and 1300 hours on Saturdays. It is considered that, in the event that permission is granted, a condition could be worded to ensure that no vehicles enter the site prior to 7am. However, suggestions relating to restrictions on the type of vehicle entering or the presence of vehicles on local roads are not considered to meet the tests for conditions set out in NPPG.

Similarly, it is noted that some comments have been received stating a preferred vehicular route. A condition requiring a particular route would also not be considered to meet the tests for conditions. Furthermore, the Highway Authority has stated that the proposal would not be detrimental to highway safety, efficiency or capacity at this location or on the wider highway network.

However, there is an existing Section 52 Agreement which requires a certain route to be followed to and from the application site. Since this is still lawful, it is considered that this requirement could be carried forward to be incorporated into a legal agreement to accompany the current application. The route requires the use of Green Lane when entering or leaving the site to or from the west, unless requiring access to sites in Southminster. It also requires general avoidance of Southminster, unless for access. This would address the routeing concerns raised by the District and Parish Councils.

A condition requiring the installation of a wheel cleaning facility is considered to be appropriate to ensure the highway is kept clean. This is also suggested as a mitigation method in the submitted dust management measures contained in the EIA.

Concerns have also been raised about the current operations, relating to mud on

the roads, damage to local roads and drivers going too fast. These points are not relevant to the consideration of this application, which should solely take into account the acceptability of the proposed development.

It is not considered to be reasonable to require the vehicles entering the site to be restricted to the applicant's own fleet. As long as the type of waste entering the site is appropriate and the daily vehicle limit is kept to, there is no planning reason why vehicles could not come from elsewhere. It is considered that a condition could be imposed to require recording of the amount of imported and exported material and the number of vehicles entering the site.

WLP Policy W10G (Public Rights of Way), in summary, requires that applications for waste management development should include measures to safeguard and, where applicable, improve the rights of way network.

With regard to public access, the proposed development is not considered to impact unacceptably on the surrounding public rights of way. The applicant has also offered to formally set out proposals for the provision of permissive rights of way within a legal obligation.

It is therefore considered that, subject to conditions restricting the number of vehicles entering the site to 48 the proposals, opening hours, maintenance of the highway free from dirt and debris and sheeting of vehicles, the proposals would be acceptable in terms of traffic generation and highway impact, in compliance with MLP Policy MLP3, RMLP Policy S11 and WLP Policies W4C and W10G.

H IMPACT ON THE HISTORIC ENVIRONMENT

RMLP Policy S10 (protecting and enhancing the environment and local amenity) requires, in summary, appropriate consideration of the natural, built and historic environment.

MDLP Policy D3 (Conservation and heritage assets), in summary, requires an archaeological assessment and recording.

The ECC Archaeologist has noted that there are extensive remains of predominantly Roman date surviving across the southern section of the site and that further deposits are likely to be found in the northern section. No objection is raised to the development, subject to conditions relating to trial trenching, preservation and recording of finds. It is considered that such conditions could be imposed on any permission granted.

The site lies in proximity to listed buildings, as stated previously in the report. English Heritage has commented that the application should be determined in accordance with national and local policy, and on the basis of specialist local advice. The ECC Historic Buildings Advisor has considered that neither Asheldham Hall nor the Church of St Lawrence would be impacted upon as a result of the proposed development.

It is further considered that there would not be any significant impact on the Scheduled Ancient Monument at Asheldham Camp .

Therefore, the development would be considered to comply with RMLP Policy S10 and MDLP Policy D3.

8. CONCLUSION

In conclusion, it is considered that the need for the proposed mineral extraction has been established and the developer would simply be extracting reserves within the lateral extent of an area which already has the benefit of planning permission. Therefore, MLP Policy MLP2 does not need to be considered.

The proposed extension of time to extract such mineral is considered to be appropriate and realistic, taking into account the proposed vehicle movements. However, there would be impacts associated with this further time.

The extraction of all remaining mineral would require an alternative restoration scheme, involving the importation of 0.857million m³ of material. The question of need for this amount of material is considered to be central the overall decision on this planning application. On balance, it is considered that the scale of landfill proposed would be essential for restoration of the site, as required by WLP Policy W9B.

It is further considered that the land would be capable of being restored to a beneficial afteruse within a reasonable time, at the earliest opportunity and the implementation of the reclamation scheme would be feasible and to an acceptable environmental condition, as required by MLP Policies MLP8, MLP9 and MLP12, RMLP Policy S12 and WLP Policy W10C. Further security of restoration could be provided for via a financial bond.

In terms of impacts, the development would not significantly impact on flooding elsewhere, or increase risk of water pollution, in compliance with WLP Policies W4A and W4B.

Subject to the imposition of conditions, the proposed development would not be considered to have any significant detrimental impact on amenity, in compliance with MLP Policy MLP13, WLP Policies W10E and W10F and RMLP Policies DM1, S2 and S10.

Subject to conditions restricting the number of vehicles entering the site to 48 the proposals, opening hours, maintenance of the highway free from dirt and debris and sheeting of vehicles, the proposals would be acceptable in terms of traffic generation and highway impact, in compliance with MLP Policy MLP3, RMLP Policy S11 and WLP Policies W4C and W10G.

It is considered that neither Asheldham Hall, the Church of St Lawrence or Asheldham Camp would be impacted upon and, subject to conditions relating to the archaeological resource it is considered that the development would comply with RMLP Policy S10 and MDLP Policy D3.

Therefore, it is considered that the impacts of the proposed development can be appropriately mitigated so that they are considered to be acceptable for the purposes of MLP Policy MLP4, RMLP Policy S6 and WLP Policy W3A.

Although there would be temporary impacts as a result of the operational phase of the development, these impacts could be mitigated through the imposition of conditions. The afteruse would be considered to present benefits to the area so that the intrinsic character and beauty of the countryside would not be adversely impacted upon, as required by MDRLP Policies S2 and CC6, MDLP Policy S8, MLP Policies MLP13 and MLP10, RMLP Policies DM1, DM3 and DM4 and WLP Policy W10E.

Furthermore, providing that the proposal is adequately controlled, it would incorporate significant benefits for wildlife, in compliance with RMLP Policies S3, S10 and S12 and MDLP Policy N2. The proposed control mechanism would be a the requirement for a 25 year management plan to ensure the site is restored and managed appropriately for biodiversity. It is considered that this could be required via legal obligation, as advocated by WLP Policy W10A and RMLP Policy DM2.

Therefore, overall, it is considered that the environmental strand of 'sustainable development' has been proven equally alongside the economic and social strands, resulting in a sustainable development proposal for which there is a presumption in favour, in compliance with the NPPF, RMLP Policy S1 and MDLP Policy S1.

9. RECOMMENDED

That planning permission be **granted** subject to:

The completion, within 6 months, of a legal agreement covering the following matters:

- The setting up and holding of a Liaison Group meeting twice annually, subject to the agreement of the Parish Council;
- A Biodiversity Management Plan covering a period of 25 years;
- A lorry routeing plan as per the existing Section 52 Agreement;
- The provision of a financial guarantee for restoration of the site,
- Formal provision of permissive rights of way;

and conditions covering the following matters:

1. COM1 – Commencement within 5 years.
2. COM2 – Commencement (waste specific).
3. COM3 – Compliance with submitted details.
4. CESS5 – Cessation of mineral/landfill development by 31 December 2029.
5. CESS6 – Early restoration in event of suspension of operations.
6. HOUR1 – Hours of working including vehicles above 3.5t gvw entering or exiting the site 7am-6pm Monday to Friday, 7am-12:30pm Saturdays and at no other times or on Sundays or Bank or Public Holidays.

7. PROD1 – Export restriction to 1,165,000m³ of sand and gravel.
8. PROD2 – records of output.
9. PROD3 – Vehicle records of output (minerals)
10. PROD4 - Monitoring waste data.
11. HIGH2 – Vehicular access.
12. HIGH3 – Surfacing/maintenance of access road.
13. HIGH4 – Prevention of mud and debris on highway (wheel cleaning facility).
14. HIGH5 – Vehicle movement limits restricted to 48 in and 48 out. Records of imported waste material to be kept.
15. HIGH6 – Lorry sheeting.
16. NSE1 – Noise limits.
17. Acoustic barrier calculations submitted to ensure bunds provide at least 10dBA noise reduction.
18. NSE2 – Temporary operations – Prior notification and - During bund construction and removal and other temporary noisy operations the equivalent continuous noise level due to operation of the quarry shall not exceed 70 dB $L_{Aeq,T}$ at any noise sensitive receptor for periods up to 8 weeks in a year.
19. NSE3 – Monitoring noise levels. Quarterly noise monitoring for the first two years, and six monthly thereafter provided there has been compliance with the noise limits.
20. NSE5 – White noise alarms.
21. NSE6 – Silencing of plant and machinery.
22. Submission of a Noise Management Scheme prior to commencement.
23. LGHT1 – Fixed lighting restriction.
24. DUST1 – Dust suppression scheme. Dust Management Plan including measures in the application and a seed mix for soil bunds.
25. DUST3 – Spraying of haul road.
26. No waste within root protection areas of retained trees.
27. Within 3 months of the date of decision, details of processing plant, concrete plant, workshop, concrete roadway, weighbridge and office/messroom to be submitted.
28. MIN1 - No importation of mineral.
29. GPDO2 – Removal of PD rights
30. LAND1 – Landscape Scheme
31. LAND2 – Replacement Landscaping
32. Phased restoration and 5-year agricultural aftercare.
33. ARC1 – Advanced Archaeological Investigation.
34. MIN7 - Extraction depth limit.
35. LS2 - Soil movement scheme.
36. LS3 – Machine movement scheme.
37. LS4 – Stripping of top and subsoil.
38. LS5 – Maintenance of bunds.
39. LS6 – Retention of soils.
40. LS8 – Soil handled in a dry and friable condition.
41. LS9 - Soil stripping depths and replacement.
42. LS10 - Notification of commencement of soil stripping.
43. LS14 – Final soil coverage.
44. POLL4 – Fuel/Chemical storage.
45. POLL3 – Trade effluent and sewage disposal.
46. Balancing hole water level to be maintained.

BACKGROUND PAPERS

Consultation replies
Representations

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

The proposed development would not be located adjacent to or within the screening distance to a European site.

Therefore, it is considered that an Appropriate Assessment under Regulation 61 of The Conservation of Habitats and Species Regulations 2010 is not required.

EQUALITIES IMPACT ASSESSMENT

This report only concerns the determination of an application for planning permission. It does however take into account any equality implications. The recommendation has been made after consideration of the application and supporting documents, the development plan, government policy and guidance, representations and all other material planning considerations as detailed in the body of the report.

STATEMENT OF HOW THE LOCAL AUTHORITY HAS WORKED WITH THE APPLICANT IN A POSITIVE AND PROACTIVE MANNER

The Minerals and Waste Planning Authority has engaged with the applicant over several months prior to submission of the application, advising on the validation requirements and likely issues.

Throughout the determination of the application, the applicant has been kept informed of comments made on the application and given the opportunity to respond.

LOCAL MEMBER NOTIFICATION

MALDON – Southminster

Consideration of Consistency of Policies

Essex and Southend Waste Local Plan

W3A	<p>The WPAs will:</p> <ol style="list-style-type: none"> 1. In determining planning applications and in all consideration of waste management, proposals have regard to the following principles: <ul style="list-style-type: none"> • Consistency with the goals and principles of sustainable development; • Whether the proposal represents the best practicable environmental option for the particular waste stream and at that location; • Whether the proposal would conflict with other options further up the waste hierarchy; • Conformity with the proximity principle. 2. In considering proposals for managing waste and in working with the WDAs, WCAs and industrial and commercial organisations, promote waste reduction, re-use of waste, waste recycling/composting, energy recovery from waste and waste disposal in that order of priority. <p>Identify specific locations and areas of search for waste management facilities, planning criteria for the location of additional facilities, and existing and potential landfill sites, which together enable adequate provision to be made for Essex, Southend and regional waste management needs as defined in policies W3B and W3C.</p>	<p>Paragraph 6 of the Framework sets out that the purpose of the planning system is to contribute to the achievement of sustainable development.</p> <p>PPS10 supersedes 'BPEO'.</p> <p>PPS10 advocates the movement of the management of waste up the waste hierarchy in order to break the link between economic growth and the environmental impact of waste.</p> <p>One of the key planning objectives is also to help secure the recovery or disposal of waste without endangering human health and without harming the environment, and enable waste to be disposed of in one of the nearest appropriate installations.</p> <p>Therefore, Policy W3A is considered to be consistent with the Framework and PPS10.</p>
W4A	<p>Waste management development will only be permitted where:</p> <ul style="list-style-type: none"> • There would not be an unacceptable risk of flooding on site or elsewhere as a result of impediment to the flow or storage of surface water; • There would not be an adverse effect on the water environment as a result 	<p>Paragraph 99 of the NPPF states that 'Local Plans should take account of climate change over the longer term, including factors such as flood risk, coastal change, water supply and changes to biodiversity and landscape. New development should be planned to avoid</p>

	<p>of surface water run-off;</p> <ul style="list-style-type: none"> Existing and proposed flood defences are protected and there is no interference with the ability of responsible bodies to carry out flood defence works and maintenance. 	<p>increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures, including through the planning of green infrastructure'. In addition Annex E of PPS10 highlights at section <i>a. protection of water resources</i> that 'Considerations will include the proximity of vulnerable surface and groundwater. For landfill or land-raising, geological conditions and the behaviour of surface water and groundwater should be assessed both for the site under consideration and the surrounding area. The suitability of locations subject to flooding will also need particular care'.</p> <p>Therefore, as policy W4A seeks to only permit development that would not have an adverse impact upon the local environment through flooding and seeks developments to make adequate provision for surface water run-off the policy is in conformity with PPS10 and the NPPF.</p>
W4B	Waste management development will only be permitted where there would not be an unacceptable risk to the quality of surface and groundwaters or of impediment to groundwater flow.	See above.
W4C	<ol style="list-style-type: none"> Access for waste management sites will normally be by a short length of existing road to the main highway network consisting of regional routes and county/urban distributors identified in the Structure Plan, via a suitable existing junction, improved if required, to the satisfaction of the highway authority. Exceptionally, proposals for new access direct to the main highway network may 	Paragraph 21 (i) of PPS10 highlights that when assessing the suitability of development the capacity of existing and potential transport infrastructure to support the sustainable movement of waste, and products arising from resource recovery, seeking when practicable and beneficial to use modes other than road transport.

	<p>be accepted where no opportunity exists for using a suitable existing access or junction, and where it can be constructed in accordance with the County Council's highway standards.</p> <p>3. Where access to the main highway network is not feasible, access onto another road before gaining access onto the network may be accepted if, in the opinion of the WPA having regard to the scale of development, the capacity of the road is adequate and there would be no undue impact on road safety or the environment.</p> <p>4. Proposals for rail or water transport of waste will be encouraged, subject to compliance with other policies of this plan.</p>	<p>Furthermore, Paragraph 34 of the NPPF states that 'Decisions should ensure developments that generate significant movement are located where the need to travel will be minimised and the use of sustainable transport modes can be maximised'.</p> <p>Policy W4C is in conformity with paragraph 34 in that it seeks to locate development within areas that can accommodate the level of traffic proposed. In addition the policy seeks to assess the existing road networks therefore, being in accordance with the NPPF and PPS10.</p>
W9B	<p>Landfill, or landraising, for its own sake, without being necessary for restoration, will not be permitted. Landfill outside the boundaries of the preferred sites will not be permitted unless it can be demonstrated that satisfactory restoration cannot otherwise be achieved. Landfill will not be permitted when at a scale beyond that which is essential for restoration of the site.</p>	<p>PPS10 sets out the key objectives to achieve sustainable waste management including Paragraph 3 "...driving waste management up the waste hierarchy, addressing waste as a resource and looking to disposal as the last option, but one which must be catered for:..."</p> <p>Policy W9B seeks to minimise landfill and landraising to that essential to achieve restoration, thereby minimising the amount of waste going to landfilling pushing waste management up the waste hierarchy.</p>
W10A	<p>When granting planning permission for waste management facilities, the WPA will impose conditions and/or enter into legal agreements as appropriate to ensure that the site is operated in a manner acceptable to the WPA and that the development is undertaken in accordance with the approved details.</p>	<p>PPS10 states that 'It should not be necessary to use planning conditions to control the pollution aspects of a waste management facility where the facility requires a permit from the pollution control authority. In some cases, however, it may be appropriate to use planning conditions to control other aspects of the development. For example, planning conditions could be used in respect of transport modes, the hours of operation</p>

		<p>where these may have an impact on neighbouring land use, landscaping, plant and buildings, the timescale of the operations, and impacts such as noise, vibrations, odour, and dust from certain phases of the development such as demolition and construction’.</p> <p>Furthermore, paragraph 203 of the Framework states that ‘Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition’.</p> <p>Policy W10A inter alia only seeks to impose conditions and/or enter into legal agreements when appropriate to ensure that the site is operated in an acceptable manner. Therefore, the policy is in accordance with the requirements of the Framework and PPS10.</p>
W10C	In considering planning applications for landfill proposals the WPA will require the proposed measures for restoring the land to an acceptable and sustainable after-use to be feasible.	See explanation notes for Policy W9B as these are relevant and demonstrate conformity with the Framework and PPS10.
W10E	<p>Waste management development, including landfill, will be permitted where satisfactory provision is made in respect of the following criteria, provided the development complies with other policies of this plan:</p> <ol style="list-style-type: none"> 1. The effect of the development on the amenity of neighbouring occupiers, particularly from noise, smell, dust and other potential pollutants (the factors listed in paragraph 10.12 will be taken into account); 2. The effect of the development on the 	Policy W10E is in conformity with the NPPF in that the policy is concerned with the protection of the environment and plays a pivotal role for the County Council in ensuring the protection and enhancement of the natural, built and historic environment. The policy therefore, is linked to the third dimension of sustainable development in the meaning of the NPPF.

	<p>landscape and the countryside, particularly in the AONB, the community forest and areas with special landscape designations;</p> <ol style="list-style-type: none"> 3. The impact of road traffic generated by the development on the highway network (see also policy W4C); 4. The availability of different transport modes; 5. The loss of land of agricultural grades 1, 2 or 3a; 6. The effect of the development on historic and archaeological sites; 7. The availability of adequate water supplies and the effect of the development on land drainage; 8. The effect of the development on nature conservation, particularly on or near SSSI or land with other ecological or wildlife designations; and <p>9. In the Metropolitan Green Belt, the effect of the development on the purposes of the Green Belt.</p>	
W10F	<p>Where appropriate the WPA will impose a condition restricting hours of operation on waste management facilities having regard to local amenity and the nature of the operation.</p>	<p>In addition Paragraph 123 of the Framework states that planning decisions should aim to mitigate and reduce to a minimum other adverse impacts on health and quality of life arising from noise from new developments, including through the use of conditions. Furthermore, paragraph 203 states that local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations.</p> <p>It is considered that as policy W10F is concerned with the protection of amenity and seeks to impose conditions to minimise this policy W10F is in conformity with the requirements of the Framework.</p> <p>Also see above regarding PPS10 and conditions.</p>

W10G	Applications for waste management facilities should include measures to safeguard and where practicable to improve the rights of way network, which shall be implemented prior to any development affecting public rights of way commencing.	<p>Paragraph 75 of the Framework states that 'Planning policies should protect and enhance public rights of way and access.</p> <p>Local authorities should seek opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails'.</p> <p>Policy W10G seeks the protection and enhancement of public rights of way and therefore, is in conformity with the Framework.</p>

Essex Minerals Local Plan (1997)

MLP2	<p>Mineral working will be permitted only where there is an identified national, regional or local need for the mineral concerned.</p> <p>In the case of preferred sites the principle of extraction has been accepted and the need for the release of the mineral proven. Applications would be allowed unless the proposal fails to meet a pre-condition or requirement in schedule 1 or there are unforeseen unacceptable environmental or other problems.</p>	<p>Paragraph 145 of the Framework places an obligation on MPAs to take account of National and Sub National guidelines when planning for the future demand for and supply of aggregates.</p> <p>Landbanks are stated as being "principally an indicator of the security of supply" in paragraph 145 of the Framework, whereas policy MLP2 treats it as the only indicator.</p> <p>At paragraph 11 & 12 the Framework states that "the development plan as the starting point for decision making...unless other material considerations indicate otherwise.</p> <p>The Framework leaves the MPA to identify sites.</p> <p>Furthermore, in recent Costs Decision (ref: Costs application in relation to Appeal Ref: APP/Z1585/A/12/2169596) The Inspector for that appeal noted at paragraph 7 that 'The applicants' view is that the MLP is out-of-date and policy MLP2 is not consistent with the Framework. Landbanks are</p>
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		<p>stated as being “principally an indicator of the security of supply” in paragraph 145 of the Framework, whereas policy MLP2 treats it as the only indicator. In addition, the criterion of overriding need is not set out in the Framework. However, the Framework is the overarching national guidance and it is for development plans to put forward detailed policies having regard to local issues. Policy MLP2 has a minor difference in wording from, but is not in conflict with, the Framework.</p>
MLP3	<ol style="list-style-type: none"> 1. Access from a mineral working will preferably be by a short length of existing road to the main highway network, defined in structure plan policy T2, via a suitable existing junction, improved if required, in accordance with structure plan policies T4 and T14. 2. Proposals for new access direct to the main highway network may exceptionally be accepted where no opportunity exists for using a suitable existing access or junction, and where it can be constructed in accordance with the County Council’s highway standards. There is a presumption against new access onto motorways or strategic trunk roads. <p>Where access to the main highway network is not feasible, access onto a secondary road before gaining access onto the highway network may exceptionally be accepted if in the opinion of MPA the capacity of the road is adequate and there will be no undue impact on road safety or the environment.</p>	<p>Paragraph 32 of the Framework requires LPAs decisions to take account inter alia that “...safe and suitable access to the site can be achieved for all people...” and in Paragraph 35 developments should be located and designed where practical to...” inter alia “...create safe and secure layouts”</p> <p>It is therefore considered that MLP3 is in conformity with Framework has it seeks to provide safe and suitable accesses.</p>
MLP4	<p>Proposals for sand and gravel working on sites other than those listed in Schedule 1 will be permitted only where:-</p> <ol style="list-style-type: none"> (i) The reserves comprising the landbank are insufficient and/or there is some other over-riding 	<p>On the 12 July 2012 the Planning Inspectorate issued a Decision (ref: APP/Z1585/A/12/2169596 and Costs Decision) for an appeal. The Inspector of that appeal highlighted that at paragraph 9 that ‘The</p>

	<p>justification or benefit for the release of the site; and</p> <p>The proposal would be environmentally acceptable.</p>	<p>Framework requires provision to be made on specific sites and preferred areas and/or areas of search and locational criteria. This site is not a preferred site and therefore it is covered by policy MLP4 of the MLP for non-preferred sites. The Framework does not contain policies for non-preferred sites, such as the appeal proposal. However, the lack of any such policy does not mean that it is contrary to the Framework, since it is still open to Councils to provide locally- developed policies in their development plans'. In the Costs Decision (ref: Costs application in relation to Appeal Ref: APP/Z1585/A/12/2169596) to that appeal the Inspector highlighted that The Framework does not specifically deal with non-preferred sites and this is a matter left to local policies. The criteria selected by the Council are not in conflict with the Framework but MLP4 also takes into account environmental factors, which are covered by the Framework as part of sustainable development. Prior extraction of minerals continues to be part of the Framework, within the context of Minerals Safeguarding Areas, in paragraph 143. Therefore the advice in the Framework is not ignored nor is it in conflict with the development plan policies for the area.</p>
MLP8	<p>Planning permission will not normally be given for the working of minerals unless the land concerned is capable of being restored within a reasonable time to a condition such as to make possible an appropriate and beneficial after-use. Where planning permission for mineral working is given on Grade 1, 2 or 3a of the Ministry of agriculture's land classification, the land will be required to be restored within a</p>	<p>Paragraph 144 of the Framework requires LPAs when determining planning application inter alia "provide for restoration and aftercare at the earliest opportunity to be carried out to high environmental standards.</p> <p>Paragraph 109 of the Framework requires protection of soils.</p>

	<p>reasonable time and as nearly as possible to its former agricultural quality. Where filling material is necessary, permission will not be given until it is shown that suitable material will be available and that the compatibility of the landfill gas and leachate monitoring and control structures and processes with the afteruse is demonstrated. Wherever possible land permitted for mineral working will be restored to agricultural use, but due regard will also be had to the need for areas for nature conservation, water-based recreation, afforestation and Leisure activities. Where permission is given, conditions will be imposed to secure:</p> <ul style="list-style-type: none"> (i) progressive working and restoration; and (ii) aftercare and maintenance of the restored land for not less than 5 years, and <p>a beneficial after use of the restored land including the use of areas that remain waterfilled.</p>	<p>The Framework does not place such weight as the MLP on the need for restoration to agriculture for land that is best and most versatile, however it is recognised in paragraph 112 that the economic and other benefits of the best and most versatile land should be taken account of. In addition at Paragraph 109 it does require protection of soils. MLP8 recognises and does not preclude restoration to alternative afteruses.</p> <p>It is therefore considered that MLP8 is largely in conformity with the Framework</p>
MLP9	<p>In considering planning applications for mineral working or related development, the mineral planning authority will permit only those proposals where the provisions for working and reclamation contained in the application are satisfactory and the implementation of the proposals is feasible.</p>	<p>The Framework at Paragraph 144 requires when LPAs are determining planning applications to "...provide for restoration and aftercare at the earliest opportunity to be carried out to high environmental standards...". To ensure such restoration can be achieved applications need to demonstrate any restoration scheme is feasible.</p> <p>It is therefore considered that MLP9 is conformity with the Framework</p>
MLP10	<p>The primary processing plant will normally be expected to be located within the limits of any mineral working at either a low level or with the step being taken to mitigate its visual and aural impact. Sites with their own processing plant will be preferred to minimise movement of material on public roads and, by conditions imposed on permission, plant will not normally be</p>	<p>The Framework at Paragraph 144 requires when LPAs are determining applications to ensure applications does cause inter alia "...unacceptable adverse impacts on the natural and historic environment, human health..." In addition Paragraph 4 requires "...decisions should ensure</p>

	<p>available for material imported on to the site.</p>	<p>developments that generate significant movement are located where the need to travel will be minimised...".</p> <p>MLP10 seeks to reduce the environmental impact of mineral processing plant, by locating it at low level.</p> <p>MLP10 also seeks to co-locate mineral extraction with the primary processing plant, reducing unnecessary traffic movements.</p> <p>It is therefore considered that MLP10 is in conformity with the Framework</p>
MLP12	<p>Planning applications for mineral working must include a programme for working within the site. A total programme of extraction and supply of minerals may be sought, covering all sites within the applicants' control throughout the county. Voluntary obligations may be entered into where appropriate.</p>	<p>The Framework at Paragraph 144 requires when LPAs are determining applications to ensure applications does cause inter alia "...unacceptable adverse impacts on the natural and historic environment, human health..." and</p> <p>In addition in paragraph 144 "...that any unavoidable noise, dust and particle emissions and blasting vibrations are controlled...and establish appropriate noise limits..."</p> <p>Policy MLP12 is in accordance with the Frameworks paragraph 144 as it requires restoration at its earliest and ensures that no adverse impacts come from the extraction of mineral during its operational phases.</p>
MLP13	<p>Planning applications for mineral extraction and related development will be refused where there would be an unacceptable effect on any of the following:</p> <p>The visual and aural environment; Local residents' (or others') amenity; Landscape and the countryside; The highway network; Water resources;</p>	<p>The Framework at Paragraph 144 requires when LPAs are determining applications to ensure applications does cause inter alia "...unacceptable adverse impacts on the natural and historic environment, human health..." and</p> <p>In addition in paragraph 144 "...that any unavoidable noise, dust and</p>

	Nature conservation.	<p>particle emissions and blasting vibrations are controlled...and establish appropriate noise limits...”</p> <p>The Framework supports sustainable transport including requiring development to have safe and suitable access (Paragraph 32) and locating development to “...accommodate the efficient delivery of good and supplies...” (Paragraph 35).</p>
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Maldon District Replacement Local Plan

S2	Outside development boundaries defined in the local plan, the coast and countryside will be protected for their own sake, particularly for their landscape, natural resources and areas of ecological, historical, archaeological, agricultural and recreational value.	<p>Paragraph 112 of the NPPF states that ‘Local planning authorities should take into account the economic and other benefits of the best and most versatile agricultural land’.</p> <p>Paragraph 114 of the NPPF states that ‘Local Planning Authorities should maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes...’</p>
CC6	<p>The natural beauty, tranquillity, amenity and traditional quality of the District’s landscape will be protected, conserved and enhanced. Proposals for development in the countryside will only be permitted provided that:</p> <ul style="list-style-type: none"> - No harm is caused to the landscape character in the locality, and - The location, siting, design and materials are appropriate for the landscape in which the development is proposed, and - The development is landscaped to protect and enhance the local distinctiveness and diversity of the landscape character of the area in which it is proposed. 	See above.

APPENDIX 2

ENVIRONMENTAL IMPACT ASSESSMENT (EIA) FOR: ASHELDHAM QUARRY (Application ref: ESS/16/14/MAL)

An Environmental Statement has been submitted with the application and examines the main potential impacts associated with the development.

The key subject areas identified are:

- Landscape and visual impact;
- Noise;
- Dust;
- Flora and fauna;
- Archaeology;
- Traffic impact and public rights of way;
- Ground and surface waters, land drainage and flooding;
- Economic and social factors.

The significance of each subject area has been identified as ranging from negligible to extreme and a negative or positive impact has been recorded.

Landscape and Visual Impact

An assessment has been made of the effect of the change resulting from the development on the landscape as an environmental resource and on local views and visual amenity.

The assessment considers the short to medium term effects of mineral operations and importation of waste, including impacts during construction of the restoration scheme. It also considers the long term effects/benefits once the quarrying operations have been completed and the land restored.

During operations

Extraction of sand and gravel would have a negative change of major to moderate significance over the short term on landscape character. Temporary water bodies as a result of extraction would have a negative effect of minor adverse significance. Vegetation on the site boundaries would be retained, resulting in a negligible effect.

The change in the landscape character would have a negative effect of negligible to moderate adverse significance.

In terms of visual effects, the assessment considers various receptors, including the surrounding public footpaths and local roads (Hall Road, B1021 Tillingham Road, B1021 Southminster Road, Manor Road, the lane to North Wyke Farm and Marsh Road).

Overall the visual effect would be temporary major adverse with extreme adverse effects on the public rights of way. However, this would be only when the works occur immediately adjacent to the route.

The visual effect on the wider landscape would be negligible due to screening of the site.

The visual effect on transport routes would generally be moderate to minor adverse effect, with the vegetation within the site making a positive contribution to the wooded character.

Post-restoration

Post-restoration permanent adverse effects (moderate to minor) would be limited to the geology, soils and landform of the site. This is due to the mineral use and would be moderated via the retention of soils, design of final levels and creation of features. Otherwise, the development results in minor to major beneficial effects.

Effects on the overall surrounding landscape would be negligible to minor beneficial.

Visually, there would be a mainly moderate to major beneficial visual effect on the main footpath users.

For surrounding highways, the effect would be moderate to minor beneficial where the proposed ecological enhancements are in view. The views from the north would remain as a negligible effect due to the reversion to agriculture.

Private properties adjacent to the site would experience a positive effect from moderate to minor beneficial significance.

In summary, there would be short to medium term adverse effects during the operation of the quarry, with long-term landscape, biodiversity and recreation benefits arising from restoration.

Noise

Earth moving, including overburden stripping and bund formation, is considered to be the noisiest phase of the extraction programme.

Bunds are proposed to protect Broomfields and Mullingers Cottages once in place. The occupiers of Mullinger's Cottages have expressly requested that the bunds protecting their property are not constructed until phase 6 is commenced, in order to preserve the visual aspect for as long as possible.

Mitigation would be in the form of the use of a limited range of equipment and machinery; the proper maintenance of such machinery; the minimisation of the need to reverse; periodic monitoring of noise emissions.

Dust

Due to the position of the water table, it is likely that a significant portion of the site would be worked 'wet'.

Principle sources of dust would be:

- Soil stripping, storage and reinstatement;
- Mineral extraction and materials handling;
- Mineral processing;
- Inert waste handling and deposition;
- Wind scouring of exposed surfaces and stockpiles; and
- Mobile plant.

Effects during operation

A negligible significance from dust would be experienced at most of the local receptors identified. Broomfield and Mullingers Cottage would experience minor negative significance without mitigation. This is a worst case scenario when operations phases are closest to the properties.

Mitigation measures are proposed to include the following:

- Minimising operations dry, windy conditions, reducing drop heights and vehicle speeds;
- Seeding of soil storage mounds;
- The use of additional measures, such as water sprays or water bowser;
- Dampening of tipped material;
- Minimisation of stockpile heights;
- The use of a wheel wash;
- Sheeting of vehicles;
- Daily inspections for visible dust emissions by the site manager;
- Installation of a wind sock to establish wind direction.

Effects post-restoration

The proposal is for the site to be restored to low-lying agriculture and aquatic biodiversity. As the site is largely used for agricultural purposes presently, the assessment concludes that significant dust impacts are unlikely.

Flora and Fauna

During operation and without mitigation, minor adverse impacts would be experienced for dry acid grassland, birds, reptiles, badgers, invertebrates and local wildlife sites. This is due to loss of species-poor dry acid grassland, disturbance to breeding birds and wintering birds, harm/disturbance to reptiles and loss of invertebrate habitat.

Post-restoration, moderate to major significant positive impacts on priority habitats, birds, reptiles and invertebrates are predicted.

Additionally, post-restoration, major significant positive impacts would be experienced on the overall biodiversity and ecological integrity of the site.

Note: A post-completion management plan is proposed for biodiversity via a legal agreement.

Archaeology

In February and March 2014, an archaeological trial trench investigation was carried out.

The site has been found to contain significant archaeological remains of early Roman date, possibly in relation to a well-appointed rural site and 'red hill' deposits in relation to the local salt-making industry.

The operation of the mineral extraction without mitigation would result in a major adverse effect, due to the destruction of the remains and the loss of the opportunity to record and study them.

To mitigate this impact, archaeological recording is proposed. The opportunity to study the archaeological remains within the application site may be seen as a minor beneficial impact.

Traffic Impact and Public Rights of Way

The proposal would result in traffic movements similar to the existing level. It is not proposed to increase the approved traffic numbers, as mineral-carrying vehicles would largely be used to back-haul importations of waste from the applicant's site at Great Leigh's. This would take place over a period of 15 years to allow extraction and restoration.

The impact from traffic during operations has been assessed as negligible. Although no significant impacts have been identified, the HGV route to the A130 is proposed to be used and drivers will be required by the operator to keep to a maximum speed limit of 25mph through the village of Asheldham.

Public Rights of Way (PROW) exist on the periphery of the site, namely footpaths 8, 10 and 11. These footpaths have been previously diverted to enable quarrying activity and therefore the routes would not be affected as a result of the current proposals.

The transportation impact on PROW during operations has been assessed as negligible. Bunding has been proposed as mitigation during operations.

The restoration proposals indicate that the site would be available for public access for amenity use. It is anticipated that there would be a reduction in transport movements post-restoration and the impact has been assessed as moderate, beneficial and permanent.

The restoration plan proposes a new permissive footpath link from footpath 10 to footpath 11 and from footpath 10 to the proposed new car parking area. This would

provide recreational access for the public and the impact has been assessed as moderate, beneficial and permanent.

Ground and Surface Waters, Land Drainage and Flooding

The proposals would result in a change to the existing topography of the site. A Flood Risk Assessment has been undertaken.

Surrounding ground level is at approximately 20 to 22m AOD and water is encountered at approximately 15.5m AOD.

Surface and groundwater are currently managed as part of the quarrying process by pumping from the excavated areas to manmade lagoons. No water is discharged off site.

The site is at a local high point.

During operations

During operations, it is likely that the surface water infiltration would happen more slowly due to the removal of permeable sand and gravel and replacement with inert material. The rate of flow of surface water to groundwater would be affected, but the groundwater level would remain the same as the volume would not change.

The impact on groundwater during operations has been assessed as negligible.

Surface water flows would most likely increase during and following extraction. The worked site would be lower than the surrounding area, thereby dictating that flows would not leave the site but infiltrate local low points according to the underlying fill material.

The impact on surface water during operations has been assessed as negligible.

The impact on land drainage during operations has also been assessed as negligible.

The impact on flooding within the site during operations has been assessed as minor, adverse and infrequent. The impact on offsite flooding has been assessed as minor, beneficial and infrequent.

Post-restoration

Post-restoration, the northern section of the site would be restored to close to its current topography and the remainder of the site would be lower than the adjacent land.

As the proposed fill material would be inert, no effect on groundwater quality is anticipated. The impact on groundwater post-restoration has been assessed as negligible.

For surface water, there is potential for there to be an increase in offsite flows and short duration flooding at low points in the southern area. As the site is proposed for amenity

afteruse, this would not impact on people or property. The rate of flow to the existing watercourses would increase, but the volume would not. It would also be counterbalanced by a slower rate of infiltration.

The impact on surface water after restoration has been assessed as minor, adverse, infrequent and permanent.

The impact on land drainage after restoration has been assessed as negligible.

Flooding is more likely to occur within the site than currently but offsite flows would be unlikely to change significantly. The impact on flooding after restoration has therefore been assessed as minor, adverse, infrequent and permanent within the site and negligible offsite.

In order to reduce the impact of any additional surface water flows, a cut off ditch could be provided close to the site boundary to intercept flows. The need for the ditch would depend on the permeability of the restored site but it would reduce the impact to negligible.

Economic and Social Factors

The site employs 8 full time staff members and 7 haulage drivers. Extracted minerals supply a range of local businesses.

During operation, the staff numbers would not alter from the current amount; however they would be employed for a further 15 years.

The proposed importation of material would increase economic connections with developments in the area.

Overall, the effect on employment has been assessed as temporary minor positive.

The site is largely grade 2 agricultural land. The loss of agricultural land would be a small area in comparison to the local and regional agricultural area. The effects during operation have been assessed as moderately adverse.

On completion of restoration, there would be a long-term moderately beneficial social impact due to the proposed public amenity use. The loss of a section of agricultural land would be moderately adverse.

The economic effect of the restoration has been assessed as moderately beneficial.

DR/25/14

committee DEVELOPMENT & REGULATION

date 25 July 2014

MINERALS AND WASTE

Proposal: **Installation of a 1000 Kilowatt (kWe) environmental flare compound comprising Gas Plant, Generator, storage tanks, transformer, Switch and meter room and associated close boarded and palisade fencing.**

Location: **Slough Lane, Ardleigh, CO7 7RU**

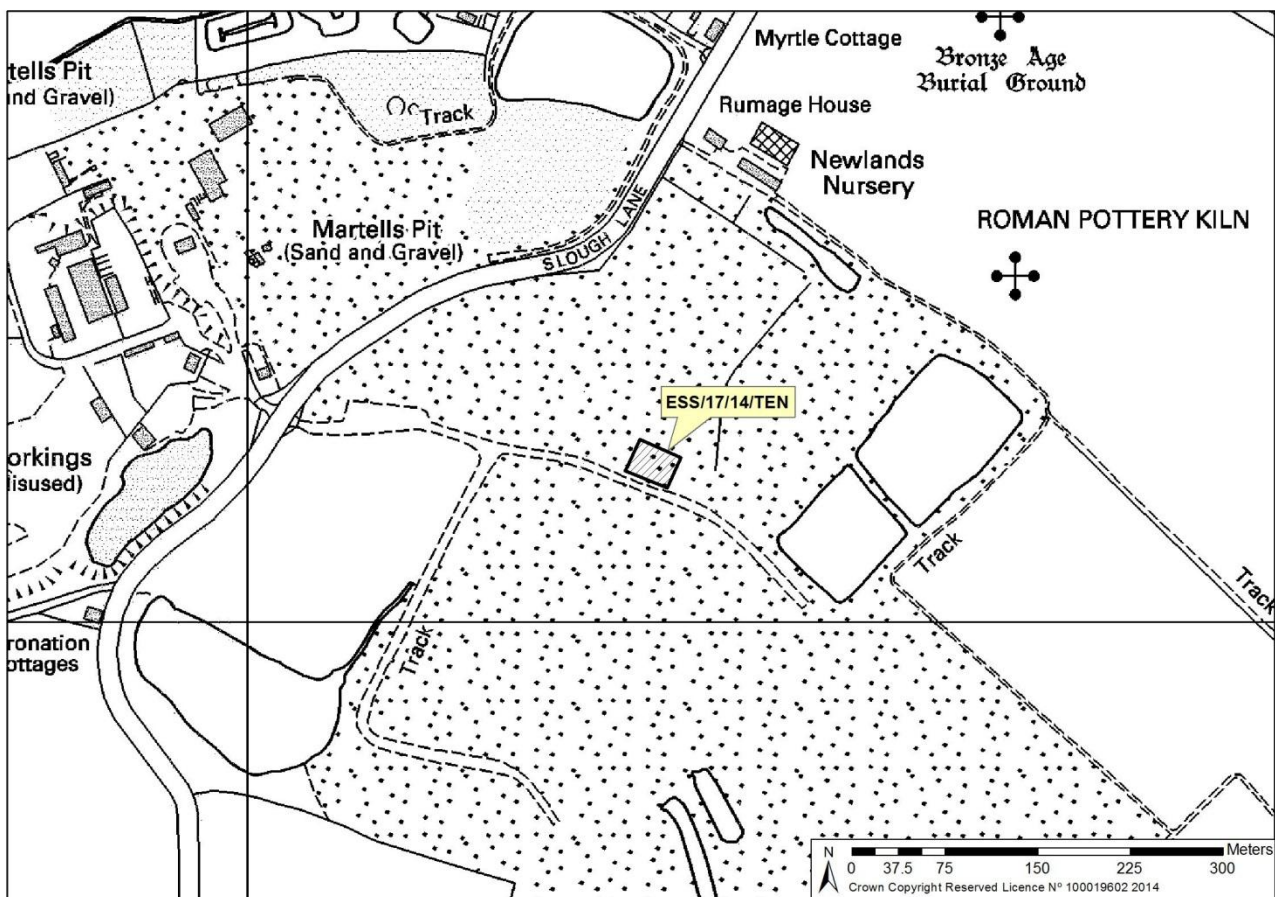
Ref: **ESS/17/14/TEN**

Applicant: **Renewable Power Systems**

Report by Director of Operations, Environment and Economy

Enquiries to: Paul Calder Tel: 03330 136825

The full application can be viewed at www.essex.gov.uk/viewplanning



1. BACKGROUND

The Ardleigh gravel deposit at Martell's Quarry has been continuously worked since the 1920's with several planning permissions been granted to extend operations. The quarry was taken over by a national aggregate company in 2007 that subsequently released the landfilling rights to a separate company.

In 1996, planning permission ESS/56/96/TEN was granted for mineral extraction from 10.3 hectares of land at Park Farm which lies to the north and east of the current application site. Restoration is to be achieved through the landfilling of commercial and industrial wastes to existing ground levels and agricultural after use. It should be noted that extraction of mineral has since ceased with only infilling having taken place with two voids remaining to be restored.

2. SITE

Martell's Quarry lies approximately 6.5km to the north-east of Colchester and 1.5km south of Ardleigh village 1.5km west of Burnt Heath village. The A120(T) trunk road is located approximately 700m to the south and connects to the A12(T) which links London and Ipswich at the Crown Interchange, just to the north of Colchester. Frating Road, part of the main road between Ardleigh and Burnt Heath lies 1km to the north-east and Bromley Road, which links Burnt Heath to Colchester, lies 500m to the south. Slough Lane, which runs north to south bisecting the quarry, with the current plant site on the west side adjoining the Martell's Industrial Estate and the most recent workings on the east side.

There are four Local Wildlife Sites (County Wildlife Sites) within 2km of the development site and there is the Ardleigh Gravel Pit geological Site of Special Scientific Interest (SSSI), within the quarry but would be unaffected by the proposal.

The proposal would be located within the quarry along the northern boundary of the site. Agricultural land adjoins the site to the north and the existing landfill to the south. The nearest residential property to the proposal site is 250 metres to the north which is screened by existing hedging along the northern boundary.

3. PROPOSAL

The applicant is seeking planning permission for the installation of a 1000 kWe environmental flare compound. It is anticipated that the compound would produce approximately 650kW of electricity for a period of ten years within a decline in production thereafter. The electricity would be exported to the local network via a buried cable.

The compound would include a gas plant, generator, storage tanks, transformer, switch and meter room and associated close boarded and palisade fencing. The maximum height of the facility excluding the generator exhaust and flare stack would be 4 metres. The generator and flare stack would be 6 metres and 8 metres respectively.

A 3.5 metre high close-boarded fence would be located along the northern boundary of the site with additional landscaping to assist in screening the proposal.

4. POLICIES

The following policies of the Essex & Southend Waste Local Plan 2001 (WLP) and Tendring District Local Plan adopted in 2007 (TLP) provide the development framework for this application. The following policies are of relevance to this application:

<u>Policy</u>	<u>WLP</u>	<u>TLP</u>
Landfill Gas	W7H	
Development Control Criteria	W10E	
Noise Pollution		COM22
Landscape Character		EN1

The National Planning Policy Framework (Framework) was published on 27 March 2012 and sets out the Government's planning policies for England and how these are expected to be applied. The Framework highlights that the purpose of the planning system is to contribute to the achievement of sustainable development. It goes on to state that there are three dimensions to sustainable development: economic, social and environmental. The Framework places a presumption in favour of sustainable development. However, Paragraph 11 states that planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

For decision-taking the Framework states that this means approving development proposals that accord with the development plan without delay; and where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or specific policies in this Framework indicate development should be restricted.

In respect of the above, Paragraph 215 of the Framework, which it is considered is applicable to the WLP and TLP, states that due weight should be given to relevant policies in existing plans according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).

With regard to updates/replacements or additions to the above, the Waste Development Document: Preferred Approach 2011 (now known as the Replacement Waste Local Plan (RWLP)) should be given little weight having not been 'published' for the purposes of the Framework. The Framework states (Annex 1):

From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:

- The stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
- The extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given), and;
- The degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given).

The RWLP has yet to reach 'submission stage' and as such it is too early in the development of the RWLP for it to hold any significant weight in decision making.

As a note to the above, the Framework does not contain specific waste policies, as the National Waste Management Plan for England (NWMP) is the overarching National Plan for Waste Management. Therefore, until Waste Planning Policy Statement (PPS 10) is updated in accordance with the advice contained within the NWMP, PPS10 remains the most up-to-date source of Government guidance for determining waste applications and as such reference to this Statement, in addition to the Framework, will also be provided, as relevant in the body of this report/appraisal.

Tendring District Council (TDC) is in the process of creating a new Tendring District Council Local Plan (TLPSD) and this was placed on public consultation from November 2012 to January 2013. Objections to the Plan raised as a part of this were considered and appraised and a series of changes, which were approved by Members in November 2013, were subsequently made to the Plan. These changes were subject to a public consultation between January and February 2014 and the intention is that the TLPSD will now be submitted to the Secretary of State for examination in early 2014. The following policies are considered of relevance:

<u>Policy</u>	<u>TLPSD</u>
The Countryside Landscape	PLA5

In consideration of the stages of production and adoption of the RMLP and TLPSD it is considered that more weight can be applied to the RMLP than the TLPSD.

5. CONSULTATIONS

TENDRING DISTRICT COUNCIL – Objects on lack of information concerning background noise levels, inadequate noise report and potential impact to residents through noise.

ENVIRONMENT AGENCY – No objection.

ENGLISH HERITAGE – Application should be determined in accordance with national and local policy guidance, and on the basis of your specialist conservation advice.

HIGHWAY AUTHORITY – No objection.

COUNTY COUNCIL'S NOISE AND AIR QUALITY CONSULTANT – No objection subject to a condition requiring updated noise assessment based on background noise levels.

PLACE SERVICES (Landscape and Historic Environment) ENVIRONMENT, SUSTAINABILITY AND HIGHWAYS – No objection subject to a condition requiring submission of a planting plan.

ARDLEIGH PARISH COUNCIL – Any comments received will be reported.

LOCAL MEMBER – TENDRING – Tendring Rural West – Any comments received will be reported.

6. REPRESENTATIONS

1 property was directly notified of the application. No letters of representation have been received.

7. APPRAISAL

The key issues for consideration are:

- A. Need and Principle of Development, and;
- B. Impact upon Amenity.

A NEED AND PRINCIPLE OF DEVELOPMENT

The Framework states that there are three strands of sustainability. Sustainable development focuses on building a strong competitive economy, whilst enhancing the local environment and supporting strong, vibrant and healthy communities. The Framework considers these three roles to be mutually dependant states significant weight should be given to proposals, which support economic growth and the prevention of climate change.

As noted earlier the within the report, the Framework does not contain specific waste policies, which means that PSS10 and the National Waste Management Plan for England are material considerations in decision making. However, local authorities taking decisions on waste applications should have regard to policies in the Framework so far as relevant.

PPS10 states that 'the overall objective of Government policy on waste, as set out in the strategy for sustainable development, is to protect human health and the environment by producing less waste and by using it as a resource wherever possible. With sustainable waste management, the Government aims to break the link between economic growth and the environmental impact of waste, by moving the management of waste up the 'waste hierarchy' of prevention, preparing for reuse, recycling, other recovery, and disposing only as a last resort

Landfill gas is the natural product of the complex process of the degradation of

organic material in the absence of oxygen. The process comprises a complex chain of reactions. Initially the oxygen within the waste is used up in an aerobic degradation phase. This is similar to the process which takes place in a compost heap. The heat generated during this phase and the new, oxygen-free environment provide the ideal conditions for different sets of bacteria to take over. These include the set known as methanogens. In addition, other constituents of the waste, including certain trace minerals, provide nutrients to the bacteria and ensure that a healthy population is maintained. The bacteria convert the carbon and water within the waste into a gas comprising methane (CH₄) and carbon dioxide (CO₂).

The applicant has stated in support of their application that modern, engineered landfill sites, such as Martells, provide ideal conditions for the methanogenic degradation of waste and the production of a useful energy source – landfill gas. The collection and utilisation of landfill gas for the generation of electricity is an increasingly popular and viable form of recycling.

As noted above the proposal would be used in conjunction with the already permitted landfill. An active gas collection system comprising vertical wells is to be installed within the landfill area to extract the landfill gas. These vertical wells are required by the Environmental Permit for the site and are covered by the planning permission for the landfill site.

The generating station would be operational for a period of up to twenty years. The Environmental Permit covering the site requires gas control on the site until the site ceases production of landfill gas. Landfill gas can be produced for many years after the site closes therefore, active gas extraction would be required over this time with or without the generation project.

WLP policy W7H states that 'Subject to the criteria and policies contained in the development plan, in particular the considerations set out in policy W10E, landfill gas utilisation plants for energy recovery will be encouraged at landfill sites, and this will be a material consideration in assessing the acceptability of landfill proposals'.

The applicant has stated that the gas flare would be expected to produce 650 kW of electricity for a period of ten years and thereafter at declining rate. At these outputs up to 65,000,000 units (kWh) of electricity could be produced for export to the local grid. Every tonne of waste deposited on site can produce over 340 kWh of electricity. This is sufficient to power an electric light bulb for 5,000 hours; alternatively it is enough electricity to supply the average household for four weeks. The scheme could supply enough electricity to meet the demands of over 1,000 households.

It is considered that the need and principle for the proposed development exists given the Martells Quarry history, the context of the surrounding area being a landfill operation in compliance with Policies W7H of the WLP. It is acknowledged that a residential uses is located 250 metres away to the north of the site therefore, the environmental role of the proposal will be considered further in the report.

B IMPACT UPON AMENITY

The Framework seeks to always secure a high standard of amenity for all existing and future occupants of land and buildings.

WLP Policy W10E (Development Management Criteria) states inter alia that waste management development, including landfill, will be permitted where satisfactory provision is made in respect of the effect of the development on the amenity of neighbouring occupiers, particularly from noise, smell, dust and other potential pollutants and impact upon the landscape.

TLP Policy EN1 - Landscape Character states inter alia;

The quality of the district's landscape and its distinctive local character will be protected and, where possible, enhanced. Any development which would significantly harm landscape character or quality will not be permitted.

Development control will seek in particular to conserve the following natural and man-made features which contribute to local distinctiveness:

- a. estuaries and rivers, and the undeveloped coast;
- b. skylines and prominent views, including those of ridge tops and plateau edges;
- c. the settings and character of settlements and of attractive and/or vernacular buildings within the landscape;
- d. historic landscapes and listed parks and gardens, ancient woodlands, and other important woodland, hedgerows and trees;
- e. native species of landscape planting and local building materials; and
- f. the traditional character of protected lanes, other rural lanes, bridleways and footpaths. Where a local landscape is capable of accommodating development, any proposals shall include suitable measures for landscape conservation and enhancement.

An objection has been raised by Tendring District Council (TDC) that the proposal would have a negative impact upon the amenity of residents through, in summary, noise as the existing background noise levels have not been assessed. The following section seeks to assess this potential impact as part of the Framework's environmental role of sustainable development.

TDLP Policy COM22 (Noise Pollution) states 'Planning permission will not be granted for noise sensitive developments such as hospitals, schools and housing unless one of the following conditions is met:

- i. the development is located away from existing sources of noise; or
- ii. mitigation measures are proposed which will adequately mitigate the adverse effects of noise at all times and in all circumstances.

Noisy developments should be located away from sensitive developments unless adequate provision has been made to mitigate the adverse effects of noise likely to be generated or experienced by others'.

With regard to noise, dust and odour, the applicant holds an Environmental Permit which requires these aspects to be strictly controlled through the permitting

regime. In addition, the applicant has highlighted that acoustically insulated containers would house the spark ignition gas engines and alternator sets with all of the necessary controls and instrumentation. The generator would be monitored continually by on board computers. The latter would feed information via a dedicated telephone link to a twenty-four hour central monitoring station. The site would be “unmanned” with control and monitoring carried out remotely by means of telemetry links. Trained technicians and engineers would visit the site at least once per week and typically two or three times a week to carry out routine monitoring and servicing. Planned maintenance may require greater attendance for short periods.

The flare would burn the landfill gas at a minimum of 1000 °C with a minimum residence time of 0.3 seconds. The flame would be completely enclosed within the flare and no flame would be visible. The applicant has confirmed the proposed generators and flare would meet the latest Environment Agency guidance for emissions.

In responding to the comments raised by TDC the applicant stated that although the exact make and model of the generators is not yet tendered the specification would be set out to match that submitted in the planning – ie that it must meet 60 dB(A) at 10 metres and have no tonal characteristic. The noise level of the generators would be checked as part of the commissioning process and continued onsite monitoring. The -5 dB screening is given by the partial screening afforded by the acoustic fence on the northern side of the proposed compound. The screen would provide partial screening for the generator as a whole (since it would fully screen the radiators and generator container but not the exhaust outlet).

The County’s noise consultant has raised no objection to the proposal on noise or air quality grounds. The noise consultant also stated, in summary, that the 5 dB correction applied to the exhaust stacks is not confirmed. Nevertheless, it is a reasonable assumption that the required noise levels at nearby residential premises could be achieved. However, it is recommended that a condition is imposed to ensure this is demonstrated, prior to work starting on site, through submission of a revised noise assessment being undertaken based on noise data for the actual gas plant to be used and to demonstrate that the noise predictions previously determined can be achieved.

Furthermore, the Environment Agency, County Landscape and Historic Building advisors have raised no objection to the scheme. Therefore, in consideration of the above, the consultation responses received, the existing land use being an active landfill it is considered that sufficient information has been produced to demonstrate that the development would not have an undue impact upon the local amenity through noise, dust or odour. Accordingly, it is deemed that the proposal complies with WLP policy W10E and TDLP Policies COM22 and EN1.

8. CONCLUSION

In conclusion, the need of the proposal has been demonstrated given that it would manage landfill gas which if left untreated would have a negative environmental

impact in compliance with the objectives of PPS10 and WLP policy W10E. Furthermore, the principle of the development being located within the Martells Quarry landfill area has been demonstrated through the site's history, the context of the surrounding area which is in compliance with WLP policy W7H.

There would be minimal impact on the landscape and visual amenity and noise could be controlled through the imposition of a condition in the event that permission is granted. The presence of the flare would act to improve amenity in terms of controlling odour, thereby complying with Waste Local Plan Policy W10E.

The economic, social and environmental strands of the Framework are considered to have been achieved equally and the gas flare would be considered to constitute 'sustainable development' in accordance with the Framework.

Furthermore, the WLP and TDLP policies relied upon in this report are considered to be consistent with the Framework and therefore the proposal is considered acceptable subject to the imposition of appropriate conditions.

9. RECOMMENDED

That planning permission be **granted** subject to conditions covering the following matters:

1. COM1 – Commencement
2. COM3 – Compliance with Submitted Details
3. Bespoke – updating of submitted Noise Assessment
4. NSE3 – Monitoring Noise Levels
5. LAND1 – Landscape Scheme

BACKGROUND PAPERS

Consultation replies

Application Details contained within ESS/17/14/TEN.

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

The proposed development would not be located adjacent to a European site.

Therefore, it is considered that an Appropriate Assessment under Regulation 61 of The Conservation of Habitats and Species Regulations 2010 is not required.

EQUALITIES IMPACT ASSESSMENT: This report only concerns the determination of an application for planning permission. It does however take into account any equality implications. The recommendation has been made after consideration of the application and supporting documents, the development plan, government policy and guidance, representations and all other material planning considerations as detailed in the body of the report.

STATEMENT OF HOW THE LOCAL AUTHORITY HAS WORKED WITH THE

APPLICANT IN A POSITIVE AND PROACTIVE MANNER

The Local Planning Authority has acted positively and proactively in determining this application by assessing the proposal against all material considerations, including planning policies and any representations that may have been received and subsequently determining to grant planning permission in accordance with the presumption in favour of sustainable development, as set out within the National Planning Policy Framework.

LOCAL MEMBER NOTIFICATION

TENDRING – Tendring Rural West

DR/26/14

committee DEVELOPMENT & REGULATION

date 25 July 2014

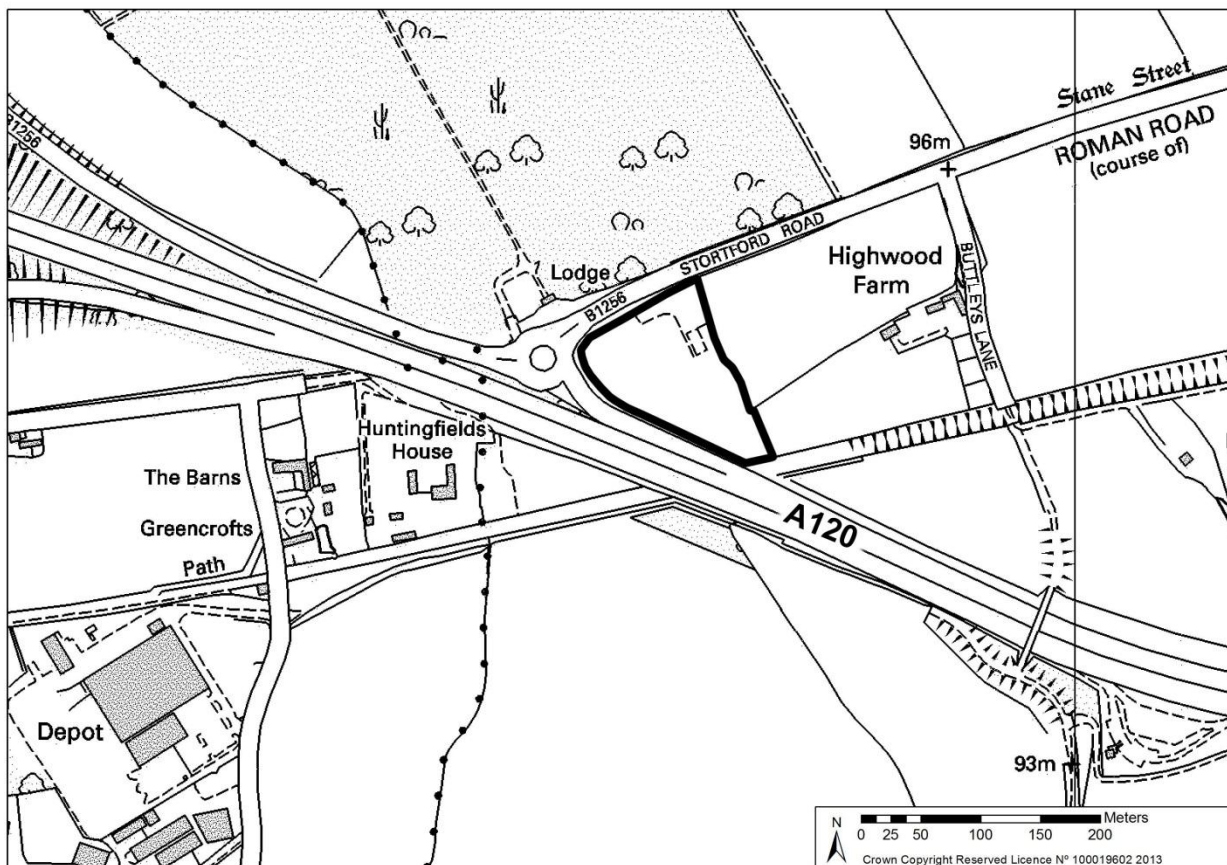
**MINERALS AND WASTE DEVELOPMENT
INFORMATION ITEM- ENFORCEMENT OF PLANNING CONTROL**

**The importation, deposition and spreading of waste materials on the land,
substantially raising the land levels (the unauthorised development)**

Location: **Land at intersection of A120 and B1256 (Stortford Road), Braintree, Essex**
Ref: **ENF/0673**

Report by Director for Operations, Environment and Economy

Enquiries to: Suzanne Armstrong 01245437556



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1. BACKGROUND AND SITE

A report was presented to the Committee on 25 October 2013 providing an update on enforcement matters relating to the above site. At that meeting the committee resolved;

- 1) Subject to the removal of the unauthorised material from the site no further action is taken, however if all imported waste materials deposited on the land have not been removed and the land restored (as required by the Enforcement Notice issued June 2009) legal proceedings are commenced for non-compliance with the notice.

On 14 August 2014 the Waste Planning Authority (WPA) witnessed importation, deposition and spreading of waste materials on the land.

There remains an extant Enforcement Notice on the land (issued on the 5th June 2009) which restricts the importation, deposition and spreading of waste materials on the land.

On the 16 August 2013 the WPA issued a Temporary Stop Notice preventing the further importation, deposition and spreading of waste materials on the land.

The Temporary Stop Notice expired on the 13th September 2013. The unauthorised waste materials remain on the land which is in contravention of the Enforcement Notice issued in 2009. A number of formal letters have been sent to the landowner requesting removal of the materials. The landowner has ignored numerous requests to comply with the enforcement notice and has already been given a concession of time.

2. CURRENT POSITION

Since serving the Temporary Stop Notice the importation of waste has ceased, however the waste materials remain on the land. There is no evidence to suggest that the waste materials will be removed and the Enforcement Notice complied with. There is an on-going breach of the Enforcement Notice issued in June 2009. The Council has exhausted all options to resolve this breach of planning control and therefore in the public interest, legal advice is currently being sought on taking formal prosecution action within the courts. A further update will be provided at the September 2014 meeting.

LOCAL MEMBER NOTIFICATION

UTTLESFORD – Dunmow .

DR/27/14

committee DEVELOPMENT & REGULATION

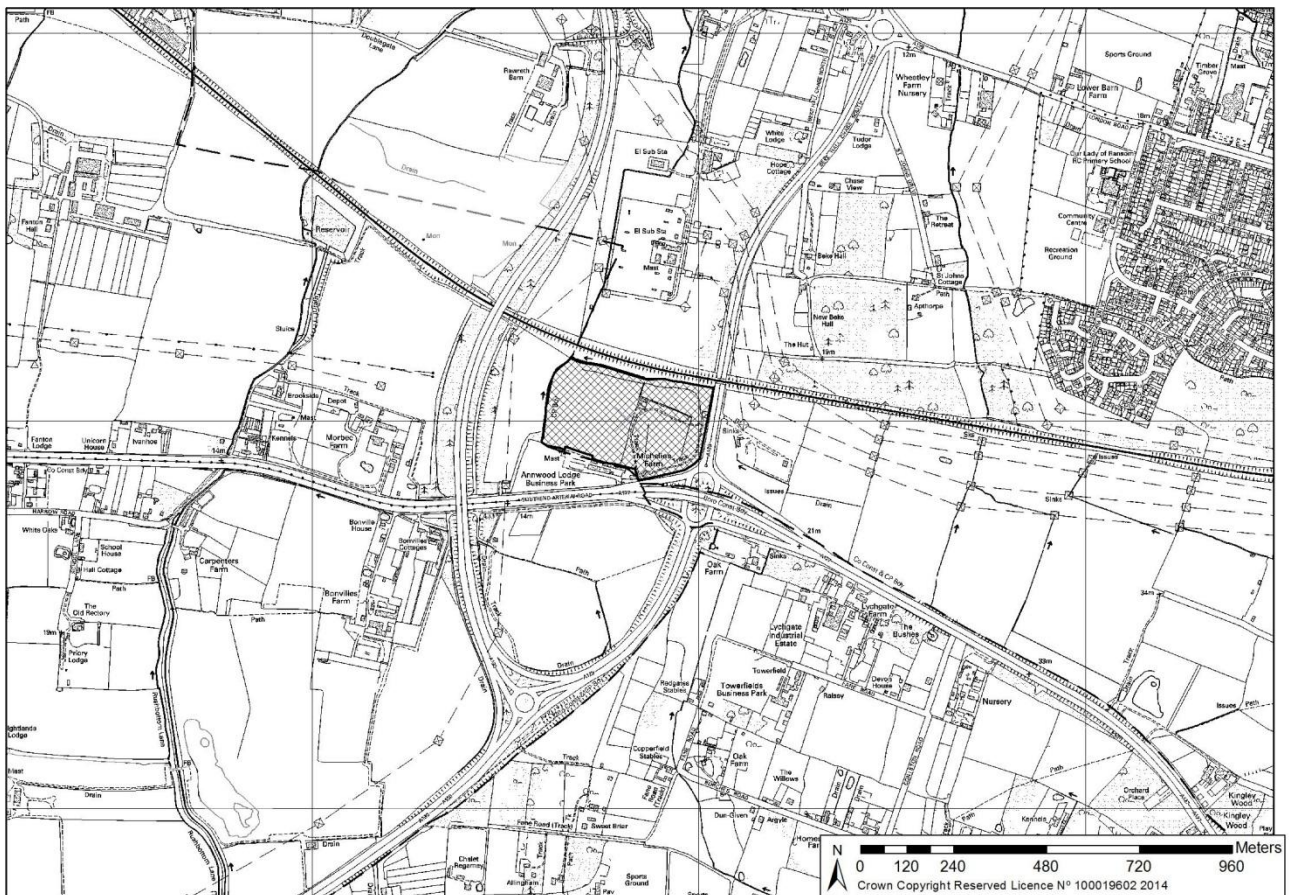
date 25 July 2014

MINERALS AND WASTE DEVELOPMENT - ENFORCEMENT OF PLANNING CONTROL
Unauthorised Development: A material change of use of the land from agricultural land to land used for the importation, deposition and spreading of waste materials, substantially raising the land levels

Location: **Land at Michelins Farm, Southend Arterial Road, Rayleigh, Essex SS6 7NG**
Ref: **ENF/0614**

Report by Director of Operations, Environment and Economy

Enquiries to: Suzanne Armstrong Tel: 03330 136823



1. BACKGROUND AND SITE

The unauthorised importation, deposition and spreading of waste materials has taken place on the land known as Michelins Farm in Rayleigh Essex.

A report was presented to the Committee on the 25 April 2014 providing an update on enforcement matters relating to the above site. At the meeting the committee resolved:

That subject to Court Order (issued under the Environment Agency's powers) being enforced or complied with, no further action is taken by the County Council as Waste Planning Authority in respect of the breach of the enforcement notice issued in June 2011.

The land has not been cleared in accordance with the Court Order and accordingly the Environment Agency and Rochford District Council proceeded with a joint prosecution.

The case was heard at Chelmsford Crown Court on 11 July 2014. In considering this case the Judge stated that the original Court Order was issued in January 2013 giving the land owner a substantial amount of time to clear the waste from the land. Some waste had been removed from the land, but it was a small amount and did not deal with the main issue at hand, which was the sheer amount of waste that the land owner had accumulated on his land. It was considered that the requirements set out in the Court Order had not been met and the unauthorised development remained.

2. CURRENT POSITION

The landowner was sentenced to 6 months imprisonment.

Following sentencing the Regulation 44 Court Order was discussed and it was concluded that it was no longer valid having expired on the 1 July 2014 and therefore could not be pursued.

3. LEGAL ADVICE

It was previously advised that if the WPA chose to prosecute for non-compliance with the enforcement notice, the landowner could raise an argument that there is an abuse of process argument as he is being prosecuted for the same 'offence' twice.

1. The prosecutor is also bound by the Code of Conduct for Prosecutors. In bringing prosecutions on behalf of ECC they must satisfy that the test for bringing a prosecution has been reached, primarily whether the prosecution has a realistic prospect of success, and that it is within the public interest for the matter to be prosecuted.

Legal advice concluded that the prospect of success was not sufficient to support a

second prosecution and as the Environment Agency had already commenced proceedings public resource should not be duplicated when the same aim is already being achieved by another agency.

Now that the first prosecution has been effectively dealt with ECC should continue to liaise with the Environment Agency and Rochford District Council in relation to further enforcement action on the landowner's release.

4. RECOMMENDED

That no further action is taken by the County Council as Waste Planning Authority in respect of the breach of the enforcement notice issued in June 2011 and that the position is reviewed after January 2015.

LOCAL MEMBER NOTIFICATION

ROCHFORD – Rayleigh North
ROCHFORD – Rayleigh South

DR/28/14

committee DEVELOPMENT & REGULATION

date 25 July 2014

ENFORCEMENT OF PLANNING CONTROL – INFORMATION ITEM

Enforcement update.

Report by Head of Planning, Environment and Economic Growth

Enquiries to Suzanne Armstrong – Tel: 03330 136 823

1. PURPOSE OF THE ITEM

To update members of enforcement matters for the period 1 April to 30 June 2014 (Quarterly Period 2).

2. DISCUSSION

A. Outstanding Cases

As at 30 June 2014 there are 22 outstanding cases. Appendix 1 shows the details of sites (11) where, after investigation, a breach of planning control is considered to have occurred.

B. Closed Cases

23 cases were resolved during the period 01 April to 30 June 2014.

LOCAL MEMBER NOTIFICATION

Countywide

Enforcement Committee Report

<u>Location</u>	<u>Nature of problem</u>	<u>Action Result</u>	<u>Remarks</u>
Braintree District			
Little Warley Hall Farm, Ranks Green, Fairstead, Chelmsford, Essex, CM3 2BG	Dirty water (waste) from abattoir and storage tank		<p>SuzanneArmstrong 08-jul-14 10:43:05</p> <p>Members resolved to refuse retrospective planning permission for the retention of a circular concrete tank for storing abattoir wash water and to serve an enforcement notice requiring the removal of the tank. Two appeals have been lodged with the Secretary of State against Essex County Councils decision to refuse permission for the development and subsequently serve an enforcement notice in respect of the unauthorised development/alleged breach. The appeal is currently in progress.</p>
Batemans Farm, Great Leighs, Chelmsford, CM3 1PU	Lorry movements and activity on site		<p>SuzanneArmstrong 08-jul-14 11:42:38</p> <p>A concrete silo is currently on site, this has been operating on a trial basis as a diversification to the main business. An application is being prepared and will be submitted to the Waste Planning Authority. Site continues to be monitored.</p>
Chelmsford City			
Land adjacent The Cock Inn, Main Road, Boreham, Chelmsford, Essex	Unauthorised demolition waste recycling. Exesive stockpile heights & mud on the		<p>SuzanneArmstrong 09-jul-14 11:51:25</p> <p>Ongoing negotiation to remove materials from the land outside of the CLUED issued by Chelmsford City Council. Further progress continues, however materials remain on the land outside of the CLUED area. The Waste Planning Authority will now need to consider if it is proportionate to proceed with formal enforcement action</p>
Colchester Borough			
Gean Trees, The Causeway, Great Horkesley, Colchester, CO6 4EJ	Importation of waste		<p>SuzanneArmstrong 09-jul-14 11:46:27</p> <p>Unauthorised importation deposition and spreading of waste materials resulting in land raising. Part of a joint investigation with the Environment Agency. A Planning Contravention Notice has been served. No further waste has been imported and it is the owners intentions to work with the two authorities to remedy the breach of planning control. Ongoing site monitoring and negotiation.</p>

Epping Forest District

Brickfields, Old House Lane,
Roydon, Harlow, CM195DL

Importation of waste
and land raising

SuzanneArmstrong 08-jul-14
14:52:33

Importation of waste, subsequently raising the level of the land. No further importation of materials onto the land. Joint investigation with the Environment Agency. A Section 59 Notice has been served on the operator to clear the land. The EA are leading on this particular case. Land required to be cleared. Ongoing visits to ensure compliance.

Land at Weald Place Farm,
Thornwood

Deposit of Waste

SuzanneArmstrong 08-jul-14
15:02:41

Enforcement Notice served against the unauthorised use of the land for the deposition of waste materials and consequential raising of the land levels. An appeal against the Enforcement Notice was submitted and has now been withdrawn. A schedule of works have been agreed by the Waste Planning Authority in order to comply with the Enforcement Notice.

Harvey Automobile
Engineering, Paynes Lane,
Nazeing, Waltham Abbey,
EN9 2EX

Not working in
accordance with
permission

SuzanneArmstrong 09-jul-14
11:48:25

Working outside of the permitted area. There are some soil materials stockpiled outside of the area covered by the CLUED, the materials are located to the North West of the site. The landowner agreed that they were outside of the permitted area, due to the excessive water on site they are trying to drain the site. There were no operations at the time of my visit. the site was completely covered in water. A timescale has been agreed with the land owner to move the materials back within the area as approved by the CLUED. Revisit scheduled. Ongoing monitoring

Maldon District

Cobbs Farm, Maldon Road,
Goldhanger, Maldon, CM9
8BQ

Breach of Condition
26 attached to
application
ESS/37/11/MAL

SuzanneArmstrong 08-jul-14
15:04:14

Without the benefit of planning permission the extraction of sand and gravel outside of the area permitted under Reference ESS/37/11/MAL. Phased working of the site is not in accordance with the approved details. The Wash Lane access position is not in accordance

with the approved plans. Planning Contravention Notice served on the 20th December 2013 requiring information to be provided in relation to the activities on the land. A planning application has been submitted to the Waste Planning Authority. Await outcome.

Rochford District

Lovedown Farm, Hockley

Deposit of waste for sea wall development

SuzanneArmstrong 08-jul-14 15:06:59

No current site activity, waste importation has ceased. continued consultation with the EA and Natural England

Tendring District

DOE Metal Recycling (Clacton) Limited, Valleybridge Road, Clacton-on-Sea

Noise

SuzanneArmstrong 08-jul-14 10:50:44

Noise complaints have been received. The operator has submitted a noise assessment report to the Waste Planning Authority, this document is under consultation to ensure noise levels are in accordance with planning conditions. Ongoing investigations and monitoring

Uttlesford District

Land at Intersection A120/B1256, Stortford Road, Braintree, Essex

Importation of Waste

SuzanneArmstrong 08-jul-14 11:32:37

On the 5th June 2009, Under Section 172 of The Town and Country Planning Act 1990, an enforcement notice was issued; the extant enforcement notice prevents the importation, deposition and spreading of waste materials on the land. On the 14th August 2013 officers witnessed importation, deposition and spreading of waste materials on the land. Therefore the current activities are in breach of the extant notice. A Temporary Stop Notice was served in the first instance. Activities have ceased on site although the waste remains. A witness statement has been prepared and the case has been referred to the Countys Legal department for consideration of a formal prosecution, if considered to be in the wider public interest. Further updates to follow.

DR/29/14

committee DEVELOPMENT & REGULATION

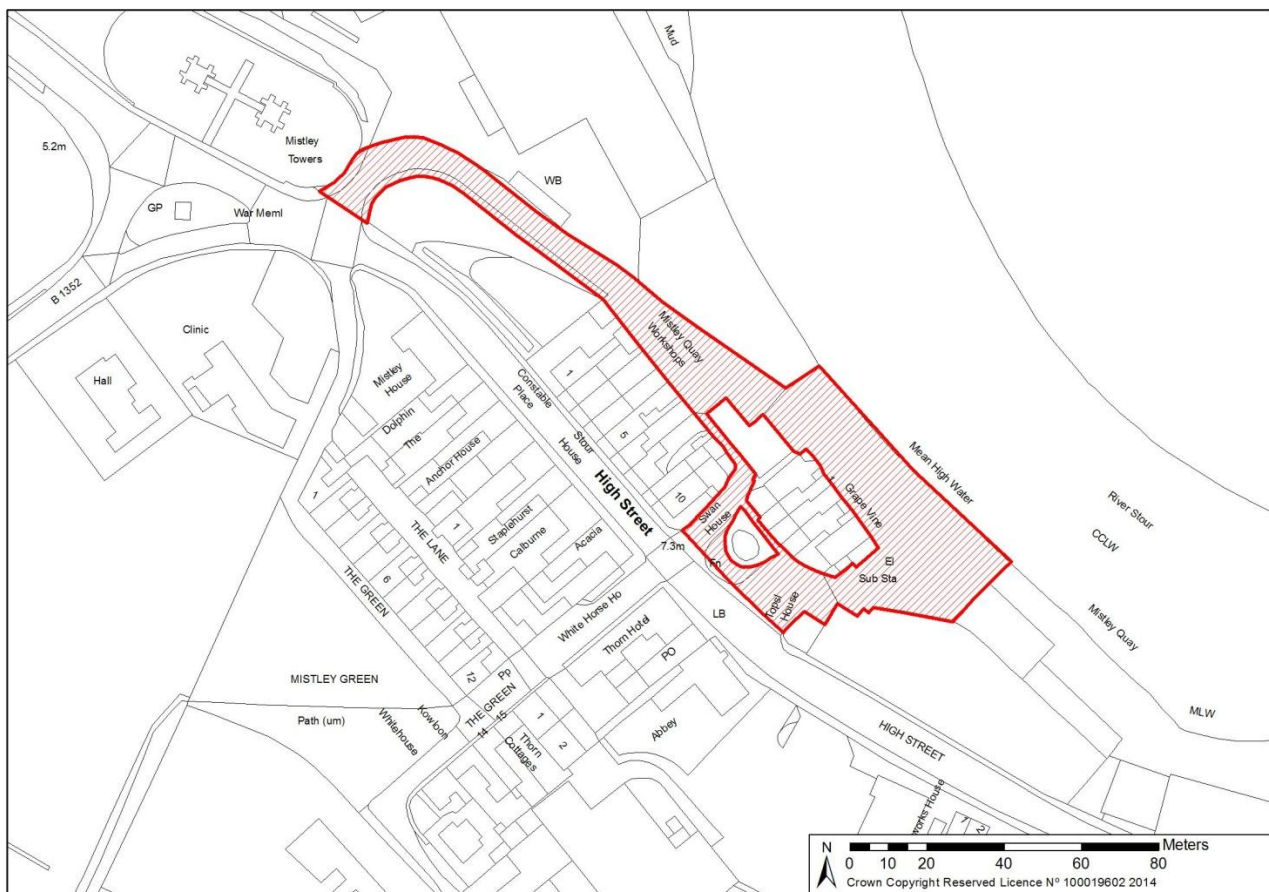
date 25 July 2014

VILLAGE GREEN APPLICATION

Application to register land at Mistley Quay, Mistley, Essex as a town or village green

Report by Director for Essex Legal Services

Enquiries to Jacqueline Millward Tel: 01245 506710



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1. PURPOSE OF REPORT

To consider an application made by Mr I J Tucker to register land described as “Mistley Quay”, Mistley pursuant to Section 15(3) of the Commons Act 2006 (“the 2006 Act”).

2. BACKGROUND TO THE APPLICATION

The application dated 18th August 2010 was made by local resident Mr Tucker for registration of land situated off the High Street in Mistley, with links through to the High Street and abutting the water’s edge of the Quayside. The area applied for is hatched on the plan at the front of this report.

The applicant had included but did not intend that the application should include the area occupied by an electricity substation and its fenced curtilage which is situated at the extreme south-eastern end of Grapevine Cottages buildings. As the OS map itself was unclear this was subject to further representations by the applicant when the inspector’s report was circulated to the parties and he issued an addendum accepting the applicant’s statement of the position subsequently (Addendum 1).

Essex County Council is the commons registration authority in relation to the 2006 Act and caused a non-statutory public local inquiry to be held into the matter over a period of eight days, namely 24^h to 27th June, 1st to 3rd July and 25th July 2013 before Mr Alun Alesbury of counsel. At the inquiry evidence and submissions were given in support of the applicant and on behalf of three objectors, TW Logistics Limited, Gladedale (South East) Limited and Anglia Maltings (Holdings) Limited.

With the agreement of the parties all of the oral evidence was heard on oath or solemn affirmation. The proposed inquiry was advertised in advance both on site and in the local press.

The Inspector made a preliminary and unaccompanied site visit on 23rd June before the start of the inquiry. He observed the surrounding area generally. He also had frequent opportunities to observe the site informally on the days when the inquiry was sitting at the beginning, end of the day and at lunch breaks. He made a further accompanied site visit with representatives of the parties after close of the evidence to the inquiry on 26th July 2013. In addition to going on to the site and looking at all of it the accompanied site visit visited and observed the area surrounding the site and other local features. He also had the opportunity to see the site and the Quayside edge facing the Stour estuary and the rest of Mistley Quay from a boat.

In addition to the oral evidence at the inquiry, the parties had exchanged documentary evidence in advance of the inquiry date and additional documents were produced during the inquiry. All the material submitted was taken into account by the inspector.

The inspector's report is appended as Appendix 1 and he makes a recommendation of registration of part only of the land applied for. The applicant and the objectors have had sight of the inspector's report and further representations have been made which are summarised in section 19 of this report.

3. DESCRIPTION OF THE LAND

The applicant provided a plan defining the boundaries of the application land when he submitted his application. This is shown by the hatching on the report map.

The land applied for is fairly clearly delineated on the ground. There are three main elements which the inspector described the land as comprising three main elements in paragraph 2.9 to 2.13 of his report.

The first is a largely concreted area of open Quayside back from the water's edge (the Stour estuary immediately to the north of the site) to the line of a group of buildings including the 'Grapevine Cottages' residential dwellings, some workshops and a café.

The eastern edge of this part of the site generally follows the line of some warehouse buildings historically associated with the maltings industry. There is a fixed metal 'chain-link' type fence very close to the northern edge of the site (i.e. the actual Quayside).

The second element of the site consists essentially of the long access road running west from the Quayside area which curves round southwards to join the main road through Mistley at the western end of the part known as the High Street.

A third element essentially consists of the routes or thoroughfares extending southwards from the Quayside to the High Street, around both the eastern and western sides of the Grapevine Cottages buildings, and also surrounding the 'Swan Basin', which is an ornamental fountain or pool to the south of those cottages. Some of this part of the site is fully usable and quite well used by vehicular traffic, as well as by pedestrians, whereas other areas of it are only practically usable for pedestrian access.

A map showing the common names of properties around Allen's Quay is attached at Appendix 7.

Substantial parts of the application site are noted in records maintained by Essex County Council as subject to 'public highway' rights of various kinds. The inspector's conclusions and recommendations took this into account and it is addressed in section 7 of this report.

At a considerably later date (May 2013) the applicant sought to amend the application area. At the eastern end of the site the amendments proposed to reduce the area of land applied for. These changes were uncontroversial at the inquiry. However another amendment sought a significant enlargement. Although this was relatively small as a proportion of the overall area it involved a substantial

increase to the frontage onto the tidal Stour estuary. This amendment was the subject of dispute between the parties at the inquiry.

The inspector's recommendation on the proposed amendments is in section 12 of this report.

4. THE APPLICATION

The applicant's case was supported and supplemented by various documents including plans, a memorandum, witness statements or completed evidence questionnaires and letters from local residents, and various other supporting material, including photographs. Other material was exchanged in the run up to the inquiry in accordance with directions notified to the parties on 28th November 2012 and re-issued 28 January 2013 when the date for the inquiry was revised.

In support of his application the applicant had provided a memorandum in support which addressed the following matters:

- That the witness statements are a representative sample of the inhabitants of the parish.
- That the terminology used to define the area of Mistley dates from 17-18 century and for new Mistley 19-20 century.
- The Swan Basin was given for the use of the parish in 1844.
- The users from what was the rural area visited Mistley for trade and social purposes.
- The witness statement evidence shows continuous, frequent and unimpeded use for recreational boating and other activities. Some were employed or had business on parts of the Quay.
- There had been coexistence of uses.
- There had been use for over 20years but the use also had a longer historical perspective.
- Uses may have been affected by the fence erected on 17 September 2008 and a list was provided of those which were and those which weren't.
- Attempts by the parish council to resolve the issues which arose from the erection of the fence were specified.
- Maps were provided showing the residences of witnesses, the areas in which activities were carried out, the commercial and non-commercial port areas, the Swan Basin and other local features and the area surrounding Mistley Quay.

When the application was advertised in October 2010 objections were received within the objection period from TW Logistics Limited (TWL) and Gladedale (East) Limited (Gladedale).

Notice of the application was not given to Anglia Malting (Holdings) Limited but they later became aware of the application and were given an opportunity to object. Since that time Anglia Maltings were treated as a duly made objector and no party concerned in the proceedings raised any concern or difficulty in respect of that.

Having seen the objections the applicant confirmed his intention to proceed with

the application on 2 December 2012.

In relation to the claimed locality or neighbourhood within a locality, the applicant stated this was the parish of Mistley. The inspector was satisfied that the civil parish of Mistley was capable of being a 'locality' in legal terms for the purposes of the commons legislation and it did not appear to be a matter of controversy between the parties.

The applicant was represented by a solicitor from Birketts at the inquiry.

5. THE EVIDENCE IN SUPPORT OF THE APPLICATION

The applicant's inquiry bundle included 24 statements for oral witnesses, 27 'other witness statements' and 23 evidence statements.

In preparation for the inquiry, the applicant lodged a further statement of case with submissions in support of their case. The statement of case set out a short summary of the history of the application land, and referred to plans showing its boundaries, ownerships and rights of way in the vicinity etc. It was explained that the Quay forming part of the application land is no longer used to unload or load commercial vessels. It was acknowledged that goods and cargoes are moved about on the application land between the operational warehouses to the west and the operational Quay further to the east. The point was made that there are by no means always vessels in the port which are being loaded and unloaded.

The Quay has for many years been used by local people for a wide range of recreational activities, which were briefly summarised. It was acknowledged that some of those activities had been curtailed by reason of a fence which was erected along the Quayside in September 2008.

Section 15 of the Commons Act was summarised, and it was made clear that the application in this case relied on Section 15(3), because the use was taken to have been interfered with at the time the fencing was erected in September 2008.

The case law relating to the various aspects of the statutory definitions in Section 15 of the Commons Act was summarised. It was made clear that the Parish of Mistley was relied on as the relevant locality. The point was particularly made that the use of land for the purpose of lawful sports and pastimes is not required to be exclusive, or even the dominant use of the application land. Qualifying use can co-exist with other beneficial use by the owner of land. What matters is that the use for lawful sports and pastimes is undertaken as of right, and fulfils the other requirements of Section 15. The decision of the Supreme Court in the case of ***R (Lewis) v Redcar and Cleveland Borough Council*** [2010] 2 AC 70, UKSC 11 was relied on. The ***Redcar*** case had made it clear that there was no principle that deference to the landowners' actions on the relevant piece of land prevented reliance on a claim that use by local people had been as of right.

The evidence in support of the application, insofar as it had been lodged on paper, was summarised. The point was specifically made that notices around the Quay and the application land did not clearly suggest that they were intended to prevent

or deter use of the application land rather than land beyond.

Those previously supplied submissions formed the basis of the opening of the case for the applicant which was made at the Inquiry.

The inspector confirmed that he considered the written evidence to be broadly consistent with the tenor of the evidence given by the oral witnesses and addressed any particular issues in his report.

18 witnesses gave evidence in support of the application at the inquiry and their evidence is summarised in section 7 of the inspector's report. The individual witness evidence is summarised in the following parts of that section: Mr Brooks 7.7 (p8) – 7.38 (p12), Mr Vonk 7.39 (p12) – 7.60 (p15), Mrs Hume 7.61 (p15) – 7.79 (p17), Mr Garwood 7.80 (p17) – 7.108 (p21), Mrs Saxby 7.109 (p21) – 7.131 (p23), Mrs Wainwright 7.132 (p23) – 7.763 (p28), Mr Horlock 7.764 (p28) – 7.204 (p33), Mr Metson 7.204 (p33) – 7.215 (p35), Mrs Smith 7.216 (p35) – 7.244 (p39), Ms Worsley 7.245 (p39) – 7.271 (p42), Mr Tucker 7.272 (p42) – 7.322 (p49), Professor McKay 7.323 (p49) – 7.341 (p52), Mr Saxby 7.342 (p52) – 7.370 (p56), Mrs Bell 7.371 (p56) – 7.407 (p61), Mr Fairhall 7.408 (p61) – 7.422 (p63), Mr Rose 7.423 (p63) – 7.435 (p64), Mr Ward 7.436 (p64) – 7.448 (p67) and Mr Wood 7.449 (p67) – 7.466 (p69).

Witnesses were cross examined on a range of issues by the objectors.

The applicant's submissions are summarised at pages 69 to 85 of the inspector's report in his part 8.

It was acknowledged for the applicant that the area of land concerned in this case does not conform to any conventional vision of a town or village green. The entire area is hard surfaced and continues to be used for some commercial purposes. However there is no requirement for a town or village green to display any particular physical characteristics. Nor is it necessary for the sole or even the principal use of the land to be for recreational purposes. The analysis by Lord Hoffmann as to what constitutes a village green in the **Trap Grounds (Oxfordshire)** case [2006] UKHL 25 was considered.

The land concerned is distinct and different in character from the remainder of the port. It is in the centre of Mistley and contains the surviving elements of Mistley's 18th century ambition of becoming a Spa, including the Swan Basin. No part of the application land is now normally used for the storage of goods or the loading or unloading of ships or vehicles. It is accessed by and includes a public right of way. The part of the application land which is not public highway is not physically separated or distinguishable from that which is.

The application land is separated from the Stockdale Warehouse compound by fencing or signage or both. It is separated from the Quay to the east by signage, and previously by a barrier which was closed at times. There has never been any physical impediment to public access to the application land or any part of it. There is much evidence that the local inhabitants have throughout living memory regarded the whole of the application land as a public area, in contrast to other

parts of the port.

Submissions were made in relation to the application to amend the application land to include the area at the north-west of Allen's Quay which had been within the area shown on the plans attached to the user evidence forms etc. The inspector's conclusions on that issue are in section 12 of this report and the matter is not addressed further here, which had been enclosed by fencing in 2008, the following submissions were made. The test for the admission of an amendment, including an enlargement of an application site, was whether prejudice would ensue to any party. It would be different if the matter were an addition to an application site by way of an afterthought, as opposed to what is in this case very clearly an error by omission on the original application plan. It would follow that if the amendment was accepted the application for the enlarged site should be treated as having been made in 2010, at the date of the original application.

The applicant acknowledged that from about the summer of 2003, a dispute had arisen between TWL and local yachtsmen about the entitlement of those yachtsmen to berth against the Quay. However it is apparent from the material available to the inquiry that this dispute was directed at yachtsmen, and particularly members of the Stour Sailing Club, rather than at the residents of Mistley as a whole. The dispute concerned the entitlement of vessels to moor alongside the Quay, and had no impact on the various recreational activities which continued to be enjoyed on the Quay until the fencing went up in September 2008. Indeed there was evidence by local inhabitants that they had continued to use the Quay for berthing their boats up to 2008 without objection. Accordingly the applicant's case is that use of the Quay for recreational purposes continued as of right until September 2008, and in consequence the relevant 20 year period for consideration is September 1988 to September 2008.

In relation to the question of the obligation to prove on a balance of probabilities that a significant number of the inhabitants of the parish of Mistley indulged as of right in lawful sports and pastimes on the application land through this 20 year period, the applicant endorsed the approach in **R (McAlpine Homes) v Staffordshire County Council** [2002] EWHC 76 that 'significant' has an ordinary meaning and the number can vary according to the circumstances. In **Leeds Group plc v Leeds City Council** [2011] 2 WLR 1010 the distinction between general use for recreational purposes by the local community for information recreation rather than occasional use by individuals as trespassers but the fact that their recreational user of the land is more than trivial or sporadic would be sufficient to put him on notice that a right may well be being asserted. TWL's principal witness had stated that many of the activities had not in reality occurred or not occurred with the frequency alleged. The applicant's witnesses had given reliable evidence under oath of use of the land. As a matter of fact, recreation and commercial use of the application land had comfortably co-existed. When all the evidence of recreational use is taken into account it constitutes substantially more than trivial or sporadic use of the Quay and demonstrates that it was in general use by the local community to a sufficient extent to put the landowner on notice that a right was being asserted.

In relation to boating activities there had been substantial evidence of use of the

Quay for temporary berthing of private yachts. Use by commercial vessels and some group activities had been pursuant to express permission but a general recreational use as undertaken by some of the users was more than trivial or sporadic. Berthing of a yacht per se did not involve use of the application land so prohibiting it did not bring into question the right of local people to use the Quay for recreational activities. But if a yacht is berthed alongside this will give rise to incidental recreational use of the Quay itself. The evidence on ladders on the Quay wall was disputed but witnessed explained they berthed at around high tide and it was possible to step onto the Quay from the vessel without a ladder.

TWL's oral witness had limited direct involvement with the day to day affairs of the port and his infrequent presence on site. He sought to paint a picture of the application land being so intensively used for commercial activities as to preclude the possibility of any recreational use. However that intensity was not borne out by the evidence. The applicant's evidence showed there was a distinct difference in commercial vehicle use of the Quay between days when a vessel is being discharged and a day when there is no such activity. Whilst there were photographs of commercial activity there were also photographs taken during the working week which showed the Quay empty or substantially empty. EDME had also given evidence about commercial use. They delivered and collected goods to and from Thorn Warehouse and between various parts of their land. These journeys involved crossing the High Street and pavement, yet these were not inconsistent with those areas being public and publicly accessible places. Some of their witnesses acknowledged that the Quay was not busy all of the time. None of the applicant's witnesses evidenced that any of them was ever unable to use the land for recreational activities or was frustrated in such use by reason of commercial vehicular activity.

The requirement for 'as of right' use in connection with the application is not a subjective intention of the user but rather the manner in which the use has been undertaken. Some use was with express permission. TWL argued that use of the Quay by *Swans in Need* or *Swans in Distress* was with express or implied permission. There was no documentary or other direct evidence that permission had been given.

Some parts of the application land are public highway. It could still be registered as village green. The use as highway would not support a village green application and the onus is on the applicant to adduce evidence of use which would not be permissible on a highway. The applicant accepted that the highway authority had correctly attributed public status to the port road. Elements of use are consistent with activities which may lawfully be undertaken on the public highway such as walking, dog walking, cycling, bird watching and photography. The activities which go beyond that are recreation walking in a non-linear fashion, drawing and painting where the artist is stationary in front of an easel, children's play and gathering elderflowers.

There had been much discussion in the evidence of the signs around the application land and their meaning and impact. The applicant considered that it was fundamental what any notice would have conveyed to a reasonable user. It had to be examined in context. TWL relied on a variety of signs located at various

points around the application land. The applicant submitted that those signs were not effective to render contentious public use of the Quay. The wording varied. Some were prohibitory, others cautionary. Prohibitory signs can be sufficient to convey that the landowner objects to public use of the land to which they relate. But the appellant argued that a reasonable person looking at the signs in their particular location and context could not conclude that the signs relate to the application land. No signs were erected where, if the intention had been to exclude the public from the application land, they would have unambiguously conveyed this. The examples of locations for significant, clear signs suggested by the applicant for this purpose are listed in paragraph 8.55 of the inspector's report.

Based on the position adopted in ***Betterment Properties (Weymouth) Ltd v Dorset County Council*** [2012] EWCA Civ 250 the Court of Appeal concluded that it is necessary to have regard to all the actions of the landowner to see if they had done sufficient to communicate opposition to public use of land. The landowner is not required to do the impossible. The 'no fishing' sign on Thorn Quay Warehouse implicitly recognised that members of the public will be present at the Quay edge. The 'No Mooring' signs were not on the application land and were not erected on the Quay edge to make the intention of preventing yachts berthing alongside Allen's Quay unequivocally clear.

It is clear that the Quay is regularly used by commercial vehicles, generally transiting from one end of the port to another. It presents a danger to persons in its path. The evidence of users has been that when faced with an oncoming, slow moving vehicle, they have held back or stepped out its way. Or a fork lift truck. Numerous witnesses explained they did not perceive there to be a significant risk. No user has been involved in or seen an incident whereby harm has come to a recreational user by the activities of commercial vehicles.

Until 2008 interacting with vehicles entering or exiting the Stockdale compounds using the gate directly onto the Quay was a rare occurrence. The applicant's case is that the scenario described was not a common occurrence and any pedestrian on the Quay had ample opportunity to move out of the way. Drivers would also have exercised due care.

The applicant accepted that although the fence alongside the Quayside had been a contentious issue the presence of the fence and its impact are factors which are irrelevant to consideration of the application.

Whilst the applicant submitted that the evidence demonstrated that the inhabitants of Mistley have used the whole of the application land for the purpose of lawful sports and pastimes as of right, in the event that it was found there was insufficient use of that part of the land subject to a public right of way there were two issues. In the event that the part of the port road where status was disputed, then the evidence of use for recreational purposes is sufficient for s15 Commons Act 2006. The applicant considered the commons registration authority could register only part of the land applied for without any amendment to the application.

The applicant's view was that the extent of highway is inaccurately recorded and should extend northwards to include the land previously supporting the railway

lines which would then adjoin land sold at auction in 1844 which was stated to have a depth of 36 feet from the Quay. It would also be consistent with other conveyancing documentation.

Use of the application site continued beyond 2008 when the fence was erected but the fencing enclosed a substantial section of it and had made it obvious the landowner asserted local people had no right to be on the Quay.

Any displacement by commercial vehicles was very short lived, approximately 20 seconds for a commercial vehicle to cross the Quay. This application was not to change things on the Quay but to preserve the status quo.

The applicant had considered other remedies such as injunction. This would require action by the Attorney General and that there was specific loss or an easement so it had not been possible to pursue an alternative remedy.

The applicant's evidence had been about use of the open Quay generally and not the one metre strip at its edge and the applicant took the view that it would be appropriate to consider the whole non-highway area.

In relation to the railway line (which was subject to post report exchanges and addressed separately in this report) the applicant said access to the rail network closed in 1986 and it could be assumed that if the rails had some technical status as a railway, that status had been abandoned. Conclusions in a rights of way inspector report in relation to railway byelaws and their effect on a length of railway extending well to the east of the village green application land and his findings should not be assumed to apply to the railway track or siding embedded in Allen's Quay.

The applicant made further representations on the report. The first was to deal with the location of the substation and the second (comprising two sets of representations) was in reply to the first objector's further representations concerning the railway. On both these issues the inspector issued an addendum at Appendices 3 and 4 to this report.

6. THIRD PARTY EVIDENCE

Mrs J Lester attended the inquiry. She stated she was neither a supporter nor an objector. She lived in Colchester now but was born to parents who lived in Mistley in 1946 and her father worked in the Maltings. She recollected the Quay as a busy industrial area.

She related the circumstances of her father's death in February 1991. It appeared that he had either slipped or jumped into the water. She had subsequently worried that had there been a fence there at the time the tragedy would not have occurred or a fence would have acted as a deterrent.

Mrs Lester's evidence is summarised in section 9 of the inspector's report at paragraphs 9.1 to 9.4 on pages 84 to 85.

7. ESSEX COUNTY COUNCIL EVIDENCE

The county council provided information from their highway records. This showed some land within the application land was publicly maintainable highway. Further land was highway which was not maintainable. Further land was proposed to be adopted by dedication.

TWL did not agree that what had been part of an old port road coming in from the west, most which has been for some time under the building known as the Stockdale Warehouse and its compounds had ever enjoyed or gained the status of public highway. For the inspector's purposes he noted that the small part of that former road within the application land is an indistinguishable part of the present port road for vehicles, pedestrians etc descending to Allen's Quay from the west.

TWL also disputed the exact status of the area lying between the bell mouth junction near Mistley Towers at one end and its junction with this previous area and the undisputedly publicly maintainable highway north west of Mistley Quay Workshops. From his observations of the site and the evidence given, this area of the port road had all the characteristics of a conventional made up road used by vehicles, pedestrians and to a lesser extent cyclists.

The inspector considered that all these areas (except perhaps the strip of land north east of Grapevine Cottages which was recorded highway in any event) have the conventional appearance of highway land i.e. routes designed and used to get from A to B. The evidence indicated this was their predominant use. There really was hardly any evidence of lawful sports and pastimes other than activities wholly consistent with highway status or potential highway status eg walking along it with or without dogs, cycling and children cycling.

In relation to the port road, he agreed with the objectors that there was no case on the evidence for registering it as town or village green whatever its highway status might be.

In relation to the remaining area of undisputed highway (principally immediately surrounding Grapevine Cottages/Mistley Quay Workshops and Swan Basin) there was a certain amount of leisure type use. However, he again agreed with the objectors that there was no substantial or convincing evidence that significant lawful sports and pastimes uses had taken place which were not entirely consistent with the use of those areas as undisputed public highway.

Together these were a significant portion of the application site as seen from the map at appendix 2.

The inspector formed the view, both on the law and on the evidence presented, that the only area which can sensibly be considered further for registration is the main part of Allen's Quay, which lies to the north east of the line where the established publicly maintainable highway end. This is defined as the 'remaining application area' on Appendix 2.

8.THE OBJECTORS

The application was advertised in the press and on site on 1 October 2010 with objections to be made by 12 November 2010. Notice was also given direct to the owners identified on the application form.

TWL are the owner of the majority of the application land.

The second objector, Gladedale, owns certain small parts of the application land. The non-controversial aspect of the applicant's May 2013 requested amendments to the application land boundaries to remove certain small areas from the land produced the result that no part of the site remained within Gladedale's ownership. However they continued with their objection because parts of the reduced application site are used to gain access to their property to the east of the application land.

The third objector was Anglia Maltings (Holdings) Limited (Anglia Maltings) own a small part of the application site as originally set out with the application form. It became clear at the inquiry that much if not all of Anglia Maltings' activity is in fact carried on in the name of a sister company called EDME Holdings (EDME).

All three objectors were professionally represented at the inquiry.

9. THE FIRST OBJECTOR'S CASE

TWL own the port access road and the main front part of the Quay. Byelaws and general directions made under the 1974 Harwich Harbour Act also include requirements for vessels to be properly berthed. As at October 1983 the rails tracks still belonged to British Rail. The Stockdale compound warehouse had been built in 1979. A permanent fence in 2008 replaced a temporary fence from 2004. The eastern access was used more when agricultural fertiliser started to be brought in in 2008.

The first objector called one witness at the inquiry, Mr Parker, whose evidence is analysed in the inspector's report in section 10.34 (p88) – 10.139 (p108). He produced a statutory declaration and a more substantial proof of evidence for the inquiry.

TWL's counsel cross-examined the applicant's witnesses in relation to areas of dispute.

TWL also relied on a number of statutory declarations analysed by the inspector in the following parts of his report - statutory declaration of Mr Moore 10.4 (p85) – 10.7 (p86), statutory declaration of Mrs Shrimpton 10.8– 10.14 (p86), statutory declaration of Mr Reason 10.15 (p86) - 10.20 (p87), statutory declaration of Mr Cone 10.21 (p87) – 10.24 (p88), statutory declaration of Mr Baxter 10.25 – 10.33 (p88) and statutory declaration of Mrs Sargent 10.34 (p88).

Mr Parker is the Chairman and Managing Director of TWL and the other individuals were employees of the company with the exception of Mr Moore who was a

building contractor who had done regular building and repair works at Mistley Quay since 1979 and recalled his observations in the 30 years that he worked at the Quay.

Mr Parker acquired TWL in 1996. TWL's headquarters is in Gainsborough, Lincolnshire. Mistley Quay was a working port from at least the 18th century. TWL are the owner and operator of the port. TWL does not own the parts of the application site immediately in front of Grapevine Cottages nor the routes around either side Swan basin.

TWL considered the purpose behind the application was removal of the fence along the exposed and potentially dangerous open Quay edge where there is a 4 metre drop to the riverbed at low time. In 2008 the Health and Safety Executive told them to fence the open Quay edge if it no longer remained an operational dock. If it remained operational dock, lifesaving and firefighting equipment would have had to be provided. It was an operational part of the port but they had agreed with the HSE that it was not an operational area of the dock. Village green activities cannot coexist with port activities which include HGVs turning on the Quay and commercial vehicles passing within 1 metre of the Quay edge. Letters and newspaper articles supported the view that making a town or village green application might be a means of getting the fence removed.

The port had been operated by the same company since 1976. It has always been a busy industrial site. The pattern of activity had changed over the last 100 years. The Stockdale Warehouse was built in the 1980s where there were previously demolished buildings. Before the fencing was extended to the Stockdale compound vehicles could take various routes including avoiding parked vehicles and a broader sweep was possible. There had been a fence when the Stockdale compound was first built in 1979 which was wooden and was in place until about 1988. Access was open from 1990 to 2004. In 2004 planning approval was given to reinstate a fence with gated access east and west. A temporary access was erected in 2004 and replaced by a permanent and gated structure in 2008.

Mr Parker produced evidence of vessel tonnages passing through the port from 1997 to 2007. 1977 to 1987 there was a 300% increase in traffic. 1988 to 1998 traffic decreased by 35% as average vessel tonnages increased. 1998 to 2007 traffic remained constant at about 2 vessels per week. Containerised client cargoes became part of the throughput especially around the west end of the port around Stockdale warehouse. Vessel berthing changes between the early 1990s and 2007. Rail traffic movements were frequent until the mid-1980s and ran the full length of the Quay. 2 tracks crossed Thorn Quay. Old photographs showed evidence of the busy industrial area. Public archive photographs related to port use. No amenity use was evident.

The broad nature of activities changed little over the decades with the primary function of mooring vessels, unloading and loading with mechanical plant and vehicles. Quay areas are in continuous use 7 am to 7pm and up to 7 days a week. Using 2007 as a benchmark HGV and equipment trips over the land averaged more than 100 per day. When a vessel was in port it would exceed 160 per day. Lash barges, floating containers arriving by feeder vessel and pulled by tug up to

Mistley would be moored up from before 1988 until about 2000. During that time 216 were brought in with over 8,000 tonnes of cargo. 'Dock runners' are unlicensed vehicles which travel on the port estate roads and the private road status of the port is important in keeping the port's unit costs down.

Previous attempts to establish public highway rights had been resisted in the 1970s. Planning conditions had required a new port access road be constructed when the new Stockdale Warehouse was approved. This was constructed and funded by TWL. Correspondence from the late 1980s with the highway authority made it clear TWL did not accept the new access road was public highway.

Occasionally there had been tensions between local residents and TWL over the intensity of movement and work. MITHRAS, formed in 1988, had been very critical of port operations in various respects. At that time they had not commented about any community amenity activity on port land. Objections had been raised to the permanent renewal of open storage areas and a trailer park on the port estate. Letters made reference to how busy the port was. Concerns about storage areas appeared to relate to areas outside the current application area.

Many of the activities claimed did not occur on the port company's land. Any that did occur did not do so with the frequency alleged. The claimed list of activities could not coexist with the heavy used of the port and signage around the port was clear and showed that all areas of the port were private and restricted with unauthorised access being prohibited. Use of Thorn Quay by visiting barges and yachts was only ever permissible with pre-authorisation. The local sailing club understood yacht mooring restrictions. No legal right exists to moor at the Quay. Ladders had been removed around 2002 near Stockdale Warehouse and within a fenced storage compound. No ladders were located in the part of Thorn Quay within the application land.

Railway lines over the land were laid in the 19th century and still operated by British Rail and not abandoned by them before 1993. This was the subject of further representations once the inspector's report was circulated to the parties. Railway rolling stock would have limited access to the rear of Grapevine Cottages as they passed within 4 metres of the rear of the properties. Until recently those residents parked their vehicles east-west along the side of their properties on the public highway as shown by photographs. Later vehicles were parked end on to the houses encroaching on the port estate. A resident built a viewing deck on the public footpath in 2007 which pushed cars onto the port estate. Residents are asked to remove their cars.

The west end of the port, including the application land, is on many occasions congested and always required for HGVs, port equipment, parking manoeuvring and use. Port activities could not exist with the alleged list of sports and pastimes claimed in the application. Residents simply do not use the port land in the way that the applicant's witnesses claim.

EDME (one of the other objectors) occupied and stored products at one end of the Quay in the Thorn Quay Warehouse throughout the relevant 20 year period for the town and village green application being 1988 to 2008. Goods were lifted on

pallets by fork-lift truck to a first floor door on the west side. Some activities in the 1990s had been on TWL's land without TWL's permission. MITHRAS had raised concern about EDME lorries kept on the open Quay and lorry speeds along the Quay. Mr Parker's view was that amenity use of the port's land was not an issue at the time. The issue was about the neighbouring residential amenity such as late working, litter, lorry congestion etc. Vehicles would often pass each other on Thorn Quay. Congestion around the Stockdale Warehouse occurs on most days. Queuing is a regular occurrence.

TWL had been concerned about the need for appropriate signage as far back as 1979. The local Stour Sailing Club expressed concerns about signage as early as summer 2004 in their newsletter. 'No Mooring' signs were clearly understood by club members. The club wrote to TWL about people being turned away from mooring in 2005. One of the applicant's witnesses (Mr Garwood) confirmed private boats were refused permission to land in 1997.

Private barges and boats had been allowed to moor between Thorn Quay and Stockdale Warehouses with permission. Documents in relation to rallies showed that permission had been obtained so that such activities were with permission.

A specific agreement between EDME and TWL in 1979 included reference to mooring on the Quay for commercial vehicles and for small private sailing boats which showed there was no belief at that time there was a general public right to moor there. Permissions had also been sought from the company prior to EDME. When TWL was acquiring the Quay its enquiries stated no-one had rights to moor there. There was ample evidence that any use of the Quay by vessels was with permission and the general instruction of the port company was to turn away visiting yachts with no permission.

Swan feeding had taken place with the express permission of TWL as shown by minutes from 1995 to 2005. Conditions were placed on the permission. As recently as 2008 permission was requested to continue feeding swans on port land although the same person had filled in a village green form saying this activity had taken place 'as of right'.

Fishing licences were granted in the 1970s but no fishing had taken place since the 1980s due to the harm caused to swans.

Harwich Haven Authority have power over the Quay to issue general directions for navigation and apply byelaws. Byelaws require vessels to be properly berthed and the general directions require the berth to be with the permission of the owner otherwise a fine is due. So any berthing without permission of TWL is an offence so it could not constitute a lawful sport and pastime.

Railway use declined in the mid-1980s but the exchanges to close the railway continued into the 1990s.

The open land on Allen's Quay was used for the transit of vehicles associated with port used. Vehicles moved backwards and forwards. A normal working day would be 8am till 12.30 and 1.30 till 5pm. There would have been use more on a Sunday

in the past and a significant amount of weekend and Sunday working in the past and in the early 1990s. Mr Parker explained the complexities of vehicle movements across the Quay and how material was moved round the various areas. In cross-examination he explained how tractor units and fork lift trucks moved goods round the site and how that had changed over the years in terms of numbers and the areas in which they were used.

Mr Parker's personal observations of the site occurred one day a week 1996-2000. He visited more frequently 2000-2005. 1996 to 2005 he would work in the Stockdale Warehouse. He didn't accept the various recreational activities which had been claimed by the applicant's witnesses had taken place. Only 2 of his 73 photographs showed any kind of leisure activity. He accepted some activities could have taken place on evenings and weekends. He strongly resisted that children could be playing on the Quay on a working day. He gave witness evidence because he did not want any tension to arise between his employees and residents. He had also given evidence at the inquiry into a public footpath claim in relation to use between 1943 and 1963 when an entirely different sort of operation took place in the port with significantly more people connected with the port and higher traffic especially with the railway.

Mr Parker accepted that the fencing did not make all of the activities claimed to have been carried out on the application site impossible. TWL's employees did not agree with all the claims about use made by the applicant's witnesses. He said the inspector would need to decide on the conflicting evidence put forward about the levels and nature of use of the Quay. He did not agree that all the photographs produced by the applicant showed relevant activities but he did accept that they did indicate some leisure activities occurred on the Quayside.

Mr Parker did not accept there was a middle ladder on Allen's Quay to his recollection and it was not there after 2004. There may have been a chain. For a short period a ladder had been near the Thorn Quay Warehouse, until 1990 or so. In emergencies the operational Quays could be used, where there were ladders.

In 2007 they had 6 agency workers if there were 2 or 3 vessels to be worked. Various vehicles had specific purposes, specific fork lift trucks, mechanical shovels etc. Vessels discharged at different rates. He explained how the staff and vehicle movements worked over various time periods of activity and during specific cargo activities, such as Cropcare after spring 2008. His aerial photographs between 1988 and 2009 of the part of the port did not show vehicles or activities on Allen's Quay. He did not agree that the photographs showed a consistent picture of the Quay being relatively empty. The impression was not representative if the tonnages were noted. Dock runners may take 20 or 30 minutes to make trips so with two that would be many trips in an 8 hour day. He did accept some of the applicant's evidence on the transit of vehicles across the Quay; 20 seconds to cross seemed about right.

In their statement in advance of the inquiry TWL submitted a statement with the following submissions. TWL did not agree to any amendments to the site by its enlargement. The date stated to be the end date for qualifying use was the date the fence had been erected but embarking and disembarking from a boat is not a

lawful sport or pastime. The application was therefore made under the wrong sub-section of the Act. The application site is an integral part of a busy working port and use for lawful sports and pastimes is fundamentally incompatible with that use. It is not the same as the sensible coexistence analogous to a golf course use considered by the Supreme Court in the **Redcar** case. Part of the land is publicly maintainable highway which is incompatible with being a town or village green or the only use made of those areas was part of the public's rights as a highway. Whilst there was disagreement as to whether the present port road is public highway or not but there was no evidence it had been significantly used over the period for anything other than use as a road. Signage indicated use was either contentious or permitted. Section 55 of the British Transport Commission Act 1949 made it an offence to trespass on the railway which had been on the Quayside for at least some of the relevant period. This argument had been accepted in relation to the recent rights of way inquiry.

In their closing submissions they made the following points.

They expanded on their point in relation to the requested amendment of the application site by the addition of the small area lately fenced off at the north-west corner of Allen's Quay. This is covered in section 12 of this report.

TWL resisted the suggestion that any part of the present port road passing along the south side of the Stockdale Warehouse had ever become a public right of way or public highway except for a small area at its western end near its junction with Mistle Towers. The main use of those parts which were public highway and the port access road was for passing and repassing of port and other traffic and pedestrians. If the part of the application site fronting the river were also highway that would be fatal to the application because all activities would be permitted on a highway.

It was clear from the way the material for the applicant was presented that the application is part of the Free the Quay campaign and that what led to the application was the erection of the fence on the Quay in September 2008. Any right of access across the Quay from the water has to be a matter of custom or statutory entitlement. They could have pursued this in a different way. An application to register a town or village green would not require TWL to take down the fence. The Harwich Harbour Act 1974 contained no public right to use the Quay and it was the obvious place for it to be. There was no other identified statutory entitlement. The historic evidence was that the owner had charged both commercial and any pleasure traffic staying more than 2 tides. This was not consistent to a claim as of right.

They restated that the case was not brought under the right sub-section. Use continued in the same way it had before the fence went up. There was no evidence of any step change in the quantity of use. The fence would have stopped fishing, swimming and swan feeding. But some of these activities were cases of activities taking place wholly or partly off site. Swan feeding was either with permission or was throwing feed off the edge of the Quay so the swans were off site. This was not a technical point which could be accommodated by amending the sub-section to the application as the evidence was all related to the end date

stated and there was no evidence to support use until 2010 when the application was made.

Most of the application site is defined by the areas of the port to which the public have access. Some is used for local people for access such as to Grapevine Cottages and properties at the rear of the High Street or for walks with or without dogs which may or may not take in the land fronting the river. Bird watching or stopping to admire the view, feeding the swans were ordinary activities entirely incidental to the use of a public highway.

A significant part of the land is also access land including for HGVs and other port vehicles. It is also used for parking, turning and vehicles idling. Residents also park as well as visitors to the commercial premises on the Quay. These are also in the nature of highway uses.

There is a fundamental incompatibility between registration as a town or village green and status as a public highway. It is recognised that there is nothing in the Commons Act 2006 which expressly prevents registration but activities on them will not count towards registration.

If the commons registration authority were to consider a smaller area for registration it needs to consider if it would be appropriate. This was not the basis on which the objectors had addressed the case. The basis for considering a much smaller applicant site had not emerged from the evidence at the inquiry. The applicant's own evidence showed the area on which there had been potential lawful sports and pastimes was limited to a narrow strip adjacent to the water. To register such an area would be radical and unfair.

The way the applicant had presented his case, on the basis that the objectors' uses of the land and those alleged by residents coexisted, is based on a fundamental misunderstanding of the law. Reference was made to legislative provisions which would mean TWL's lorries could no longer use it to access the port and other vehicles could also be prohibited. Vehicular use and recreational use cannot coexist if the land were registered so logically cannot have coexisted during the qualifying 20 year period. In addition, the facts demonstrated that competing uses did not and could not sensibly coexist. It was far removed from the golf course situation in **Redcar**. The statutory provisions referred to and case law meant that there could be various impacts on the potential acquisition of rights as well as the use by vehicles. If there was coexistence village green rights would have to be reduced so that there would be no conflict with vehicles and that would be so drastic that there would be no meaningful entitlement to use the land as village green. Rather than coexistence there would be displacement of one activity to another i.e. any village green use gives way to the continuous stream of traffic on a port unloading day.

There was evidence on both sides of the use of the Quay by vehicles which was hard evidence although it was difficult to establish the truth over a 20 year period. A feel could be obtained from Mr Parker's figures and the survey by Mrs Bell in 2013. In addition there would be employee traffic and EDME traffic. Lash barges would have been attached by rope to the Quay which would obstruct recreational

use.

Signage around the port needed to convey a relevant message to the users. Case law indicated notices should be read in a common sense and not a legalistic way. There is a practical problem of putting up signs close to a public highway. There was a progression of signs as people moved east across the site from the port access road. The context of the signs at Thorn Quay Warehouse indicated the Quay area was private property and no unauthorised persons were allowed. This should be taken as applying to the whole Quay including the area in front of the sign.

All use on the public highway should be discounted. And of those who drive to the Quay and sit in their car and eat their lunch. These uses are not lawful sports and pastimes as they are vehicular use. Uses for walking and dog walking are in the nature of use as a footpath and must be discounted as well as walking across the Quay for swimming. Uses incidental to that footpath use must also be discounted.

Permitted uses should be discounted, so fishing and mooring, and mooring without consent, which was unlawful. The reality was that the extent of any true lawful sports and pastimes was probably some swan feeding and bird watching on the edge of the Quay.

Finally, section 55 of the British Transport Commission Act 1949 had been held to prevent a claimed public footpath being established over the eastern part of the Quay. It can also prevent land becoming a town or village green. The railway was not being worked during the use period but it does not appear to be abandoned in 1994 as evidenced by correspondence in 1994 relating to the proposed closure of the line.

10. THE SECOND OBJECTOR'S CASE

Gladedale called one witness, Mr Brodie, whose evidence is analysed in the inspector's report at 12.1 (p120) – 12.22 (p123).

Mr Brodie has been Managing Director since 2010. Gladedale own two parcels of land subject to the town and village green application. They acquired the land in March 2000 with planning permission in place and there was no indication in its enquiries at that time of any areas of concern in relation to public access or adverse rights.

Between 2000 and 2008 Gladedale carried out a development of 70 residential units and a restaurant on land to the south east of the application site. The last unit sold in 2010. This land has the benefit of a right of way across the application land and they had a statutory declaration from a previous Director of TWL who sold them the land which did not highlight any of the activities referred to in the town or village green application. On acquisition Gladedale was also granted formal pedestrian and vehicular rights of way over access routes from Mistley High Street to its property for the benefit of itself and all occupiers of its development.

In January 2002 they acquired some more land, small parts of which are within the

eastern part of the application site. In March 2002 they purchased an area adjacent to the application site at the far western end lying to the south of the port road.

Mr Brodie first visited the site in October 1999 with a view to acquisition and undertook regular visits after that. Prior to planning permission being granted TWL and its consultants had carried out a consultation exercise and he did not recall any issues or concerns having been raised about conflict with existing uses or areas being used for access or recreation. He had been responsible for the site from 2000 to 2007. He had site meetings at least once a month. Company representative were on site throughout the whole period and he had weekly site reports on construction and health and safety matters which would include the means of access and ingress to the site up to the public highway. At no time was the observation of town or village green activities brought to his attention by any of those employees. He had not seen anyone swimming or accessing the water from the Quayside. He'd not seen any crabbing. He hadn't seen any large groups of people on the site nor any chairs or tables placed on it nor any leisure or picnic uses taking place. He had never witnessed any sports or pastimes being conducted on Gladedale land on his numerous visits.

Part of the land was an electricity sub-station where it would have been impossible to carry out such activities. At the inquiry the applicant confirmed that this area should be excluded.

The part of the land around Swan Basin was adopted public highway and he had witnessed parking and pedestrian activity there but never any aspect of a sport or pastime. On the port access road from the west he had witnessed people walking to and fro as well as the main vehicular activity and this was primarily immediately behind the workshops and cottages adjacent to the Swan Basin which was also adopted highway. Gladedale had never received complaints from owners of the residences that they had developed that their right of way had been blocked or delayed by persons engaging in town or village green activities.

He had seen people feeding the swans on the Quayside in groups of 2 or 3 at most. This was not on Gladedale land but was on the application site.

The sign prohibiting fishing is on the warehouse at the east end of the site and in Gladedale ownership. It had been in place when the land was bought in 2000 and remains. He had not seen anyone contravene the notice. There were other signs in the vicinity prohibiting mooring. He hadn't observed any ladders but a colleague had but not within the application land area. He'd not seen pleasure boats moored against the Quay. When Gladedale erected portacabins for meetings on the Quayside in 2004/5 they were further east away from the application site as they had to avoid any of their car traffic coming through Swan Basin. As he walked through the site for health and safety checks he did not think he had noticed people on the application site bird watching.

Photographs showing EDME lorries parked in front of the Thorn Quay Warehouse are representative of what he would have seen on site. Some are on what is now Gladedale land. They granted a licence to EDME to use parts of the warehouse

and to unload and store material on part of its land to enable deliveries to the warehouse.

The main Quayside in front of Grapevine Cottages he has always seen as very much a working Quay. Some of Gladedale's publicity material had rather shown a Quayside with historic or leisure vehicles alongside. An illustrative photograph showed a Quayside with low railings, how they had wished to present the flats. The treatments in fact put in place were not as the district council had requested.

In closing submissions they made the following points.

The application should be rejected in its entirety based on the evidence presented to and heard at the inquiry. There is no arguable case that lawful sports and pastimes have taken place to a material degree. Large swathes of the area can only have been used for the passage of vehicles including the metalled port road and to Allen's Quay in front of Grapevine Cottages. Linear activity has been held in case law not capable of generating a town or village green claim.

A great number of the activities could only be carried on at the very edge of the Quay. Other evidence of use was de minimis (eg. bird watching by Mr Vonk) or on very rare occasions outside the 20 year period claimed. No use of the Gladedale land was for an activity that would comprise lawful sports and pastimes. To the extent that it had been used for any purposes it would have comprised a use for passage which does not amount to uses for lawful sports and pastimes.

The part of the application relating to the electricity sub-station must fail. The remainder is an area of metalled road or other hard-standing. The case had not been proved.

The requisite intensity needs to be shown throughout the whole 20 year period. Gladedale's representatives were regular observers. Mr Brodie was only aware of a handful of people feeding swans. That use was carried on at such a low level is fatal to the application since it would not have put a notional landowner on notice that his property was at risk of registration.

The TWL statutory declaration, made before the town or village green issues were raised, was powerful evidence that such activities were not taking place on any sufficient level to justify a claim for registration.

Fishing couldn't have been as of right due to the prohibitory sign and would have been 'by force' if it did take place. Activities comprising a transit across the site on the highway were ones people had a right to do in any event so were not as of right.

Gladedale considered it would unfairly prejudice the landowner objectors for the commons registration authority to consider registering a smaller area than claimed.

They also made the point that the present site was a working port area which bore no resemblance to the golf course in the **Redcar** case. There are heavy duty industrial style vehicular activities on Swan Basin road and the port road.

Common sense says these places could not be claimed relying on things like games. Such uses cannot reasonably coexist with the other uses which take place there.

To the extent people did frequent the Quayside for leisure related activities they were regularly displaced by the rightful owner of the area. This was not deference. These were constant interruptions to the 20 year period of use required for a claim.

11. THE THIRD OBJECTOR'S CASE

The third objector was Anglia Maltings (Holdings) who were represented by Howes Percival solicitors at the inquiry. Much of the company's activity is in fact carried on by EDME Holdings (EDME).

They called the following employees as witnesses:- Mr I Burns (analysed in the inspector's report at 14.1 on p125 – 14.22 on p14.23), Mr B Herrington (14.23-14.44 on pp129-132), Mr J Powell (14.45-14.56 on pp132-134), Mr E Leggatt (14.57-14.72 on pp135-136), Mr S Townes (14.73-14.82 on pp136-138) and Mrs C Townes (14.73-14.91 on pp138-140). They recounted their own observations as to use and their own activities on the application land.

Mr I Burns joined the company in 1996. He had observed very little non-commercial use of the areas used by EDME.

Mr B Herrington had been employed by EDME since 2001. He gave a similar view to Mr Burns in relation to the operations and movements at Thorn Quay Warehouse. He had observed some limited leisure activities – walkers, painting, boats and cars parked up for lunch.

Mr J Powell had been employed since 1986. He gave his recollection of deliveries and vehicle movements he'd observed whilst attending to his duties. He had seen some limited activity - people walking but not with dogs, possible bird watchers, swan feeding, occasional pleasure yachts moored further to the right. He confirmed his observations were similar to Mr Herrington's.

Mr E Leggatt has been employed since 1991. He'd only seen EDME's unloading and loading as the commercial activities taking place on Allen's Quay. He listed only the following recreational uses - a maximum of 10 or so pleasure yachts, cars parked on the Quayside behind Grapevine Cottages, dog walkers on the main road and people fishing about twice.

Mr S Townes has worked for EDME since 1994 mainly based at Thorn Quay Warehouse. He rarely saw recreational activities. Boats were moored up on rare occasions. He and his colleagues occasionally swam at the Quay but he'd not seen anyone else. A group of school children had been painting the Quay. He saw people walking. He's seen football a couple of times but it had been him with a friend on a break. He had possibly seen bird watching a few times, perhaps 3 in 20 years. People parked near The Swan and might walk and stand on the Quay. He has seen bicycle riders in the walked areas and going to the Quay edge. If there were no lorries people went all over the Quay. He had seen people feeding

swans.

Mrs C Townes had grown up in Mistley and worked at EDME since 1983. From her childhood and employment she had rarely seen recreational activity. She recalled one or two people a year mooring boats along the Quayside. She could only remember local people on the Quay such as walking up to the post office. She saw two people swimming on one occasion. She did not observe any other activities from her time on the Quay.

Their counsel cross-examined the applicant's witnesses in relation to areas of dispute.

In their bundles for the inquiry EDME had produced some submissions largely subsumed into their closing submissions when they made the following points.

They accepted that the commons registration authority does have a discretion to amend or accept the amendment of the application site boundary to a lesser area but in exercising that discretion must take care that any decision would not cause prejudice to any of the parties. They had not been aware of the application until late 2013 because their interest in the original site boundary had been missed. They had met with the applicant in early 2013 and asked him to remove the land in their ownership and the land in Gladedale's ownership from the application. Their only interest was to ensure it could access Thorn Quay Warehouse for the purpose of its proposed redevelopment. The applicant did agree to remove their land from the application but not the other areas. This was reiterated at the inquiry.

They said that on this occasion it was not appropriate to register a lesser area and the application should stand or fall in its entirety. The geography of the site makes it impossible to separate one part from another. The inquiry had not explored where any reduced boundary had been drawn. The applicant had been given ample opportunity to consider applying to amend the boundary and it was not the registration authority's job to do this for them. The registration authority had to be an impartial arbiter. They had no opinion on the applicant's request to extend the application land to include the extension to the Stockdale compound.

They also made submissions as to activities that were permissible on the areas which were highway and they did not argue against the port access road status as public highway as TWL did.

They submitted that the applicant's written evidence in relation to different uses was not borne out by the oral evidence at the inquiry. There was almost a complete absence of evidence of use of parts of the application land of particular interest to them.

Some of their witnesses had spent significantly more time on the application land than the applicant's did; their evidence is therefore more complete in respect of mooring and all the other uses claimed. They did not accept that mooring took place within the application land or that it was a lawful sport or pastime. Even if they were they only took place at the very edge of the application land. It is also not clear that the majority of the boats moored were by the inhabitants of the

claimed locality area of the parish of Mistley and case law requires that land must be used predominantly by inhabitants of the village or locality claimed. Mooring would also not be as of right as TWL's documentary evidence showed express permission to all organised moorings and there was signage and communication with the local sailing club which were understandable.

The same limited use of the application land would relate to swan feeding, crabbing, fishing and swimming. At best the application land was used for access to carry out these activities rather than for lawful sports and pastimes. Witnesses who had enjoyed the view or bird life were just pausing on a walk through the application land.

The limited evidence of children playing was all concentrated on the Quayside and not on the rest of the application land. Painting was also confined to the Quayside or in the highway around Swan Basin or Grapevine Cottages. There was no evidence of informal roaming and most walking and dog walking use was most akin to a right of way. Other activities such as community celebrations such as carol singing and community celebrations had become clear were organised by the Free the Quay campaign. Carol singers visiting Grapevine Cottages were acting within the normal range of uses of highway. There was very limited evidence of non-employees playing football and also in relation to cricket. When picnicking was referred to it was people driving on the Quay and eating in their cars whilst looking at the view. They did not consider this a lawful sports and pastimes. There was one witness to rare family dinners on the Quay and that involved non-parishioners and was either on the highway or the Quayside. Kite flying evidence was extremely limited.

Their case was that there had been no use of those parts of the application land that are highway for lawful sports and pastimes that go beyond what is ordinarily permissible on highway land. As for the remainder of the land, other than part immediately adjacent to the water's edge, there has been nothing more than a de minimis use and on much of the site no evidence of any use at all and certainly not sufficient to alert a reasonable landowner to the fact that a public right was being asserted. The extent of use is an important issue as it needed to be of such an amount and carried out in such a manner as to appear to the landowner to constitute the assertion of a public right rather than an occasional trespass. The applicant paints a picture of an idyllic area with little or no industrial activity where children can kick balls around and lie down on the Quayside to drop crab lines down. That is not credible and not supported by photographic or other evidence. The registration authority has to decide which evidence it prefers. There was evidence, including from the applicant, of significant commercial activity across the Quay on a typical working day.

Case law acknowledges that the motive of witnesses is a factor to be taken into account when assessing their credibility. This objector's witnesses had no interest in the outcome in comparison to the applicant's. The use of Thorn Quay Warehouse had now ceased. They had no reason to give anything other than honest evidence. The only sensible conclusion from the evidence of those witnesses who say they cannot recall seeing such activity is either that they were not there or that their recollection of the level of commercial activity is not accurate.

The level of recreational use has come nowhere near to being sufficient to give the impression of a public right being established but nothing more than an occasional trespass.

Once the highway use was taken out and activities that were not lawful sports and pastimes such uses are neither at a level to constitute the assertion of a public right or by such number of residents of the parish to give the impression of significance required by case law. In any event the applicant cannot show an uninterrupted 20 year period of use. The photographs and other evidence show car parking around Swan Basin and outside Grapevine Cottages. The applicant's witnesses acknowledged parking on any part of the Quay. EDME's HGV loading and unloading was around Swan Basin and in the area between Thorn Quay Warehouse and Grapevine Cottages. Moored lash barges and other commercial vehicles would also interrupt use of the Quayside.

This is not an argument about deference between the uses. Local people were excluded from the relevant parts of the applicant land completely for so long as the obstruction remained in place as effectively as any fencing would be done. So the application must fail in the absence of the proven continuous period of use of any part of the site.

Some activities were not carried out as of right – swan feeding and mooring were expressly prohibited by TWL. Others were permissible. Some use was by force following actions by TWL. Many of the signs related to the application land. TWL had been restrained in where it could position the signage but on any objective interpretation the signs displayed around the port must apply equally to all parts of the application land.

They did not consider that the applicant had discharged the burden on him under the Commons Act 2006. If the registration authority decides the applicant had satisfied the legal tests in to part only of the application land the prejudice that a partial registration would cause to EDME and the absence of any prejudice to the applicant means the registration authority should decline to exercise its discretion to register a lesser part of the land and the application should be rejected in its entirety. In the event it does not agree EDME stressed the complete absence of evidence of use on some parts of the application land which should be excluded from any partial registration.

12. ISSUES RELATING TO THE USER EVIDENCE AND THE STATUTORY GROUNDS

The burden of proving that the land has become a town or village green lies with the applicant and the standard of proof is the balance of probabilities.

In order to add the application land to the Register of Town and Village Greens it needs to be established that “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.” It was disputed that the use had been extensive enough across the application area to pass this test taking

account of the other operations on the land. The activities carried out at the water's edge were of disputed legitimacy. There was a difference in the case of the objectors.

Section 15 of the Commons Act was summarised, and it was made clear that the application in this case relied on Section 15(3), because the use was taken to have been interfered with at the time the fencing was erected in September 2008. It has to also be the case that the use continued until the date at which it was interrupted. There had been discussion at the inquiry about whether this was the right approach.

The inspector accepted that it is relatively common to vary the sub-section on which an application depends provided there is no unfairness to any party involved. There were constraints in which the standard application Form 44 could be used but having regard to the actual wording of section 15 there was no valid reason why an applicant could not apply one or more sub-sections according to the view the commons registration authority may take of the evidence. In this case he did not consider that the applicant had recited the wrong sub-section or the wrong qualifying period. The sudden erection in September 2008 of a substantial enclosing fence around the edge of what had been an open Quay represented a major and noticeable shock to the local community. He accepted that in practical, literal terms it only actually prevented those activities requiring access over the very edge of the Quay but it was an action by TWL which made it very apparent to local people that owning company had determined not to allow recreational 'sports and pastimes' to continue on the Quay. The qualifying period was therefore 20 years to 17th September 2008.

Since the receipt of the inspector's report two significant cases have been decided on village green matters, one of which is relevant to the circumstances arising in this case.

In ***R (Church Commissioner for England) v Hampshire County Council and Another and Barbara Guthrie*** [2014] EWCA Civ 634 the power for the commons registration authority to allow time for applications to be changed was subject to court scrutiny. Mrs Guthrie filed her village green application on 30 June 2008 but it was defective. 2 of those defects were serious as they made it impossible to tell if the application was properly made. It was not until 20 June 2009 she complied with all the requirements. At the High Court it had been held that firstly the application could as a matter of law be corrected and that if the corrections were made within a reasonable period the corrected application would take effect from the date it was filed and secondly, the time taken by Mrs Guthrie was within a 'reasonable opportunity'. The landowner appealed that decision.

It was accepted by the Court of Appeal that if the appeal succeeded Mrs Guthrie would be out of time to make a new application and the Church Commissioners will be able to develop the land, which they wished to do in part.

The main judgment of the majority decision was given by Lady Justice Arden. She confirmed that 'on the facts' the judge's ruling on the retrospectivity issue was plainly correct as a matter of statutory interpretation. On the reasonable

opportunity point she considered that this is ultimately a question of law for the court rather than only of the registration authority. The requirements for applications represent a balance between the interest of the public and that of the landowner. That balance was struck by the time Mrs Guthrie had been given 9 months to correct her application. She had been warned that she had to complete it within a period of time which she exceeded on more than one occasion without explanation. The time given to Mrs Guthrie was more than reasonable opportunity within the provisions of Regulation 5(4) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The commons registration authority could only give her a reasonable opportunity and the judge had been wrong to conclude otherwise.

Even if she had taken the view that the matter was for the commons registration authority to set the time line, she considered that they had done so and there was no basis for them to properly come to a different conclusion than they did. So on the reasonable opportunity point she disagreed with the court below and allowed the appeal.

In the Mistley application there were a number of changes to the application on which the inspector commented in section 2 of his report at Appendix 1. The application was dated 18 August 2010. By letter dated 4th May 2013 the applicant sought to amend the area of land to which it related. This was about a month and a half before the inquiry. Some of those amendments were to reduce the land applied for. At the inquiry the parties appeared to view these minor changes as uncontroversial. However the amendment also included a significant enlargement including a substantial increase to the frontage onto the tidal Stour estuary. This change was disputed. As the inspector recorded in paragraph 2.5 of his report, 'In the light of that, I shall not at this point in my report record any concluded view as to the overall extent of the site to be considered; rather I shall endeavour to summarise the positions of the respective parties on this matter in the later sections of the Report where I seek to record their evidence and submissions, and will express my own conclusions and recommendations of the matter within my concluding section.'

His conclusions were set out in section 16 of the report and he dealt with the issue of the requested amendments in 16.17 – 16.27. In relation to the areas requested to be excluded the inspector noted these contained rough vegetation including elder bushes. No-one objected to the exclusion and he did not consider there could be any cogent objection to such minor changes which prejudice no-one and accord with common sense. He therefore concluded and advised that those two small amendments should be accepted (paragraph 16.18).

The area requested to be added was much more controversial and formed an area fenced off by TWL, the first objector, in September 2008 to form an additional or extended 'compound'. The applicant said this area was omitted by mistake from the original application plan and had been used in exactly the same way as the rest of the Allen's Quay part of the application land. The intended larger application site was included within the boundary on the smaller scale plan attached to each of the 20 evidence questionnaires of the users, including the one signed by the applicant himself. The applicant said it must have been apparent

that the intention had been to make an application covering the larger site and TWL would not be prejudiced if the application was formally amended.

TWL accepted that in overall spatial terms the amendment was a relatively small addition to the whole application site and that the omission from the original application plan was the result of error, rather than by design. TWL also accepted the position in law in relation to the amendments is that their acceptance or otherwise may be left to the discretion of registration authorities subject only to the principle of being fair to the parties and the avoidance of parties being prejudiced thereby. However, TWL argued that the proposed amendment by enlargement would give rise to considerable prejudice. The land had been fully enclosed by fencing in September 2008. Had it been the subject of an application at the date the amendment was requested, in May 2013, which would have been well outside the 2 year time line permitted for applications reliant on section 15(3) of the 2006 Act. TWL said that if land is not capable of registration by way of a normal application because it would be time expired it is wrong in principle to try and circumvent that by an amendment application.

The inspector agreed with the submission by TWL and advises the commons registration authority accordingly and set his reasoning out. He relied partially on the clarity of the application plan and also that the area proposed to be added was distinct from the remaining land at the date of the application so that it would not have been self evident that the exclusion must have been a simple mistake. He accepted there would be a clear prejudice to TWL as landowner if the applicant were to be allowed to add in a significant extra piece of land almost 5 years after it was fenced off from use.

As the inspector has not recommended that the more significant amendment should be accepted and as the exclusions were accepted by the affected parties, it is not considered that this particular issues needs to be revisited after the recent judicial pronouncement.

The inspector confirmed that, to the extent the facts are in dispute, he needed to reach a judgment, on the balance of probability, as to the disputed aspects of the evidence given so far as it is relevant to determine whether the statutory criteria for registration are met. The objectors had reasonably made the point that the applicant's evidence needed to be carefully questioned.

The inspector considered that more weight would in principle generally be accorded to evidence given in person by witnesses on oath or affirmation who have been subjected to cross-examination that would necessarily be the case for written statements etc. and even statutory declarations which have not been subjected to an opportunity of challenge.

Taking account of the objectors' submissions the inspector also had to consider whether, having set out his 'remaining application area' to exclude the highway area, the whole application should fall or the commons registration authority could carry on to consider and determine the application in relation to the part of the original application land still remaining. He considered that there was the power to do so and this appeared to be accepted by all parties and, he considered, within

the clear words of Lord Hoffmann in the 'Trap Grounds' (*Oxfordshire v Oxford City*) case.

The inspector noted that the objectors had stated that to do so would be unfair and unjust because the whole of the inquiry and evidence had been focused on the entire application site and it would be unfair and unjust to change the focus late in the day to just the open, non-highway part of Allen's Quay. He found these arguments unconvincing and unmeritorious. There was no substantial justification to the objectors' complaint that they would somehow be unfairly prejudiced. He therefore proceeded to consider the evidence and submissions in relation to that remaining application site area which is shown on Appendix 2.

13. **LOCALITY AND NEIGHBOURHOOD WITHIN A LOCALITY**

The claimed locality is the civil parish of Mistley. The inspector's view (paragraph 16.51 of his report) was that this is clearly capable of being a locality as a matter of law and at least a reasonable number of inhabitants of the parish had claimed to have indulged in leisure activities on the land in question. There was some use by leisure craft by people from outside the parish or even overseas and some of the land based leisure activities such as bird watching or drawing/painting could have been outsiders to the parish as well.

The view he formed from the evidence is that there is no reason why this application should fail because of an inaccurately or inappropriately identified locality and the balance of the evidence was that the civil parish was a sensible identification for the locality.

14. **'LAWFUL SPORTS AND PASTIMES'**

This is covered in paragraphs 16.59 – 16.121 of the inspector's report. The inspector considered that there had been extensive use over the years of the remaining application site for activities which are to be regarded as 'lawful sports and pastimes'. The majority of the evidence did relate to the parts of Allen's quay specifically which were nearer to the waterfront and this point was made with some force by the objectors.

The objectors argued that the pastimes had related to a very narrow strip along the extreme waterside edge. While it was undoubtedly true that some of the activities such as jumping/diving into the water to swim, crabbing, mooring and embarking/disembarking from pleasure vessels etc. could only take place at the edge, the evidence as a whole did not in the inspector's view lead to the conclusion that it was only a strip of a metre or two from the edge that had ever been materially used for lawful sports and pastimes.

He considered that there was extensive evidence of other informal recreational activities by local people on the surface of the Quay more generally. There was evidence of informal walking or wandering, with or without dogs, and of people often standing and having a chat with others in association with such wanderings. Other informal games and social activities were also referred to by a number of

witnesses but the informal walking or wandering seemed on the evidence to be the most common feature.

As a matter of law activities such as informal walking or wandering with or without dogs and not on a fixed route are well capable of being 'lawful sports and pastimes'.

The inspector concluded that there is abundant evidence of use of the part of Allen's Quay within the remaining application site as shown on Appendix 2 for such informal recreation. He provided his views on some of the specific uses claimed which were subject to conflicting evidence and submissions at the inquiry as well. His analysis of the water's edge activities is at paragraphs 16.61 – 16.96 of his report.

On the matter of mooring he accepted that the evidence shows that as early as summer 2004 it became known to the local sailing fraternity that visiting yachts were being discouraged. Some signs were also erected around that time. By contrast there was evidence that some local yachtsmen carried on mooring or loading/unloading until the fence was erected in 2008. The applicant's boating interest evidence was that they took the view there was a long established practice or local right to moor at the Quay. TWL's evidence was about charging vessels moored for more than two tides and the organised practice of permission for boat rallies and multi-boat mooring. TWL also relied on the General Directions of the Harwich Haven Authority.

The inspector agreed that mooring or getting on or off a boat is not of itself a sport or pastime especially if it was for some commercial or other work-related purpose. However it was his understanding that in practice places where local people have temporarily moored boats used for leisure purposes have been registered under this legislation. It is not obvious as a matter of principle why a piece of land used for part of the activity of leisure boating should not be registered just because the other part of the leisure activity takes place elsewhere i.e. out on the water.

Issues also arose around fishing, crabbing and swimming. Parts of these activities also took place off the application land, in the water.

There was little evidence of swimming although there was some earlier and outside the qualifying period. He did not consider that his finding on the use of the remaining application site would be any different whether or not the small amount of swimming related activity on the land in the relevant period that occurred. Even if the swimming in the water could not be included, any activities on the land such as the wandering to and fro before and after being in the water and getting changed on the waterside land area could be seen as engaging in lawful sports and pastimes.

Fishing and crabbing shared similar features but arguing leisure or recreational use which take place only partly on a piece of land cannot 'count' towards lawful sports and pastimes on that land was wrong as it would produce absurd and unjust results.

Fishing however raised other issues in relation to the statutory criteria as there were admonitory signs to be taken into account (covered under 'as of right' in section 16) which covered most of the relevant period by a clearly painted and legible sign fixed to one of the buildings directly facing the application land and facing onto Allen's Quay in particular. Its context was reasonably understood as allying to that Quay and others and therefore fishing could not properly be seen to be as of right for the qualifying period of the application.

Crabbing would not be prohibited by the sign. The inspector saw no reason why this pastime should not count as lawful sports and pastimes just because the crab was in the water. It could only take place at or close to the water's edge so does not affect any overall finding over the remaining application site more widely. Although commercial vehicles would be moored up at times, a small gap of still water between Quayside and moored vessel could have created very good conditions for that activity, as argued by the applicant.

Swan feeding was also the subject of much of the evidence. At one time 'sweepings' from the malting operations went into the water and when it ceased in about 1994 malnourished swans became a nuisance so local groups to feed them were formed. There was evidence of early co-operation from the port. The inspector did not accept that this demonstrated that the activities were with permission and saw no reason why swan feeding by local people should not up to 2008 be seen as a component element of lawful sports and pastimes on the open Quay. This would involve standing or moving along, at or close to the edge of the Quay to give food to the swans. This is consistent with much of the other user evidence but does not alter his general conclusion about use over the whole of the area.

Painting and drawing had taken place at times when commercial activity was carried on from photographic evidence. Some artists were from outside Mistley. So this was probably a very minor element of the total sports and pastimes use but part of the overall pattern.

Parking of cars and picnics in cars etc. was carried out with reasonably regularity by local people and perhaps others to admire the view. The inspector was inclined to accept the evidence that this did happen from time to time but reluctant to accept it was what Parliament had in mind as a lawful sports and pastime. He therefore discounted it.

There was one part of the remaining application area the inspector considered specifically. That is the small triangle of land north of the Mistley Quay Workshops but to the south of the pre-extension Stockdale Compound at the extreme eastern end of the port road which land is neither part of the original almost rectangular Allen's Quay nor regarded by the highway authority as subject to public highway rights. No argument was raised that this should be treated in any way differently from the remainder of Allen's Quay. No evidence was specifically directed to this small area. The inspector therefore tried to form a view, using the principles enunciated in the 'Trap Grounds' case by the House of Lords, as to the conclusion to be drawn in relation to this small area. He considered that the land had never been fenced off or separated from the rest of Allen's Quay and should be regarded

as part of the remaining application site as a whole even if no-one's evidence particularly singled out those few square metres.

He applied similar considerations in relation the small patch of land belonging to Gladedale which was subject to specific submissions. These were two small triangular parcels adjacent to each other at the extreme south east end of the application site. Together they were clearly part of the larger, roughly rectangular area of land making up the wide open area of Allen's Quay. There were no observable distinguishing features of one land ownership against others. Therefore he formed the same view that from the evidence as a whole the lawful sports and pastime uses over the surface of the non highway part of Allen's Quay generally have included the two parcels of Gladedale land. Use was more in the nature of the general recreational wandering and openly and regularly occurred over the whole relevant period.

He also considered the representations and evidence in relation to the residual railway track or tramway which comprised two steel rails set at 4 foot 8.5 inches embedded on the level in the concrete surface of Allen's Quay. It had not been operationally used during the relevant 20 year period and probably last in 1984. Back in the 19th century there had been active sidings, tramways and dock lines to the east of Mistle station curving down to the Quayside level. In earlier years at least one other pair of rails was set in the Quay nearer the water's edge. The surviving set of rails is approximately at the boundary between the southern strip of Allen's Quay recognised as publicly maintainable highway and the wider (non highway) part of the Quay to the north east and on the TWL part of the Quay. TWL raised a technical argument that the rails were technically part of an operational railway line for at least part of the 20 year period. So they argued trespassing would be committing an offence under section 55 of the British Transport Commission Act 1949. He was referred to the rights of way inspector's report from September 2012 and the submissions made at that time.

Whilst this was the subject of further representations of TWL and the applicant addressed in section 19 in this report the inspector concluded that the material presented did not enable him or the commons registration authority to make a definitive determination on the status of the disused rails. There had been no check on whether or not the Eastern Union Railway Act of 1847 actually covered the railway lines and that was an assumption he did not consider could be made. Other legislation was referred to which clearly had nothing to do with the rails on Allen's Quay such as the Tramways Act 1870. Correspondence from 1994 did not clearly suggest that what it related to included a tramway-type, unfenced siding on a privately owned but publicly accessible Quayside. If the applicant's case is otherwise made out it would need some clear and convincing evidential and legal basis to overturn that conclusions based on the criminal unlawfulness of local people's uses of that part, on the balance of probabilities and that had not been provided.

15. **USE BY 'A SIGNIFICANT NUMBER OF THE INHABITANTS' OF ANY NEIGHBOURHOOD**

This was addressed in paragraphs 16.122 – 16.190 of the inspector's report.

Taking the evidence as whole the inspector concluded that there can be no real doubt that over many years significant numbers of the local inhabitants of Mistley parish have enjoyed using the remaining application site regularly for leisure-related purposes.

Where there was conflict the generality of the evidence called for the applicant was much more convincing than the evidence given for TWL. One witness for Gladedale, Mr Brodie, acknowledged that his own personal direct knowledge of going on the Allen's Quay covered only a very small proportion of the total time and he had noticed walkers and people feeding swans for instance. The inspector did not accept Gladedale's suggestion that only their witnesses could be relied on as they had no interest in the outcome. They clearly had a strong interest in the development/redevelopment of the landholding and had a sufficiently strong interest to be legally represented at the inquiry and call witnesses.

The truth is that all the parties had a definite interest in the result. But this was merely background to reaching a view on the factual elements relevant to the statutory criteria. He concluded, on the balance of the evidence that there had been leisure type use and activity on the open area of Allen's Quay over a considerable period by a significant number of the inhabitants of Mistley rather than there just having been, for example, occasional or sporadic trespass by individuals. It was a general use by local people for informal recreation.

The nature of those activities is considered separately in section 14.

16. **'AS OF RIGHT' USE "FOR A PERIOD OF AT LEAST 20 YEARS"**

This was analysed in paragraphs 16.122 – 16.190 of the inspector's report. This was the most contentious and difficult of the issues raised. It is well established that clear signs erected by a landowner telling the public or local inhabitants that they are not allowed on a piece of land will mean use in the face of prohibitory signs is 'by force' and will negate a claim of as of right use. The effect of signs which have existed at various places around the edges of the original application site was an important issue between the parties. There were various judicial pronouncements on the way in which signs should be considered in Commons Act cases. The main points came down to the need to interpret signs in a reasonable way, not a legalistic way, according to what a reasonable observer would have made of them and in their context.

A considerable number of signs were on or close to the fencing of the compound around the Stockdale warehouse. Some other signs were on the buildings themselves. Those facing the port road were quite well away from the remaining application site except for one or arguably two fixed to the compound fencing nearer the Quay which said 'Hazardous Area' which would have described the compound behind and not have anything to do with the areas in front of them.

With regard to the remaining application area the only relevance of the other signs further west up the port road would be if they conveyed a message warning people of Mistley Quays. These other signs were much more varied. There are warning signs about vehicles and forklift trucks and aimed at deterring pedestrians and

unauthorised personnel. As well as specific messages they inform 'Quay areas are dangerous. Do not play on this quay' and 'parents are requested to warn children of the dangers and consequences of trespassing on this site.'

To see the signs a reader would have to be standing or walking down the port road. In the inspector's judgement nothing about this collection of signs would convey to any reasonable observer that they were meant to apply to anything other than the fenced compound. His conclusion was that TWL's argument that these signs clearly warned people off the whole of the port road and Allen's Quay etc. is manifestly wrong and unjustifiable.

At Allen's Quay and the remaining application site there are no signs at all as one descends to the Quay via the east or west side of Grapevine Cottages. The nearest sign is the 'No Fishing ... from these Quays' sign on the Thorn Quay Warehouse on the eastern edge of the application site. Although the inspector considered they did prohibit fishing he did not regard them as otherwise particularly relevant to the as of right test save for its positive implication that people might legitimately be on the Quay doing other things than fishing.

There was another collection of signs further east in the dock area including Baltic Wharf where all the commercial craft now dock. This is at the extreme north east corner of the application land. Signs attached to the railings are on the Quay edge immediately next to the water. They face someone passing from Allen's Quay eastwards. There were also more haphazard signs earlier in the user period but always near to the corner of the building. He accepted the objectors' point that these signs are not just directed to vehicles using that route but that positioning is not irrelevant to assessing their significance given that there have not been any other signs at all around Allen's Quay to any kind of similar effect. To read this formidable and extensive collection of warnings and notices a person would already need to have traversed almost the whole of the application land. He informed the view that no reasonable normal person on seeing these signs would have drawn any other sensible conclusion than that they were intended to relate to people and vehicles passing through from the more obviously public seeming space of Allen's Quay via the narrow Quayside passage route to Baltic Wharf etc. The signs give no impression at all that they are intended to apply to the open area of Allen's Quay.

The final issue was the question of mutual compatibility of use of the sites. It was an undoubted fact that there was commercial use by dock-related commercial vehicles, forklift trucks etc. and also to a lesser extent the loading/unloading of commercial vehicles on parts of the Quay. There was also evidence of occasional temporary storage of materials on parts of the Quay. Other non-port related vehicles also parked on the Quay.

The courts have already indicated that there is no requirement under the commons legislation for the land concerned to look like a classic chocolate box idea of an English village green. Allen's Quay in the inspector's view could have a slight air about it of a town or village square, being a hard-surfaced multi-purpose publicly accessible area in or near the centre of a settlement and with buildings around at least some of the sides.

He found as a fact that the remaining application site had been used on many occasions by dock or EDME-related vehicles, even if at varying frequencies on many occasions over the relevant years. The only exception to this is the very edge of the Quay, although even that area had been used for the tying up of commercial lash barges during the earlier part of the period. Any local person engaged in informal recreation would get very sensibly out of the way. A journey across the Quay by a vehicle may only take 20 seconds and it would be travelling at relatively slow speeds. If it makes sense to refer to the act of avoiding being run over by a vehicle as 'deferring' to it then local people did defer to the various vehicles traversing the application land.

The principles established in the **Redcar** case should apply here as well. If local people have been in the habit over a prolonged period of using the application land openly for lawful sports and pastimes without force and without permission the fact that from time to time they get out of the way of a passing lorry or forklift truck does not vitiate their claim to have been using the land as of right. Avoiding vehicles was no more than exercising courtesy and common sense which can sensibly be described as give and take. This is what had happened until the fence was suddenly erected in September 2008. Nor could the 'displacement' when people stood to one side, being similar to standing out of the way for the golf balls in the **Redcar** case, re-start the requirement for a twenty year period although in other factual circumstances it could have been a stronger argument. The totality of evidence showed that this open use of Allen's Quay by local people for informal recreation, intermingled with passing commercial activity had gone on for very much longer than merely since September 1988 and had done so to an extent where an observant owner might reasonably have been expected to notice as an assertion of a local public right to be there.

Had Allen's Quay been for much of the time the nature of a heavily used industrial road then it would have been difficult for local people to use the surface recreationally in any way which would look like an assertion of the right to do so. Even on TWL's evidence the highest use would be 224 vehicle movements per day in 1989 based on a ship being in port. This had been a theoretical calculation. The applicant's figures seemed to show 180 vehicle movements on a busiest working day. With 20 seconds per vehicle closing that would be an aggregate of approximately one hour in a busy working day. Neither set of vehicle calculations could be relied on as being accurate or precise but they did, in the inspector's view, provide a reasonable overall feel for and understanding of the intensity of use. It is a fair assumption that on busy working days when unloading was going on perhaps a little over an hour within a working day could consist of time when a significant dock-related vehicle was crossing the Quay. When no ship was unloading it would have amounted to much less time, possibly a third or even a quarter.

This all fits with the overall impression given the balance of the evidence from actual, live witnesses and led the inspector to the view that although the port business had peaks and troughs Allen's Quay in particular has not typically, even on busier port days, been busy or congested with commercial traffic. The EDME evidence of the warehouse reports gave a somewhat confused and confusing

picture and there was a very wide range of different inconsistent estimates from their witnesses. It was no means straightforward to follow their quantitative and evidential input. It was clear that they did make regular deliveries to the Thorn Quay Warehouse including bringing large commercial vehicles onto Allen's Quay and unloading with forklift trucks. The process could take half an hour or up to an hour. It was not a major or noticeable feature of activity on the Quay, occurring only several times a week. This was just another relatively minor temporary interruption to the usability of the Quay for informal recreation.

Matters like this are inherently difficult for a decision maker to resolve, especially when the evidence on either side is less than clear. The inspector took the view that it would have been possible for two of the objectors to have mounted a case that, whatever the position was for the rest of Allen's Quay, the specific parcels at the south east end which were now owned by Gladedale had been used in a distinct and different way for the regular unloading of EDME lorries and that was inconsistent with the use claimed. But they did not argue this. Instead they backed TWL's argument that no town or village green claim could have been established on any part of Allen's Quay at all or indeed the entirety of the original application land.

The inspector considered that there was sufficient evidence called by the applicant to demonstrate continuous use for informal recreation of the whole surface of the remaining application site but subject to amicable coexistence with such commercial activities as took place there. The point was soundly taken by the applicant that the best answer to the claim of non-co-existence was the very fact that such co-existence was in reality the regular pattern on the Quay for a period going back over and before the relevant period.

Use of the Quay edge by TWL's vehicles, looking at the balance of the evidence overall, persuaded the inspector that prior to September 2008 crossing the Quay like that on a route uniformly close to the edge had in fact been comparatively rare with nearly all such traffic using more of a variable diagonal route across the Quay.

Principally TWL also argued that since arguably it would be unlawful on an already registered town or village green for anyone including the landowner or its licensee to start driving lorries or forklift trucks over it and stop and unload them, then it must be impossible to register as such land an area where this already happens. The same principle of mutual compatibility as occurred in **Redcar** applies there.

In making his recommendation of registration of the remaining application site area the inspector was clear (in paragraph 16.188 of his report) that he was referring to the whole site right to the very edge of the Quay and not merely to the fence erected in 2008. The fence is therefore physically situated within the site he recommends for registration.

17. LOCAL MEMBER NOTIFICATION

The local member has been consulted. Councillor Guglielmi commented that he was happy with the Inspector's opinion and had nothing else to add.

18. **INSPECTOR'S CONCLUSION AND RECOMMENDATION**

The inspector's conclusion is that the evidence in relation to the application met the statutory criteria set out in section 15(3) of the 2006 Act up to the date that use had been prevented in September 2008.

However part of the land was acknowledged as highway so this conclusion relates to the remaining application site part of the application land as shown on the map at Appendix 2 which comprises the area of the original part of the application land which lies to the north-east of the outer boundary of the highway area between it and the Stour Estuary.

No other area for which the applicant made application should be so registered

Had the applicant not left his amendments so very late the inspector would also have recommended inclusion of the Stockdale compound area.

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19. **REPRESENTATIONS FOLLOWING INSPECTOR'S REPORT**

The applicant and objectors were given an opportunity to comment on the inspector's conclusions.

All parties provided comments.

The applicant requested that the correct position of the sub-station which was incorrectly labelled on the base Ordnance Survey map was noted. There was no contrary view expressed by the other parties and the inspector has issued an Addendum to his report which is at Appendix 3 confirming this amendment. Due to his other conclusions this does not affect the accuracy of the delineation of the remaining application site on the map at Appendix 2.

The following representations were made by the objectors.

Cripps Harries Hall on behalf of Gladedale, set out a number of points of interpretation, referred to on the second page of their letter as 1-5, in relation to the compatibility of use with commercial port/loading/storage; interruption by commercial activities; the inspector's analysis in relation to the Gladedale land or that when distinguishing supposed user from other user is disregarded there is no justification for the registration as village green of the remaining application site.,

They indicated that, if part of the land were excluded as set out on a plan provided by them, they would refrain from a judicial review.

The land shown on their plan is land on which they said there is virtually no evidence of user and comprises the unloading/storage area that was accepted. It is also proposed that it will enable the next phase of residential redevelopment of

the Quay.

The Gladedale plan referred to is Appendix 6.

The representations from Trevor Ivory of Howes Percival on behalf of EDME makes the point that the lawful sports and pastimes use is focussed on the Quayside and that the loading/unloading activities means that there could not have been lawful sports and pastimes for more than 20 years. They say the rules arising from the **Redcar** case are not applicable and that the inspector's analysis did not take into account the distinction between physical obstruction and deference.

They also refer to the likely impact of the restriction of use on village greens with vehicles.

They ask that the area they identify as 'disputed land', described in page 1 of their letter as being the area between Grapevine Cottages and the Thorn Quay Warehouse, is excluded from any land registered as village green and threaten judicial review in the event it is not.

The inspector considered these two representations and as a result issued his second Addendum which is at Appendix 4.

He considered that the letter on behalf of Gladedale largely revisited a number of points taken at the inquiry. In so far as they suggested that his report should have considered their land in isolation from the rest of the application land he had in fact consider this in his report at 16.169 to 16.174. He also noted that their witness (Mr Brodie) acknowledged that he might have seen people walking across the company's land to get to the edge of the Quay when the use of the Quayside for leisure purposes was under discussion.

The letter for EDME also revisited issues which were fully argued at the inquiry and covered in his report. They also suggested that their evidential position should have been given more distinct consideration. What the further representation called the 'disputed land' was not the main thrust of the case presented by EDME at the inquiry. The inspector did not accept that he had not addressed the issues they raised or that there was any consistency with the way he had addressed the matter.

As part of the exercise of revisiting his analysis he did identify a minor textual amendment where he had mistaken the reference to a relevant date in paragraph 16.176 of his report.

Representations were also received from TWL. So far as they relate to the issues to be addressed as part of the decision, they related to the operational tramway/railway line issues. The applicant was given the opportunity to comment on the additional material produced by TWL and these exchanges were reviewed by the inspector against his original recommendations.

These exchanges were in a series of letters from Birketts for the applicant of 13

March, 19 May and 16 June 2014 and from TWL of 7 January 2014 and 2 June 2014. The inspector's third Addendum at Appendix 5 addressed the points raised.

TWL provided some additional evidence relating to the legal effect of the railway line in (a) a letter from 1978 in evidence before a rights of way inquiry to Strutt and Parker confirming that the tramways on a plan are British Railway Property Board's and have been worked by BRPB's traffic for over 20 years and probably over 70 years (b) a conveyance extract showing that the line terminates at the dock at the western end of Mistley Quay and (c) a letter from British Railway Property Board to Brooks Saville Ltd from 1977 in relation to a wall obstructing the tramway and confirming a perpetual right to run traffic and requesting the obstruction be removed.

They say the last year of use was 1986 not 1984 but that an assumption that the railway line was abandoned by 1988 cannot be legitimately made. They argue that the effect of the British Transport Commission Act 1949 section 55 is wider than the inspector interpreted it as it applies to 'any of the lines of the railway or sidings or in any tunnel or upon another railway embankment cutting or similar work now or hereafter belonging or leased to or worked by any of the Boards'. They did not accept that there was any reference to a defence to a penalty for criminal trespass in the British Transport Commission Act 1949 in relation to an unfenced line accessible to a member of the public.

The applicant commented on these points in the letter from Birketts of 13 March 2013.

They considered that the evidence of their witness Mr Garwood, which was uncontested, was that use of the tramway had ceased by 1986 and that, even if the Quay had been subject to the provision of the Railway Acts, the lines were not worked at any time within the 20 year period claimed.

As TWL had identified that the inspector had stated that the issues of section 55 of the British Transport Act 1949 was 'the only issue in the Report where the Inspector states that he did not believe he had sufficient material before him to reach a property conclusion' they treated this as an invitation to submit further evidence and the applicant provided further evidence so that the inspector would have a complete picture. As well as the evidence on the date by which it was disused there was evidence at the inquiry that the line belonged to and was operated by the landowner. They submitted a short history to illustrate this point. TWL had not made out an argument that the tramway was worked by British Rail (BR) within the meaning of the Railways Act. TWL referred to 'abandonment' of the use but this is not referred to in the legislation. The evidence in the inquiry bundles contained considerable evidence of use of the Quay by the various owners of property on the Quay and no evidence of overriding right of BR. Although they had argued the point at the 2012 footpath inquiry, TWL only referred to the argument briefly in their closing submissions at the village green inquiry.

They also produced a 'short history of the origins and use of the Tramway on Mistley Quay' which brought together the evidence before the inquiry on the subject and some new evidence. They said this demonstrated that the lines

across this part of the Quay were not constructed under the provisions of the Eastern Union Railway Act 1847. The lines were constructed under a private agreement and had been privately owned. The lines were never leased to BR or the previous Boards. The rights of BR to use the lines were shared with others. Owners of Quayside property enjoyed and created various private rights to use the tramway and rights across it. As recently as 1978, the title of Mistley Quay Forwarding grants and reserved rights to use the tramway and regulated its use by owners. At no point during the relevant period were the lines worked by BR.

The applicant was able to provide a full copy of the agreement of 25 November 1846 and the plan they had was not the same as the TWL plan. The applicant accepted that the part of the route marked B-D passed across the application land but no provision was made in the Eastern Union Railway Act 1847 for the construction of this line. It was distinguished from the other elements of the track because there was only a right to use the track in common with others so entitled. The agreement also provided that the regulations did not apply to B-D, in direct contrast to the branch railway line of the main line which ran on A-B and E-F.

They considered that there was no support for the contention by TWL that use of the Quay by the public was unlawful.

Those further representations were referred back to the inspector and he asked for further comments to be sought from TWL and that the applicant has an opportunity to deal with any points made. A timetable was set for responses and TWL wrote again on 2 June 2014 and the applicant on 16 June 2014.

TWL stated that their main issue in relation to the applicant's comments was that they did not consider they were supported by evidence. They did not consider that there was any evidence before the inquiry that the line belonged to or was operated by the landowners. The TWL witness, C A Brooks, who provided evidence in a statutory declaration, confirmed the railway company worked and maintained the line and the landowner maintained the land over which it passes. That is consistent with the parties' respective rights. The railway company also contributed the cost of repairing damage caused by their rail operations.

They did not agree with the interpretation of the effect of the 1846 agreement. The railway company was granted a perpetual wayleave between D-B to use it in common with the landowners and to keep it in repair. It was agreed the landowners could make sidings to it. The right of common use of the tramway extended to the mainline at point A. The auction particulars of 1883 state the purchasers of various lots would acquire rights to use the line. This is consistent with the 1846 agreement but doesn't spell out the ownership position. It can be deduced ownership is vested in the railway company. Auction particulars from 1892 they provided also crossed B-D and stated 'the tramway passing over this lot is the property of Railway Company ...' The right to common use of the line is also stated. The late 20th century documentation evidences the line was owned and operated by the railway company.

TWL did not dispute that 1986 was the last year the line carried rail traffic but Mr Garwood's evidence for the applicant was that 'access to the railway line was

closed in 1986 and this was incorrect on the evidence as the line was not closed until on or after 21 January 1994 based on a letter from Railfreight Distribution to BR's solicitor's office. They point in relation to the application of section 55 of the 1949 Act is that the line belonged to BR. Section 55 applied until the line closed in 1994.

It was not accepted that the use of the Quay by various owners and the rights of the railway company were the same issue: they are two distinct issues with the railway company rights in the 1846 agreement. The line was not privately owned; it did belong to BR and its predecessor Boards. It was not accepted that the Board changed its position with regard to its ownership of the tramway. The letter of 9 March 1978 confirms the tramways belong to the Board, have been worked by their traffic for over 20 years and are their maintenance responsibility. In the letter of 3 April 1978 the Board confirms it uses both sets of tramways and maintains both.

The Special Conditions of Sale referred to does make reference to BR as the property is sold subject to the 1846 agreement. The seller reserved a right to access and use a 15 feet Quayside loading area to transfer cargo in and out of its building on to railway wagons and vehicles. Another condition prohibited parking railway wagons off the railway line but also stated the seller would not be responsible for 'railway wagons parked by British Rail'.

The applicant made a final response on 16 June 2014. They also set out the difference between the ownership of the land itself and the ownership of the railway tracks. There was no evidence the Quay was owned by Eastern Union Railway Company. TWL appeared to accept ownership of the land by the individual landowners. The use of the tracks was under a wayleave (in common with other property owners (granted in 1846 in return for laying the rail. They were paid for by one of the owners of the Quay. A wayleave is granted by a landowner to a third party to install equipment in return for a fee or other rights. The auction particulars are not relevant. The lot referred to by TWL is identified as owned by Eastern Union Railway Company so the auctioneers may have drawn more attention to the railway issues than with other lots but there was no difference. The auction particulars make it clear the tramway belongs to the railway company and they have a wayleave over it subject to the free use by others under the 1846 agreement. This is a clear demonstration that the railway company only ever had the wayleave.

At the time of the letters of 1978 referred to by TWL, the acquisition of the site from Brooks Mistley to Mistley Quay Forwarding and EDME was in negotiation and appears to establish the interest in common with the railway company.

The evidence from the applicant is said to clearly demonstrate the tramway was never subject to the Railway Acts and there is no question of a statutory trespass. The fact that access closed in 1986 should be an end to the matter. It was de facto incapable of being operated and was severed from the rail network. TWL say it wasn't closed till 1994. The evidence shows that the railway, shoes and fishplates have been shown to be regarded as property of the railways and correspondence after the de facto closure of the tramway is only relevant in

relation to these pieces of steel and iron. Closure was in fact before the relevant period claimed for the town or village green application.

The inspector's view on these additional issues is set out in Addendum 3 at Appendix 5 and summarised below.

The first main point taken in TWL's representation related to a point which was made almost at the very end of their closing submissions on the final day of the inquiry and on which nothing of substance had been said orally by anyone in the preceding 7 1/2 days. The argument was that any use could not be 'lawful' because it would be a criminal act to cross the railway line. The inspector had recorded the exchanges in paragraph 16.110 of his report. He had reached a conclusion that the applicant had made a case for lawful sports and pastimes on the area comprising the remaining application site.

The objector needed to provide a clear basis on which it could be understood that the ostensibly lawful activities were in fact a criminal trespass. Whilst the applicant needs to make out his case the inspector was doubtful this extended to proving a negative but the further representations did explore the issue at greater length.

The inspector considered it likely the rails were the property of BR and its predecessors. But the evidence showed they did not own the relevant part of the Quay. Their last use was about 1984. The relevant 20 year period was September 1988 to September 2008 so it made no practical difference if the end of any rail use was 1984 or 1986. The only relevance if at all is whether there were grounds to conclude that the physically unusable set of metal rails was for any material time after September 1988 something which could be covered by the criminal offence provision in section 55 of the British Transport Commission Act 1949. TWL persisted with this suggestion that this was still a 'line' in January 1994, which the inspector addressed in paragraphs 16.117-118 of his report.

The additional evidence since then did not give him any more reason now than then to conclude that the operational railway of that branch, requiring some kind of formal closure procedure, included the disused tramway in Allen's Quay. The inspector considered that it seemed even clearer after the further representations that the tramway was something over which BR had only a wayleave in common with others even if they may have owned the actual metal of the rails. The alleged 'criminal offence' aspect of TWL's point could only have force if the rails were understood to be a siding or line or railway 'worked by' BR at any time from September 1988. His conclusion from the evidence is that cannot possibly have been the case from 1984 or 1986 at the latest. He did not consider that anyone could have been successfully prosecuted from 1988 to 1994 say for trespassing because they walked over or engaged in lawful sports and pastimes on the unused and unusable pieces of metal set into the Quay. That is what TWL are arguing was the position.

The inspector has viewed the various representations and, other than the Addendum to his report in relation to the sub-station, has confirmed that, to the extent that the representations contain new information or new submissions, they did not alter his conclusions or recommendations set out in his report at Appendix

1.

16. **RECOMMENDED**

That, in accordance with the recommendations made by the inspector based on the evidence examined at the public inquiry and in exchanges since:

1. The locality of the civil parish of Mistley is accepted as the locality for the application;
2. The inspector's analysis of the evidence in support of the application is accepted and his recommendation that the application made by Ian Tucker dated 18th August 2010 is accepted so far as the land identified as 'remaining application site' on the map at Appendix 2, and
3. In relation to the remainder the application is rejected for the reasons set out in the inspector's report and in summary in this report.

BACKGROUND PAPERS

Application dated 18th August 2010 with supporting papers.
Further representations from applicant, TWL, Gladedale and EDME.

Local Member Tendring Rural West

Ref: Jacqueline Millward CAVG/55

COMMONS ACT 2006, Section 15

Registration Authority: ESSEX COUNTY COUNCIL

**RE: LAND AT MISTLEY QUAY,
MISTLEY, ESSEX**

**REPORT OF THE INSPECTOR
MR ALUN ALESBURY, M.A., Barrister at Law**

into

**AN APPLICATION TO REGISTER THE
ABOVE NAMED LAND**

as a

TOWN OR VILLAGE GREEN

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1. INTRODUCTION

- 1.1. I have been appointed by Essex County Council (“the Council”), in its capacity as Registration Authority, to consider and report on an application submitted to the Council, dated 18th August 2010, for the registration as a Town or Village Green under Section 15 of the Commons Act 2006 of an area of land described as ‘Mistley Quay’, at Mistley, Essex. Mistley lies within the administrative County of Essex, for which the County Council are responsible as Registration Authority for these purposes.
- 1.2. I was in particular appointed to hold a Public Local Inquiry into the application, and to hear and consider evidence and submissions in support of the application, and on behalf of the Objectors to it. I was also provided with copies of the original application and the material which had been produced in support of it, the objection duly made to it, and such further correspondence and exchanges as had taken place in writing from the parties. Save to the extent that any aspects of it may have been modified by the relevant parties in the context of the Public Inquiry, I have had regard to all of that earlier material in compiling my Report and recommendations.

2. THE APPLICANT AND APPLICATION

- 2.1. The Application received by the County Council in August 2010 was made by Mr Ian James Tucker, of 4 High Street, Mistley. Mr Tucker is accordingly “*the Applicant*” for present purposes.
- 2.2. It was indicated in the Application Form as completed that the Application was based on **subsection (3) of Section 15** of the **Commons Act 2006**. This subsection is relevant when use ‘as of right’ of the land concerned is claimed to have ceased at a date prior to that of the Application itself. In this case the Application Form stated that such use had ceased on 17th September 2008.
- 2.3. The boundaries of the application site were shown on a plan (“*Map A*”) which accompanied the Application. However, at a considerably later date than that of the Application itself, the Applicant by letter (dated 4th May 2013, stamped as received by the County Council on 8th May) sought to amend the area of land to which the Application applies. In certain small respects, notably at the eastern end of the site, the amendments sought reduced the area of land covered by the application. It was my understanding from the stance of the parties at the Inquiry that these minor changes were uncontroversial; I agree.
- 2.4. However the amendments sought in May 2013 by the applicant also included a significant *enlargement* to the site covered by the Application. While the area of the requested enlargement was relatively small as a proportion of the overall area of the original application site, it involved a substantial increase in the ‘frontage’ of the site applied for directly onto the tidal Stour estuary immediately to the north.

- 2.5. Not entirely surprisingly, this aspect of the requested amendments was the subject of dispute between the parties at the Inquiry. In the light of that, I shall not at this point in my Report record any concluded view as to the overall extent of the site to be considered; rather I shall endeavour to summarise the positions of the respective parties on this matter in the later sections of the Report where I seek to record their evidence and submissions, and will express my own conclusions and recommendations on the matter within my concluding section.
- 2.6. The Application Form as completed stated that the ‘locality or neighbourhood within a locality’ in respect of which the application was made was the parish of Mistley. I understand Mistley to be a civil parish, which as such is well capable of being regarded as a ‘locality’, in the sense which the courts have given to that term when interpreting the commons legislation.
- 2.7. This did not appear to be a matter of any controversy between the parties, and seems to me to ‘make sense’. Accepting that the relevant locality is the parish of Mistley does not of course in itself mean that any other aspects of the statutory tests within *Section 15* of the *Commons Act* have been satisfied. Those other aspects, particularly where they were the subject of dispute, will be duly considered later in this Report.
- 2.8. As for the Application Site itself it is, subject to the point already mentioned as to the exact extent of the land properly to be considered by the Registration Authority, fairly clearly delineated on the ground. It includes three main elements.
- 2.9. The first is a largely concreted area of what had clearly been for a long part of its history open quayside, stretching back from the water’s edge (the Stour estuary immediately to the north of the site) to the line of a group of traditional buildings which I shall for the present call the ‘Grapevine Cottages’ buildings, but which at the time of the Inquiry I held included some workshops and a café, as well as residential dwellings.
- 2.10. The eastern edge of this part of the site generally follows the line of some warehouse buildings historically associated with the maltings industry established in Mistley. Visually, the appearance of this first part of the site as ‘open quayside’ is at present very much affected by a fixed metal ‘chain-link’ type fence which has been erected in recent years, very close to the northern edge of the site (i.e. the actual quayside).
- 2.11. What I will call the second element of the site consists essentially of the long access road (with some other small pieces of associated land alongside it) running west from the (formerly) open quayside area, and eventually curving round southwards to join the main road through Mistley at the western end of the part known as the High Street.
- 2.12. A third element or part of the application site essentially consists of the routes or thoroughfares extending southwards from the (formerly) open quayside to the High Street, around both the eastern and western sides of the Grapevine Cottages

group of buildings, and also surrounding the ‘Swan Basin’, an ornamental fountain or pool to the south of those cottages. Some of this part of the site is fully usable (and clearly quite well used) by vehicular traffic, as well as by pedestrians, whereas other areas of it are only practically usable for pedestrian access.

- 2.13. I note at this point (without considering the matter further at this stage) that substantial parts of the application site are noted in records maintained by the County Council under other legislation as being subject to ‘public highway’ rights of various kinds. Clearly this is a matter of potential relevance to a ‘town or village green’ claim, but this preliminary part of my Report is not the place to reach any conclusions as to what that relevance might be.

3. **THE OBJECTORS**

- 3.1. There were three Objections to the application. The first was made by **T W Logistics Limited** (often abbreviated to “TWL”), the owner of the majority of the land affected by the application.
- 3.2. The second Objector was **Gladedale (South East) Limited**; it [or rather a company within the Gladedale group] is the owner of certain small parts of the application site.
- 3.3. The third Objector was **Anglia Maltings (Holdings) Limited**. A small part of the application site, as it was originally delineated by the applicant, was in the ownership of this company. I was led to understand that notice of the application had not in fact been given to the company at the time when the application was first received. Accordingly it did not make an objection at that time. However, subsequently Anglia Maltings (Holdings) Limited became aware of the application and indicated its desire to object to it.
- 3.4. From that time on, Anglia Maltings (Holdings) Limited has been treated as an objector whose objection has been duly made, and no party concerned in these proceedings has raised any difficulty or concern in respect of that.
- 3.5. I note that the non-controversial aspect of the Applicant’s request to change the boundaries of the Application Site (the proposal to remove certain small areas from the site), as discussed by me above, produced the result that no part of the site thus altered remained within the ownership of this objector. Nevertheless Anglia Maltings (Holdings) Limited wished to continue with its objection, because parts of the reduced application site are used to gain access to its property, associated with the building known as the Thorn Quay Warehouse, immediately to the east of the application site.
- 3.6. The other point which I note in relation to this particular objector is that it became clear that much, if not all, of the business activity related to the still active maltings business in Mistley is in fact carried on in the name of a sister company in the same group called **EDME Limited**. Thus for most purposes during the Inquiry which I held the third objector was in fact referred to by all parties

(including itself) as “EDME”, rather than Anglia Maltings. This did not cause any confusion, and for most practical purposes, as far as the *Commons Act* considerations are concerned, the two names can be regarded as interchangeable.

- 3.7. All three of the Objector companies were professionally represented at the Inquiry which I held.

4. **DIRECTIONS**

- 4.1. Once the County Council as Registration Authority had decided that a local Inquiry should be held into the Application (and the objections to it), it issued Directions to the parties as to procedural matters, which I believe were subject to further refinement and adjustment. Matters covered included the exchange before the Inquiry of additional written and documentary material, such as further statements of Evidence, case summaries, legal authorities etc. Since those Directions were, broadly speaking, observed by the parties, and no issues arose from them, it is unnecessary to comment on them any further.

5. **SITE VISITS**

- 5.1. As I informed the parties at the Inquiry, I had the opportunity in the afternoon of the day before the Inquiry commenced to see the site, unaccompanied. I also observed the surrounding area generally. As the Inquiry was almost entirely held in Mistley, I also had frequent opportunities to observe the site, and the adjacent parts of Mistley, informally, on the days when the Inquiry was sitting, both at the beginning and end of the day, and during the Inquiry lunch-breaks.
- 5.2. After the close of the Inquiry, on 26th July 2013, I made a formal site visit, accompanied by several representatives of the Applicant’s and the Objectors’ sides. In addition to looking at the site, we visited and observed the area surrounding the site, and other local features. We also had the opportunity to see the site, and the quayside edge facing the Stour estuary (which had been extensively referred to in evidence), and the rest of Mistley Quay, from a boat.

6. **THE INQUIRY**

- 6.1. Most of the Inquiry was held at the Mistley Village Hall, on 24th, 25th, 26th and 27th June 2013, and then on 1st, 2nd and 3rd July 2013. The final day of the Inquiry proper (excluding the formal site visit) was held on 25th July 2013, at the Venture Centre, Lawford, a little over a mile from the application site.
- 6.2. Submissions were made on behalf of the Applicant and the three Objectors, and oral evidence was heard from witnesses on behalf of all parties (and one additional person who asked to speak – Mrs Lester), and subjected to cross-examination, and questions from me as appropriate. With the agreement of the parties participating in the Inquiry, all of the oral evidence was heard on oath, or solemn affirmation.

- 6.3. As well as the oral evidence, and matters specifically raised at the Inquiry, I have also had regard in producing my Report to the written and documentary material submitted by the parties, including the material submitted in the early stages of the process, which I have referred to above. I did however stress to the parties at the Inquiry the importance of drawing attention at the Inquiry itself to any aspects of the (voluminous) written material which had been deposited which were regarded as being of substantial significance to the relevant party's case, especially when any such material had not been expressly referred to in the evidence delivered orally at the Inquiry. I report on the evidence given to the Inquiry, and the submissions of the parties, in the following sections of this Report.

7. THE CASE FOR THE APPLICANT – Evidence
General approach to recording of the evidence

- 7.1. The comments I make in this and the next five paragraphs, while expressed in relation to the case of the Applicant, are (in principle) of general application to the cases of the parties as a whole, *mutatis mutandis*. As I have already to some extent noted above, the Application in this case was supported and supplemented by various documents including plans, a memorandum, witness statements or completed evidence questionnaires, and letters from local residents, and various other supporting material, including photographs.
- 7.2. Other written or documentary material was submitted on behalf of the Applicant in the run-up to the Inquiry, in accordance with the Directions which had been issued. Some of this consisted of written statements from witnesses who would in due course give evidence at the Inquiry itself.
- 7.3. I have looked at all of this written material, and the photographs, plus other documentary items with which I was provided, and have taken it into account in forming the views which I have come to on the totality of the evidence, and indeed on the parties' cases as a whole.
- 7.4. However, as is to be expected, and as indeed was the subject of discussion and acknowledgement at the Inquiry itself, more weight will inevitably be accorded (where matters are in dispute) to evidence which is given in person by a witness (in this instance on oath or affirmation), who is then subject to cross-examination and questions from me, than will necessarily be the case for mere written statements, evidence questionnaires etc, where there is no opportunity for challenge or questioning.
- 7.5. With all these considerations in mind, I do not think it is in general necessary for me specifically to summarise in this Report all the evidence contained in any statements, letters, or questionnaires etc. by individuals who gave no oral evidence. Overall they are broadly consistent with the tenor of the evidence given by the oral witnesses, and (unless I make some specific reference) nothing stands out as being particularly worthy of having special, individual attention drawn to it in this Report.

- 7.6. In any event all of the written and documentary material I have referred to is available to the Registration Authority as supplementary background material to this Report, and may be referred to as necessary.

The oral evidence for the Applicant

- 7.7. **Mr Richard Brooks** lives at Church Farm, Edgfield, Melton Constable, Norfolk. He said that his family had been engaged in business on Mistley Quay since about 1830. He is a direct descendant of Edward Brooks who acquired Mistley Quay by inheritance in 1858, having previously been its manager. The Quay had remained in the ownership of his family or companies controlled by them until the business was sold in 1959 to Rank Hovis McDougall. Mr Brooks's father who had worked in the business of the Quay throughout his life remained Chairman of the company after the sale to RHM until he retired in 1974. Mr Richard Brooks (the witness) had been employed by Brooks of Mistley from 1961 to 1969.
- 7.8. As a child Mr Brooks lived with his parents in Dedham and then in Brantham. He had been a regular visitor to Mistley Quay with his father and on many occasions would join him there by pony or bicycle. It was a wonderful place for a child to explore, and he recalled many happy days spent in the Mill operated by the company.
- 7.9. During the whole of the time that his family owned and maintained the Quay it was always regarded as a public Quay. He understood from his father that yachts were allowed to moor against the Quay and victual, and that by custom no charge was made for this for two tides. A charge may have been made however for unloading any cargo, as that was the commercial business of the port. The Quay was used principally by Allen's of Sudbury, who gave the Quay one of its names, Allen's Quay. There had never been any restriction on public access to the Quay, and fishing and swimming took place. Vehicular access was also freely allowed to the Quay, even at times of intense commercial activity, and all the uses accommodated each other. Mr Brooks' father had always accepted that the Quay was public, and that he had an obligation to maintain a reasonable surface on the Quay and at its edge.
- 7.10. Mr Brooks produced a copy statement (dated 16 August 2010) by Mr James Charles Bolton who had died in June 2011. Mr Bolton's father had also been a Director of Brooks Mistley Limited. James Charles Bolton had been known to Mr Brooks throughout his life, and Mr Brooks agreed with Mr Bolton's statement.
- 7.11. In that statement Mr Bolton had explained that he had worked at Brooks of Mistley from 1953 and become a Director of the company in 1965, until the takeover of the Quay in 1968. Then in the 1970s he had visited the Quay about 3 times a month as he had retained an interest in what was going on there. That had continued until 1996. Since then Mr Bolton had visited the Quay about 8 times every year.
- 7.12. Mr Bolton said that throughout the whole of his time on the Quay, both during his working life and subsequently, small yachts and boats had tied up to the Quay

with no-one ever being turned away, although sometimes for reasons of convenience yachts had been asked to moor in a different position. No charge had ever been made.

- 7.13. Mr Bolton had also over many years seen many people feeding swans from the quayside, and people walking along the Quay edge to enjoy the view, or get closer to barges or boats moored on side. Cyclists had stopped on the edge of Quay; crew had come ashore from boats moored alongside to go to the Thorn Pub for refreshment, and there would be many sightseers and visitors sitting in cars parked near the edge of the Quay to enjoy the view. Mr Bolton had explained that this scene was one that had existed for many years. His own father, who had been a Director of Brooks Mistley Limited and a former Chairman of the Harwich Harbour Conservancy Board, had told him about the Quay from the early days when he had visited it from about 1925 onwards.
- 7.14. In addition to the activities already mentioned, Mr Bolton had explained that a number of local residents used the Quay to fish for eels. They would recover the eels by using the ladders on the Quay at low water. There had never been any obstruction to the use of the Quay, nor any signs other than one relating to fishing, erected in response to public pressure to prevent injury to swans. Nor had there been physical or oral challenge to the use of the Quay by him or others.
- 7.15. Having drawn attention to the late Mr Bolton's statement, Mr Brooks explained that he himself had not had any business involvement with Mistley Quay since 1969, but he had often gone there as a visitor. He personally had never resided in Mistley Parish and had only been an occasional visitor during the last 20 years. Conversely Mr Bolton had lived in Mistley until he died.
- 7.16. Mr Brooks repeated that Mistley Quay in his view had been a public Quay and no-one was ever stopped from going there, either by land or by water. Thames barges could use the Quay, and his father had believed that he was entitled to charge them if they stayed for more than two tides. Lots of members of the public had enjoyed the Quay during that period.
- 7.17. Mr Brooks made reference to some of the old photographs of people on the Quay showing people fishing and indulging in other activities on the public part of the Quay. His father had always said that the land to the east of the Thorn Warehouse was private, but in fact a blind eye had been turned to people fishing even from that part of the Quay.
- 7.18. Mr Brooks explained that the Quay had not been as busy during the period when he was employed there as it had been during his childhood. It had been a very busy Quay just after the Second World War, but then use of the Quay died down slightly.
- 7.19. *In cross-examination by counsel for TWL*, Mr Brooks explained that his professional involvement with the Quay had ceased in 1969, and that his father had retired from involvement in 1974. His own personal experience as a child was before the 1960s. He had been born in 1940. Thus his childhood use of the Quay had been from 1945 to the early 1950s.

- 7.20. He had often been to the Quay as a visitor and occasionally during the last 20 years. As far as the application site was concerned, he had visited that about five or six times a year broadly consistently since the 1960s.
- 7.21. The vessels he had referred to which used to moor up alongside the Quay were mooring on that part of the Quay which was in the present application site. He personally did not know that a charge was ever made, although his father had said that he was entitled to charge any vessel that was there after two tides. Mr Brooks did not think that the company owning the Quay had ever given permission to people to moor there; people just moored there.
- 7.22. He accepted that a letter written in 1976 from the East Coast Sail Trust had appeared to ask for permission to moor at the Quay. However he did not think that altered his own position; if anyone turned up they could stay for two tides at the Quay without permission. He was not able to comment on correspondence from 1976 which was after his time of professional involvement.
- 7.23. He himself was a sailor but he had not sailed to Mistley Quay in recent years. He had not been aware of a sign attached to the Thorn Warehouse building saying "*Danger No Mooring*", shown in photographs taken within approximately the last 10 years. He did not know when a notice to that effect had gone up. It seemed to contravene the history of the Quay for 100 years or so.
- 7.24. He had been aware that the new owners of the Quay had in latter years begun to resist mooring there. He was generally aware that from about 2003 onwards there was disagreement about the use of the Quay, but he himself was not a member of the Stour Sailing Club, for example. The dispute was of no concern to him as he had moved on. A letter written by the Stour Sailing Club dated 9th July 2003 did however reflect his understanding of the situation that had arisen by then.
- 7.25. He had had no knowledge of charges which had apparently been levied on a non-commercial vessel at the Quay as early as 1998. It saddened him that the long public understanding in relation to the use of the Quay appeared to have been overridden.
- 7.26. His visits to the Quay since 1969 had generally been by car. More often than not he would park his car and get out. He would park anywhere on the Quay.
- 7.27. The main part of the Quay was historically known as Allen's Quay. The part known as Thorn Quay was further to the east. The part further to the west was historically known as the Maltings or the Granaries.
- 7.28. In relation to photographs showing signs in the vicinity of the access road forming the western part of the application site, Mr Brooks said that he might have driven past those signs in recent years, but would not have read them. He would have assumed that they related to the area near to the warehouses in that vicinity.
- 7.29. As far as the sign saying "*No Fishing*" attached to the wall of the Thorn Quay Warehouse was concerned, that notice had been put up by the current owners he

thought. He understood that the concern which had led to that related to swans being injured by fishing tackle.

- 7.30. Allen's Quay always used to be an open quay, but that was not so to the east, or to the west of the open part of Allen's Quay. He had personally observed swimming going on from the Quay although he himself had never swum there. He could not remember when he had last seen swimming taking place there but probably it was not in the last 20 years. There definitely were ladders by which one could get out of the water onto Allen's Quay. He believed that there had been one in about the middle of Allen's Quay, and one on Thorn Quay. They were not really ladders, but metal bars cemented into the side of the Quay. There also used to be a ladder near to the silos which were further west. In that area to the west of the open quay there were buildings right up to the water's edge vertically, and one could not walk along there.
- 7.31. In relation to the feeding of swans, he personally had had a lot of fun feeding the swans from one of the buildings (now demolished) shown in old photographs. The company used to sweep grain into the water for the swans to feed on.
- 7.32. Where he parked the car when he visited the Quay would depend on what else was going on there, but it would be on the application site. Sometimes it would be with the car's bonnet facing the water. His visits might be on weekends or on weekdays. More recently his visits had tended to be in the week. He would not have hindered any operations being carried on on the Quay.
- 7.33. *In cross-examination by Mr Ivory for the Third Objector*, Mr Brooks said that activities he had seen on the open quay included fishing, swimming, mooring. All of those took place towards the water's edge, but the whole Quay area was used for leisure uses. All of it was used. People fishing used to overflow onto Thorn Quay further east as well.
- 7.34. The principal access to the Quay was via the road from Mistley Towers. However the eastern access from the Swan Basin would be used by children for cycling down. He had seen that sort of thing for all his life, and indeed participated in it.
- 7.35. He had no recollection of seeing lorries being loaded or unloaded on the quayside just to the west of the Thorn Warehouse. He was not aware of any activities associated with the firm EDME at Thorn Quay. Nor had he seen EDME forklift trucks involved in any activity there.
- 7.36. *In re-examination* Mr Brooks said that as far as the use of the Quay for vessels was concerned, his understanding was that commercial vessels if they discharged or loaded cargo were charged for use of the Quay; however Thames barges if used for pleasure were treated like any other leisure vessels.
- 7.37. He thought he had noticed some of the signs along the access road to the west but he had not taken any notice of them, he had assumed they were to do with TWL's own yard.

- 7.38. *To me* Mr Brooks explained that commercial usage of Allen's Quay in particular had somewhat died down in the 1960s. He accepted that there was more interchange now between the premises on the two sides of Allen's Quay (to the east and the west of it) than there had been in the old days. The Granary buildings which had been demolished could take bulk corn from a ship moored along there to the west.
- 7.39. **Mr Richard Vonk** lives at 80 California Road, Mistley. He has lived there since November 2001. Prior to that he lived in Ramsey, Essex. He has known the area which includes the application site since 1998 but his interest has been greatest since 2001.
- 7.40. His partner worked here from 1998, so he came to see her at that time. He moved to Ramsey, about 5 miles away, in January 1999, and then later to his address in Mistley.
- 7.41. His interest in the application site has related mainly to bird watching and also to feeding swans on the Estuary. During the summer there is relatively little of interest to bird watchers so he would visit the application site less in the summer, but there is enormous interest during the winter and he would visit more. He himself works for the Royal Society for the Protection of Birds ("RSPB"). He had completed one of the evidence questionnaires produced in support of the Applicant's case, dated 7th January 2013.
- 7.42. His visits to the site have been about once a month on average. They are in a complete mix of circumstances and days. For about 1½ to 3 hours either side of high tide wading birds are pushed up against an island which can be seen from the application site quayside.
- 7.43. His visits with children are fairly infrequent as there is usually a cold wind in winter. His children are now aged 11 and 9. He used the application site with his children in the period 2003 – 2005 or so. As for carol singing on the application site, the last time he had indulged in that was around 2010 he thought. He could not recall if it had happened more than once.
- 7.44. He could recall seeing a Thames barge called 'Victor' and other private craft moored against the Quay. And he had seen people having a fun time there, that was the sort of thing that happened. He had never asked for permission to be on the application site or the quayside. He had however asked for permission to go further east to see birds more clearly. That had arisen 5 or 6 times between 1999 and now. The reason he had asked for permission was because of the nature of what was going on there further east which was more intense than on the open quayside. He had been told that that part of the Quay was private. The general position however was that he had never been challenged in his use of the Quay which is in the application site.
- 7.45. He thought there may have been times when a vehicle would be in the way of a lorry moving on the quayside, and that he had seen a request to move such a vehicle being made. He himself would usually go on foot to the Quay but he would sometimes park at the east end of the site. When he went by car he would

usually watch birds from out of the car. There are different types of bird watching, occasionally he would not get out of the car, for example if he was looking at black-headed gulls, in order not to disturb them.

- 7.46. As for the commercial use of the Quay, he had seen workmen there, usually wearing overalls or high visibility clothing. But honestly he did not take much notice of movements on the Quay other than avoiding getting run over. It is not a particularly busy port or place compared with others he had seen. There may have been one or two occasions when there was a lot of traffic going past. In such circumstances he would have gone away or stood on the quay edge between the bollards there.
- 7.47. He had occasionally seen children playing on the Quay, usually with adults accompanying them. He had seen drawing and painting going on on the quayside 2 or 3 times. Dog walking happens there daily. Some community celebrations he thought had happened there.
- 7.48. Usually there are one or two birdwatchers there every day, and a lot more than that at weekends. He had seen people picnicking there on the Quay in their cars but not outside on rugs. Bicycling on the Quay is a daily occurrence.
- 7.49. As for signs, he had seen some signs in the vicinity of the access road and the quayside, but he had understood the whole of the area of the application site was open and available. He had seen the “*No Fishing*” sign on the western wall of the Thorn Quay Warehouse. He had always thought that he could be there on the site as long as he was not standing right in front of a lorry. The signs adjacent to the access road he thought applied to the land behind those signs, not the application site. People visiting the Quay in the way that he and others did had never had to put on high visibility jackets or anything like that, and no-one had ever challenged their presence there.
- 7.50. As for the other signs adjacent to the north-west corner of the Thorn Quay Warehouse, he had always thought that those signs seemed to apply to the area of the Quay further to the east.
- 7.51. *In cross-examination by Counsel for TWL*, Mr Vonk confirmed that he had moved to Mistley in 2001 and that his primary use of the application site was for bird watching. When he had referred to community events on the Quay it was primarily the 2010 carol singing that he had in mind. He believed that may have been associated with the “*Save the Quay*” campaign, but it felt like a community and family affair.
- 7.52. When in his questionnaire he had referred to carol singing and a meeting having taken place on the application site, the meeting referred to was after the fence went up. It must have been a protest meeting against the fence. The police were there.
- 7.53. As regards the use of the application site land generally, he agreed that the port access road (the western part of the application site) was primarily used for access rather than recreation. However it was not only a port-related road because people

live down there and use it for their access, for example to Grapevine Cottages. Nevertheless it would be difficult to play on the port access road. There is another road access down from the Swan Basin which is somewhat rough in places. He does use that route for access, but also he might birdwatch from there if some elevation was needed in order to look at birds further away, the slope might help to give elevation.

- 7.54. Generally when birdwatching he prefers to stand on the Quay itself for the wider vista you get from there. He has stopped to talk to people there on the slope down from the Swan Basin, but otherwise it is used relatively little other than as an access route.
- 7.55. Generally vehicles access the Quay along the main access road or come out from the warehouses to the west. That is what he has generally seen. He has seen an articulated vehicle trying to go out through the Swan Basin, which is not a good idea.
- 7.56. He has seen normal HGVs and also forklift trucks and flatbed “*dock runner*” type lorries being used on the quayside. It is common sense to get out of the way of HGVs or forklift trucks.
- 7.57. That arises because of the way the site is set out. People need to co-exist. He had been impressed that when the argument broke out between the people of Mistley and TWL the people concerned had generally behaved in a restrained way on both sides. He did not dispute TWL’s figures as showing the number of ships or the tonnage of cargo which had transited the port over the years. He accepted that the quayside including the application site was used for the passage of vehicles associated with that cargo. He personally had not seen lorries turning around on the part of the quayside within the application site. He did not think that could happen a lot, because he had not seen it. If that activity were happening people would get out of the way. His general perception was that there was a right of access to the quayside for people on foot and with vehicles. There were residential uses along the quayside, and also a little bit of commercial activity there. In his own experience he had quite often seen a traffic jam with lorries parked up on the main road, but there were long periods when the Quay itself was almost devoid of traffic.
- 7.58. He himself had never seen barges moored up at Allen’s Quay. He recognised that some of the photographs showed commercial vehicles parked near the Thorn Warehouse. Some of the photographs produced by EDME showed lorries being unloaded there. He did not recall seeing any extensive storage on the quayside within the application site, outside the areas which had been fenced. A photograph showing goods deposited on the open quayside was not at all the norm he thought.
- 7.59. He knew that there had been various signs around the edges of the application site, but he regarded the Quay as being a publicly accessible place. The signs did not give the impression that they were meant to apply to the main Quay, but to areas behind the signs. No-one could sensibly assert that it was obvious that the signs applied to the part of the Quay within the application site. There were no safety

signs on the commonly accepted area which people could access. The signs generally looked as if they only applied to other parts of the Quay. For example the signs near the Thorn Warehouse appear to apply to the area further east.

- 7.60. *In cross-examination on behalf of EDME/Anglia Maltings*, Mr Vonk explained that for birds the winter season is regarded as being between August and May. *In re-examination* he explained that there had been a lifting barrier which used to go down at times, preventing access past the Thorn Quay Warehouse to the part of the quayside which was further east.
- 7.61. **Mrs Charlotte Hume** lives at 2 Millers Reach, Mistley. She has lived there since 1998. Prior to that she had lived in Dedham. She had known the land since 1973. In 1973 her parents had moved to Dedham. Her grandparents had lived in Mistley, and her parents often brought her there. She had completed one of the evidence questionnaires in support of the Applicant's case, dated 30th April 2013.
- 7.62. She had used the land between 1973 and 1983, and then she moved away to school. She then had little connection with the area until she moved back here.
- 7.63. As for her use of the land, when her children were younger they used to access it often in order to feed the swans after school, and they would go crabbing about twice a month in summer. They would quite often picnic by taking sandwiches to eat on the Quay while they were feeding the swans or amateur bird watching. Millers Reach where she lives is up past the EDME works and over the railway bridge to the east. Her means of access to the quayside would depend upon the season and the weather. She would access the Quay by car if she was on her way somewhere else, but not if that was her destination. The activities of herself and her family could be on weekends or weekdays, but were weather dependent. There was no distinct pattern of usage. She and her family had definitely used the Quay both in the week and at weekends.
- 7.64. When they had used the Quay she had been aware of commercial traffic, sometimes more than at other times.
- 7.65. She was generally there with her children, and other people were there as well with children, including quite young ones. Therefore one would make sure that they were all safe. One was aware of commercial traffic and one would take sensible precautions.
- 7.66. She would access the Quay by various routes from the west or the east, around either side of the Grapevine Cottages group of buildings. Crabbing would be along the front of the quayside. Picnicking with her family before 2008 would also have been on the edge of the Quay. Activities of bird watching and photography also took place on the front part of the Quay.
- 7.67. She and her family have also cycled down into the site from the west near Mistley Towers. The route via Swan Basin had been mainly used for walking or looking.
- 7.68. As for the commercial activity she has seen on the Quay, that has involved cars, lorries driving along, loading or unloading, and fork lift trucks. As for frequency

there had been very little activity at weekends; during the week there had been a bit more, particularly during working hours, especially early in the morning. She thought she might have seen traffic on the Quay and avoided it, one would avoid being in the way.

- 7.69. She had never been forced by the weight of commercial activity or traffic on the Quay to avoid using it. Nor had she ever been challenged as to her use of the Quay. Only the erection of the fence along the quayside has challenged her use of the land.
- 7.70. Prior to that she had been using the Quay for a variety of recreational opportunities. She had never thought she was not allowed there.
- 7.71. As for the various signs along the edge of the access road to the Quay, she might have walked past those signs without particularly noticing them. She would have been walking, talking, holding children's hands and so forth. If she had noticed them she would have assumed them clearly to relate to the left hand side of the access road, within the compound associated with the warehouses.
- 7.72. She had noticed the signs on the wall of the Thorn Quay Warehouse, but had thought they related to the area beyond to the east. There were no signs at all on the access routes down from the Swan Basin. She had never seen the signs as prohibiting her from being on the quayside.
- 7.73. *In cross-examination by Counsel for TWL*, Mrs Hume said that she had three children who had been born in 1997, 1999 and 2006. So her eldest is 16, then 14 then 6. Her visits had varied somewhat in frequency over the years. When the two older children were young the visits were more frequent as it was an easy walk or bike ride from their home. Her oldest child started school in 2003. Thereafter they visited the application site once a week on average. That could have been in the week or over the weekend.
- 7.74. Their activities involving crabbing or feeding swans would take place at the water's edge. Picnics were also on the quayside, as were their activities involving bird watching.
- 7.75. When her children were learning to ride their bicycles they indulged in more cycling on the road area associated with the Quay. She had seen HGVs, forklifts and possibly flat-bed dock runner lorries on the quayside. However that never presented itself as a problem in relation to her or her children's activities. If there had been traffic they might move away, but she did not in fact recall having to move away. One might move close to a bollard for example. The traffic had never passed that close to her.
- 7.76. She did not recall seeing commercial vehicles parked, or large amounts of material stored on the quayside in front of the Thorn Quay Warehouse. When there was commercial traffic on the Quay she never felt unacceptably close to it, it was safe to be on the Quay near to a bollard.

- 7.77. Shown some photographs indicating lorries parked near the quayside in the central part of Allen's Quay, Mrs Hume said that she had never seen commercial vehicles parked there like that. If there had been, she might go round to the edge of the Quay and would go and feed the swans around behind the bollards for example. In all the time she had used the Quay she had not experienced any situation where she was not able to use it because of commercial vehicles or traffic. Clearly when vehicles are parked on the Quay one cannot use the part where the vehicles actually are. One would go around them. In her recollection she and her family had always experienced very courteous driving by drivers moving vehicles on the Quay. They had often been on the Quay while fork lift trucks were working there for example. Of course she would avoid getting in the way of a fork lift truck. She had never seen large articulated lorries manoeuvring or turning around on the part of the quayside in the application site.
- 7.78. She personally might call the application site either Mistley Quay or Allen's Quay. As far as the notices close to the water at the east end of the Quay were concerned, she had always assumed that those notices applied to the part of the Quay beyond the signs, where the ships would be docking. It was more commercial down there. She had not thought such signs applied to the open part of the Quay.
- 7.79. *In cross-examination on behalf of EDME/Anglia Maltings*, Mrs Hume said that when she and her family arrived at the Quay by car they would generally park in front of Grapevine Cottages or by the Thorn Warehouse. Sometimes they would park on the front of the Quay in order to feed the swans. There was always give and take in terms of use of the Quay, in her view.
- 7.80. **Mr Keith Garwood** lives at Cedar Cottage, Trinity Close, Mistley. He had completed one of the original evidence questionnaires, dated 14th July 2010.
- 7.81. He had lived at a house called Ivy Villa in California Road, Mistley from being born in 1943 to 1962. Then he had lived at the Corner House, Mistley from 1962 to 1974, and at Cedar Cottage since then.
- 7.82. He had been employed for 20 years by Trent Wharfage. That was between 1977 and 1997, he had been the Operations Manager. That job involved managing the whole Quay operation, unloading etc. He had used the land on the Quay and the application site between 1950 and 2010, including of course in relation to his employment. As for recreational use, in his younger days he would access it on foot or by bicycle. His father had been the Manager of the Maltings. He himself had been brought up in Mistley. The whole Quay was an open area which everyone used.
- 7.83. In his younger days one could walk all the way along to Baltic Wharf, but it is now gated and locked off down there. No-one really goes along to the Baltic end of the docks now, there used to be another access to the docks down at that end. In his young days there used to be public access both to the present application site and to the Baltic Wharf and beyond. He was not sure when that had changed, but in 1997 it was still open for the public to walk along to the Baltic end. The

other entrance to the Baltic Wharf from the east had been via a lane called Batter Pudding Hill. Gates are there now blocking that access route.

- 7.84. Some of the signs on the western side of the Thorn Quay Warehouse were not there when Mr Garwood was involved with the Quay.
- 7.85. As a boy there had been general public access to the whole length of the Quay. Even when he worked at the Quay there was still public access to all of it, people used it all. However they did not use to picnic at the eastern end towards Baltic Quay.
- 7.86. His main interest is in ships. He would go there to see ships, but also to be with friends or for crabbing or for photography. He has also seen people swim from the Quay. He himself used to fish there until he was aged about 12. He did not swim from the Quay himself, but he quite often dangled his feet in the water while crabbing. He had also taken his own children down there a few times some 30 years ago.
- 7.87. On the Quay ship spotting, one could see ships right down the river even as far as Felixstowe. He did that and indeed still does that almost every day. He would go down at weekends or evenings to see if there were any ships coming or going. He would go and sit in the car and see what was going on and look through his binoculars. He might do that 4 or 5 or even 6 times a day. While on the Quay he would also go for a walk or do a bit of bird watching.
- 7.88. He has also walked on the Quay with his children or grandchildren. One of the latter lives in the area in Manningtree. He has seen other people with children playing and running around on the Quay. Children would not be playing there while they are at school. However the Quay could be busy with children in the holidays or at weekends.
- 7.89. As far as fishing was concerned, he used to fish there, and quite a lot of it went on in those early days. It was done both by children and grownups. However when he worked at the Quay they did put a stop to fishing. That was because of swans getting hurt. The sign was put up telling people not to fish from the Quay. The ban on fishing was introduced in the 1980s.
- 7.90. As for seeing artists on the Quay, that was not frequent but perhaps one would see them a dozen times a year. As for dog walking, people would walk down to the Quay with their dogs, stand around, chat with others and then move on. The whole site was used for dog walking.
- 7.91. Feeding swans from the Quay took place almost every day prior to the fence being erected. People did it regularly. As for bird watching, people would come with their binoculars quite regularly, nearly every day depending on the time of year. Sometimes there were crowds of them. Picnicking would take place on the quayside in the better weather.
- 7.92. People would regularly walk on the Quay. As for bicycling there was not so much, perhaps because people might get their bicycle wheels caught in the

railway lines set into the quayside. He knew most of the people who were involved in the activities on the Quay. Most of them were Mistley people, but perhaps with some from Manningtree and Lawford as well, but mostly Mistley people.

- 7.93. Nowadays ships are bigger than they used to be, and the tonnage coming through the port has halved. The cargoes are different, the employee numbers at the Quay are different. There were about 30 and now there are about 10 or so. The area where ships are worked now is Baltic Wharf to the east of the application site. Cargoes from Baltic Wharf are then brought along to the warehouse by Dock Runners. Some cargo goes out via Batter Pudding Hill. However one can go to the quayside and be there for several minutes and not see one lorry. There are busy times and quiet times.
- 7.94. The port might see three ships in one week but then nothing in the following week. The commercial activity does not interfere with the recreational use of the quayside.
- 7.95. He had never been challenged in respect of recreational use of the Quay, nor indeed had he ever challenged anyone in that respect. Even when he worked there, that area was regarded as an open Quay for use by anyone.
- 7.96. The signs alongside the port access road were warnings to people of areas where they should not go. In Mr Garwood's view they did not tell people not to go on the land that is within the present application site.
- 7.97. *In cross-examination by Counsel for TWL*, Mr Garwood said that he had been made redundant in 1997. Nowadays he gains access to the Quay generally by car, but when he first worked there he would go by his bicycle. Then up until 1997 he had had a company car.
- 7.98. Nowadays his principal purpose for going to the Quay is to look at ships. He generally stays in his car and watches vessels. In order to do that he would park along the quayside. There is plenty of room if there is a car parked by the quayside for a lorry to go around it. Whenever he had been parked along there no lorries ever came out through the end of the fenced compound directly to the west of where he was parking. He would park in the middle part of the Quay.
- 7.99. Shown an aerial photograph indicating lorry tracks coming out of the eastern end of the compound at the west side of the Quay, Mr Garwood said that that use would have related to some cargoes of crushed fertiliser which had quite often come to the port in recent times. However in the normal run of things far more lorries go up around the left, southern side of the compound, than drive into its eastern end as that particular photograph showed. Marks like that in the particular aerial photograph would show up on very little use, with that particular cargo. The aerial photograph which had prompted these questions was taken in 2012. Mr Garwood understood.
- 7.100. Vehicles did not generally drive out of the eastern end of the compound associated with the Stockdale Warehouse. Normally there was plenty of room for a vehicle

on the quayside to go around a parked car there, and that is what happened. When he was in charge he did not worry about any vehicles which were parked on the quayside. They did not obstruct anything.

- 7.101. He accepted that there might have been an occasion when he had told someone once not to moor alongside the Quay. His father had been a member of the Stour Sailing Club; he had been made an honorary member but had never been an active member of it. He had been aware of the situation arising in about 2003 that the skippers of leisure craft using the Quay had been told that they would no longer be able to do so. He was generally aware of all of that taking place. When he, Mr Garwood, had been in charge there was nothing like this going on. But he did remember that the East Coast Sail Trust had asked for permission to moor at the Quay quite a long time ago. Historic boats called the Old Gaffers used to come to the Quay. He accepted that in June 1999 the Old Gaffers Association had appeared to ask by letter for permission to use the Quay.
- 7.102. As for the swan feeding, he while in his job had discussion with the swan rescue service. However he personally did not attend the meetings of the organisation called Swans In Distress. He agreed that notes or guidelines for the feeding of swans from the Quay appeared to have been agreed in the mid-1990s.
- 7.103. He accepted that the Quay to some extent was a transit route. However fork lift trucks did not and do not go back and forth all day. Some of them are kept in the warehouse and would go down to the Baltic Wharf end, and then stay down there all day. He would not say that they never passed along the length of the Quay, they were just not doing it the whole time.
- 7.104. As for signs, people could come down from the area of the Thorn Public House and Swan Basin and see no signs at all. In his view the signs on the Thorn Quay Warehouse were with reference to the area beyond that towards Baltic Wharf. No-one had ever thought about putting up signs relating to the open area of the Quay, because so many people went there. When he was involved with the company it never tried to put people off coming onto the open area.
- 7.105. *In answer to cross-examination on behalf of EDME/Anglia Maltings*, Mr Garwood said that while he was working his office had not been on the application site. Therefore he would not tend to park his company car on the Quay. However householders parked there, and people working in other offices nearby parked on the Quay. Also people visiting the Thorn Public House would park on the Quay.
- 7.106. He accepted that before 1997 one would find lorries loading or unloading from time to time on the quayside within the application site, in the area to the west of the Thorn Warehouse. Cargo would be put into an open door in the side of the warehouse. He did not think that many lorries were loaded there with cargo from the other side of the High Street however. He could recall that there were operational issues occasionally when lorries might get in the way on the quayside.
- 7.107. He accepted that there was some fork lift truck activity in the area to the west of the Thorn Quay Warehouse. There were forklifts either in that vicinity or down

by the ships at Baltic Wharf. However in his view the sign near the north-west corner of the warehouse speaking of danger from fork lift trucks related to the area beyond that point. In his recollection EDME also used to load lorries down towards the Baltic Quay end.

- 7.108. *In re-examination* Mr Garwood said that he himself had had the “No Fishing” sign put up many years ago. Fishing previously had been allowed all the way along the Quay to the Baltic Wharf. Indeed people used to have fishing permits from Allied Breweries when they owned the Maltings.
- 7.109. **Mrs Margaret Saxby** lives at 1 Grapevine Cottages, Mistley. She has lived there from 1957 to present day. She had completed one of the original evidence questionnaires dated 7th July 2010. She explained that she had given the answers on that form, but someone else wrote them down for her.
- 7.110. Thus she had lived at Grapevine Cottages for 56 years. Her house backs on to the Quay that is within the application site, her front door is on the Swan Basin side. However normally to get to her house you would come down towards the Quay from the west on the access road to her back door. Her back door is straight out onto the Quay.
- 7.111. She enjoys and has always enjoyed watching swans or boats loading at the Quay, walking on the Quay or sitting out in the sun. She goes out there every day. She goes onto the Quay for the view, and also to go shopping, coming out at Mistley Towers in order to go shopping in Manningtree. When she sits out she sits on the area close to her own house, but she has in the past sat on the Quay edge.
- 7.112. Some of the photographs in the hardback book of photographs of Mistley Quay which had been produced by the Applicants showed members of her own family, and indeed one photograph of herself possibly from as long ago as about 1960. Some of her relations live next door to her in Grapevine Cottages. The photographs illustrate the way in which she and her family have used the Quay.
- 7.113. She recalled seeing people fishing from the Quay, and various of the other photographs showed typical scenes of recreational activity along the Quay, they were the normal everyday scene, in summer time especially.
- 7.114. Other activities she had seen included children playing, skipping or running around, crabbing (although she had not seen that recently). Men fishing from the Quay used to be frequent; her own son-in-law used to fish out there all night sometimes. She had also seen artists out there on the Quay. In summer time a group of artists used to come down to the Quay perhaps two or three times, but also other people would be there doing such things.
- 7.115. People would walk their dogs on the Quay every day. Bird watching was also a common activity which took place there. Picnicking was quite common too, but mostly by people sitting in their cars and mostly on weekday lunchtimes. People walk on the Quay a great deal, and people do also ride their bicycles there. Some of the photographs showed people with bicycles. Carol singing she thought had

only happened in one year, as a community thing after the fence around the Quay had gone in.

- 7.116. Boats used to come up to the Quay to moor, that is small yachts and also Thames barges. Their occupants would go to the Thorn Public House for lunch. They would moor alongside Allen's Quay although that use was constrained by the tides.
- 7.117. She personally had never swum from the Quay itself. Her husband used to but not regularly, perhaps two or three times in a summer. Other people also did that. She had seen people dive off from the Quay into the water. Clearly there had been no swimming since the fence along the quayside was put there, but there had been a few years ago.
- 7.118. As for commercial use of the Quay, her own kitchen window overlooks the Quay and she gets a beautiful view right across the river. Therefore she spends a lot of time in her kitchen and she notices all that goes on. The amount of commercial traffic depends on whether there is a boat up. Sometimes there is a lot of traffic and sometimes hardly any. There is not a lot of congestion caused by commercial traffic. When there is a boat in at the port there are lorries and fork lift trucks.
- 7.119. Boats normally moor along Baltic Quay where they are loaded and unloaded and then cargos are brought along in the lorries. There are never lots of lorries on the Quay at the same time. She thought she had seen lorries turning around on the Quay. She did not think they did that often but she had seen it.
- 7.120. When there is no boat in the port there is not much traffic on the Quay. Her own ability to use the Quay is not much affected by the commercial traffic when it is there. She has to avoid the traffic, but it does not affect her. She has never not gone out because of traffic on the Quay.
- 7.121. *In cross-examination by Counsel for TWL*, Mrs Saxby said that she could remember when there was a railway along the Quay. Before she lived there that railway had been used. She could not remember it having been used since she got married however.
- 7.122. She has two daughters who were born in 1959 and 1961. Since her daughters were young she used to go regularly to feed swans at the edge of the Quay, and also to admire the view and to sit out and enjoy herself.
- 7.123. She had been familiar with the organisation which had been variously called Swan Watch, Swans In Distress or Swans In Need. Val Saxby whose name is referred to in some of the minutes of that organisation is her sister-in-law. She personally would go out to feed the swans from the quayside several times a week when they had bread to spare.
- 7.124. In order to admire the view from the Quay she would regularly cross the Quay, stand there and walk along and walk back. If a lorry happened to be passing she would wait for it to pass. The Quay near her house was used for parking from

time to time. The parking was generally by the people who lived there. That area by the cottages has been consistently used for the parking of cars.

- 7.125. Occasionally the Quay had been used for the parking of commercial vehicles but they were not there for long. They never have tended to park there very much. They might stop for a couple of minutes perhaps.
- 7.126. She had however seen the activity of unloading lorries on the quayside in front of the Thorn Quay Warehouse. She would avoid that area when that was going on. One would naturally avoid a commercial vehicle.
- 7.127. In her questionnaire she had indicated various activities that she had seen taking place on the land and in general all of those had taken place over the last 20 years or so. As for fishing, she had certainly seen it going on. She could not really say how often. It was occasional. She accepted that there is a notice on the Quay saying "*No Fishing*". Drawing and painting on the Quay happened in the period before the fence went up. It was frequent, two or three times every summer. The artists have been coming for years she said. It was quite frequent to see men and women with easels. They would sit down and paint or draw. That happened over several years. She knew some of these people, in fact she knew one who came from Brantham.
- 7.128. As for swimming, the swimmers had a ladder to get out of the water. It was somewhere in the middle of Allen's Quay, and there was another ladder at the west of it. It was there for a long while. There was a ladder more or less in the area in front of her house on the quayside. She did not know when that had gone.
- 7.129. She had seen roller skating take place on the Quay, and children playing there. She would generally be out with them when they were her children. She accepted that there is a sheer drop from the Quay wall but nevertheless children were out there on their own sometimes. They did not go right near the edge. Very young children would always be accompanied. She identified various members of her family who were shown in some of the historic photographs of families playing or walking on the Quay.
- 7.130. *In answer to questions on behalf of EDME/Anglia Maltings*, Mrs Saxby said that occasionally one would see vehicles at the east end of the group of buildings where she lives but not frequently. She does not really go down that way a lot. Generally people parking in that area park higher up nearer to the pub.
- 7.131. *In re-examination* Mrs Saxby reiterated that it was rare to see commercial vehicles parking on the open Quay to any extent, it certainly did not happen very often that three lorries were on the Quay as were shown in some of the photographs which were produced. If lorries were out on the Quay she would just have to wait for them to move on. She and her family had always regarded the Quay as rather like their back garden.
- 7.132. **Mrs Margaret Wainwright** lives at Port View, 21 New Road, Mistley. She had produced one of the original evidence questionnaires in support of the application dated 15th July 2010. She had moved with her husband to Mistley in 1977 and had

lived at her present address since then. They moved to Mistley because they had taken a decision in 1968 that this was where they wanted to live and to keep their boat. When they moved they brought a historic boat they owned to a mooring in Thorn Reach, where it remained throughout their time in Mistley until her husband's death.

- 7.133. In order to go aboard their boat they kept an inflatable dinghy at their house and brought it down to the Quay, having driven there from the High Street in Mistley. At the end of the day or a weekend or a cruise they would then come ashore at Mistley Quay using the ladders on the Quay and pulling their dinghy up to take it home again. They did that most weekends, summer and winter, when the tide and weather were suitable, until she sold their boat in the summer of 2008 after her husband's death.
- 7.134. Once they were on board their boat they frequently came alongside the Quay to embark crew or stores. That would be a very regular occurrence. They never asked permission to use the Quay for that purpose, and no-one suggested that it was required.
- 7.135. Since 2004 she has also used the Quay regularly to bring her mother there in a wheelchair to sit and admire the view. That was before the erection of the fence.
- 7.136. At no time has access to the Quay been physically obstructed, other than by the recent erection of that fence, which prevents the use of the Quay for the purposes for which it has been used by her and other local people for so long. There have been no signs or any other challenges to their use of the Quay in all the years they had used it.
- 7.137. She and her husband would regularly park on the Quay, and they used a ladder at the north-east corner of the Quay. Their boat was out in a position to the north-west. There had been another ladder in the centre of the Quay as well. They would bring their rubber dinghy to the Quay on the roof of their car, and lower it over on ropes. One could do that two hours either side of high tide.
- 7.138. Their Thorn Reach mooring had more water but usually they would go out there two to three hours before high tide. It was necessary to lower the dinghy perhaps 2 – 2½ metres. They would then go down to the dinghy on the ladder. They mainly used the ladder in the north-east corner of the Quay, by the railings, because they could tie their dinghy to the railings. It was an iron rung ladder fixed to the Quay wall; she thought the ladder was one structure fixed to the wall; it went down at least as low as where their dinghy would be.
- 7.139. That ladder was by the corner of the Thorn Warehouse. There was another ladder in the middle of the Quay, but it was not in very good condition. It was similar to the first one but not in good condition. It was fixed to the wall. There was then another ladder by the Stockdale end. They tended to use the central and eastern ladders rather than that western one. The rubber dinghy they had would only hold two people and luggage.

- 7.140. There had never been any challenge to their use. There were no signs relating to that. She knew that there are signs by the Quay, but she always assumed that those signs related to the Stockdale area, or the area to the east in the latter years. Originally the position was much freer to the east than it is now. She accepted that there was a sign on the north wall of the Thorn Warehouse saying "*Working Area No Mooring*", but that was outside the application site. There was another sign in further east which she took to refer to that area further east in front of the Thorn Warehouse and further along to the east.
- 7.141. She was aware of the existence of a sign saying "*Danger No Mooring*" but she was not sure where it was, she had not used the Quay to sail herself since 2007, when her husband had sailed to Holland but died on the journey. Her husband had been the Secretary of the East Coast Old Gaffers Association.
- 7.142. She accepted that when her husband was involved in that Association in 1999 he had written a letter which was requesting permission to moor at the Quay. However that was in relation to a festival when he would have been expecting 40 – 50 boats to be there. Her husband would do this out of courtesy, because so many boats would be coming up. 40 to 50 boats would be rafting up against the Quay.
- 7.143. Boats would often come up the Stour to Mistley because it is so pretty, and less busy than the Orwell Estuary. Thus people from Shotley would sail up frequently to Mistley, perhaps to have lunch. This happened all the time in the summer. However several of the users of the Quay would be from the Parish of Mistley. Mistley was a cheaper place to keep a boat than Shotley. She was familiar with people from the Parish of Mistley who regularly used the Quay. There were several such people.
- 7.144. Her use of the Quay with her mother happened from 2004 onwards when her mother was in a wheelchair. Her mother lived in Manningtree; the route from there to the Quay was flat and therefore convenient. Her mother died in 2008. During the relevant period she would take her mother to Mistley Quay 3 or 4 times a week. Once they got there they sat and talked. She would also push her along the Quay front and chat, perhaps 3 or 4 times a week. It did depend on the weather but she did it as often as she could both on weekdays and weekends. Her mother died aged 92 in December 2008.
- 7.145. In addition to those walks they also walked on the Quay with visitors. For example when her sister who was an artist came to visit they would go there with her kit in order that she would be able to paint.
- 7.146. It was common to see children playing on the Quay, or adults there with children. Children do not sit still but play around. In the holidays this would be considerably more frequent, whereas it would be less during school terms. She personally had never seen anyone fishing from the Quay, although she knows people who have fished there.
- 7.147. She works part-time at the Mistley Norman School. Children from that school come down here and sketch on the Quay. Since the fence has gone up they have

just walked there. She personally has never accompanied those children on the sketching trip, but she knows that they have taken place from one of her colleagues at the school.

- 7.148. As for dog walkers, whenever one goes there one would see dog walkers on the Quay, and also bird watchers. People picnicking on the Quay was also common. Before 2008 more people would get their chairs out. Now people usually sit in their cars.
- 7.149. Walking happens a lot on the Quay, and she has seen many people cycling there. She has seen people canoeing from the Quay.
- 7.150. As for the impact of commercial use of the Quay, she has never been aware that the Quay was busy continually. Her view was that the photographs showing lorries parked there were selective. Lorries only parked momentarily, it was not the norm. Where they do often park is outside Mistley Towers. She has never seen a multiplicity of lorries parked on the Quay such as was shown in some of the photographs produced by the Objector. She had never seen anything like that. Lorries were only there momentarily. She had never had to modify her behaviour because of commercial traffic on the Quay.
- 7.151. *In cross-examination by Counsel for TWL*, Mrs Wainwright said that she was familiar with the event known as the East Coast Classics held by the Old Gaffers Association which her late husband had been involved in organising, as witnessed the letter of 7th June 1999. She was familiar with the instructions for that event. There would be about 40 boats, each with perhaps three crew members. The instructions about “*not lingering on the Quay*” were because of the traffic from the transit sheds. One would not want that many people congregating on the Quay. They were there to go to the Thorn pub for lunch. The idea was not to interfere with transit traffic.
- 7.152. There were other events which involved coming to Mistley, such as the Ruby Rally, which her husband was also involved with. Her husband would want to make everyone involved aware of the worst case scenario. Not everyone involved would be regular visitors to Mistley.
- 7.153. As for mooring on the Quay at Mistley, she and her husband would occasionally bring their boat Deva alongside the Quay. She had not been aware that from 1996 the company discouraged mooring. She was aware that because of the tides one could not moor there very long, because the boat could tip as the tide went down. Of course high tide is not always there at lunchtime so it was the custom to come to that Quay when the tide was right.
- 7.154. Her husband had been, and she had been and remained, a member of the Stour Sailing Club. However she did not know the person (a Mr Kimberley) who had written a letter in 2003 on behalf of the Club complaining about the restriction on craft using Mistley Quay. She agreed however that by 2003 it seemed that use of the Quay by leisure craft had become contentious. She would not necessarily have read articles in the magazine of the Stour Sailing Club, except for those written by her husband, but they would have received that magazine. She

accepted that it was clear that matters had become contentious in relation to use of the Quay by 2005, and acknowledged that there had been correspondence from the Stour Sailing Club expressing concern about the situation.

- 7.155. As for notices and signs around the Quay and the application site, she knew that since 2008 there had been a lot of notices put up. However she had not used the Quay from the waterside since 2008. She accepted that before that there had been a contentious issue. Her husband had seen notices which had been put up, but chose to take no notice of them. She accepted that there had been some signage from about early 2005 saying for example “*No Mooring*”.
- 7.156. If one is a boat owner and one ‘moors’ at a Quay, that is normally taken as meaning for a period of time, possibly overnight. To ‘moor’ is not normally understood as meaning putting a dinghy into the water in order to transfer to another boat from the Quay. Even if the notices put up from 2005 would have applied to the Quay within the application site she did not accept that they would have applied to the transfers by dinghy which she and her husband undertook. As far as mooring their larger boat *Deva* was concerned, one would have to tie that boat up both fore and aft if mooring at the Quay, a process that would take 5 minutes or so.
- 7.157. *Deva* would be brought to the Quay only if it had crew on board. Her husband would row out to it by dinghy himself. However the trips he made with crew would be less frequent than those when he was on his own. In truth whether he would come to the Quay or not depended on how fit his crew were. It was not that frequent to come to the Quay with *Deva*, it was occasional.
- 7.158. When using the Quay with the dinghy they would use the ladder near the Thorn Warehouse, as everyone else did. There was a railing there and it was safest to put a dinghy in there.
- 7.159. The railing by the Thorn Quay Warehouse was the favoured ladder. There was a rickety ladder in the middle of the Quay, and another to the west in the Stockdale compound. She had never used that western ladder while the compound has been there. The rickety middle ladder was not in the best condition, but it was a good way of getting up and down. It was useable and not dangerous, but it was not very good if you were unfit. She had not used it since 2007 at the latest, but they used to use it quite often to disembark, for example for her to get off and go and get the car and the dinghy. The ladder did not reach the top of the wall so one had to haul oneself up the top part.
- 7.160. She understood that complaints in 2004 about fencing being erected at the west end of the Quay, preventing people from using the ladder at that end, related to the ladder in the Stockdale compound.
- 7.161. When she last used the middle ladder it had been in a really bad condition. It was quite difficult to remember, but the eastern ladder had definitely still been there in 2008. The centre one she was 95% sure had still been in place in 2007 although she herself may have last used it about 2003.

- 7.162. She agreed that in her completed questionnaire and her statement, both produced in the summer of 2010, she had made no reference to her sister's visits to the quayside for painting. Her visits to the quayside with her mother had taken place about 3 or 4 times a week. An answer she had given in her questionnaire saying that she used the land twice a week had been incorrect. What she might have been thinking at the time was that she visited 3 or 4 times a week in good weather but probably twice a week on average over the year. The area where she took her mother was probably on part of the transit route used to get from the western to the eastern part of the docks.
- 7.163. She remained of the view that commercial vehicles did not park for prolonged periods on the Quay. Thus when one sees photographs showing such vehicles appearing to be parked on the Quay one does not know how long they had been there.
- 7.164. **Mr Robert Horlock** lives at Calm Waters, Shrubland Road, Mistley. He was born in Ipswich in February 1946. However his family has lived in Mistley since about 1840, and he has lived at his current address for the whole of his life.
- 7.165. He had used the whole of the Quay at Mistley and the surrounding area for various recreational and leisure purposes from about the age of 4 with his parents, and from about the ages of 7 or 8 onwards with friends or by himself. He had summarised the recreational and leisure activities which he had enjoyed, and those he had seen others enjoying on the Quay, in an evidence questionnaire he had completed dated 14th July 2010.
- 7.166. The part of the Quay within the Village Green application is known as Allen's Quay, and is accessed from roads either side of the Swan Basin and from Mistley Towers. Until the later 1970s there were two access roads at the western end. The more northerly is now blocked by the erection of the Stockdale Warehouse. The more southerly one is overgrown and blocked at its entry to the High Street, and where it joins the present port road. The current port access road was built to replace those other roads when they were closed. To access the Quay he had previously used the earlier roads which existed, and then latterly the modern road. He has accessed the Quay over the years on foot, by bicycle and in a motor vehicle. In recent years his visits have been more by vehicle.
- 7.167. In his youth he used Allen's Quay for fishing, feeding the swans, boarding and coming ashore from boats, and swimming in the summer months. A visit to the Quay was a pleasant recreation in those days. He subsequently became interested in photography and took many photographs on the Quay, some of them have been included in the papers supporting the application. When swimming from the Quay he usually swam out to the sandbank on the other side of the channel and then came ashore using a ladder near the Thorn Mill. The last time he swam from the Quay was in 1998.
- 7.168. On his visits to the Quay and the surrounding area he had normally seen numerous other people using it in a similar manner to himself. From 2003 until the erection of the fence in 2008 he had regularly come ashore or picked up passengers from

the Quay for fishing trips in his fishing boat. No-one had ever told him that such use was not allowed nor had they prevented him from doing that.

- 7.169. He continued to the present day to visit the Quay on foot, or more usually by vehicle, almost every day all year round. The erection of the fence at the edge of the Quay has severely reduced the pleasure of those visits and restricted many activities. Despite that he still observes the wild life and always has binoculars with him. He will walk around the Quay to get a better view. Allen's Quay (and other parts of Mistley Quay in fact) has always been open to the public, and particularly the people of Mistley, for recreational and leisure purposes. He has never sought permission to use the Quay and nor has he been required to do so. No-one has ever challenged his use. He is keenly interested in local history and is the author of a book which chronicles the life of his father and others who were involved in racing Thames barges. He has also published a collection of historic photographs of the area around Mistley and Manningtree. He spoke of the document entitled "*Historical Recreational Activities at Mistley Quay*" which was attached to his statement of evidence. That accurately reflected the history of Mistley Quay and the recreational activities on the Quay. No-one who lives in Mistley would be unaware of the recreational and leisure use of the Quay, which was an integral part of the life of the village.
- 7.170. Allen's Quay would have been a lively place in days gone by. It is recorded that in 1855 there were 16 public houses and 7 beer houses in Mistley. Of those 6 were on Mistley Quay, and he was aware that two more not included in that total had also been on the Quay.
- 7.171. He referred to other documents giving historical accounts showing what a busy and thriving port Mistley had been in the past. It was difficult to imagine that such a thriving and vibrant community would not have enjoyed using Mistley Quay for relaxation as much as the present day inhabitants do.
- 7.172. He himself had been involved in attempting to establish the existence of a public footpath on Mistley Quay, which culminated in a public inquiry which took place in July 2012. That had substantially related to a part of the port further east than the present application site, although beginning within the application site. One of the issues addressed at that public inquiry had been whether there had been footpath use of a defined way or alternatively a recreational use resulting in users wandering around the whole of the Quay area.
- 7.173. The Inspector who had conducted that Rights of Way Inquiry had concluded in a decision letter dated 17th September 2002 that she was not satisfied that there had been use of a route as a right of way, because the public use was more akin to a general access to the Quay for recreational activities. She had thought that the evidence showed general wandering over the Quay rather than following a particular route. She had observed that such use was consistent with accessing the Quay as a whole (to engage in a variety of recreational activities) rather than the use of a more or less defined route.
- 7.174. The period being considered by that Inspector was 1943 – 1963, although Mr Horlock had argued it should have been 1954 – 1975. Evidence was given at that

inquiry by witnesses based on memories of their childhood, although that Inspector had clearly been impressed by a document signed by 11 elderly Mistley residents in the early 1980s (including Mr Horlock's father) which stated that there had been open and unobstructed access to the whole of Mistley Quay.

- 7.175. At the Rights of Way Inquiry TWL Limited had actually been arguing that the use by the public of the parts of the Quay concerned had been in the nature of a general wandering, rather than walking along a particular route. In Mr Horlock's view that assessment of the situation applied at least equally to the parts of the Quay which are within the present village green application site.
- 7.176. The document signed by the 11 elderly Mistley residents had, he thought, been produced in 1981 or 1982. Mr Horlock thought they were talking principally about the area further to the east, because they thought that Allen's Quay was definitely a public quay.
- 7.177. Some gates had been erected along the route to the Baltic Quay around 1963 (further east than the present application site), other gates had been erected in 1975 at the top of Batter Pudding Hill.
- 7.178. Access to that eastern part of the docks was starting to be questioned around 1980, and people were being upset about it at that time.
- 7.179. Mr Horlock explained that from the age of 4 in 1950 he would go with his parents along the Quay in Mistley. From 1974 – 1980 he had gone to Australia to teach, but other than that he had in fact lived in Mistley all his life.
- 7.180. In the evidence questionnaire which he had completed (dated 14th July 2010) he had said that he went to the application site about 3 or 4 times a week. In his youth he mainly visited the site in the school holidays, especially in summer. Later on he would call in at the quayside almost daily. Perhaps 3 or 4 times in the working week, and also at weekends. That was while he was working in Ipswich. He would almost always make a detour around the Quay. He always carries binoculars in his car to look at things. He would typically be there about 10 minutes to look at ships etc. His visits are mainly by car now. In fact that had been true from about 1980 on, although before that they had been more by foot.
- 7.181. His fishing from the Quay had been in his youth, perhaps once a week on average. He had not fished there since 1980. That fishing would sometimes be along Allen's Quay because there was a sewage outlet there which attracted fish. That outlet only operated on the ebb tide.
- 7.182. Therefore he and others tended to swim not on the ebb tide. It was best to go up with the tide and then get out at Allen's Quay. From 1980 onwards he had not been a frequent swimmer, although in 1997 and 1998 as it happened he had swum there about 15 times a year. That was usually at high water. He would come out at the ladder at the north-eastern corner of the Quay. There had been a ladder in the centre, but he did not remember when that had last been there.

- 7.183. He had a vague recollection of the other ladder on the Quay. Sometimes commercial vessels would moor against the Quay and that ladder was needed for crew to get off at low tide.
- 7.184. As far as crabbing was concerned, he had not done it as an adult. However he had landed at the Quay from a boat on occasions. His fishing boat had been bought in 2003, and he would occasionally come to the Quay to collect people. He keeps the boat at Wrabness. Before 2003 he would come ashore from rowing boats or others that he had borrowed, but that was not often.
- 7.185. As far as his photography on the Quay was concerned, if a large ship was coming to the port Mr Garwood would sometimes tell him and he would go and photograph it. His walking activities on the Quay are not as much as they used to be. He mentioned that the path he had tried to claim went underneath the Thorn Mill building. That walk had been cut off in 1974 by the erection of a gate on Batter Pudding Hill.
- 7.186. It was always interesting to view the river estuary as there was always something interesting to be seen from the Quay. He had very often seen children playing and running about on the Quay, often with their parents. As for fishing, since 1980 he had seen very few people doing it. He had seen groups of artists drawing or painting on the Quay, including in the relevant 20 years for the present Inquiry. However he did not necessarily recognise the people doing this. As far as dog walking was concerned, that would be local people. Bird watchers would sometimes be local people and others not. People having a picnic on the Quay would usually be in their car, or they would sit on the bollards. It was not usual to see people there with tables and chairs.
- 7.187. He sees people walking on the Quay on a daily basis. As for bicycle riding there was not a great deal, but he does see them. As for boarding of boats and barges, sailing barges used to come up: Dutch barges, yachts etc. In his youth he used to see other people swimming there, but not latterly. Crabbing certainly did carry on on the Quay until the fence was put up.
- 7.188. He had never been challenged or told not to be on the Quay.
- 7.189. He had seen the signs that had been put up around the site, he was aware of them. Those signs have no relevance to his access to the Quay; his understanding was that they referred to the area beyond the signs.
- 7.190. As far as traffic on the Quay was concerned, in his view there had always been coexistence. Recreation and commerce both took place, and one did not impinge greatly on the other. He had never encountered any problems in this respect at all. Lorries tend to go wide across the Quay and do not interfere with people using the Quay. He personally had never seen a vehicle come out of the Stockdale compound very close to the edge of the Quay, and then onto the open Quay. They would always come out onto the port road near the Stockdale Warehouse in his experience. The compound next to the Stockdale Warehouse had been for storage, and there was a portacabin there for a long time, blocking any access

through that route so there never was an access onto the Quay close to the edge in his experience.

- 7.191. He had never seen the central part of Allen's Quay full of parked commercial vehicles such as a few of the photographs produced by the Objector suggested. It was most uncommon to see commercial vehicles parked on the Quay. Lorries were usually parked up by Mistle Towers or on Batter Pudding Hill. The Quay is essentially a transit area and it was very unusual to have any lorries parked there.
- 7.192. There had been a drop down barrier at the north-west corner of Thorn Mill. The gates which were erected in 1963 affecting the claimed footpath path route had not been in that position, they were further east than that. However they had later been replaced by this barrier. He thought this barrier had still been there in 2004, but it went when flats were created further along the Quay. He personally had still walked to the eastern end of the Quay beyond the application site while that barrier was there.
- 7.193. *In cross-examination by Counsel for TWL* Mr Horlock said that he visited the application site 4 or 5 times a week on average, latterly almost daily since he had been retired. Those visits were mainly by car. His average visit would be for 15 minutes or so at most.
- 7.194. He accepted that the metal fence around the original Stockdale compound was put in in 2004. It was not there before; there had been a mark on the ground, but not a fence or gate around the compound. The lorries would go around into that original compound via the road, not via the area near the quay edge which had been enclosed by the very recent (2008) addition to the compound further east.
- 7.195. He accepted that there had been gates in the original Stockdale compound at its eastern end, which might have suggested there had been some intention to use them. However he believed that vehicles had only really gone in and out that way when chicken meal was being imported. He reiterated that he personally had not seen commercial vehicles parked on Allen's Quay.
- 7.196. He had however seen commercial vehicles loading and unloading by the EDME building. Vehicles coming from the part of the docks further east tend to veer to the left on reaching Allen's Quay, in order to go up the dock road to the Stockdale Warehouse. There is plenty of room to pass people who might be on the Quay. He himself has parked by the quayside, and been down there for 15 minutes for example and never seen a lorry. When he has been down there he has never seen lorries using the eastern entrance to the Stockdale Warehouse compound directly onto the Quay. The normal position is that there is a whole triangular area which is safe for people to be on, and which the lorries moving across the Quay will avoid. People do avoid being close to lorries. It may be that lorries will pass by and people will get out of the way, but there is no huge conflict. Clearly he would not park his car if he knew it was going to be in front of a lorry.
- 7.197. On his visits very often there would be no traffic. He would generally park along the Quay and if a lorry came along it would simply go around him. There would

have been a lorry about every 10 minutes if a boat was in, but that was not normally the situation.

- 7.198. When he did go swimming on the Quay in 1997 and 1998 that had been about 15 times a year. He generally used the ladder to the right as one looks out to the water, near the corner of the Thorn Quay Warehouse by the railings. It seemed the ladder might have gone by 2006, because it was not in a photograph taken in that year. His recollection was that you could use the ladder at low tide in order to get up out of the water. There had been a sewage outlet beneath the quayside for a long time and the water used to be very polluted. In the 1950s there were signs saying not to swim in the river, although local people took little notice of them.
- 7.199. As far as the “*No Fishing*” sign on the west side of the Thorn Warehouse was concerned, Mr Horlock thought it had applied to the area beyond it. Certainly the notices near the corner of that building saying things like ‘No Admittance’ in his view applied to the areas beyond that notice.
- 7.200. He confirmed that only a very small part of the route that had been considered by the Rights of Way Inquiry in 2012 had been on the present application site.
- 7.201. *In cross-examination on behalf of EDME/Anglia Maltings*, Mr Horlock said that it was normal for cars to be parked behind the electricity sub-station and the Grapevine buildings. He had not seen lorries on the Quay blocking cars in.
- 7.202. The sign set near the corner of the Thorn Quay Warehouse saying “*Danger Fork Lift Trucks*” was in the wrong position if it was intended to warn of fork lift trucks around the EDME vehicles unloading on Allen’s Quay. It clearly related to the part of the Quay beyond the sign.
- 7.203. One of the doors into the Thorn Quay Warehouse opened at first floor level, and fork lift trucks were used to put goods into and out of that door. He accepted that fork lift trucks were used on Allen’s Quay in relation to that operation.
- 7.204. He maintained his view that the “*No Fishing*” sign related to the area beyond the notice, not to Allen’s Quay itself. Generally speaking if one puts up a sign it relates to what is beyond it.
- 7.205. **Mr William Meston** lives at Staplehurst, High Street, Mistley. He has lived there since 2001. From 1989 – 2001 he had lived at 11 The Green, Mistley.
- 7.206. Mr Meston had completed one of the evidence questionnaire forms, dated 1st August 2010. He said that he is the Chairman of the Mistley Thorn Residents Association (MITHRAS). Since the erection of the fence on Mistley Quay in 2008, MITHRAS has been opposed to the fence and campaigned for its removal. MITHRAS fully supports the application by Mr Tucker for the registration of Allen’s Quay as a Town or Village Green.
- 7.207. Mr Meston explained that he would go dog walking on the Quay 2 or 3 times a week; his other activities there happened when and if the mood took him. For example, he would walk from Manningtree via the port road and the Quay back to

his house. He had indulged in crabbing from the Quay on a few occasions with his children when they were young. One of the photographs in the hardback book of photographs had been of his own boys, taken in about 1990. They were all about to get onto a boat called “*Balmoral*” to go to Clacton. They were waiting to get on the boat.

- 7.208. The crabbing activities had taken place once or twice during the holidays during a period of some 2 or 3 years. However they would go about weekly to feed swans from the Quay. As far as he himself was concerned, photography on the Quay was a fairly rare pursuit, possibly 2 or 3 times a year.
- 7.209. In his experience commercial traffic on the Quay depends on the time of day. It is small in amount, and maybe there would be a little more activity early in the morning. It had certainly never caused him to alter his use of the Quay.
- 7.210. As far as children playing on the Quay, both his children and others from the neighbourhood would play there quite commonly, and occasionally they would fish. He had seen people painting and drawing on the Quay; indeed he had seen one or two neighbours doing that. Bird watching, he would certainly see people doing that. People having picnics were usually in their cars. He remembered seeing kite flying when his children were small. One always sees people walking on the Quay. He also sees bicycles being ridden. The carol singing that had been mentioned only happened once since the fence went up.
- 7.211. He had both seen and indulged in swan feeding from the Quay. He had seen yachts and boats using the Quay possibly about 2 or 3 times a week at times in the past, but not since the fence went up.
- 7.212. He had never been challenged in his use of the Quay. He had seen most of the signs that had been put up in the vicinity of the Quay. In his view most of them generally related to the Stockdale Warehouse, whereas the ones near the Thorn Quay Warehouse relate to the situation going into the area to the east of that. He has personally read a number of these signs, but in general they were not relevant to the route he followed.
- 7.213. He goes to the Quay for a walk daily at about 7.45 in the morning. It is quiet in winter and somewhat busier in the summer, but it depends if a boat is in. He had hardly ever seen commercial vehicles parked in the middle of Allen’s Quay, such as a couple of the photographs produced by the Objector had suggested. That was a very rare thing.
- 7.214. *In cross-examination by Counsel for TWL*, Mr Meston said that walking and dog walking were his most frequent use of the Quay. He has had dogs ever since he has been in Mistley, until his dog died last year. The walk he tends to go on is via Manningtree. He certainly sees others walking on the quayside when he is there.
- 7.215. He confirmed that the Mistley Thorn Residents Association covers the whole of Mistley, from approximately where the Towers are to the top of the hill. However MITHRAS does not include Mistley Heath. That is New Mistley. He had been the Chairman of the organisation for 2 months, but the organisation had been

running since 1975. He accepted that in March 1990 MITHRAS appeared to have complained about overnight parking of lorries on the Quay.

- 7.216. **Mrs Alexandra Smith** lives at Millstone Cottage, 4 Norman Road, Mistley. She has been there since 1989, although she had in fact lived in other parts of Mistley during the intervening period. She has had knowledge of the land since 1959 when her family came to and discovered Mistley. She has been back since then every year. Her family had lived in Middlesex back in those days. Mrs Smith had completed one of the evidence questionnaires, dated 17th July 2010.
- 7.217. Her house had been bought in 1989. She had started using the application site in 1994 in an organised way. A group of people had got together to look after the welfare of the swans at that time. It started with the cessation of the spent grain being allowed to go into the river from the Maltings. Swans were in consequence dying of starvation. They had been living on that food until 1994. So a group came together of concerned locals which was called "*Swans In Need*". She personally did not recall the name "*Swans in Distress*", although the organisation is now in fact called "*Swan Watch*".
- 7.218. She had been present at the first meeting of the group, and accepted that for a very short time the group had in fact been called "*Swans in Distress*". Mr Peter French became the Chairman of 'Swans in Need'. There were administrators and practical workers, and it took a while to get going. People however started feeding the swans shortly after the first meeting had been held. The original feeding was done in a somewhat non-organised way in response to the need. Foodstuff was stored in an empty salt-bin on the Quay, which was not very satisfactory. Her role had been to assist in getting something off the ground.
- 7.219. When EDME stopped feeding the swans the group fed them from Allen's Quay; they thought it would be the safest place to do that feeding. There had been no contact at that time with the Mistley Quay and Forwarding Company; no permission had been asked for. Probably Peter French would have contacted them as a courtesy, explaining that the group wanted to help the swans.
- 7.220. It was best both for the swans and for traffic considerations that they fed them early in the morning at about 6.30am, though this was tide-dependent. There was a feeding rota of volunteers. She was one, she did it about 3 or 4 times a week, always in the mornings. The amounts of the food were not at that time worked out in regard to the needs of the swans, it was just what was available and was mainly bread. Grain was also left by EDME in a disused salt-bin along the wall of the Thorn Warehouse.
- 7.221. Things continued like that for quite a while. It was not satisfactory, as rats would get in, or they would find that others had thrown the grain over the Quay and so it was wasted.
- 7.222. Things evolved, and by the time the grain system stopped they had raised some funds and were able to buy feed, a group member had that delivered to his garage and the group would collect it from there. One would collect a sack which one would keep at home and then take to the Quay.

- 7.223. Mrs Smith still feeds the swans now, she has done it consistently from 1994 to date.
- 7.224. Swans in Need disbanded in 2005; there was a lot of politics about what they should be doing, and tensions within the group.
- 7.225. She herself had left with a group of people who supported her, which is now called "*Swan Watch*", the others just disbanded; there is only room for one group. Swan Watch is now a registered charity and still feeds daily from Mistley Quay. The prime objective is the wellbeing of the swans on Mistley Quay. There is a feeding rota but she takes responsibility herself mostly. She normally feeds the swans daily. Initially this was done twice a day, but after a discussion with the Queen's Swan Warden she had been advised it could be left to once a day.
- 7.226. She feeds in the early morning about 6am, adjusted according to the tide if it is very low. If the tide is very low, she feeds later. In winter if it is rough, the swans might shelter around the corner and she would feed from the walls to the west of Mistley Towers.
- 7.227. She could vaguely remember a document being produced called "*Notes for Feeding Guidance*" in the early days. It represented a commonsense approach and was probably produced by Peter French. However it was not always possible to have two people feeding. The requirements of that guidance had been thought up by Peter French, and fluorescent jackets were provided by him.
- 7.228. After the fence was erected in 2008 that made it very difficult to feed swans. She had written to a representative of TWL on 16th September 2008 with the idea of asking for permission to feed them via the Baltic Quay area where there was no fence. But there was not a very satisfactory outcome to that. She asked for permission because that was very much the working area where boats come into the docks. That is not in an area where people wander at will, it is fenced off unlike the open area of Mistley Quay had been. The reality has been that they have in fact carried on feeding the swans through the fence at Mistley Quay. It is difficult because of the fence, especially if there is an on-shore wind. She has never been challenged while feeding swans on Mistley Quay.
- 7.229. She is interested in migratory birdlife and there is always much to see from the Quay. There was more interest in the days before the fence, with barges calling at the Quay, etc. She does go there at other times than when feeding swans, indeed she might go at any convenient time during the day or in the evening on a daily basis, or she might stay on after swan feeding to look at interesting things.
- 7.230. She had seen children playing on the Quay, but not in an organised way, she had seen children with parents having fun on the Quay, running around. There were more before the fence went up but children still go there now.
- 7.231. As for fishing from the Quay, people did do it in the days before the fence and she has seen it taking place. Quite a lot of artists used to sit and do either drawing or painting on the Quay. A lot of people take their dogs for walks on the Quay, that

happens very often. As for bird watching, people do come down to the Quay but not as much now as before. However people now do sometimes stand on the mooring posts and try to look from a slightly higher vantage point.

- 7.232. She has seen people picnicking on the Quay, but not necessarily out of their cars. She has seen some bicycle riding on the Quay and certainly one local man always rides his bicycle along there. As for carol singing, she was aware that carol singers used to go to the cottages as well as other areas of Mistley and she has been there carol singing herself. She has also seen other people not associated with her group feeding swans, although that does not happen so frequently now.
- 7.233. She has seen people swimming off the Quay, but not for some years even prior to the fence. But years ago it was quite regular on a good summer's day to see people swimming. That probably happened more when she was visiting Mistley than since she has been living here. People would even swim among the barges when they were moored alongside the Quay.
- 7.234. As for boating, barges and the sailing club vessels, and a lady with a coracle, all used to get in or out of their craft at the Quay. In fact one person had more than one coracle which they used from the Quay. As for crabbing, that certainly took place, and her own grandchildren had indulged in crabbing from the Quay. She had certainly seen others doing it before the fence went up.
- 7.235. As for the signs around the area of the application site, she had seen them and she had understood that they were cautionary but referred to fork lift vehicles and the likes. In her view the signs are really unclear, and she thought they related to the compound belonging to the forwarding company and the area further to the east. She did not regard them as having any bearing on her use of Mistley Quay.
- 7.236. As for traffic on the Quay, there is usually none there while she is there feeding the swans. It is only a busy port at times; it depends if a boat is in. There can be three vessels in at times, so the traffic can vary hugely. However it does not affect her activities on the Quay.
- 7.237. *In answer to questions by Counsel for TWL*, Mrs Smith said that back in the mid-1990s when the swan feeding group was set up it was Mr French who would have had any contact there was with the Mistley Quay and Forwarding Company. Mr French had also been the Chairman of MITHRAS. As far as the Notes for Feeding Guidance document was concerned, she had assumed that members of the swan feeding group took responsibility themselves as individuals to do what they were doing by way of feeding. The feeding was done from an area where people had always fed the swans.
- 7.238. She agreed that the records of meetings with the Mistley Quay and Forwarding Company from the mid-1990s suggested that there had been a good relationship, and courteous contact between the swan group and the company then owning the Quay. It may well be that the company were supporting what the group did and knew that they were feeding the swans. However she did not know in what way it could be said that the company was 'sponsoring' them.

- 7.239. Before the fence went up in 2008 she had had contact with the company owning the Quay at its local office. She went in, but not frequently, if a concern had arisen about a swan, or in order to pick up tide-tables. She would speak to one of the secretaries. She did call in there but not on a regular basis. There were times when employees at the Quay were helpful, for example to clear up a bicycle that had fallen into the water, or when there was a problem with a particular swan. Someone in the office would try to sort out the problem. She had continued to contact the company during the period when "*Swans in Need*" was being disbanded. She may well have discussed the new way forward with the company's representative.
- 7.240. She knew that a Mrs Kilmartin had tried to get the company to stop her feeding. She thought the people 'at the ground floor' in the company were having a hard time. She had a friendship with one of the ladies in the company's office and talked to her more as a friend than as a company representative.
- 7.241. As far as the position in 1995 was concerned, the swan group were provided with fluorescent jackets from Mr Peter French's company. This was just a precautionary measure in order to be seen on dark winter mornings, to be seen by traffic generally, including port traffic. It was not a requirement, it was a common sense thing, and not everybody wore those jackets.
- 7.242. In autumn 2008 Mrs Sargeant from TWL had phoned her after she had written her letter to the company. Mrs Smith's recollection was that the letter referred to the area further down towards the Baltic Quay. Even in respect of that it was not her view that Mrs Sargeant had given "*permission*" to feed from there; it was more a question of Mrs Sargeant indicating that she could not see why Mrs Smith should not continue. Mrs Smith's view was that she does not have "*permission*" to feed swans from the Quay even now. However she cannot get in when the Quay is not working. She had been asking for special authority to feed swans from a part of the Quay to which she had not previously had access. She certainly did not need permission to feed swans from Allen's Quay in her view.
- 7.243. The dog walkers' route which she was familiar with was via the port road and then the edge of Allen's Quay and up to the High Street via the Swan Basin. Children playing on the Quay were usually doing so near the Quay edge. Her own grandchildren had gone crabbing on the Quay but they are all adults now aged from 20 to 26. One of the families lives in Manningtree, and two others of her grandchildren live in Colchester. They had spent a lot of time in Mistleley with Mrs Smith. Crabbing was something which older children would do without parental support, or younger ones with their parents. It is a summer activity which was seen on the Quay quite frequently.
- 7.244. As for the notices on the EDME building, the precautionary notice about fork lift trucks is not in a very appropriate place to attract attention. It says 'Danger' but in fact most people do not walk along there, eastwards past the side of the building. Fork lift trucks do go through but not all the time. She accepted that fork lift trucks can operate on both sides, that is beyond the Thorn Quay Warehouse and in front of it. She was not sure people read these notices anyway, there are so many of them. She accepted that they were warning notices of a kind suggesting that

this was a working area. However it is also an area of great beauty which people enjoy going to.

- 7.245. *Ms Kate Worsley* lives at 3 Millers Reach, Mistley. She has lived there since 2007, and prior to that at 4 The Green, Mistley since 1999. She had completed one of the evidence questionnaires, dated 30th April 2013.
- 7.246. As for activities on the Quay, when they first moved to Mistley they were working at Canary Wharf and they would come to Mistley at weekends because they regarded it as a beautiful place. She would walk to the Quay and do a circuit either alone or with others.
- 7.247. Then in 2002 she got an office at Topsail House, by the sub-station. Prior to that she had worked in her own house. Her first child was born in 2001. Thereafter she would walk around and sit on the bollards, feed the swans, socialise etc. She did not know anyone in Mistley at first, but on the Quay one would bump into people who one knew, or she and her family would take friends and visitors there.
- 7.248. When her children were a bit older they went crabbing there in the summer, and they would pass by and see other people crabbing and enjoying themselves.
- 7.249. As for swan feeding, the longer they had lived here the more habitual it became to do this. It was done more often in winter, in fact every day. She had also indulged in photography on the quayside if the sky was interesting. As far as riding bicycles was concerned, that would generally be along the port road down to Allen's Quay. At evenings and weekends in particular the Quay is a big wide open space.
- 7.250. From her office they would often have lunch on the Quay, they would sit there and have lunch usually sitting on a bollard. She had never taken a chair out there. As far as kite flying was concerned, that was not usually very successful with young children, but they did try several times. Use by them for some purpose or other was almost every day. She had been working in London during the day in her early period of living in Mistley, but from 2001 onwards when her children were little she was there on the Quay more than once a day, often more than twice.
- 7.251. She was in the Topsail House office until 2007, but gave that up on moving to her new home in Miller's Reach.
- 7.252. As far as activities by others were concerned, she had seen children playing there on the Quay, more frequently at weekends and holidays. When she was there with their own children, as often as not there would be other children there too. As far as fishing from the Quay was concerned, that had not happened so much in the latter years, even before the fence went up.
- 7.253. As far as seeing people painting or drawing on the quayside was concerned, she would say that in the summer months one would see people doing that on perhaps 3 or 4 weekends or other occasions in the year. Conversely there is always someone on the Quay indulging in dog walking there. She had seen informal games of football or cricket take place on the Quay, but nothing organised. It was

more like kicking a ball about, or cricket with a plastic stump. Bird watchers are more seasonal. Some do it from cars parked along the front of the Quay or in front of the houses, and some of them would stand on the quayside. It is very frequent that one would see people eating their lunch from cars parked on the Quay. She had seen other people trying to fly kites but only infrequently.

- 7.254. As far as people walking on the Quay was concerned, there is often no-one there, but usually someone would come along at some point as often as not. She has seen touring cyclists stop on the Quay, both adults and people with children. As far as sailing is concerned, people would sail past or moor at the Quay with barges or yachts or kayaks. Only a few brave people would swim in the water however. She recognised the woman who had a coracle and used it from the quayside. She was the girlfriend of a person in the workshop who she knew. The swimmers she knew were local, and also she knew some locals who moored their boats at the Quay from time to time.
- 7.255. When they first came to Mistley they would use the Quay at weekends or in the evenings, and it was usually free of any commercial activity. Then when they were here in the week they realised that it was busier when a ship was in, and also saw EDME trucks around the eastern end of the quay. Nevertheless her impression had always been that this was a public place, and that there was no conflict between people and traffic. All of the traffic moves fairly slowly and it is quite easy to be aware of what is coming when. The only time of more concern is when lorries stack up from the Mistley Towers area towards the weighbridge.
- 7.256. She had not seen lorries parked on the Quay in the period relevant to the present Inquiry. She had seen lorries on the Quay just before the fence was put up, but she had not otherwise seen lorries stop on the Quay itself.
- 7.257. As far as signs were concerned, when they first moved to Mistley there were a few very old signs on the warehouse at the east end of the Quay. There have been new ones or renewed ones placed there since, and she had read some of them. Her recollection was that when they first came to the Quay the signs notified people that it was a working Quay but other than that they did not affect people's use of the Quay.
- 7.258. *In cross-examination by Counsel for TWL*, Ms Worsley said that she is involved in the "*Free the Quay*" organisation. Because of her background as a journalist she had taken on the role of dealing with the press and publicity. The objective of that organisation is to restore the public access to the Quay, and the removal of the fence which impedes free access to the Quay. The Commons Act Applicant is also involved in "*Free the Quay*". Certainly "*Free the Quay*" supports the application as its aim is to restore public access. The fence is the principal obstacle to freeing the Quay.
- 7.259. When she first moved to Mistley she was a commuter until her eldest child was born in 2001, thereafter from 2002 – 2007 she had worked from Topsail House in Mistley.

- 7.260. When her children were young she would get outside with them from about 10 or 11 a.m. Later when they were at pre-school she would get out onto the Quay in the afternoon with them. Nowadays they are at school and she goes with them in the evenings after school and at weekends.
- 7.261. As for the routes they would use when walking by the Quay, they followed various circuits. If they took bicycles down there at weekends they would usually go in one way and out of the other. Her children are now aged 12, 10 and 6. They are not quite ready to do a family bike ride together. But learning to ride with them had generally taken place on the port road.
- 7.262. From 2004 onwards, during the working week there could be quite a lot of lorries on the port road. Cycling with her children was only at weekends, it took her children months to learn to ride their bicycles. Port activity during her time has generally been on weekdays.
- 7.263. She agreed that the Quay area is used as a route of transit by port-related vehicles. This traffic can include HGVs or dock-runners or fork lift trucks. She has certainly seen vehicles of that kind there. If there was port activity going on on the Quay then she and her family would move out of the way in order to avoid danger.
- 7.264. In her experience in the period up to 2008 traffic was not coming out of the Stockdale compound at its eastern end directly onto the Quay. Lorry traffic would go up either towards the Swan fountain or diagonally across the Quay towards the port road, and out via Mistley Towers. There were some gates in the eastern end of the Stockdale compound, but to her that always seemed to be as good as a fence because the area was full of stored material. She had never seen those eastern gates in general use; her view was that they were not generally used. Indeed she remembered when there had been no fence there; before 2004 material tended to be stored in a triangular shape and she was not aware of vehicles going back and forth coming in and out of that material. She accepted that in the area very close to the Thorn Warehouse at the other side of the Quay, the port traffic would be near to the edge wherever it was going to, thus if one saw a lorry coming through one would not hang around and get in the way.
- 7.265. She had not seen lorries parking on the Quay although she had sometimes seen vehicles idling there. Generally commercial vehicles were not parked on the Quay but were passing through. Nor had she ever seen trailers parked on Allen's Quay but only on Baltic Quay.
- 7.266. She had seen lorries being unloaded or loaded by EDME on the eastern side of Allen's Quay. Indeed that was exactly the sort of thing her children were most interested in. They would stand and watch but not get in the way of the people working.
- 7.267. She had seen fishing from the Quay in the early 2000s. She had seen the "*No Fishing*" sign which mentions "*These Quays*", so she assumed it applied to the whole length of the Quay but it didn't discourage people from fishing however.

When she saw fishing going on in her early years in Mistley it would usually be at most two fishermen doing it.

- 7.268. As for people painting and drawing she personally did not know any of them, she particularly remembered a couple of years around 2003 or 2004 when 3 or 4 times a year she saw people there doing that. Otherwise it was something which happened occasionally at weekends during the summer months, in her experience.
- 7.269. As far as dog walkers are concerned, they would walk around the Quay generally, and possibly stop and have a chat with other people. As for games of football or cricket on the Quay, her children had been small and un-sporty, and a ball did not generally get very far, but they did that more often than trying to fly kites.
- 7.270. *In cross-examination on behalf of EDME/Anglia Maltings*, Ms Worsley said that the football and cricket she had referred to had involved herself and her family. She had seen other people kick a ball around there, but as far as her family was concerned they would not do it during the working hours of the port. The concrete area in fact made it easier to kick a ball. It was easier to kick a ball around on the Quay than it was on “*The Green*” in Mistley because there was long grass there which made it difficult to kick the ball.
- 7.271. *In re-examination* Ms Worsley said that she could remember seeing the Stockdale Compound full of stored materials which would have made it impossible to drive vehicles in and out of its eastern end.
- 7.272. **Mr Ian Tucker**, the Applicant, lives at 4 High Street, Mistley. He had completed an evidence questionnaire, dated 21st July 2010. He explained that he is a member of Mistley Parish Council which supports the village green application. He pointed out that Tendring District Council had issued an Article 4 Direction in relation to the erection of fencing on the Quay.
- 7.273. Mr Tucker said that he had lived at 4 High Street, Mistley since 1988, and had been making and restoring musical instruments at the Mistley Quay Workshops since 1979. Before he came to live in Mistley he lived in Manningtree. His work is by nature solitary, so in addition to walking several times a day between his house and his workshop he takes breaks from work from time to time; those breaks often involve wandering around the Quay, and frequently he has lunch on the Quay as well.
- 7.274. Since coming to the area he had become interested in the history and life of Mistley Quay over the centuries. He explained how the Quay had come to get its various names, and in particular the origin of the name Allen’s Quay for the Quay forming part of the application site. Most people however refer to the application land as Mistley Quay or just the Quay. The Quay had plainly had an interesting and active history.
- 7.275. As far as signage on Mistley Quay was concerned, all of the signs in Mr Tucker’s view were at entry points to those parts of the Quay that are operated commercially by TWL. Many of them clearly relate to what is obviously the operating area around the Stockdale Warehouse, and give the usual warnings in

relation to industrial premises. All the signs at the western end of the Quay clearly relate to the commercial and industrial operations carried on within that compound.

- 7.276. The signs attached to the western end of Thorn Mill deal with questions of access and safety. They clearly relate only to the commercial and industrial areas at the eastern end of the Quay beyond the corner of that warehouse. They are situated at the entrance to those areas, and their aspect and the industrial nature of the site beyond this point make it clear that that is so. Other signs are clearly directed at waterborne traffic with their aspect towards the river. In his view those signs clearly identify the Quay at certain points as being working areas, and in Mr Tucker's view distinguish those areas from Allen's Quay where there are no such signs.
- 7.277. There are no signs prohibiting or restricting entry to the Quay on either side of the Swan Basin or indeed on the Quay itself.
- 7.278. The sign relating to "*No Fishing*" was erected for the protection of swans in the early 1980s following several incidents of injury to the birds from lead weighted nylon filament fishing line. Mr Tucker's view was that while the "*No Fishing*" sign must relate to Allen's Quay as well as other parts of the port, the other signs on or near the Thorn Mill clearly related to the areas beyond that.
- 7.279. Mr Tucker said that his relationship with the Quay workers over three decades had been an easy one, with of parties acknowledging each other with a wave or the occasional brief conversation over the noise of a fork lift, on whatever topic was of current interest. However since the erection of the fence in 2008 contact with the Quay staff has waned to become almost non-existent, with a few exceptions.
- 7.280. Mr Tucker explained that he had tried on several occasions to initiate a dialogue with TWL to seek a negotiated resolution of the issues which had been raised by the erection of the fence of Allen's Quay, and to avoid the need for an Inquiry into the village green application. Local people were not opposed to the idea of any fence along the side of the Quay, but a low post and chain fence such as used on many other quaysides would be more appropriate and acceptable. However no dialogue with the company owning the Quay had proved possible.
- 7.281. After he had arrived in Manningtree in 1972, from about 1975 he used to go down to Mistley Quay in order to explore the area. Early in 1979 he had been told a workshop was available on Mistley Quay and he rented it. He still occupies a workshop down there, although it is not the same one as he originally occupied. The access to his workshop is from the Quay but the windows of it all face the Swan Basin.
- 7.282. As far as his recreational activities on Mistley Quay are concerned, they have involved walking; most of the time he takes walks for recreation. He wanders around the Quay in order to clear his mind and for fresh air. He does that and has done that at least once or twice a day. He usually works on Mondays to Fridays but sometimes on Saturdays. Quite a lot of the photographs in the hardback book of photographs had been taken by him himself. Some of them show his own

children; for example there were some photographs taken in about 1983 showing his children. His children had learned to ride their bicycles on the port road.

- 7.283. He has sometimes fed swans from the Quay on behalf of Swan Watch, or just on his own initiative. He also sometimes has a picnic lunch on the Quay. When he was working more at his workshop he would do that almost every day in the summer. He used to put his lunch on some railway buffers when they were still in place there on the Quay.
- 7.284. He has played on the Quay with his own children who were born in 1982 and 1985. He played with them there from the late 1980s through to the mid-1990s. His children also would go out onto the Quay themselves when they were older. They also indulged in crabbing from the quayside for educational reasons. He himself always looks at the view when he goes for a walk on the quayside.
- 7.285. As far as the activities of other people are concerned, he had seen children playing there both by themselves and with their parents, promenading or walking around, although he himself had not seen them kicking balls there. It is not that frequent to see children there during the week but at weekends and holidays they are there a lot.
- 7.286. Fishing has mostly been undertaken from the eastern end of the Quay, but generally not since before the fence went up, and it was not a common activity. By the eastern end he meant near the eastern end of Allen's Quay. However he had last seen someone fish, over the top of the fence, about 2 years ago.
- 7.287. Drawing and painting on the quayside used to be very popular, and was sometimes done by people in groups. The corner which was near an old railway buffer used to be well used by those people. He would not know if the artists were local people or not.
- 7.288. As far as dog walkers were concerned, there were 3 or 4 people he knew who regularly walked dogs there, including Mr Meston. They were certainly mainly Mistley people. Bird watching used to be a great pastime there for people before the fence went up. One would sometimes see groups of people doing that there, he thought that one or two of them were local people. People did picnic in their cars or sometimes sit on the edge of the Quay. One or two people came down there quite regularly, perhaps 5 or 6 times a week one would see that.
- 7.289. People walk on the Quay a great deal and they tend to wander round the Quay either individually or in groups. Some of them might have been walking the Essex Way. His own children used to cycle on the Quay.
- 7.290. As for boating there used to be quite a few yachts and barges, private ones, which used to come up and moor alongside the Quay. For example there was one from Amsterdam which came every year for 5 years or so. The owner was an oboeist from the Concertgebau. He had also seen a Canadian glass fibre canoe being launched from the Quay, and someone who had a dinghy moored out in the estuary would go out to it in a lightweight canoe.

- 7.291. As far as crabbing was concerned, both his son and daughter had done it, and also he had seen other people doing it. They would lay on their stomach using string hanging over the side. Quite a lot of people have indulged in photography on the Quay. As for picking elderflowers and berries, the Quay was not the best place to pick those, but alongside the Thorn Mill and also the west side of the road down from the Swan there were berries etc., that could be picked. He personally had never swum from the Quay, but he knew of people who had done so, especially a lot of children. He last saw that happen a few years before the fence was put up. He had also seen courting couples in cars on the Quay. Neither he nor anyone else had ever been challenged in respect of use of the Quay, or been told that they should not be there.
- 7.292. As far as traffic on the Quay was concerned, he would say that since 1979 the vehicles used as dock-runners had been much improved, but the frequency of their usage had gone down. They used to be very intensively used at the Stockdale Warehouse. In his experience any traffic congestion tended to happen on the port road, rather than the Quay itself. For example lorries might pull up while waiting for the weighbridge, but that was not a common occurrence. There used to be a trailer park on the south side of the port road, but that was sold about 2002 to Gladedale, and is no longer used. It was not a problem in his experience as it was not used frequently.
- 7.293. When a ship is in port the open quay area can be quite busy, with vehicles perhaps passing at 15 minute intervals, and occasionally two vehicles passing on the Quay. However vehicles are not typically parked on the Quay; he had only seen that happen twice.
- 7.294. As far as access from the Stockdale compound was concerned, when he first came to Mistle there was no access into the east end of the Stockdale compound, there were buffers there. The present fence was put in in 2003/4. Mostly vehicles went into the Stockdale compound via the port road, and not via the eastern end of the compound. Now since the additional 2008 fence went in, there had been some access into that compound directly from the east, with a crop fertiliser known as Cropcare. With that cargo there could be very intense activity for one day. Smallish lorries are used to do that along the edge of the Quay. It happens about once a month.
- 7.295. One of the aerial photographs produced by the Objector TWL showed apparent tracks from that Cropcare spilling out over the sides of the vehicles. The tracks shown in that photograph are not worn in the ground, they are just the Cropcare being spread by the lorry wheels. Those tracks occur for one day while that material is being delivered, and then TWL send around a sweeper to sweep it all up. Other than that those gates at the eastern end of the Stockdale compound are very little used; they are shut for weeks at a time.
- 7.296. Generally lorries do not turn on Allen's Quay itself, they typically turn around in the vicinity of the weighbridge, and the Applicant's side had produced a number of photographs to show how that happened. He had only seen lorries turn on Allen's Quay itself on a couple of occasions ever.

- 7.297. As for the basis of the application, Mr Tucker explained that what is sought is to bring back the use of the Quay for the people of Mistley. The removal of the fence along the quayside would certainly assist sailors and crabbing, but is not so relevant to the activities which take place on the surface of the Quay.
- 7.298. *In cross-examination by Counsel for TWL*, Mr Tucker agreed that the land in the application site had a variety of functions. One element of it is public highway land. There is also the port access road which extends from the High Street to the start of the old adopted road. The open quay area is also used for access between different parts of the port. It is used for passing and re-passing between the eastern and western ends of the port, for transiting goods over the Quay as part of the port operation. Much of the storage of the port is at the western end, but the vessels are now generally loaded and unloaded at the eastern end at Baltic Quay.
- 7.299. Mr Tucker did not dispute the proposition that approximately 90% of the cargo shipped via the port has to be brought across Mistley Quay, and the other 10% approximately is taken in or out via Batter Pudding Hill. The means of transit of the cargoes across Mistley Quay would be by HGV, dock-runner or fork lift truck.
- 7.300. In his view children playing or crabbing, lying on the Quay with a string, could still take place even when the Quay is being used for transit. The Quay is quite a wide area between the compound and the quay edge. Before the present fence went in, there was quite a safe area which could be described as being 'in the lee' of the Stockdale compound. The transiting vehicles did not go right up close to the edge of the Quay, certainly in the western half of the Quay.
- 7.301. The area now included in the Stockdale compound extension used to be safe from passing vehicles up until September 2008, and that was so even while vessels were being loaded or unloaded. It was more or less in the area of that triangle where activities could still be carried on on a busy day.
- 7.302. As for the Stockdale compound, Mr Tucker's recollection was that there used to be an old timber fence which had been erected in about 1976, but by the early 1980s it was damaged and then it was removed. He did remember that there could be an apparent gap at the eastern end of the Stockdale compound, but his recollection was that there used to be a difference in level there between the level of the compound and the Quay to the east of about 6 inches, and that it was not really used as a through route. Then a temporary HERAS fence was put in around the compound that was there for a period which he thought was longer than 18 months. Then a replacement fence was erected in about 2005/6 with gates. He accepted that gates are not usually put into a fence unless there is an intention to use them, but he did not remember them ever being used regularly like that. In fact they were only put there a short while before the present fence was put in place.
- 7.303. When he is working in his workshop he can see none of the application site, but when he was in his other workshop you could see the Stockdale compound. The other workshop he used had a window on its back wall. He tends to be in his main workshop between 9am and 6pm, but he gets bored and goes upstairs where there is a view.

- 7.304. He accepted that there are other uses of the land which has been claimed for a town or village green, for example the land is used for residential access to the flats which have been created in the Maltings. So a number of cars would pass along the Quay back and forth in relation to that occupation, he accepted that. He also accepted that he had on occasions seen two HGVs passing on the Quay. However when that happened the passing would be at an angle which would produce the result that the lorries were quite a lot further over than the edge of the Quay.
- 7.305. He had only occasionally seen the turning of commercial vehicles on Allen's Quay itself. He himself does not have a car but people do park by Grapevine Cottages. He had seen lorries being loaded and unloaded on the quayside in relation to the operations of EDME. However it was very rare that there was external storage near the EDME warehouse. There had been some granite setts there on an occasion, but that was a very rare occurrence.
- 7.306. He accepted that a "*lash barge*" could be seen alongside Allen's Quay in one of the photographs. However that had been in 1990. Lash barges are not put there frequently. He believed that the port used to put lash barges there for a short period before they were discharged further to the east, at Baltic Wharf. Lash barges would be brought by tug to Allen's Quay for a short period, in the past. Oddly enough the presence of a barge alongside the Quay is helpful because it creates quiet water for crabs between the barge and the Quay, and there would still be space between them in order to go crabbing.
- 7.307. It was most unusual to see lorries parked on the Quay. He remembered one incident when there were several such lorries parked on the Quay, and he wondered why photographs had been taken of that occasion. He personally had never other than that one occasion seen so many vehicles together on the Quay. As far as EDME was concerned, they used to use their warehouse in the early days up until about 10 years ago, but it was only temporary storage that ever took place outside EDME.
- 7.308. His understanding was that throughput of the port had reduced as ships had got bigger. However he did not know that there was more traffic in the earlier days. There were times he was sure when the port was busier, but he did not know the details. He accepted that the greater the tonnage the more goods would need to be moved.
- 7.309. He accepted that he had been in correspondence with Tendring District Council in November 1994, objecting to an application to renew a permission for a trailer park associated with the Quay. However that was in relation to an application for external storage in front of the warehouses, not anywhere on the present application site. There was concern also because vehicles using the port were very dirty at that time. They would come to the Quay and keep their engines running overnight for example. He accepted that his letter of 2nd November 1994 might have been slightly emotive, because he wished to ensure that external storage did not take place, in order to leave more working space. He had also written a letter in October 2003 to the Mistley Quay Company complaining about

overnight parking in the weighbridge area. His comments about lorries overnighing more, and frequently arriving at all times of the night, related to the circumstances in that location, not the open quay.

- 7.310. As far as the notices or signs on the site were concerned, he was aware of those on the edge of the EDME building. He was also aware of the notices up at the western end of the port road near Mistley Towers. The site safety notice up at the latter position had only been there for a few years, since a footpath had been established in that vicinity. His understanding was that the notices along the port road related to the area of the Stockdale compound and the weighbridge area. That sign and the other similar signs clearly related to the TWL premises behind the points where the signs were. The signs do not apply to the dock road itself.
- 7.311. As for the use of the Quay by children playing, a lot of that happens at weekends, or generally when the port is not operating. He accepted that the port has occasionally been worked at weekends.
- 7.312. As far as his comments about fishing was concerned, he had seen one person fishing over the top of the fence 2 years ago. Even before the fence it was relatively infrequent. Years ago there had been a lot more fishing near the sewage outfall.
- 7.313. As far as people drawing and painting were concerned, they would be there in the corner with chairs, or sitting on the piles of granite blocks in the Stockdale compound, and also around the edge of that compound, or they might sit on a bollard or on the edge of the Quay itself.
- 7.314. As far as dog walkers were concerned, he knows and has known some of them. It is a frequent activity.
- 7.315. As far as the hardback book of photographs is concerned, he accepted that some of the photographs in it do relate to the period before 1988, and that some photographs were taken after the end of the 20 year period.
- 7.316. As far as requests for permission to moor at the Quay were concerned, he acknowledged that on one or two occasions permission had been asked for. For example when the vessel called the Balmoral docked at the Quay he was sure that permission had been sought and was given. However even on that occasion a lot of locals came down onto the Quay to see the vessel and to watch what was going on. In fact he had been surprised how many people came.
- 7.317. He did not accept that there had been a dispute about access to the Quay itself prior to 2008, other than the dispute with the Stour Sailing Club about access across the Quay. There had been no dispute about access to the surface of the Quay itself until the fencing started to go up.
- 7.318. *In answer to questions on behalf of EDME/Anglia Maltings*, Mr Tucker said that he had not been aware of the sign saying “*Danger No Mooring*” attached to the northern side of the Thorn Quay Warehouse. He had always understood that the commercial Quay proper started at the east of the application site.

- 7.319. He accepted that lorries used to come onto the Quay and load materials up into the EDMC warehouse. He had often seen fork lift trucks take material out of the doors which lead onto the High Street. He cannot see the eastern end of Allen's Quay from his workshop, but he does see it when he is out and about. He is there twice or more a day when taking his breaks.
- 7.320. He has seen people doing drawings and paintings up by the Swan Basin, they are quite frequently there. The brick pavement that such people stand on is in fact within the application site. One sees that less now, but in the mid-2000s groups or sometimes individuals did go there for painting and drawing. However the access to the east side of the Swan Basin had never been obstructed by anyone as far as he was aware.
- 7.321. He acknowledged that he had done a traffic speed survey in 2013, so that would not take into consideration EDMC's use of its site because it had stopped by then.
- 7.322. *In re-examination* Mr Tucker said that the passing of commercial vehicles on Allen's Quay was really quite a minor occurrence. Transit of commercial vehicles only took place about once every 15 minutes on a busy day when there was a ship in port. On the day of his speed survey only one of the transits which took place involved vehicles passing on the Quay. The typical time taken by a vehicle to cross the Quay from one side to another was between 18 and 24 seconds, the survey had shown.
- 7.323. **Professor David McKay** lives at Acacia House, High Street, Mistley. He has lived there since 2000. From 1989 to 1997 he lived in Manningtree. From then until the end of 1999 he had been living in California but was a frequent visitor back to the area. He had completed one of the evidence questionnaires, dated 21st July 2010. He had known the site since 1989 and used it between 2000 and 2010.
- 7.324. In relation to his activities on the Quay and the application site, he said that although he is not a particularly keen photographer himself, his wife is and he would often accompany her to take photographs of scenery, or indeed of their young daughter born in 2002. A photograph of him and his daughter on the quayside in about 2003, taken by his wife, was in the hardback book produced by the Applicant. He usually accompanied his wife with her camera when she took photographs in that locale. She usually has her camera with her but she does not take photographs every time they go there.
- 7.325. They do tend to talk to other people they see on the Quay, and know some of them socially. The frequency of their visits to the Quay depends on the time. When their daughter was young they did take her down there several times a week. Since 2005/6 their visits had been a little less frequent, probably twice a week between 2005 and 2008. In reference to some barbeque events on the Quay, he said that those were after 2008 and related to the 'Free the Quay' campaign.
- 7.326. Looking back more generally, the time of their visits to the Quay was usually throughout the week, weekdays or weekends, but usually after 10.00am and before sunset. Those visits have coincided with commercial activity on the Quay,

but which has had no significant impact on their use. There had been commercial vehicles on occasion. If the port is active on any day, the occasional HGV passes across the Quay at relatively infrequent intervals. That had occurred when they were there with their daughter, including taking their daughter in a pushchair. Common sense is used by the vehicular traffic, and if one is on the Quay one takes all the usual sensible precautions.

- 7.327. The busyness of the Quay when a boat is in is highly variable. When no boat is in there is often no commercial traffic at all. They had been able to use the Quay quite freely and happily, co-existing with vehicles. He had never seen Allen's Quay in a congested state. Things had been congested up by the Stockdale Warehouse, and at the top of the port road. Before 2003/4 one could have seen lorries stacked up in front of Mistley Towers or in New Road. He had not seen commercial vehicles parked on Allen's Quay, or impeding their use of the Quay. Never had their right to be on the Quay ever been challenged by anybody.
- 7.328. In relation to signs, he had always assumed that the signs close to the Stockdale Warehouse referred to activities in the Stockdale Warehouse compound. He was familiar with the signs by the Thorn Warehouse. The one on the river side is clearly meant to relate to activities beyond Allen's Quay towards Baltic Wharf. The signs on the Thorn Warehouse itself also seem to relate to the position beyond there. He had never assumed that those signs apply to Allen's Quay within the application site. There are no signs to be seen by anyone coming straight down onto the site from the High Street.
- 7.329. As for activities witnessed on the Quay, he had often seen children playing in that general area, including his own child and his friend's. However his daughter was not allowed to go down there and play unaccompanied. Even now they are reluctant to let her cross the High Street by herself. Once she is over on the Quay he would not be concerned as to her safety, even when the Quay was not fenced.
- 7.330. As for fishing he had seen it infrequently. He had seen plenty of painting and drawing going on, probably occasionally rather than frequently. He knew some of the people indulging in this activity, for example a gentleman from Wrabness.
- 7.331. Dog walking he had seen frequently on the Quay. He named people who he had often seen dog walking there. He had seen bird watchers on a number of occasions, possibly not frequently though. He had seen them on the Quay with their binoculars, and also up by the Swan Basin. They are usually fairly identifiable when they are out of their cars. As for picnicking, he had seen that mostly since 2008, but he had seen people eating sandwiches there at earlier times. Kite flying he had seen infrequently.
- 7.332. He had very frequently seen people walking on the Quay; members of the public wandering around the site. It was used as a general public area. Bicycle riding he had seen, and indeed he had taught his daughter to ride there. As for boating, he had seen people getting in and out of the water with kayaks, canoes, and he had seen recreational sailing, mooring and leaving of the Quay. He personally had embarked on a barge there for a 3 day trip in October 2000. He with his wife runs the Thorn Hotel, and until the fence was erected sailors mooring at the Quay and

coming in for a drink was quite a frequent occurrence. They had opened the Thorn as a hotel in March 2004.

- 7.333. He had seen crabbing going on from the Quay, but not very often. Swan feeding took place very regularly. He had been involved in it himself, and other people he knew were also involved. He did remember people throwing feed in from plastic buckets in an organised way. Other people threw food in as well, including bread from the kitchen of the Thorn. He has also seen people on the Quay watching the sunset, and he himself had watched the sun rise there.
- 7.334. *In cross-examination by Counsel for TWL*, Professor McKay agreed that he had made a statement which was before the Inquiry, dated 10th November 2009. That statement had described a walking route that he would quite regularly take, but that was not the route which he would always take. What he had said in that earlier statement was entirely correct, and was not at all incompatible with what he had said at the Inquiry. It was true that he had had to avoid vehicles on the Quay on the rare occasions that there was a vehicle moving across it; that is a matter of common sense. In that limited sense his route would be “dictated” by commercial vehicles, in that one has to avoid them.
- 7.335. He had been on the Quay when vessels were loading or unloading at the eastern end of the port. He did not know the percentage of cargo that came out towards the west. He had seen HGVs and fork lift trucks and flat bed lorries pass across the Quay, and also private vehicles to the dwellings down there to the east. Nevertheless vehicles passing are relatively infrequent. Sometimes there are no commercial vehicles to be seen at all.
- 7.336. If he walked his daughter along to Manningtree he would have to be very much more careful as to her safety than he would normally have to be on the Quay. He did not suggest that the traffic on the Quay had no impact at all on use of the Quay, but the impact of commercial traffic had been insignificant in his view.
- 7.337. His reason for not allowing his daughter to go down to the Quay on her own was because of traffic on the High Street, rather than traffic on the Quay. In general lorries did not drive along close to the edge of the Quay in his experience.
- 7.338. It was true that from the edge of the Quay there could be a drop of several metres, depending on the state of the tide. He personally had never been there when lorries were moving in the way shown on some aerial photographs taken in 2012, when the fertiliser crop was being loaded or unloaded. In his experience commercial vehicles always travelled across the Quay closer to Grapevine Cottages and that side of the Quay. He personally was not even sure that there were gates on the Stockdale compound which were used by commercial traffic before 2008. However even if gates were there, in the qualifying period he had never encountered a commercial vehicle that close to the quayside edge. He agreed that lorries do come close to the quay edge when passing the Thorn Warehouse at the north-east corner of Allen’s Quay. The recreational use on the Quay was on a much more secure, safer area than many other parts of Mistley, especially the High Street.

- 7.339. *In answer to cross-examination on behalf of EDME/Anglia Maltings*, Professor McKay said that he had from his own study a clear view of the Swan Basin, and part of the application site. His study is on the north-east corner of his house. From there he could see EDME deliveries taking place. He does recall having seen them. Whether they were frequent would depend on the time of day. Sometimes they were frequent, but sometimes not. His recollection was predominantly of fork lift trucks going across the High Street to the High Street end of the building. He did not remember lorries on the Quay so much. The EDME traffic on the High Street which he had noticed came down the High Street and then turned right into a bay at the top of the Thorn Warehouse, with plastic sheeting over an entrance there.
- 7.340. Nevertheless he had seen some deliveries up from the Quay to the upper doors of the building.
- 7.341. The bird watching activity which he had observed had predominantly been on the paved area by the Swan Basin, but may have been on the roadway as well.
- 7.342. **Mr Clive Saxby**, lives at Fountain House, High Street, Mistley. He had completed one of the evidence questionnaires, dated 17th July 2010. He had also produced another earlier statement dated November 2009. He had been born and brought up at 1 Grapevine Cottages, and then moved into Fountain House next door. He had been there basically for the whole of his life, apart from 1968/1969 when he was in Colchester. Therefore he had a lifelong knowledge of the area. He was born in 1954 and he in fact bought Fountain House from his parents in 1972.
- 7.343. When he first lived in Fountain House he used to use the different route from the west to Allen's Quay which then existed. He also used the routes down to that block of buildings from Swan Basin.
- 7.344. Both as a child and in subsequent years he had used the whole of the area of the Quay, in particular between the tramway and the edge of the Quay, for a variety of purposes including: fishing from the edge of the Quay, which he had enjoyed throughout his life; mooring a boat alongside the Quay for short periods on many occasions between 1977 and 1983; launching an inflatable dinghy which he kept in his garage; learning to swim from the Quay, as did all his three children; as a child using the Quay for crabbing; subsequently feeding the swans and sea birds from the edge of the Quay; in his younger days the peaceful quiet of the Quay on a summer's evening made it a good place for courting.
- 7.345. He had been aware since about the mid-1990s of a sign on the Quay relating to fishing and mentioning the danger to swans of discarded tackle. That sign was often ignored and he had never understood it to be a prohibition on fishing. It did make him take additional care to avoid harming the swans.
- 7.346. Over the years he had seen many other people enjoying the Quay. This included bird watchers, artists, ramblers, people walking dogs, picnickers, cyclists and yachtsmen coming alongside for provisions or refreshments in the Thorn.

- 7.347. The public have also always used the Quay for parking their cars. At weekends in the summer the car parking on the Quay can become quite congested, particularly with people visiting the Mistleley Quay Cafe and the workshops. Since his children when visiting found it difficult to park, he erected a no-parking sign outside his own house about 12 years ago but that proved not to be very effective. He had always regarded the Quay as open to the public at large.
- 7.348. He was not aware of any obstruction ever having been put in the way of the use of the Quay, except for the fence erected in 2008. No-one had ever objected to the way in which he or others had used the Quay over the years, nor have they ever suggested that permission was required to use it. In 2009 a person who he understood to be called Mr Reason of TWL had told him he should not park in front of his house as it obstructed the roadway. He, Mr Saxby, had pointed out that the only reason why the roadway was restricted at that point was because the firm had erected a fence a year previously which changed the route of the road and made it much narrower. It was that which was causing the obstruction. Apart from that no-one had ever objected to his parking on the Quay, which he believed to be a right he shared with everyone else.
- 7.349. He had never used any force to enjoy using the Quay, nor had he done so secretly, nor had he ever sought permission or considered that he needed to ask for permission.
- 7.350. He further explained that when he had used the Quay with a boat it was not a boat that he owned, but he was involved in a fishing boat. They also had a rubber dinghy in their garage on the Quay. The business with the fishing boat finished in 1983 he thought.
- 7.351. He confirmed that children playing on the Quay was common, and that for all his life children had played there every day of the week, even on school days when they come out of school. They are Mistleley children, he recognises the local ones. It is general play and can be with scooters, trikes etc. Even the previous night a child had been out there with a two-wheeled bicycle, and another one on a scooter.
- 7.352. As for fishing, he confirmed that he had fished there. He had last done so about 6 or 7 weeks before the fence went up. He personally had had two rods to fish with and fished quite frequently, especially if he had been out in his boat and had some bait left. They would use that bait up if the tides were right, on the following day or that evening.
- 7.353. As for drawing and painting on the Quay, clubs used to come down there with 10 or 15 people doing it sometimes, but he did not know them. Dog walking is extremely regular there; he has two dogs himself. Perhaps 7 or 8 people regularly come along there walking dogs. Bird watchers are there every day. As for people eating picnics or sandwiches, that is a regular thing to see. People do put chairs up, sitting near their cars. People walking on the Quay is very regular. They come down from the Towers and walk anywhere on the Quay. Bicycle riding is also regular, mainly by adults including some riding tandems.

- 7.354. His own recollection was that there had been regular carol singing which took place on the Quay, not just in association with the 'Free the Quay' event.
- 7.355. He recognised the photographs of the various signs around the application site. However in his view they do not refer to the application site part of the Quay, they refer to the areas behind. For example the signs on Thorn Quay Warehouse relate to the area beyond the signs. One on the corner of that building had been put there about 3 years ago; it had not been there that long. He thought that the signs as they are now only appeared in the last 3 years or so.
- 7.356. As for traffic, it can be busy on some days, for example if a ship is in port. But on other days there is hardly any traffic. Even when it is busy though, it is not continuous. Some days there is a commercial vehicle movement every 10 – 15 minutes, and on other days one would see nothing. Seeing something every 10 – 15 minutes would be a busy day in his view. He had seen lorries passing each other on the Quay when they had a fertiliser boat in, with two lorries unloading it, doing a circuit. The only time he had ever seen the Stockdale compound gates open at the east end of the compound was for that chicken litter fertiliser traffic.
- 7.357. Usually lorries would not cross on the Quay but loop round through the compound. It would only be occasional that they would cross on the Quay. Apart from the eastern gates being open when the fertiliser boat is in, which he had only seen about once himself, those gates were generally never opened. For a long time there had been a portacabin in the way.
- 7.358. If a vehicle was coming when he was on the Quay himself, he would wait in order to avoid it. It was very rare indeed that there was a commercial vehicle parked on the Quay. Sometimes a lorry driver would pull up there for a sandwich or a smoke. But lorries tend to park up the port road, especially at the top end of it. There can be congestion sometimes up the port road beyond the houses and workshops.
- 7.359. As for ladders on the Quay, there were three ladders. There was one at the north-east corner of Allen's Quay, one in the middle and one in the Stockdale area by the old granary. The centre one was basically opposite his own house, and finished 18 inches or so below the top of the Quay. He believed it was still lying on the mud down there, but it had previously been fixed to the Quay. He had used that ladder hundreds of times. He was last able to use it in 2003 he thought, but later the ladder disappeared.
- 7.360. *In cross-examination by Counsel for TWL*, Mr Saxby said that 1983 was when he stopped being associated with his fishing boat, and therefore his use of the Quay in that context stopped at that time. As for fishing, he fished off the Quay right until the fence went up. It was less frequent in the latter years but he still did it. In 2000 – 2008 he did it about once a week, always from the edge of Allen's Quay. When he had been a child in earlier years he had fished right along to the Baltic Quay to the east.
- 7.361. The "No Fishing" sign attached to the Thorn Warehouse had been a cautionary notice he thought.

- 7.362. He personally had learned to swim from the Quay, as did his three children. His daughter is now 44, his son is 40 and his other daughter is 38. So they learned to swim in the 1970s and 1980s. Crabbing from the Quay was something he personally had done as a child.
- 7.363. His wife and his sister-in-law had been involved in the Swans in Distress organisation, and his wife feeds swans from the Quay every day.
- 7.364. He sees about 7 or 8 people walking their dogs on the Quay each day. They take a variety of routes, including a walk along the Quay edge usually. He sees other people walking, and the bird watchers he sees often. There were lots of people down there every day walking for some purpose or other. People would come to the Quay via one or other of the accesses, and then just walk around somewhere on the quayside. As for the bird watchers, he thought some of them came there deliberately for a purpose, and some of them were just opportunistic bird watchers. Many people come with a telescope or binoculars and then just casually say I'll look at that bird for example. He knows some of the bird watchers who come from Mistletoe or Manningtree or the surrounding area.
- 7.365. As for people with picnics, some come quite often; there is one in a little red car who brings fold-up chairs and a flask of tea, and has done so for many years. This usually happens at lunchtimes, and people doing that might stay for an hour or so. They would generally park opposite Grapevine Cottages on the quayside. They would tend to park with their bonnet forwards towards the Quay. He did not know who they were. He himself parks by Grapevine Cottages. People coming to the cafe would tend either to park along port road or sometimes along Allen's Quay.
- 7.366. He confirmed what he had described before about his conversation with Mr Reason of TWL in the autumn of 2009, when he told him that it was the company's fault that there were issues with his parked car, because of the new fence bringing the traffic closer to Grapevine Cottages. He confirmed that once every 10 – 15 minutes was his view as to the frequency of commercial traffic on the Quay when it was busy. However he agreed that the level of activity had changed over the years on the Quay, and that that would affect the amount of traffic going past his house.
- 7.367. He confirmed that he had only ever seen a commercial vehicle come out of the east end of the Stockdale compound when chicken fertiliser was being unloaded. His understanding was that those deliveries were about one a month, but very occasionally there might be two in a month. It was definitely not an entrance that was used more frequently than that. Back in 1990 the Stockdale compound had not been enclosed; an earlier timber fence that had been there had gone at that time. Nevertheless the gap at the eastern end of the compound had only ever been used for the fertiliser traffic in his view.
- 7.368. He could remember a time when some granite blocks were stored for a while near the Thorn Warehouse. He could also remember that Allen's Quay used to be used sometimes to moor lash barges. They were then unloaded at Baltic Quay.

Occasionally they were tied up at Allen's Quay, but they were not there very long. However Allen's Quay had not been used for that purpose for a long period. It had not been used like that for 10 years or so, it was something very rarely done. That part of the Quay had not been used for commercial traffic for years. It was very rarely even before that.

- 7.369. As for vehicles passing and turning on Allen's Quay, he had occasionally seen that with the fertiliser vehicles, but it was rare. The only vehicles that he had actually seen turn on Allen's Quay were EDME vehicles. They would go underneath the arch of the Thorn Quay Warehouse a little then reverse and turn and unload. Other vehicles turning on Allen's Quay does not very often happen. It could only happen once or twice a year he would guess.
- 7.370. *In re-examination* Mr Saxby said that as far as swimming from the Quay was concerned, his children had swum from there, and he personally had swum from there from the age of 8 until the fence was put up.
- 7.371. **Mrs Nancy Bell** lives at 3 Grapevine Cottages, Mistley. She has lived there with her family since 2002. She had completed one of the evidence questionnaires in support of the application, dated 21st July 2010. She confirmed that she had also made an earlier statement about the land on and in the vicinity of Allen's Quay, dated 10th November 2009.
- 7.372. She said that until the erection of the fence on the Quay in 2008, she and her family had enjoyed a happy relationship with the employees of TWL as they passed to and fro on the Quay. When she was feeding swans or crabbing with her children on the Quay they would exchange friendly waves with the TWL staff. In 2007 when her neighbour Jenny Cooper was moving into Grapevine Cottages TWL helped with a fork lift to lift a sofa to her first floor windows.
- 7.373. She commented on the extent to which TWL in its evidence laid emphasis on the significance of the Quay at Mistley being an operational port. This gave the impression that the Quay is a busy industrial area which is likely to grow, and to which public access should be restricted. That may be so at the eastern and western ends of the Quay, both of which are largely fenced industrial areas to which the public does not readily have access. It is certainly not so in respect of the part of the Quay covered by the village green application. This part has always seemed to her to be predominantly for leisure and recreational purposes. In order to assess the inter-relationship of port-related and non-port related activities on Allen's Quay, she had conducted a survey of traffic on that part of the Quay.
- 7.374. A number of headline conclusions can be drawn from her traffic survey. In respect of her winter survey, carried out in January and February 2013, when recreational and leisure use of the Quay would be expected to be at a low level, she had observed that: on a working day when no ship was unloading, non-port vehicles outnumbered port vehicles by more than 4:1; on a working day when a ship was unloading, non-port vehicles outnumbered port vehicles; at weekends there is a threefold increase in pedestrian traffic; on working days, whether a ship was being unloaded or not, general public pedestrian traffic was considerably

greater than port-related pedestrian traffic; even in the depths of winter there is a broad distribution of recreational activities, with peaks occurring at weekends. In respect of her Spring survey carried out in April/May, 2013 the overall picture of use is very similar, with slightly lower levels of increase in weekend pedestrian traffic.

- 7.375. Since her survey was only a snapshot on randomly chosen days, a direct comparison between the days surveyed is difficult. The results for recreational use would for instance be influenced by weather conditions, public holidays and other competing attractions on the day in question. Those factors were unlikely to affect port-related activities. She noted that the average speed of port vehicles along Allen's Quay (which had been calculated by Mr Tucker) was higher than that which was supposedly permitted in the operational port area to the east of Thorn Mill.
- 7.376. In her view there had been no material change in the use of the Quay by TWL and others for port-related activities since the erection of the fence in 2008. She thought that non-port related activity had probably also remained at about the same level; some visited because they were curious about the fence, and they equated roughly to those who had ceased to visit because they knew that the fence was there.
- 7.377. The mood and attitude of TWL and its employees changed after it was clear that there was extensive local opposition to the erection of the fence on the Quay in 2008. That also coincided with some changes in the nature of the cargoes being processed by TWL.
- 7.378. Since the fence was erected there had been aggravation of those opposed to the fence, by TWL and some of its employees, involving intimidating behaviour and harassment. She thought that behaviour had been intended to deter her and others from continuing to use the Quay as their village green. In her view there was no reason why the former peaceful co-existence of the local community and TWL and its employees should not be restored.
- 7.379. She gave a long list of the mainly leisure related activities which she had observed people carrying on on the Quay over the 8 years that she had been living in Grapevine Cottages, up until July 2010. Her own three children were currently aged 18, 13 and 6. Thus in 2002 her oldest was 7; her then younger child was 2½. They used to feed the swans almost every day, she and her children, with her husband at weekends. She still does that, but it is not as easy over the fence so she does it once a week probably. Until the fence was erected she did it almost every day.
- 7.380. As for crabbing, she did that from Allen's Quay, notably with her husband and son. They did it from about 2003, when they had seen others doing it, and they continued doing that in good weather until 2008. Bird watching was also something they had done as a family. It was one of the pleasant things about living there. They used to go to the edge of the Quay; her husband would take some binoculars and they had a bird book. They did that quite regularly when her husband was at home.

- 7.381. They used to walk on the Quay with the children almost every day. Because their house backs onto the Quay they treated it like an extension of their garden; they only have a small front garden themselves. For example, her son had a bicycle with a long handle for them to hold him while he was on it, and her young son had had a pedal car; both were used on the quay.
- 7.382. The children would also kick a ball around, and her boys used to love drawing on the Quay; for example they would try to draw the boats.
- 7.383. As for picnicking, her husband and she used to have a glass of wine reasonably regularly at the edge of the Quay. They also had big family meals on the Quay with tables out sometimes, usually at weekends, Saturdays or Sundays. They did that several times. They also had parties which had spilled out onto the Quay. Indeed her son had once commented that there was a boat in their garden. Her son had learned to ride his bicycle on the Quay, but not by the edge, and both her sons had had scooters which they used on the Quay.
- 7.384. One of the photographs in the hardback book of photographs showed her children in 2002 or 2003. They were drawing a picture of a shipwrecked barge out in the estuary. Another photo showed her younger son with the first crab he caught there. Another showed her husband feeding swans; yet others showed her children as well.
- 7.385. Never until 2008 had she or her family been told not to go onto the Quay or to stop doing any of the various things that they had openly done there.
- 7.386. She was familiar with the various signs around the application site. Her view was that they related to areas outside the application site, either the Stockdale compound or the area to the east of Thorn Quay.
- 7.387. She had been on the committee of Free the Quay since it began in 2008. It is a group of local residents trying to open dialogue with TWL. Her view was that the whole of the residents of Mistley are in support of Free the Quay. Its objective is to bring the Quay back to having public access. They do not mind a safety barrier along the Quay edge, but they wish to be able to continue activities there as before. The evidence statement she had produced in 2009 was part of an exercise to collect evidence to show that people had openly used the Quay until the fence went up. The group had discussions at that time with Essex County Council, and needed advice as to the avenue to go down.
- 7.388. In her traffic surveys carried out in 2013, when describing traffic as commercial traffic serving the port, that traffic had included TWL's own vehicles, dock-runners, fork lift trucks and also hauliers and outside contractors carrying cargoes.
- 7.389. As for private traffic coming onto Mistley Quay, they did not differentiate between the occupants of private cars. In the exercise one vehicle movement represented a vehicle going across the Quay in one direction. Therefore the survey would have included some vehicles on a number of occasions passing and re-passing.

- 7.390. Since they moved here in 2002 she and her family had quickly realised that there were some days when there were ships in the port and there was traffic across the Quay, and other days when it was extremely quiet, indeed as dead as a doornail. When the port is busy it is hard to say exactly how often a vehicle passes across the Quay, but that did not stop her or her family going onto the Quay and doing the things that she had referred to in her evidence form. Sometimes when a ship was in there was not even any transit along Allen's Quay. Sometimes things were unloaded at the Baltic Wharf and did not in fact come out across Allen's Quay; sometimes materials were just left sitting on the Quay, such as bricks or fly ash.
- 7.391. The days that had been recorded in her survey were fairly standard ones. There had been some cargoes that had changed over time, but overall things were much the same as they had been in earlier years. In Autumn 2008 TWL started importing chicken fertiliser. That is when they started to use the east gates of the Stockdale compound. Before that those gates had been very little used. That route had only been used after the Autumn of 2008 to her knowledge. She did not recall them ever using that route before. In fact she did not recall there even being gates there before 2008. That particular cargo had caused problems of chicken manure being blown everywhere by high winds. Indeed they had complained to the local MP about it.
- 7.392. Prior to 2008 commercial traffic had had no impact on them as a family, except the need to avoid it if a lorry came along. Parking of commercial vehicles on the Quay was something she very rarely saw. Vehicles passing on the Quay she had seen now and again. If dock-runners were moving materials there seemed to be a pattern of two vehicles moving, but they do not necessarily pass on the Quay every time.
- 7.393. She had rarely seen HGVs turning on Allen's Quay. She had seen it at the Stockdale Warehouse.
- 7.394. Before 2008 she and other local people felt that the port and the public co-existed well with no aggravation. People were respectful of what each other did. Things had subsequently changed for the worse and she did not understand why. There used to be give and take with most of the port employees before that.
- 7.395. *In cross-examination by Counsel for TWL*, Mrs Bell said she had moved from London in 2002. Therefore out of the period relevant to the application, she had known the Quay from 2002 to September 2008. She explained that her traffic report had shown what was going on on the "*snapshot*" dates. It was a factual observation. The traffic survey was focused on Allen's Quay.
- 7.396. The winter survey had been carried on between 7.00am and 6.00pm on the relevant days, and it had been a continuous observation during that period. In her understanding the normal port operations took place between about 7.30am and 5.00pm. However sometimes they work until 6.00pm, so it was fairer to survey those hours. They did 7.00am to 6.00pm every day of the survey. They did not know the specific port operational hours on those days.

- 7.397. As for the recreational activities observed during the survey, for example the number of dog walkers given was the number walking past the survey place. "*Pram pushing*" included both prams and pushchairs. The references to bird watching were used however hi-tec or low-tec that observing appeared to be. The reference to picnicking meant someone sitting on a bollard with coffee, or eating within their car, or possibly getting out with a coffee. The reference to jogging meant someone running in jogging kit not in ordinary clothes.
- 7.398. As far as the observation of vehicles were concerned, TWL vehicles were considered to be the vehicles which were used permanently on the Quay, untaxed fork lift trucks and dock-runners, and the two tractor units there. The reference to other port vehicles was the external hauliers' vehicles. She had not seen any TWL vehicles which looked like ordinary lorries. She knows that TWL do have some lorries like that, but she did not see them during the survey. The pedestrian Quay workers who had been referred to meant those with high visibility jackets on, and she does personally recognise a lot of them. The pedestrian general public who were referred to meant pedestrians in ordinary clothes whatever purpose they were there for.
- 7.399. In the winter survey there were 368 vehicles movements over the period of the survey which was 11 hours. That represented 33.5 vehicles per hour.
- 7.400. She conceded that the survey data might well depend on the size of the ship. She was just providing a factual survey on the days which were surveyed. Clearly the number of vehicle movements associated with the vessel may depend on the size of vehicle as well. On the relevant day of the survey there was one ship unloading. She accepted that two ships might generate more movements. However generally when two ships are in, one of them is off-loaded onto Baltic Wharf and the cargo not taken out by lorry. That was her observation; she can see Baltic Wharf with her binoculars and often does in fact do so. It is also the case that some goods are more dense than others. Her observation was that in general it takes a day or a day and a half to unload a ship. She had not noticed that one type of unloading had taken much longer than any other type.
- 7.401. She explained further the figures documented in her winter survey. However she pointed out that there were other people who accessed the Quay going for walks in the evening, even in winter. And also there are people walking or jogging a lot on the Quay every weekend. What her survey showed she thought was that even on a busy port day there are still people accessing the Quay for leisure activities.
- 7.402. On the working day during her spring survey when a ship was in the port there were 81 TWL port vehicle movements, which with other port vehicles and cars and vans made a total of 227 vehicle movements on that day with a ship unloading. She agreed that there had in fact been 229 vehicle movements in total on the working day with no ship unloading.
- 7.403. Going back to the winter survey, it was a freezing cold day, and the survey period of 7.00am to 6.00pm did not cover the period relevant to a commuters' working day. She knows a lot of people who commute from Mistley. Even people who work in Ipswich do not get back in time to be out for a walk on the Quay by

6.00pm. She thought that 8 bird watchers on a working day was in fact quite a large number.

- 7.404. As far as her family's use of the land on the Quay is concerned, she has a large extended family who visit on occasions, not just her immediate family. One of the photographs in the hardback book showed one of those occasions when she had members of her extended family visiting. There were times when they had a lot of family eating with them, with three decorator's tables used for eating, positioned out on the Quay. Her husband had also done quite a lot of drawing, sitting out on the bollards on the Quay.
- 7.405. She would not want to leave a young child unsupervised playing out on the Quay, although some of the photographs do show her children out there on the Quay.
- 7.406. She had had some decking at the back of her house within the area that is now within the village green application site, but that had gone. They had not realised that it needed permission because it was technically on part of the highway.
- 7.407. *In answer to cross-examination on behalf of EDME/Anglia Maltings*, she explained that her comments about the level of activity on the Quay remaining much the same before and after the erection of the fence in 2008 had related to the quay generally, behind her house. She could remember Thorn Quay Warehouse fork lift trucks unloading into a high first floor access door there. She could also remember quite a lot of activity in the vicinity of the Swan Fountain, with access being taken into the EDME building by the plastic doors up there. She had certainly seen those plastic slat gates in use. There had in fact been an incident of the plastic slat door being used in the middle of the night which had caused her to make a complaint. Her recollection was that she did not remember EDME's activities having that much of an impact on the environment down on the Quay; there really was not that much activity during the time that she has known the Quay. EDME had generally been regarded as good neighbours.
- 7.408. **Mr John Fairhall** lives at Elm House, Trinity Road, Mistley. He had been there since 1994, and prior to that at Stour House, High Street, Mistley. He had completed one of the evidence questionnaires, dated 24th January 2013.
- 7.409. He had known Mistley Quay since 1971, and had had a chalet at Wrabness and a boat on the river since 1971. In his questionnaire he had explained that he used to go onto the application site in order to admire the scenery and birdlife, to meet visiting yachts, and when younger in order to land at Allen's Quay.
- 7.410. As for his sailing activities, his boat was kept down river at Wrabness, he had sailed up regularly to call at Mistley since 1971. However he had ceased to have a boat some 15 or so years ago in about 1998. His boat was shown in one of the photographs in the hardback book of photographs. He had intended to moor at the Quay overnight, but the ladder was missing and he could not get ashore without moving and using the commercial quay ladder. The other ladder had been there previously, and he had used it for years. That was the one half way along Allen's Quay. That had been a metal ladder, but one used to have to scramble up over the top part. He thought it had been a fixed ladder. The incident he was referring to

happened in about 1990. An employee of Trent had said that he should not moor on the commercial quay; he explained the position about the missing ladder, but that gentleman had said that he should moor at Allen's Quay, rather than where he was.

- 7.411. Previously he had several times moored at Allen's Quay, perhaps twice a year over several years. He did not use the Quay after 1990. He did however sail there with some athletic friends who managed to get out of the boat at high tide.
- 7.412. The Quay is the centre of Mistley life; with their children and grandchildren his family would all go to the Quay to visit it, to bird watch, and if they saw a mast they would go there in order to see the boat and also take photographs of swans. They would go to the Quay like that every weekend. No-one ever told them that they should not be there.
- 7.413. As for signs around the application site, he recognised some of them. He did not think they represented any restriction other than where the area was fenced off and the sign said that it was hazardous. He would not go into such areas. The signs on the Thorn Warehouse meant not to go along further to the east, and he did not do that, or fish from the Quay.
- 7.414. As for children playing, both his own children and then his grandchildren had played on the Quay. He had seen fishing and drawing and painting go on, as well as community celebrations. He had seen the Old Gaffers occasions with 50 or 60 or even 70 yachts there, and he was not aware that permission had been sought.
- 7.415. As for bird watching, his brother used to do it, although he was not a Mistley resident. He could not give the names of the bird watchers, but every other time they went there they would see a bird watcher. People used regularly to ramble or walk there, including local people and people who were in the room at the time of the Inquiry, he said.
- 7.416. As for commercial vehicles, there was the occasional lorry crossing the Quay, generally slowly and cautiously, and one would just stand aside. These vehicles did not create any hazard.
- 7.417. *In cross-examination by Counsel for TWL*, Mr Fairhall explained that he had given up his boat about 1998. The photograph in the hardback book of photographs was about 1990.
- 7.418. He did not remember seeing a sign along the Quay pointing out towards the estuary saying "*Danger No Mooring*". He agreed that that message is clear. He had been involved in Old Gaffers rallies. He was a member of the Stour Sailing Club.
- 7.419. The ladder in the central part of the Quay had always been very difficult to use. He was aware from about 2003 onwards that use of the Quay by leisure craft had become controversial.

- 7.420. As far as his own children were concerned, the oldest now is 50 and his youngest grandchild now was 9. His other son is 42/43. He has three grandchildren aged 17, 14 and 9. The 9 year old lives in Mistley.
- 7.421. In general his visits to the Quay have tended to be every weekend. He was a commuter, but 20 years ago he stopped working.
- 7.422. In good weather another thing he would do was to drive along to look at the river. That could be on a weekday or whenever. But he would generally stop when he went to Allen's Quay. He would park so as not to be in the way of commercial vehicles, and to leave room. He would generally park at the west-end of Allen's Quay near to the fenced compound.
- 7.423. **Mr Ian Rose** lives at Yaffles, School Lane, Mistley. He had completed one of the evidence questionnaires, dated 7th August 2010. He had moved a number of times but always within Mistley.
- 7.424. He regarded himself as very fortunate that he with others had had free access to the whole of Mistley Quay when he was younger, and he and friends could roam around the area. Mistley Quay was a public quay area and lots of boats used it; it was free for people to use as they wished.
- 7.425. A lot of local people learned to swim off that Quay. When they went swimming his dog used to dive in with them. He had not swum there since 1988, but the other things he had referred to in his questionnaire he had done in more recent times. More recently bird watching had taken up a lot of his time. If the river is frozen and very cold he is there almost every day. He had never been told he should not be there.
- 7.426. When he first started using the Quay there were no signs. A lot of the signs are on the eastern part of the Quay. In general the signs near the Thorn Warehouse look as if they apply to the area beyond. He remembered when the roadway down to the Quay from the west was a different one from the one which now has to be used. The other old road is blocked. He had been a Parish Councillor, and the Chairman of Mistley Parish Council. The Parish Council had always supported the Quay and regarded it as important for local employment. It is a port which can take cargoes which other ports will not have. Mistley Quay has always been used for boats and barges.
- 7.427. He remembered the time when the ladder of the Quay had been damaged or removed. There were complaints about the danger which had been caused because people could not get out. It was the issue about the removal of the ladder which had caused particular concern for Mistley Parish Council.
- 7.428. *In cross-examination by Counsel for TWL*, Mr Rose reiterated that it was the ladder issue that had been of most concern, when that was removed. There had been a meeting between the Parish Council and the Health and Safety Executive about the Quay, and the HSE had said that they had not asked for the fence that TWL erected to be put there.

- 7.429. As for dog walking on the Quay, Mr Rose currently had a dog, and indeed had usually had one. Walking on the Quay forms part of a natural dog walking circuit.
- 7.430. As for bird watching, he generally has binoculars with him when he goes for a dog walk. On other occasions he has driven down there, perhaps in order to carry heavy tri-pods or a 500mm lens. Winter is generally the most interesting time on the river from a bird watching point of view. He would get out of the car to use a tri-pod. The time of his visits could be anytime depending on the tide and the weather.
- 7.431. He is still a member of Mistley Parish Council and has been so since at least 1993. The Parish Council generally supports the port.
- 7.432. What had been the trailer park to the west of the Quay (for lorry trailers) now belongs to the firm Gladedale. Complaints which had been made in 1993 had partly related to sago dust being blown over all the houses near the Quay, but had also related to lorries parking overnight on that trailer park, which they did for some time and it caused a problem. Lorries used in fact to park all the way from Mistley Church right down to Mistley Towers (on New Road), and that also caused much local concern.
- 7.433. In the heyday of the Quay, perhaps 100 barges used to work there. He remembered the Swans in Need organisation having been set up, and may well have been provided with information about it. His own view had been that it was wrong to feed the swans. When the Maltings went, the food source went. Swans would walk over the road at that time and cause traffic jams and conflict.
- 7.434. Mr Rose regards this as an operational port, and he would certainly not park so as to interfere with the port operations. But there never had been a problem, because people co-existed. He had often parked very close to the Quay.
- 7.435. *In re-examination* Mr Rose said that he had understood that lorries parking used particularly to upset Mr French at Mistley House, because the lorries were parked near his house. A lot of the parked lorries were in the trailer park or alongside the port road. He had not known of any lorries parked on Allen's Quay itself, and in particular had not known of them parking on Allen's Quay overnight. The problem at night had been elsewhere, in the places he had mentioned.
- 7.436. **Mr Hubert Ward** lives at 1 The Green, Mistley. He had completed one of the evidence questionnaires, dated 8th January 2003. He has owned his present property since 1978. But he was living in school accommodation in Ely (he was the Head of the Kings School, Ely) and has lived here fully in his house since 1996.
- 7.437. He said he had sailed on the Stour and other east coast rivers every year between 1970 and 1998 and occasionally since. During that time he had on several occasions moored alongside Mistley Quay for the purpose of loading and discharging his sailing cruiser and embarking and disembarking crew. He and his family were in the house about every six weeks when he was working at the school. This had been in both the school full holidays and half-terms. He had

been a member of MITHRAS (the Mistley Thorn Residents Association) but not of the Parish Council. He had used the Quay on the application site for recreational purposes in general as well as from time to time loading, discharging, boarding or disembarking from his sailing cruiser, which would be temporarily moored alongside. His use of the land when in residence would be several times a week, and this had been the same from 1978 through until the erection of the fence. As well as the activities relating to his sailing cruiser he had regularly indulged in walking on the quay, dog walking, bird watching and just enjoying the scenery.

- 7.438. When they came to Mistley from Ely the first thing they would do is go for a walk on the Quay in order to take in the atmosphere. They used to visit the Quay approximately every other day. In the early years one could walk the entire length of the Quay from one end to another. They would walk on the Quay via a variety of routes. Occasionally in the earlier days they would come down Batter Pudding Lane and use all of the Quay. That was until 1996.
- 7.439. Since then they have used the Quay on the application site in the same way, but more frequently. When they had been in Mistley for short periods they still used it approximately every other day. They have always had a dog.
- 7.440. They had also indulged in fishing off the Quay. In 1978 their children were aged about 17, 14 and 11, and were a daughter, a son and a daughter. In those early years they would swim near Mistley Towers or off the Quay itself whenever the tide was in. As for fishing, his son would go off in the early evening and often come back with a bucket full of eels. That was primarily from Allen's Quay. His son went off to university in 1982 and did not fish at Mistley after that.
- 7.441. No-one had ever challenged his family's use of the Quay. As for the signs currently around the edges of the application site, those signs are familiar to him. There was not as much fencing in the vicinity of the site early on. A lot of the signs have appeared since 1978 when he and his family first went there. However it had never occurred to him that the signs related to Allen's Quay. They related to Baltic Wharf or the other private areas.
- 7.442. He had looked recently at his sailing logs, which had shown that there had been 5 occasions on which he had moored with his boat at Mistley Quay. Once was in September 1985, another in August 1987. Then twice in August 1988 and once in August 1989. On none of those occasions was there any suggestion that mooring was not allowed. Indeed on one of the occasions he was helped with his mooring line by a person working on the Quay. He referred to a publication known as "*East Coast Rivers*" which really is the Bible for people who go yachting on the east coast. He produced a statement from a lady called Janet Harber who is the current Editor of 'East Coast Rivers', whose sub-title is 'a Yachtsman's Pilot to the Rivers of Suffolk, Essex and Kent'. That lady had explained in her written statement that the first edition of the work had been written by her father and published in 1956. It was followed by many other editions, and after her father's death in 1993, Ms Harber's sister and she produced several further editions. Since 1996 she, Ms Harber, had been the sole editor. She was extremely familiar with

sailing the rivers of Suffolk and Essex and had a long personal knowledge of cruising the Stour and sailing to Mistley Quay.

- 7.443. Indeed she believed that in 1955 she with her family had visited Mistley Quay on her father's yacht and anchored off Baltic Wharf, going ashore by dinghy without worrying about the tide. She thought it was likely they would have rowed to Allen's Quay to get water or visit the shops in Mistley. Ms Harber had explained that Mistley and Mistley Quay had been referred to in various older works relating to sailing on the Stour and the east coast. For example in a work published in 1927, the 'Yachtsman's Pilot to the Rivers and Creeks of the Thames Estuary', it had been observed that at Mistley "*landing may be effected at the quayside, while supplies and water are available close at hand*".
- 7.444. In the 1956 version of the work her family had been associated with, it had been stated in respect of Mistley that "*landing at the quayside by means of one of the several vertical ladders is not very easy, except at high water, but it is worthwhile going ashore at Mistley ... [to enjoy a fine view]*". Much the same had been stated in a later edition of the work published in 1983. In the 2008 edition there was reference to the facilities that could be accessed from Mistley Quay, and it was stated that it was possible to moor temporarily alongside the Quay, but that the quayside itself is not very yacht-friendly.
- 7.445. Mr Ward stated that he had never yet met a yachtsman on the east coast who did not use the work "*East Coast Rivers*". He explained that it is not in fact essential to use a ladder to disembark at Mistley at high tide, even at neap tides. Normally what one would do would be to turn and moor facing into the rising tide. He produced some photographs of the quayside. Some of them showed signs relating to mooring, fixed to the seaward wall of the Thorn Warehouse. Mr Ward had never thought that those signs related to his use of Allen's Quay. He had not used the Quay with a boat now for some 8 – 10 years.
- 7.446. *In cross-examination by Counsel for TWL*, Mr Ward said that as for his mooring use of the Quay, 1989 was the last time he had an entry in his own logbook. However in 1993 his boat was brought to Allen's Quay and lifted out for repair.
- 7.447. He is a member of the Stour Sailing Club, which he joined in 1967 and he has been a member since. He was aware of a sign saying "*Danger No Mooring*" situated near the north-west corner of the Thorn Warehouse, which was shown in the summer 2004 edition of the Club's magazine. He felt fairly sure that in the late 1980s that notice was not there. [Indeed TWL confirmed that the notice was erected in 2004]. That notice would be seen if one was approaching up-stream, but it is not totally clear which piece of the Quay it actually relates to. His own view was that that notice was disregarded by anyone who wanted to go ashore there. Mr Ward did not disagree with the impression given by the 2004 Sailing Club newsletter, that by 2004 the use of the Quay had become controversial. He accepted that yachts were possibly being discouraged by that time from coming ashore there.
- 7.448. He had owned his house since 1978, but been a full-time resident since 1996. Nevertheless even during that period when he had not been living there full time

he still came back with his family for half-terms and holidays. The main use of the Quay by himself and his family had been for general recreation, apart from sailing. When walking he and his family would walk a circuit which involved the Quay. Their dog could be on or off its lead. One might well stop on the Quay to look if there was something attractive to be seen.

- 7.449. **Mr John Wood** lives at 5 New Road, Mistley. He had lived there since 1987, and prior to that lived in Norman Road from 1973. He had completed one of the evidence questionnaires, dated 12th April 2013.
- 7.450. He had known the land since 1962. He moved to High Street, Manningtree in 1961 with his parents. So he knew this area as a “*local lad*”. His use of the land for exercising himself or his dogs, or just to enjoy the view, had mainly been from the 1970s on.
- 7.451. In 1973 he had bought a coal business, and he had had some customers in Mistley High Street and Grapevine Cottages to whom he delivered every fortnight throughout the year. There was not a lot of shipping at Mistley at that time, and most of the Quay was used for malting. The shipping came back to the port later he thought.
- 7.452. He had had a dog at all times relevant to his evidence, except for a gap without dogs from about 2000 until he got a new dog in 2008. He had dogs consistently from 1971 to 2000, and during that period he had a usual circuit with his dogs which included Allen’s Quay. He would often enter via the Swan Basin, and as well as walking his dog he would be looking at the boats moored in Thorn Reach. He had a particular interest in seeing the boats, and he would go once or twice a week to the Quay.
- 7.453. He had also used the Quay for boating himself, and seen other activities on Mistley Quay when he was there. Those activities included local children playing, people fishing and people quite regularly painting there. There was someone in Dedham who ran courses and brought artists there. He used to see locals playing football on the Quay, for example EDME employees. He also saw people walking, bird watching, youngsters riding bikes. He was sure that the young men he had seen playing football were local lads. The dog walkers also were Mistley residents.
- 7.454. He had been a keen yachtsman throughout his life, and many of the most enjoyable visits to Mistley Quay had been in relation to boating activities. He produced a statement containing a list of yachts and small boats that he had boarded at Mistley Quay, or disembarked from over the years. That list had been compiled from diaries and logs he kept. At no time had he ever thought that permission was required to board or disembark at the Quay and he had never sought permission to do so. He had always used the Quay openly at all times and no-one had ever tried to prevent him from doing so.
- 7.455. The list he produced was of occasions when he had been involved with a vessel that had been mooring or berthing at Mistley Quay. Many of the vessels, apart from one which had belonged to his late father (also a Mistley resident), were

themselves boats that belonged to Mistley residents. He would only have noted some special event, and that was reflected in the list which he had produced.

- 7.456. He had some knowledge about the time when Mr Ward had had his boat lifted out of the water at Mistley Quay, however he was not sure if it was a lift-out by the Quay operators, or a lift-out by the sailing club. The Club used to have organised lift-outs during the time when Mr Garwood was the manager of the port, and also during the period of Mr Forbes.
- 7.457. As for signs around the Quay, he felt fairly sure that the signs about danger, no mooring, had been put there to protect the granite blocks being stored. Fencing had been installed in order to produce a compound around the granite blocks. His own view was that, given the prominent yellow bollards on Allen's Quay, he had considered that the sign about mooring on the compound fence applied to the area up-stream, and not the area where the bollards were. He used to use the area where the bollards are on Allen's Quay.
- 7.458. His own recollection was that all three ladders on the Quay were taken down at about the same time. The use of the Quay anyway would usually be at high water or half-ebb. Usually he could get off a boat onto the Quay. There used to be several large tyres on chains to help one get up onto the Quay.
- 7.459. Other Mistley residents, including Jon Wainwright and others who had moorings in Thorn Reach, would use Mistley Quay with a dinghy on the early flood tide. The Quay was generally used around high water, it was a regular occurrence. He himself would generally take the opportunity, if he saw a mast of a vessel at Mistley Quay, to go and have a natter with the skipper of that craft.
- 7.460. *In cross-examination on behalf of TWL*, Mr Wood confirmed that he had been a member of the Stour Sailing Club for a long while. He also confirmed that he had seen the notice stating "*Danger, No Mooring*" which was pictured in the summer 2004 edition of the Club's newsletter. He had assumed that these notices related to or were intended to apply to the commercial part of the Quay. He chose to ignore that sign as having any relevance to him.
- 7.461. He agreed that lash barges when they were used would tie up at the bollards at Allen's Quay. Bollards like that are normal in any commercial port.
- 7.462. It was never his understanding that private mooring at the Quay had been resisted by the Quay's owners from 1996 onwards. As far as his own use was concerned, he was never warned off use of the Quay. He had used the Quay for many years without any constraint.
- 7.463. His own recollection was that granite blocks had been stored on the Quay at one stage. Some of them had been stored in wooden crates.
- 7.464. As for other activities on the land, he had seen children playing there, including when his own children were small. More recently he had seen playing by youngsters there as well, and also when he was carting coal between 1973 and 1985. Indeed the arrival of his coal truck used to attract youngsters to come and

have a look. His own children were born in 1991, 1993 and 1998. On his coal deliveries, he would deliver to a number of High Street properties which were accessed via the Quay. He had about 4, 5 or 6 customers along there to whom he would deliver coal.

- 7.465. He felt sure that the people he had seen playing football on the Quay were EDME employees, but also children kicking a ball around on the port road sometimes. The latter was usually at the weekend. It was possible that those young men kicking a ball about on the Quay were a mixture of Brooks and EDME employees, but it was an occasional thing. The children playing there kicking a ball around he had not seen other than at weekends and evenings he thought. In general, in some years or on some days the port had been busier than at other times.
- 7.466. *In re-examination* Mr Wood confirmed that his diaries and logs, encapsulated in the schedule he had produced, showed 33 entries between 1988 and 2007 relating to use of the Quay with vessels, and on none of those occasions was he told by anyone not to be there.

8. THE SUBMISSIONS FOR THE APPLICANT

- 8.1. Accompanying the original application was a memorandum in support which essentially consisted of submissions arguing the case for registration. They were relatively brief but have in effect been subsumed within the later submissions made on behalf of the Applicant, so I do not need to record them specifically here.
- 8.2. In preparation for the Inquiry, the Applicant lodged a further statement of case, with submissions in support of the Applicant's case. Much of this was also subsumed within the later and fuller submissions made at the Inquiry. I record briefly that in the statement of case set out a short summary of the history of the application land, and referred to plans showing its boundaries, ownerships and rights of way in the vicinity etc. It was explained that the Quay forming part of the application land is no longer used to unload or load commercial vessels. It was acknowledged that goods and cargoes are moved about on the application land between the operational warehouses to the west and the operational quay further to the east. The point was made that there are by no means always vessels in the port which are being loaded and unloaded.
- 8.3. The Quay has for many years been used by local people for a wide range of recreational activities, which were briefly summarised. It was acknowledged that some of those activities had been curtailed by reason of a fence which was erected along the quayside in September 2008.
- 8.4. *Section 15* of the *Commons Act* was summarised, and it was made clear that the application in this case relied on *Section 15(3)*, because the use was taken to have been interfered with at the time the fencing was erected in September 2008.
- 8.5. The caselaw relating to the various aspects of the statutory definitions in *Section 15* of the *Commons Act* was summarised. It was made clear that the Parish of Mistley was relied on as the relevant locality. The point was particularly made

that the use of land for the purpose of lawful sports and pastimes is not required to be exclusive, or even the dominant use of the application land. Qualifying use can co-exist with other beneficial use by the owner of land. What matters is that the use for lawful sports and pastimes is undertaken as of right, and fulfils the other requirements of *Section 15*. The decision of the Supreme Court in the case of *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70, UKSC 11 was relied on. The *Redcar* case had made it clear that there was no principle that deference to the landowners' actions on the relevant piece of land prevented reliance on a claim that use by local people had been as of right.

- 8.6. The evidence in support of the application, insofar as it had been lodged on paper, was summarised. The point was specifically made that notices around the Quay and the application site did not clearly suggest that they were intended to prevent or deter use of the application site rather than land beyond.
- 8.7. Those previously supplied submissions formed the basis of the opening of the case for the Applicant which was made at the Inquiry.
- 8.8. I now summarise the full closing submissions which were made on behalf of the Applicant in the light of having heard all of the evidence at the Inquiry, and the submissions of the other parties. It was acknowledged for the Applicant that the area of land concerned in this case does not conform to any conventional vision of a town or village green. The entire area is hard surfaced and continues to be used for some commercial purposes. However there is no requirement for a town or village green to display any particular physical characteristics. Nor is it necessary for the sole or even the principal use of the land to be for recreational purposes. The analysis by Lord Hoffmann as to what constitutes a village green in the well known *Trap Grounds (Oxfordshire)* case [2006] UKHL 25 was considered.
- 8.9. In this case the evidence and physical inspection of the application site indicate that the land concerned is distinct and different in character from the remainder of the port. It is in the centre of Mistley and contains the surviving elements of Mistley's 18th century ambition of becoming a Spa, including the Swan Basin. No part of the application land is now normally used for the storage of goods or the loading or unloading of ships or vehicles. It is accessed by and includes a public right of way. The part of the application land which is not public highway is not physically separated or distinguishable from that which is.
- 8.10. The application land is separated from the Stockdale Warehouse compound by fencing or signage or both. It is separated from the Quay to the east by signage, and previously by a barrier which was closed at times. There has never been any physical impediment to public access to the application land or any part of it. There is much evidence that the local inhabitants have throughout living memory regarded the whole of the application land as a public area, in contrast to other parts of the port.
- 8.11. In relation to the application made during the course of the Inquiry to amend the extent of the application land, by the inclusion of an area at the north-west of Allen's Quay which had been enclosed by fencing in 2008, the following submissions were made. The test for the admission of an amendment, including

an enlargement of an application site, was whether prejudice would ensue to any party. It would be different if the matter were an addition to an application site by way of an afterthought, as opposed to what is in this case very clearly an error by omission on the original application plan. It would follow that if the amendment was accepted the application for the enlarged site should be treated as having been made in 2010, at the date of the original application.

- 8.12. Had the Objectors been caught by surprise in this case? The only plan, in the many versions of the plan with the application papers, which was incorrect happened to be the one which was attached to the application. All of the user evidence forms etc., correctly showed the larger area intended, including the north-western corner of Allen's Quay. Therefore what had happened had purely been a clerical colouring error, so there could be no real prejudice to any other party. It must have been apparent both to the Registration Authority and to the Objectors right from the outset that this had just been a clerical error.
- 8.13. Neither the **2006 Act** nor the **2008 Regulations** made under it make provision for the withdrawal or amendment of applications, or indeed for the registration of part only of an application site. As Lord Hoffmann had made clear in the House of Lords in the **Trap Grounds** case, the general principle was one of being fair to the parties. There is no rule that an amended application must be for substantially the same land as the original application. If it relates to a larger or different piece of land, the Inspector or Registration Authority may well think that fairness requires the republication of a new application. But the matter remains one for the exercise of their discretion.
- 8.14. Attention was drawn to the guidance to Commons Registration Authorities which had been published by DEFRA, and in particular to **Section 7.14** and **7.16** of that Guidance. It was again stressed that the omission of the north-western area from the application plan in this case had been an inadvertent one. All of the user evidence forms submitted in support of the application had correctly identified the full extent of the application land. The land which it is sought to have added is within the ownership of the principal Objector, and prior to the erection of the fence in 2008 was part of the open quay and indistinguishable from the remaining application land.
- 8.15. There are no arguments or issues which are peculiar to the small area of land which it is sought to add to the application. All of the relevant arguments and issues have been fully explored at the Inquiry. The Objectors have not been prejudiced in any sense other than that a failure to grant the application for an amendment would result in any further application to add the omitted land being time-barred. Fairness dictates that the application to amend should be allowed.
- 8.16. The Applicant considers that use of right of the application site (whether enlarged or not) ended on 17th September 2008, being the date that fencing was erected on the Quay. It appears now to be the principal Objector's contention that use of the Quay had become publicly contentious at some earlier date, as a result of the issues which arose in relation to the berthing of the yachts alongside the Quay.

- 8.17. The Applicant acknowledges that from about the summer of 2003, a dispute had arisen between the principal Objector (TWL) and local yachtsmen about the entitlement of those yachtsmen to berth against the Quay. However it is apparent from the material available to the Inquiry that this dispute was directed at yachtsmen, and particularly members of the Stour Sailing Club, rather than at the residents of Mistley as a whole. Furthermore the dispute concerned the entitlement of vessels to moor alongside the Quay, and had no impact on the various recreational activities which continued to be enjoyed on the Quay until the fencing went up in September 2008. Indeed there was evidence by local inhabitants that they had continued to use the Quay for berthing their boats up to 2008 without objection. Accordingly the Applicant's case is that use of the Quay for recreational purposes continued as of right until September 2008, and in consequence the relevant 20 year period for consideration is September 1988 to September 2008.
- 8.18. The Applicant adopted the approach to the evidence which had been used by Lord Hope in the *Redcar* case (referred to above). That approach had been firstly to address the quality of the user for the 20 year period. So it must be demonstrated that the land has been used by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes. They must have been doing so openly and in a manner that a person rightfully entitled to do so would have used it. If the evidence demonstrates that user for at least 20 years met those tests, so that it would reasonably be regarded as the assertion of a public right, the owner is to be taken to have acquiesced in it unless he can claim that one of the three vitiating circumstances apply, and if he does, the second question is whether that claim can be made out.
- 8.19. The Applicant had thus to prove on a balance of probabilities, that a significant number of the inhabitants of the Parish of Mistley had indulged as of right in lawful sports and pastimes on the application land throughout the period 1988 to 2008.
- 8.20. On the question of a significant number, the Applicant endorsed the approach of Sullivan J in *R (McAlpine Homes) v Staffordshire County Council* [2002] EWHC 76. That was to the effect that "*significant*" is an ordinary word which should be given its ordinary meaning. What is a significant number can vary according to circumstances, but in general terms it is a number that is more than de minimis and sufficient to indicate that the land is in general use by the local community. There is no requirement that the local inhabitants using the land for recreational purposes must be the predominant users. Sullivan LJ (as he had then become) also commented on this topic in *Leeds Group plc v Leeds City Council* [2011] 2 WLR 1010. He had pointed out that the important point was the distinction between general use by the local community for informal recreation rather than occasional use by individuals as trespassers. Even if the landowner would not know without carrying out a detailed investigation whether those using his land for recreation were local people or not, the fact that their recreational user of the land is more than trivial or sporadic would be sufficient to put him on notice that a right may well be being asserted, so that he may choose between warning them off or finding that the apparently asserted right had become established.

- 8.21. It was acknowledged that the principal witness for the First Objector (TWL) had stated that many of the activities which had been claimed on the land had not in reality occurred, or alternatively they had not occurred with the frequency alleged; and anyway they could not co-exist with the heavy uses of the port. However a significant number of inhabitants of the Parish of Mistley had under oath, and subject to cross-examination, given reliable evidence of use of the land for recreational purposes. Evidence of commercial use of the application land had not supported the contention that the land was so heavily used by commercial traffic as to preclude use for recreational purposes. As a matter of fact, recreational and commercial use of the application land had comfortably co-existed throughout the relevant 20 year period.
- 8.22. The Applicant's evidence of recreational use of the application land had been contained in written statements and oral evidence from 18 witnesses, supported by further evidence questionnaires from other witnesses. The evidence was further supplemented by a collection of photographs. The witnesses who gave oral evidence had testified to the use of the Quay for a range of recreational activities at all times of day, all days of the week and all times of the year. All had believed the application land to be open and available for use by local people. The witnesses had been distributed throughout the Parish.
- 8.23. Aspects of the more important parts of the evidence given by individual oral witnesses were summarised. It was acknowledged that not all of the users who had been seen undertaking recreational activities on the site would have been residents of the Parish of Mistley, but all of the witnesses had been residents of the Parish. Some of the other users were identified as residents of the Parish, and it is likely that many of the others would be local people. When all of the evidence of recreational use is taken into account it constitutes substantially more than trivial or sporadic use of the Quay, and does demonstrate that the Quay was in general use by the local community to a sufficient extent to put the landowner on notice that a right was being asserted.
- 8.24. As far as use of the application land for boating activities was concerned, there had been substantial evidence of use of the Quay for temporary berthing of private yachts. It was acknowledged that use by commercial vessels, or for some group activities, had been pursuant to express permission, but a general recreational use, as undertaken by Mr and Mrs Wainwright, Mr Fairhall, Mr Horlock, Mr Ward or Mr Wood, and as attested to in a statement of a Janet Harber and the guides prepared by her and her father, was more than trivial or sporadic. The berthing of a yacht per se does not involve the use of the application land, and thus a prohibition on berthing does not bring into question the right of local people to use the Quay for recreational activities. However when a yacht is berthed alongside the Quay this will give rise to incidental recreational use of the Quay itself. Many of the Applicant's witnesses had said that they considered the Quay to be a public quay, including Mr Keith Garwood who spent his working life on the Quay. The evidence of Mr Brooks, whose family had owned the Quay from 1858 until 1959 was that the Quay was always a public quay. Nothing in the General Directions of the Harwich Haven Authority can remove this right. If the Direction has any effect at all in requiring permission to remain berthed, then permission will be implied by virtue of the public right.

- 8.25. Evidence had been given about the presence or otherwise of ladders on the quayside. There had been a conflict of evidence between a number of the Applicant's witnesses on the one hand and Mr Parker of TWL on the other. The Applicant's witnesses recalled 3 ladders, albeit one of them would now be within the Stockdale compound. That evidence is relevant only to the extent that the presence of ladders would facilitate use of the Quay for the berthing of yachts and for swimming. However the witnesses who have berthed at the Quay explained that they usually only did so around high tide and that it was possible to step from a vessel onto the Quay at such times without a ladder. In any event clear evidence from local boat owners as to the presence of the ladders should be preferred. Reference was made to a 1977 agreement between EDME and Trent Wharfage which had granted such a right in relation to an area further to the east. This and other documentation from around that time tended to suggest that there was recognition that there was already a public or customary right to berth alongside the part of the Quay which is within the present application site.
- 8.26. As for the Objectors' evidence, the principal Objector (TWL) relied on the oral evidence of Mr Parker, together with statutory declarations from him, five employees and a contractor to TWL. Mr Parker's evidence had covered the period since 1996. He had estimated that he spent about 4 days in every 3 week period at Mistley. Until 2001 his office had been in the Maltings building, now converted to apartments, and some distance from the application land. Since that date his office had been in the Stockdale Warehouse area. He does not have charge of the day-to-day operations of the port. Although two of the port managers during the relevant period of time had given statutory declarations, it was notable that neither they nor any of the other witnesses who are employees of TWL had attended to give evidence at the Inquiry, despite it being apparent that aspects of their evidence were contentious. One of those who had made a declaration had even attended every day of the Inquiry. Evidence given personally under oath and subject to cross-examination should be preferred in such circumstances where there is any conflict.
- 8.27. The evidence which had been given by Mr Parker should be considered in the context of his limited direct involvement with the day to day affairs of the port and his infrequent presence on site. There were also apparent discrepancies in Mr Parker's various statements of evidence.
- 8.28. Mr Parker in his evidence had sought to paint a picture of the application land being so intensively used for commercial activities as to preclude the possibility of any recreational use. However that claimed intensity of commercial vehicular use is not borne out by the evidence. The level of use has been variable, with periods of greater use when a vessel is in port and its cargo being discharged, interspersed with much quieter periods. The frequency with which vessels have used the port has varied throughout the relevant period. In general terms the number of vessels using the port has steadily declined since the late 1980s, and the quantity of cargo passing across the Quay reduced by about half.
- 8.29. Mr Parker had given evidence about the operations associated with discharging cargo from a vessel. Those operations varied according to the nature of the cargo.

Also some cargoes were discharged from the vessels and stored on Baltic Quay before being collected and removed from the site at a later date. Other cargoes were discharged and then stored in the Stockdale Warehouse. Mr Parker had emphasised that there were a large number of variable factors. His principal contention had been that the level of vehicular activity is determined by the quantity of cargo which has to pass over the application land, and that this had been such as to render it impossible for the claimed recreational activities to have occurred. He had however accepted that the level of movement across the Quay was constrained by the available vehicles and staff to drive them. Mr Parker's evidence about all this was confused and confusing. It was clear that the maximum number of motor units available to move bulk or flat-bed trailers was 4 or 5 in 1992, and Mr Parker had stated that later on the maximum number of units moving up and down the Quay had been 2. It should be concluded that the available number of tractor units and staff would not allow for the intensity of use of the Quay that had been claimed by TWL.

- 8.30. Mr Parker had produced a table purporting to assess the frequency of vehicle movements across the Quay, not derived from any survey of actual use, but instead as a calculation based on the tonnage of material delivered to the port, divided by average vehicle loads. However in his evidence Mr Parker himself had stressed the large number of variables that applied, particularly the nature of the cargo and cargo mix, which would determine how it was discharged and how it was moved and where it was stored. An exercise like Mr Parker's could only produce an average figure which may bear no relation to the level of actual vehicle movements on any given day.
- 8.31. In contrast Mrs Bell for the Applicants had undertaken a survey of vehicular and recreational use on 6 different days, albeit outside the 20 year period, which were representative of different levels of port activity, 3 in the winter and 3 in the spring. It was accepted that this exercise had produced snapshots in time which may or may not reflect the normal pattern of use.
- 8.32. Comparing both approaches to the evidence, some conclusions could be drawn. Mrs Bell's survey shows that there is a distinct difference in the level of commercial vehicle use of the Quay between a day when a vessel is being discharged and a day when there is no such activity. Mr Parker's figures do not demonstrate this, although he conceded that to be the case. Mrs Bell's maximum figure for commercial use in a single day (when a vessel was unloading) of 151 movements, and a minimum of 41 when no vessel was in port, would appear to be broadly consistent with Mr Parker's average figure of 103 vehicle movements a day, or his maximum suggested figure of 224.
- 8.33. Mr Parker had sought to rely on a series of photographs to substantiate his claim that the Quay was frequently congested with commercial vehicles, and that the Quay was used for HGVs to turn. The Applicant acknowledged that some of the photographs did indeed show those states of affairs. However the assertion that these were commonplace occurrences is at odds with the evidence of numerous witnesses. It is important to note that several of those witnesses actually live and/or work on the Quay and are intimately familiar with the daily goings on there over a long period.

- 8.34. Considering the totality of the photographic evidence available, although some of it does indeed show commercial activity, it would be true to say that most photographs taken even during the working week in fact show the Quay to be empty or substantially empty, and entirely capable of supporting the recreational activities described by the Applicant's witnesses. Some of the photographs also show recreational activities going on at the same time as commercial activities were taking place.
- 8.35. Evidence had also been given by several witnesses on behalf of EDME in relation to how the application land was used for the delivery and collection of goods to and from the Thorn Warehouse, and for the transit of goods from one part of the EDME estate to another. However it should be noted that every time one of EDME's commercial vehicles crossed from EDME's Thorn Warehouse to the other part of the EDME estate south of the High Street, it itself was crossing the public highway consisting of the street pavement and a public road, yet these activities were not inconsistent with that pavement and that road remaining public and publicly accessible places. EDME had produced a number of tabulated figures in relation to deliveries and the frequency of vehicles loading or unloading, but no proper distinction had been made between lorries loading or unloading at the Thorn Quay Warehouse or elsewhere on the EDME site, with the result that the evidence could not be relied on to validate the recollection of any particular witness in this context.
- 8.36. It was notable that the evidence of Mr Herrington, one of EDME's witnesses, covered the period when he had been employed (previously) by TWL, the principal Objector. Mr Herrington did not describe regular congestion on the Quay. He had acknowledged that he had seen sightseers and other people on the quayside, estimating that at about 4 or 5 people a day. He had also acknowledged that he had seen dog walkers and recreational walkers perhaps 2 or 3 a day. Mr Ian Burns also did not recall congestion on the Quay, although he was aware that sometimes HGVs had queued on the port road, and that at times these spilled onto the High Street. He had seen some non-EDME vehicles turning on the Quay but that was not a frequent occurrence.
- 8.37. Mr Jason Powell for EDME had described the Quay as only being busy from time to time. He had occasionally seen vehicles crossing on the application site. He did not recall having seen port lorries turning in that area. He had seen people walking on the Quay looking at the view along the riverside, bird watching and feeding swans. He had also seen the occasional yacht moored further up the Quay. Mr Townes had seen people painting at the Swan Basin, and thought that every week he had seen people dog walking across the Quay. He himself had played football on the Quay a couple of times. He had possibly seen people bird watching, infrequently. He had seen people walking to the Quay edge, more in summertime; he had seen people riding bicycles and had seen Mrs Smith feeding the swans every day. He himself had swum from the Quay on one occasion.
- 8.38. To the extent that there was a conflict between the evidence of the Applicant's witnesses and EDME's witnesses on the one hand, and that of Mr Parker for TWL on the other, then the evidence of those witnesses who were permanently on site

should be preferred to the evidence of Mr Parker whose personal presence and connection with the site was extremely limited. Several of the Applicant's witnesses have lived and worked on the Quay throughout the full 20 year period. They and others who covered part of the period presented a consistent picture of use of the Quay where there are periods of more intensive commercial use, but they do not recognise the congestion alleged by Mr Parker. All of the Applicant's witnesses have said that even at busy times recreational use is possible and has taken place. Outside those busy times there are long periods during every working day when the traffic is light, and at evenings and weekends there is usually no commercial traffic.

- 8.39. The evidence of the Applicant's witnesses as to their own recreational use of the Quay, and the use they have witnessed, was given honestly, reliably and credibly. There was no evidence that any witness was ever unable to use the land for recreational activities, or was frustrated in such use by reason of commercial vehicular activity.
- 8.40. The recreational use of the Quay had been independently endorsed by several of the witnesses who gave evidence for EDME. That evidence had to be seen in the light of the limitations of the time and ability of the EDME employees to view activity on the Quay. Each of those witnesses had been engaged in doing their own job. Some of them did not work on the Quay and had very limited opportunity to see what was going on there. Others did spend limited parts of their working day on the Quay and had witnessed recreational activity. Taking all these matters into account it was reasonable to regard their evidence as consistent with that of the Applicant's witnesses.
- 8.41. Mrs Bell's traffic survey had included a schedule detailing the timing of vehicles passing across the Quay (which had been measured by Mr Tucker) that demonstrated that the average time taken to cross the Quay was a little less than 20 seconds. Mr Parker did not take issue with this, and Mr Herrington of EDME agreed that it was about right. On that basis, allowing for 151 vehicles to cross the Quay in one day, and assuming that no two vehicles were on the Quay at the same time, the aggregate actual time that commercial vehicles would be on the Quay is approximately 50 minutes. That was for a busy day when a vessel is unloading. On other days the time would be less. Thus on any account there are long periods in every working day when no commercial vehicles are moving across the Quay.
- 8.42. Thus the evidence demonstrates that the level of recreational use that was made of the Quay was significantly more than trivial or sporadic, and well capable of demonstrating to a reasonable landowner that a right was being asserted.
- 8.43. As to the requirement that use of the application site must have been "*as of right*" that test does not relate to the subjective intention of the user, but rather to the manner in which the use has been undertaken. The approach of the Supreme Court in the *Redcar* case was commended, as was the analysis of Lord Hoffmann in *Sunningwell* [2000] 1 AC 335 that the English theory of prescription was concerned with how the matter would have appeared to the owner of the land. In other words if the use was without force, secrecy or permission, it should

reasonably have alerted a landowner to the need to put a stop to the use before it matured into a right. In the present case there have been no issues relating to secret or covert use of the land. Issues have arisen however in relation to the effect of some permissive use of the application site, and also whether use was rendered contentious by the display of signs at various points around the site.

- 8.44. As to permissive use, use can be permissive as a result of express permission from a landowner, or as a result of implied permission or statutory authority. The Applicant accepts that specific permission was given for Mistley Quay to be used for the berthing of commercial vessels and for some organised events relating to non-commercial vessels. Such use of the Quay cannot be relied on to support the *Commons Act* application.
- 8.45. TWL had also argued that use of the Quay by members of the organisation Swans in Need or Swans in Distress was with the express or implied permission of the landowner. There had been no direct evidence of such permission having been sought or given. The only direct evidence on the issue had been from Mrs Alex Smith who said that permission was neither requested nor given for the use of the application land for feeding the swans. She had acknowledged that permission had been sought to use commercial parts of the Quay, but that application had not been responded to. Nothing in the documents suggested that formal permission had ever been given by officers or representatives of the harbour company.
- 8.46. It is acknowledged that some parts of the application site are public highway, subject to public rights of way. Land which is highway is not precluded from being registered as a village green. Clearly use of highway land for any purposes for which a highway can lawfully be used cannot be relied upon in support of an application to register that same land as a village green. It is accepted that the public are entitled to undertake a range of ancillary activities on a highway, and these will include activities which might otherwise be relied on in support of registration of a village green. The case of *DPP v Jones* [1999] 2 AC 335 was referred to in this regard.
- 8.47. The onus is therefore on the Applicant in relation to that part of the application site which is highway, to adduce evidence of use of that part of the land for lawful sports and pastimes which would not be permissible on a highway.
- 8.48. The Applicant further accepts that Essex County Council as highway authority had correctly attributed public status to the port road, i.e. the current version of the port road which replaced the two earlier routes which had apparently existed.
- 8.49. The Applicant acknowledges that elements of the evidence to the Inquiry about use of the parts of the application site which are highway land are consistent with activities which may lawfully be undertaken on the public highway. Such evidence would include use of the highway for walking, dog walking, cycling, bird watching and photography. Those activities which go beyond what is permissible on a public highway include recreational walking in a non-linear fashion, drawing and painting whereby the artist is stationary in front of an easel, causing an obstruction of the highway, children's play, and gathering elderflowers.

- 8.50. It was accepted on behalf of the Applicant that use of a piece of land can be rendered contentious by the landowner communicating to the potential users a prohibition. That can be achieved by the erection and maintenance of suitably worded notices in a prominent position. The efficacy of such notices had been considered in the caselaw on the topic.
- 8.51. The following principles can be extracted. The fundamental question is what any notice would have conveyed to a reasonable user. Would a reasonable user have known that the landowner was objecting to and contesting his use of the land? Evidence of the actual response by users is relevant to that question. The nature and context of any notice and its effect must be examined in context. Any notice should be read in a commonsense and not a legalistic way. Evidence as to what the owner subjectively intended the notice to achieve is strictly irrelevant in ascertaining its objective meaning. If the owner's intention was communicated to the users, or a representative of the users, that might reinforce or explain the message conveyed by the notice. If it is suggested that the owner should have done something more than erect a notice, whether by way of putting up another notice or otherwise, the court should consider whether anything more would have been proportionate to the user in question. Fencing off the area concerned, or taking legal proceedings against users will not always be necessary. The aim should be to let the reasonable user know that the owner objects to and contests his user.
- 8.52. TWL in this case relies on a variety of signs located at various points around the application land. The Applicant submits that those signs were not effective to render contentious public use of the Quay.
- 8.53. The wording of the signs varied. Some were prohibitory in nature, others were cautionary, e.g. danger fork-lift trucks, hazardous area, danger vehicles loading and unloading etc. It is accepted that prohibitory signs can be sufficient to convey to a reasonable user that the landowner objects to public use of the land to which those signs relate.
- 8.54. The Appellant however argues that a reasonable person looking at the signs in their particular position and context here would not conclude that the signs relate to the application land. Each of the signs is located at a point of access from the application land onto what may reasonably be termed the commercial areas of the port. All of the individual signs which had been considered at the Inquiry were addressed individually or collectively.
- 8.55. It is relevant that no signs had been erected at any other position within the application land where, if the intention had been to exclude the public from the application land, they would have unambiguously conveyed this. For example no signs had been erected along that section of the port road over which Mr Parker does not accept that any public rights of way exist. No signs had been erected along the Quay edge or attached to the longstanding concrete filled barrels. Had the Objectors' intention been to prevent the public from having access to the open area of Mistley Quay, such signs could easily have been erected.

- 8.56. The Applicant's witnesses had been cross-examined at length about the effect of the signs. Each witness had maintained either that they had ignored the signs or that they interpreted the prohibitory signs as relating to the land beyond the application land, land which they regarded as being the commercial part of the port, which was separate and distinct from the application land. Accordingly the Applicant submits that prohibitory signs were not effective in rendering use of the application land contentious.
- 8.57. The position adopted by the High Court and the Court of Appeal in the case of *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2012] EWCA Civ 250 was considered; the subject matter there was the question whether the landowner had done sufficient to communicate opposition to public use of land. It was concluded that it is necessary to have regard to all the actions of the landowner.
- 8.58. The landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Applying the principles of that case to the facts in the present case, where the users unanimously state either that they did not read the signs or if they did, they did not consider the signs to apply to the application land, it must be concluded that, if the landowner's intention had been to exclude the public, he had not done enough to give reasonable notice in the particular circumstances of the case. It might be noted that in none of the photographs could one see either Mr Parker or the TWL staff on the Quay wearing a hard hat in compliance with the notices which TWL now claimed applied to the parts of the Quay within the application site.
- 8.59. As for the specific "*No Fishing*" sign attached to the Thorn Warehouse, it is accepted that this sign sought to prohibit fishing from the Quay, and that any use of the application land after that sign was erected would be contentious, and thus not capable of being relied on in support of the application. However that sign does have a further relevance. It implicitly recognises that members of the public will be present at the Quay edge. It does not state that fishing is forbidden because it will involve trespass. It prohibits it because of potential harm to swans. There is an implicit recognition of the right of the public to be on the Quay for other activities.
- 8.60. As far as the "*No Mooring*" signs were concerned, they like other signs need to be construed in context. There is no evidence that there has ever been a "*No Mooring*" sign on the application land. Had TWL wished to prevent yachts berthing alongside Allen's Quay, there is no apparent reason why a sign could not have been erected on the Quay edge which would have made that intention unequivocally clear. Instead the landowner now seeks to construe signs erected elsewhere as referring to the application land. In the case of each of those signs, the Applicant's witnesses have given a convincing explanation as to why it should relate either to the Quay to the east of the application land, or to that part of the Quay laying alongside the Stockdale Warehouse compound, again outside the application land. Mr Parker had asserted that the sign saying "*Danger, No Mooring*", located on the Quay edge near the corner of the Thorn Warehouse, facing east, referred to the part of the Quay within the application land. However neither Mr Parker nor anyone else could explain what danger might result from

berthing alongside the Quay within the application land, and this suggestion of danger is at odds with the various pilot books produced in the Applicant's evidence.

- 8.61. On the important points of law arising from the **Redcar** case, and in particular the principle of deference, the following points were made. TWL had argued that the application must fail because the recreational activities relied on in support of the application are wholly inconsistent with the continuing commercial use of the land. However that is not the correct approach to the requirements for registration set out in **Section 15** of the **Commons Act 2006**.
- 8.62. The decision of the Supreme Court in the **Redcar** case had conclusively endorsed the tripartite test which was first explained by Lord Hoffmann in the **Sunningwell** case in relation to the latin tag "*nec vi, nec clam, nec precario*" – without force, without secrecy and without permission. There is no room for the imposition of any additional requirement in establishing that use has been undertaken as of right. If use is with without force, secrecy or permission, that is enough. There is no need to ask any further questions.
- 8.63. Having considered the tripartite test in the **Redcar** case, Lord Walker had gone on to consider what rights would exist after registration. The concern he was addressing in the Supreme Court in that case was that if the land was registered as a village green the rights of the local residents to use the land for recreational purposes would prevent the owner from using it for its previous use, in that case as a golf club. Lord Walker made it clear that registration as a town or village green does not mean that the landowner is altogether excluded from the land. The landowner still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. Registration as a green does not necessarily confer unrestricted rights of recreation on local inhabitants. Rather, in a case where the land has been used by both the owner and the local inhabitants during the pre-registration period, neither interfering with the other, then the local inhabitants' rights will continue to be qualified after registration. They will have to allow the owner to continue using the land in the same way as before.
- 8.64. Lord Hope in **Redcar** had approached the matter in a somewhat different way from Lord Walker, but came to the view that if the activities of the landowner and the local inhabitants could co-exist before registration, then equally they could co-exist after registration, subject to give and take on both sides. Viewed in that context deference by the public to what an owner does on his land may in fact be taken as an indication that the two uses can in practice co-exist.
- 8.65. It was acknowledged that Lord Hope expressly addressed the possibility that there might be a position where two uses on a piece of land could not sensibly co-exist at all. However that is not what arises in a situation where two or more rights co-exist over the same land but there are merely occasions when they cannot practically be enjoyed simultaneously. The facts of the **Redcar** case were considered. Some of the Objectors in the present case argued that on the facts **Redcar** was wholly distinguishable from the circumstances at Mistley Quay. The Appellant's argument however was that there are genuine parallels between the

facts in *Redcar* and the evidence here as to the manner in which Mistley Quay has been used both by local people and by commercial traffic associated with the port, and formerly EDME.

- 8.66. It is clear that the Quay is regularly used by commercial vehicles, generally transiting from one end of the port to the other. Rather like a driven golf ball, a commercial vehicle presents a danger to persons in its path. The evidence of users has been that when faced with an oncoming, slow moving vehicle, they have held back or stepped out of its way. The same applies to a fork lift truck engaged either in discharging the contents of a delivery lorry or moving pallets from one part of EDME's premises to another. Numerous witnesses had explained that they did not perceive there to be a significant risk. No user has been involved in or seen an incident whereby any harm has come to a recreational user by reason of the activities of commercial vehicles on the Quay. No evidence was given of any such incident having occurred.
- 8.67. Much had been made of the perceived danger to a pedestrian on the Quay edge when a commercial vehicle is entering or exiting the Stockdale compound using the gate directly onto the Quay from that compound. The Applicant's case is that until 2008 that was a rare occurrence. Several witnesses had said that prior to the Cropcare product being imported from 2008 it was very unusual for any traffic to use that gate. Mr Garwood and Mr Horlock had referred to parking their cars on the Quay edge, and there is photographic evidence of cars so parked, something which would potentially obstruct use of that access. At times that access had clearly been blocked by stored material, as seen in some of the photographs. The Applicant's case is that the scenario described was not a common occurrence, and when it has occurred any pedestrian on the Quay had ample opportunity to move out of the way of a slow moving vehicle, either in the space remaining at the Quay edge, or towards Grapevine Cottages. No doubt the driver of the vehicle also would have exercised due care in the circumstances.
- 8.68. Thus on the evidence recreational use of the Quay has for many years co-existed with its commercial use. Mr Parker's view that commercial and recreational use cannot co-exist is unwarranted. Such co-existence has been a regular pattern for much longer than the required 20 year period. That has been so because the impact of commercial use of the Quay has been significantly less than Mr Parker claimed, and when recreational users have encountered commercial vehicles they have held back or stepped to one side, and the vehicle drivers have clearly manoeuvred so as to avoid pedestrians. In this way there had been give and take on both sides sufficient to allow both uses of the Quay to continue without difficulty.
- 8.69. As far as the fence alongside the Quay is concerned, that had undoubtedly been a contentious issue which has been a catalyst for action on the part of the local residents, leading to the application for registration of the land as a town or village green. However the presence of that fence, and the desirability or otherwise of its removal or replacement, are factors which are irrelevant to consideration of the present application. The application stands or falls on whether the Applicant is able to prove that the land has been used in accordance with the requirements of *Section 15* of the *Commons Act 2006*.

- 8.70. As regards the area of land potentially to be registered, it is the Applicant's primary submission that the evidence demonstrates that the inhabitants of the Parish of Mistley have used the whole of the application land for the purpose of lawful sports and pastimes, and that such use had been undertaken as of right.
- 8.71. In the event that it is found that there has been insufficient use of that part of the application land which is subject to a public right of way, two issues arise. The first is how to deal with that part of the port road where the status is disputed. The Applicant's position is that Essex County Council have correctly identified this section of the port road as a public highway. In any event the status of that route is not a matter for this Inquiry. In the event that that land is not part of the public highway, the Applicant argues that the evidence of use for recreational purposes is sufficient to satisfy the requirements of **Section 15** of the **2006 Act**. The second issue is whether the Registration Authority is entitled, without any amendment of the application, to register only that part of the application land which is found to have been sufficiently used. That matter had been considered by the House of Lords in the **Trap Grounds** case. The view of the House of Lords had been that the Registration Authority is entitled without any amendment of the application to register only part of the land applied for, where that part had been proved to have been used for the necessary period. It would be difficult to see how that could cause prejudice to anyone.
- 8.72. In this case the area in question would be the open Quay adjoining and laying immediately to the north-east of the recorded publicly maintainable highway. It is the Applicant's belief that the extent of the highway is inaccurately recorded by Essex County Council, and should extend further to the north, so as to include the land previously supporting the railway lines. That would put the boundary of the highway adjoining the strip of land which had been subject to an auction sale in 1844 and which had been stated to have a depth of 36 feet from the Quay. It would also be consistent with the intention which had been stated in 1844 that the land to the rear of the lots being sold was being retained to provide a new access road. It would also be consistent with the registered title that had been established on the quayside.
- 8.73. It was acknowledged that use of the application site had in reality continued after September 2008, but such use had been knowingly contentious after the fencing off of the Quay, and enclosure of a substantial section of it. Further the erection of the fence in 2008 had made it manifestly obvious that the landowner was asserting to local people that they had no right to be on the Quay.
- 8.74. In relation to the argument for some of the Objectors that rather than there having been co-existence between the various uses of the quayside, there had been displacement of the recreational use by the commercial activities on the Quay, if one accepted the time trial evidence of approximately 20 seconds for a commercial vehicle to cross the Quay, and if one accepts that the crossings of the Quay or congestion on the Quay were relatively infrequent, then the 20 second passing of a vehicle is not displacement.

- 8.75. It is not accepted that if the application site becomes a village green the passage of all vehicular traffic over it would become unlawful. The *Redcar* case had put matters like this into a different context, and suggests that users of a village green registered in such circumstances would have a qualified right to use the Quay, not an unqualified right. Compatibility is a question of degree, and one of the matters relevant to that would be the fact of vehicular use. If village green-type use and the commercial vehicular use have in fact co-existed, then they cannot be said to be incapable of co-existing. This is not an application which seeks to change things on the Quay, but to preserve that which has been the status quo there in the past.
- 8.76. As to the consideration of alternative remedies (alternative to a *Commons Act* application), it was conceded that the Applicant's side had taken advice on possible injunctive remedies. If one were to seek an injunction it would have had to be a relator action by the Attorney General, as an individual would not have had locus standi. A private individual would have had to show specific loss, or that there was an easement. However in this case there would have been no dominant tenement for the purpose of an easement. Therefore the suggestion that the Applicant should have pursued an alternative remedy is irrelevant.
- 8.77. As for the suggestion on behalf of TWL that considering a reduced application site would alter the whole focus of the Inquiry, the Applicant's answer was that the focus of this Inquiry has been the open Quay generally and not the one metre strip at its edge. Therefore the Applicant took the view that it would be appropriate to consider the whole non-highway area.
- 8.78. As far as concerned the suggestion that village green rights could not be established on the part of the Quay which had had railway tracks embedded in it, access to the rail network had closed in 1986, and therefore it could properly be assumed that even if those rails had had some sort of technical status as a railway, that status had been abandoned. Therefore the point that had been alluded to in paragraph 43 of the *Rights of Way Inspector's Report* of September 2012 was not applicable here. Furthermore the Inspector's findings in that case had related to a length of railway extending to a point (identified as C/D) which was very well to the east of the present application site. There was no reason to assume that the railway track or siding embedded in the Quay on Allen's Quay was a railway subject to railway bylaws.

9. **THIRD PARTY EVIDENCE**

- 9.1. The Inquiry was attended by a *Mrs Jacqueline Lester*, who asked to give evidence, although she said that she was neither a supporter or nor an objector to the application being considered. Her current address is in Colchester.
- 9.2. She said that she was born in 1946 to parents who lived in Mistley and had spent the first 20 years of her life living in Mistley, where her father worked in the Maltings. She married in 1966 and moved to Colchester where she still lives.
- 9.3. Mistley Quay was a busy industrial area during the time she lived there, with many large foreign boats constantly moored against the Quay discharging their cargoes. She and her brothers occasionally went down to the Quay to try to see their father

but were always discouraged from doing so because of the dangers connected with the busy working port. During the time she lived in Mistley and did venture down to the Quay she could not recall seeing anyone swimming from the Quay.

- 9.4. In February 1991 she received a telephone call informing her that her father's body had been recovered from the river off the Quay. It appeared that he had either slipped or jumped into the water. She had subsequently always been worried that, had there been a fence there at the time, perhaps that tragedy for her family would not have occurred. At least it might have acted as a deterrent for her father. She said she had always believed that the Quay is privately owned. The Quay area is a commercial working port and her own brother had worked there for many years until his own death in 2004. She produced a number of documents relating to the inquiries and post-mortem which took place into her father's death in 1991.

10. **THE CASE FOR THE FIRST OBJECTOR – TW LOGISTICS LIMITED – EVIDENCE**

- 10.1. Only one witness was called to give oral evidence on behalf of the First Objector, namely **Mr Parker**, the Chairman of the company whose name I shall abbreviate to TWL. I shall endeavour to summarise his evidence below.
- 10.2. However Statutory Declarations were also lodged which had been completed by six other persons, five of whom are employees of TWL, the other gentleman being a retired building contractor who had over the years done a lot of building work at the Quay for TWL. In spite of the fact that these witnesses' declarations related extensively to matters of fact which were the subject of serious dispute at the Inquiry, none of them was called to give oral evidence or made available to be cross-examined. I was given to understand that this was as a result of a conscious decision taken on behalf of TWL, rather than because of the personal unavailability of any of the individuals concerned.
- 10.3. In the following paragraphs I shall endeavour to record briefly what seemed to me to be the gist of the main points covered by those statutory declarations.
- 10.4. **Mr David Moore** in his declaration said that he is a retired building contractor living in Henstead, Suffolk. Since 1979 his former company had been contracted by the Quay owners to do regular building and repair works at Mistley Quay. That work had included re-concreting the strip of the Quay fronting the water. That was done in 1989 and took approximately 2 months. Mr Moore estimated that he worked at the Quay for about 4 or 5 months over the course of each year during the relevant years.
- 10.5. In 2008 he had been contracted to install the fencing along the edge of the Quay, and also to fence the additional compound area.
- 10.6. During the time that he worked at the port he had seen the access road and the strip of the Quay fronting the water being used principally to provide access for

large commercial vehicles etc. EDME until about 2008 also regularly parked lorries at the eastern end of the land to load and unload them.

- 10.7. In the 30 years that he worked at the Quay he remembered seeing commercial boats moored against it. He only remembered seeing a domestic boat once. He has seen the same lady regularly feeding swans. He thought he may have seen people drawing or painting. He had occasionally seen people walking on the Quay. If a lorry came along they got out of the way. There had always been a number of signs around the Quay and indeed he or his firm had erected them.
- 10.8. **Ms Susan Shrimpton** has been employed full-time at the Quay since April 1992. She is currently the Administration Manager for TWL, a post she has held from 2004. From 2002 to 2004 she was Port Manager.
- 10.9. Her work had been at Mistley Quay on weekdays over the years. For a lot of the time she had worked in an office overlooking the Quay, and then in 2003 she had moved into an office in the Stockdale Warehouse from which there was a more restricted view. The land had not really changed over the relevant years.
- 10.10. The access road was always heavily used by lorries collecting or delivering. Both it and the open Quay by the water's edge were frequently congested by lorries arriving or leaving. Lorries regularly parked on the access road, lorries also waited on the open part of the quayside. She had a recollection of a local resident complaining to her about 10 years ago about the number of lorries parked on the open Quay. EDME also used to use the eastern part of the open Quay to load and unload lorries and store pallets of goods. The warehouse they used at that end was used until about 4 or 5 years ago.
- 10.11. People in cars have driven in and parked on the open Quay but tend only to be there for about 10 minutes.
- 10.12. The Quay used to be used to tie up lash barges. Other people occasionally moored their yachts along the open quayside, but not often, and if she saw them she told them not to, as she was instructed to do.
- 10.13. One local lady used to come regularly to feed swans with permission from the company.
- 10.14. She did not remember seeing dog walkers on the land but saw other people walking there, perhaps once or twice a week. She has seen people on bicycles but rarely. She has never seen children playing. There have always been signs around the Quay.
- 10.15. **Mr Ronald Reason** in his declaration said he had been employed at Mistley Quay since 1994 so his evidence related to the period between 1994 and 2008. Latterly he had been Operations Manager at the Quay, and before that he had had various other posts. All of his posts had involved his being outside on the Quay for most of the time. During 2008 he had helped to erect the fence around the Quay.

- 10.16. There used to be a ladder on the side of the Quay at the north-east corner but it was taken down in 2002 because it was in poor condition. Lorries regularly parked on the access road running past the warehouse and the weighbridge. Lorries also often park on the open quayside area fronting the river. He himself often sent lorries down to park on the open quayside to wait to be loaded or unloaded.
- 10.17. Other people had sometimes parked along the strip of the open quayside fronting the water. If they were not in the way they were generally left but if they were in the way they would be asked to move. EDME also used to load or unload lorries on the open area next to their warehouse.
- 10.18. They regularly docked lash barges along the open quayside until the early 2000s. He had occasionally seen sailing yachts or private boats moored against the open quayside but he always asked them to move if he saw them.
- 10.19. He had occasionally seen artists sitting on the granite blocks in the main compound outside the application site. Sometimes he had seen people walking on the land but he did not recall seeing people with dogs. He has seen the occasional cyclist on the land. He had never seen children playing on the land. There had always been signs around the Quay.
- 10.20. **Mr Geoffrey Cone** has been employed at Mistley Quay since 1974, initially as a crane driver and latterly as a machine driver. His declaration says that the Stockdale Warehouse was built in 1979 and that he thought the length of fence alongside the weighbridge was put up at the same time.
- 10.21. As long as he had worked at the Quay there had been a problem with congestion caused by lorries waiting to get onto the weighbridge. Many years ago, but probably after 1988, there had been a traffic light system at the entrance to ease congestion and lorries were held or stacked out on New Road.
- 10.22. On a daily basis lorries were parked in the compound in front of the warehouse, on the access road, and also on a daily basis lorries were stacked up on the open quayside by the water. During working hours the access road, the compound, the warehouse and the open quayside were constantly used by lorries, forklifts etc.
- 10.23. Up until about 5 years ago EDME used to load or unload goods to and from their warehouse next to the open area; lorries parked on the open area to load or unload and often their cargoes on pallets would be sat on the ground there.
- 10.24. Lash barges used to be tied up against the open Quay. For about the last 10 years there had been an occasional problem with cars parking along the open Quay area on the roadway in front of the houses opposite. That sometimes obstructed the lorries.
- 10.25. He had occasionally seen domestic boats and yachts moored against the open Quay. He had seen people feeding swans. He had occasionally seen people painting or drawing on the Quay. He had seen dog walkers, he had occasionally

seen cyclists, he had never seen children playing on the land, he had occasionally seen people bird watching. He had only seen people swim there before 1988.

- 10.26. **Mr Christopher Baxter** in his declaration said that he had been employed at Mistley Port since 1974 as a warehouse supervisor and fork-lift truck driver. He said there had always been a problem with congestion on the access road, mainly caused by lorries waiting to go on the weighbridge. Lorries would regularly park on the bend of the access road. There might perhaps be lorries stacked up on the open area of the quayside as well.
- 10.27. During the relevant years, particularly Monday to Friday, there were constantly large vehicles moving round on the land. Until 4 or 5 years ago EDMC used the eastern part of the open quayside to load and unload their cargo on a daily basis.
- 10.28. Some days are busier than others at the port, but even on a quiet day they have numerous vehicle movements that use all of the available space. They used to use the area of open quayside to tie up lash barges. Domestic boats were occasionally moored against the open area of the Quay until the fence went up in 2008.
- 10.29. He had seen people feeding swans on the Quay. He had occasionally seen people painting or drawing there during the summer. He had seen dog walkers. He occasionally saw bird watchers. He occasionally saw people cycling. He had never seen children playing there. There are lots of warning and safety signs around the land.
- 10.30. **Ms Patricia Sargent** is the Company Secretary of TWL. The registered office of the Company is at Gainsborough, Lincolnshire. She had been employed with the company since July 1983 and her evidence related to the entire relevant period 1988 to 2008.
- 10.31. The frequency of her attendance at the Mistley site had varied depending on need. As part of her responsibilities she had been involved in liaising with the Health and Safety Executive in 2008, which circumstance led to the erection in that year of the fence along the Quay. Also at that time, in company with Mr Parker, the Company's Chairman, she had met representatives of the protest group called "*Free the Quay*". From that she had gained the strong impression that access to the river by sailors was the protest group's primary concern.
- 10.32. She herself could attest to the heavy commercial activities undertaken on the land. That led her to say that the land could not possibly have been used during the relevant years for the sports and pastimes alleged in the application.
- 10.33. However over the years she had seen cars parked on the port road and occasionally on the open Quay, but only for a short time. She had also seen pedestrians during her regular visits to the Mistley site, but only very occasionally, apart from those on the part of the land which is the public highway.
- 10.34. **Mr Michael Parker**, who is the Chairman and Managing Director of TW Logistics Limited ("TWL") gave oral evidence to the Inquiry, and was cross-examined. He had in fact produced an earlier statutory declaration, as well as later

producing a more substantial proof of evidence for the purpose of the Inquiry. In my report I shall concentrate mainly on the evidence which Mr Parker gave on oath at the Inquiry, as in general it includes within its coverage the matters which the earlier declaration had dealt with.

- 10.35. As a Director of the company which owned TWL, he had supervisory responsibility for the company from 1994, involving close contact with Mistley Port. He had acquired TWL in 1996, and since then had had overall management responsibility for port operations and business development. TWL is a manufacturing and logistics company operating in the eastern counties of England. The port of Mistley is not its only asset; TWL's Headquarters is in Gainsborough, Lincolnshire.
- 10.36. Mistley Quay had been a working port since at least the 18th century. The three main elements of it are the Baltic Quay to the east, the Thorn Quay, most of which is comprised in the current application site and the Stockdale Warehouse (and its compound).
- 10.37. TWL is the landowner and operator of the port of Mistley. Plans and documents showed the extent of the land ownership of TWL at the port of Mistley. As far as the application site is concerned TWL's ownership effectively covers the port access road and the main front part of the Quay variously known as Thorn Quay or Allen's Quay (and also sometimes Brooks Quay). TWL does not own the parts of the application site immediately in front of Grapevine Cottages, facing towards the quayside, nor the routes up round either side of the block of property containing the Grapevine Cottages and surrounding the Swan Basin near the High Street. Mr Parker explained that various archives had been researched in producing his evidence, and he gave appropriate references.
- 10.38. It was clear from the village green application documents that the purpose behind the application was to seek to achieve the removal of a fence along the exposed and potentially dangerous open quay edge. At Mistley Port there is a 4 metre drop from the Quay edge to the riverbed at low tide. The Health and Safety Executive conducts regular risk inspections at the port and makes recommendations supported by an enforcement regime. In 2008 the HSE had told TWL that it would be necessary to fence the open quay edge if it no longer remained an operational dock. If TWL had continued to class the open quay as an operational dock, lifesaving and fire fighting equipment would have had to be provided.
- 10.39. In the workings of the port commercial vehicles pass close to the quay edge, within 1 metre of it at times. HGVs also turn on the Quay. The rationale for erecting a substantial railing is obvious. Town or Village Green activities cannot coexist with port activities. The fence was erected in September 2008, although protesters had attempted to prevent its erection, alleging that it interfered with an ancient right of access to the river.
- 10.40. Mr Parker explained various contacts he had with local people protesting against the erection of the fence in late 2008. The concerns appeared to be about the fence impeding an established right of access to the water, and to some extent about the fence interfering with the view of the water. In his understanding the

idea of making a town or village green application in relation to the Quay originated with the idea that it might be a means of getting the fence removed. He produced letters and newspaper articles which he said supported this view. TWL had in fact submitted a planning application to replace the existing fence with railings 1.44 metres high.

- 10.41. Mr Parker explained that, apart from his own acquisition of TWL and its subsidiaries in 1996, the port had been operated by the same company since 1976. The port has always been and remains a busy industrial site. The pattern of activity has changed significantly over the last 100 years, with a further evolution between 1988 and 2008 (the relevant period).
- 10.42. He produced evidence setting out the vessel tonnages passing through the port over the period 1977 to 2007. The trends thus revealed showed that between 1977 and 1987 traffic had increased 300%; average vessel tonnage had increased threefold, and vessel arrivals averaged 8 per week. Between 1988 and 1998 traffic decreased by 35%, average ship tonnage increased by 25% and vessel arrivals averaged 4 per week. Then between 1998 and 2007, traffic remained constant, average ship tonnages doubled and vessel arrivals reduced to 2 per week. However there were also containerised client cargoes which should be added to the figures, and these had amounted to some 29,000 tonnes of throughput in 2007 for example. Those tonnages generate substantial activity levels at the west end of the port around the Stockdale Warehouse, where most of the port's internal storage is located.
- 10.43. The tonnage levels highlight the reasons why vessel berthing changed between the early 1990s and 2007. In the 1990s berths were used along the full length of the Quay, with vessels mooring at 10 berths including those at Stockdale Quay, and Thorn Quay. By 2003 average vessel tonnage doubled, and some vessels could only be discharged on the dredged deepwater berths at the east end of the port (Baltic Quay). Cargoes are now therefore increasingly transported by dock shunter to the Stockdale Warehouse.
- 10.44. Rail traffic movements were frequent until the mid-1980s, and ran the full length of the Quay. There were two tracks across Thorn Quay. One was in front of Grapevine Cottages and the other nearer to the quay edge.
- 10.45. The broad nature of stevedoring duties and responsibilities at the port has changed little over the decades. The primary function is the mooring of vessels, unloading or loading of cargoes using a wide variety of mechanical plant and vehicles. The port estate runs the entire length of the Quay, and all Quay areas are in continuous use during operating hours, 7.00am to 7.00pm and up to 7 days a week. In the late 1980s and 1990s long hours were worked at the port including significant periods of weekend working. In recent years overtime working has been less frequent.
- 10.46. Using 2007 as a benchmark TWL evaluated all HGV and equipment trips moving backwards and forwards over the land as averaging at more than 100 per day. Those movements peak when a vessel is in port and then exceed 160 per day. In the late 1980s and early 1990s trips would have been proportionately higher.

Transport on the Quay is principally provided by “*dock runners*” (unlicensed vehicles) which travel on the port estate roads.

- 10.47. The private road status of the port is important in keeping the port’s unit costs down.
- 10.48. The Stockdale Warehouse was built in the 1980s on the site of previously demolished buildings incorporating an animal feed factory and earlier granaries and malting, which had been demolished in 1976.
- 10.49. Mr Parker noted from the records that in the 1970s Brooks had resisted an attempt to establish public highway rights over the private access roads of the port, and had provided Essex County Council with an evidence base to support a legal objection. Prior to the demolition of the Brooks animal feed factory and the acquisition of the site by TWL in 1976, a narrow road which is a public highway had provided means of access to Brooks and the rear (quay side) of the Grapevine group of properties. That highway had met a railway line which terminated at the factory, and narrowed further at that point.
- 10.50. It had been a condition of the approval of the new 5,500 square metre Stockdale Warehouse that a new port access road should be constructed. That access road was in fact constructed and funded by TWL. New storage areas and weighbridge facilities were also approved. Mr Parker produced correspondence and documents dating from the late 1980s and earlier, including correspondence between TWL and Essex County Council as highway authority. From this it was clear he said that TWL does not accept that the new access road which it had built is a public highway.
- 10.51. The land now subject to the *Commons Act* application had been a busy industrial area with continuous vessel discharge, rail truck and HGV movements, as many old photographs showed. Port equipment and employees have continuously used the land, which lies at the centre of the port operation. That use was especially intense during the first years of the claimed period. At that time work would have frequently extended until 9.00pm in the evenings.
- 10.52. The intensity of movement and work had occasionally in the past led to tensions between local residents and TWL. He produced an example of an issue which had arisen in 1993, where local people were reported as complaining about activities on the port, including the point that lorries parked overnight on land belonging to the port, and kept their engines running overnight.
- 10.53. A local group called MITHRAS had been formed in 1988 which was very critical of port operations in various respects. What was notable was that there had not been any comments at those times about any community amenity activity on the port land. Mr Parker produced some correspondence from local people in 1994, objecting to the permanent renewal of open storage areas, and a trailer park at the western end of the port estate. A number of those letters had made reference to how busy the port was, and concerns about the storage areas. The areas covered by those applications however did not appear to lie within the present application site. Plans with the applications appear to show that they related to open areas

within the Stockdale Warehouse compound. However there was no reference in the correspondence from local people at that time to any community use of the port's land. The concern was the existing level of industrial use and its potential escalation at the west end of the port, and the impact on adjoining residential amenity. Mr Tucker, the present Applicant, had also made mention of congestion in the area in other correspondence about a planning matter which arose in 2003.

- 10.54. The present application is a misconceived attempt to register a town or village green in the middle of a busy industrial area. The real aim is principally to remove a fence, with the prospect of allowing unauthorised yachts access to a privately owned quay.
- 10.55. Many of the activities claimed did not occur on the port company's land. Any that did occur did not do so with the frequency alleged. The claimed list of activities could not co-exist with the heavy use of the port. Furthermore, signage around the port was clear and showed that all areas of the port were private and restricted, and unauthorised access was prohibited.
- 10.56. Usage of the Thorn Quay by visiting barges and yachts was only ever permissible if pre-authorisation had been given. Yacht mooring restrictions were clearly understood by the local sailing club. No legal right exists to moor at the Quay, and it is an offence to moor a vessel at a quay within the area covered by the Harwich Haven Authority without the permission of the quay owner.
- 10.57. Ladders on the Quay which were removed around 2002 only existed near Stockdale Warehouse, and within a fenced storage compound. No ladders were located in the Thorn Quay area that is in the application site. Railway lines laid over the land in the 19th century were still operated by British Rail and not abandoned by them before 1993.
- 10.58. All the claimed village green area has been in continuous use by the port, and the area around the EDME building including Thorn Quay Warehouse was in use by them as well. Swan feeding was only undertaken with permission of the port.
- 10.59. Mr Parker suggested that in the many photographs he had produced, the types of activities taking place were solely port operations, and no amenity usage was evident. The photographs he had produced were all of those that he could locate from public archives. The only activities apparent from photographs obtainable from the archives that he had been able to access are those related to port use. That indicated to him that village green type use is not compatible with the port use.
- 10.60. In relation to traffic movements in the area of the Quay, access to the rear of Grapevine Cottages was limited, especially given that railway rolling stock used to pass within 4 metres of the rear of those properties. Until recently residents of those cottages parked their vehicles east-west along the side of their properties, on the public highway. There was photographic evidence of this. Vehicles later started to be parked end-on to the houses and encroaching on the port estate. Photographs from 2009 showed this. One resident had built a viewing deck on the public footpath in about 2007, which pushed parked cars onto the port estate.

These encroachment pressures began to arise towards the end of the village green application period. On occasions when car parking takes place on port land, residents and visitors are requested to remove their cars. Some co-operate and others do not, and sometimes the visitors cannot be located.

- 10.61. The west end of the port, including the application site, is on many occasions congested and always required for HGVs, port equipment, parking, manoeuvring and use. That is illustrated in the range of photographs produced. They represent typical activity at the west end of the port. Port operations could not exist with the alleged list of sports and pastimes claimed in the application. Conflict with use of that kind had never arisen in the past. Residents simply do not use the port land in the way that the Applicant's witnesses claim.
- 10.62. At one end of the Quay the firm EDME had occupied and stored products in the Thorn Quay Warehouse throughout the relevant 20 year period 1988 to 2008. Goods were mainly palletised, and these were lifted by fork-lift truck to a first floor door on the west side of the warehouse. Indeed there had been an issue between TWL and EDME in the late 1990s in relation to EDME carrying on its activities on TWL land without TWL's agreement. In-house health and safety meetings within TWL in the mid-1990s had also shown that congestion of the port was a major concern.
- 10.63. There had been issues raised between the Mistle Thorn Residents Association (MITHRAS) and the company in the late 1980s and early 1990s showing some of the local concerns. For example the minutes of a liaison meeting in June 1989 recorded that local people were concerned about the open storage of stone blocks and the parking of port company lorries. That was said to be detrimental to the amenity of local residents and to the enjoyment of the Quay by visitors. The concern about overnight lorry parking on the port's land was also mentioned, and strong opposition was expressed to it on behalf of local people. There was mention that EDME lorries were sometimes kept on the open quay. Lorry speeds along the Quay were also a concern. Overnight parking and lorry speeds were among the concerns which were also mentioned in a letter from the Association in March 1990.
- 10.64. Mr Parker's view from all this material was that amenity use of the port's land was not an issue at the time. The issue was the quality of neighbouring residential amenity. In essence the dialogue had been related to late working, litter, and lorry congestion, etc. Local residents clearly were critical of port operations, but no suggestion was being made that any public rights of way existed over port areas, or that sports and pastimes were being pursued.
- 10.65. As many as 165 vehicle movements could take place on a working day when one vessel is in port, as against his assessment of an average figure of 103. He initially said that the only turning area for HGVs was on Thorn Quay, but later he accepted that that was not the case. However on regular occasions port vehicles need to pass each other on Thorn Quay which is one of the few areas where that can be done. Congestion around the Stockdale Warehouse occurs on most days. Queuing also remains a regular occurrence at the port. It is notable that in all the available photographs of port activities, both from the archives and current

photographs, the general public are absent. There would have been yet further congestion when the rail line was being operated.

- 10.66. There has always been clear signage around the port to show the private status of port land, to provide clear guidance to authorised users of the port, and to provide clear warnings to the public that unauthorised access to port land is prohibited. Mr Parker produced photographs showing signs around the port. Replacement of signs is undertaken as they age. He produced a plan showing where the signs were, and photographs and other material showing what was written or illustrated on those signs.
- 10.67. Documents showed that TWL as a company had been concerned about the need for appropriate signage as far back as 1979.
- 10.68. The local Stour Sailing Club had itself expressed concerns about signage on the Quay as early as their newsletter of summer 2004. The signs stating “*No Mooring*”, and prohibiting public access on the Quay, were clearly understood by club members who communicated those restrictions widely. The club had written to TWL protesting about this signage, and people being personally turned away from mooring at the Quay in 2005. In April 2004 there had been a suggestion in a local newspaper that it was increases in liability insurance costs that had been blamed for the public no longer being able to use Mistley Quay with vessels. Health and safety reasons were cited in another newspaper article about restrictions on private boats using the Quay which was published in May 2004. That article recorded a response from TWL saying that this was a working port with vehicles on the Quay, which was incompatible with people loading or unloading yachts and bringing cars down onto the Quay and walking around in connection with that. The local Stour Sailing Club were clearly maintaining that there was a public right to bring vessels to the Quay, but a memorandum of Tendring District Council in July 2005 showed that that council’s solicitor took the view that the public rights to use the Quay which the sailing club had asserted had not been legally or conclusively established.
- 10.69. That dispute led to the District Council promoting new public footpaths and public mooring rights in a draft version of its local plan in 2005. However those policies were modified by the local plan inspector in 2007 to apply only to non-commercial areas.
- 10.70. Mr Parker pointed out that Mr Keith Garwood, a witness for the Applicant, had confirmed in his statement that private boats were refused permission to land at the Quay in 1997. Signage showing the status of the land as private property and prohibiting public access had been fixed to prominent positions on the Quay before 2004. It was clear that by 2004 the issue of public access to the land had become contentious, and a substantial local dispute had broken out, over 6 years before the village green application was lodged. He himself had met with representatives of Mistley Parish Council and the local sailing club on a number of occasions with the aim of maintaining good relations, and to explain the reasons why the port could not allow the public access to its land.

- 10.71. Private barges and boats had sometimes been allowed to moor between the Thorn Quay Warehouse and Stockdale Warehouse, but permission was required for that. There were copy invoices which had been raised for the mooring of barges. One of those recorded that for health and safety reasons passengers should not linger on the Quay. A letter to the company from the Old Gaffers Association in 1999 confirmed that the instructions to its members mooring at the Quay would include that same instruction not to linger there, because of traffic to and from the transit sheds.
- 10.72. Various other documents were produced relating to boat rallies which had been held at the Quay, from which it is apparent that permission had been obtained from the company. Such activities therefore did not take place as of right but by express permission, and with the understanding that specific instructions must be followed by the users. Some of the people who had been involved in those activities where permission had been sought and obtained to use the Quay, were later involved in protest activities when the fencing was put up, alleging that there was a public right to use the Quay.
- 10.73. There had also been a specific agreement between EDME and TWL in 1979, which among many other things had included reference to mooring on the Quay not only for commercial vehicles but also for small private sailing boats. That showed that there was no belief at that time that there was a general public right to moor there. It was also apparent that mooring permissions had been sought from the company Brooks prior to the acquisition of the Thorn Quay Warehouse by EDME, or of the Quay itself by TWL. In pre-contractual enquiries before TWL bought the Quay it had been stated that no-one had rights to moor there, but that some fishing licences were issued. There was correspondence dating as far back as April 1976, when Brooks owned the Quay, showing that the East Coast Sail Trust had received permission from Brooks to moor barges alongside the Quay at certain weekends and other times during the summer. In summary there was ample evidence showing that any use of the Quay by vessels was with permission, and that the general instruction of the port company had been to ensure that visiting yachts without permission were turned away.
- 10.74. The feeding of swans had certainly occurred on the open Quay at Mistley, however that was with the full involvement and express permission of TWL. A series of minutes for years between 1995 and 2000 demonstrated that point. The permission granted for swan feeding was given upon a number of conditions, including for example the wearing of fluorescent jackets. At that time residents accepted that dangers existed on the Quay and the fluorescent jackets were necessary if the activity was to take place on port land. It was recognised by the people involved with feeding the swans at the time that this activity did not take place "*as of right*". Indeed Mrs Alex Smith had written to TWL as recently as 16th September 2008 requesting to continue to feed swans on port land, and confirming that she never interfered with port activity and always wore a fluorescent jacket. However in August 2010 Mrs Smith had completed a village green claim form alleging that the swan feeding activity had taken place as of right, and no permission had been requested or given.

- 10.75. Although in the 1970s some fishing licenses had been granted, since the 1980s no fishing had taken place from the Quay due to the harm caused to swans by fishing tackle. There is a prominent “*No Fishing*” sign of which photographs were produced.
- 10.76. The Harwich Haven Authority is empowered under the **1974 Harwich Harbour Act** to make byelaws and issue general directions for navigation which operate throughout its jurisdiction. That jurisdiction extends to Mistley Quay. The byelaws require vessels to be properly berthed. The general directions for navigation say that no vessel shall be moored or remain at a berth except with the permission of the owner of that berth. Breach of that direction is subject to a fine under the general directions. Therefore the mooring or berthing of any vessel at the port without the permission of TWL constitutes an offence and is unlawful. Thus any unlawful sailing activity involving mooring or berthing at Mistley Quay could not acquire lawfulness or constitute a lawful sport and pastime in the context of the current application.
- 10.77. Although railway usage had declined in the mid-1980s, the process of ending operational use of the lines in the port was a lengthy one, with exchanges still taking place in 1993. TWL produced a letter from the company to part of the British Railways Board in October 1983, from which Mr Parker said it was clear that at that time the tracks on the Quay still belonged to British Rail. He also produced a copy of the Rights of Way Inspector’s Report into the claim that a right of way should be registered along parts of the Quay which were almost entirely to the east of the present application site. That report was dated 17th September 2012.
- 10.78. He further explained that of the many photographs that he had produced 53 of them were independent of TWL, and were from a wide range of archives. He acknowledged that on further consideration two of them had any element of community use that could be seen in them. One of them from 1986 showed a little gathering of three people watching barges.
- 10.79. He also produced a new document explaining the history of the use of lash barges at Mistley Quay. Lash barges are in effect floating containers (the abbreviation stands for lighter aboard ship). They would arrive on a feeder vessel at Felixstowe and then be pulled up by tug to Mistley. On arrival they would be moored awaiting discharge. Lash barges were used at Mistley from before 1988 until about the year 2000. Between May 1998 and December 2000 records showed that there had been 216 lash barges brought to Mistley, and over 80,000 tonnes of cargo.
- 10.80. He produced some additional photographs which he said showed how close to the edge of the Quay HGVs coming out of the Stockdale compound frequently would drive. There could be no recreational use on the quayside in these circumstances. There was no refuge from the HGVs, given the evidence of these photographs. He acknowledged however that before the extension of the fencing to the Stockdale compound had been undertaken, vehicles could take various routes including avoiding parked vehicles. A broader sweep was possible before the extended compound was created.

- 10.81. There had been a fence around the Stockdale compound when the warehouse was first built in 1979. It was a wooden fence which had been in place until about 1988. By 1988 the only piece remaining was on the roadside. The end fencing had gone by then. The access to that area remained open for the next 14 years or so, from about 1990 to 2004. However the way that goods and materials tended to be stored in the compound enabled vehicles to exit out through the eastern end through a gap. There was no point in regularly leaving a gap like that if there had been no intention to drive through there.
- 10.82. In 2004 there was a planning approval to reinstate a fence round the compound, with gated access to the east and west. In 2004 a temporary fence was erected with temporary gates at its eastern end. Photographs were produced in relation to these various stages. The temporary fence was replaced in 2008 by a more permanent fence with gates. The extended compound was then put in in September 2008, when the rest of the area of the Quay was also fenced. So, in summary, from 1988 to 2008 there had been an open access on the east side of the Stockdale Warehouse compound. That would be used for the movement of plant and equipment and for vehicle routeings which would avoid congestion. It also gave easy access to the doors at the eastern end of the warehouse building. When agricultural fertiliser started to be brought into the port in 2008, use of that eastern access became much more intensive than it had been previously. Nevertheless that access had been in continual use even before that.
- 10.83. There was a small mound rather like a speed bump on entering the compound area from the main Quay, but that constituted no problem for vehicles. Goods taken through that gate could be destined either for the warehouse itself or for open storage in the compound. The routing through the eastern gate is not just a modern routing but had long been used.
- 10.84. The open land on Allen's Quay was used for the transit of vehicles associated with port uses, as was the dock road. This was so for all cargo apart from about 10%, which involved use for grain of the eastern access route. Mr Parker produced a new document in relation to plant and equipment movements at Mistley Port. There was not a simple tidal movement morning and afternoon of vehicles from the warehouse end to the Baltic Quay end of the port. Vehicles moved back and forth more frequently than that. For example operatives would lose time if they had to walk back to the warehouse end for their tea breaks, so they come back in their vehicles.
- 10.85. A normal working day would be 8.00am to 5.00pm, with lunch from 12.30 – 1.30. In past days it had been 7.00am to 7.00pm. Use on Sundays is infrequent, especially in this current year, but there may have been more Sunday use in the past; in the early 1990s there was a significant amount of weekend and Sunday working for example.
- 10.86. Mr Parker produced and explained his analysis of daily vehicle movements at the port, for which he provided the documentation. He further explained the way in which commercial vehicle movement occurred on the port land. There is one way working past the EDME building. Given the frequent movement of vehicles there

was a significant potential for congestion in and around the application site land. Also because of the narrow neck of land between the Thorn Quay Warehouse and the quay edge vehicles might have to queue on the application land at busy times. When material could be piled on the ground outside the EDME warehouse, as some of the photographs showed, this tended to accentuate this problem. There often were commercial vehicles parking or idling on the open Quay. Sometimes customers of the port would send vehicles which had to wait for some time in order to pick up cargoes, perhaps having delivered a different cargo earlier using the same lorry. That caused inevitable queuing around the port and in the High Street from time to time. He gave examples of the circumstances which could cause this to happen. Also each vehicle would need to go over the weighbridge, then park, then load, then go over the weighbridge again. So if there was a queue the haulier could be there with his vehicle for quite a period. That was part of the cause of what became a complaint by the organisation MITHRAS in the early 1990s. At busy times of the port there were many pressures and circumstances which could bring about situations of congestion, leading to frequent use of the open Quay for parking.

- 10.87. As for turning of commercial vehicles on the Quay, he had made an allowance of 10% for such turning. If the area around the Stockbridge Warehouse is congested, it is not possible for HGVs to turn near the weighbridge, although he conceded that in other circumstances HGVs could be turned there. In the circumstances postulated turning had to be done on Thorn Quay, or even further east. Because turning on the Thorn Quay needed to be a possibility that was available, it was not possible to erect a fence nearer to the Grapevine Cottages on the edge of the public right of way.
- 10.88. Mr Parker further explained his views in relation to the many signs which had been erected around the Quay and the application land. In general those signs were not intended to apply only to land beyond them. The company had wanted to site them at specific locations where there was a boundary with the public highway, in order to make the position clear.
- 10.89. *In cross-examination* Mr Parker said that trailers clearly need a motor unit to operate them. The figures he had given in his analysis of vehicle movements had been indicative ones that he had for the period around 1992 having spoken to people involved at that time. As for fork-lift trucks, the company had had 11 units in recent times; he regarded that figure as realistic for earlier times too. Three was a realistic figure to be used for the typical number of mechanical shovels employed at the port.
- 10.90. As for dock runners, there are only two tractor units now. So in 2003 the maximum number of units which could move on the port is 2. However in 1992 there would have been 4 or 5. In his exercise of analysing potential traffic movements he had taken a reasonable view of what products were coming through the port. As for grain, tonnages were much higher in 1988 to 1990 than they are now. There were not just imports but also exports of grain. He had used the benchmark figure of 10% for grain throughput in 2010, but 10% is not a fair representation throughout the years because grain had been much higher in earlier years.

- 10.91. In relation to fork-lift trucks, the principal use is either at Baltic Wharf or at the Stockdale Warehouse and compound. Fork-lift trucks are kept overnight in different locations at different times for security reasons. They tend to be in the transit shed in the middle of the port estate, but have been kept in the Stockdale Warehouse. But they do move around and then at the end of their day they go back to their relevant store. Fork-lift truck drivers have breaks during the morning, at lunch time and during the afternoon. The morning and afternoon breaks are 15 minutes. So a driver working at the Stockdale end would go up to the Baltic Wharf end for his breaks whereas if the driver was working at the Baltic Wharf end he would not need to move his vehicle in that context.
- 10.92. In the early 1990s there were many more vessels using the port. However he had not been trying to maximise numbers but to give a good indication across the 20 year period. In reality each day would be different, traffic ebbs and flows. There can be one vehicle every minute or even 10 every minute, or there could be one every half an hour for example. As for refuelling, fork-lift trucks need to be refuelled about every 3 days. There is not a huge amount of capacity difference between regular HGVs and dock runners. Dock runners do not have the same weight limit constraints as vehicles which are used on the public roads. Nevertheless he in his exercises had tried to take representative movements, weights and types of cargo. He had tried to produce realistic evidence.
- 10.93. As to the extent of his personal involvement with Mistley Quay, Mr Parker explained that he is the Chairman and Managing Director of TWL, which has operations also in Gainsborough and Scunthorpe. It is also involved in the handling and distribution of ferroalloys, and has been so since 1988. Between 1994 and 1996 he was also a Director of an agricultural group. His full responsibility for TWL had been from 1996. In the early days from 1996 to 2001 Mr Forbes directed Mistley Quay. Mr Parker visited because that worked logistically for him and he would spend at least one day a week at Mistley from 1996 to 2000. In 2000 to 2005 the previous Director had retired so he visited more frequently. The lash barge business ceased so he might go twice every three weeks because the staff needed moral support. In about 2007 business was reasonably stable and they now had a business development manager responsible for Mistley, which coincided with Mr Parker's effective retirement, so that he was only involved at Mistley once a month. Then because of the recession in 2009, his involvement was in the north more than in the south, and his retirement ambitions were frustrated, so he did still visit Mistley. Summarising some of what he had said, between 2000 and 2005 he would visit every week, but once every three weeks he would go twice a week.
- 10.94. When at Mistley he was based, prior to its being redeveloped, in the Maltings buildings. After that he would work in the Stockdale Warehouse and that is still the case now. When he was at Mistley he would spend the day on a wide range of activities. From about 1996 to 2005 he would be fairly active dealing with customers, not sitting in the office all day. The person in daily charge of operations from 1996 was Mr Forbes, then from 2001 to 2003 it was Sue Shrimpton, then John Jenkins from 2003 to 2005. From 2007 they had Ron

Reason who was responsible for what went on on the Quay. The administration responsibility was with Sue Shrimpton.

- 10.95. Mr Parker simply did not accept that the various recreational activities which had been claimed by the Applicant's witnesses had taken place. He had produced 73 photographs and only 2 of them showed any kind of leisure activity. Even in respect of the Applicant's book of photographs, he questioned whether there were any photographs showing coexistence between leisure activities and port use. He accepted that of the photographs in the book there were 43 from the 1988 to 2008 period, but reiterated that none of them showed recreational use while the port was actively working. None of the photographs showed coexistence with the port use. Nevertheless he did respect the statements of the local people. He just did not think that some of the claimed activities could have taken place. He was not trying to be provocative.
- 10.96. He accepted that some of the activities claimed could have taken place on evenings or weekends. The point he wished strongly to resist was for example the idea that children could be playing there on the Quay on a working day. That would be totally irresponsible and did not happen. He was not saying that it could not have taken place at other times. He simply did not accept that those activities took place during working time. The photographs produced by the Applicant could have all been taken at weekends, because there were no dates for them. If such activity had happened then no-one at the port had seen it.
- 10.97. The reason why only he was appearing as a witness at the Inquiry was that he did not want any tension to arise between his employees and the local residents. Thus his other witnesses had provided statutory declarations but not appeared at the Inquiry.
- 10.98. He had appeared as a witness and given evidence at the Inquiry into the public footpath claim. That inquiry had related to the period between 1943 and 1963 when an entirely different sort of operation took place in the port. There had been a significantly higher number of people who benefited from connection with the port. There had been a railway on the Quay and substantially higher traffic then than there is now. Nowadays there is nothing like the tonnage throughput that had taken place then. Then it was a malting with a lot of barge traffic and the means of carting material was quite different. He personally did not think that recreational activities did coexist with commercial use of the port, in the way that Mr Dove QC, counsel for TWL at that Inquiry had suggested. The whole circumstances being considered in that case were different, which also affected the outcome of that Inquiry. Many hours were spent there on cross-examination of witnesses.
- 10.99. Mr Parker agreed that the Inquiry had heard evidence from a number of witnesses in relation to many leisure activities which were claimed to have been carried out on the application site. He agreed the presence of the fence along the quayside did not make all of those activities impossible. Nevertheless the whole focus of the protest group had been to remove the fence from the quayside.

- 10.100. As for the evidence of all the Applicant's witnesses, he had not seen the activities claimed. He himself was not at the quayside full time, but some of the visits about which the Applicant's witnesses had given evidence were by people who had gone there less than he had himself. Some also of those witnesses claimed to visit the Quay more frequently but only for short periods. The statutory declarations from TWL employees which had been lodged with the Inquiry did not agree with all the claims about use of the application site which has been made by the Applicant's witnesses. It would have to be for the Inspector to decide on the conflicting evidence that had been put forward about the levels and nature of use of the Quay.
- 10.101. Mr Parker agreed that one of the photographs in the Applicant's book of photographs, which had apparently been taken in August 2007, showed an artist painting a picture on the Quay at the same time as a dock runner and a man in a fluorescent jacket were visible on the Quay. It appeared to have been a photograph taken on a working day. However there were 43 photographs said to be from 1988 to 2008. 17 of them were of various vessels or swan feeding, 9 of them were of scenery shots and in the remaining ones there were 2 people painting, 3 photographs of crabbing and other photographs of people standing or someone on a bicycle. On the face of it 95% of those photographs did not relate to activities on a working day.
- 10.102. In relation to another photograph of leisure activity, said to have been taken in 2007, Mr Parker agreed that there was a crane holding a bucket in mid-air, so the photograph was likely to have been taken on a working day. Another photograph said to have been taken in 2003 appeared to show a person in a fluorescent jacket in the Stockdale compound. The people in the foreground of that picture appeared to be feeding swans. Mr Parker was not saying that some things by way of leisure activities had not occurred on the Quayside. He conceded that there are 4 or 5 photographs which do relate to a recreational use. He accepted that there would have been occasions when there had been observation of certain leisure-type activities on working days on the Quay. He agreed that another photograph in the Applicant's book of photographs showed a truck which was tipped up in the Baltic Wharf area. That appeared to be some sign of port activity; however the photograph only showed a person walking on the Quay who could have been anyone.
- 10.103. A number of the photographs showed the droppable barrier which used to be there across the access way to Baltic Quay close to the corner of the Thorn Quay Warehouse. He agreed that that barrier did define a commercial area of the port. Nevertheless the application land also had been and still was a commercial area. However the part of the Quay on the application site had not been used for unloading or unloading vessels for a very considerable period.
- 10.104. As for the Stockdale compound, that had originally been fenced with a wooden fence, which later became dilapidated and was then replaced after some time with a wire fence. That represented a contained, defined area. The application site and in particular the open quayside sat between the Stockdale Warehouse and the area which had been behind the droppable barrier.

- 10.105. Asked about the letter which the company had received from the Health and Safety Executive, dated 15th February 2008, Mr Parker said that the culmination of the company's action taken in response to that letter had been the erection of the fence on the quayside in September 2008. That action had been taken on the basis that Allen's Quay was not an operational dock. His understanding was that the HSE had always known that the company had lorries driving across Allen's Quay. TWL is still responsible for that area even if it is not used for vessels to dock. But it is not an operational dock. They are not using it as an operational dock. However it was and remained an operational part of the port. Thus it was that the company had agreed with the HSE that it was not an operational area of the dock as far as the HSE's concerns went.
- 10.106. It was a safety concern relating to the disappearance of a ladder from the Quay which prompted Mistley Parish Council to raise concerns on that point. He had explained when the Parish Council first raised that point why it was that the company had removed it, the ladders were rusted through. Also it was within the compound fence. The company had however made it clear that in emergencies the operational quays of the port could be used, where there are ladders.
- 10.107. In relation to ladders on the Quay, he disputed that there had been a middle ladder on Allen's Quay. Such photographic evidence as there was tended to support him. There was for a short period a ladder near the Thorn Quay Warehouse, about in front of the middle of that building. TWL could find no evidence there had been a middle ladder on the Quay. He accepted that a chain might have hung down from the middle part of the Quay.
- 10.108. The Quay had been in normal use right the way through from 1989 to 2007. During that time the Quay would have been in use on working days from 8.00 am to 5.00 pm, but with breaks during the day. At times work would start at 7.00 am or carry on later than 5.00 pm, for example to 7.00 pm. Occasionally there would have been work at weekends. So the Quay could operate from 7.00am to 7.00pm but did not always do so.
- 10.109. TWL employs about 13 people now with occasional use of temporary or agency staff on top. Two of the staff work in the office. In 2007 they had in fact employed two more personnel, so there were possibly three people in the office then. On a normal mixed day there would be 2 or 3 people working in the Stockdale Warehouse.
- 10.110. In the early part of the period under consideration the number of workers was higher, and the distribution of the people would have been split around fork-lift truck drivers, crane drivers, staff dealing with silos and fitters. In 2007 the distribution of the staff would vary in accordance with the number of agency workers. At times they had had 6 agency workers, for example if there were 2 or 3 vessels that needed to be worked. That would be what it was like at their very busiest times during the period he had known the port.
- 10.111. Specific fork-lift trucks are used for specific purposes. Not all of them are used at the same time. The same goes for the mechanical shovels; also vessels all have different speeds of discharge. The thing that really affects congestion on the Quay

is what else is going on. It might be goods being collected, which adds to the congestion, although he was not suggesting that that happened every day.

- 10.112. When a ship is in, as for the numbers of staff working to remove the cargoes, the situation is quite complex. For some vessels two people would be working on cranes, three or four people on fork-lift trucks and three people in the hold. Cargoes of metal might be palletised, which affects the number of staff used. When a group of workers such as the one he just identified was working in that part of the port, the others would have been working in the Stockdale Warehouse receiving the cargo. Other staff might be dealing with other things.
- 10.113. So typically, in the hold there might be various people working, then cargo would be lifted by crane and loaded from the Quay onto a dock runner that was then driven to the Stockdale Warehouse. It might take about 15 minutes to load a dock runner. So there would be 15 minutes stationary at each end, and a 2 or 3 minute journey along the Quay. A round trip might be not quite 35 minutes.
- 10.114. He had already produced in tabular form how many vehicles would pass while the port was working. He was reluctant to become involved in discussing other more detailed considerations than what he had already shown in the written tables he produced in his evidence in chief. The exercise he had put forward on paper was the only reasonable way of reflecting the frequency of movements over the Quay, and his giving additional evidence which might be contrary to that information was going to be misleading, he said.
- 10.115. As for a photograph which he had put forward as typical of the use of the port in 1990, he agreed that he had not been personally involved with the port then, but that photo represented the activities that went on, for example lash barges and vessels along the Quay. It also showed activity near the EDME building and vehicles in the roadway.
- 10.116. The tonnage through the port was three times as high in 1986 as it had been in 1977. Indeed 1986 had been the peak tonnage year through the port.
- 10.117. He agreed that many of a series of aerial photographs he had produced showing the western part of Mistley port in the years between 1988 and 2009 did not in fact show vehicles or activities on Allen's Quay. Some of those photographs would have been taken at weekends however, and some of them did show vehicles or trailers on the Quay. He accepted the point that some of the photos showed no commercial activity on a particular day but they were just a snapshot. We know (he said) what the vehicle movements would have been. He did not agree that the photographs showed a consistent picture of the Quay being relatively empty. But the impression they gave was not representative, if one goes back through the tonnages that were moved. Tonnages are the clearest indication of the traffic that would have gone across the Quay.
- 10.118. When he had said in his evidence that the west end of the port is on many occasions congested, he had been referring to the port between the EDME warehouse and Mistley Towers. Many of the photographs of the port access way to the west did show a situation which was quite busy, or beginning to get quite

busy. It is difficult however from photographs to know which vehicles are moving. Some photographs might show vehicles which were queuing. The photographs he had produced showing vehicles in that area had been taken in 2012, but were representative in order to illustrate congestion round the port. Those photographs showed a situation which could have related to the position around the Stockdale Warehouse when a vessel or two were being worked in the port. Vehicles do tend to accumulate at the Stockdale Warehouse end of the port.

- 10.119. The photographs showing lorries parked next to each other on Allen's Quay which he had produced had been taken for the purpose of the 2006/7 public inquiry into the local plan, where he had given evidence. That was dealing with the issue of a proposed master plan for the port which was aiming to remove all of the western end of the port from commercial activity and consolidate it at the eastern end. TWL had objected to that at the inquiry. The company's submission had been that it could not survive like that. In the end that inspector had decided that the master plan should be deleted, which was done. Those photographs had been used in order to show use of the open quay. The only photographs like that that he had produced he accepted were photographs of the same event, and he did not have any other similar photographs. Those photographs were for a particular purpose, and had that circumstance not arisen he would not have taken other photographs of lorries on the Quay. The company's evidence at the local plan inquiry had been robustly tested by cross-examination.
- 10.120. The general position was that the photographs he had produced represented the total availability of photographs he could bring to this present Inquiry to demonstrate use of the Quay. If he had not had those photographs produced for the 2006/7 inquiry he would not have been able to bring those photographs.
- 10.121. No-one at the 2006/7 inquiry had argued that the sort of thing shown in those photographs did not occur on the Quay.
- 10.122. In relation to the records that had been found of liaison meetings between the port company and the Mistley Thorn Residents Association in 1989, he thought that the open storage area being complained about was the open quay. However he agreed that he had no personal knowledge of that event. He accepted that the references to concerns about visual amenities included the observation that the open storage was detrimental to the enjoyment of visitors as well as local people. It might be that the concerns then expressed in relation to vehicle parking were in relation to parking further to the west on the port property, however he thought the complaints were general in relation to the west end of the Quay.
- 10.123. As for the turning of vehicles on the Quay, in his exercise he allowed for 10% of movements to involve turning. He based that on talking to staff and what typically happens. It had not been done on the basis of a survey. It is something that he had done based on detailed discussions with people who work on the Quay. The photographs he had produced showing articulated HGVs turning on Allen's Quay were photographs of something that was done in order to illustrate that point. They did not show a normal commercial manoeuvre that had taken place. He agreed that vehicles can sometimes turn in the Stockdale compound. He was not saying that u-turns could not be done at the Stockdale Warehouse.

They can. But when it is congested there u-turns cannot necessarily be done at that location. There are some types of commercial vehicle unit that can actually shorten themselves when unloaded and be manoeuvred more easily. For example some of these units can be shortened from 53 feet to 42 feet but ordinary normal HGVs cannot do that.

- 10.124. He said that he regarded his figure of 10% of vehicles turning on the Quay as an average. On a quiet day that would not happen but on a busy day it would. He said that he had seen those u-turns on the Quay, but what he had mainly done was to ask the people responsible for the port traffic in order to guide his estimates. Nevertheless it would have been wrong to ask those people to speak at the Inquiry.
- 10.125. He agreed that in his proof of evidence he had described Allen's Quay as the only turning area available in the port, whereas now he was saying that that was only used 10% of the time. He has now qualified what he had said in his proof and included his 10% estimate in his evaluation of port traffic.
- 10.126. As to Mr Tucker's survey and the estimate it produced of the time vehicles took in transiting the open Quay, he accepted that that was broadly relevant to the vehicles to whose transit was measured. It seemed about right that they would take 20 seconds to cross. Whether that meant that every vehicle which came along interfered with other users of the Quay, such as leisure users, for 20 seconds would depend on the overall use of the Quay, and other factors relevant at the time.
- 10.127. The import of the Cropcare fertiliser cargo started in the Spring of 2008, so it just overlaps with the relevant period. It was in connection with that crop that most particularly the eastern gates to the Stockdale Warehouse compound were used. He only had 3 photographs showing use of the compound gate at that location. Those particular photographs were the ones which he had produced intending to relate them to this particular point. Before the period of the Cropcare import, he did not say that the eastern gate to the Stockdale compound was very frequently used. But it was used from time to time to relieve congestion, so while it was not frequently used it would be quite regularly used especially when the gates were open, or when the compound was open in the way shown in some of the photographs.
- 10.128. The Cropcare contract began in the Spring of 2008 and involved the importing of loose material. It was taken from the Baltic Quay to the Stockdale Warehouse end in loose containers. He agreed that the tracks shown in the aerial photographs relating to that cargo were accentuated by the spillage of that particular produce. The import of that product tends to be seasonal and can be busy in the summer months. That entrance was not only used for Cropcare, but he could not comment on how often it might be used for anything else. He did not suggest that lorries drove along the part of the Quay nearest to the water as frequently as they used the main route across the Quay. The predominant use of a lorry route along near the edge of the Quay of late had been for Cropcare. All he said was that it had also been used for other things as well.

- 10.129. If someone was walking on that route then they would get out of the way. He accepted that. He thought that any people on the Quay when a vehicle was approaching would tend to move in a landward direction rather than moving nearer to the Quay edge. The area between the landward side of the bollards and the Quay edge is not a place where he would want to stand when an HGV was passing. He agreed that the maximum speed on the Quay is 10mph. Nevertheless he thought that there was a serious risk if one was on the Quay feeding swans for example and an HGV passed. He did not say that people were never on the edge of the Quay when an HGV was passing. Nevertheless TWL is responsible for the Quay from a health and safety point of view. They had had discussions with the HSE on a number of different types of goods going across the Quay. And there had also been the public inquiry at which they were trying to resist a master plan for the Quay. And the HSE had been threatening to take action against them in February 2008.
- 10.130. As to signs, he accepted that some of the company's signs must relate to situations beyond where the sign was situated, he did not dispute that. In some cases the company did not even own the land in front of the sign so it must relate to the land behind. However the "*No Fishing*" sign on Allen's Quay for example related to activity over the water's edge, not on land in front of or behind the sign in that case. As for the signs near the edge of the port road, the company's intention had been to make those signs generally applicable to the whole port area. Many of them had been erected in the only places where the company could put them. It was an attempt to put signage on the roadway. They could not place signs any nearer a public highway than they did. In his view the company had been putting as much signage as it could to make sure that its general purpose was understood. It was general signage to apply to the port area as a whole. He thought the messages of the company signs had been understood. For example the intent of the company signs had been immediately recognised by the sailing club in 2004.
- 10.131. His own view was that the company's signs had been understood clearly by everyone because everyone knew that it was private land.
- 10.132. As for the signs about mooring which were visible from the river side, he agreed that a sign saying simply "*Danger*" was a warning rather than a prohibition. So the signs were for putting across a series of different messages, he accepted that. But there were 'no mooring' signs spread along the Quay. It had been clearly understood by the sailing club that the intent of those signs had been to prohibit mooring at the Quay.
- 10.133. As far as the feeding of swans was concerned, Mr Parker accepted that his comments about swan feeding having been with the express involvement of and permission from the company had related to the organised Swans in Need or Swans in Distress group, and did not relate to casual swan feeding by other people. His suggestion that there had been express permission was something which he thought could be implied from the evidence. He believed the papers relating to the swan feeding organisation showed that permission was given. There were minutes and there was the express involvement of Mr Garwood who was then the manager in charge of the port; also there was the disclaimer at the bottom of the notes giving advice as to how the swan feeding should be carried

out. Mr Parker had no other pieces of paper than those that had been presented to the Inquiry. He did not himself know who had produced the notes of guidance for the swan feeders. He was nevertheless clear from his point of view that those documents represented a recognition that there had been a permission from the company to feed swans from the Quay.

- 10.134. As for the question of permissions being given for vessels to use the Quay, it was quite clear from the documents that had been found that permission had been given for commercial events like the arrival of the steamer Balmoral or organised events for barges or Gaffers etc. He had no other evidence than that which was shown by the documents which had been found. He agreed that the interplay with the sailing club had been with respect to whether yachts could come alongside Mistley Quay in order to berth. They had not related to other activities on the Quay. Other activities on the Quay did not come up for discussion at all at that time, until the fence went up and the village green application was made. In Mr Parker's view rights for fishing had never been permitted on the Quay, and swimming was prevented. In doing such things the port company was displaying its control of the Quay. Swimming was definitely resisted on the one occasion that he had witnessed it.
- 10.135. Reverting to the matter of vehicle and cargo movements, he explained that quite often bulk or palletised cargo could be stored at the Baltic Quay. For example if palletised cargo arrives it would be stored in a place that there is for it on Baltic Quay. It would wait there until the customer collected it, or it was otherwise removed. There was no increase in the traffic across Allen's Quay which would be caused by that type of situation, but on the other hand there was nothing inconsistent in that with what he had said in his evidence. The sort of commodities which go to the Stockdale Warehouse include the Cropcare, but palletised metals of different kinds also go to the warehouse; they are products of some value which need to be taken there.
- 10.136. *In re-examination* Mr Parker said that when vessels are unloaded some material is put in its appropriate place on Baltic Quay. Some material is picked up directly upon its unloading; that picking up would be undertaken by a third party haulier. Material which is taken off a vessel to be stored on Baltic Quay would remain there until the end customer sends a haulier to pick it up.
- 10.137. As for his estimate that the dock runners would take half an hour to do a round trip, there were two dock runners so that would produce 4 trips and hour if there were two of them, which would amount to 32 trips over an 8 hour day. Yet 151 movements had been shown on the survey which the Applicant's side had conducted, and that was a figure much more than 32. There would be other direct collections by or deliveries for customers from the east end of the port. Also his 30 minute estimate may have been longer than the dock runners really took, for example if they only took 20 minutes there would be three round trips per hour.
- 10.138. As for the photographs he had produced of lorries at the western end of the port estate, those vehicles would be going across the application land he would assume. Some of them would be but, what the others would do was speculative.

- 10.139. *To me* Mr Parker explained that he understood there had been a ladder on the Quay by the Thorn Warehouse until 1990 or so. As to whether there had ever been a middle ladder, it was a question of the timing of its removal. No-one he had spoken to could recall a ladder in that position. He agreed that that did not mean that there was not a ladder there at some time, but clearly there had not been one there after 2004. He agreed that the bollards on the open quayside had provided a relatively safe area to stand when a lorry was passing, especially during the time when the fence was not there alongside the Quay edge.

11. SUBMISSIONS FOR THE FIRST OBJECTOR

- 11.1. The First Objector TWL produced a statement of case in the run up to the Inquiry, which included some submissions. These were largely subsumed within the fuller submissions made on behalf of TWL at the Inquiry itself; however I record here the gist of the main points which were made at that earlier time.
- 11.2. TWL made it clear that it did not agree to any amendment to the application site by its enlargement. It also suggested that the application had been wrongly made under **Section 15(3)** of the **Commons Act 2006** on the basis that the qualifying use ceased on the 17th September 2008. That had been the date when the fence along the quayside was erected. However embarking and disembarking from a boat is not a lawful sport or pastime, so the erection of the fence did not have any direct bearing on the **Commons Act** claim. Other activities were claimed to have carried on since then. The application had therefore been made under the wrong subsection. The Objectors' main point was that the application site is an integral part of a busy working port where use for lawful sports and pastimes is fundamentally incompatible with that use. There could not have been any significant use of the land for lawful sports and pastimes. Also part of the site is a public maintainable highway. That status is incompatible with being a town or village green, or in the alternative the only use which had been made of those parts of the site was use which formed part of the public's rights on the land as a highway.
- 11.3. Although there is a disagreement between TWL and Essex County Council as to whether the main part of the present port road is a public highway or not, it clearly is a road and there was no evidence that it had been significantly used over the period for anything other than use as a road. That left the main open quayside part of the application site to the north of the public highway in front of Grapevine Cottages. there was little evidence that there was any significant use of that part of the application site during the working week for leisure related activities.
- 11.4. The port-related activities on the land could not sensibly coexist with the claimed use as a town or village green. This case is not analogous to the coexistence between a golf course use and village green type uses which was considered by the Supreme Court in the **Redcar** case.
- 11.5. The signage around the site also showed that any use which had been made of the application site was either contentious, or in the case of swan feeding had been permitted. There was an additional point that **Section 55** of the **British Transport**

Commission Act 1949 made it an offence to trespass on the railway. There had been a railway on the quayside at least for some of the relevant period, and lawful sports and pastimes could not have been carried out during that part of the period. An argument to that effect had been accepted by the Inspector at the relatively recent Rights of Way Inquiry mainly relating to land further east.

- 11.6. At the Inquiry itself TWL expanded its submissions in relation to the requested amendment of the application site by the addition of the small area which had been lately fenced off in the north-west corner of Allen's Quay. It was accepted on behalf of TWL that the Registration Authority has a discretion to accept amendments to an application site after an application had been made, and that such discretion extended to amendments by addition. It was also accepted that in overall spatial terms this amendment requested here was small, and that in this particular case the error had been by omission and not by design.
- 11.7. However on the question whether the amendment would cause prejudice or not, TWL asserted that certainly the amendment here would give rise to considerable prejudice. If an application in the form as proposed by the amendment had been made now at the time of the Inquiry, it would fail. The land had been enclosed in September 2008. An application to register that additional area now would fall outside **Section 15(3)**. That, in those circumstances, would be a "*knockout blow*" argument against registration. It is not appropriate to circumvent the process of law which would arise in those circumstances by allowing an amendment to the previously made application in a situation where the additional land concerned was not capable of being registered by a normal application now. Allowing the application to be amended now would remove the "*knockout blow*" which TWL currently have the benefit of. Therefore TWL is entitled to rely on **Section 15(3)**.
- 11.8. TWL also made clear that there continued to be a disagreement between it and Essex County Council as Highway Authority as to the status of the main central part of the port road (within the present application site) leading to the open quay from the west. Apart from a small area of that road at its western end near its junction at Mistley Towers, TWL firmly resisted the suggestion that any part of the present port road passing along the south side of Stockdale Warehouse had ever become a public right of way or a public highway. Evidence showed that this was a position which it had maintained previously, and indeed which its predecessors the Brooks company had also maintained.
- 11.9. In the full closing submissions made on behalf of TWL at the Inquiry, it was pointed out that all of the six volumes of material produced on behalf of the Applicant bore on their spine ends the logo of the Free the Quay campaign. It is clear that the application is part of the Free the Quay campaign. Furthermore it is clear that what led to the application was the erection of the fence on the Quay by TWL in September 2008. Any right of access over the Quay from the water has to be a matter of custom or statutory entitlement. It was known that the Campaign had sought legal advice about that. They had not taken any action to pursue a claim of that kind. It was not known why and it was accepted that that might have been because of the cost of doing so. The Campaign also might have asserted that there was a right of way over the Quay which terminated at the Quay edge and which TWL were obstructing. That again was a line which the Campaign

originally took but had not pursued. What it had pursued was the present application to register the Quay as a town or village green, which is odd because even if the claim were well founded it would not require TWL to take down the fence. This is a very contrived way of proceeding. That is the context for consideration of what is on the face of it a most unlikely village green.

- 11.10. The claim that there is a public right to use the Quay is misconceived. There is no entitlement contained in the *Harwich Harbour Act 1974* which would have been the obvious place for it to be put. There is no suggestion of any other statutory entitlement. No highway or public right of way on the Quay had been shown in the *1910 Finance Act* map which had been produced by the Applicants. There had been reconfigurations both of roads and in respect of the Quay since 1910. Moreover the evidence in relation to use of the Quay had been that historically the owner of the Quay had charged both commercial and pleasure traffic, albeit he did not charge pleasure boats if they stayed for not longer than 2 tides. Charging for use of the Quay would be inimical to a claim to use as of right and thus to the establishment of a custom.
- 11.11. Nevertheless much of the application site is in fact public highway, and the use of the access road is clearly principally for passing and re-passing of port and other traffic, and pedestrians. In fact if the part of the application site that fronts the river were also a public highway that would be fatal to the village green claim, because all the activities relied on by way of sports and pastimes would be permitted on a highway.
- 11.12. TWL repeated its objection that the case had not been properly brought under *Section 15(3)*. The Applicant was required to demonstrate that qualifying use ceased on the date asserted, namely September 2008. The fence along the quayside was undoubtedly erected in September 2008, but on the face of it use of the application site continued in the same way that it had before. While some people may have been put off by the fence, there was no evidence of any step change in the quantity of use. If that is correct the application should have been brought under *Section 15(2)* rather than *sub-section (3)*.
- 11.13. There are some caveats to this point. The erection of the fence would have stopped fishing, swimming or swan feeding, all of which had been claimed as lawful sports and pastimes. However even on the Applicant's evidence fishing had been very limited during the qualifying period. In any event, in order to qualify fishing would have to take place entirely within the application site. It is no good sitting on the edge of the application site and catching fish outside the site. However even on the Applicant's evidence fishing has been very limited because people have respected the prohibitory notice. Those who did not respect the notice were acting unlawfully. Swimming is an even clearer case of an activity in fact taking place off site.
- 11.14. As far as swan feeding is concerned that was largely off site, in that the swans were off site and the activity involved throwing feed off the Quay's edge. Also the majority of the swan feeding was with permission. Thus it is not possible to say that whatever qualifying use of the application site had occurred before September 2008 (which TWL claims was very little) ceased in September 2008.

- 11.15. This is not just a technical point. It is not a matter which could be accommodated by amending the existing application to make it a claim under **Section 15(2)**. First of all, the application and all the evidence in support had been directed at the period ending in September 2008, the period relied on. The Applicant has not and cannot be taken to have produced evidence in relation to a materially different period ending in 2010. As such any amendment of the application would not remedy the issue since there is no evidence to support use until 2010. Secondly any such amendment would be prejudicial to the Objector since it has not been required either in its own evidence or testing of that of the Applicant to focus on this materially different period ending in 2010. The Applicant has therefore proceeded both in law and in fact on an erroneous basis which is fatal to the application. It was noted that the advocate for the Applicant, Mr Farthing, in a case in Hampshire where he was sitting as the Inspector, had held that he did not have power on behalf of the Registration Authority to accept an amendment to change an application between one subsection and another under **Section 15** of the **Commons Act**.
- 11.16. Subject to the points about the application to extend the site, the application site here is defined by the areas of the port of Mistley to which the public have access. Most of it is made up of road or port access land, and is indeed used by local people for access e.g. to Grapevine Cottages and the properties to the rear of the High Street, or for walks with or without dogs, which may or may not take in the part of the land fronting the river. It would be surprising if people taking a walk did not from time to time take in the land fronting the river, and equally surprising if they did not sometimes stop to admire the view. Likewise if they were bird watchers they might watch birds or they might feed the swans. Those are ordinary activities entirely incidental to the use of a public highway. A number of the village green cases which had got into the courts had referred to this sort of point, as had a report by Mr Vivian Chapman QC on a village green application at **Radley, Oxfordshire**. Essentially what was claimed to be done on this land by local people was incidental or ancillary to use which was in the nature of a highway use.
- 11.17. From the point of view of TWL, the land also functions as access land, and for purposes ancillary to that, although in their case the access is exercised primarily by HGVs and other port vehicles. It is also used to a significant extent for parking and turning of vehicles, and for vehicles idling.
- 11.18. The other use made of the land is for parking by residents of Grapevine Cottages and the High Street, and visitors to the commercial premises on the Quay. All of these uses also are in the nature of highway uses which are either getting from A to B or are ancillary or incidental to that.
- 11.19. TWL argues that there is a fundamental incompatibility between registration of a highway as town or village green and its status as a public highway. However it is recognised that there is nothing in the **Commons Act** which expressly says that a public highway may not be registered as a town or village green. In any event most of the things that are generally relied on as establishing a claim for a town or

village green are things which one is entitled to do on a highway anyway, even though they are not passing and re-passing: see the case of *DPP v Jones*.

- 11.20. It is necessary to note that walking with or without a dog on a highway is first and foremost a use of a highway for its normal use. Decisions of the court support that view. Only activities on the claimed site which are not passing or re-passing, or incidental to highway use, can really be considered as in any way contributing towards a village green claim. The report on a village green inquiry in *Addlestone, Surrey* was referred to as being potentially helpful in this context.
- 11.21. As matters stand it is common ground that the correct area to be looking at for registration or non-registration is the whole of the application site. The majority of the application site was highway land, or land used as a highway, and is not eligible to be registered because there have not been sports and pastimes that count towards registration. On the small remaining part of the site there cannot have been sports and pastimes sufficient to justify registration of the whole site.
- 11.22. The Applicant's argument that registration of the whole is justified by the reference to the part is simply untenable. If there had been any activities amounting to lawful sports and pastimes they were limited physically to the narrow strip adjacent to the water. That could not on any proper basis justify registration of the land as a whole.
- 11.23. It needs however to be considered whether the Registration Authority itself could take a different approach and say that, in circumstances where there had been no use that counted towards registration on large parts of the land, it could decide that the appropriate thing to do was to consider a smaller area for registration. As a matter of its powers, TWL would accept that the Registration Authority could do this, but that does not make it appropriate to do it. The basis for considering a much smaller application site than the Applicant had asked for has not emerged from evidence given to the Inquiry. It was evident from all the material previously lodged. The Registration Authority should be slow to move the goalposts at this very late stage. The whole case has been addressed by the Objectors on the basis on which it was put, so they would be prejudiced if that basis were to be altered now. This is not a case, even on the Applicant's evidence, of a small area of non-use while the remainder of the site had been shown to have been used. On the Applicant's own evidence the area on which there had been potential lawful sports and pastimes was limited to a narrow strip adjacent to the water. To register such an area in the context of the whole application, and the Inquiry into it, focusing on the application land as a whole, would be radical and unfair.
- 11.24. Next for consideration was the incompatibility between use of the land as an access way for port vehicles and registration as a town or village green. The Applicant's case had been advanced expressly on the basis that the Objectors' uses of the land and those alleged by residents coexisted. The Applicant therefore argued that the vehicular use did not generate any impediment to registration as a village green. The Applicant's case in this respect is based on a fundamental misunderstanding of the law. First, vehicular use and recreational use for lawful sports and pastimes cannot coexist if the land were to be registered, and therefore

logically cannot be claimed to have coexisted during the qualifying period. Secondly, and in any event, the facts demonstrate that the competing uses did not and could not sensibly coexist. This is simply common sense. The position on the facts is far removed from the situation pronounced upon by the Supreme Court in the *Redcar* case.

- 11.25. Consider any other village green. Can it really be contemplated that the owner of a town or village green can drive HGVs over it if it suits him? The answer is clearly no. It is nonsense to talk about give and take or some such concept in this context. It is no different when one is looking at land which is already used by HGVs, and there is a proposal that it should be registered as a town or village green. In TWL's submission the two activities are simply incompatible.
- 11.26. TWL accepts that if one is looking at land which is crossed by, for example, an unmade track providing access to a house on one side of the land, the existence and use of that track may not be an objection to registration of the land as a town or village green. On the face of it the position would be rather different if the land were crossed by a made-up road which was used during working hours to provide access to a warehouse used by heavy vehicles during the day. That on any sensible basis should be an objection to registration, and it would not matter that out of hours the land could be used for walking.
- 11.27. It is helpful to recall the extent to which the application site here has been used by HGVs, mechanical plant and commercial traffic. Establishing the truth from evidence over a 20 year period in the past is difficult. However there is hard evidence. For example in 1989 the local organisation MITHRAS had complained at a liaison meeting about open storage of stone blocks on the Quay, the parking of lorries there and in particular the parking of lorries overnight. Excessive lorry speeds were referred to, and the point that they were more noticeable on Sunday mornings. The intensity of use of the Quay in comparison with earlier days had been complained about. Congestion was commented on.
- 11.28. As to more recent times, it was helpful to remember the survey that had been carried out by Mrs Bell for the Applicant's side. On 4th February 2013 Mrs Bell had surveyed 180 port vehicles: 20 an hour over a 9 hour day. That gives a feel for current traffic levels, albeit that it related to a day after the conclusion of the relevant 20 year period. Traffic on the Quay had been referred to in various other documents from dates within the 20 year period.
- 11.29. Although Mrs Bell's figures did not tally entirely with those put forward by Mr Parker, they do give a feel for the matter. Broadly speaking, tonnages in 1988 were more than twice what they were in 2007, but carried in four times the number of ships. The number of lorry movements per ship has not changed greatly. The quayside has been recorded by the local planning authority in 1996 as carrying much heavy traffic; it was much busier in 1988. Also these figures do not include the traffic generated by port employees, and in the early part of the period there were more than 30 employees.

- 11.30. On top of all this there was the EDME traffic. That had involved significant HGV movements to service the Thorn Quay Warehouse, and in association with that significant fork-lift truck movements.
- 11.31. In the early part of the qualifying period the Quay was also used for the mooring of lash barges which were attached by rope to the Quay. When that occurred there was unlikely to be recreational use of the Quay, given the obstructive effect of such mooring.
- 11.32. The extent of the commercial use of the Quay was also illustrated visually by the very many photographs which had been generated before the town or village green application had been made, and which were plainly objective and not capable of being said to be tainted. Those photographs showing port use of the Quay demonstrate how entirely unrealistic it is to suggest that that commercial use and recreational use could coexist.
- 11.33. In the *Redcar* case as considered by the Supreme Court, local people had had to pause momentarily to allow golfers to play their shots. The *Redcar* situation was more akin to an occasional vehicle servicing a house driving across a track on a village green. It was not like the present situation of extensive commercial vehicular use on the area claimed to be appropriate to registration.
- 11.34. *Section 12* of the *Inclosure Act 1857* makes it unlawful to interrupt the use or enjoyment of a town or village green as a place for exercise and recreation. Thus on the face of it if the application site were registered as a town or village green, it would mean that it could no longer be used by TWL's lorries to access the port. The use of those lorries would, on the face of it, interrupt the use or enjoyment of the area as a place for exercise and recreation. Registration would also mean that the land could not be used by local people for parking their cars.
- 11.35. *Section 34* of the *Road Traffic Act 1988* was also referred to. That is the provision which makes it an offence to drive a vehicle on any common land or land of any other description which does not form part of a road, without lawful authority.
- 11.36. One possibility to be considered is whether registration as a village green would produce a situation where the crossing of the area by lorries would interrupt the use and enjoyment of the land and so be unlawful. A second possibility is that the use by HGVs and the parking of cars by local people would *not* in fact interrupt the use and enjoyment of the site as a place for recreation. The third possibility is that those vehicular uses *would* interrupt the use of the land as a place for exercise and recreation, but in the light of the vehicular use already made of that land, the application site is not registrable as a town or village green. Clearly TWL would be very concerned if the first approach was correct, and it does not argue that it is (that is that the site is registrable as a town or village green, but that thereafter it could not cross the site with its commercial vehicles). Accordingly the other options need to be considered.
- 11.37. The Court of Appeal decision in *Massey v Boulden* [2003] 1 WLR 1792 should be considered. It concerned a claim by prescription to a vehicular right of way

over a village green to a single large house. This was a use which would not have given rise to many vehicular movements. *Attorney General v Southamptton Corporation* (1970) 21 P&CR 281 had held that it was fundamentally incompatible with the duties of the local authority in relation to the public's enjoyment of the land of Southamptton Common (for the purpose either of being used as public walks or pleasure grounds or as a public open space) for the Council to allow part of that land to be used as a car park where, when cars were parked on it, the land could not be used for exercise or for air. What had been envisaged in that case would therefore be unlawful.

- 11.38. The observations of Sullivan J (as he then was) in *R (Laing Homes) v Buckinghamshire County Council* [2003] 3 PLR 60, in relation to the incompatibility between town or village green designation and the continued use of the land there for the landowners low level agricultural activities was referred to. What Sullivan J had said in that case had been questioned by Lord Hoffmann in *Oxfordshire County Council v Oxford City Council*. However Lord Hoffmann in that case was envisaging the relationship between village green use and low level agricultural use, which he evidently considered would not offend the provisions of the *1857 Inclosure Act* which prohibit interference with or disturbance of village green use.
- 11.39. The question of the inter-relationship between town or village green registration and the continuing ability of the landowner to use the land for his own purposes was of course the principal subject under consideration in the Supreme Court in the case of *R (Lewis) v Redcar* [2010] 2 AC 70. The judgment of Lord Kerr should be considered, and those of Lord Hope and Lord Walker. The key issue was the possibility of sensible coexistence on the land between the uses of the land by local people for sports and pastimes, and the use to which a landowner may wish to put his land. Lord Hope's observation that the position may be that the two uses cannot sensibly coexist at all was critically important.
- 11.40. TWL's main case on this Inquiry is that any village green type use had not been sufficient anyway to be taken as the assertion of a right over the land or any part of it. However TWL needed to address the possibility that the finding might go against them on that particular point, so the question became that of whether TWL's use could sensibly coexist with use of the land as a town or village green. It must be relevant in that context to ask whether TWL's use would constitute an offence under *Section 12* of the *Inclosure Act 1857*. On the face of it, it would.
- 11.41. The only way in which coexistence could subsist here would be if the village green rights on registration were reduced so as not to give rise to any conflict caused by the movement and parking of vehicles. Such a reduction would be so drastic that the rights would become emasculated to the extent of being incapable of giving any meaningful entitlement to use.
- 11.42. In *Abercromby v Fermoy Town Commissioners* [1900] 1 IR 302 it was held that the owner of land whose status was effectively that of a village green did not have the right to grant to individuals the right to pass over it in carriages, unless that was done on the condition that the use would not interfere with that of the inhabitants of the town. It was also stated that the landowner would not be

entitled to convert it into a public road to be traversed by all kinds of vehicles. If the land in this present case were registered as a village green on the basis of the rights of the landowner to drive HGVs over it being preserved, the law of village greens would in effect be stood on its head. Inhabitants would have to defer to the HGVs.

- 11.43. The sensible view is that the use of land for access by heavy vehicles and for parking is completely incompatible with its being used as a town or village green. It was accepted on behalf of TWL that the question of compatibility or coexistence between the competing uses is fact-sensitive in any individual case. In this particular case coexistence should be regarded as a non-starter.
- 11.44. There was a further aspect of the *Redcar* case that needed to be considered. Clearly that case shows that land may be registered as a town or village green even though it is used by the landowner for something else; in that case use for golf. Thus as a generality it can be said that there can be coexistence between use for sports and pastimes and other uses. TWL have argued that any material vehicular use of a claimed village green is inconstant with its claimed status. The further aspect which needs to be considered however is that the use made by the landowner in the *Redcar* case was for golf, which is not a particularly intensive use of the land, and may in fact have been less intensive than its use for the lawful sports and pastimes. It was a classic case of the give and take which the Supreme Court had referred to. The golfers came onto their golf tees, and the local inhabitants paused before carrying on. That was a process which could be repeated many times during the day, indeed many times during a single hour. That issue had been approached in *Redcar* on the basis of the argument that because they paused to allow the golfers to play, the use by local people of the land was not as of right. However there is a difference between coexistence between two activities and the *displacement* of one activity by another.
- 11.45. Consider a school playing field which is used all day by the school for football, cricket and other games. However out of school hours and at the weekends and in the holidays it is used by people living nearby for dog walking and children's play. Those local people never use the field during the school day. TWL's argument is that such land would not be properly registrable as a town or village green, however extensive the use by local people may have been. That is because what one was looking at was not coexistence between uses but two completely separate uses. Every day during the school year the use by local people would be displaced by the school's use of the land, until later in the day when the school use would cease. Local people therefore never acquire a continuous 20 years use of the land. The longest consecutive period of their use would be the 6 weeks of the school summer holidays.
- 11.46. That then is a good example of the displacement of one activity by another, and not of coexistence. The same analysis is applicable in the present case. Support for this can be found in the case of *R (Mann) v Somerset County Council* (2012) CO/3885/2011. The analogy with the present case is that when a ship is at the Quay it generates what can appropriately be described as a continuous stream of traffic. Of course there are some gaps in the traffic, but if and insofar as any village green use takes place within the gaps in the traffic, it is physically

displaced by the arrival of an HGV. The person gets out of the way. That accords with common sense.

- 11.47. That common sense accorded with the evidence which had actually been given by the Applicant's witnesses. Many of them had acknowledged that they got out of the way of or avoided traffic on the Quay. All of this was clear evidence of displacement as between one activity and the other, rather than a situation of coexistence. Even Mrs Bell's survey tended to confirm this. What that survey showed was that when the port was operationally busy there were considerably reduced levels of alleged recreational use. The same analysis is applicable even when there is not a ship in, and there are fewer lorries. It arises also as a result of the parking and storage which has occurred regularly, by TWL and by EDME. What one sees on each occasion is the displacement of the local inhabitants by the HGVs concerned.
- 11.48. The Applicant's response to this appears to be simply to say that use by local people had coexisted with the use of the port, and therefore there had been coexistence which does not preclude registration. This is a superficial analysis. TWL maintains its argument about the inherent incompatibility between vehicular and village green uses. There are additional points still to be made. One is that the port was historically busier than it is today. It is busy today, but not as busy as it once was within the 20 year period. In this regard one should recall the MITHRAS documentation which complained about the busyness of the port in earlier years.
- 11.49. Second, if one is contemplating the proposition of village green rights which are cut down to reflect the right of TWL to drive HGVs across the village green, it is necessary also to contemplate the implications of potential intensification of such use. As things stand now, the application site is not a village green, and it may be used by its owners in whatever way they think fit, in accordance with planning law. That means that TWL could use it much more intensively than they do now. That is a legal right of TWL, which must be taken into account in any view of how the situation would work in the future.
- 11.50. The Applicant also claimed to point to an inconsistency between the line which had been taken by TWL in the relatively recent public footpath inquiry about the Quay further to the east, and the position adopted by TWL in the present case. In the footpath inquiry TWL had argued that people had not followed a defined route on the Quay but had wandered about across it generally in an undefined way for access to the Quay for the purposes of fishing, swimming etc.
- 11.51. The first thing to be said was that that inquiry had related to a 20 year period ending in 1963. In that busy period the port was served by both lorries and trains, including steam trains, and the idea that it could sensibly have been registrable as a town or village green, had an application been made, could not be seriously supported. There had been no sensible coexistence between the uses of the port and any lawful sports and pastimes uses. Also what the inspector at that public footpath inquiry actually found should be noted. She found in that case that the public use of the quay that had been shown was more akin to a general access to the quay for recreational activities. It might seem that what the inspector was

saying was that local people went onto the land of the quay to indulge in recreational activities on it. However when one looks more carefully at the decision it can be seen that what they were doing was generally to wander over the quay to access numerous points along the quayside to engage in a variety of recreational activities. It is clear from the context that the recreational activities the inspector was speaking of were fishing and swimming, i.e. not activities carried on on the land area of the quay. The recreational activities that that inspector was speaking of were not recreational walking. There is a significant difference between not using a defined path, whether for recreational or non-recreational walking, and using land for recreation purposes. It was accepted that land on which there had been recreational walking which did not follow a defined route might count towards registration as a town or village green, but it did not follow that land which is subject to such recreational walking would necessarily be so registrable.

- 11.52. As for the presence of signs around the application site, the effect of signs in making a use contentious had been mentioned in many of the reported cases, including *Redcar* in the Supreme Court. The decision of the High Court in *R (Oxfordshire and Buckinghamshire Mental Health Trust) [2010] 2 EGLR 171* was particularly relevant in this context. The fundamental question is what the notice concerned conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of land, the notice is effective to render the use contentious. What is important is that the user knew or ought to have known that his use was disputed. Users cannot turn a blind eye and walk past a sign and then pretend it has no application to them. The judge in the Mental Health Trust case also enunciated various other principles which are relevant. One of them was that the nature and context of any notice as well as its effect must be examined in context. Another was that the notice should be read in a common sense and not a legalistic way.
- 11.53. In this case, as Mr Parker had explained in his evidence, there is a practical problem with putting up signs in circumstances where one is close to a public highway. As for the signs adjacent to the port access road, whatever else those signs did, the signs at the western end negated any intention to dedicate. If it is not a public highway, it is a bad point for the Applicant and his witnesses to say that they were able to ignore the signs at the western end of the access road on the basis that they could not be applying to a public highway.
- 11.54. Moving further east there is a progression of signs as one passes through the site. These should all be considered. References on the signs to the Quay should be taken as meaning the Quay. The suggestion that these signs were ambiguous is unconvincing.
- 11.55. In relation to the signs on the side of the Thorn Quay Warehouse, the “No Fishing” sign had been accepted by the Applicant as applying to the application site, even though that was an area in front of the sign. The Applicant’s witnesses were being inconsistent in not seeing signs about the danger of fork-lift trucks as likewise referring to the area in front of the sign. Also the words indicating that the Quay area was private property, and that no unauthorised persons were allowed should, consistently with the fishing notice, be taken as relating to the whole Quay, including the area in front of the sign. Context is all important.

- 11.56. On the question of quantum of use, it is necessary to discount all the use of the land that has taken place on the public highway. Next one must discount the use of those who drive to the Quay and sit in their cars and eat their lunch. A vehicular use of a claimed village green cannot be a relevant sport or pastime. Next one must discount all walking and dog walking. Uses of that kind are in the nature of the use of the land as a footpath. One must also discount uses incidental or ancillary to use as a footpath. It is accepted that some walking and dog walking may not have been referable to a notional path. But some clearly would. The fact that some walkers may pause to look at the view en route is also referable to footpath type use. As far as the port road was concerned, alleged recreational use was, unsurprisingly, limited to walking and occasional cycling. Even though that road is not a public highway such a use would on any reasonable basis be attributed by a landowner to people asserting highway rights. In that case use of this kind should be discounted in that it is not a qualifying sport or pastime.
- 11.57. Swimming took place only very occasionally, even on the Applicant's own evidence, and in any event took place outside the application land (as did mooring of boats). Walking across the application land to enter the water to swim is not a lawful sport or pastime. It is more akin to a highway use. The evidence suggests that even if ladders had been present on the side of the Quay, they had disappeared by 1990. They had certainly gone by 2006.
- 11.58. Permitted uses should be discounted. Fishing should be discounted; evidence of it was very limited and for most of the period it was prohibited.
- 11.59. Mooring by those who were permitted to moor at the Quay must be discounted. In any event the mooring took place outside the application land.
- 11.60. It is also necessary to discount those who moored after mooring became contentious, which it had for much of the qualifying period. In any event mooring without consent would have been unlawful in this location. The fact that the company (TWL) took action to deter mooring at the quayside but did not do anything in relation to any other activity itself suggested that other recreational use outside the mooring of vessels was in reality non-existent or at least not material. Why would the company intercept those mooring at the Quay if other recreational uses were taking place? Swan feeding was permissive and thus not as of right.
- 11.61. In relation to the photographs produced in the Applicant's hardback book of photographs, TWL had provided an analysis. The short point was that it demonstrated how few relevant photographs of the use of the Quay for lawful sports and pastimes there were in reality. The pictures of boats using the Quay to moor are usually pictures of permitted uses. There had been much talk of use of the site for photography, but there were only 5 landscape shots. There were 3 of children doing things which may be called play, as opposed to just being there.
- 11.62. The other thing which the Applicant's photographs showed was just how much the activities claimed in reality related only to the edge of the Quay, and not the

surface of the claimed area generally. Others of the photographs were not actually on the application site.

- 11.63. Considering the claims about use of the Quay by children, children in reality would not have been down at the Quay playing by themselves, with the risk of falling in or drowning or injuring themselves. Years ago it might have been different but not now. Also they were not going to be on the Quay playing games of football with the risk of the ball going into the water. The reality is that the extent of any true use for lawful sports and pastimes was probably some swan feeding and some bird watching on the edge.
- 11.64. The limited use of the surface of the application site generally for sports and pastimes was to be distinguished from the general wandering over the whole surface of an area used for leisure purposes which had been described in the case of *Abercromby v Fermoy Town Commissioners* referred to earlier.
- 11.65. TWL still maintains its case based on *Section 55* of the *British Transport Commission Act 1949*. Note should be taken of what the Rights of Way Inspector had said in this regard, where that inspector had regarded this as a crucially important point. In that case, which concerned a claimed public footpath over the eastern part of the quay, the inspector had held that the effect of this section was to prevent a public footpath from being created. Similarly the section can operate to prevent the land over which a railway track runs from becoming a town or village green, because any sports and pastimes would not be lawful. It might be that the railway was not being worked by British Rail within the relevant period, but in 1993 it does not appear that the railway had been abandoned. A letter dated 21st January 1994 from Rail Freight Distribution was referred to. That letter had been headed ‘Mistley Quay Branch – Bridge No.1051’. It briefly stated that “*Closure of this line is now in hand with the Board’s solicitor but may take some time to complete.*”

12. THE CASE FOR THE SECOND OBJECTOR – GLADED DALE (SOUTH EAST) LIMITED – EVIDENCE

- 12.1. *Mr Ross Brodie* is the Managing Director of Gladedale Estates Limited (‘Gladedale’) and has held that post since 2010. He had been Managing Director of Gladedale (South East) Limited prior to the acquisition of Gladedale’s landholding in Mistley and until 2008.
- 12.2. Gladedale owns two parcels of land subject to the Town and Village Green application in this case, as well as other land adjoining the application site, and yet further land in the area. He produced plans showing Gladedale’s relevant land holdings.
- 12.3. Between about 2000 and 2008 Gladedale carried out a development of land to the south east of the application site which included 70 residential units and a restaurant. All of Gladedale’s land to the south east of the application site has the benefit of a right of way across the application site.

- 12.4. Gladedale first purchased land and buildings in Mistley in March 2000. Some of the land and buildings had the benefit of planning consent for conversion and refurbishment. When Gladedale purchased its interests none of its enquiries disclosed any areas of concern in relation to public access or adverse rights. At the time of purchase a statutory declaration had been obtained from a Mr Forbes, a Director of TWL, the Vendor which, while noting some vehicular movement by non-TWL staff, did not highlight any of the activities referred to in the town or village green application. In addition to its purchase of land Gladedale was granted formal rights of way over access routes from Mistley High Street to its property for the benefit of itself and all occupiers of its development. Those rights are both pedestrian and vehicular.
- 12.5. In January 2002 Gladedale had purchased some more land in Mistley, small parts of which are within the eastern part of the application site. In March 2002 Gladedale also purchased an area adjacent to the application site at its far western end, lying to the south of what at the Inquiry was known as the port road.
- 12.6. Mr Brodie first became familiar with the application site on visiting the Quay in October 1999 with a view to his firm's potential purchase of the land that it subsequently bought. Thereafter he undertook regular visits. Prior to planning permission being granted between 2001 and 2004 TWL and its consultants had undertaken a comprehensive public consultation exercise. He did not recall any issues or concerns having been raised about uses which conflicted with existing uses, nor any reference to areas being used for access or recreation. He had not personally attended the public consultation exercise. There had been a public meeting. Further consultations had been held in relation to aspects of proposed developments at Mistley Quay. Work commenced on the site in the Autumn of 2000. Mr Brodie had responsibility for development of the site. The main period of construction ran from 2000 to early 2008. Some work continued beyond 2008 as a result of customer care issues etc. The last residential unit was sold in 2010. Mr Brodie was directly responsible for the site through the period 2000 to 2007, during which time he visited it on a regular basis, with site meetings taking place at least once a month. Gladedale had representatives on site throughout the whole period. Weekly site reports had been provided to him covering construction and health and safety matters.
- 12.7. Although his visits were approximately monthly the required reporting process would have led his representatives on site to highlight any concerns which would have included leisure activity affecting their land ownership or access routes.
- 12.8. Additionally the site was regularly visited by other office-based employees of Gladedale. At no time during his years of involvement with the site did any of those employees mention witnessing any town or village green activity on the site. None of those former colleagues are employed any longer by Gladedale, but Mr Brodie had made contact with one of them who confirmed to him that he had not witnessed any town or village green activity on the site.
- 12.9. On none of his regular personal visits to the site had Mr Brodie ever witnessed anyone swimming or accessing the water from the quayside. He had never seen any large groups of people on the site nor any chairs or tables placed on it nor any

leisure or picnic uses taking place. He had never witnessed any sports or pastimes being conducted on any of Gladedale's land on his numerous visits.

- 12.10. As far as Gladedale's own land in particular was concerned, it would have been impossible for any village green activities to take place on the part of their land which consisted of an electricity sub-station. [At the Inquiry it was made clear on behalf of the Applicant that it was not the Applicant's intention that the electricity sub-station which Mr Brodie referred to should be included in the application site].
- 12.11. The area around the Swan Basin was adopted public highway anyway. He (Mr Brodie) had witnessed parking and pedestrian activity there but had never seen any aspect of a sport or pastime.
- 12.12. As far as the main port access road from the west was concerned, he had witnessed people walking to and fro in that area (as well as its main use for vehicular access) but primarily this had been in the area immediately behind the workshops and cottages adjacent to the Swan Basin, which was also an adopted highway area. Gladedale had never received a complaint from any of the owners of the residential units they had developed that their right of way had been blocked or delayed by persons engaging in town or village green activities on the application site.
- 12.13. Mr Brodie had witnessed individuals walking across the application site land to feed swans on the quayside. However on the few occasions he had seen that, those engaging in it had been individuals or groups of no more than 2 or 3. Also the people concerned had been standing on the edge of the Quay on a narrow strip of land. Certainly there had been no activity on any of the land owned by Gladedale, save insofar as someone may have walked across it to get to the edge of the Quay.
- 12.14. There is a sign attached to the warehouse at the eastern end of the application site which is now in Gladedale's ownership which prohibits fishing from the Quay. That sign was in place prior to Gladedale's purchase of that building in 2000 and is still in place now. There are also several other signs in the vicinity prohibiting mooring at the Quay. He personally had never seen anyone fishing from the Quay in contravention of the "*No Fishing*" notice.
- 12.15. Although some witnesses had referred to using ladders at the Quay, Mr Brodie himself had not noticed any ladders there, although he understood from one of his colleagues that there is one ladder at the Quay which is not located on the application site area. In the early stages of the Gladedale development his firm had had portacabins for meetings on the quayside, but they were situated further to the east than the application site. They had tried to avoid any of their car traffic associated with those meetings coming through the Swan Basin.
- 12.16. Photographs which the Inquiry had seen, showing EDME lorries parked in front of the Thorn Quay Warehouse are representative of what he would have seen. Some of them showed EDME lorries on what is now Gladedale land. In fact when they purchased the relevant part of their site they granted a licence to EDME

to use parts of the warehouse which they themselves now own. EDME had a licence agreement with Gladedale enabling EDME to unload and store material temporarily on part of its land while goods were being delivered to the warehouse. He had not seen any crabbing taking place nor any swimming and nor had he personally seen pleasure boats moored against the Quay.

- 12.17. *In cross-examination* Mr Brodie said that when he was working on his firm's project at Mistley, they had regular project meetings once a month, and earlier there were regular meetings with the vendors to Gladedale, and there were also meetings with the planners. The regular meetings would last about half a day. The meetings with planners would tend to be progress meetings, and one would take the opportunity to be on-site at those times for an hour or two.
- 12.18. It was around 2004/5 that they had the portacabins there, he would come by car and park on a part of the quay which was in Gladedale's ownership.
- 12.19. He would always come into the quayside via the Towers and would drive across the Quay to the portacabins. Those portacabins were in a part of the port area which was further to the east than the present application site. The portacabins generally had windows around them, so that one could see back along the Quay from them. After 2004 Gladedale's offices at Mistley were in one of the buildings they were developing.
- 12.20. On occasion they did have to walk the access routes to their site in order for health and safety checks to be carried out.
- 12.21. He did not think he had noticed people on the application site bird watching, although he had seen them feeding swans. The main quayside area in front of Grapevine Cottages he has always seen as very much a working Quay. He accepted that some of Gladedale's publicity material had included photographs which did not purport to show a busy industrial quay, but rather had shown a quayside with historic or leisure vessels alongside. He also agreed that one of their illustrative photographs had showed how they had wished to present the flats they were developing, adjacent to a quayside with low railings along it. That represents how they wished to see the project in their early drawings he agreed, but the treatments in fact put in place along the quayside were not as the District Council had requested.
- 12.22. *In re-examination* Mr Brodie explained that when the project was underway he would receive a weekly report with daily logs identifying any areas of health and safety concern. That was mainly in relation to the health and safety of workers on the regeneration scheme, but it would also cover the means of access and ingress to the site up to the public highway.

13. **THE SUBMISSIONS FOR THE SECOND OBJECTOR**

- 13.1. On the basis of the evidence that had been presented to or heard by the Inquiry, the application should be rejected in its entirety, not just the part belonging to Gladedale but the whole of the rest of the site owned by other parties. There is

simply not an arguable case that lawful sports and pastimes have taken place on the application site to a material degree. Large swathes of the area can only have been used as a route of passage to or from the quayside. That applied both to the metalled Port Road and to Allen's Quay in front of Grapevine Cottages. Mr Brooks, one of the Applicant's witnesses, had accepted that any activity was only on the quayside. It was also pointed out that in the well known *Laing v Buckinghamshire* case it had been held that linear activity was not capable of generating a town or village green claim.

- 13.2. A great number of the activities claimed could in reality only be carried on at the very edge of the Quay, e.g. swan feeding, fishing, crabbing, swimming. If those activities happened at all they must have been at the very edge of the Quay. As far as activities like having picnics or playing football or cricket were concerned, on the basis of the evidence there could not have been any material intensity of such activity. If they had taken place they must have been on rare occasions or outside the relevant 20 year period. Other occasional instances such as Mr Vonk standing in a particular position to watch birds were de minimis in the context of the whole application and do not justify registration.
- 13.3. There had been no use of the Gladedale land for any activity that would comprise lawful sports or pastimes, and to the extent that it had been used for any purposes whatsoever that use would only have comprised a use of passage. Such an activity does not amount to use for lawful sports and pastimes.
- 13.4. Other things which had been claimed by the Applicant's side, such as quiet contemplation or "*reflecting*" are not lawful sports and pastimes. The upshot was that the case had not been proved. What one is looking at in this case is an area of metalled road or other hard-standing. Clearly the part of the application that had appeared to relate to the electricity sub-station must fail.
- 13.5. As for intensity or degree of use, the claimed use must have been carried on in a manner that would have demonstrated that the land was in general use by the local community for informal recreation rather than occasional use by individual persons who might be trespassers. That requisite intensity also has to be shown throughout the whole of the relevant 20 year period. Gladedale through Mr Brodie and its representatives were regular observers here. Mr Brodie visited every month from 2000 onwards. He had only been aware of a handful of people feeding swans. That the use of the land was carried on at such a low level during the relevant period is fatal to the application, since it was not an intensity of activity that would have put a notional landowner on notice that his property was at risk of registration.
- 13.6. The statutory declaration of Mr Forbes of TWL had been a document drafted before town or village green issues had raised their heads at all at this location. It was a statutory declaration so that the author knew that he was required to tell the truth, and there was not one reference to the type of activity which is being relied on at this Inquiry. That was powerful evidence that such activities were not taking place on any sufficient level to justify a claim for registration.

- 13.7. As for whether any activities were as of right, if any fishing took place it was clearly prohibited by a sign. Gladedale do not accept on the balance of the evidence that fishing did take place but if it did it would have been “*by force*” because it was done against the clear prohibition in the sign. Also a village green claim could not succeed as of right for that part of the application site which was already public highway. The case of ***DPP v Jones*** was referred to.
- 13.8. Insofar as any activities had taken place on the land other than transit from A to B, activities on the public highway that had been referred to were ones which people had a right to do in any event. Therefore they were by right not as of right.
- 13.9. Gladedale did not propose to take any points about the requirement of the inhabitants being from a particular locality. In Gladedale’s view it would unfairly prejudice the landowner Objectors for the Registration Authority to consider registering a smaller site than the area claimed by the Applicant, for example the site without the part that is public highway.
- 13.10. As far as the Supreme Court decision in the ***Redcar*** case was concerned, that case was wholly distinct on its facts. In the present case one was dealing with a working port area which bore absolutely no resemblance to the golf course in the ***Redcar*** case.
- 13.11. A footpath and a golf course can coexist. Similarly taking a hay crop is something which can coexist with a recreational use on land. At Mistley one is not looking at a scenario of that kind.
- 13.12. If one considers the Swan Basin road as well as the port road, what they show are heavy duty industrial style vehicular activities. Common sense, indeed sanity, say that these areas could not be claimed for town or village green use relying on things like games of football and cricket. If these areas were registered as town or village green people would be entitled to do those things on them, which cannot reasonably coexist with the other uses which take place there.
- 13.13. To the extent that people did frequent the quayside for leisure related activities, they were regularly displaced by the rightful owners of the area. This was not a case of deference but there were regular interruptions by the port activities, in particular the movements of the port vehicles which took place during the entire 20 year period. So at Mistley there was not a ***Lewis v Redcar*** coexistence scenario, but one of constant interruptions to the 20 year period required in order to generate a valid claim.
14. **THE CASE FOR THE THIRD OBJECTOR – ANGLIA MALTINGS (HOLDINGS) LIMITED – EVIDENCE**
- 14.1. ***Mr Ian Burns*** gave his address as 7 Silverthorne Close, Colchester. He joined EDME Limited as a warehouse operator in the main warehouse on the south side of the road in Mistley, in 1996. Since 1999 he has been working as a warehouse supervisor in and around EDME’s premises adjacent to the application site.

- 14.2. Over the years he has worked changing weekly shifts, some of which have him starting work at 6.00am and at the opposite end of the day some of the shifts involve working until 10.00pm. Those were the times on Mondays to Fridays, but he had also worked approximately one weekend per month on average. When he was a warehouseman there were three different shifts and then when he was a supervisor he had two different shifts of work. The job of the warehouse supervisor is to brief the men who work in the warehouses, and he would brief the warehousemen in the Thorn Quay Warehouse.
- 14.3. From about 1996 to 1999 the Thorn Quay Warehouse was used to produce flakes and syrups. During that time pallets of raw materials and other goods were regularly transported from EDME's premises south of the High Street to the Thorn Quay Warehouse. A shopping list of goods would be provided to him at least twice a day which he would collect from south of the High Street and transport by forklift truck to the Thorn Quay Warehouse, using the entrance at the top, southern end of that warehouse near the Swan Basin. Each shopping list might comprise 15 – 20 pallets of stock. He usually received one at the start of the morning and the second in the early afternoon. The usual access route he would take from the southern premises to Thorn Quay Warehouse would be over the High Street and into the access road next to the Swan Basin. The forklifts only carried one pallet at a time. Therefore each shopping list would take about 1 – 2 hours to complete.
- 14.4. Also between 1996 and 1999 he recalled tipper trucks from Beestons regularly using the access road near the Swan Basin in order to make deliveries of loose raw materials to Thorn Quay Warehouse. Beestons were located at East Bergholt, approximately 5 miles away. These trucks would deposit materials at a tipping point, again near to the top of the roadway that goes down to the Quay from the Swan Basin, on the east side of that roadway. About 5 deliveries per week of that kind used to take place.
- 14.5. EDME customers would also send HGVs each day to collect large quantities of syrups from Thorn Quay Warehouse. About 6 or 7 such HGV collections were made each day. Each of those HGVs would park in the area in front of the Thorn Quay Warehouse at the eastern end of Allen's Quay (within the application site) while forklift trucks would manoeuvre on the quayside loading the syrups onto the vehicle pallet by pallet from the warehouse.
- 14.6. From 1999 to approximately 2010 Thorn Quay Warehouse was primarily used for storage of products, materials and pallets. The tipper truck deliveries of raw materials to the warehouse ceased from 1999 onwards, but the movement of goods using forklift trucks between Thorn Quay Warehouse and the buildings to the south of the High Street increased substantially. On average some 50 forklift journeys per day were made between the premises. Also about 8 HGV deliveries per week at least were made during that period.
- 14.7. In his experience Mr Burns said that very little non-commercial use had been made of those parts of the application site which were used by EDME. Before the fence was erected along the quayside in 2008 he had seen a maximum of 3 or 4 boats per week travelling and mooring along the Quay during peak season. He

never recognised any of those boats as being from the local area. When people disembarked he noticed that they would walk straight towards Mistley Towers or head directly to the shops on the High Street. He had never seen anyone else walking over or using the access road up from the Quay to the High Street for any other recreational activity. He did remember vehicles being parked along the access road down from the Swan Basin from time to time.

- 14.8. He had seen the odd person painting or eating their lunch on the quayside. However he had never seen people walking on the quayside other than those employed in the area, or feeding swans or fishing or using the quayside for any recreational activity. He could recall builders redecorating Swan Basin about 6 or 7 years ago but other than that he had not seen people ever sitting picnicking or using the area around the Swan Basin for any recreational activity. He presumed that that was because there was nowhere for people to sit.
- 14.9. After the syrup and flake production was shut down, they then took goods and materials into the top floor of the warehouse in order to be taken through to the High Street. They would tell lorry drivers to come in via the Port Road. The vehicle would park end-on to the warehouse and they would off-load. The lorry would move away and forklift trucks would lift goods to the first floor. The lorry would usually then turn around and go back up the Port Road.
- 14.10. EDME had a large forklift truck which was required for the height that had to be lifted, not because the pallets of goods were that heavy. Unloading of that kind could take about an hour. While that type of activity was happening prior to 1999 it would be 5 or 6 or perhaps 7 times a day. Most of those goods would be stored in the Thorn Warehouse.
- 14.11. Sometime after 1999 forklift trucks would cross the High Street but instead of going to the door at the top near the Swan Basin they would go down to the lower quay near to the door onto Allen's Quay.
- 14.12. Mr Burns produced a number of spreadsheets which he explained formed part of EDME's records. He and his assistant were responsible for the production of that data. These spreadsheets were headed "*Daily/Weekly Warehouse Performance Report*", Mr Burns explained how they were to be understood and pointed out a minor error that had occurred on one of them as presented.
- 14.13. Mr Burns said that he had seen the occasional car parked on the left-hand side of the roadway going down to the quayside from the Swan Basin. He had never seen any children playing on the quayside nor any fishing going on there. He had seen an elderly person painting on the quayside. He thought maybe in 2006 or 2007 he had seen him about 3 or 4 times. He recognised him as the same person each time. He had never seen any dog walkers, bird watchers, picnickers nor people walking apart from workers. He had never seen any bike riding, football, cricket or kite flying.
- 14.14. He himself did not recall seeing other goods and materials than EDME's materials stored on the open Quay near to their warehouse, such as were visible on one or two of the photographs which TWL had produced. He could recall some EDME

trailers being on the Quay sometimes, but he was not sure about photographs suggesting that other trailers had been parked on the Quay. EDME trailers would not very often have been left on the Quay. They had used the quayside to park foreign drivers overnight but not often. If that happened it would usually have been to do with the drivers' permitted driving hours.

- 14.15. In his experience the Quay would never be congested with HGVs. There might be a couple of them up near the weighbridge at the western end possibly. He had seen vehicles turn by the Thorn Quay Warehouse, either EDME or other vehicles. However it is not a regular occurrence, it happens about 6 or 7 times a year.
- 14.16. *In cross-examination* Mr Burns explained that every forklift truck trip would be travelling across the High Street to or from EDME's southern premises. The tipping point along the east side of the access road near the Swan Basin was for loose material but which could well be in bags. Sometimes vehicles dealing with that material would come in via the top but would then go out via the Port Road.
- 14.17. EDME still made some products after 1999. They still stored goods in Thorn Quay Warehouse until 2008.
- 14.18. In relation to the figures he produced, Mr Burns agreed that the figures shown for vehicles loaded per day were from the whole EDME site, not all of them from the Thorn Quay Warehouse. The company would try to minimise unnecessary movements. They also would try to get a forklift truck to take something back rather than go back empty where that was possible. He agreed that the figures he had produced did not show if there would be any empty journey involved. Not all of the vehicles associated with EDME have to go over the weighbridge. EDME now has a weighbridge but used to use the Mistley Quay weighbridge near the Stockdale Warehouse.
- 14.19. When a vehicle was sometimes parked overnight that would be done in a way to minimise inconvenience to the public coming down onto the Quay. By the public he meant people who park there for their work or because they live there as residents.
- 14.20. He had never seen people indulging in leisure activities on the quayside like those shown in some of the photographs in the Applicant's hardback book of photographs. He thought those he had seen on the site walking were usually workers. He accepted that families do live adjacent to the Quay but he had never seen them there during working hours. He had however seen about 3 or 4 holiday boats or barges per week moor at the quayside. He thought that one of them belonged to a Dutchman.
- 14.21. *In re-examination* Mr Burns explained further, in connection with the spreadsheets he had produced, that a reference to 52 pallets would mean 104 movements across the High Street, whether the forklift truck concerned went back full or empty. He could not say how many would go back either full or empty.

- 14.22. He also explained that at the end of the day they tend to have a busy time clearing all the movements that are required by the various departments of the firm before they go home.
- 14.23. **Mr Brian Herrington** gave his address as 1 Queensway, Lawford, Manningtree. He has been employed by EDME since 2001, when he joined as a warehouse operator. His current position is as a production supervisor. He had generally been based in the premises known as the Thorn Quay Warehouse, when he was a warehouse operator.
- 14.24. As production supervisor now he is in charge of production of everything on site. He is no longer concerned with the warehouse and he is based in an office on the south side of the High Street.
- 14.25. Prior to working for EDME from 1989 to 2001 he worked as a dock worker for the Mistley Quay and Forwarding Company on the quayside to the south east of the application site. His position had involved general dock work including crane driving and forklift truck operation on the quayside.
- 14.26. He worked shifts at Mistley Quay starting at either 8.00am or 7.00am and finishing at 5.00pm or 7.00pm during busy periods. He also worked weekends typically once a month. When working for Mistley Quay and Forwarding Company he used to go up and down the application site in a forklift truck, or lorries, or with cranes, from the Stockdale end along to the Baltic Wharf. When a boat was in if he was working a crane that would be at the Baltic Wharf end. If he was lorry driving he could pass back and forth a number of times during the working day. His view was that it took about half an hour to load or offload and move a lorry from one end of the port to another. There were build-ups of traffic on occasions. They could sometimes have lorries queuing on the Port Road and on occasions it had been congested on Allen's Quay. Back in 1999 it was a busier time and there could be congestion perhaps once a week at times.
- 14.27. Since he has worked for EDME, he had usually worked either a shift from 6.00am to 2.00pm or from 10.00am to 6.00pm on Mondays to Fridays.
- 14.28. When he was working for the Mistley Quay company and driving vehicles along the Quay, there would occasionally be the odd car parked on the Quay but it was not frequent and one would drive around them. At the eastern end one would drive perhaps one metre from the bollards. Lorries were not roped up so they could be unstable but there were never any accidents.
- 14.29. From 2001 until about 2007 the premises of Thorn Quay Warehouse were primarily used for storage. A considerable amount of goods and materials needed to be moved between EDME's southern premises and the warehouse in order to supply the production processes. During each working day a large number of forklift movements were made between the premises using the access by the Swan Basin.
- 14.30. Also during that period a number of HGV deliveries were made to the Thorn Quay Warehouse each day. Each of those deliveries required a number of forklift

journeys associated with it. These were either between the Thorn Quay Warehouse and EDME's premises south of the High Street, or they were down on the quayside while the goods were being loaded or unloaded from the HGV. Approximately 3 to 4 HGV deliveries were made per day. A number of forklift operators would unload and load the vehicles as necessary. The HGVs were typically either flatbed or curtain-sided vehicles typically 40 feet in length. They might weigh 40 tonnes when loaded.

- 14.31. With these lorries sometimes the goods would be offloaded onto the Quay or occasionally if there were sufficient men available goods would be taken straight from the lorry to the high doors in the Thorn Quay Warehouse. In the period 1999 to 2008 they did not use the doors on the High Street. The majority of the list of items that needed to be moved would come out of the bottom doors down on Thorn Quay, because the storage of goods was more handy to those doors. That however changed in 2008 for health and safety reasons concerning the use of the high-level doors. He produced some sample warehouse performance reports and explained them to the Inquiry.
- 14.32. Working in or around the application site since 1989, his impression of the site, in particular the quayside and immediate vicinity, was that it had been mainly used for commercial purposes. He had on occasion seen the quayside part of the application site used for some non-commercial uses. That had mainly consisted of a maximum of 2 or 3 people per day during summer months having lunch on the quayside's edge. He had also seen the odd boat being moored on the quayside and the odd person painting, but those instances had been few and far between. He identified the approximate locations of those activities which he had seen. They were along the edge of the Quay. He had never seen any leisure activities on the access road by the Swan Basin, nor did he recall it ever being regularly used by pedestrians for any recreational activities. Those people he had seen walking along that road, perhaps not more than 4 or 5 a day on average, had always used that road to access the quayside. However he thought that many of those people were likely to have been employed by the businesses on the quayside.
- 14.33. During his time he could not remember grain ever being delivered to the EDME premises. He did not recall seeing goods or materials deposited on the Quay and left there. That may have happened before his time. There were not normally parked containers on the quayside to the west of the Thorn Quay Warehouse. He did recall commercial traffic sometimes parking on the Quay for drivers' breaks and the like. Normally if they slept overnight they would be up at the Stockdale Warehouse end. It was very rare for an EDME vehicle to remain overnight at Thorn Quay but he thought it did occasionally happen.
- 14.34. As for lorries turning on the Quay, both EDME lorries and Mistley Quay lorries did turn there, perhaps about 4 a day. He thought about 90% of the EDME lorries would turn on Allen's Quay and then face out before they unloaded them. Sometimes a port lorry would turn on the Quay. It depended how busy things were up at the Stockdale Warehouse. It is busy up there at times and there have been busier times, for example around 2001/2002. He could recall perhaps 4 or 5 cars always being parked on the land next to the Swan Basin.

- 14.35. *In cross-examination* Mr Herrington explained that during his time with Mistley Quay and Forwarding, he worked with cranes, forklift trucks and dock runners. Crane driving had been his principal job and that was all up at the Baltic Quay end. If he was not driving a crane he would sometimes drive a forklift truck and that could be anywhere, depending what was in the port at that time. It could be at the Baltic end or he could work at the Stockdale Warehouse end all day. It would typically be one or the other. He was on dock runners occasionally, perhaps one day every two weeks.
- 14.36. In his time forklift trucks were all based and parked at the Baltic Warehouse end. So if one was working at the Stockdale Warehouse one would go from the Baltic end in the morning, back at lunch time and back at the end of the day. As for the use of dock runners to move cargoes along from one end to the other, he estimated a half an hour turnaround but thought it could have been a little quicker than that. Actually driving across Allen's Quay would take about 20 seconds.
- 14.37. As for turning on the Quay, from memory he thought it had been busier in around 2001 or 2002. He joined EDME in 2001. He agreed that when working at EDME a lot of his time had been spent over the road in the southern premises, so that he was not that familiar with the circumstances which would make TWL for example turn its lorries on the quayside during that period.
- 14.38. During the period 2001 to 2008 when he was a warehouse operator not all of his work activities involved Thorn Quay. He was not there full time, perhaps 4 or 5 hours a day.
- 14.39. He explained the interior workings of the Thorn Quay Warehouse and which of the floors of the warehouse the various doors facing Allen's Quay opened onto. In the lower floor there had been raw materials. Packaging was on the middle floor. The raw materials floor is on the same level as the High Street, and also the entry point with the plastic doors facing the Swan Basin near the High Street.
- 14.40. When working in the warehouse there would be stock rotating or organising, or stocktaking on both of the floors that were in use. That was an inside job. Occasionally he would be out on the ground outside if they were short-manned, and he could work a forklift truck. Usually someone else would work the forklift trucks and he would be inside.
- 14.41. With reference to the warehouse performance reports, it was not possible to tell from them whether lorries were unloaded on the Thorn Quay or south of the High Street. He could often tell from looking at the data which pallets did go into the Thorn Quay Warehouse however. 90% of the loading of lorries would be over on the southern side rather than at Thorn Quay Warehouse he said.
- 14.42. He himself lived in Lawford so that Mistley is where he comes to for work. Therefore his recollections are of when he comes to work. Most of the time while he is working he is away from the area of the application site. His only regular observation of the application site was when he was crossing it in a forklift truck or in a dock runner. However when working a crane one could see the whole Quay albeit from about 400 or 500 metres away. He agreed that when driving a

crane one would have to focus on one's task. However there are times when one would be bored or waiting for a job to do.

- 14.43. *In re-examination* Mr Herrington said that he had seen people on the quayside sometimes. They were sightseers mainly, looking at the view. He thought he had seen 4 or 5 people a day perhaps. He had never seen any sports going on there, but occasionally he saw a pedestrian with or without a dog. He thought that was perhaps twice or three times a day but he did not take much notice.
- 14.44. Dealing with the warehouse performance reports, he said that although it was true that there were places both at Thorn Quay Warehouse and to the south of the High Street that were used for unloading lorries, it was likely that all of the pallets being unloaded would have been dealt with by Thorn Quay rather than south of the High Street. When working with the pallets he would be quite aware of the area of Allen's Quay. If one were in the warehouse pulling a pallet in one would overlook the area. He felt he would have noted anything unusual. He would have been involved with most of the deliveries to the Thorn Quay Warehouse.
- 14.45. **Mr Jason Powell** said that his personal address is in Dovercourt, Harwich. He has been employed by EDME since 1986 when he joined the company as an apprentice. From 1985 to 2005 he was employed as a mechanical engineer, and from 2005 to August 2012 he was the Engineering Manager. Since that date he has been the Site Director. He has always worked at the EDME site in Mistley. That site has two sides to it, the Thorn Quay Warehouse part and the southern side to the south of the High Street.
- 14.46. When he was a mechanical engineer his duties were to maintain plant and equipment on both sides. However he spent most time on the southern side. Nevertheless when called upon he went to the Thorn Quay side, typically at least a couple of times per week. There would be many reasons to go to the Thorn Quay side. Some of those would be entirely inside but some outside. For example there is an exhaust ventilation kit on the outside of the Thorn Quay Warehouse. He thought that 60% of the work would have been inside and 40% on the outside.
- 14.47. As Engineering Manager he would oversee the maintenance team. He was heading a team of engineers and getting contractors in for work or maintenance. That work would have been less on Thorn Quay than his previous job had been. Probably he was once a week on Thorn Quay and not so likely therefore to be aware of what was going on on Allen's Quay. Maybe 70% of that work was entirely inside.
- 14.48. His typical shift pattern had varied since he worked for the company. From 1986 into the late 1990s he would normally work three different weekly rotations of shifts which would begin as early as 6.00am or end as late as 10.00pm according to which shift it was. On average he would work one weekend every 4 to 6 weeks. He would also be on call after his normal working hours to deal with urgent repairs and would normally receive one such call-out per week.
- 14.49. From the late 1990s his current shift pattern was introduced, being alternative weekly shifts of 6.00am to 2.00pm and subsequently 2.00pm to 10.00pm. For the

last 6 years he had not been required to work weekends as regularly, but it still had been necessary from time to time.

- 14.50. During the period that he has been working a number of other employees have regularly moved materials and equipment around between the EDME southern site and Thorn Quay Warehouse using forklift trucks. These journeys across the High Street would happen a number of times each day between 7.00am and 7.00pm. Use of forklift trucks outside those hours was avoided in order to try not to cause disturbance to residents of the area.
- 14.51. From 1986 to about 1999 when the production of syrups at Thorn Quay Warehouse ceased, he recalled that heavy duty dumper or tipper trucks would transport loose raw materials from the southern site to Thorn Quay Warehouse. That would happen at least once a week. Those materials would be transported via the High Street and deposited in the tipping area just to the north east of the Swan Basin.
- 14.52. Throughout the period Thorn Quay Warehouse would also accept a number of HGV deliveries to the entrances by Allen's Quay. He personally had had no involvement with the HGV deliveries but would see them when working outside. They would usually be loading or unloading by the two doorways facing onto Allen's Quay. Therefore he would have seen quite a lot of the forklift truck movements. That might happen for example while they were maintaining the exhaust ventilation units on that side. Typically the EDME vehicle being loaded or unloaded would be parked parallel to the quayside. He thought on the whole that there were more movements of HGVs on the quayside than parking of HGVs there. There was not really room to park HGVs on the quayside without causing obstruction. He estimated that during the 1986 to 1999 period there would be an HGV delivery to Thorn Quay Warehouse at least once a week. He thought an EDME related trailer might occasionally have been left without its tractor unit on the quayside while the tractor had gone over the road to the southern site. He thought he could recall such an occasion.
- 14.53. As for congestion or activity on the quayside one would see that from time to time. He could not recall any overnight parking. Occasionally commercial vehicles came down the access route via the Swan Basin. He himself did not really see port lorries turning on the area of Allen's Quay, he thought it might have happened further up.
- 14.54. As for recreational uses, he never saw those on the quayside. He had not seen fishing taking place on the quayside although he believed it used to happen further along towards Baltic Quay. He had never seen people drawing or painting on the quayside. He had seen people walking there but not with dogs. He thought people might have been walking on the quayside enjoying the view but that is not something he was distracted by. There were not a lot of people doing it anyway, it was not very frequent. He never saw any football or cricket, maybe he had seen bird watchers but he did not remember noticing people with binoculars. He had not seen people picnicking or kite flying or riding bicycles. Occasionally he had seen swan feeding depending on the tide times. He had never seen anyone swimming. One would occasionally see a boat come in, but further to the right he

thought. There was the odd pleasure yacht which was also further to the right. As for deliveries to EDME he thought there may have been more than one taking place at one time on occasions but he did not see that. He had seen cars parked near the Swan Basin but he thought they belonged to the occupiers of the residential units on the quayside or employees in the commercial area at Mistley Quay workshops.

- 14.55. *In cross-examination* Mr Powell said that different equipment breakdowns would involve different durations of work. There were three ventilation units on the Allen's Quay side of the Thorn Quay Warehouse.
- 14.56. Since he had been the Engineering Manager he spent less time on Thorn Quay. So the observations he had given related to the times he had been there. What he had mentioned was what he had seen in the very limited time that he was on the Quay. He agreed that what he had seen on the Quay was broadly consistent with what Mr Herrington had said he had seen.
- 14.57. **Mr Eric Leggett** lives in Bentley, Ipswich. Since 1991 he has been employed by EDME Limited working at Mistley. He joined the company as a cleaner, which was solely an indoor job, and has since enjoyed a variety of roles including a production operative, supervisor, manager and warehouse manager, which is his current position. He was a production operative from about 1993 to 2000. That was in the Thorn Quay Warehouse where there was a production plant.
- 14.58. His father Mr Ivan Leggett had also worked for EDME on or around the application site. For about 15 years before joining the company in 1991 at least once a month he used to visit the site with his father during weekends while his father undertook stock takes.
- 14.59. From about 1991 to 2002 he had worked shifts on a rotation which sometimes started as early as 6.00am and sometimes ended as late as 10.00pm. From 2002 on his working hours typically would be anything from 7.00am to 6.00pm, although latterly this has been regularised to 9.00am to 5.00pm. He has been required to work weekends on occasions.
- 14.60. From 1991 to 1997 the Thorn Quay Warehouse building was solely used for manufacturing and production, including the processing and drying of wheat subsequently used to dust over bakery products. Apart from manufacturing food ingredients Thorn Quay Warehouse was also used for the production and assembly of CD cabinets.
- 14.61. During that period quantities of materials and equipment were required to be moved from the premises south of the High Street into the Thorn Quay Warehouse. These movements were normally using forklift trucks travelling across the High Street and in through the upper door near the Swan Basin.
- 14.62. Apart from that dump trucks also used to come regularly from EDME's sister company Crisp Maltings who were based in Lawford. They would come in via the Swan Basin from the High Street to the loading bay at the top. Unloading one of these lorries would take about 45 minutes. That lorry would typically go out

via the High Street as well; they were small lorries. He thought deliveries like that had happened at least once a day if not more.

- 14.63. In about 1997 all production at Thorn Quay Warehouse ceased. From that time the warehouse was used predominantly for storage. EDME's manufacturing activities were now on the south side of the High Street and this resulted in the significant increase in the forklift truck movements between that side and Thorn Quay Warehouse.
- 14.64. From 1991 to 2009 HGVs used regularly to deliver to Thorn Quay Warehouse, he thought about twice or three times per week. These HGVs were about 40 feet in length and about 40 tonnes in weight when fully loaded. They would normally access the warehouse using the Port Road from Mistley Towers and along the Quay. He personally had been to the area by the doors from Thorn Quay Warehouse onto Allen's Quay on occasions. It was infrequent, maybe every 6 or 7 weeks or so. As a supervisor, from 2000 onwards he was working on the southern side of the High Street. But he did go to the Thorn Quay Warehouse occasionally to stock take. From 2004 his work had been predominantly office based. The key period during which he saw Allen's Quay with any regularity was from 1993 to 2000.
- 14.65. When he used to visit the site with his father in his earlier years those visits would predominantly be to the indoor parts of the premises.
- 14.66. As far as Allen's Quay was concerned, the unloading and loading of EDME lorries were the commercial uses that he had seen. He did quite often see the shunter lorries of the port and forklift trucks passing as well. It depended on the length of time that he spent down there.
- 14.67. He had not seen the parking of commercial vehicles on the Quay himself. He occasionally sent lorries over there, for example if customers sent lorries to EDME all at the same time they might occasionally send lorries over there to wait. Then one of the men working in the warehouse would go over to get them, but it would not be Mr Powell who did that. He personally was not aware of EDME lorries being parked on the Quay overnight. Nor had he seen lorries turning on the Quay.
- 14.68. As for recreational uses that he had observed on the Quay, a maximum of 10 or so pleasure yachts had been seen. For many years his office had been in a building known as the Abbey Flats opposite the Swan Basin, and when standing up in his office one could see the quayside. He was in that office for some 4 years and saw 10 or so boats moored during that period. They were moored alongside Allen's Quay.
- 14.69. He had never seen children playing on the Quay. On about two occasions he had seen people fishing. He had never seen people drawing or painting. He had seen dog walkers on the main road. He had never seen football or cricket or bird watching or picnicking or kite flying, he had only seen bicycle riders on the High Street. Nor had he seen swan feeding on the quayside, only on the walls to the west of Mistley Towers.

- 14.70. *In cross-examination* Mr Leggett clarified that he had been a cleaner with EDME from 1991 to 1993, and from 1993 to 2000 a production operative. In that role he was only in the Thorn Quay Warehouse when he was needed. The rest of the time he was a plant processor. From 2000 to 2004 he was a supervisor in an office. If he stood up in that office you could see the Quay through a gap down the road but not over the top of the buildings.
- 14.71. When working his connection with the Quay had been either when assisting with unloading up by the Swan Basin, or when he went to inspect lorries about once every 6 weeks or so down on Allen's Quay.
- 14.72. The small dump trucks or lorries that came from Lawford used to come in via the Swan Basin. Only large trucks would come down the Port Road. His opportunities while working to observe Allen's Quay had then been limited to those occasions. He agreed that he had seen people walk on the Quay. He had seen boat owners disembark from vessels at the Quay but he could not recall more than about 10 occasions when he had seen that. He had seen cars parked on the quayside behind Grapevine Cottages.
- 14.73. **Mr Shane Townes** said that he personally lives in Holbrook, Suffolk. He has been employed by EDME since 1994, working in or around the application site, predominantly in the Thorn Quay Warehouse. He had typically worked shifts between 7.00am and 5.00pm Mondays to Fridays, as a warehouse operative or forklift truck driver. As a forklift truck driver his main job was loading or unloading lorries and taking goods across the road to EDME's southern site.
- 14.74. The quayside around EDME's premises had always been a busy commercial port. From 1994 until about 1999, while syrups were being produced in Thorn Quay Warehouse, he recalled that raw materials such as flakes, wheat and flour were continuously transported between the southern EDME premises and Thorn Quay Warehouse. At least 10 to 20 pallets of goods would be moved by forklift truck per day, usually into the plastic doors at the top of the Thorn Quay Warehouse near the Swan Basin. From 1998 to 2009 the forklift movements between the premises intensified and about 20 to 40 pallets of goods per day were transported by forklift. There were three relevant doors on the Thorn Quay Warehouse. Depending on where the goods were, they would take the goods either from the Allen Quay doors or the one up near the Swan Basin. That would happen 3 or 4 times a day at least. Those aspects of the activity ceased in 2009 when all the production and storage elements of Thorn Quay Warehouse were moved to EDME's premises south of the High Street.
- 14.75. In the earlier period about 6 to 8 HGVs a day would deliver or collect goods to or from the Thorn Quay Warehouse adjacent to Allen's Quay. The HGV would park in the area while goods were loaded or unloaded by forklift trucks. The goods would either be stored in the warehouse or transported by forklift to EDME's site south of the High Street. While the pallets were being loaded or unloaded they were typically placed on the quayside adjacent to where the lorry was. He had always regarded those parts of the site that served the Thorn Quay Warehouse as being the commercial hub of the quayside. He was surprised they had not

received complaints about noise and nuisance from local residents, considering the intensity of commercial operations in the area. If more than one lorry came the second one would have to wait and might be sent over the road, but usually the second lorry would just wait on the Quay. He thought that had happened about once a week. However an EDM lorry would not stay on the Quay for very long as there were port vehicles passing. There were only a few occasions when he saw any congestion. That might cause there to be a lot of annoyed lorry drivers which they would have to sort out. But it was not very frequent that congestion like that would come to gridlock.

- 14.76. Their lorries used to come along the Port Road. Foreign drivers however would be sent down via the Swan Basin. In order to turn lorries one could send them along to the Baltic Wharf to turn, or the other way.
- 14.77. As for recreational activities he had only rarely seen them on the quayside. On rare occasions he had seen recreational boats moored along the quayside. He very rarely recognised the people as being from the local area. Also, while he and his colleagues occasionally swam at the Quay he had never seen anyone else doing so. He had never seen anyone fishing from the quayside. He had seen the odd group of school children standing opposite the Swan Basin and painting it. He had seen people walking dogs perhaps every week, probably first thing in the morning when it is quiet. One would not want to walk down there when things are busy. He had seen football a couple of times but it had only been him himself with a friend on their break. He had possibly seen bird watching a few times, maybe three times in 20 years. He had never seen anyone picnicking or flying kites. As for people walking, they usually parked near The Swan and might walk and stand and look and be there for 10 minutes. That happened 2 or 3 times a week but more in the summer if the weather was nice. He had seen bicycle riders down there on the Quay in the same area as where they walk. If there were no lorries around people would go all over the Quay. He had seen people feeding swans; every day a lady collected feed and fed swans there. He believed her name was Alex. He had occasionally seen other people do that. As for his own swimming there, he thought he had only done it once between 1988 and 2008. That was during a lunch hour break on a hot day.
- 14.78. As for the boating he had seen, there used to be one time a year when a lot of boats, perhaps 20 of them, would come up and moor at the quayside and their crews would go to have a drink, but it happened once a year. He had never seen crabbing at the quayside.
- 14.79. *In cross-examination* Mr Townes said that between 1994 and 1998 his role had essentially been that of shuffling goods from one side of the road to the other or loading lorries. In his early period the moving of goods would be both to the High Street end doors and the Allen Quay doors. He dealt with both deliveries and collections at that time. Between 1994 and 1998 or 1999 he thought there could have been typically 10 to 20 pallets coming in of raw materials on a daily basis. At that time Thorn Quay Warehouse was both a storage and a production facility. His work could have related at that time to moving raw materials or loading or unloading lorries.

- 14.80. He accepted that there could be loading or unloading of lorries to the south of the High Street as well. He could have been working on either side of the High Street. He would say that typically his working day would have been spent one half on the Thorn Quayside and the other half to the south of the High Street.
- 14.81. From 1998 to 2009 pallets could come out onto Allen's Quay or up by the Swan Basin. His personal time spent on the Quay during that period was less, perhaps about 3 or 4 hours a day.
- 14.82. He had seen bicycle riders go to the edge of the Quay and admire the view. He confirmed that he had only been swimming once during the period concerned. However he had seen one person walking there with a cigarette every day. He was sure that others did it as well but less regularly. He could remember seeing a couple of ladies down there with their children but usually they had got into a car and taken them to school. He had also seen local residents outside their houses and out on the quayside itself. He thought that if people lived there they would indeed walk across the Quay in order to get some fresh air, or to look across the river.
- 14.83. *Mrs Carol Townes* lives at 268 Colchester Road, Lawford, Manningtree. She had grown up in Mistley and lived in the area all her life. She started working at EDME in 1983, initially within the Thorn Quay Warehouse where the syrups were produced and packaged. That was until approximately 1999 when production ceased and the business concentrated on the production of dry goods. By 1988 Mrs Townes had become a packaging supervisor. That was in the Thorn Quay Warehouse. It was indoor work but her office was right at one end where the windows were and she knew what was going on outside. She would be looking out for lorries coming in from her office. That office was up overlooking the Swan Basin. She has changed roles since then. Syrup production ceased in 1999 or so and she became a site supervisor, organising cleaning mainly on the other side of the High Street. Then she became a purchasing supervisor until 2011, and that again was based on the other side of the High Street. She did do some stock checks over in the Thorn Quay, but inside. The best knowledge she had of Allen's Quay was really in the period up to 1999. She worked normal working hours Mondays to Fridays but would occasionally work Saturdays in the morning as well.
- 14.84. She had been born in Mistley and went to the Mistley Norman primary school. She never went down the Quay as a child because it was always considered a busy industrial area. Also while she was working 1998 to 2009 was a very busy period. They made all the home brewing equipment for Boots at one time. And they also were involved in packaging all of the equipment which went with that.
- 14.85. The Quay, especially the part used by EDME, had been used for their industrial and commercial purposes, but certain parts of the quayside had also been used by other local businesses, such as the Mistley Quay and Forwarding Company, and also a firm called ARC Marine. She did not know what that firm had done by way of business, but they were in a building at the east end of Grapevine Cottages and parked vehicles by the Swan Basin. Her husband also used to park on the Quay every day. He worked there for 40 years.

- 14.86. Since she joined the firm, until the production of syrup ceased in 1999 she recalled a continuous flow of HGVs visiting and leaving the Thorn Quay Warehouse to deliver and collect goods each day. Those vehicles would normally arrive and leave Thorn Quay Warehouse via the public highway from Mistley Towers along the quayside. They would park and load or unload in the area in front of that warehouse. Occasionally some would use the access road via the Swan Basin. The lorries also used to use the weighbridge sometimes. Occasionally there were a couple of lorries down there at the same time, and one might wait in the area behind Grapevine Cottages. She did not recall seeing lorries turning on the Quay.
- 14.87. In about 1999 production of syrup ceased and consequently the need to package or can syrup also became redundant. That enabled the business to concentrate on the production of dry goods, and the Thorn Quay Warehouse was predominantly used for the storage of raw materials and supplies. From that date HGV and forklift truck movements became less intense, but they were still frequently made.
- 14.88. From being familiar with the site right from her childhood and then working at EDME from 1983 onwards, she had rarely seen the application site used for any form of recreational activity. She had never seen people walking or undertaking activities on the access road by the Swan Basin or on the quayside. She did recall seeing perhaps one or two people a year mooring their boats along the quayside edge. When they did that they would always disembark and walk over the access road to the Swan Basin and on to the Mistley Thorn. In previous years, but during her working years there, she recalled that EDME once a year used to moor a barge on the quayside in order to entertain its clients and employees.
- 14.89. She had never seen children playing on the quayside nor any fishing. Since 1988 she had never seen any people drawing or painting on the quayside. She had not seen people dog walking, but that was not to say that they had not done so. She had not seen people playing football or cricket and would be surprised at that being done because it is a busy working quay. She had seen no bird watching or picnicking or kite flying. She did remember that all the boats came up about once a year and people walked on the Quay from those boats. Otherwise she only ever saw local people on the Quay, for example Mrs Saxby walking up to the post office or somewhere. She never saw any bicycle riding or swan feeding herself. Until the syrup production ceased a lot of grain went into the river and that kept the swans well fed. She only saw two people swimming on one occasion.
- 14.90. *In cross-examination* Mrs Townes said that up until 1998 she was a packaging supervisor. From 1983 she had been a packaging operator and had become supervisor by the mid to late 1980s. When she had worked on the packing line as an operator that was based on the top floor of Thorn Quay Warehouse. She worked on the line for some 3 or 4 years until 1986 say. Then later on in 1999 she became the site supervisor for cleaning. When her office was above the Swan Basin loading bay she could see into the High Street, into the Basin and also down the road to part of the Quay. She could not see the loading point from Allen's Quay into Thorn Quay Warehouse and could not see any part of the Quay itself.

- 14.91. She had always regarded the Quay as a place where one did not go. In the latter part of her employment she had been engaged in various roles across the road to the south. She agreed that her opportunities to see Allen's Quay had been fairly limited apart from knowing what was coming in or out. She definitely did not recall seeing informal type recreational activities on the Quay however.

15. **SUBMISSIONS FOR THE THIRD OBJECTOR**

- 15.1. The Third Objector produced some submissions in the run-up to the Inquiry, but these were largely subsumed into the full submissions which were made at the end of the sessions of the Inquiry, and it is on those full submissions that I largely concentrate now.
- 15.2. It was accepted on behalf of the Third Objector that the Registration Authority does have a discretion to amend, or accept the amendment of, the application site's boundary. Sullivan J had acknowledged that discretion in his judgment in the *McAlpine* case. Such a discretion had been confirmed by Lord Hoffmann in the *Oxfordshire* case.
- 15.3. While it followed from those authorities that the Registration Authority has a discretion to decide to register a lesser part of the application site, it must take care to ensure that any decision to do so would not cause prejudice to any of the parties. It was also important to recall that the Registration Authority has no investigative duty that requires it to reformulate an applicant's case.
- 15.4. The Third Objector was late becoming involved in this application because its interest in the original site boundary was missed, and so it was not made aware of the application until late 2012. A meeting had taken place early in 2013 between the Third Objector and the Applicant at which the Applicant was asked to consider removing the land within the Third Objector's ownership, and the two parcels within the ownership of the Second Objector between the Thorn Quay Warehouse and Grapevine Cottages, from the application so that the Third Objector need take no further part in the application. The Third Objector's interest was only to ensure that it could access Thorn Quay Warehouse for the purpose of its proposed redevelopment. At that meeting the Applicant agreed to remove the Third Objector's land from the application site, but it was indicated that the Applicant was not willing to remove the other areas of concern to the Third Objector from the application site.
- 15.5. During the course of the Inquiry the Applicant had again been asked to consider seeking to amend the application site boundary, but had not done so. It had remained committed to proceeding with an application to register the whole of the application site.
- 15.6. While still acknowledging the Registration Authority's discretion to consider registration of part only of the application site, the Third Objector maintained that it is not appropriate for a lesser area to be registered on this occasion. The application should stand or fall in its entirety. This is because first the geography of the application site is such as to make it impossible for the authority properly to

separate one part from another. Given the Applicant's insistence on maintaining the application across the whole site, the Inquiry had not explored where any reduced boundary should be drawn. Any attempt by the Registration Authority to do so now would inevitably be arbitrary and would risk substantial prejudice to the Third Objector, given the importance of the issue to it, and the implications if such a boundary were drawn in a way which would interfere with its ability to redevelop the Thorn Quay Warehouse.

- 15.7. The Applicant has been given ample opportunity to consider making an application to amend the boundary and chosen not to do so. The House of Lords had warned Registration Authorities against doing an applicant's job for them. That warning is pertinent in this instance. A Registration Authority should remain an impartial arbiter and ought to deal with this application on the basis on which it had been presented.
- 15.8. The Third Objector expresses no opinion on the Applicant's request to extend the application boundary to include the extension to the Stockdale compound. That area of the site is of no interest to the Third Objector. Large parts of the application site are highway. While that designation does not prevent land being registered under the *Commons Act*, it is common ground between the parties that the Applicant cannot rely on lawful sports and pastimes that would ordinarily be permissible on the highway, such uses being by definition permitted and so not being as of right.
- 15.9. An important preliminary question therefore is what activities can lawfully be carried out on a highway. The House of Lords judgment in *DPP v Jones* [1999] 2 AC 240 is particularly relevant. The range of uses permissible within a highway is wide, and in order to justify registering the parts of the application site that are already highway, the Applicant must show the requisite use for lawful sports and pastimes going beyond the kind of uses described in that case.
- 15.10. On a separate but related point it is noted that the First Objector has indicated that it disputes the highway status of the port access road. However there is no evidence before this Inquiry that contradicts the definitive map's designation of that land as highway. On that basis the Third Objector submits that the only reasonable course open to the Registration Authority is to treat the definitive map as being correct in that respect.
- 15.11. It is not relevant whether the Applicant might have attempted to pursue some other remedy in order to attempt to overcome the grievances he and his colleagues clearly feel about the situation on the Quay. The only relevant question in the present proceedings is whether the application meets the statutory test under the *Commons Act*.
- 15.12. Although the Applicant's written evidence claimed that a number of different uses had been undertaken on the application site during the relevant period, the oral evidence at the Inquiry did not bear out use to anything like the extent initially claimed. The Third Objector's submissions concentrate on the almost complete absence of any evidence of use of the parts of the application site of particular interest to this Objector.

- 15.13. Much of the Applicant's evidence focused on the mooring of vessels, a matter that has clearly been of public dispute since long before the end of the relevant period in 2008. Yet both Mr Parker of TWL and the Third Objector's witnesses had a very different impression of the level of recreational mooring that has taken place alongside the application site from that which has been put forward by the Applicant and those who support him. It should be noted that some of the Third Objector's witnesses spent significantly more time on the application site than the Applicant's witnesses did. Some of the latter such as Mr Garwood only visited the site for brief periods. The evidence from the Objectors' side is therefore more complete and more accurate in respect of mooring and all the other uses claimed to have been carried out on the site.
- 15.14. In any event all vessels were moored off the Quay and not within the application site. The physical act of mooring is not a lawful sport or pastime. Sailing a vessel may well be a sport or pastime but the act of tethering a boat to the land to stop it floating away is not. Likewise use of the application site to gain access to or from a moored vessel is not a lawful sport or pastime. The fact that the vessel may be used recreationally on the water does not mean that the acts involved with embarking or disembarking, loading or unloading are lawful sports and pastimes, they are plainly not. Even if they were, these activities only take place at the very edge of the application site and not across all or any significant part of it.
- 15.15. It is also far from clear that the majority of those mooring their boats were inhabitants of the Parish of Mistley. Lord Hoffmann in the *Oxfordshire* case made it clear that land must be used predominantly by inhabitants of the village or locality claimed. Witnesses giving evidence in support of the application often relied on Old Gaffers Association rallies, but there had been no indication that any of the participants apart from Mrs Wainwright's husband had been inhabitants of the Parish. Also many witnesses were clear that it was only possible for a vessel to be moored for a short period of time because of the tides, and that the normal purpose for which casual sailors would moor up would be to go for lunch in the Thorn Hotel. It would be strange if residents of the Parish went to the trouble of fetching their boats from their usual moorings in order to take them to the Quay and go and have lunch in their local pub. Some residents of the Parish may have occasionally moored their boats against the Quay on the application site, but the Applicant had failed to show that they were the predominant users for that purpose. In any event the evidence clearly showed that the unpermitted mooring use was at best limited in extent. The photographs the Inquiry had seen supported that view. There was nothing more significant here than occasional trespass.
- 15.16. Also any mooring which did take place by residents of the Parish did not meet the as of right test, based on the Latin maxim *nec vi, nec clam, nec precario*. TWL's clear documentary evidence showed that it expressly permitted all organised moorings by groups of boats. Similarly the Inquiry had not heard evidence from sailors resident in the Parish who were not members of the Stour Sailing Club. It is quite clear that members of that club knew from 2004 at the latest that any recreational use of the Quay was challenged by TWL as being a matter of right. Thirdly there were clear signs making it plain that mooring was not permitted.

There can be no doubt that the reasonable man would have clearly understood those signs to relate to the application site.

- 15.17. Finally as regards mooring it is clear from the photographs and the evidence of Mr Parker that there had been frequent interruptions to the availability of the water's edge of the application site for public mooring. The presence of lash barges was one example. Likewise it is plain that during the Old Gaffers Association rallies it would have been impossible for a member of the public to moor alongside the application site.
- 15.18. As far as swan feeding, crabbing, fishing and swimming were concerned, by definition any of these or any other water-based activities can only have taken place on the quayside. At best the majority of the application site was only being used as a means to gain access to the Quay by those carrying out such activities, rather than for lawful sports and pastimes.
- 15.19. A number of the Applicant's witnesses had given evidence of enjoying the view of the river or of the bird life on it. In most instances this was nothing more than pausing on a walk through the application site to take in the view and the activities taking place on the river. Only Mr Garwood had given evidence of a more in depth boat watching activity, although on his own evidence that took place from within a parked car, and also Mr Garwood made it clear that he had been told by his employer to challenge any recreational use he saw on the quayside. While he claimed to have disregarded that instruction to challenge any use it is difficult to see how his own use of the application site in later years could have been as of right.
- 15.20. In any event it is clear from the evidence that those activities, to the extent that they were carried out, were carried out along the water's edge and not elsewhere on the application site. There is no evidence of those activities taking place on the Port Road, nor of there being carried out on the land around the Swan Basin. Nor had they been carried out in the area between the Thorn Quay Warehouse and Grapevine Cottages. The only exception to that was the evidence of Mr Vonk that he occasionally might have made his way up the slope to get an elevated view of the river. Also Professor McKay had stayed mainly on the paved area around the Swan Basin. In any event both Mr Vonk and Professor McKay were standing in the highway. Standing in the highway to take in the view is clearly within the ordinary range of uses permitted on a highway.
- 15.21. There had only been limited evidence of children playing on the application site. What there was was all concentrated at the quayside. There was no witness evidence of use of the wider application site by children for playing, nor indeed are any photos of such activity included among the many submitted to the Inquiry.
- 15.22. A number of witnesses gave evidence of use of the site for drawing and painting, although none gave evidence of having done so themselves. It is far from clear that that activity was predominantly carried out by inhabitants of the Parish. In any event, almost without exception, that activity was confined to the quayside. Also if any painting or drawing were done in the areas of acknowledged public highway around the Swan Basin or the Grapevine Cottages, those were entirely

within legitimate uses of the highway and do not contribute to supporting a claim for village green registration. Some witnesses had mentioned taking photographs on the application site. That is another activity which is ordinarily permissible in the highway.

- 15.23. A number of witnesses gave evidence of walking or dog walking, although in each case that activity involved the application site forming part of a longer walk. There had been no evidence before the Inquiry suggesting that a more informal roaming exercise had been carried out, and the use described had been most akin to a right of way and not evidence of general recreational use. In any event the route each witness described taking was almost if not entirely contained within the existing highway. As such that type of use cannot support the application as it is within the range of uses ordinarily permissible in the highway.
- 15.24. Mr Tucker himself had given evidence that he alone had stopped alongside the Thorn Quay Warehouse in order to pick elderflowers from the bushes growing on the land within the ownership of the Third Objector. Mr Tucker had accepted that he was standing on highway land at the time, albeit that the elderflower bushes themselves were outside the amended application site boundary. Mr Tucker was therefore doing nothing more than pausing on the highway.
- 15.25. While many of the questionnaires had mentioned activities such as community celebrations and carol singing, it had become clear from the oral evidence that those were references to events organised by the Free the Quay campaign after the erection of the fence and so outside the relevant period. While the Inquiry heard that carol singers sometimes visited the properties at Grapevine Cottages in earlier years, that activity took place within the highway and is clearly within the normal range of uses of the highway.
- 15.26. As far as football and cricket were concerned, Ms Worsley had described her children having played football and cricket on the application site because it was apparently a more attractive surface for such games than the green right outside her house. Even if that evidence is accepted, it is the only evidence of such activities being carried out by residents of the Parish on the application site, and so does not really take the application any further forward. The only other example of such activities that had been mentioned was the kicking around of a football by some of the Third Objector's employees during their breaks, and none of them were resident in the Parish at the time.
- 15.27. When asked about the danger of a ball going over the edge of the Quay, Ms Worsley had indicated that the activity had only been carried out when her children were young and was carried out well away from the edge of the Quay. As that land is highway it follows that such informal play was within the normal lawful use of the highway.
- 15.28. As far as picnicking on the application site was concerned, it became clear during the Inquiry that what the Applicant's witnesses meant by that term was people driving onto the Quay and eating their lunch or supper in their cars while enjoying the view. That is not a lawful sport or pastime. Also there is no evidence of it having taken place anywhere other than at the water's edge. Mrs Bell had given

evidence of some family dinners on the Quay, but she was the only witness who had partaken in such an activity. Those were clearly rare occasions and involved her family rather than other parishioners. It also seemed that the relevant location was either on the highway or the quayside.

- 15.29. The evidence of any kite flying was extremely limited and had clearly only been for a small amount of time on rare occasions. No-one else could even attest to having seen other people doing it.
- 15.30. One of the most significant points of disagreement between the witnesses at the Inquiry had been as to the extent of any use made of the application site. This is an important issue. The first reason for this is that the level of use claimed by the Applicant's side needs to have been of such an amount and carried out in such a manner as to appear to the landowner to constitute the assertion of a public right rather than an occasional trespass.
- 15.31. It is not the Third Objector's case that there has been no public use of any part of the application site during the relevant period for lawful sports and pastimes. The Third Objector's position is as follows. There has been no use of those parts of the application site that are highway for lawful sports and pastimes that go beyond what is ordinarily permissible on highway land. As for the remainder of the application site, other than that part immediately adjacent to the water's edge, there has been nothing more than a de minimis use. On much of the site, in particular to the east of Grapevine Cottages, there is no evidence of any use at all for lawful sports and pastimes, and certainly not sufficient use to alert a reasonable landowner to the fact that a public right was being asserted. While there may have been a higher level of unauthorised use made of the part of the Quay immediately adjacent to the water's edge, such use was still de minimis and insufficient to assert a public right, especially given the incompatibility of that right with the commercial use of the site.
- 15.32. That is why the conflict between the evidence of the witnesses is so important, and why the Registration Authority must decide which evidence it prefers. The Applicant's witnesses have sought to paint a picture of an idyllic area with little or no industrial activity, where children can safely kick balls around and lie down on the quayside to drop crab lines into the water without having to worry about the dangers of industrial vehicles moving behind them, or lash barges bobbing around in front of them. That is not credible and is not supported by the photographic or other evidence.
- 15.33. Even putting aside the clear evidence of Mr Parker for TWL, the traffic survey carried out by Mrs Bell showed significant commercial activity across the Quay during a typical working day. Also she had readily accepted that it was carried out after the closure of the Thorn Quay Warehouse, and so does not give an accurate picture of the level of use during the relevant period. The nature of the Third Objector's operations in and around Thorn Quay Warehouse is supported not just by witness evidence but also by documentary records and photographs. That activity was clearly being carried out at various times throughout the working day. Mr Townes, one of the EDME witnesses had given clear evidence that he could be out on the Quay for at least 4 or 5 hours every day observing what

was going on, and no other witness has been able to give direct evidence for such substantial parts of the relevant period.

- 15.34. As had been pointed out by Sullivan J in the *McAlpine* case, the motive of witnesses is a factor to be taken into account when assessing the credibility of those who give evidence in favour of an application. While the witnesses supporting the application clearly have something to gain from the success of the application, the Third Objector's witnesses have no interest in the outcome whatsoever. The manufacturing and warehouse uses of the Thorn Quay Warehouse have permanently ceased. Whatever the outcome of this application, life will go on for the Third Objector's witnesses. They have no reason to give anything other than their honest evidence as to what they have seen taking place on the application site.
- 15.35. If one accepts the evidence of significant commercial activity associated with EDME's operations having taken place around the Thorn Quay Warehouse and in the Swan Basin, then the only sensible conclusion to draw about the evidence of those witnesses who say they cannot recall seeing such activity is that either they were not there or that their recollection of the level of commercial activity is not accurate.
- 15.36. Such level of recreational use of the application site, and in particular the areas between Thorn Quay Warehouse and Grapevine Cottages has come nowhere close to being sufficient to give the impression of a public right being established. It had been nothing more than an occasional trespass being generally committed outside of the working hours of the port and other businesses in the vicinity of the application site.
- 15.37. It is also part of the statutory test that it must be shown that a claimed application site has been in use by a significant number of the inhabitants of the Parish of Mistley. In this case, after one has excluded the use of highway for permissible uses, the use of the remainder of the site for purposes more akin to a right of way, the use by persons not resident in the Parish, use for activities that are not lawful sports and pastimes, and uses carried out with permission, very little if anything is left other than some very infrequent use of the very edge of the Quay for occasional crabbing, bird watching/sightseeing, and perhaps informal swan feeding. Such uses are neither at a level to constitute the assertion of a public right, or by such number of residents of the Parish as to give the impression of significance which is required by the caselaw.
- 15.38. In any event the application is doomed to fail because the Applicant cannot show an uninterrupted 20 year period of use in respect of any part of the site. It is clear from the photographs and other evidence that various non-recreational uses have been carried out at different times during the relevant period on the entire site. Car parking is undertaken around the Swan Basin and outside Grapevine Cottages almost constantly. It is also regularly undertaken in the area of land owned by the Second Objector adjacent to Grapevine Cottages. Also the Applicant's own witnesses had given evidence of parking anywhere on the Quay that they could.

- 15.39. The Third Objector's evidence had clearly shown parts of the application site in the Swan Basin and in the area between the Thorn Quay Warehouse and Grapevine Cottages being regularly used for the unloading and loading of HGVs, and for storage of materials and goods waiting to be moved around the EDME operation. All witnesses have accepted that the port access road is often lined with HGVs stacked up relating to the port. That is difficult to reconcile with any suggestion that this was not a well used and heavily trafficked Quay. There had also been evidence of overnight parking on the Quay by HGVs, including some belonging to the Third Objector. Photographs had shown parts of the Quay being used to park vehicles and store goods.
- 15.40. Outside of the application site the mooring of lash barges and other commercial vessels also had the effect of interrupting use of the quayside for water based activities. It is not credible that a mother such as Ms Worsley would have allowed her children to lean over the edge of the Quay to go crabbing in the presence of a lash barge moored alongside.
- 15.41. The argument in this case is not about deference. For the Applicant to argue give and take, he must be able to show that there is some conscious decision being made by local people to give way to other uses of the land at a time when the land continues to be available for use should they wish. The facts in the *Redcar* case were a good example of this. Had local people there wished to stand in the way of the golf balls on the fairway they could have done so. In the present case local people did not have a choice as to whether to give way to an alternative use. The presence of cars, forklifts, HGVs, lash barges and piles of heavy materials all had the effect, not of inviting deference, but of excluding local people from the relevant part of the application site completely for so long as the obstruction remained in place, as effectively as any fencing would have done. Thus the application must fail in the absence of a proven continuous period of use of any part of the site.
- 15.42. The Applicant had also not demonstrated use as of right. Some uses such as swan feeding and mooring were expressly permitted by the First Objector TWL. Many others were permissible in the highway in any event. In addition the clear actions of the First Objector TWL were sufficient to mean that all public use of the land was "*by force*". There is clear evidence that the local sailing club, the Parish Council and the Residents Association were all aware as early as 2003/4 that the First Objector was asserting control over its part of the application site, and seeking to control the use being made of it.
- 15.43. On top of that there is the issue of signage. Witnesses for the Applicant had consistently asserted that none of the signage located within the application site related to the site. All of the witnesses, albeit in different ways, managed to construe each sign in such a way as to make sure that it did not relate to the application site. Yet many of the signs clearly did relate to the application site. For example the "*No Fishing*" sign on the western wall of Thorn Quay Warehouse could only relate to the Quay to the west of the sign. It is accepted that some of the signage is not ideally placed, but the First Objector TWL had been constrained by the unusual lack of clarity about the boundary between the

highway and non-highway land. The First Objector TWL had not been entitled to place signs in the highway, indeed it would have been illegal to do so.

- 15.44. To have erected signs in the middle of the Quay at a point where highway and non-highway land meets would have obstructed not only the commercial activities but also the private rights of way of the Second Objector. On any objective interpretation the signs displayed around the port must apply equally to all parts of the port.
- 15.45. On the issue of deference, all of the Applicant's witnesses accepted that they would move out of the way of port and other commercial vehicles passing through the site. While the Supreme Court in *Redcar* had accepted that deference did not prevent use being as of right, their Lordships were equally clear that this was on the basis of their finding that two uses, one being for lawful sports and pastimes and the other being as a golf course, could sensibly coexist as mutually compatible uses on the basis of give and take.
- 15.46. That principle has no application to a situation where land is in use for industrial purposes. To expect a landowner to accept a situation where their use of their land is forced to coexist with a public right of recreation, in circumstances where the landowner's use poses a risk of serious harm to the public is neither desirable nor fair. Lord Hope in the *Redcar* case had acknowledged that some uses cannot sensibly coexist at all.
- 15.47. To expect the Objectors to share the land with members of the public exercising a legal right to use the land for recreation would be irresponsible. All three Objectors have a duty of care to ensure that their operations are carried out safely. To expect them to discharge that duty through nothing more than "*give and take*" would put them in an impossible situation. They would be unable to impose reasonable safety precautions, whether required by the Health and Safety Executive or otherwise. That would risk causing an unacceptable situation where the Objectors would be prevented from continuing to use the application site in the way they have throughout the relevant period.
- 15.48. While the Third Objector does not consider that there is any basis for the application site boundary to be amended by the Registration Authority, it is important to note the complete absence of any evidence of use for lawful sports and pastimes within almost the entire application site.
- 15.49. The Applicant and his witnesses had in reality only been able to give evidence of use of the part of the application site closest to the river. In particular there had been no evidence of use of the two areas of the application site in the ownership of the Second Objector between Thorn Quay Warehouse and Grapevine Cottages. Many of the Applicant's own witnesses had made it clear that their only activities had taken place in the area of the edge of the Quay and the public highway. There was really no evidence suggesting that the steep access road running up between Thorn Quay Warehouse and Grapevine Cottages to the Swan Basin had been used for recreational activities at all. Not a single one of the photographs submitted in support of the application had shown any recreational use other than on the quayside. Given the completeness of the collection of photographs submitted it is

unlikely that any such photos exist. Clearly the Swan Basin and the area between Thorn Quay Warehouse and the Grapevine Cottages was never used for anything other than access to the quayside and car parking.

- 15.50. In conclusion the Applicant has failed to discharge the burden placed on him by the ***Commons Act 2006***. The Applicant cannot demonstrate in respect of any material part of the application site that such part has been continuously used throughout the relevant period. At times when the application site was available for use, the Applicant has failed to demonstrate us as of right for lawful sports and pastimes by a significant number of the inhabitants of the Parish. If the Registration Authority decides that the Applicant has satisfied the legal test in respect of part only of the application site, then the prejudice that a partial registration would cause to the Third Objector, and the absence of any prejudice to the Applicant, means that the Registration Authority should decline to exercise its discretion to register a lesser area of land, so the application site should accordingly be rejected in its entirety.
- 15.51. If the Registration Authority is minded to register part only of the application site, then the Third Objector would stress the complete absence of any use of the areas of the site that are highway for any lawful sport and pastimes over and above those uses that are permitted by the highway designation. Furthermore the Third Objector would stress the clear evidence that the two parcels of land in the ownership of the Second Objector between the northern edge of Thorn Quay Warehouse and the highway in front of Grapevine Cottages have been used regularly during the relevant period for the storage of goods and the parking of vehicles. There is also a complete absence of any evidence of use of those parts of the application site for lawful sports and pastimes. Any partial registration cannot therefore properly include those areas of land.

16. DISCUSSION AND RECOMMENDATION

- 16.1. The Application in this case was made under ***Subsection (3)*** of ***Section 15*** of the ***Commons Act 2006***. That section applies where:

- "(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
- (b) they ceased to do so before the time of the application ... ; and*
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."*

The Application was dated 18th August 2010, and (I understand) promptly delivered to the County Council as Registration Authority. The date given in the

Application as being the time when lawful sports and pastimes ‘as of right’ had ceased on the land was 17th September 2008.

The Facts

- 16.2. In this case there was very considerable dispute of fact in relation to many (but not every one) of the matters which are relevant to the determination of applications of this kind. To the extent that the facts are in dispute, it is necessary to reach a judgment, on the balance of probability, as to the disputed aspects of the evidence which has been given, insofar as that evidence was relevant to the determination whether the statutory criteria for registration have been met. The point was reasonably made on behalf of the Objectors that it must be carefully questioned whether the evidence produced or called on behalf of the Applicant really did meet all of the statutory criteria or tests prescribed by the wording of **subsection 15(3)**.
- 16.3. As just mentioned, where there are material differences, or questions over points of fact, the legal position is quite clear that they must be resolved by myself and the Registration Authority on the balance of probabilities from the totality of the evidence available. In doing this one must also bear in mind the point, canvassed at the Inquiry itself (and mentioned by me earlier in this Report) that more weight will (in principle) generally be accorded to evidence given in person by witnesses, on oath or affirmation, who have been subjected to cross-examination, and questioning by me, than would necessarily be the case for written statements, questionnaires and the like, and even Statutory Declarations, which have not been subjected to any such opportunity of challenge.
- 16.4. I would say at this point that I do not think that the nature of the evidence given to me in this case makes it especially suitable for me to set out in my Report at this point a series of ‘findings of fact’. Rather, what I propose to do, before setting out my overall conclusions, is to consider in turn the various aspects of the statutory tests under **Section 15(3)** of the **2006 Act** (but not necessarily in the order in which they there appear), and to assess how my conclusions (on the balance of probabilities) on the facts of this case relate to those aspects. It should not however be assumed that any facts I mention under one heading are only relevant to that heading. I have taken into account the totality of the underlying facts and evidence in reaching my conclusions under all the headings, and (of course) in reaching my overall conclusions as well.

The correct Subsection?

- 16.5. As recorded above, the application in this case had been made under **Section 15(3)** of the **2006 Act**, based on the claimed use ‘as of right’ having ceased almost two years before the application date. At the Inquiry the point was pursued with some vigour by the Objectors’ side, principally by Counsel for the First Objector TWL, that the application should be rejected because it had been brought under the wrong subsection; the argument was that the application should have been brought

under **subsection (2) of Section 15**, based on the claimed use having continued up to the date of the application.

- 16.6. It might be thought that this was rather a strange argument to be made by a party which also argued, with at least as much vigour, that there could not have been any ‘as of right’ use of its part of the application site by the local inhabitants for many years before September 2007, because it (TWL) had maintained an array of signs, backed up in a few instances by other actions, which had made it clear that use by the (local) public of the relevant land at Mistley Quay was not allowed, indeed was forbidden by the company. Also it (TWL) maintained that it had made it clear to the local boating fraternity, from at least as early as 2004, that leisure activities which involved mooring craft alongside Allen’s Quay, and the associated embarking, disembarking, loading, unloading etc, were activities which were not allowed, indeed were prohibited by the company.
- 16.7. The rationale behind the TWL argument as presented to me was that, whatever else might be concluded about the (local) public’s activities on Allen’s Quay (or the wider areas of Mistley Quay included within the application site), they had continued to take place in much the same way *after* September 2008, (and through to August 2010) as they had before, with the exception (because of the erection of the fence) of those activities which involved ‘crossing’ (in some sense) the edge of the Quay, such as mooring/accessing boats, fishing, swimming, crabbing etc.
- 16.8. So, it was argued, the Applicant had used the wrong subsection, and it is beyond the powers of a Registration Authority to accept an amendment to an application changing it from one subsection to another, because that is too fundamentally substantive a change, and/or it would be unfair or prejudicial to an objector. I was referred to examples of instances where Inspectors (for Registration Authorities) had considered whether to accept such amendments, including one (in Hampshire) where the Inspector had been Mr Farthing, the advocate for the Applicant in this present case. As far as I could see (and as referred to in Mr Farthing’s relevant report) the practice had gone both ways.
- 16.9. I will mention in passing [though, perhaps fortunately, in my opinion no decision needs to be taken based on this in the present case] that in my own experience, both sitting as Inspector and as advocate, it is relatively common for applications to vary the subsection on which an application depends to be allowed, provided there is no unfairness to any party involved.
- 16.10. For example it is quite common in practice for situations to arise where it is not entirely clear to a (frequently lay) applicant whether on the facts which he/she presents it is **subsection (2)** or **subsection (3)** which is the more appropriate, or indeed where there is a dispute of fact (which the Registration Authority needs to resolve) concerning the very matters which determine whether it is (2) or (3) which is the more apt.
- 16.11. There is not any obvious statutory justification for the instruction in the standard Application Form used in these cases (Form 44) to applicants to ‘tick [only] one’ of the boxes relating to the subsection which is claimed to apply. Having regard to the actual wording of **Section 15**, no valid reason is apparent as to why an applicant should not be able to say (for example): “*either Section 15(2) or Section 15(3) applies, according to the view which the Registration Authority takes of the*

facts which I here seek to present”, especially if the applicant also offers a view as to what date (or range of dates) might be seen as the relevant ‘cessation’ if **subsection (3)** is decided to be the appropriate one.

- 16.12. I entirely accept that other parties should not be unfairly taken by surprise, having focused all their efforts on rebutting one particular case, only to be told at the last minute that an Applicant is now putting his/her case in a very substantially different way. However, given that the wording of Form 44 is as it is, I do not, as at present advised, see why an Applicant who has from the start disclosed all the relevant facts known to him/her, should not expect reasonably sympathetic consideration to be given to an application to ‘vary’ the relevant subsection, in the light of the evidence as it has actually emerged from the parties on all sides, provided no one is left unfairly surprised or unable to deal with such an ‘alternative’ view of the matter. Still less is it obvious why such a variation should be seen as such a fundamental change to the substance of an application that it should be rejected as a matter of principle in all cases.
- 16.13. I am guided in reaching the views I have just expressed by the words of Lord Hoffmann in paras 60-62 of his speech in the well known ‘Trap Grounds’ case [*Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674]. I would respectfully express the view that those words are not only wise but quite evidently correct, and nothing that had been said in the Court of Appeal in that case (or elsewhere) seems to me to require that view to be qualified. It is not, I would respectfully suggest, for lawyers to try to create artificial ‘traps for the unwary’ in what is intended to be a “*relatively simple and informal*” procedure, provided that the Registration Authority is “*guided by the general principle of being fair to the parties*”.
- 16.14. Having said all that, however, it is not my view that the Applicant here did cite the wrong subsection, and hence by implication the wrong qualifying period, in his application, or that in consequence he needs to ask to be allowed to amend the application in that respect. It is quite clear to me from the evidence that, whatever else might be the ‘rights and wrongs’ of the matter, the sudden erection in September 2008 of a substantial enclosing fence around the edge of what had hitherto (and possibly for several centuries) been an open quay represented a major, and therefore noticeable, ‘shock’ to the local community. Even though it is true to say that in practical, literal terms, it only actually prevented those activities which required some form of access over the very edge of the quay, this was an action by TWL which in my view made it apparent to local people, in a very visible and challenging way, that the owning company had determined not to allow recreational ‘sports and pastimes’ uses to continue on the Quay.
- 16.15. I accordingly conclude, on the strong balance of the evidence, that what happened in September 2008 made it clear, in a way it never had been before that such recreational use as had been taking place on the application site was not ‘as of right’ in the sense of being without challenge from the landowner TWL. Accordingly, without at the moment determining any other points in the case, my conclusion is that the application was properly and sensibly made under **Section 15(3)**, so that the ‘qualifying period’ for principal consideration is the 20 years to 17th September 2008.

- 16.16. I would add that, if I were wrong on that point (which I do not believe I am), that could only logically arise because such ‘lawful sports and pastimes’ uses by local people as had carried on, despite the appearance of the fence and the controversy it caused, had *still*, on the evidence, been engaged in “*as of right*” during the period from 17th September 2008 to 18th August 2010. On that hypothetical basis, reliant as it would be on assertions about the facts made by the Objector TWL itself, it is difficult to see what hardship or unfairness there would be in acceding to a request to amend the application, based on **Section 15(2)**. Given that all of this relates to matters which arose at, and were fully discussed at the Inquiry, I do not believe that any such amendment would have been procedurally unfair either to TWL, or to the other objectors, both of whom were legally represented, and well able to grasp the relevant issues. However, as I have already indicated, I do not believe that any such amendment is appropriate or required, so I shall continue to consider the Application here under **Section 15(3)**, as made.

The specific Amendments requested by the Applicant

- 16.17. The Applicant, in early May 2013, little more than a month and a half before the Inquiry began, had made a request in writing to be allowed to amend the Application, by way of changing the extent of the area of land covered by it, in a number of significant ways.
- 16.18. Two of the changes involved the exclusion from the application site of small areas, very roughly triangular in shape, ‘tucked’ into the corners of the group of buildings known as the Thorn Quay Warehouse, and immediately to the south east of the roadway going down from the Swan Basin to the Quay. These are areas which contain rough vegetation, including elder bushes. No-one objected to the exclusion of these two areas from the application site. Nor does it seem to me that there could be any cogent objection to such minor changes, which prejudice no-one, and accord with common sense. I therefore conclude and advise that those two small amendments should be accepted.
- 16.19. The other amendment sought at the same time by the Applicant was very much more controversial. This was a request that there should be *added* to the application site a significant area at the north-western end of the part of Allen’s Quay which directly fronts on to the Stour estuary, this being an area which was fenced off by TWL, the first Objector, to form an additional or extended ‘compound’ (the ‘Stockdale Compound extension’), at approximately the same time, in September 2008, as the fencing was erected along the waterside of the quay more generally.
- 16.20. The rationale behind the Applicant’s request to amend was that this extended compound area was omitted by mistake from the original application plan, and that prior to the fencing being erected it had been used in exactly the same way as the rest of Allen’s Quay, from which it was at that time indistinguishable on the ground. The intended larger application site, including the Stockdale Compound extension, was included within the site shown on a smaller scale plan which was attached to each of the 20 Evidence Questionnaires which had accompanied the original application, including the one signed by the Applicant Mr Tucker himself. It must have been apparent that the intention had been to make an application covering the larger site, so TWL as owner of the ‘Stockdale Compound extension’

would not be prejudiced by the application now being amended so as formally to include that area in a larger application site including the whole river frontage of Allen's Quay.

- 16.21. TWL, the first objector, did not agree to this amendment being made. It accepted that in overall spatial terms the amendment represented a relatively small addition to the whole application site, and that the omission of the additional area of the Stockdale Compound extension from the original application plan had been the result of error, rather than by design.
- 16.22. It also accepted that the position in law in relation to amendments is that by and large their acceptance or otherwise may be left to the discretion of Registration Authorities, subject only to the principle of being fair to the parties, and the avoidance of parties being prejudiced thereby. These principles are notably supported by the passage from the speech of Lord Hoffmann in the 'Trap Grounds' [*Oxfordshire v Oxford City*] case, which I have already referred to in my paragraph 16.13 above. Lord Hoffmann in that passage clearly thought in that passage that fair and non-prejudicial amendments might in some cases include enlargements to application sites.
- 16.23. However, TWL argued, in this case the proposed amendment by enlargement would give rise to considerable prejudice. If a new application had been made at the time of the Inquiry (or when the Applicant had first requested the amendment in May 2013) for registration of the additional area (the Stockdale Compound extension) as town or village green, it would inevitably have been doomed to failure. The land concerned had been fully enclosed by fencing in September 2008, very well over 2 years before May 2013. An application to register under **Section 15(3)** of the **2006 Act** would have been a complete 'non-starter'.
- 16.24. Where land is not capable of registration by way of a normal application now, because it would be time expired, it is wrong in principle to try to circumvent that by an amendment application. The landowner is entitled to rely on the **Section 15(3)** time limit, so there would be clear prejudice in allowing this amendment now.
- 16.25. On this particular dispute I find myself in agreement with the submissions for TWL, the first Objector, and I so advise the County Council as Registration Authority. It is no doubt unfortunate that the Applicant 'left out', by simple human error it seems, a significant part of the intended application site on the quayside when the application, with large scale plan, was submitted in August 2010. No doubt also it would have made the whole issue in dispute between the parties 'neater' if the Stockdale Compound extension had been included in the application site. Its history prior to September 2008 seems to have been substantially the same as that part of the quayside area of Allen's Quay which *is* within the site.
- 16.26. However the large-scale application plan was perfectly clear in this respect – the 'Stockdale Compound extension' was not included in the application site. Since, by the date of the application in August 2010 that extended compound had already been fenced off for almost 2 years in a way distinct from the rest of Allen's Quay, it would not even have been self-evident at that time to others considering the

application, it seems to me, that there *must* have been a simple mistake by the Applicant.

- 16.27. The points made by TWL on this are in my view cogent ones. There *would* be clear prejudice to the company as landowner if, as late as May/June 2013, the Applicant were to be allowed to ‘add in’ a significant extra piece of land, not far short of five years after it had been fenced off from (local) public use, when the statutory time limit for the making of such claims is two years. I would therefore reject the Applicant’s request to amend in this respect.

The electricity sub-station

- 16.28. During the course of the Inquiry it was clearly stated on behalf of the Applicant that it was not in fact the Applicant’s intention that there should be included in the application the area occupied by an electricity substation, and its fenced ‘curtilage’, situated at the extreme south-eastern end of the ‘Grapevine Cottages’ block of buildings, on the north-west side of the access road running down from the Swan Basin, between that sub-station and the Thorn Quay Warehouse group of buildings.
- 16.29. The plot containing that substation had been (inadvertently it seems) included in the application site in both versions of the application plan, i.e. the original one, and the one which Mr Tucker sought to substitute in May 2013 (as discussed above). The plot in question is very roughly semi-circular in shape, and is clearly marked on (among other plans) a plan showing Land Registry titles in the vicinity produced by the Applicant as document 1.3.1. It is there identified as an isolated, western part of title reference number EX682042, being part of the property of one of the Gladedale companies, i.e. effectively for these purposes the second Objector.
- 16.30. There was no objection from the second objector to the proposition that this small parcel of land should be removed from the application site, indeed quite the reverse. It does not seem to me that the amendment of the application site by the removal from it of this small and readily identifiable area could conceivably cause any prejudice or unfairness to any other party, so my conclusion and advice to the Registration Authority is that this further amendment by removal should be accepted.

Are any further amendments to the site warranted?

- 16.31. This question is of greater significance than the other, relatively minor amendments which I have just been considering – such that I have considered very carefully whether it would be more appropriate to leave dealing with it until after I have set out the conclusions which I have reached in the light of all of the evidence and arguments for the parties as a whole. However, in view of the direction in which my conclusions on this particular aspect have taken me, I have decided that it will make the structure of this section of my Report more straightforward, and ultimately (I hope) clearer, if I tackle this issue now.
- 16.32. The issue in question arises indirectly from the fact that the application site, even as amended to the extent discussed in previous paragraphs, contains large parts which have the appearance of being roads, footways or footpaths. For the purpose

of assisting the Inquiry, the County Council in its role as Highway Authority produced a plan identifying the relevant areas within and just outside the original application site which were shown in its records as being public highway, whether maintainable by the public or not. Versions of this plan, some of them enlarged, were also produced to the Inquiry by the parties, including notably the Applicant and the First Objector TWL.

- 16.33. These records and plans indicate, first of all, that some significant parts of the present application site are shown in the County Highway Authority's records (with no party questioning this status) as publicly maintainable public highway. This applies to part of the 'bell-mouth' at the far western end of the port road (near Mistley Towers) at its junction with the High Street; the whole of the roadway down the eastern side of the Swan Basin to Allen's Quay; the whole of the route (part roadway, and part rather too narrow for cars) on the west side of Swan Basin, and descending to Quay level around the south-west of the 'Grapevine' block. There is some inconsistency among the different versions of the plan produced to the inquiry as to the precise extent of the 'public maintainable highway' status over the 'pavement' or non-vehicular footway area immediately surrounding the Swan Basin itself, but all of that area has very much the character of either being a footpath (north of the Basin), or a pavement/footway area associated with a general purpose highway. Finally, included within the area recognised as publicly maintainable public highway, is a strip of land, generally at the level of the Quay, running along the 'back' [NE side] of the 'Grapevine' buildings, and then stretching somewhat more widely north westwards for some distance from the Mistley Quay Workshops.
- 16.34. In addition to those areas of apparently undisputed public, maintainable highway, the present application site contains a small part of what was an old 'port road' in from the west, most of which has now, and for some time, been 'buried' under the building known as the Stockdale Warehouse, and the wholly or partly fenced compounds associated with it. I was led to understand that there is an unresolved issue between the County Highway Authority and the present owners (TWL) [and possibly the previous owners] of that route as to whether it had ever enjoyed or gained the status of public highway.
- 16.35. Happily that is not an issue which I am called on to resolve. For present purposes all I need to note is that the small part of that former route that is within the application site currently forms an indistinguishable part of the present port road for vehicles, pedestrians, etc., descending to Allen's Quay from the west.
- 16.36. The remaining, principal part of the present port road is that which lies between the 'bell-mouth' junction near Mistley Towers, at the one end, and its junction with both the area discussed in the previous paragraph and the undisputed publicly maintainable highway area north west of Mistley Quay Workshops. Once again I was given to understand that there are unresolved issues between the County Highway Authority and the owners (TWL) as to the exact status of this main area of the port road in highway law – and once again it is not my place (and nor is it necessary in my view) for me to seek to resolve those issues. What I can say, both from observation on fairly numerous occasions, and from the evidence I was given, is that this area of the port road has all of the characteristics of a

conventional made-up road, used as such by vehicles, pedestrians and to a lesser extent cyclists.

- 16.37. I have laboured the descriptions of these areas somewhat, because I wish to go on to consider them collectively, so as to reflect an important strand of argument and discussion which took place at the Inquiry. They all (with the possible exception of the strip running past the NE side of Grapevine Cottages and the workshops, which undoubtedly *is* public highway anyway) have very much the conventional appearance of highway land, i.e. routes designed and used to get from A to B, whether for vehicles or pedestrians or both. The evidence from all sides at the Inquiry also led me to the conclusion that this is what those areas were and are predominantly used for. The evidence of ‘highway-type’ use [i.e. as a route from A to B] was (perhaps ironically) overwhelmingly predominant in the case of the parts of the port road whose public highway status was the least clear. There really was hardly any evidence of ‘lawful sports and pastimes’ type use of the port road, other than for activities like walking along it with or without dogs, or to a lesser extent for cycling, including children cycling at times. These are activities which are wholly consistent with highway status, or with potential highway status, rather than ones which would put an observant landowner on notice of a potential *Commons Act* claim.
- 16.38. The Objectors at the Inquiry, and most particularly the First Objector, forcefully argued that there is a fundamental incompatibility between highway status, and highway type use, on the one hand, and ‘town or village green’ registration on the other – although I understood it to be accepted on all sides that the fact that a highway crosses (within) a piece of land is not necessarily a bar to that land being registered under the *Commons Act*. Thus a field or open area with a footpath or track (with highway status) across it might properly be registered, to give a straightforward example, provided care is properly taken at the assessment stage not to include activities which are or are incidental to use of the highway as such as part of the evidence base in favour of town or village green status. That much is clear, in my opinion.
- 16.39. Plainly this particular instance at Mistley Quay is quite different from that example. However, as far as the port road is concerned, and in particular those parts of it whose highway status is less clearly established, I agree with the Objectors that there is no case on the evidence for registering it as ‘town or village green’ (whatever its highway status might be).
- 16.40. That then leaves the remaining area of undisputed public highway, principally being the area immediately surrounding the Grapevine Cottages/Mistley Quay Workshops group of buildings, and the Swan Basin. There was a certain amount of evidence of leisure-type (‘lawful sports and pastimes’) uses, which were not just ‘getting from A to B’, from time to time in parts of this area, notably around the Swan Basin and to the north-east of Grapevine Cottages. However I agree with the Objectors that there was no substantial or convincing evidence that significant ‘lawful sports and pastimes’ uses had taken place, which were not entirely consistent with the use of those areas as a undisputed public highway.
- 16.41. I accept the strand of the Objectors’ arguments in this particular respect, based on the caselaw (e.g. *DPP v Jones* [1999] 2 AC 240) to the effect that a public

highway is a public place which the public may enjoy for any reasonable incidental purpose, as long as it does not unreasonably obstruct the main purpose of the highway.

- 16.42. I have therefore formed the view, both on the law and on the evidence presented, that the only area which can sensibly be considered further for registration as ‘town or village green’ is the main part of Allen’s Quay which lies to the north-east of the line where the established publicly maintainable highway ends [or at its extreme north-western tip, the line where the ‘non-highway’ part of Allen’s Quay meets the line of the old port road, which I discussed earlier].
- 16.43. This conclusion is a reasonably predictable one to be drawn from the factual and legal circumstances in the present case, as is clear from the fact that it was directly addressed in the submissions of all of the parties to the Inquiry – the Applicant and all three Objectors.
- 16.44. The key question for consideration is what the consequence should be of the decision that a substantial part of the original application site (the public highway and ‘arguably highway’ areas which I have discussed) ought to be excluded from further consideration under the **Commons Act**. Is the whole application to fall because of that, or should the Registration Authority carry on to consider and determine the application in relation to the part of the original site still remaining, i.e. effectively the open area of Allen’s Quay, situated between the recognised highway area and the edge of the Quay, facing on to the Stour estuary?
- 16.45. I asked the question “*should the Registration Authority [carry on to consider ...?]*” rather than asking whether the Authority has the **power** to do so, as it appeared to be accepted by all parties (and was expressly and clearly so accepted on behalf of the First Objector) that as a matter of **vires**, it is within the powers of the Authority to do this. Indeed that much seems to follow quite straightforwardly from the clear words of Lord Hoffmann in the ‘Trap Grounds’ (***Oxfordshire v Oxford City***) case in the House of Lords, at paragraph 62 – which I have referred to earlier.
- 16.46. The position taken for the Applicant was that it was clear all along that one of the possible results was that the Registration Authority might take the view that the ‘highway’ areas should not be included in any **Commons Act** registration, and that in the light of Lord Hoffmann’s observations in ***Oxfordshire***, just referred to, the Authority might legitimately go on to consider the lesser area, without that causing prejudice to anyone, even without there having been any formal request to amend the application. In the event, at the Inquiry the Applicant (through his advocate) made a contingent request that the application should be treated as being for the remaining area, if the Authority is minded (as I recommend) to find against registration of the ‘highway’ areas.
- 16.47. The argument of the Objectors, expounded most fully on behalf of the First Objector, was that to do this would be unfair and unjust, because the whole of the Inquiry and evidence had been ‘focused’ on the entire original application site, and it would be unfair and unjust to ‘change the focus’ late in the day on to just the open, non-highway part of Allen’s Quay. I found these arguments for the Objectors to be unconvincing and unmeritorious. It had in fact been a significant argument from the Objector’s side that the only real evidence of ‘lawful sports

and pastimes' activity on any of the land had related to the parts of Allen's Quay close to the waters' edge.

- 16.48. In my judgment the truth of the matter is that the main focus of the Inquiry had already been quite obviously on the 'open quay' part of the application site, effectively the very same area that logically remains to be considered by the Registration Authority, once the 'highway' areas have been eliminated from consideration.
- 16.49. Accordingly, in my view there is no substantial justification at all for the Objectors' complaint that they would somehow be unfairly prejudiced by the Registration Authority considering for potential registration just that part of the original application site on Allen's Quay which is outside and to the north east of the recognised, established publicly maintainable highway, and also excludes the other parts of the port road which the County Highway Authority has indicated (on plans provided to all parties) as having, in its view, some form of highway status, in the way I have discussed in earlier paragraphs.
- 16.50. Accordingly I shall now go on to consider the evidence and submissions relating to the remaining part of the application site, extending to the waters' edge of Allen's Quay, against the various elements of the statutory criteria under ***Section 15(3)*** of the ***Commons Act 2006***.

"Locality"

- 16.51. In this case the claimed 'locality' has throughout been the civil Parish of Mistley, which is clearly capable of being a 'locality' as a matter of law. Without at this point getting into the questions of 'significant number', or the scope of credible 'lawful sports and pastimes', it seems to me indisputable on the evidence that at least a reasonable number of inhabitants of the parish have claimed to have indulged in 'leisure' activities on the land in question. There has been evidence that some users of the Quay with leisure craft, when that was practicable, had been people from outside the Parish, or even from overseas, and so more akin to the public at large than local inhabitants. Also, clearly, some of those reported to have used the remaining application site for land-based leisure activities such as bird watching or drawing/painting would, on the evidence, have been outsiders to the Parish as well. But all of those giving oral evidence for the Applicant were residents of the Parish. Thus the view which I have formed from the evidence on this point is that there is no reason why this application should fail because of an inaccurately or inappropriately identified locality. In my view, on the balance of the evidence, the civil parish of Mistley has been sensibly identified as the 'locality'. None of the parties at the Inquiry pursued any substantial argument against this view.

"Significant number of the inhabitants"

- 16.52. Taking the evidence as a whole, I have concluded that there can be no real doubt that, over many years, significant numbers of the local inhabitants of Mistley parish have enjoyed using the remaining application site on Allen's Quay

regularly for leisure-related purposes. I would observe that, given the inherent attractiveness of Allen's Quay as a location (which clearly would have been greater before the present fencing was erected), and its central position to the main part of Mistley, and the general tendency of humankind to be attracted to waterside locations, it would have been mildly surprising if an open, accessible quayside location such as this had not been so used.

- 16.53. However I do not base my conclusions on surmise of that kind. Where there was conflict, I found much more convincing the generality of the evidence called for the Applicant's side in this respect, rather than the evidence given for the First Objector (TWL) in the form of the combination of Mr Parker and a number of untested written statements (albeit statutory declarations) from a small group of persons with strong personal and/or business connections to TWL (mostly as employees). Mr Parker's own personal presence on (or vision over) the relevant part of Mistley Quay during the period concerned had clearly been for a relatively limited proportion of the overall time.
- 16.54. The one witness called for the Second Objector (Gladedale), Mr Brodie, gave his evidence in a straightforward and inherently credible way, but he himself was ready to acknowledge that his own personal direct knowledge of goings on on the Allen's Quay covered only a very small proportion of the total time – and he had in fact, in the context of his visits for other purposes, noticed people both walking along or across the Quay, and standing on it in groups of up to 3 people feeding swans, for example.
- 16.55. I did not find myself entirely convinced by the suggestion of Mr Ivory, advocate for the Third Objector [Anglia Maltings (Holdings) Ltd] that only the witnesses for that firm, or its associated company EDME Ltd, could be relied on to give unbiased and objective evidence, because they had "*no interest in the outcome whatsoever*", since manufacturing and warehousing activities in the Thorn Quay Warehouse, next to the application site, have ceased. The Third Objector and EDME Ltd clearly have a strong interest in the development/redevelopment of their remaining landholding at the Thorn Quay Warehouse, and all of the witnesses called for the Third Objector were current EDME employees. And the Third Objector clearly felt it had a sufficiently strong interest in the outcome of this dispute for it to be worthwhile to be legally represented throughout a lengthy inquiry, and to call six witnesses.
- 16.56. I hasten to add that I am not suggesting that because Anglia Maltings/EDME see themselves as having an interest in the result, it therefore follows that witnesses who are EDME employees were giving untruthful or partial evidence. The true position, it seemed to me, was that all four of the main parties to this dispute have a definite interest in the result, if to varying degrees and for various reasons, and there is no formulaic basis for claiming that any one party's witnesses have no interest, or some lesser interest in the outcome, and so are more likely to be reliable witnesses. All of this, it seems to me, is merely background to be borne in mind when seeking to reach a view (in instances where evidence has conflicted), on the balance of probabilities, having regard to all the evidence, on the factual elements relevant to the statutory criteria in this case.

- 16.57. As it happens, a number of the EDME witnesses did in fact recall seeing various ‘leisure’ type activities on Allen’s Quay from time to time, or on the other hand acknowledged that they were busy with their work on other parts of the EDME/Anglia Maltings premises for most of the time, and so did not have very much opportunity for extensive observation of the open quay area during most of their working hours.
- 16.58. I should stress that in this present sub-heading I am doing no more than to conclude, on the balance of the evidence, that there had been ‘leisure’ type use and activity on the open area of Allen’s Quay, over a considerable period, by a “*significant number*” of the inhabitants of Mistley, rather than there just having been (for example) occasional or sporadic trespass by individuals. It was a general use by local people for informal recreation, in my judgment. I have yet to address the questions whether those activities or uses were “*lawful sports and pastimes*” of the kind required; whether they were extensive over the remaining application site now being considered; whether they were sufficiently continuous over the relevant 20 year period, having regard to the undoubted fact that a considerable amount of other activity, commercial and port-related, and including the transit of vehicles, had *also* taken place on the same piece of land over the same period. I also acknowledge that the evidence showed that the intensity of ‘leisure’ type activity on the Quay by local people would typically be at its greatest at times when people ordinarily relax, such as late afternoons/evenings (and to a lesser extent early mornings), weekends, and more in periods of better or warmer weather, rather than necessarily coinciding with periods of the greatest commercial activity during a working week, for example.

“Lawful sports and pastimes on the land”

- 16.59. I was persuaded by the totality of the evidence that, on the balance of probabilities, there had been quite extensive use over the years of the remaining application site for activities which are to be regarded as ‘lawful sports and pastimes’. I go on to consider some of the main aspects that were mentioned in the evidence.
- 16.60. I accept and acknowledge that some of the evidence related to parts of the larger original application site which I have already advised should be excluded from consideration. However it was clear that the majority of the evidence as to ‘sports and pastimes’ use did indeed relate to the parts of Allen’s Quay specifically which were nearer to the waterfront. Indeed, as noted already, that was one of the points which was made with some force by parties on the Objectors’ side.
- 16.61. Part of the argument from the Objectors’ side was that the only evidence there had been of ‘lawful sports and pastimes’ use had related to a very narrow strip along the extreme waterside edge of Allen’s Quay, by implication a strip much narrower than the area of non-highway land on the Quay which I have been referring to as the remaining application site. While it is undoubtedly true that some of the activities referred to, such as jumping/diving into the water to swim, crabbing, mooring and embarking/disembarking from pleasure vessels, etc, could only take place at the edge, the evidence as a whole did not in my view lead to the

conclusion that it was only a strip of a metre or two from the edge that had ever been materially used for ‘lawful sports and pastimes’.

- 16.62. There was, to my mind, extensive evidence of other informal recreational activities by local people on the surface of the Quay more generally, which were not necessarily reliant on a position right next to the water’s edge. Most notable in this category was the evidence of informal walking or wandering, with or without dogs, and not on a fixed route, and of people often standing and having a chat with others in association with such wanderings. Other informal games and social activities were also referred to by a number of witnesses, but the informal walking or wandering seemed on the evidence to be the most common feature.
- 16.63. It has been clear as a matter of law for some considerable time now that activities such as informal walking or wandering, with or without dogs, and not on a fixed route [and also which are not just minor or incidental deviations from an adjacent or nearby fixed route] are well capable of being “*lawful sports and pastimes*”. It is my conclusion, on the balance of the matter that there is abundant evidence of use of the part of Allen’s Quay within the remaining application site for such informal recreation.
- 16.64. It is a feature of the recent history of matters at Mistley Quay that another public inquiry was held only about one year before the inquiry which I held, into a claim under the highways legislation that a public right of way in the nature of a footpath should be registered along the eastern part of Mistley Quay, stretching for some considerable distance eastwards from the eastern edge of the present application site. The land affected by that footpath claim was therefore almost entirely different from the area I am now considering.
- 16.65. However in that rights of way dispute the principal Objector was also TWL, the First Objector in the present case. Both the Decision Letter (dated 17th December 2012) and the very full closing submissions which had been made by Counsel for TWL in the rights of way case were produced as documents for the benefit of my Inquiry.
- 16.66. It is a noticeable feature of that previous dispute that it was argued strenuously for TWL that the evidence in that case showed that (on land immediately to the east of the present site) there had been no defined way, because people had strayed and wandered across the whole available quay area; that people’s access to the quay had taken a variety of forms for a variety of purposes, which involved people straying across the accessible parts of the quay as a whole, enjoying a ‘general right of access’ [as opposed to walking a defined route].
- 16.67. There were other issues in that case which meant that this was not the sole determining issue, but nevertheless on this point the Inspector found that “*public use is more akin to a general access to the Quay for recreational activities*”. [Decision letter para 6.5].
- 16.68. I do not fall into the error of assuming that that Inspector’s conclusions can be directly transferred to this present case. They related to a different (albeit adjacent and very slightly overlapping) site; the qualifying period under consideration was entirely different, and of course rights of way cases turn upon use by ‘the public’

generally, while **Commons Act** determinations relate to use by inhabitants of a particular area ('locality' or 'neighbourhood').

- 16.69. Nevertheless the descriptions given on behalf of TWL in that earlier context (and as referred to by me in paragraph 16.66 above) of the use people had made of the eastern quays over many years, do in reality apply as an entirely apt description of the use which I find as a fact, on the evidence, that local people (inhabitants of the Parish) have made over the years relevant to this present case, on the remaining application site on Allen's Quay.
- 16.70. I expressly raised with the parties at my Inquiry, and (for obvious reasons) in particular with TWL, the question whether (ignoring the distinction between the general public/local inhabitants criteria in the different statutes) there were any forms of general recreational wandering, straying and accessing for recreational activities which would 'count' neither towards a right of way claim (because not on a fixed route), nor towards a 'lawful sports and pastimes' claim under the Commons Act, if carried out by local people.
- 16.71. I did receive submissions from TWL on this point, which included the suggestion that the general wandering and straying for recreational purposes in the earlier case had not been 'recreational walking', but only walking in order to do recreational things off the land then in question, such as fishing or swimming. Clearly I was not present at that earlier inquiry, but I did not find those submissions convincing, from my reading of the closing speech of Mr Dove QC (for TWL) to that Inquiry, and the way the Inspector in that case expressed her conclusions.
- 16.72. But, be that as it may, my conclusion in the present case is that the Applicant's evidence **does** show that there was general recreational wandering and straying over the surface of the relevant part of Allen's Quay by local people during the period I am concerned with, and that this form of recreational walking and wandering was a "*lawful sport or pastime*", and a very significant component of the totality of such activity on the application site.
- 16.73. In one sense that would represent a sufficient conclusion on the "*lawful sports and pastimes on the land*" aspects of the statutory criteria. However there are a number of other important specific points which received detailed attention in the submissions and arguments of the parties, and I need to explain the views I have formed in relation to them.
- 16.74. First I need to say something about the whole question of **mooring** at Allen's Quay. This topic took up some considerable time at the Inquiry. I have already noted in passing that it seems to have become known locally, at least to the sailing fraternity, as early as Summer 2004, that visiting yachts at least were being discouraged from mooring at the Quay. It seems that some signs which were at least discouraging to mooring, even if their precise intent was not always clear, were also being erected around that time. On the other hand it was also clear from the evidence that some local yachtsmen, in the belief that they had a long-established right to do so, carried on mooring, or at least loading/unloading at the Quay in connection with leisure trips, until the fence was erected in late 2008.

- 16.75. On the other side of the argument again is the evidence of the long-standing practice of the Quay owners (even before TWL took over) to charge vessels mooring for more than two tides, and the similarly long established apparent practice for the organisers of boat ‘rallies’ and other occasions of multi-boat mooring to request ‘permission’ in polite terms beforehand. The historical evidence in relation to mooring therefore points in decidedly mixed directions.
- 16.76. In addition to this, the point was taken on behalf of TWL that the General Directions of the Harwich Haven Authority (whose jurisdiction includes the Stour Estuary) forbid mooring or remaining at a berth within the area without the permission of the owner of the berth – in this case TWL. Compliance with those Directions is enforced through Byelaws and so, TWL argued, it would have been unlawful to moor at Allen’s Quay without TWL’s permission, and therefore no mooring of recreational boats could have been a “*lawful sport or pastime*” on an ‘as of right’ basis.
- 16.77. I understood that those on the Applicant’s side with an interest in boating matters take the view that there was a long established public or local **right** to moor at the Quay, the existence of which effectively substituted for any requisite permission. This is an interesting argument, but it is not one which either I or the Registration Authority are in a position to determine, either as a matter of jurisdiction or otherwise.
- 16.78. It was also argued for TWL that mooring, or embarking/loading to or from a boat (which by definition, while in the water, would not be on the application site itself), could not be a “*lawful sport or pastime*”. I would certainly agree that mooring, or getting on or off a boat, is not of itself a sport or pastime. Most obviously, a boat might be at a quay for some commercial or other work-related purpose, and ancillary actions in relation to this would in no sense be a sport or pastime.
- 16.79. However, to the extent that this is relevant, it is my understanding that in practice places where local people have temporarily moored boats used for leisure purposes have been registered under the ‘town or village green’ legislation as being used for ‘lawful sports and pastimes’, although my attention was not drawn to any cases of that nature having been commented on by the courts. Nevertheless, it is not obvious as a matter of principle why a piece of land which is used by local people for **part** of the activity of leisure boating should not be registered under the **Commons Act (section 15)**, just because the other part of the leisure activity takes place elsewhere (out on the water), provided all the statutory criteria are otherwise met.
- 16.80. However, for the reasons I have discussed in the preceding paragraphs, it is not clear on the evidence that the mooring, loading or unloading of leisure boats has in this instance constituted a lawful sport or pastime ‘as of right’, at least since 2004, so I discount activities of this kind, relating to boats, from consideration in deciding there is sufficient evidence of ‘lawful sports and pastimes’ on the remaining application site.
- 16.81. I now consider the activities of **Fishing, Crabbing** and **Swimming** from the relevant part of the Quay. Clearly, given the boundaries of the application site, the parts of these activities which take place off the site, in the water, cannot be

sports or pastimes *on* the land of the application site. In the case of *swimming*, all of the actual activity covered by the term is by definition off-site (except possibly for the action of diving or jumping in). A swimmer who walks (especially along a fixed route), in his/her swimming costume, and then jumps in and swims in the off-site water, before getting out and walking directly away again, might well not engage in any ‘lawful sport or pastime’ on the waterside land area. I would respectfully observe, however, that swimmers who wander over the waterside land, and perhaps get changed there into or out of their swimming clothes, might well in my judgment be seen as engaging in ‘lawful sports or pastimes’ on the waterside land, even though their main motivation for being there might be the swim in the water.

- 16.82. However in this particular case there was relatively little evidence of a substantial amount of swimming having taken place from the Quay within the relevant period (1988 – 2008), [there did appear to have been more in earlier years]. It is therefore appropriate that I should mention that my finding on ‘lawful sports and pastimes’ use of the remaining application site would be the same, whether or not the small amount of swimming-related activity on the land in the relevant period had occurred.
- 16.83. Fishing and crabbing both share the feature of being activities partly on site, partly off site. Again, in my view, those who argued that leisure or recreational uses which take place only partly on a piece of land cannot ‘count’ towards ‘lawful sports and pastimes’ on that land are wrong. That view would produce absurd and unjust results. An example which springs to mind would be a grassed area within a village, one part of which happens already to be registered formally as ‘Public Open Space’; the other part, indistinguishable on the ground, is not (perhaps because in different ownership). If the villagers happen to be in the habit of playing games or sports on their green area, which overlap the ‘Public Open Space’ part and the other part, could it seriously be argued that the ‘other’ part of the green could not be registered under the *Commons Act*, just because typically only *part* of any ‘sports or pastimes’ would take place on it. I can see no reason in principle why use of waterside land for fishing or crabbing in adjacent water should not ‘count’ towards ‘lawful sports and pastimes’ use of a piece of land, provided all the other statutory criteria are met.
- 16.84. In the case of *fishing*, however, there is in this case a problem in relation to one of the other statutory criteria. I intend to deal with the question of admonitory *Signs* generally in the next sub-section of this Report, when considering the ‘as of right’ test. However, in the case of fishing in particular, there has for most (at least) of the relevant period been a clearly painted and legible sign affixed to one of the buildings directly facing the application site, stating “*No Fishing. Fishing is not allowed from these Quays due to Injury to Swans from Discarded Tackle*”. This particular sign faces onto Allen’s Quay in particular, and is in my judgment to be reasonably understood in its context as applying to that Quay, as well as others, as many of the Applicant’s witnesses agreed. In the face of this, I cannot see how fishing from the Quay can properly be seen to have been ‘as of right’ during the relevant period, whatever might have been the position in earlier years.
- 16.85. I am however inclined to agree with Mr Farthing’s submission for the Applicant that the wording of this sign does quite strongly convey an implicit recognition

that members of the (local) public will otherwise (than fishing) quite legitimately be at the quay edge – on Allen’s Quay at least – rather than being there as trespassers.

- 16.86. As for **Crabbing** from the quayside, there was no suggestion from any party that this was intended to be prohibited by the “*No Fishing*” notice. I agree that it was not. As it happens there was a reasonable amount of evidence from a number of witnesses about this pastime having been indulged in from the quayside of the application site over the relevant years, often with children, and (inevitably) in better weather. I can see no reason at all why this pastime should not ‘count’ as part of the lawful sports and pastimes indulged in, just because the crab was in the water at the start of the exercise. Clearly this was an activity which **only** took place at and close to the waters’ edge, and does not in itself contribute to my overall finding of lawful sports and pastimes use over the remaining application site more widely.
- 16.87. I do not at all accept TWL’s argument that crabbing was not something which could be done at times, in the earlier part of the relevant period, when ‘lash barges’ and other commercial barges were from time to time at Allen’s Quay. Common sense suggests that on the contrary, the mooring of a vessel alongside, with inevitably (because of fenders etc) a small gap of still water between quayside and moored vessel could have created very good conditions for that activity, as was argued from the Applicant’s side.
- 16.88. I now turn to **Swan Feeding**, at Allen’s Quay, the saga of which took up some time at the Inquiry. It was clear from the evidence that the traditional mode of operation of the malting industry at Mistley had generated a good quantity of nutritious ‘sweepings’ into the water, which had provided an attractive food source which had brought to (or or kept at) Mistley a considerable flock – if that is the right term – of resident swans.
- 16.89. I understood from the evidence that when this food source ceased in about 1994 the malnourished swans had become something of a nuisance in Mistley. In any event they attracted significant sympathy and concern for their plight. That led to the formation of a local group to try to feed them, called variously (at different times) ‘Swans in Distress’, ‘Swans in Need’ or ‘Swan Watch’. I received a great deal of evidence about this, summarised within the earlier sections of this report.
- 16.90. It suffices for now to say that what I took from the evidence was that these swan feeding efforts, particularly in their earlier years, had a certain amount of co-operation, even support, from both the dock company (then called the Mistley Quay & Forwarding Co [“MQFC”]) and EDME Ltd. Some ‘Notes for Guidance’ for swan feeders were produced, suggesting that feeding should be done by two persons, and that fluorescent jackets should be worn, etc. These notes typically carried at the bottom a disclaimer, whose words varied slightly, but were generally along the lines of ‘Responsibility is not assumed by either’ MQFC or Swans in Need.
- 16.91. It was suggested that these and other related circumstances showed that the swan feeders were given permission by the company to go onto the quay to feed the swans, and that their actions while there were controlled or made subject to condition by the company. I have to say that this seems to me to be an over-

interpretation of the situation from scant evidence. The wearing of fluorescent jackets was a sensible precaution for swan feeders, who could be there in all weathers, and perhaps early in the morning or in other conditions of poor light, and 'Swans in Need' disclaimed responsibility as much as the company did.

- 16.92. There clearly was cooperation, especially in the early years, between the swan group and both MQFC and EDME, but I did not detect from the evidence anything which amounted to a 'permission' from MQFC, or which was in any way inconsistent with a clear local belief that people had a right to be on Allen's Quay in any event.
- 16.93. I can see no reason why swan feeding by local people should not, in the years to 2008, be seen as a component element of the various 'lawful sports and pastimes' which they indulged in on the open quay. Clearly, as with a number of activities, this one was done while standing or moving along at or close to the edge of the Quay, at least in terms of actually giving the food to the swans. I have already noted that the evidence did show that the greatest amount of 'sports and pastimes' activity on the application site tended to happen on the few metres nearest to the quayside edge, but this does not alter the general conclusion I reached (and have mentioned above) that the evidence as a whole convincingly justified the conclusion (having regard to the balance of probabilities test) that local people in the relevant period indulged in 'lawful sports and pastimes' to a degree which was significant, not trivial or sporadic, over the whole of the area within the remaining application site.
- 16.94. ***Painting or drawing*** on or near the quayside was another activity which attracted a certain amount of specific discussion during the inquiry. It is clear that it did take place with some regularity. It seems clear too from some of the photographic evidence that it has taken place at times when commercial activity has also been taking place at Mistley Quay. However some of the evidence also suggested (perhaps unsurprisingly) that among the artists there could quite frequently be people from outside Mistley, or from other parts of the country completely – as well as local people. This leads me to the view that painting pictures or making drawings was probably only a very minor element of the total 'sports and pastimes' use by Mistley inhabitants of the remaining application site, but nevertheless it was part of the overall pattern.
- 16.95. ***Parking of Cars/Picnics in cars etc.*** There was a strand of evidence which showed that, with reasonable regularity, local people (and perhaps others) would, during the relevant period, drive in their cars to the part of Allen's Quay that is within the remaining application site, and perhaps sit in them to admire the view of the estuary, or in order to enjoy a 'picnic' meal – though others would apparently get out and enjoy their picnic while sitting on a quayside bollard.
- 16.96. All would acknowledge that the use of motor cars for leisure activities is an undoubted feature of the modern age (an expression which certainly covers all the relevant years from 1988 to 2008). I am inclined to accept the evidence from some of the Applicant's witnesses that this kind of parking did in practice happen from time to time, as opposed to Mr Parker's assertion for TWL that it did not. However I am reluctant to accept that parking and then sitting in a car, even to enjoy the view or eat a sandwich, is quite what Parliament would have had in

mind as ‘lawful sports and pastimes’, in the context of applications under the *Commons Act*. My approach therefore is not to regard this relatively minor element of local activity on the Quay as ‘counting’ *towards* the assessment of ‘lawful sports and pastimes’ use by local people. The perhaps more significant question whether it was in some way incompatible with ‘lawful sports and pastimes’ use of the surface of the Quay, and so should count *against* the Applicant’s claim, is one that I cover in the next sub-section, where I consider the interaction between vehicular and recreational uses of the Quay and their mutual compatibility (or not) more widely.

- 16.97. I now turn to consider whether there might be certain *parts of the remaining application site* which ought to be viewed in a different way from the rest of it, as far as this application is concerned. In general Allen’s Quay, the majority of which is included in the remaining application site, presented until September 2008 a relatively uniform appearance, and was of a regular, almost rectangular shape, lying between the Grapevine Cottages/Mistley Quay workshops group of buildings and the quayside edge. For reasons extensively discussed earlier, I have advised that the part near the Grapevine buildings which is publicly maintained highway should be regarded as excluded from the site under consideration. The area of the fenced Stockdale compound extension, formed in September 2008, would have formed a logical part of the application site, but for the Applicant’s unfortunate error of leaving it out of his application. Again this is a matter I have discussed earlier.
- 16.98. I do however note that, approximately to the north of the Mistley Quay Workshops, but to the south of the pre-extension Stockdale Compound, is a small triangle of land, effectively lying at the extreme eastern end of the port road, which is neither part of the original (almost) rectangle of Allen’s Quay, nor on land which the County Highway Authority has ever hitherto regarded as subject to public highway rights. No party at the inquiry raised any argument that this small triangle should be treated in any way differently from the remainder of Allen’s Quay within the (potentially) reduced (by removal of highway-type land) application site. No evidence, in my understanding, was specifically directed to this small area. I have therefore tried to form a view, on balance, and having regard to the principles enunciated by the House of Lords in the ‘Trap Grounds’ (*Oxfordshire v Oxford City*) case as to what conclusion if any should be drawn in respect of this small triangle.
- 16.99. Allen’s Quay, and this very small piece of land running north west out of it, are of course extremely different from the 75% impenetrable scrubland (with 25% paths and clearings) of the ‘Trap Grounds’. However the Applicant called evidence which sought to cover use of the entirety of the original application site, including Allen’s Quay and the small triangle I am now considering. I found that evidence to be, on balance, generally convincing. Since the small triangle is not affected by the reasoning which has caused me to remove from consideration the highway land, and has not at any point been fenced off or separated from the rest of Allen’s Quay within the reduced application site, I have taken the view that it should be regarded as a part of the remaining application site as a whole, even if no-one’s evidence particularly singled out those few square metres.

- 16.100. Somewhat similar considerations have affected the view which I have formed about the small patch of *Gladedale land* lying within the remaining application site (although this area *was* the subject of some specific submissions). This area consists of two small parcels lying adjacent to each other, at the extreme south-eastern end of the application site. One of these is a small, triangular patch of open ground, lying to the north-west of the extreme northern (or north western) corner of the Thorn Quay Warehouse, and being part of Land Registry Title number EX682042, in the ownership (I understand) of Gladedale Estates Limited. The second is another small patch of ground, again roughly triangular in shape, lying immediately to the south-west of the first triangle. This latter triangle is a patch of ground which Mr Ross Brodie of Gladedale Estates Ltd told me was unregistered land which had been transferred to that company in 2002. No-one at the Inquiry sought to contradict Mr Brodie's evidence in this regard.
- 16.101. The area of Gladedale land comprised in these two adjacent 'triangles' undoubtedly is part of the larger, roughly rectangular area of land making up the wide, open area of Allen's Quay. No-one at the Inquiry sought to pursue an argument that this patch of Gladedale ownership on the quay was visually or functionally or in any other way noticeably different from the remainder of the expanse of Allen's Quay. I myself did not observe or note on any of my site visits any apparent distinguishing features of this 'Gladedale patch' which might lead to it being viewed differently from the rest of the open part of Allen's Quay owned by TWL).
- 16.102. Therefore in this instance as well I have formed the conclusion from the evidence as a whole that the 'lawful sports and pastimes' uses over the surface of the non-highway part of Allen's Quay generally have included this 'Gladedale patch', in a way indistinguishable from the rest of the open quay. I entirely accept that the uses of this 'Gladedale patch' by Mistley inhabitants, on the evidence, have tended to be more those of the general recreational wandering (with or without dogs) type, rather than those involving immediate proximity to the water's edge, but nevertheless they did regularly and openly occur over the whole relevant period, on my view of the evidence. Even Mr Brodie acknowledged that he might have seen local people walking across the Gladedale land.
- 16.103. I make it plain that I am not at this moment addressing the implications of the commercial activities which did undoubtedly also occur during much of the relevant period, in relation to the loading or unloading of EDMC lorries on roughly this part of Allen's Quay. That is part of the topic I address under the next sub-heading.
- 16.104. Finally under this sub-heading I consider the implications of the residual *railway track* or tramway on Allen's Quay – more accurately at present just two steel rails, set at the normal railway standard gauge of 4ft 8½ ins, embedded on the level in the concrete surface of Allen's Quay, and completely unfenced. It was my understanding from the evidence that this track has not been operationally used or connected with the general railway system at any time during the 20 year period relevant to this Inquiry.
- 16.105. However it is equally clear that, going back to the 19th century, there used to be an actively used set of sidings, tramways and dock lines connected to the main Great

Eastern Railway system to the east of Mistley Station, which then curved down to quayside level to serve the docks, quays and maltings of Mistley at that level. It was undoubtedly possible for many years for a wagon on the rails still embedded in Allen's Quay to be moved from there to the general national railway system, without leaving the rails. It was also clear that in earlier years there had been at least one other pair of rails set into Allen's Quay, nearer to the water's edge. The timing of the disappearance of these other rails was not brought up as an issue by the parties.

- 16.106. The surviving set of rails is approximately at the boundary between the southern strip of Allen's Quay which is recognised as publicly maintainable highway, and the wider (non highway) remainder of the Quay to the north-east. It was my understanding from the evidence (although the County Council as highway authority was not a party to the inquiry) that the view of the Highway Authority is that the publicly maintainable highway begins almost immediately to the south (or south west) of the southernmost of the two steel rails. It became apparent at the Inquiry that the view taken on behalf of the Applicant was that, for reasons derived from the historical land transactions, the 'privately owned' part of the quay to the north (now owned by TWL) should really begin to the north of the embedded rails, so that the area where the rails are should be part of the recognised public highway. However I regard that as an issue which is entirely outside my (or the Registration Authority's) competence or jurisdiction to decide in the context of these present proceedings.
- 16.107. I therefore take the embedded rails as being on the 'TWL' part of the Quay, albeit right next to (and entirely unfenced from) the recognised area of public highway.
- 16.108. The reason why I am labouring these points about the rail lines is that TWL raise the argument that these rails were in fact, on the evidence, technically part of an operational railway line for at least part of the 20 year period 1988 – 2008. Because of that, it is argued, anyone 'trespassing' on a line or siding of the British Railways Board would have been committing an offence under **Section 55** of the **British Transport Commission Act 1949**. Accordingly anyone wandering over the line on Allen's Quay would have been committing a criminal offence; their action therefore cannot have formed part of a '*lawful* sport or pastime.'
- 16.109. If substantiated this is clearly a formidable problem as far as the Applicant's case is concerned, since the line of disused rails effectively severs the remaining application site from the rest of Mistley to the south. Furthermore, TWL pointed out that they had effectively "*won*" on this point, as one of the major reasons (along with others) why they successfully defeated the 'Right of Way' claim, heard about one year before this **Commons Act** claim, affecting other quayside land at Mistley further east. There (as I understood the matter) the claimed right of way had crossed, or indeed in part followed the same route as, a formerly active dock siding or sidings, argued to be part of an operational railway.
- 16.110. Because of this I openly expressed at the Inquiry, and in particular to those representing TWL, the importance that I should be provided with the full and clear the factual and legal basis which would enable me to understand specifically and clearly how 'trespass' on this particular set of lines would have been a criminal offence. I made it clear that if I were (hypothetically) to be put into the position of

having to find against a ‘town or village green’ claim which otherwise met the criteria of the *Commons Act*, on this ground, I and the Registration Authority would need a clear and complete basis for making and reaching such a finding.

- 16.111. As far as the previous Rights of Way inquiry was concerned, the parties collectively provided me with copies both of the relevant Inspector’s reasoned Decision Letter (dated 17th September 2012) and the very full submissions made to the inquiry by Mr Dove QC for TWL.
- 16.112. From that documentation it was apparent that at the Rights of Way Inquiry it seems to have been argued by counsel for TWL that it should be assumed that the sidings and lines on the quays at Mistley must have been part of the “*railway*” authorised by the *Eastern Union Railway Act 1847* – that being the railway which subsequently became the Great Eastern Railway, then the London and North Eastern Railway and then the British Railways Board – all names referred to at various points in the papers lodged in the present case.
- 16.113. I have to say that I find that argument somewhat surprising. As is well known, the railway and railway parliamentary history of this country, in the relatively ‘free enterprise’ approach to railways of the Victorian and early 20th century periods, produced very many private sidings, factory railways, dock lines and the like which, though usually connected to the ordinary ‘public’ railways at some point, were by no means necessarily part of them in any legal sense. In the Rights of Way submissions it appears to have been assumed that because the dock sidings or ‘tramways’ had appeared on an Ordnance Survey map of 1876 they must have been part of the “*railway*” authorised by the *Eastern Union Railway Act* of 1847 – without any check apparently having been made as to what lines were in fact covered by the 1847 legislation authorising the main line railway company. That assumption seems surprising to me, and far from being self-evidently correct. But, be that as it may, the main point I draw from this material is that the Rights of Way Inspector (who may well have been provided with more material than was presented to me) was only persuaded to find that the “*railway*” line (and hence the criminal trespass aspect) extended to a point very well to the east of the present application site. That was sufficient to make the argument relevant to the determination of that case, but not necessarily to this one.
- 16.114. I note further, from the various historic maps and plans produced in the present case, that the rail lines on Allen’s Quay were frequently referred to and marked as a “*Tramway*”. That point had been referred to at the Rights of Way Inquiry, where TWL had correctly pointed out that there had been a *Tramways Act* of 1870, governing the provision of the well-known urban public transport systems where people were (indeed still are in some places) carried in ‘trams’ on rails in public streets. That clearly had nothing to do with the rails on Allen’s Quay, but it seems to me on the face of it to be wrong to assume that the only thing ever properly or normally referred to as a ‘tramway’ in the 19th century was an urban public transport system of the kind governed by the *Tramways Act 1870* (or any later analogous legislation).
- 16.115. I take note of the fact that it was completely clear from the evidence in the present case that the relevant rails on Allen’s Quay had lain for a long period (even when the rails were in use) immediately adjacent to an area of long-established public

highway land, on the level with the highway, and with no fence ever having existed between them. I was also informed by the Applicant's side (and no-one contradicted this) that the last actual use of these rails on Allen's Quay was in 1984.

- 16.116. Other evidence which was brought to my attention by the First Objector TWL at this *Commons Act* inquiry consisted of some brief observations from Mr Parker, who had had no personal connection with the port at any time while rail-based transport was in use. He said that exchanges had still been going on into the 1990s with British Rail about abandonment of the lines at the port, and produced a letter of October 1993 from a representative of TWL to Railfreight Distribution about liabilities in respect of removal of railway structures.
- 16.117. During the course of the Inquiry a further copy document was submitted by TWL. It appeared to be a memorandum or note from the Private Siding Manager of Railfreight Distribution, dated 21st January 1994. It was headed "*Mistley Quay Branch – Bridge No. 1051*" and the text within it included words confirming "*that closure of this line is now in hand with the Board's Solicitor, but may take some time to complete*". It is suggested by TWL that the letter and memorandum referred to lead to the conclusion that the disused pair of rails which have remained embedded in the surface of Allen's Quay throughout the relevant period from 1988 to 2004 were, at least until 1994, an operational "*railway*" to which the criminal trespass provisions applied.
- 16.118. I have difficulty in seeing those items as proving that. As noted above, the Rights of Way Inspector, who seems to have been presented with much more evidence on this topic than I was, did **not** find that an operational "*railway*" had extended anything like as far west as this. The "*Bridge No. 1051*" referred to as the subject of the January 1994 memorandum is clearly neither on the application site, nor (as far as I can tell) anywhere near it. There is nothing about this extremely brief document which suggests that, in railway parlance, the expression "*Mistley Quay Branch*" would necessarily be taken as encompassing a tramway-type, unfenced siding on a privately owned but publicly accessible quayside – even if that dock siding did ultimately connect with a branch from the main line at Mistley.
- 16.119. As it happens, the historical material collected by the Applicant's side did contain items which suggested that the actual metal of the rails set into Allen's Quay had been the property of the London & North Eastern Railway Company, and then British Rail, and that those successive organisations had maintained or repaired the track as required – but that they had only had a right of way over it, pursuant to very long established contractual arrangements.
- 16.120. I have rather laboured all this merely to make the point that I have in my view not at all been presented by the parties, and in particular TWL, with the evidential or other material which would enable me (or the Registration Authority) to make a definitive determination on the status of the disused rails set into Allen's Quay. Their precise status, by 1988 and beyond, remains somewhat shrouded in the obscurities of railway and dock history. There is nothing particularly strong in terms of basic merit about TWL's position on this aspect of the case, in that all parties agree that the rail tracks had remained disused throughout the entire relevant period between 1988 and 2008, and for some while before 1988.

- 16.121. If the Applicant's case is otherwise made out, in terms of the *Commons Act* criteria (as I believe it to be on the balance of the evidence) on this particular part of the application site, it would need some clear and convincing (on the balance of probabilities) evidential and legal basis to overturn that conclusion on the grounds of the 'criminal unlawfulness' of local people's use of that part. No such clear and convincing basis has been provided, in my opinion.

"As of right ... for a period of at least 20 years"

- 16.122. This, the last major subsection of this part of my Report, is where I deal with what were some of the most contentious and difficult of the issues raised by the evidence and submissions of the parties. It is the "*as of right*" issue that was more contentious than the "*20 years*" aspect, though it is critically important (and I have done this) at all times to keep track of what the evidence said about the changing patterns and intensities of uses over the relevant years.
- 16.123. One important issue between the parties related to the significance and effect of a considerable number of *signs* which have existed at various places around the edges of the original application site (though many of them are well away from the relevant area of the 'remaining application site' on Allen's Quay which I am advising should now be considered for registration.
- 16.124. It is well established that clear signs erected by a landowner, telling the public (or local inhabitants) that they are not allowed on a piece of land, or forbidding them to trespass on it, will negate a claim of 'as of right' use. Use in the face of prohibitory signs is taken to be use 'by force', in the same sense as breaking down someone's fence to get on to his land.
- 16.125. I am familiar with (and the parties made sure that I was reminded of) the various judicial pronouncements there have been as to the way in which signs should be considered in the context of *Commons Act* cases. The principles can be stated at greater length, and were not in dispute between the parties; but in brief the main points came down to the need to interpret signs in a reasonable way, not in a legalistic way, according to what a reasonable observer would have made of them, and in their context.
- 16.126. A considerable number of the signs discussed at the Inquiry were in fact on or close to the fencing (or entrance through that fencing) of the generally enclosed compound surrounding the Stockdale Warehouse buildings. Some other signs were affixed to those buildings themselves, i.e. well within that obviously private compound, but the majority of them were more or less on the fence line of the compound, facing the port road. Nearly all of these latter signs were quite well way from what I am calling the 'remaining application site' down on Allen's Quay, except for one, or arguably two, affixed to the compound fencing nearer to that quay, which simply said 'Hazardous Area'. The situation of these last two

was in any event such that, in my view, any normal or sensible person would have regarded them as descriptive of the compound behind them, to whose fence they were attached, not as having anything to do with the public-seeming areas in front of them.

- 16.127. Because of my views as to the reduced area which should sensibly be regarded as the application site under consideration, the only relevance of the other signs further to the west up the port road would be if they conveyed a message warning people off Mistle Quays, including Allen's Quay, more generally. These other signs were and are much more varied in wording than the two I have just mentioned. Several of them include fairly explicit and clear warning signs about the dangers of forklift trucks, or vehicles reversing etc, and some of those also carry other clear indicators aimed at deterring pedestrians or unauthorised personnel. Some of them then go on to include a selection of other warning or safety messages in smaller lettering. These, to those who read them through, contain a variety of messages which include: instructions to visitors and contractors to report to reception, hard hats and safety footwear to be worn on *"this quay"*, and inform that *"Quay areas are dangerous. Do not play on this quay"*, and *"Parents are requested to warn children of the dangers and consequences of trespassing on this site"*.
- 16.128. However all of these signs, without exception, are placed very obviously along the boundary, mostly fenced, of a clearly private compound surrounding a warehouse building, behind which is quite a long length of quay (even if TWL have chosen to fence it off). The putative reader of these signs would be standing in or walking down the port road, which (whatever its official status as highway may prove to be) has all the appearance of a normal public road open to all. In my judgment nothing about any of this collection of signs along or close to the fence line would at all convey to any reasonable observer that they were meant to apply to anything other than the fenced compound beyond them. They certainly give no impression of being intended to apply to the public seeming road space in front of them. I have to say that my conclusion was that TWL's argument that these signs clearly 'warned people off' the whole of the port road and Allen's Quay etc. is manifestly wrong and unjustifiable.
- 16.129. As for Allen's Quay itself, and the 'remaining application site', there are no signs at all as one descends to the quay via either the east or the west side of the Grapevine Cottages group of buildings. In other words it is and always has been possible to get on to the 'remaining application site' from the central part of Mistle without passing any signs at all. TWL explain this by saying that they cannot erect signs on the public highway, and do not wish to have signs obstructing the central, clear part of the Quay where their property boundary is. These things are both no doubt true, but the truth is still also that there are and have been no signs.
- 16.130. The nearest sign, from the point of view of anyone reaching the Quay from the Swan Basin/High Street is the *"No Fishing ... from these Quays"* sign affixed to one wall of the Thorn Quay Warehouse at the eastern edge of the application site. I have already indicated that I *do* regard that sign as a reasonably clear prohibition on fishing from Allen's Quay (among other quays). I do not however regard it as

otherwise particularly relevant to the “*as of right*” test, save for its positive implication that people (including local inhabitants) might legitimately be on the quay doing other things than fishing.

- 16.131. Apart from the signs along the port road, which I have already dealt with, the other main group of signs which produced much contention at the Inquiry was the collection of them either side of the quayside passage route from Allen’s Quay to points further east in the dock area, notably including the Baltic Wharf, where these days all of the commercial craft using the port actually dock. These signs are at the extreme north-eastern corner of the application site.
- 16.132. One part of this collection of signs is attached to railings which are actually on the quay edge, immediately next to the water. They face someone who is minded to pass from Allen’s Quay eastwards along the passage route towards Baltic Wharf. The other, larger group of signs, also facing the same way, is immediately on the right hand side of that passage route, affixed to the wall of the Thorn Quay Warehouse building. It is clear from both photographic and personal evidence that for the earlier part of the relevant period this latter group of signs had been placed in a somewhat more haphazard way than they have been latterly, with some of them higher up – but always near to the corner of the building and the passage route I have referred to – before being consolidated to the positioning they retained on my site visits.
- 16.133. I entirely accept the point made by the Objectors that the fact that these groups of signs are either side of the passage route going out of the application site towards Baltic Wharf does not per se mean that the signs are only directed to persons or vehicles using that route. However that positioning cannot be irrelevant to assessing their significance, given that there are not, and have not been, any other signs at all around Allen’s Quay to any kind of similar effect.
- 16.134. It is accordingly necessary to consider those signs with some care. The left hand set, right by the waters’ edge, was at the time of my site visits somewhat faded and difficult to read in parts, but I accept that this would not always have been so. It appears when more legible to have been very similar in wording to some of the more wordy of the signs towards the west end of the port road. It contains a fairly clear pictorial and written warning about the danger of forklift trucks, and then a series of instructions in considerably smaller lettering, including the advice to visitors and contractors to report to reception, and to wear hard hats and safety footwear. When the writing was clearer it proclaimed “*No admittance to unauthorised personnel*”, “*Quay areas are dangerous. Do not play on this quay*”, and “*Parents are requested to warn children of the dangers and consequences of trespassing on this site*”.
- 16.135. The larger collection of signs, on the right hand side of the passage route to Baltic Wharf (and affixed to Thorn Quay Warehouse) says, from the top down:
- “*No unauthorised vehicles allowed beyond this point*”
- “*Give way to oncoming traffic. 10mph*”
- “*Danger. Fork Lift Trucks*”
- “*No unauthorised admittance*”

“All visitors must report to reception”

“Strictly Authorised Personnel Only” [with a raised hand symbol implying ‘Stop at this point’ (unless authorised)]

“Warning to Public. This quay area site is private property. No unauthorised persons allowed. Liability will not be accepted by TWL for any injury sustained by trespassers.”

“Notice to parents. Parents are especially requested to warn children of the dangers & consequences of trespassing on this site.”

- 16.136. This is a formidable and extensive collection of warnings and notices (and there was no suggestion that their wording had previously been different in any material way, even if the signs had been physically moved around somewhat, and consolidated during the relevant years). However, it must be recalled that in order to read many if not all of these signs a person would already need to have traversed almost the whole of the application site on Allen’s Quay, to its furthest north-east corner. And, as I have noted, these collections of signs are, clearly deliberately, placed either side of the passage route through from Allen’s Quay to the much more commercially active part of the port (in the sense of ships coming and going, loading/unloading etc) to the east around Baltic Wharf. And, as I have also noted, similar signs are placed nowhere else around Allen’s Quay.
- 16.137. The view which I have formed, after careful consideration, is that no reasonable, normal person, on seeing these signs would have drawn any other sensible conclusion than that they (individually and collectively) were intended to relate to people and vehicles passing through from the more obviously ‘public’ seeming space of Allen’s Quay via the narrow quayside passage route to Baltic Wharf etc. The signs to my mind, in their context, give no impression at all that they are intended to apply to the open area of Allen’s Quay where the notional reader is standing, or to the area behind that reader which he/she will have crossed in the first place, in order to read these signs. This remains my view, even when I acknowledge that I have accepted that the “No Fishing” sign, somewhat further to the right on the warehouse wall, *was* intended to apply to fishing from Allen’s Quay (as well as other quays).
- 16.138. Some time was also spent at the Inquiry discussing the significance of various signs that were placed facing out towards (or at least legible by) the users of craft on the water, discouraging them from mooring, or warning them of the dangers of doing so. As I understood the evidence, none of these signs had ever actually been affixed to the part of the quay frontage that is actually within the application site.
- 16.139. However, as I have explained earlier, there were aspects of the evidence which suggested that any ‘right’ (if there had been one) to moor leisure craft alongside Allen’s Quay had been challenged, in circumstances which had become well known to local boat users, significantly (i.e. several years) before the end of the period which I am considering, in September 2008. Therefore I have not considered or ‘counted’ mooring-related activities as being among the ‘lawful

sports and pastimes’ of local people, for the purposes of my conclusions and recommendations.

- 16.140. Clearly there might be other legal and historical reasons, unrelated to the *Commons Act*, why local boat users might feel they have an established right, which has been usurped, to moor craft to Allen’s Quay. However neither I nor the Registration Authority are in a position to be able to deal with issues of that kind.
- 16.141. I now turn, finally, to consider what was probably the most difficult issue to arise in this whole dispute, namely the question of the mutual compatibility (or otherwise) between the ‘lawful sports and pastimes’ uses which I have found did take place on Allen’s Quay over the whole relevant period, and the undoubted fact that **additionally** so did commercial use by way of the passage of dock-related commercial vehicles, forklift trucks, etc, and also, to a lesser extent, the loading/unloading of commercial vehicles on parts of the quay within the application site. As well as these two main elements, there was evidence of occasional temporary storage of materials on parts of the Quay. I have already noted that other motor vehicles, by no means always port-related, have also parked there, sometimes containing people eating ‘picnics’ or admiring the view. Can vehicular (or to a very much lesser extent) occasional storage activities of these kinds be compatible with the registration of an open area as a ‘town or village green’?
- 16.142. The Courts, including those at the very highest level, have already indicated with great clarity that there is no requirement, for registration of a piece of land as a ‘town or village green’ under the commons legislation, for the land concerned to look anything like the classic ‘chocolate box’ idea of an English village green, or indeed to have anything ‘green’ (in the grassy sense) about it. As it happens, Allen’s Quay at Mistley (and hence the remaining application site) could in my view be seen as having the slight air about it of a town or village ‘square’ (albeit in this case on the one side open to the water of the estuary), rather than looking like a classic ‘green’. I mean this in the sense of its being a hard-surfaced, multi-purpose publicly accessible area in or near the centre of a settlement, and with buildings around at least some of the sides.
- 16.143. However, it is undoubtedly the case on the evidence (and was throughout the whole relevant 20 year period) that the application site on the quay has also been subject, on a regular basis, to being crossed by, or otherwise used by, vehicles including HGVs engaged in the business of the wider port, and to a lesser extent by some of the vehicles of or associated with EDME Ltd. I find as a fact that effectively the whole of the ‘remaining application site’ has been used by dock or EDME-related vehicles, even if at varying frequencies, on many occasions during the relevant years. The only possible exception to this is the very edge of the Quay, among or to seaward of the bollards set there, and even that small part of the site would, on the evidence, have been used for the tying up of commercial lash barges and the like from time to time during the earlier years of the period.
- 16.144. Likewise there is no doubt – indeed it was expressly conceded on all sides – that when an HGV or other vehicle is crossing the Quay, any local person who was engaged in informal recreation there would very sensibly get out of the way. They would also no doubt have kept out of the immediate proximity if lash barges

were being tied up or untied, and would not have got in the way or climbed over them if any goods were being temporarily placed or kept on the quayside by EDME Ltd or the port operator.

- 16.145. If it makes any sense to refer to the act of avoiding being run over by a vehicle as ‘deferring’ to it, local people certainly deferred to the lorries and other commercial vehicles of the dock operator (or EDME Ltd) when they were on the application site.
- 16.146. Until the law in this field was clarified by the Supreme Court in the very important case of ***R (Lewis) v Redcar and Cleveland Borough Council*** [2010] UKSC 11 (2 AC 70), many practitioners in this area of the law (this one included) might well have thought that, in circumstances where local people routinely ‘deferred to’, or got out of the way of, activities of or on behalf of the landowner on the land, there could be no successful claim of ‘as of right’ use. Local people were implicitly deferring to the landowner’s right to do what he/it wanted to on the land.
- 16.147. The Supreme Court decision in ***Redcar*** however made it clear that this old argument based on ‘deference’ is wrong. The fact that local people sensibly get out of the way of potentially perilous activities by or sanctioned by the landowner does ***not*** necessarily mean that local people’s general recreational use of the land cannot be ‘as of right’, if these things happen in a sensible atmosphere of mutual ‘give and take’ – except perhaps if the two ‘competing’ uses “*cannot sensibly coexist at all*” [Lord Hope at ***Redcar*** para 76].
- 16.148. A great deal of argument was raised by the parties as to how I and the Registration Authority should see the principles enunciated in ***Redcar*** as applying to the present case – or not. The Objectors strongly argued that the circumstances of an open quayside crossed by lorries and the like are very different from the situation of informal recreation on an active golf course which the Supreme Court considered in ***Redcar***, and should be seen as a case where the two uses “*cannot coexist at all*”.
- 16.149. In reaching my conclusions on the evidence and circumstances of the present case, I have given very careful consideration to their Lordships’ decision in the ***Redcar*** case, reading and re-reading all of their judgments several times, in the light of the submissions which were made to me.
- 16.150. Being hit by a lorry or forklift truck is clearly an objectively different misfortune from being hit by a flying golf ball, but I have no doubt that both are experiences which any recreational user of an open piece of land would be strenuously keen to avoid. It appeared to be accepted on all sides that commercial vehicles moving across Allen’s Quay would generally be travelling at relatively slow speeds. There was no real disagreement with the evidence, derived from a survey on behalf of the Applicant, that a vehicle movement across Allen’s Quay would typically take just under 20 seconds.
- 16.151. Although Allen’s Quay at Mistley does not visually resemble a golf course at all, I have formed the view that there is no reason in principle why the law as enunciated by their Lordships in ***Redcar*** should not apply here as well. If local people have been in the habit over a prolonged period of using the application site

openly for lawful sports and pastimes, without force and without permission, the fact that from time to time they get out of the way of a passing lorry or forklift truck does not vitiate their claim to have been using the land 'as of right'.

- 16.152. In avoiding passing (or much less frequently, unloading) vehicles, local people were doing no more than exercising courtesy and commonsense, and what can sensibly be described as 'give and take'. Indeed I found convincing the extensive evidence from the Applicant's side that, until the fencing was suddenly erected in September 2008, there had been precisely such a prevailing atmosphere of sensible 'give and take' on the quayside, with generally good and cordial relations between local people and staff of the port (latterly TWL) and of EDME Ltd.
- 16.153. Indeed I was persuaded by the totality of the evidence that this open use of Allen's Quay by local people for informal recreation, intermingled with passing commercial activity, had gone on for very much longer than merely since September 1988, and had done so to an extent which any observant landowner might reasonably have been expected to notice as an assertion of a (local) public right to be there.
- 16.154. I clearly take note of the observation by Lord Hope that there might be cases where two uses cannot sensibly coexist at all on a piece of land. Thus, for example, if Allen's Quay (within the remaining application site) had for much of the time the nature of a heavily used industrial road, with large and dangerous vehicles passing back and forth continuously, then it would have been difficult for local people to use the surface recreationally in any way which would look like an assertion of the right to do so.
- 16.155. Does any consideration of this latter kind apply in this present case? The Applicant and the Objectors all raised both evidence and submissions evidence and submissions which sought to address this question. For the First Objector (TWL), Mr Parker produced in evidence a number of iterations of an exercise designed to show how many dock-related vehicle movements per day there would have been across Allen's Quay in various years. It transpired that this was a theoretical exercise based on a back-calculation from the recorded total tonnage throughput of the port, making assumptions as to how much cargo might have been moved per vehicle, and a number of other assumptions as to the manner in which the cargoes would have been handled. I have to record that it was noticeable at the Inquiry that Mr Parker did not appear to have a close personal grasp of the detailed basis of the figures which he was producing, and in particular was reluctant (to the point of declining to do so) to consider any questions put to him aimed at exploring the effect on those figures of varying some of the assumptions made.
- 16.156. Points made clear by Mr Parker's evidence were that the 'busiest' year in tonnage terms at the port during the relevant 20 years had been 1989, the first full year within the period, with a throughput more than twice as great as the typical year in the last 10 years or so of the period. Conversely the average size (or at least tonnage carried) of the ships calling at the port had markedly increased, the (admittedly larger) throughput of the early years having required three or four times more ships to carry it as was typical in the last years, from (say) 2001 on. In fairness to Mr Parker, he did acknowledge that the amount of vehicular traffic

generated could vary considerably according to the nature of the cargoes, and the particular manner in which its loading/unloading/transshipment was being handled.

- 16.157. Be all that as it may, I note that the highest vehicular movement per day put forward in the final version of Mr Parker's theoretical exercise would have been 224 per day in 1989, based on there being a ship in port, and one particular manner of loading/unloading. Mr Parker's exercise acknowledged that vehicular traffic across Allen's Quay would be very much less (but by no means non-existent) on days with no ship waiting in port.
- 16.158. By contrast the Applicant offered an exercise based on actual surveys of vehicular (and indeed pedestrian) movements over six different days, but all of them quite well outside the 1988-2008 period (in early 2013), being three working days each in Winter and Spring, in each case one working day *with* a ship unloading, one working day with no ship unloading, and one weekend day with no port activity.
- 16.159. This exercise also clearly had its serious limitations in terms of giving reliable figures for commercial vehicle movements over the relevant years. Subject to that caveat, the Applicant's figures seemed to show 151 movements by TWL dock-related vehicles on the busiest working day (with a ship unloading) which was observed, plus 29 movements by similar port related vehicles of other hauliers, making a total of 180 movements in all. The Appellant's side calculated (and the mathematics of this at least were not challenged) that the 151 TWL movements represented about 50 minutes of time during a busy working day during which one of those vehicles was crossing Allen's Quay, based on a vehicle taking a little less than 20 seconds to cross the Quay. Even simpler arithmetic tells me that the 180 movements by all dock-related commercial vehicles would take up an aggregate crossing time of approximately one hour in a busy working day, on the same basis.
- 16.160. The figures for equivalent movements on working days with no ship unloading (in 2013), as shown by the Applicant's side's survey, were 52 and 53 movements per working day respectively. The nearest equivalent figures from Mr Parker's back-calculated exercise suggested figures between 51 and 95 daily movements on non-unloading days over various of the relevant full working years from 1999 to 2007. I have to say, however, that it was not entirely clear from such explanation as Mr Parker gave of TWL's exercise, exactly what was the full rationale behind these figures.
- 16.161. It any event it seemed to me that neither TWL's nor the Applicant's figures could be relied on as being accurate or precise, as estimates of the actual number of movements of dock-related commercial vehicles across Allen's Quay during the relevant 20 year period. They do however, in my view, provide a reasonable overall feel for and understanding of the intensity of use, and are in reality not very far apart from each other. In my judgment therefore, a fair assumption from the evidence would be that on busy working days, when unloading was going on, perhaps a little over an hour in aggregate within such a working day would consist of time when a significant dock-related vehicle was crossing the Quay. This aggregate time would be split up into individual (approximately) 20 second 'passages' throughout the overall working day. I was persuaded by the evidence overall that it was comparatively rare (though it did sometimes happen) for two

port-related vehicles going in opposite directions to 'pass' each other on Allen's Quay.

- 16.162. On working days with no ship unloading, dock-related traffic on Allen's Quay would have taken up on aggregate very much less time, possibly as little as a third or even a quarter of the time on busier days. Although the evidence suggested that there had sometimes in the relevant period been weekend working, overall the impression I formed from what I was told was that weekends were typically very much 'quieter' again (in terms of commercial traffic) than the quieter type of weekday.
- 16.163. These conclusions, based on the two decidedly imperfect figure-based exercises, do in fact fit with the overall impression given by the balance of the evidence from actual, live witnesses. This leads me to the view that, although the port business clearly has (and has had) peaks and troughs of activity, Allen's Quay in particular has not typically, even on busier port days, been 'busy' or 'congested' with dock-related commercial traffic. On quieter days, which have not been unusual, even in the working week, there could be prolonged periods of very little commercial activity on Allen's Quay at all.
- 16.164. I am afraid I was not convinced by Mr Parker's assertions in evidence that Allen's Quay was regularly busy and congested with commercial dock traffic on working days. I noted that he appeared to admit in cross examination that sets of photographs he had produced purporting to show the multiple parking of lorries on Allen's Quay, and lorries turning on that Quay, had been staged events for the purpose (as I understood him to say) of some earlier planning proceedings relating to the future of Mistley Port. The conclusion which I came to from the balance of the evidence, including not that just coming from the Applicant's witnesses, but the overall impression from the witnesses for the Third Objector as well, was that both the parking of dock-related vehicles and the turning of them on Allen's Quay was a rare event rather than the norm.
- 16.165. That brings me on to the additional evidence produced on behalf of the Third Objector, who for these purposes I shall call Anglia Maltings/EDME. Various clearly genuine records were produced in the form of 'Daily/Weekly Warehouse Reports' from EDME Ltd, and spoken to by a number of the witnesses. However, when presented at the Inquiry these gave a somewhat confused and confusing picture, in which it was frequently impossible to tell with confidence which if any deliveries would have related to movements affecting Allen's Quay, as opposed to the very substantial other EDME premises in Mistley, on the south side of the High Street. Furthermore there was a very wide range of different, inconsistent estimates given by the several EDME witnesses as to the number of EDME deliveries per day or per week which would have affected Allen's Quay.
- 16.166. Also it was by no means straightforward to follow from EDME's quantitative or other evidential input, which of EDME's goods which *were* moved to or from its Thorn Quay Warehouse group of buildings, would be taken to or from the high warehouse entrances facing onto Allen's Quay, as opposed to other entrances to the Thorn Quay Warehouse higher up and nearer to Mistley High Street. On this last point I do note, in fairness to the Third Objector, that the original application

site in this case affected EDME's entrances higher up towards the Swan Basin as much as the 'remaining application site' in Allen's Quay does.

- 16.167. In spite of these question marks over the significance of EDME's quantitative information, what is clear nevertheless is that, during years which were within the relevant period, EDME did take regular deliveries to the Thorn Quay Warehouse, some of which involved the bringing of large commercial vehicles onto Allen's Quay, from which palletted material was there unloaded by EDME's forklift trucks. The Inquiry was presented with some photographic evidence of precisely that sort of activity taking place.
- 16.168. Clearly, when this happened, the lorries concerned would not be on Allen's Quay for only 20 seconds. The impression I gained from the evidence (which again was not completely consistent between witnesses) was that the process could take half an hour, or even up to an hour. The estimates as to the frequency of this occurring varied enormously, even among the EDME witnesses, with some suggesting several times a day, and others 2 or 3 times a week, or at least once a week. The general impression I gained from the Appellant's witnesses overall was that, while it was not claimed that such activity did not occur, it was not a major and noticeable feature of activity on the Quay.
- 16.169. Matters like this are inherently difficult for a decision maker to resolve, especially when the evidence on either side has been less than clear. I approach the matter having regard to these points. As I understood the evidence, the two small adjacent parcels of land within the 'remaining application site' at the south east end of Allen's Quay which are currently in the hands of the Second Objector (or a Gladedale group company) are parcels which it has acquired from the Third Objector (or some part of the Anglia Maltings/EDME group). Both these parcels immediately abut the Thorn Quay Warehouse buildings, and would appear to be approximately where the EDME lorries would typically stand in order to be unloaded in the manner just discussed.
- 16.170. However these two parcels are not and were not clearly demarcated on the ground – or at least no demarcation was ever pointed out to me (or otherwise obvious). [I am aware of the short line of painted oil drums on the quay near the north west corner of Thorn Quay Warehouse in several of the photographs (no doubt there for some safety related purpose), but they do not appear to relate to any property boundary].
- 16.171. It clearly would have been possible, and perhaps logical, for the Third Objector (or indeed the second Objector, though its access to contemporaneous evidence was rather more limited) to have mounted a case based on the argument that, whatever might have been the position on the rest of Allen's Quay, these specific parcels at its south east end had been used in a distinct and different way, for the regular unloading of EDME lorries, and that this in particular was inconsistent with, and incompatible with, any claimed use 'as of right' for lawful sports and pastimes.
- 16.172. However neither the Third nor the Second Objector did in the event argue their cases that way. Instead they essentially took the line of backing the First Objector in its argument that no town or village green claim could have been established on any part of Allen's Quay at all (or indeed the wider original application site). I

have already indicated that in my judgment the evidence overall, seen in the light of the Supreme Court decision in *Redcar*, does justify registration under the *Commons Act* of the non-highway parts of the site. There was ‘give and take’ between the users of the surface of the Quay, and I am persuaded on the evidence that a large part of that use was by local people for informal recreation. They were there making such recreational use, over many, many years, ‘as if of right’.

- 16.173. Viewed in that context, and considering the surface of the ‘remaining application site’ as a whole, the unloading of EDME lorries was just another, relatively minor, temporary interruption to the usability of the Quay for informal recreation. It was an interruption of a slightly different character from the passage from time to time of dock-related vehicles, but not one which leads me to the view that there were two (or more) uses here which ‘could not sensibly coexist at all’.
- 16.174. I acknowledge that it was included as an argument for the Objectors, notably in the submissions for the Third Objector, that the Applicant’s evidence had not demonstrated ‘lawful sports and pastimes’ uses over the two relevant parcels of land now owned by the Second Objector. But that is a different argument from the point which I have just been considering, and in my judgment on the evidence it is a wrong argument. There *was* in my view sufficient evidence called on the Applicant’s side to demonstrate continuous use for informal recreation of the whole surface of the remaining application site, including those two parcels, but subject to amicable coexistence (and ‘give and take’) with such commercial activities as took place there. I have already noted that there is no obvious demarcation on the ground marking out the two parcels now owned by the Second Objector, and none of the Objectors argued that the evidence should be viewed differently (from the rest of the quay) in relation to those parcels. Nor in my view did the evidence overall justify or require the making of such a distinction.
- 16.175. In my judgment the point was soundly taken for the Applicant’s side that the best answer to the claim that local recreational use cannot coexist with commercial use on the Quay was the very fact that such coexistence was in reality the regular pattern on the Quay for a period much longer than (but including) the required 20 year period. This was possible because, in my view of the evidence, the impact of commercial uses on the Quay has in reality been significantly less than asserted by the Objectors, and in particular Mr Parker for the First Objector.
- 16.176. When local people encountered commercial vehicles, they sensibly stood aside or moved around them, and the vehicle drivers also clearly manoeuvred to avoid pedestrians. There was give and take on both sides, sufficient to allow both ‘lawful sports and pastimes’ uses and the commercial activities to continue without difficulty. The evidence leads me to take the view of the matter overall that, before matters came to a head in September 1988, there was not a state of conflict, and in general everyone was considerate.
- 16.177. I ought in concluding to say a few words about some of the subsidiary arguments which were raised. It was argued, in an attempt to distinguish the *Redcar* case, that there was not ‘coexistence’ on Allen’s Quay, but a state of constant ‘*displacement*’. I understood this to mean that every time a commercial vehicle travelled over or manoeuvred on the Quay it *displaced* local people from its path (or where it was temporarily stopped). Local people clearly could not be in that

same place at the same time. So (it was argued), every time a commercial vehicle did something on the Quay, it ‘displaced’ any lawful sports and pastimes use, so that the 20 year ‘clock’ had to start running again, and thus 20 years continuous use could never be achieved.

- 16.178. In my view, this argument is not consistent with what the Supreme Court actually said and did in *Redcar*, when the same reasoning is applied to the facts of the present case. People clearly stood to one side, and did not get in the way – for reasons both of natural courtesy and personal safety – when shots were being played by the golfers in that case. That was not found to cause ‘displacement’ which re-started the 20 year ‘prescription’ period every time a group of golfers played through – in a situation where that use by golfers was said to have been extensive and frequent. There is no logical reason, in my view, why such a ‘displacement’ theory should be applied to the present site, because lorries or forklift trucks pass through from time to time.
- 16.179. I can see that there might be cases where a ‘displacement’ argument is stronger. The example was posited of school playing fields which during school days are *only* used by pupils and staff to play games, but where in the evenings and weekends (and perhaps in school holidays) local people habitually came out to walk their dogs or take an informal stroll. The argument would be that a claim of 20 years continuous ‘as of right’ use would be ‘displaced’ by the regular, quite long periods during which locals were firmly excluded from enjoying informal recreation.
- 16.180. I am not sure that this argument has yet been fully addressed by the courts, but I can understand its potential force. If the truth was that Allen’s Quay at Mistley had only been used recreationally in the evenings or at weekends, but was much too busy and congested for that to happen during the working week, then the argument might have more pertinence here. But my finding is that, even during the working week, the Quay has not by any means typically been so busy and congested that coexistence with recreational users has been impossible. And, furthermore, that type of coexistence of recreational and commercial use has in fact regularly and consistently occurred both on weekdays and those weekend days when any port operations were taking place.
- 16.181. I have concentrated so far on coexistence between recreational users and port-related traffic, and to a lesser extent the vehicles associated with EDME Ltd. That is because those are the aspects which the parties to this dispute clearly saw as being of the greatest significance. However I am clearly aware from the evidence that other vehicles also drive on Allen’s Quay, including the ‘remaining application site’, from time to time, and will have done so over the relevant years. These will have included local residents, local people and others parking to ‘admire the view’ etc (as referred to earlier), people associated with the buildings which the Second Objector has converted to flats, and no doubt also some local workers. However nothing that was said about such classes of user leads me to believe that this additional use of the Quay in vehicles ‘tipped the balance’ so that there could no longer be said to have been the sort of courteous coexistence between informal recreation and vehicles which I have considered in relation to the main vehicular users concentrated on by the parties.

- 16.182. Some time was spent at the Inquiry discussing the proposition that TWL's dock related vehicle movements might quite frequently have been along the very 'front' part of Allen's Quay, nearest the water, and so would have made conditions more difficult for people wishing to indulge in lawful sports and pastimes on the most attractive part of the Quay, near its edge. It certainly did appear to be the case that, since the construction of the Stockdale compound extension fencing in September 2008, a lorry route moving close to the Quay edge has tended to be used in relation to one particular incoming cargo, known as 'Cropcare' fertiliser, which arrives at the port about once a month. The import of that fertiliser did apparently begin rather earlier in 2008 than September, but the arrangement of the fencing and gates in the pre-extension compound did not force vehicles as close to the edge as has been the case since the extension was created. The balance of the evidence overall persuaded me to conclude that, prior to September 2008 crossing the Quay like that on a route uniformly close to the edge had in fact been comparatively rare, with nearly all of such traffic as there was using more of a variable 'diagonal' route across the Quay, from roughly the line of the port road to the quayside passage route to Baltic Wharf north of Thorn Quay Warehouse. Nothing about this strand of evidence, or the fact that Cropcare imports began before September 2008, causes me to alter my overall view of the balance of the evidence.
- 16.183. I ought also to refer to the line of argument taken, principally on behalf of the First Objector, based on such cases as *Massey v Boulden* [2003] 1 WLR 1792 and *Attorney-General v Southampton Corporation* [1970] 21 P&CR 281, and *Abercromby v Town Commissioners of Fermoy* [1900] 1 IR 302. The gist of this argument ran as follows: Since arguably it would be unlawful, on an already registered town or village green, for anyone (even the landowner or its licensee) to start driving lorries or forklift trucks over it – or to stop and unload them – then it must be impossible to register as a town or village green an area where these things already happen – either because it shows that the activities are mutually incompatible, or because a situation would be produced where things lawfully done on its land by the landowner or its licensees would be rendered unlawful, or even illegal, on the new 'town or village green'.
- 16.184. It seems to me however that this argument was effectively 'putting the cart before the horse', and was doing so in precisely the way that was rejected by the Supreme Court in the *Redcar* case. It was just as arguable that, on an existing town or village green which was not also already a golf course, it would be unlawful, and quite possibly illegal (in the criminal sense) to set up a *new* golf course on that land, with parties of golfers regularly firing off volleys of potentially dangerous shots through the local inhabitants on the village green. It is not as if the golf course in *Redcar* was only occasionally or irregularly used. It is clear from the reports that it was in regular, frequent use.
- 16.185. It was the history of actual, relatively cordial coexistence, with courteous common sense and mutual 'give and take', which led their Lordships in *Redcar* both to see the two uses as mutually compatible, and to say that the golfing use could carry on lawfully into the future, even after a 'town or village green' registration. It seems to me that exactly the same principle applies here. The commercial activities on the quayside within the remaining application site, have sensibly coexisted with informal recreational use during the qualifying period, and there is no reason why

that same coexistence should not continue after registration in this case. That is exactly what *Redcar* says, in my understanding of the case.

- 16.186. I have also considered the judgment in the fairly recent ‘village green’ case of *R(Mann) v Somerset County Council* (2012) CO/3885/2011, which was referred to in the closing submissions for TWL. Nothing in that judgment causes me to alter my conclusions on the very different circumstances of the present case.
- 16.187. One last detail which I ought to address concerns the very precise extent of the site I recommend for registration, along the edge of the quay by the waters’ edge. A good deal of the Applicant’s evidence showed recreational activities which involved people doing things at that very edge, perhaps even leaning out over the edge. Examples would include crabbing or leaning over to feed swans or other birds, but there were other examples. Both oral and photographic evidence showed people sitting on the edge with legs dangling over the side.
- 16.188. I therefore wish to make it clear that in recommending part of the original application site for registration, I intend to refer to the whole site right to the very edge of the Quay, not merely up to the fence erected in September 2008. In other words, that fence is physically situated within the site I am recommending for registration. I entirely accept that making this clear does not mean that the Registration Authority’s decision would secure the removal of the fence, and nor is that my intention. Nevertheless the physical relationship between the fence and the site to be registered is something which ought to be made clear, in my opinion.
- 16.189. Before setting out my formal recommendations on what has been an unusual and difficult case, I think it is appropriate to ‘stand back’ and reflect briefly on whether the result to which the evidence and the law have driven me is one which ‘makes sense’ – or conversely whether a result has been produced which looks obviously wrong.
- 16.190. It is quite clear, in my view, that the local inhabitants of Mistley have been extensively using the area of Allen’s Quay for informal recreation over very many years, including the 20 relevant years. They have been doing so openly, and behaving exactly as if they have the right to do so. In doing so however they have courteously coexisted with a reasonable, but by no means excessive, amount of commercial activity on the Quay. There does not appear to be any other available route than the *Commons Act* by which local people’s perceived right to continue using this area as hitherto can be protected from summary curtailment. In these circumstances registration under *Section 15* of the *Commons Act* appears to me to be entirely appropriate, as well as being the conclusion which the law and the facts lead to.

Final conclusions and recommendations

- 16.191. It is no doubt most unfortunate that the Applicant did not include the ‘Stockdale Compound extension’ (the NW corner of Allen’s Quay) in the site for whose registration he made application on in August 2010. For reasons given earlier it would in my view be unjust to allow him to enlarge the application site to include that area. I make it clear, however, that had it not been for this error by the Applicant, and the injustice to the First Objector of a very late amendment by enlargement, I would on the evidence have recommended that the Stockdale

compound extension area should also be included in the registration under **Section 15**.

- 16.192. For reasons also discussed extensively earlier, I recommend that a large part of the original application site, consisting essentially of highway or ‘highway type’ land, is not appropriate to be included in the Register of Town and Village Greens. That includes the whole of the highway areas shown in colour on the plan of highways (whether maintainable or not) produced for the benefit of the Inquiry by the County Council as Highway Authority, and the whole of the area around the Swan Basin, whether currently regarded by the Highway Authority as publicly maintainable highway or not.
- 16.193. The single area of the Applicant’s original application site (i.e. excluding the Stockdale Compound extension area) which lies to the north-east of the outer boundary of the highway area just discussed (between it and the Stour estuary) is what I mean by “*the remaining application site*”. I have endeavoured to show this remaining area on the plan attached at the end of this Report.
- 16.194. My conclusion, on the evidence which I have received, together with the submissions and arguments of the parties, and in the light of all that I have explained and set out under the previous sub-headings in this section of my Report, is that the criteria of **Section 15(3)** of the **Commons Act 2006** are met in respect of what I identify above, and on the plan just referred to, as the “*remaining application site*”, and that registration of that area alone is justified.
- 16.195. Accordingly my conclusion and recommendation to the County Council as Registration Authority is that the “*remaining application site*” as defined above should be added to the Register of Town or Village Greens under **Section 15** of the **Commons Act 2006**, for the reasons given in this Report – but that no other area for which the Applicant has made application should be so registered.

ALUN ALESBURY
28th October 2013

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APPENDIX I – APPEARANCES AT THE INQUIRY

FOR THE APPLICANT –

Mr Nigel Farthing, Solicitor - Messrs Birketts, LLP
24-26 Museum Street
Ipswich IP1 1HZ

He called:

Mr Richard Brooks, of Church Farm, Edgfield, Melton Constable, Norfolk
Mr Richard Vonk, of 80 California Road, Mistley
Mrs Charlotte Hume, of 2 Millers Reach, Mistley
Mr Keith Garwood, of Cedar Cottage, Trinity Close, Mistley
Mrs Margaret Saxby, of 1 Grapevine Cottages, Mistley
Mrs Margaret Wainwright, of Port View, 21 New Road, Mistley
Mr Robert Horlock, of Calm Waters, Shrubland Road, Mistley
The Hon. William Meston, of Staplehurst, High Street, Mistley
Mrs Alexandra Smith, of Millstone Cottage, 4 Norman Road, Mistley
Ms Kate Worsley, of 3 Millers Reach, Mistley
Mr Ian Tucker [the Applicant] of 4 High Street, Mistley
Professor David McKay, of Acacia House, High Street, Mistley
Mr Clive Saxby, of Fountain House, High Street, Mistley
Mrs Nancy Bell, of 3 Grapevine Cottages, Mistley
Mr John Fairhall, of Elm House, Trinity Road, Mistley
Mr Ian Rose, of Yaffles, School Lane, Mistley
Mr Hubert Ward, of 1 The Green, Mistley
Mr John Wood, of 5 New Road, Mistley

FOR THE FIRST OBJECTOR (TW Logistics Limited)

Mr Douglas Edwards, Queen's Counsel; and
Mr Philip Petchey, of Counsel - instructed by the First Objector company

They called:

Mr Michael Parker, Chairman and Managing Director
TW Logistics Ltd, of (registered office)
The Old Shipyard, Gainsborough
Lincolnshire

FOR THE SECOND OBJECTOR – Gladedale (South East) Ltd

Mr Alexander Booth, of Counsel

- Instructed by
Messrs Cripps Harries Hall LLP
Wallside House, 12 Mount Ephraim Road
Tunbridge Wells, Kent, TN1 1EG

He called:

Mr Ross Brodie, Managing Director,
 Gladedale Estates Ltd
 30 High Street
 Westerham, Kent

FOR THE THIRD OBJECTOR – Anglia Maltings (Holdings) Limited

Mr Trevor Ivory, Solicitor
 Messrs Howes Percival LLP
 The Guildyard, 51 Colegate
 Norwich NR3 1DD

He called:

Mr Ian Burns, of 7 Silverthorne Close, Colchester
Mr Brian Herrington, of 1 Queensway, Lawford
Mr Jason Powell, of 11 Willow Way, Dovercourt, Harwich
Mr Eric Leggett, of 3 Highfields, Bentley, Ipswich
Mr Shane Townes, of Garden Cottage, Holbrook, Suffolk
Mrs Carol Townes, of 268 Colchester Road, Lawford

THIRD PARTY

Mrs Jacqueline Lester, of 3 Tall Trees, Mile End Road, Colchester

APPENDIX II

LIST OF NEW DOCUMENTS PRODUCED TO THE INQUIRY

NB. This (intentionally fairly brief) list does not include the original application and supporting documentation, the original objections, or any material or correspondence with or from or submitted by the parties prior to the issue of Directions for the Inquiry. It also excludes the material produced in the prepared, paginated, and for the most part satisfactorily indexed, Bundles of Documents produced for the purposes of the Inquiry on behalf of the Applicant and each of the three Objectors, and provided to the Registration Authority (and me) as complete bundles. [It also excludes law reports copied for the Inquiry]

BY THE APPLICANT

Bundle containing additional photographs, diagrams and correspondence.

Written note of closing submissions by Mr Nigel Farthing

Enlarged photograph of artist on quay on working day

BY THE FIRST OBJECTOR – TW Logistics Ltd

1. TWL 'New document 1' (including notes on the following):
 - 'Lash Barges at Mistley Port'
 - 'Mistley Port – Daily Vehicle Movements'
 - 'Daily movements – Further analysis' etc
 - 'Plant and Equipment Movements at Mistley Port'
2. Dated photographs of Allen's Quay
3. Further photographs (mostly aerial)
4. Photographs from estuary
5. Mistley and Manningtree Conservation Area – Review extract
6. Photographs/plans re signs/termination of highway
7. Photographs re changes to signs
8. Swan Basin Entrance signs – more photographs
9. Mistley Community news extracts/press cuttings
10. Further collection of photographs

Bundle of 'Freedom of Information' documents obtained from Essex CC

Written note of closing submissions by Mr Edwards QC and Mr Petchey, including:

- Annex 1 - note re Public Footpath Inquiry
- Annex 2 - Schedule of Photographs in 'Mistley Quay – What better place?'

Letter/note from Railfreight Distribution, 24/1/94

Report (23/3/11) to Hampshire CC re village green application at Curdridge

Report (13/10/07) to Oxfordshire CC re village green application at Radley

Report (28/3/12) and Supplemental Report (25/6/12) and Surrey CC re village green application at Row Town, Addlestone

BY THE THIRD OBJECTOR – Anglia Maltings (Holdings) Ltd

EDME – Daily/Weekly Warehouse Performance Reports – various dates 2005-2010

Photographs of EDME vehicles on Allen's Quay

Note of Closing Submissions by Mr Ivory

BY THIRD PARTY (Mrs Lester)

Note of Mrs Lester's Evidence/Submsision

Papers re investigation by HM Coroner for Essex, 1991

BY THE REGISTRATION AUTHORITY

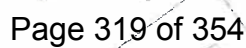
CRA1 Notes and Plans re Highway affecting the Village Green Application Area

CRA2 Copy of Directions issued to Parties

CRA3 Street Map of Mistley/Manningtree/Lawford

CRA4 letter from Applicant (4/5/13) requesting amendment to application site

APPENDIX 2



COMMONS ACT 2006, Section 15

Registration Authority: ESSEX COUNTY COUNCIL

**RE: LAND AT MISTLEY QUAY,
MISTLEY, ESSEX**

**ADDENDUM TO
REPORT OF THE INSPECTOR**

1. It has been pointed out in correspondence by Mr Nigel Farthing of Messrs Birketts, who was advocate for the Applicant at the Public Inquiry, that Paragraphs 16.28 to 16.30 inclusive of my original Report of 28th October 2013 appear to have been based on a misapprehension of the facts as to the accurate geographical position of an electricity substation at (approximately) the southern corner of Allen's Quay at Mistley, in relation to the application site in this case.
2. On reviewing the situation I can see that what Mr Farthing says is correct, and that the 'very roughly semi-circular' plot I was referring to in paragraphs 16.28 to 16.30 is not in fact where the substation is, in spite of its being seemingly so marked on most of the Ordnance Survey-based plans which were produced for the Inquiry.
3. This anomaly was not something to which (as far as I recall) attention was drawn either during the Inquiry, or on the formal Site Visit. Nevertheless it is, as I say, clear that what Mr Farthing has now pointed out is correct. The substation is not within the roughly semi-circular plot, but on another parcel of land next to it.
4. However, as Mr Farthing also recognises, this factual clarification is not in the event material to my overall findings and recommendation to the County

Council as Registration Authority. The roughly semi-circular area concerned is not within or immediately adjacent to the area which I have otherwise recommended for registration under the Commons Act, but is part of another area to the south which has more the character of highway land [and indeed most of which is recognised by the County Council as Highway Authority as being public highway].

5. Accordingly this clarification, for which I am grateful to Mr Farthing, does not cause me to alter in any way the concluding recommendation of my Report to the County Council as Registration Authority under the Commons Act.

ALUN ALESBURY
3rd January 2014

Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH

COMMONS ACT 2006, Section 15

Registration Authority: ESSEX COUNTY COUNCIL

**RE: LAND AT MISTLEY QUAY,
MISTLEY, ESSEX**

**SECOND ADDENDUM TO
REPORT OF THE INSPECTOR**

1. After the production the first Addendum to my Report, further comments and representations came in from other parties to the Inquiry. This Second Addendum considers two of them, namely a letter (with enclosures) dated 23rd December 2013 from Messrs Cripps Harries Hall on behalf of the Second Objector Gladedale (South East) Limited, and one from Messrs Howes Percival, dated 20th December 2013, on behalf of the Third Objector Anglia Maltings (Holdings) Limited.
2. The letter from Cripps Harries Hall is largely a revisiting of points taken at the Inquiry itself, and fully dealt with in my main Report – although it would be fair to note that the Second Objector played a comparatively lesser active part in the Inquiry, in comparison with the other three main parties.
3. Insofar as it now seems to be suggested by Cripps Harries Hall that my Report should have considered the land belonging to the Second Objector ‘in isolation’ from the rest of the application site (although this was not an argument actively pursued on behalf of the Second Objector at all at the Inquiry itself, as it seemed to me), I would point out that I did in fact consider this issue with some care in my Report, notably at paragraphs 16.169 to 16.174 inclusive.
4. I would also mention in passing that the witness for the Second Objector, Mr Brodie, had at least acknowledged in his evidence that he might have seen

people walking across the land belonging to Gladedale to get to the edge of the quay (as I noted in paragraph 12.13 of the Report), in a context where it was clear that it was use of the quayside for leisure (sports and pastimes) purposes that was under discussion.

5. The letter from Howes Percival (for the Third Objector) again seeks to revisit issues (especially to do with ‘deference’, interruptions to use, and the **Redcar** case) which were fully argued at the Inquiry and covered in my Report, but also again (like the Cripps Harries letter) suggests that the Report should have given more distinct consideration to the evidential position specifically on the land belonging to the *Second* Objector.
6. This letter now calls that land the ‘Disputed Land’, although it was not at all a main thrust of the case presented for the Third Objector at the Inquiry to make such a distinction. The Howes Percival letter suggests that there is some inconsistency between what I said in paragraph 16.172 and my recording in paragraph 15.51 of a particular aspect of the submissions that had been made for the Third Objector, the suggestion being that the concluding section (16) of the Report had failed to consider that aspect.
7. However in fact that point is considered and addressed in paragraph 16.174, as part of the overall consideration of this sub-issue in that and the preceding paragraphs.
8. In summary then, nothing in the letters received on behalf of the Second or Third Objectors causes me to feel that my Report or recommendations need to be altered in any respect. [I have however, in reviewing the adjacent paragraphs of the report, noticed that the reference in paragraph 16.176 to September 1988 should of course read September 2008 – the end rather than the beginning of the ‘relevant period’].

ALUN ALESBURY
31st January 2014

Cornerstone Barristers
2-3 Gray’s Inn Square
London WC1R 5JH

COMMONS ACT 2006, Section 15

Registration Authority: ESSEX COUNTY COUNCIL

**RE: LAND AT MISTLEY QUAY,
MISTLEY, ESSEX**

**THIRD ADDENDUM TO
REPORT OF THE INSPECTOR**

1. As I have noted previously, after the dissemination of my Report into this matter, produced following the public inquiry which I held in 2013, further comments and representations came in from the principal parties to the inquiry. This Third Addendum arises from the submissions and representations contained in a letter (with appendices) of 7th January 2014 from TW Logistics Limited (“TWL”), the ‘First Objector’ to the application in this case.
2. In this particular instance the nature and content of the submissions and representations from TWL seemed to me, and to the Registration Authority, to require the ‘opposing side’ (the Applicant under the *Commons Act*) to be given the further opportunity to reply.
3. That opportunity was duly given, and led to a response, with a substantial collection of attached documents, from the solicitors for the Applicant, dated 13th March 2014. Because of the considerable element of ‘new’ material (albeit much of it was historic) contained in these documents, TWL were given the opportunity to respond once more, which they did in a letter of 2nd June 2014, accompanied by a further attachment. And the solicitors for the Applicant have made a final reply in a letter of 16th June 2014.
4. I regard it as most unfortunate that these exchanges should have carried on over such a protracted period after the submission of my Report on 28th

October 2013. However it can at least be said that the two affected parties (TWL and the Applicant) have each had a very full opportunity to consider and comment on the points raised by the other party, and there should now be no further reason for the Registration Authority to have to defer its reaching a final decision on this application, in the light of my original Report and the three subsequent Addendum Reports. [I should observe that it seems to me that the issues raised in these exchanges between TWL and the Applicant relate to an area of dispute which did not arise from the cases as presented by the second and third objectors, or indeed any other party. Thus there was no need, based on ‘natural justice’ or any other principle, for those other parties to be invited to become involved in this particular post-Report correspondence whose implications I now seek to address].

5. Turning to the substance of the matters raised in the correspondence, it is (in my view) only necessary for me to address points and matters which go beyond what was already before me in the context of the public inquiry in 2013, and then only to the extent that the new material and submissions might in principle lead me (or the Registration Authority) to form a view different from the one I expressed in my 28th October 2013 Report.
6. It was with surprise and at least an element of consternation that I noted that the first main point taken in TWL’s representation of 7th January 2014 appears to be a suggestion that the exchanges I report in paragraph 16.110 of my original Report had not in fact taken place.
7. It had been a matter of very considerable concern to me as Inspector that on the eighth and final day of the Inquiry, almost at the very end of the closing submissions for the First Objector (which immediately preceded those for the Applicant), Counsel for that objector (TWL) had appeared to be raising as decisive a point about which nothing of substance had been said orally by anyone, witness, or advocate, during the preceding seven and a half days of inquiry. This was an argument to the effect that, whatever might have been the strengths of the Applicant’s evidence about local people indulging in ‘sports and pastimes’ over the years on the most important, central part of the quay at Mistle, those can never have been ‘*lawful* sports and pastimes’ [as required by the ***Commons Act***], because (at least for some of the relevant period) it would have constituted a criminal offence for people to be on, or to cross, the metal rails embedded in the surface of the quay.
8. It was a matter of particular concern to me because it seemed that what was in effect a ‘new’ point, as far as the active debate and argument at the inquiry were concerned (although I accept that the basis for the point had been foreshadowed, rather unobtrusively, in written material previously lodged for

TWL), was being raised for the first time orally as being a serious, determinative point, at a time when the inquiry was very close to its end. [There had been no need for me to say anything about the point at an earlier stage, as no active reference had been made to it by anyone on behalf of TWL, witness or advocate].

9. I have no doubt at all that Paragraph 16.110 of my Report accurately records the gist, if not the precise words, of what I said in relation to this matter at that late stage in the Inquiry, in the circumstances which I have just outlined.
10. Indeed the substance of what I said in that paragraph of my Report forms the logical basis for what I now go on to say about the content of the exchanges which have taken place in the post-Report correspondence from the two relevant parties.
11. I had concluded on the evidence, and so advised the Registration Authority in my main Report, that the Applicant had established, on the balance of probabilities, that what on any normal view would be regarded as ‘lawful sports and pastimes’ had been indulged in by local people on the ‘remaining application site’, over the relevant 20 year period between 1988 and 2008.
12. On that basis (and subject to all the other considerations discussed at length in the main Report) the Applicant’s case had met the tests set by **Section 15** of the **Commons Act**. In my judgment, if in those circumstances an objector wishes to say (in effect) “*well, no, the activities here were not in fact ‘lawful’ – they either were, or included, a criminal act*”, there is at least an obligation on that objector to provide (in particular as far as the factual element is concerned) a clear basis on which it can be understood that the ostensibly lawful activities were in fact a criminal trespass.
13. I entirely accept, and so advise the Registration Authority, that the basic obligation to prove his case evidentially on the balance of probabilities lies upon the Applicant. I would express doubt however as to whether this obligation extends to his having to prove a negative, i.e. that the lawful-seeming activities he relies on were **not** criminal – at least unless some plausibly convincing basis has been introduced for thinking that the activities concerned might have been criminal ones.
14. In any event, the matter has now, in the post-Report correspondence, been addressed at greater length by both relevant parties, including the introduction of new (to me and the Registration Authority) evidential material.

15. As to the approach now to be adopted, points of law, insofar as relevant, must be interpreted correctly, to the best of our abilities, by myself and the Registration Authority; but insofar as the question turns upon disputed areas of fact, the balance of probabilities, on the material available, seems to me to be the basis on which it must be determined whether the activities of local people on the relevant part of the quayside here were either lawful or criminal.
16. I have considered all of the material which has been provided (whether by way of submission or factual material) in the post-Report correspondence from TWL and the Applicant. Since it is all in writing, and in the possession of the Registration Authority, it seems to me neither necessary nor appropriate to set out a lengthy summary of what the two parties are saying.
17. Thus in the following paragraphs I explain the conclusions I have reached (on the balance of probabilities where matters of fact are concerned) in the light of the material now available, together with what I and the Registration Authority had received previously.
18. It seems likely that the actual metal of the rails set into Allen's Quay was the property of British Rail and its predecessor companies (London & North Eastern Railway, Great Eastern Railway, etc.).
19. However I conclude on the balance of probabilities from the evidence provided that British Rail and its predecessors were not owners of the actual land of the part of the quay relevant in this case, into which the metal rails of the 'tramway' were embedded; they only had a wayleave over the track, in common it seems with property owners on the quay.
20. Although, as I had noted in my Report, it had been mentioned orally at the inquiry, with no party having then treated it as a controversial point, that the last actual use of the rails on Allen's Quay had taken place in about 1984, both parties in their further representations have alluded to the fact that Mr Garwood (one of the Applicant's witnesses) had given unchallenged evidence that access to the rail network had been closed in 1986. I should in the circumstances perhaps note that it was clear from the context to all concerned in the inquiry, including myself, that Mr Garwood had been referring to the end of physical access to the rail network, not to any kind of legal process.
21. As the 20 year period principally relevant to this case ran from September 1988 to September 2008, it makes no practical difference whether the ending of any rail use on the quay might have been in 1984 or 1986. The only

relevance of this issue at all, it seems to me, is as to whether there are grounds for concluding, on balance, that the physically unusable set of metal rails in the quay surface constituted, for any material time after September 1988, something which fell into the category of ‘lines of railway’, ‘sidings’, etc., trespass upon which is made a criminal offence by **Section 55(1)** of the ***British Transport Commission Act 1949***.







22. It appears (though this is not completely clear from its letters) that the First Objector TWL persists with its suggestion, raised on the final day of the public inquiry, that the piece of track on Allen’s Quay was part of the ‘Mistley Quay Branch’, whose potential closure as a ‘line’ was still apparently under consideration by British Rail in January 1994. This is the point I discussed in paragraphs 16.117-118 of my original Report.
23. In spite of the months which have passed since I produced that Report, and the several new contributions (including evidence) from both ‘sides’, there does not seem to me to be any more reason now than there was then to conclude that the operational railway of that Branch, requiring some kind of formal closure procedure, included the disused (and it seems unusable) metals of the tramway embedded in Allen’s Quay.
24. On the contrary, and as I have indicated in paragraphs 18 and 19 above, it seems clearer now than it did then, that the ‘tramway’ inset into Allen’s Quay had been something over which British Rail and its predecessors had enjoyed nothing more than a wayleave, in common with others, even if they might have owned the actual metal of the rails.
25. In these circumstances, it seems to me that the alleged ‘criminal offence’ aspect of TWL’s point could only have any force if the rails embedded into the quay’s surface were plausibly to be understood as a ‘siding’ (or of course ‘line of railway’) “*worked by*” British Rail, at any time from September 1988 onwards.
26. My conclusion, from the evidence I have received, is that that cannot possibly have been the case, from 1986 at the latest, and quite possibly from 1984. It is for example inconceivable, in my view, that anyone could have been successfully prosecuted, between September 1988 and early 1994 (say) for ‘trespassing’ on a railway line or siding ‘worked’ by, or belonging to, British Rail, because they had walked over, or engaged in ‘lawful sports and pastimes’ on, the unused and unusable pieces of metal set into Allen’s Quay. Yet that is in effect what TWL are arguing.

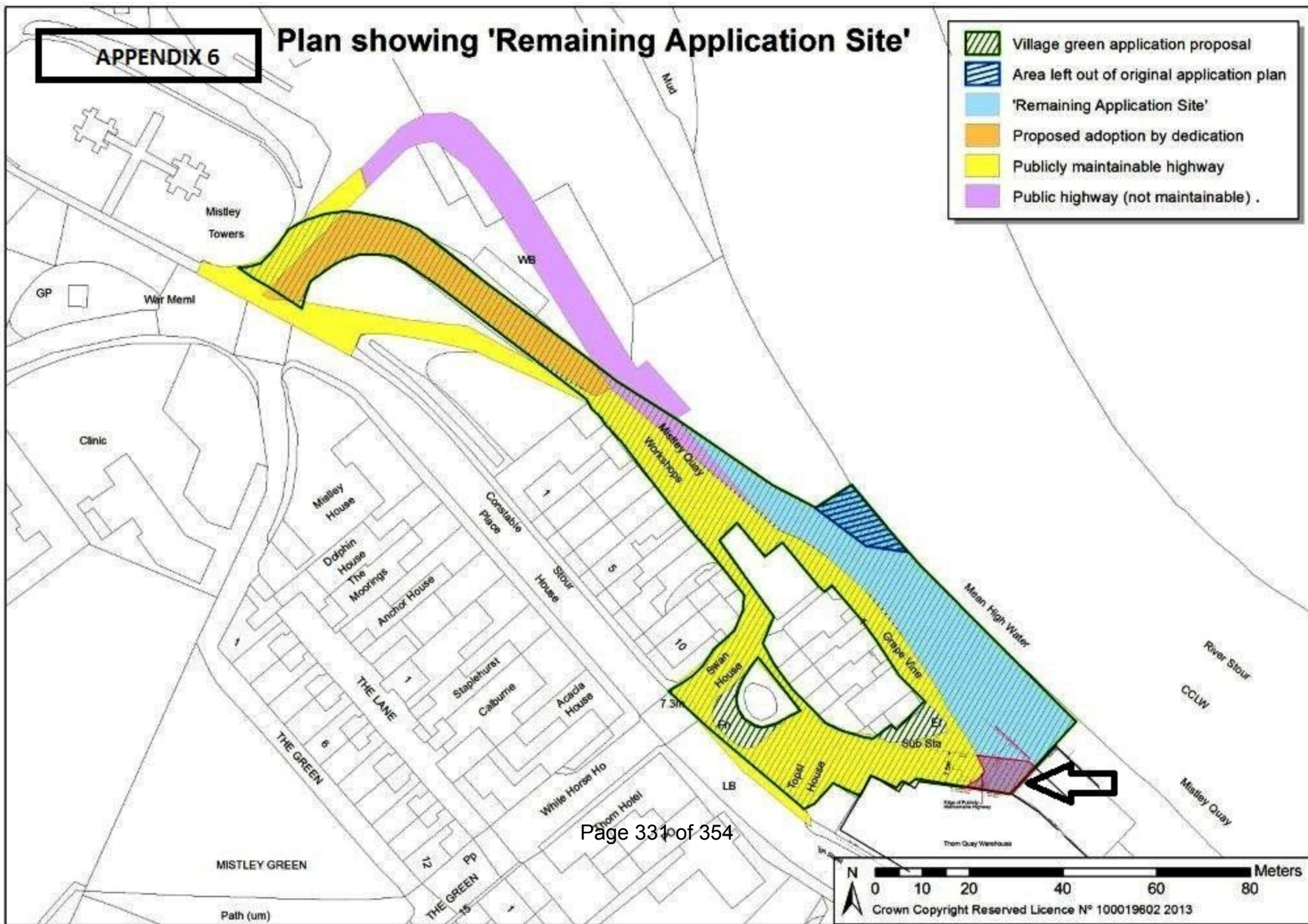
27. My conclusion therefore, on the new material which has been received from the parties, is that nothing has emerged which causes me to change the conclusions and recommendation set out in my original Report, except that to my mind it is clearer now than it was then that TWL's point based on 'railway law' is lacking in merit.
28. I should perhaps add that nothing in any of the exchanges which have taken place has led me to the view that there is any need to reopen the inquiry into this application; nor in my view is there any reason why the Registration Authority should not be able now to proceed to its determination of this matter.

ALUN ALESBURY
30th June 2014

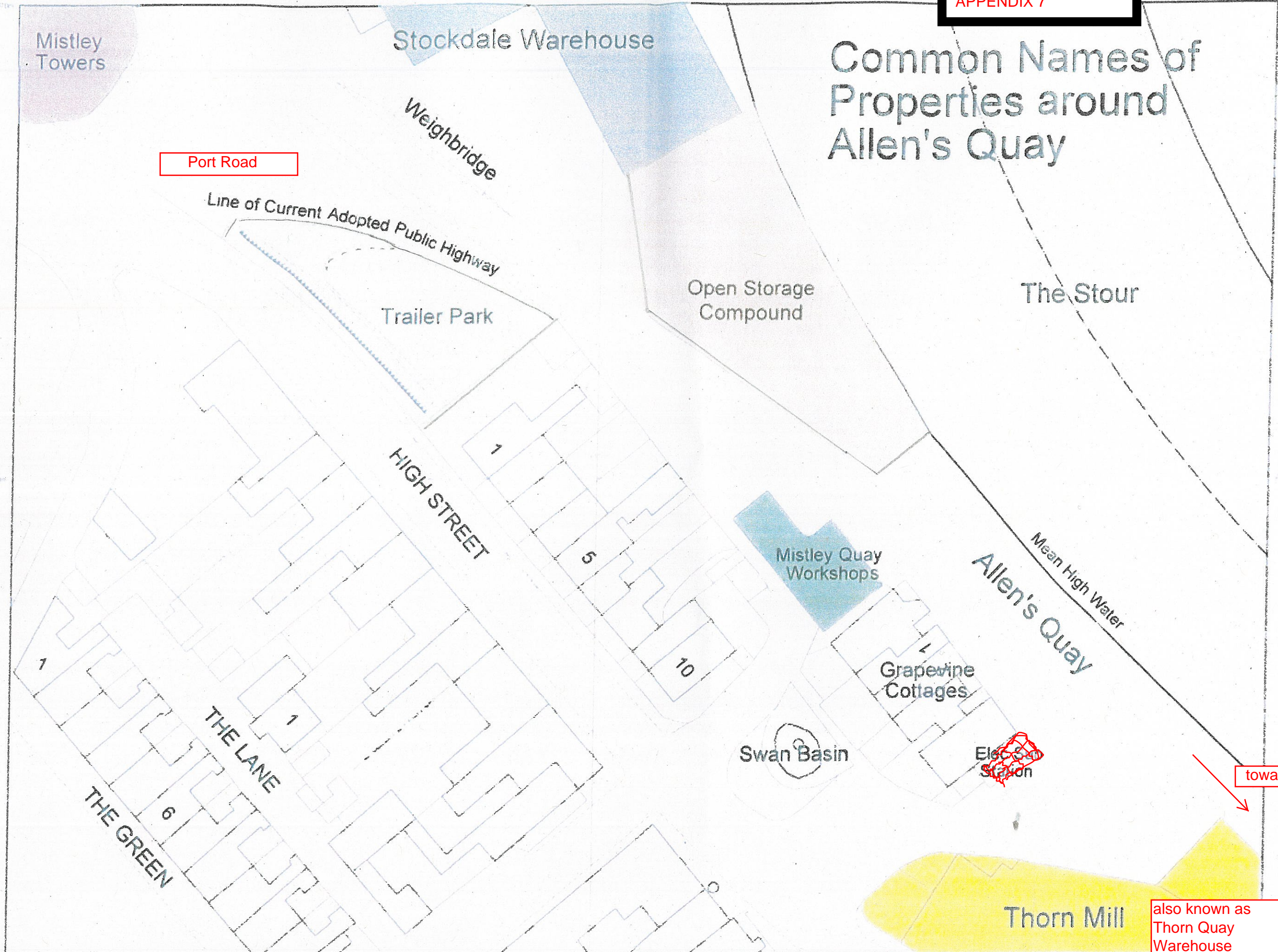
Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH

Plan showing 'Remaining Application Site'

-  Village green application proposal
-  Area left out of original application plan
-  'Remaining Application Site'
-  Proposed adoption by dedication
-  Publicly maintainable highway
-  Public highway (not maintainable) .



Common Names of Properties around Allen's Quay



DR/30/14

committee DEVELOPMENT & REGULATION

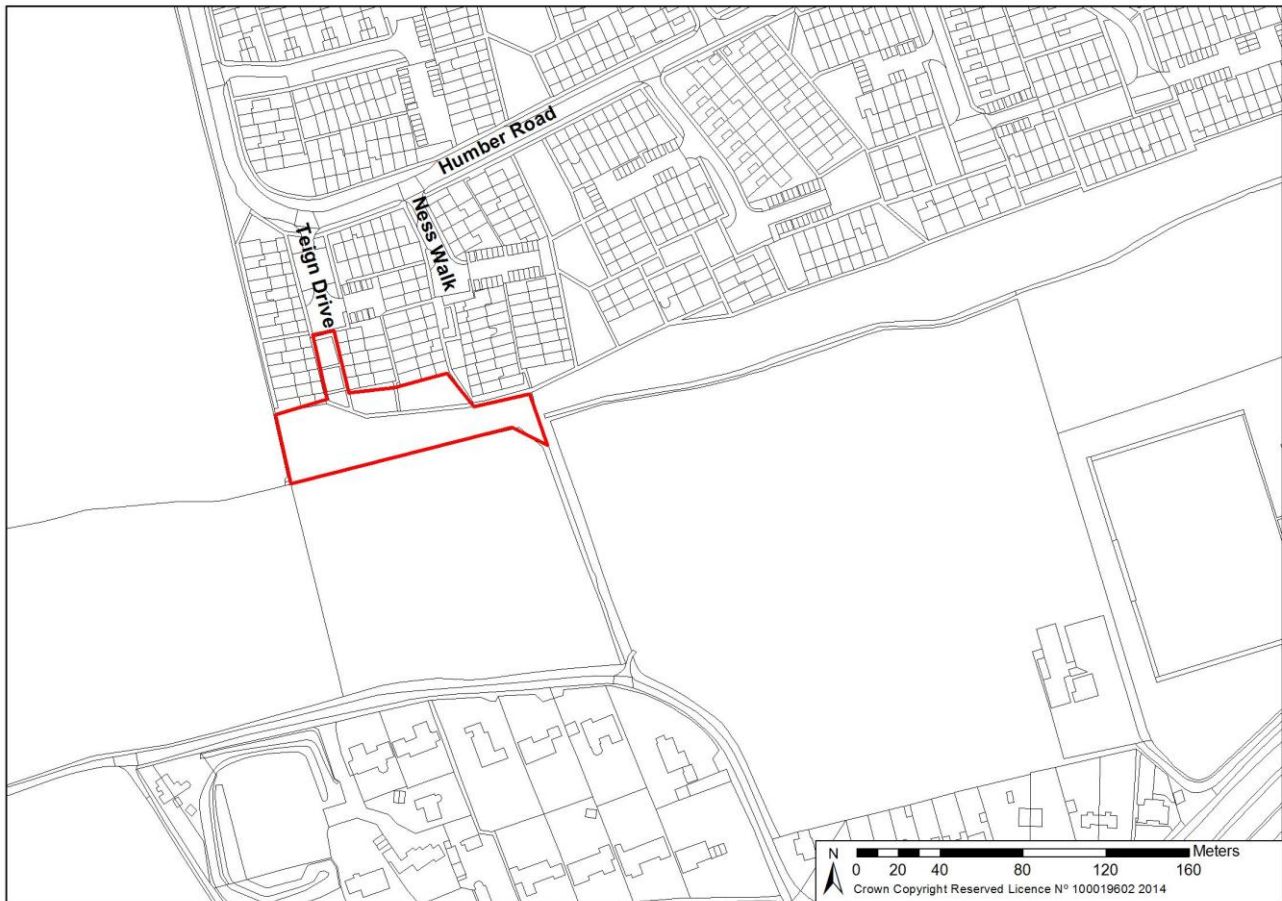
date 25 July 2014

VILLAGE GREEN APPLICATION

Application to register land at Horsemans Green, Witham, Essex as a town or village green

Report by County Solicitor

Enquiries to Jacqueline Millward Tel: 01245 506710



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1. PURPOSE OF REPORT

To consider an application made by Mrs Janet Shepherd under Section 15(2) of the Commons Act 2006 ("the 2006 Act") as amended, to register land at Horsemans Green as a Village Green.

2. BACKGROUND

The County Council has a duty to maintain the Registers of Commons and Town and Village Greens. Under Section 15 of the 2006 Act applications can be made to the Commons Registration Authority (CRA) to amend the Register.

The County Council as Registration Authority has received an application made by Mrs J P Shepherd to register the application site as a Town or Village Green under the provisions of Section 15(2) of the 2006 Act.

The application was advertised in the local press and on site on 1 May 2013. Notice was also served on the identified landowner Greenfields Community Housing by letter of 25 April 2013. Braintree District Council (BDC) also own part of the land and were also served with notice on 22 May 2014. The County Council received one objection to the application, from BDC.

In the case of Village Green applications the County Council has a discretion whether to hold an oral hearing before confirming or rejecting the application as there is no prescribed procedure in the relevant legislation. Where there is a dispute which "is serious in nature", to use the phrase of Arden LJ in ***The Queen (Whitmey) v The Commons Commissioners*** [2004] EWCA Civ. 951 (para 29), a registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry".

The objection, as examined in further detail below, indicated there is a permission to use the land which is not disputed. There are some cases where a "knock out blow" does arise i.e. it is possible to reject an application on legal grounds following a consideration of the papers. This potentially saves money and avoids an inquiry the outcome of which could be foregone conclusion before the hearing of any evidence. What is disputed in this case is the effect of the permission to use the land but the permission or the way that the land was made available to the users can be a knock out blow in relation to the statutory grounds required for a successful application such that a non-statutory public inquiry has not been held. This approach has been approved by counsel on the facts of this case.

3. THE APPLICATION SITE

The application form referred to a plan on which the application site is marked and is transposed onto a map of the area on the front page of this report. The applicant described the land as 'between the houses of Teign Drive and the area of land bordering Horsemans field between Teign Drive and Ness Walk'. It lies to the south of an existing residential area in Witham town. A number of pedestrian access pathways across the land were apparent from the application plan. The roadway and footways at

Teign Drive are publicly maintainable highway and footpaths across the application land are also recorded as being publicly maintainable. The paths in the south east corner, around the rugby and football ground, are recorded on the Definitive Map as Footpaths 76 and 77, Witham.

Counsel analysed the evidence in relation to two parts of the site which are shown on the map supplied by BDC at appendix 2 and separately hatched red (between the houses on Teign Drive) and hatched green (bordering Horsemans field).

4. DEFINITION OF A TOWN OR VILLAGE GREEN

The burden of proving that the land has become a town or village green lies with the applicant and the standard of proof is the balance of probabilities. In order to add the application land to the Register of Town and Village Greens it needs to be established that “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.”

Because the applicant relies on section 15 (2) of the 2006 Act it has to also be the case that the use continues at the time of the application.

5. THE APPLICATION

In March 2013 an application was made to the County Council to register the land as Village Green based on use for 30 years prior to the date of the application in 2013. Further information was requested in relation to the locality and the application was formally acknowledged on 20 March 2013. The application stated that the land had become a Village Green for the following reasons. “The claimed land has been used by the inhabitants of the locality ... for over 30 years and continues to do so for sports, dog walking community and children’s play without force, without secrecy and without permission. This was done in the belief that the land was and is a village green. A significant number of the inhabitants both past & present have used the claimed land as a village green for a range of pastimes as laid out in the attached witness statements ... As such the applicant believes that all relevant criteria required to be demonstrated in order for the land to be entered in the register of village green has been met. As evidence of the activities above we have attached photos gathered from local residents.....”

18 witness statements were submitted which are summarised in Appendix 1. Four were completed by two users. With the exception of the detailed statement from the applicant most of the user information is very brief and most do not indicate the dates of their use. The applicant’s statement included copies of some photographs.

A letter was also received from Mr K C Davies of the Humber Road Estate Community Initiative. To the extent that this contains comments in relation to his own use of the land, that is covered in Appendix 1. He made some more general comments as chairman of the Humber Road Estate Community Initiative. He said he fully supported the application for village green. He considered BDC’s commitments to the area as recreational was demonstrated by the provision of play and exercise equipment. He

thought the provision of the green space for resident use was consistent with the statutory duties of Braintree District Council.

Together with Mr Davies' evidence there is user evidence from 23 individuals.

6. LOCALITY

In part 6 of the form the applicant stated this was 'within Witham West Ward' and provided a further map. At the CRA's request a better plan was provided. Witham West Ward is an administrative area for the local authority and is capable of being a locality for the purpose of the 2006 Act. A substantial part of the Ward area is undeveloped land and the application land and the surrounding residential area falls within the Powers Hall End area to the east side of the Ward. The objector provided a map demonstrating the spread of the users over the locality area.

The Ward area and its relationship to the site is shown on the map at Appendix 3.

7. OBJECTION

A land registry search on 23 May 2013 shows that the first part of the application land, where it continues from Teign Drive, is in the registered ownership of Greenfields Community Housing Limited. Many individual properties are shown to have been taken out of the area covered by the original land conveyance but those transfers had the benefit of easements and reservations as set out in Chapter 1 of Part 1 Housing Act 1980 or part V of the Housing Act 1985 and paragraph 2 of Schedule 2 to the Housing Act 1980 or Schedule 6 of the Housing Act 1985. The landowner of the remainder is Braintree District Council).

Areas appeared to be left as open land in conjunction with the development of what was originally a council housing estate. An objection dated 28 June 2013 was received from BDC on 2 July 2013. It made a number of points summarised below.

The land was acquired with other land by Witham Urban District Council in December 1964. Those assets transferred to BDC in 1974. It was laid out as a housing estate with roads and open spaces in accordance with statutory powers now contained in the Housing Act 1985. Part of the land was transferred to Greenfields Community Housing Association in 2007; the rest (which forms the majority of the applicant land) remains with BDC. Third party rights exist in relation to a water pipe and also a right to take water from the land. Common footpaths within the land are subject to rights of way for owners, tenants and occupiers of the housing area. Byelaws confirmed on 13th December 1993 also apply to use of the land.

BDC specifically took the point that 'the site was laid out as a council housing estate with roads and open space in accordance with the powers which were re-enacted in Section 13 of the Housing Act 1985.' It also claimed in its objection that the majority of the present application site has been considered to be 'public open space', and indeed part of a larger area of public open space known as the Spa Road Recreation Area. Furthermore it says that the larger area (including the majority to the application land) has been the subject of byelaws 'for Parks, Recreation Grounds and Open Spaces' which it made in 1992 under the Open Spaces Act 1906.

BDC considers the land to be public open space except for the part between the dwellings of Teign Drive. Local Plans have defined this as informal recreation land since the Witham Town map of 1976 and is still shown on the Local Plan Review adopted in 2005 as such. This is replicated in part in the Site Allocations Development Management Plan 2013. The part not included is shown as a proposed road.

In relation to the more substantial part of the land behind Teign Drive, BDC confirm they treated this as open space laid out and available to the public and that use is 'by right' rather than 'as of right'. The notice referred to by the applicant in her statement was to prevent adverse possession and claims for public rights of way and to clarify that BDC consented to their use of the land. This was intended to prevent a claim for village green on the basis of use as of right and 'without permission'.

In relation to the rectangular section between the houses on Teign Drive, this is ancillary open space and forms part of the landscaping of the housing estate. It gives access to dwellings and abuts front gardens. It also provides access from other roads. Teign Drive was BDC owned properties, many now sold under the Right to Buy Scheme and the remaining land now transferred under its Housing Stock Transfer to Greenfields Community Housing Association. Use of this area is also considered to be 'by right'. Tenants would have rights of way over estate ways and similar rights would be included in 'right to buy' purchase documents. BDC considers this relates to all the use including by children for recreation. BDC would not give express permission, especially for use of the land by children but, as this was ancillary to the occupation of the residential properties, it would be unreasonable to withhold consent.

BDC were critical of the lack of user evidence in one statement and the lack of time period information in 8 statements. They did accept that those 8 statements could be supportive of the remainder.

BDC stated that the application land is south of the Humber Road Estate and is a part of a larger public open space known as Spa Road Recreation Area in Witham. Witnesses are from Humber Road, Ness Walk and Teign Drive, with the majority (10) from Teign Drive. 4 statements (6 users) demonstrate users abut or are near to the land. BDC consider this use is ancillary to the occupation of their properties. BDC do not consider that the statements provide sufficient information to evidence that a significant number of inhabitants have used the land to satisfy section 15(2).

The earliest user evidence is forty and a half years ago. Only 9 statements provide evidence of activities over a requisite 20 year period (Carter, 40.5 years; Shepherd (x2), 39 years; Heyman, 35; Holditch, 29; Thornhill (x2), 27; and Doran (x2), 27). The evidence is mainly anecdotal in relation to activities consistent with sports and pastimes.

The applicant's statement is consistent with BDC's view that the land is public open space and use is therefore 'by right'. BDC agrees with the applicant's statement that there are many pedestrian accesses which have never been blocked. There was no need to as the public can use the land 'by right'.

The applicant's photographs appear to be of the land between the houses on Teign Drive so are evidence of ancillary use. One photograph is of the dog waste bin which is

provided by BDC. This is consistent with BDC's view that the land is public open space and the public can use it by right.

A byelaw made on 14th December 1992 and confirmed on 13th April 1993 relates to the Spa Road Recreation Area. There is no plan accompanying the byelaw but BDC consider that it includes the area behind Teign Drive. It is made under section 164 Public Health Act 1875 and section 15 Open Spaces Act 1906 in respect of pleasure grounds. These are defined as including parks, playing fields, sports grounds, recreation grounds and open spaces. Any 'no ball games' sign would have been in accordance with the byelaw provisions.

In conclusion BDC considered that the application should be refused. The public use of the land behind Teign Road has been 'by right'. Use has been controlled by the byelaw. The land between the houses on Teign Drive is also 'by right' as regards the occupants of Teign Drive. The application does not therefore comply with s15 (2) of the Commons Act 2006.

Although not specifically mentioned by the objector any issues regarding potential 'as of right' uses following their transfer to Greenfields in 2007 would not of itself give rise to a requisite period of user between 2007 and 2013.

8. OUTLINE OF THE RELEVANT ISSUES

The relevant issues for consideration are:

- a. Has the use been for lawful sports and pastimes?
- b. Has there been 20 years of such use?
- c. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?
- d. Has the user by inhabitants been as of right?

Has the Use Been for Lawful Sports and Pastimes?

The onus is on the applicant to establish her case with sufficient certainty as to the nature, extent and time of the alleged activities and the locality of those who are claimed to benefit from the rights. The uses indicated in Appendix 1 would be uses which could be termed lawful sports and pastimes.

Use of the recorded highway routes across the site would be taken to be by virtue of those public rights but the users do not define their use of the land in those terms. To the extent that pedestrian use and dog-walking follows any adopted highway, that use can be attributed to the exercise of a right of way and as such is irrelevant to the village green application.

The relevant test is: "how the matter would have appeared to the owner of the land". Applying this test, can it be concluded that the use was sufficient to bring to the notice of a reasonable landowner the fact that village green rights were being asserted? Here the landowner has indicated that they viewed all use as being within the ambit of the

conveyance rights they had granted or by virtue of it being made available as open space.

Has there been 20 years use?

Use of the claimed land is continuing at the present date. The applicant has only indicated that the land has been used for 30 years and no specific time period has been claimed. It would be usual to take the 20 year period immediately preceding the application, from 1993 to 2013.

Taken together there is some evidence of use as set out in Appendix 1 in excess of 20 years up to the date of the application.

Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?

The applicant indicated that the use of the site was by residents of the Witham West Ward area. The applicant provided a plan which indicates the addresses from which the users of the claimed green derive. The users were clustered around the streets in the immediate vicinity of the land. A significant number reside in Teign Drive.

Has the user by inhabitants been as of right?

The applicant indicates there has been no challenge to use by signage on the site until recently when a notice 'permitting' use has been erected. A 'no ball games' sign was observed which BDC say is consistent with the byelaw applicable to the site.

The critical issue appears to be whether the use that has taken place can be said to fall wholly within the 'as of right' use by providing the land as open space and ancillary housing land to the residents of the area since the estate was constructed.

BDC set out the manner of the acquisition and use of the land during their ownership. They regarded the public as having the benefit of a right to use the land they had provided specifically for this purpose. In relation to the land between the houses this had a slightly different character and purpose, being ancillary to the use of the houses but would still be viewed by them as giving the residents a right to use the land.

The landowner's action in erecting the 'no ball games' sign appears to indicate that the control offered by the byelaws has been applied in at least one instance. The very recent action of the 'permissive' notice on the land would not impact on the user evidence to a great degree as it comes at the very end of the relevant user period but it is equally clear that the points made by the landowner in relation to the deficiencies in the user evidence are sound.

Legal issues in relation to grounds for registration

Counsel was asked to consider if, in these circumstances, there is support from case law for an 'as of right' argument on behalf of a local authority landowner who has laid out land in the way that BDC has which has been used for these purposes. If that

argument was likely to be successful there may be nothing to be gained by holding a public inquiry on the application.

Counsel examined BDC's argument and supporting documents and provided an advice. The significant points are summarised below:

- The land applied for was left as open land in conjunction with the development of a council housing estate.
- BDC has specifically stated that the site was laid out in accordance with powers re-enacted in section 13 of the Housing Act 1985. It claimed the majority of the site was considered as public open space. The larger part was known as the Spa Road Recreation Area and the subject of byelaws made in 1992 under the Open Spaces Act 1906. This is the part shown hatched green on Appendix 2. Although there was no map or plan associated with those byelaws he did not consider that uncommon and left it to evidence or local knowledge to establish whether a particular piece of ground is or is not within an area covered by relevant byelaws.
- The applicant hasn't challenged in her reply to BDC's objection the point that the larger part of the land is said to be open space and subject to the byelaws.
- Taking account of recent case law (the Supreme Court in **R (Barkas) v North Yorkshire County Council** [2014] UKSC 31) it is inevitable that the Commons Act 2006 application must fail in relation to this larger plot of land. There is no logic or need to arrange a public local inquiry to reach this decision.
- The small piece of land between the houses at Teign Close was not claimed to be public open space or subject to the byelaws. This is the part hatched red on Appendix 2. It is stated to be subject to 'ancillary' rights in favour of local residents derived from their occupation of (later) ownership of properties on the housing estate. Counsel did not consider this in itself a sufficient answer to claims of use by local people from a housing estate more widely to have used a piece of land for lawful sports and pastimes recreational enjoyment.
- However, BDC asserted, without contradiction by the applicant, that the whole of the land, including this small but significant part, was laid out with roads and 'open spaces' in accordance with the same Housing Act powers. He considered this a plausible and logical argument. The most rational explanation for the existence of the small area in Teign Drive is that it was indeed provided as an 'open space' as part of the housing estate development in accordance with those powers. He considered that it was inevitable, following the same case law, that this part of the application must also fail as a matter of law, as a 'knock out' legal point and again would not need the commons registration authority to arrange a public inquiry to make a decision.

Counsel's advice is that a decision to refuse the application without a public inquiry is a reasonable course of action for the commons registration authority to take on the facts on the case as evidenced by the exchanges of the parties. The open space issue is the sort of 'knock out' legal point which means that there would be no logic or need for the commons registration authority to arrange for a public local inquiry. It is inevitable and unsurprising that local people should have been using this land for recreational enjoyment but it does mean that it does not pass the statutory tests for registration required for the application.

9. CONCLUSION

Although the user evidence may be adequate to demonstrate lawful sports and pastimes and the locality claimed satisfies the various legal tests, the manner in which the land has been provided by the district council is persuasive evidence that use of the majority of the land applied for has been 'by right'. It was recreational land provided by BDC during the period from when the estate was built in the early 1970s and use from then to when the application was made or when the land was transferred in 2007 was 'by right'.

The remaining land between the houses is subject to rights for the benefit of individual properties and forms part of the ancillary land to the housing estate since the estate was constructed. As such the use of these areas would also be 'by right'.

The recent decision by the Supreme Court on the interpretation of 'by right' use in the **Barkas** case makes it clear this is the correct interpretation on the facts described.

10. LOCAL MEMBER NOTIFICATION

The local member was aware of the application, has been consulted and had no comments to make.

11. RECOMMENDED

That the application is rejected on the basis that the use demonstrated has taken place 'by right' and village green rights have not arisen.

BACKGROUND PAPERS

Application by Mrs J Shepherd dated 21 January 2013 with supporting papers.

Local Member Witham Southern

Ref: Jacqueline Millward CAVG/78

APPENDIX 1

Evidence in Support

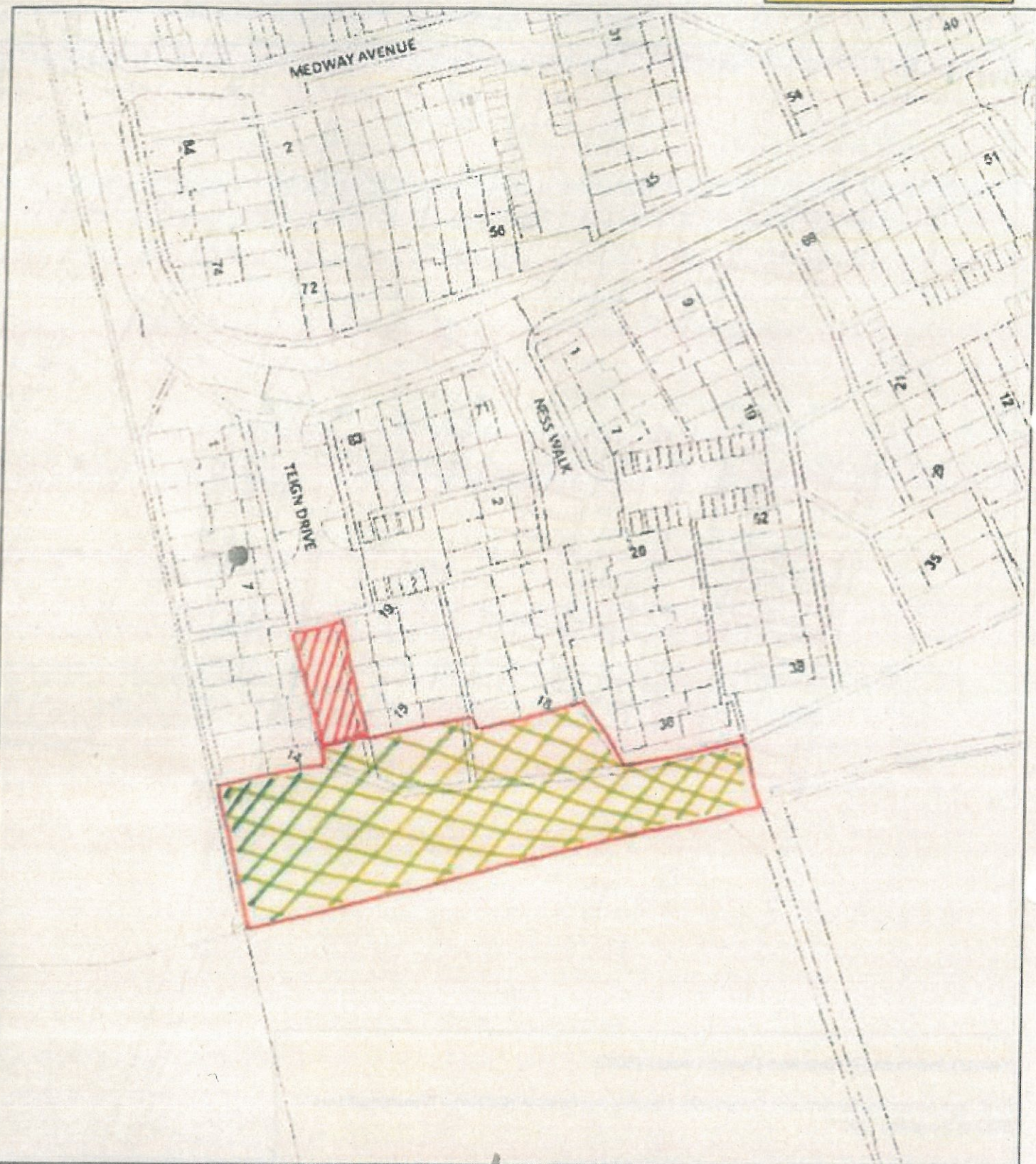
User evidence		
1	Mary Holditch	Moved in in May 1983. Children played on land from

	30 Ness Walk CM8 1TN Form dated 1/12/12	day moved in. Grandchildren also played there. Saw other children from window regularly as well as dog walkers.
2	Karen Davis 26 Chipstead Way Banstead SM7 3JP Form dated 14/12/2012	Played games 'down the block' and on the green. Interacted with horses, wildlife and many dogs walked there.
3	Lisa Baker 14 Teign Drive CM8 1TW Form dated 3/12/2012	Lived there 11 years. Children, aged 4 and 6, regularly used green. Green is directly outside home. Children ride scooters and bikes around the square in front of house. Busier in summer with some parents as well as children. Family have played rounders, football and cricket. Lots of families have snowball fights and build snowmen in winter.
4	Angie Carter 2 Ness Walk CM8 1TN Form dated 11/12/2012	Lived at address last 40 years. Self, husband and friends walked along footpath and surrounding area. Children played and picnicked on green and in fields. Spent time with cows in field when calving.
5	Carly Dobson 7 Teign Drive CM8 1TW Form dated 9/12/2012	Age 37. Played on 'big field' when a bit older. Football, rounder, ditch climbing, rope swing over ditch at bottom of Teign Drive. Moved away aged 21. Moved back 9 and a half years ago with husband and son. Son uses on bike, skateboard, scooter. Plays football with friends. Children and adults building snowmen and having snowball fights on 'bottom field' in snow last year (2011).
6	Graham and Jacqueline Doran 10 Teign Drive CM8 1TW Form dated 11/12/2012	Lived in Teign Drive 27 years. Green in front of house has been used by children to play on. Neighbours meet outside for barbecues etc. in summer. Used to be seating areas. Dog walkers, children playing. When estate built believed was a communal area on plans. 5 grandchildren who play out on the green.
7	Miss Edwards 78 Humber Road CM8 1TQ Form dated 7/12/2012	Take dogs for a walk daily. Also walk with friends and their children to the newly established park. Seen other children playing in summer.
8	Mrs Michelle Foxlow 3 Teign Drive CM8 1TW Form dated 9/12/2012	Uses green by Teign Drive to walk her dog.
9	David Harwood 74 Humber Road CM8 1TQ	2 daughters played there as kids and two nephews. Walked dogs on area. Grandsons played there and picnic in summer.

	Form dated 8/12/12	
10	Mrs Lynda Heyman 5 Teign Drive CM8 1TW Form dated 8/12/2012	Moved to Teign Drive April 1977. Son was 6. Constantly played games on the green area at the bottom of Teign, cycling around the square. Sometimes with friends. Grandchildren do same. Can see them front of house.
11	Elizabeth Massie 9 Teign Drive CM8 1TW Form dated 7/12/2012	Observes that has been used for casual recreation since the houses were built about 1973.
12	M Pegler 8 Teign Drive CM8 1TW Form dated 10/12/2012	Has 4 children who all play on green.
13	Amanda Pleasance 16 Teign Drive CM8 1TW Form dated 11/12/2012	Lived at 16 Teign Drive for over 7 years and green has been used for all kinds of reasons by community. Barbecues for each house, children's parties, and neighbours having a cup of tea and watching children play. Used by children in all weather.
14	Ms Lily Rainger 1 Ness Walk CM8 1TN Form dated 29/11/2012	Grandchildren played on green for years.
15	Janet and Trevor Shepherd 6 Teign Drive CM8 1TW Joint form dated 4/12/2012 Statement by Mrs Shepherd dated 21/01/2013	<p>Mrs Shepherd is the applicant.</p> <p>Moved in to house in 1973 when new. Could see children playing from window. Daughter born in 1975 and played on grass and set up tea sets on wall from early age. Would sit out with mums and be supplied with tea. Kids would play rounders on extended green when older. Was also football and a rope to swing on. Children came from surrounding roads. Green was intended for recreational purposes.</p> <p>Still live in property. Land is not fenced off and can access directly from 6 Teign Drive. Originally was concreted over and there was a fixed seating area. Photograph provided. Now grassed. Area has been used by residents and their families within locality continuously. Own children and of other families in Teign Drive have regularly played on land. Daughter learned to ride her bike and roller skate on the land. Observed over last 30 years sports, rounders, cricket and other sports, picking sloes, football and other ball games, kite flying, dog walking, setting up camps, playing with dogs and cars, model planes, roller skating, bike riding, playing Frisbee, bird watching and other activities. Tree on land used in past for</p>

		<p>swinging with rope.</p> <p>When weather good land used by people on a daily basis. Sunbathers. A place of congregation. Used for picnics, communal and private parties. Own family have used for family picnics, impromptu family gatherings, midsummer parties and family birthdays. Use has never been challenged.</p> <p>Pedestrian access points never blocked. Land used to walk dogs by others on daily basis. Route to Footpath 76 is well used. Dog waste bin installed on land.</p> <p>Never sought permission to use. Understood that when estate constructed was intended for recreational purposes ancillary to the housing.</p> <p>Approximately 10 years ago a sign erected by Council saying 'no ball games', possibly as a result of complaint by home owner to noise of balls against flank wall. Use continued thereafter. Not aware anyone has been asked to stop use.</p> <p>New sign noticed on 23 December 2012 stating permission is granted to use the land.[sign reads: NOTICE Highways Act 1980 s31(3) – Commons Act 2006 s15 THIS LAND IS PRIVATE PROPERTY Although this land is private property, permission is granted by the landowner for members of the public to access the land until further notice on condition that they do so at their own risk Please note that this permission may be withdrawn at any time No responsibility will be accepted for any loss or damage arising out of such use of the land.]</p> <p>Aware of planning application to develop and be a public highway to enable development of adjacent land. Collected approximately 160 signatures to a petition to support claim to remain a village green and not become a road.</p>
16	Sharon and Keith Thornhill 68 Humber Road CM8 1TQ Form dated 29/11/2012	Lived at 68 Humber Road for 27 years. During that time used Horsemans Field to play ball with grandchildren, feed the horses which were there and used the pathways through it on a regular basis. Continue to do so.
17	Paula and Daniel Voyce 4 Ness Walk CM8 1TN Form dated 3/12/2012	Lived at 4 Ness Walk since 1998. 3 children use this part of Teign Drive to play. Ages 10, 8 and 6, who are able to meet up with friends living in Teign Drive.
18	Natasha Winter 13 Teign Drive CM8 1TW Form undated	Moved in to property with two children because was somewhere safe to play.
19	K C Davies	Lived there since April 1980. Used green area to

	<p>40 Ouse Chase CM8 1TX</p> <p>Letter dated 06/02/2013</p>	<p>exercise dogs, children (2 and 6 when moved in, now 35 and 39) and grandchild. When moved in area was designated by Braintree DC as are for recreation and verbally confirmed by the Estate Manager. Daughter learnt to ride bike here. Braintree DC have provided play and exercise equipment showing commitment to use as recreational land. New notice at end of Teign Drive tends to confirm BDC acknowledgement of right to use the land.</p>
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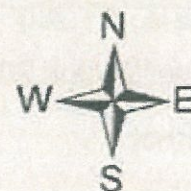
Scale: 1:1,250

Date: 24 Jun 2013

Author:

Map Notes

0 5 10 20 30 40 Meters



DR/31/14

Committee DEVELOPMENT & REGULATION

date 25 July 2014

INFORMATION ITEM**Applications, Enforcement and Appeals Statistics**

Report by Director of Operations, Environment & Economy

Enquiries to Robyn Chad – tel: 03330 136 811

or email: robyn.chad@essex.gov.uk**1. PURPOSE OF THE ITEM**

To update Members with relevant information on planning applications, appeals and enforcements, as at the end of the previous month, plus other background information as may be requested by Committee.

BACKGROUND INFORMATION

None.

Ref: P/DM/Robyn Chad/

MEMBER NOTIFICATION

Countywide.

SCHEDULE**Minerals and Waste Planning Applications**

No. Pending at the end of previous month

20

No. Decisions issued in the month

5

No. Decisions issued this financial year

11

Overall % in 13 weeks this financial year (target 60%)

63%

% on target this financial year (CPS returns count)	27%
Nº Delegated Decisions issued in the month	4
Nº Section 106 Agreements Pending	1
<u>County Council Applications</u>	
Nº. Pending at the end of previous month	10
Nº. Decisions issued in the month	1
Nº. Decisions issued this financial year	9
Nº of Major Applications determined (13 weeks allowed)	0
Nº of Major Applications determined within the 13 weeks allowed	0
Nº Delegated Decisions issued in the month	1
% age in 8 weeks this financial year (Target 70%)	44%
<u>All Applications</u>	
Nº. Delegated Decisions issued last month	5
Nº. Committee determined applications issued last month	1
Nº. of Submission of Details dealt with this financial year	54
Nº. of Submission of Details Pending	75
Nº. of referrals to Secretary of State under delegated powers	0
<u>Appeals</u>	
Nº. of appeals outstanding at end of last month	2
<u>Enforcement</u>	
Nº. of active cases at end of last quarter	23
Nº. of cases cleared last quarter	20

Nº. of enforcement notices issued last month	0
Nº. of breach of condition notices issued last month	0
Nº. of planning contravention notices issued last month	0
Nº. of Temporary Stop Notices Issued last month	0
Nº. of Stop Notices Issued last month	0

