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By email to: Harry.Goodchild@hants.gov.uk
and by post

25 June 2020

Dear Sir

Application for the registration as a town green of land described as The Green, Coles Mede, Otterbourne, near Winchester, Hampshire SO21 2EG.

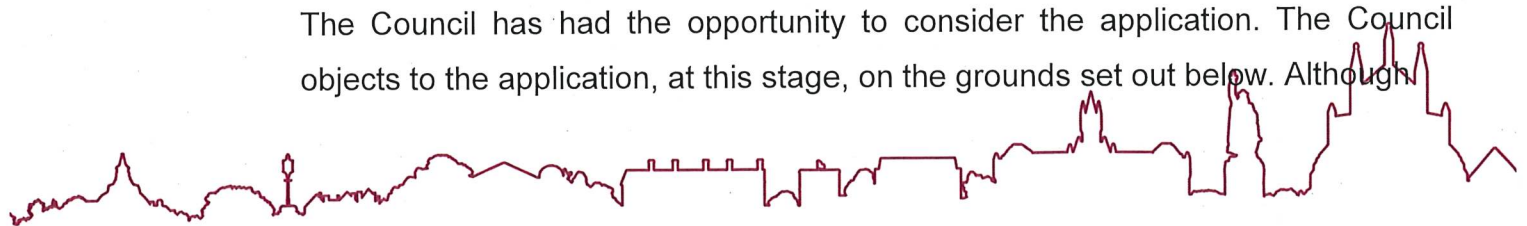
Application Reference: VG266.

By an application ("the application") made under the section 15(2) of the Commons Act 2006 on 25 June 2015, Jennifer Larby seeks to register as a town green a parcel of land used as public open space and described at part 5 of the application form as "The Green", at Coles Mede, Otterbourne ("the application land").

The application was made to Hampshire County Council as the Commons Registration Authority ("the Registration Authority"). The application has been given the reference VG266.

Winchester City Council ("the Council") is the owner of the freehold interest in the application land. Coles Mede is an unclassified publicly maintainable highway.

The Council has had the opportunity to consider the application. The Council objects to the application, at this stage, on the grounds set out below. Although



the Council has not yet been asked to submit formally its Statement of Objection, it is considered that those grounds of objection, if accepted by the Registration Authority, each are fatal to the application and each give rise to a series of “knock out blows”. As such, the Registration Authority is invited to consider these grounds of objection and the matters raised, as preliminary issues and to determine, on the basis of them, that the application should be rejected at this stage.

The grounds of objection set out below are limited to those which, the Council considers, generate *in principle* objections to the application. The Council reserves an entitlement to supplement or to amend these grounds of objection should the application proceed further.

Approach to the Determination of the Application

The burden of proving that the relevant qualifying criteria are met rests on the Applicant.

The standard of proof is the civil standard, namely the balance of probabilities. The need for particular and careful scrutiny of the Applicant's case has been emphasised by the Court. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 Lord Bingham held as follows, at paragraph 2:

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

The Qualifying Requirements

The relevant qualifying requirements are derived from s.15(2) of the Commons Act 2006. Those are as follows:

- the use of the land for lawful sports and pastimes
- by a significant number of the inhabitants of a locality or of a neighbourhood within a locality

- as of right
- for a period of not less than 20 years up continuing up to the date of the application.

That the application land has been used for lawful sports and pastimes for many years is not in dispute. The grounds of objection set out below are concerned, principally, with the qualifying requirement that use of the application land should be *as of right*.

The Statutory Holding Power

The application land was acquired by the statutory predecessor to the Council - the Winchester Rural District Council - through two separate conveyances completed in 1936 and in 1938. On both occasions, the land parcels were conveyed to the Rural District Council by Winchester College. The consideration payable was stated to be £450 and £150 respectively. As is not uncommon, neither conveyance states the power relied upon for the acquisition, nor the purpose of the acquisition.

However, material within the Council's archive demonstrates that the parcels of land were acquired for the purpose of delivering new homes. The decision to acquire the two parcels of land was made by the Housing Committee of the former Winchester RDC.

Records held by Otterbourne Parish Council are consistent too with the land acquired in 1936 and in 1938 having been acquired for housing purposes. The Parish Council records demonstrate that (a) there was a demand for new council housing in Otterbourne, (b) that the Parish Council were pressing for new housing to be provided, (c) the Parish Council drew the attention of the former Winchester Rural District Council to the availability of land at Otterbourne Hill, and (d) that following acquisition, the land acquired was to be know as Coles Mede, being the name of the former field on which the houses had been built.

Moreover, a valuation report prepared for Winchester College, from whom the two parcels of land were acquired in 1936 and 1938 respectively, records that the land

transferred in 1936 was intended by the Council "for their housing scheme" (see report of 4 August 1936). A further valuation report prepared for Winchester College for the purposes of the acquisition of further land in 1938 records that the Council had "built cottages on the part of the area" conveyed in 1936 (see valuation report of 22 February 1938). Moreover, a third valuation report of 19 January 1945 (which concerns a further parcel of land acquired by Winchester RDC (but outside the application land)), records that "The College sold the western half of this field to the Winchester R.D.C. for a housing site in 1936, and a further plot adjoining that for a similar purpose in 1938".

The land so conveyed was thereafter laid out as a housing estate which became known as Coles Mede.

The application land was developed as part of that wider estate and was laid out and thereafter maintained as an area of open space within the Coles Mede estate. That this was the case is confirmed by Part 7 of the Application form, where it is stated that the application land "was established in 1936 when the current houses of Coles Mede were constructed".

The land has thereafter and at all times been maintained as open space.

At the time of acquisition of land in 1936, the operative legislation by which local authorities were empowered to acquire land for housing purposes and thereafter develop and lay out such land was the Housing Act 1925. By 1938, the relevant legislation was set out within the Housing Act 1936.

Section 58 of the Housing Act 1925 provided a power for a local authority to acquire land for the erection of dwellinghouses. S.59(1)(a) of the Housing Act 1925 provides that where land has been acquired by a local authority for housing purposes then it may "lay out and construct ... open spaces on the land". The corresponding provisions within the Housing Act 1936 are ss.73 and 79(1)(a) respectively.

Where land is acquired by a local authority and thereafter held for housing purposes, it is to be presumed that the authority was acting lawfully and pursuant to the statutory powers available to the authority to acquire and hold land for such purposes. It follows, on the basis of the matters of fact set out above, that, on the balance of probabilities, the application land (together with other land subsequently laid out as Coles Mede) was acquired and laid out pursuant to powers within the Housing Acts (see *Naylor v Essex County Council* [2014] EWHC 2550 (Admin); *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58) ('Lancashire').

Thus,

- the Application land, as part of a wider parcel, was acquired by the Council's predecessor pursuant to express statutory powers to acquire land for housing purposes; and
- the application land was laid out as open space and has at all material times thereafter been made available and maintained as open space pursuant to statutory powers to provide open space on land acquired for housing purposes.

The relevant documentation which is available in copy form to the Council is included in an appendix to this letter. Some documentation referred to above is held in archives maintained by Hampshire County Council. This material has been inspected by officers of the Council. Given the condition of some of this material, it was not possible to take copies of this material. In the event that the Registration Authority considers that copies of this material would be of assistance, the Council will seek to obtain copies of this same upon request and when the archived can again be accessed.

Grounds of Objection

Ground 1

It is well established in law that where land is held or made available by a local authority as recreational open space pursuant to an express statutory power to do

so, then the use by the public of that land for recreation will be *by right* not *as of right* (see *R (Barkas) v North Yorkshire County Council* [2015] AC 195 ('*Barkas*') per Lord Neuberger PSC at paras.21, 23-24).

The application land was acquired for housing purposes and was laid out as open space pursuant to express statutory powers to do so, as identified above. The land has at all times thereafter been retained and maintained as open space.

Use of the application land as for lawful sports and pastimes here therefore been *by right* rather than *as of right* following *Barkas*.

It follows that the requirement for the Applicant to demonstrate that the application land has been used for lawful sports and pastimes *as of right* throughout the qualifying period cannot be met.

This omission is, of itself, fatal to the application.

Ground 2

Moreover, and without prejudice to ground 1, if (which is not accepted) the application land was not laid out as open space pursuant to the statutory powers set out in the Housing Acts or other statutory powers, then the fact that the land has been laid out and maintained as open space so as to facilitate its use for recreational purposes means that any use of it for lawful sports and pastimes is *by right* in any event (see *Barkas* (above) and *Beresford* (above)).

Ground 3

The application land was acquired for statutory housing purposes. The application land has thereafter remained held for statutory land housing purposes, albeit laid out and maintained as open space. In terms of its statutory holding power, the Council is therefore entitled statutorily to use the application land for general housing purposes, not limited to open space, should it consider it expedient to do so. Such purposes would include its development for housing (subject to securing planning permission).

The registration of the application land as a town green would prevent the use of the land for wider housing purpose; its development to deliver new homes, in particular, would be precluded absolutely.

The Supreme Court confirmed in *Lancashire* that where the effect of registration as a town/village green of land held by a public authority would be to prevent the use or development of the land for the statutory purposes for which it is held then, on the basis of statutory incompatibility, the registration of the land is precluded as a matter of law.

The principle of statutory incompatibility established in *Lancashire* is engaged in respect of the application land. The registration of the application land will preclude its potential future use for general housing purposes by the Council and therefore for the purposes for which it is statutorily held. For the avoidance of doubt, it is not necessary, for the principle of statutory incompatibility to be engaged, for there to be a positive or firm intention to use the land for the statutory purposes which would be impeded by registration. Following *Lancashire*, the registration of the application land is precluded as a matter of law.

Disposal of the Application

The grounds of objection set out above are fundamental and unanswerable.

The issues raised by the above grounds are capable of being determined without the time and expense of a public inquiry which would necessarily be incurred by the Applicant, the Council and the Registration Authority. The Registration Authority is therefore requested to consider these grounds of objection as preliminary issues and to determine whether the application should be rejected accordingly.

We anticipate that the Registration Authority will wish to set directions for determination of a preliminary issue, including for lodging of evidence and any submissions by the Applicant and the Council, as Objector. The Council will provide copies of the archival and other evidential material referred to above in accordance

with such directions or upon request. We request that such directions are issued forthwith.

Yours faithfully

A handwritten signature in black ink, appearing to be 'CK', written in a cursive style.

Catherine Knight
Service Lead – Legal

cc The Applicant - Jennifer Larby, 13, Coles Mede, Otterbourne, Winchester, SO21
2EG by post and email