



Mr H Goodchild
Map Review Manager
Hampshire County Council
Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

Your Ref:
Our Ref : MW/TVG Coles
Contact: Michael Woods
Direct Line: (01962) 848181
M: 07713 691821

Email: mwoods@winchester.gov.uk

17 February 2021

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.

We refer to the formal objection dated 25 June 2020 by Winchester City Council ("WCC") to the application ("the application") made under the section 15(2) of the Commons Act 2006 on 25 June 2015 to Hampshire County Council as Registration Authority ("HCC") under which 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 Mead, Otterbourne.

Following consideration of the submissions made to HCC by the applicant under cover of email of 6 January 2021 and by the applicant's advisers Gowling WLG by way of letter dated 20 December 2020 regarding WCC's formal objection, WCC offers the following response.

Letter of Philip and Jennifer Larby (sent to HCC under cover of email of 6 January 2021)

Response 1 – Holding Power

The evidence on which WCC relies to demonstrate that the application land was acquired and has at all times since been held pursuant to the Housing Acts is summarised in the Statement of Objection and contained within the appendix thereto. That evidence reveals that on the balance of probabilities the application land was acquired and was laid out and thereafter maintained as open space pursuant to powers in the Housing Acts.



Response 2 – Barkas

The application land was acquired as housing land and laid out as open space pursuant to express powers contained therein (see Housing Act 1926 s.59, Housing Act 1936 s.79 and WCC Statement of Objection page 4). No ministerial consent was required. In *Barkas*, the land was laid out as a recreation ground for which such consent was required (see e.g. s.80(1) Housing Act 1936).

The principle established in *Barkas* is engaged in the same way whether or not ministerial consent is required pursuant to a statutory provision.

Response 3 – As of right

WCC's position is that by reason of the statutory holding power or by reason of the maintenance of the land to make it suitable for public recreational use, any use for lawful sports and pastimes is *by right* and not *as of right* (see Statement of Objection Grounds 1 and 2). That conclusion follows ineluctably as a result of the holding power and the operation of *Barkas*.

Response 4 – Beresford

Beresford was not overruled in *Barkas* in respect of Lord Bingham's conclusions as to the burden and standard of proof (see WCC's Statement of Objection (see page 2)).

Barkas expressly held that encouragement by a landowner of use of land is such that the use is permissive and not as of right. To that extent *Barkas* did overrule *Beresford* and it is in that context that *Beresford* is referred to and relied on for the purposes of ground 2 in the Statement of Objection.

Response 5 – Statutory Incompatibility

The majority judgment in *Lancashire* is that of Lord Carnwath and Lord Sales JSS with whom Lady Black JSS agreed. That majority judgment is the ratio in the case.

TVG registration would prevent the application land being developed for housing, which is the statutory purpose for which the land was acquired. Incompatibility therefore arises. A fixed intention to use the land for such purposes is not necessary for the preclusion to registration by reason of incompatibility to be engaged, as is made clear in *Lancashire*.

Gowling WLG letter of 20 December 2020

WCC's response to the points made in Gowling WLG's letter of 20 December 2020 is as follows, using the same paragraph numbers as used in that letter:

1. A full copy of the Appendix to the WCC letter of 25 June 2020 addressed to Mr. Goodchild was sent to Ms. Larby by email of 29 June 2020 and by post (as attached).

2. The information relied on by WCC in support of its position as to the holding power is enclosed as Appendices to the Statement of Objection.
3. This is accepted and reflects WCC's position.
4. WCC has shown that the application land was acquired and is held for housing purposes and was laid out and is maintained as open space pursuant to statutory provisions set out in the Housing Acts. This is fully particularised in the Statement of Objection.
5. WCC's position is set out in its Statement of Objection. The application land was acquired and is held for housing purposes and was laid out and maintained as open space pursuant to express provisions included in successive Housing Acts. No appropriation is claimed and none is relied on. WCC can only act pursuant to statutory powers. The powers relied upon were those in the Housing Act 1925 and successor Acts.
6. The land has been established to have been acquired and laid out pursuant to the Housing Acts.
7. Grounds 1 and 2 are advanced in the alternative; they are not the same. The Statement of Objection is entirely clear. Gowling LLP misunderstand the difference between the two grounds.
8. Already answered above.
9. Ground 2, in the alternative to ground 1, is that *if* (which is not the case) the application land was not acquired for housing purposes and laid out and maintained as open space pursuant to express provisions within the Housing Acts, the fact that the land has been maintained as open space to facilitate public use is such that any use for lawful sports and pastimes would be permissive in any event.

HCC as the Registration Authority is requested to consider the above responses as part of WCC's formal grounds of objection as preliminary issues and to determine whether the application should be rejected accordingly.

Yours faithfully



Catherine Knight
(New Zealand qualified)
Service Lead – Legal
Deputy Monitoring Officer