HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Jonathan Woods – Countryside Strategic Manager
Date:	03 October 2024
Title:	Application for the registration of land at Orchard Close, New Alresford, as a town or village green (Application No. VG271) Section 15, Commons Act 2006
Report From:	Director of Universal Services

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Purpose of this Report

1. The purpose of this report is to recommend whether to accept an application to record land at Orchard Close, New Alresford, as a town or village green.

Recommendation

2. That the application to register the land (shown edged blue on the plan appended to this report) be refused.

Executive Summary

3. Hampshire County Council is the Commons Registration Authority (CRA) for the purpose of exercising functions under the Commons Act 2006. One such function is the determination of applications made to register land as a town or village green. In the present case, the County Council must determine whether to accept an application to register land at Orchard Close, in New Alresford, as a town or village green. The application was advertised and attracted an objection from Winchester City Council. The applicant was given the opportunity to respond to these objections.
4. Whilst it is commonplace for applications under the 2006 Act to be determined following the holding of a non-statutory public inquiry, in this case the matter hinges upon the interpretation of relevant case law, and it is therefore recommended that in this case the application can be determined without the need for a public inquiry to be held.

Legal framework for the decision

COMMONS ACT 2006

Registration of greens:

15(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

15(2) This subsection applies where-

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

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

THE COMMONS (REGISTRATION OF TOWN OR VILLAGE GREENS) (INTERIM ARRANGEMENTS) (ENGLAND AND WALES) REGULATIONS 2007

Consideration of objections

6(1) Where an objection is made under Section 15(1) of the 2006 Act to register land as a town or village green, as soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority must proceed to the further consideration of the application, and the consideration of statements (if any) in objection to that application, in accordance with the following provisions of this regulation.

(2) The registration authority –

(a) must consider every written statement in objection to an application which it receives before the date on which it proceeds to the further consideration of the application under paragraph (1); and

(b) may consider any such statement which it receives on or after that date and before the authority finally disposes of the application.

(3) The registration authority must send the applicant a copy of every statement which it is required under paragraph (2) to consider, and of every statement which it is permitted to consider and intends to consider.

(4) The registration authority must not reject the application without giving the applicant a reasonable opportunity of dealing with—

(a) the matters contained in any statement of which copies are sent to him under paragraph (3); and

(b) any other matter in relation to the application which appears to the authority to afford possible grounds for rejecting the application.

OPEN SPACES ACT 1906

9. A local authority may, subject to the provisions of this Act,-

(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and

(b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and

(c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.10) Maintenance of open spaces and burial grounds by local authority

10. A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired —

    (a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and

    (b) maintain and keep the open space or burial ground in a good and decent state.

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

DEFRA Guidance regarding the Open Spaces Act 1906

('Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate – December 2014', Para 6.10.44)

'If land is held on trust for the purpose of recreational use and enjoyment by the general public (or a section of the public including the users of the land), the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. The clearest example of a statutory trust is that imposed in terms on open space land held under the Open Spaces Act 1906 by Section 10 of that Act, which obliges the local authority to "hold and administer the open space in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and…for no other purpose".

RELEVANT CASE LAW

R v Oxfordshire County Council and Others, Ex Parte Sunningwell Parish Council – House of Lords (2000) – 'Sunningwell'

The House of Lords decided that the proper test for user as of right is an objective test based on evaluation of the actual user: was it without force, without stealth and without licence (*nec vi, nec clam, nec precario*). Emphasis was placed on the need to consider how the matter would have appeared to the landowner.

R (on the application of Laing Homes Ltd) v Buckinghamshire County Council

The High Court endorsed the view that identification of the relevant locality (or neighbourhood within a locality) was a matter of fact for the registration authority to determine in the light of all the (potentially conflicting) evidence. Subject to considerations of fairness towards the interested parties, the registration authority should be able to decide that question irrespective of whether this corresponded with what had been put forward by the applicant.

R (on the application of Cheltenham Builders Ltd) v South Gloucestershire Council

Sullivan J held that a 'neighbourhood' need not be a recognised administrative unit and could include (for example) a housing estate. It could not however simply be any area of land that an applicant had delineated upon a plan and the registration authority must be satisfied that the proposed neighbourhood had *"a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning"*.

Paddico (267) Ltd v Kirklees Metropolitan Council & Others – High Court - (2011) – 'Paddico'

Vos J said that he "was not impressed with the suggestion that [the] distribution of residents was inadequately spread" across the specified localities when this case was considered in the High Court. He noted that the majority of users making declarations lived closest to the claimed green, and that this was precisely what one would expect. This view was not disputed when the case progressed through the Court of Appeal. It was also held that a 'locality', for the purposes of the 1965 Act, "is to be understood in all the legislation…as meaning an administrative district or an area within legally significant boundaries". DEFRA's view is that there would appear to be no reason for the definition of 'locality' to be interpreted any differently in the 2006 Act.'

R (on the application of Barkas) v North Yorkshire County Council and another - Supreme Court (2014) – 'Barkas'

The Court determined that where land owned by a local authority is provided and maintained as recreational land for the public under statutory powers (section 12(1) of the House Act 1985 or its statutory predecessors), the public have a statutory entitlement to use the land for such purposes. Such use of the land is therefore "by right" and not "as of right" within the meaning of section 15(2)(a) of the Commons Act 2006, and as a consequence cannot be registered as a town or village green on the basis of such use.

Naylor v Essex County Council – High Court (2014) – 'Naylor'

It was held that public use of land that was privately owned but managed as public open space by a local authority (on behalf of that private owner) was 'by right', and not 'as of right', and that in the absence of any evidence to the contrary, a local authority entering into such an arrangement had done so lawfully and pursuant to statutory powers (such as the Open Spaces Act 1906).

Description of the Land (please refer to the plan at Appendix 1)

5. The land which is the subject of the application ('the Application Land') comprises two parcels of land bounded on three sides by Orchard Close (an adopted residential road), and on one side by a tarmac footpath which separates the land from residential dwellings. It consists of approximately 0.43 acres of land (1,720 square metres), which is grassed and bounded by tarmac footpaths and vegetation (hedges and mature trees). The two parcels, which were acquired by private individuals living outside Hampshire at auction (and registered to those parties between 2017 and 2019), has been used by local inhabitants for organised events, sports and pastimes since the area was developed in the late 1980s.

Background to the Application

6. According to the Applicant, the housing estate in which the Application Land is situated was built in 1987, at which point the Application Land was laid out pursuant to an agreement between Percy Bilton Ltd ('The Developer') and the local planning authority, Winchester City Council ('WCC'). In 1992 the Developer entered into a Deed of Dedication to 'give up and dedicate to the Council' land that included the Application Land, so that it would form part of WCC's 'open space and amenity land'. As a consequence of the agreement, WCC undertook to maintain the land, and it has been held in trust for this purpose ever since.

7. According to WCC, the 1992 Deed included an option for the Developer to transfer the land to WCC, but that this option was not exercised within the specified period of time. This notwithstanding, WCC states that the Application Land has been controlled by it under the terms of the 1987 agreement, and that use of the land is subject to those terms, irrespective of the sale of the Application Land in 2017 and 2019.
8. The Application Land has been held and maintained by WCC as an area of public open space through a programme of grass cutting and landscaping since its formation, which continues to the present day.

Issues to be decided

9. For the application to register the Land as a town or village green to be accepted, the legal tests set out in Section 15(2) of the Commons Act 2006 must be met. It must therefore be shown that, *'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years'.* All limbs of the legal test must be satisfied for registration to take place.

User Evidence

10. The application is supported by the evidence of 35 people, who completed user evidence forms detailing use of the land since its creation as an area of open space (earliest recorded use in 1985) up until the submission of the application in 2018.
11. Witnesses state that they used the land on a regular basis for the purposes of playing games such as football, cricket and rounders; dog walking, picnicking, kite-flying, attending organised events such as an annual bonfire/fireworks display, birthday parties and events linked to Halloween.
12. None of the users stated that they sought permission to use the land or were challenged or prevented from doing so.

Representations

13. Due to a backlog of applications, the County Council was not in a position to investigate the application until recently, and the application was ultimately advertised in March 2024. Forty-eight expressions of support were received from local residents and from New Alresford Parish Council. WCC provided comments on the application. All representations are discussed below.

Winchester City Council (WCC)

14. WCC's representation (included as Appendix 2) predominantly focuses upon the status of the Application Land from the date of its creation through to the submission of the application in 2018.
15. WCC does not dispute that the Application Land has been used for lawful sports and pastimes but asserts that use has not been of the character required to meet the statutory test set out in Section 15(2) of the 2006 Act. It states that the Application Land was dedicated as open space by the owner following residential development of the area, and confirms that an agreement was entered into with the Developer in

1987, providing for the landscaping and laying out of the land. Through the Deed of Dedication dated 19 March 1992, the owner formally dedicated the land to WCC so that it became part of WCC's open space and amenity land. It has therefore effectively been held in trust by WCC since 1992.

16. WCC confirms that ownership of the land was not passed to the Council as the option to transfer the land under the 1992 Deed was not exercised within the relevant time period. However, the Application Land is in effect controlled by WCC and can only be used as open space and amenity land as a result of the covenants in the 1987 Agreement and the consequent formal dedication of the Application Land by way of the 1992 Deed. Although ownership of the Application Land has changed in recent years, WCC asserts it remains subject to the covenants and dedication provided in the 1987 Agreement and 1992 Deed, and the Application Land is further protected from development by Local Plan policies.

17. WCC confirms that the Application Land has been held and maintained as an area of public open space throughout the twenty-year period leading up to the date of the Application (and continues to be so held to date), through a programme of regular landscaping maintenance and grass cutting.

18. WCC summarises its position as follows:

    i. The Application Land was laid out and formally dedicated as open space and amenity land to statutory powers. The application Land has at all times thereafter been retained, controlled, maintained and made available by the Council as open space and amenity and has been used as such by local residents for public recreations purposes.

    ii. Use of the Application Land for recreation, lawful sports and pastimes has therefore been with permission and so *by right* rather than *as of right* following *Barkas.* It follows therefore that the requirement for the Applicant to demonstrate that the Application Land has been used for recreation, lawful sports and pastimes as of right throughout the qualifying period does not appear to have been met.

    iii. In any event, even if the Application Land was not held and maintained for public recreation purposes pursuant to those or other statutory powers, then the fact that the Application Land has been laid out and maintained so as to facilitate its use as open space for recreational purposes means that any use has been by right in any event (see *Barkas* and *Beresford*).

Other Representations

19. The other responses to the advertisement of the application came from New Alresford Parish Council (whose response was limited to expressing its support for the application) and local residents (the majority of whom live in Orchard Close).

20. Responses from residents included details of their own use and knowledge of the Application Land, with descriptions of the activities undertaken on the land by them and their families dating back to the time the land was laid out as open space. These included dog-walking, picnics, barbecues, organised games (eg cricket and football) and celebrating national events (such as jubilees, royal weddings etc). Some respondents confirmed that the land had been maintained for recreational purposes by WCC.

21. Many respondents expressed their desire to see the land registered to preserve its status as area of open space for community use in perpetuity.

Response to objections

22. Under the regulations governing the processing of an application made under Section 15 (see 'Legal Framework' Section above), the County Council is not able to reject an application without first sending the applicant a copy of every written statement in objection to the application.

23. Although not characterised as an 'objection', because WCC's submission raised issues which might lead to the refusal of the application, its statement was forwarded to the Applicant for comment. In response, the Applicant stated that they considered the application to register the Application Land to be in the public interest, because the developer chose to sell the land despite the existing condition on the land under an S106 agreement and indicated that they therefore wished to pursue the application.

Analysis of the evidence

24. Each limb of the criteria set out in Section 15(2) (see above) must be satisfied for village green rights be recorded over the Application Land. If any test cannot be satisfied, then the application must be refused Each of the limbs in Section 15(2), and the question of statutory incompatibility, are considered below.

'A significant number of the inhabitants of a locality, or the neighbourhood of a locality…'

'Significant Number'

25. It is common ground between the Applicants and WCC that the Application Land has been used for lawful sports and pastimes for a significant period of time (exceeding twenty years), and the *prima facie* evidence put forward in support of the application appears to be sufficient to satisfy this test. In other circumstances, it might be necessary to test the strength of the user evidence at a public inquiry, but because there is general consensus as to the volume of public use of the Application Land, it has not been necessary to consider this further.

'Inhabitants of a locality, or neighbourhood within a locality'

26. The locality or neighbourhood cited by the applicant is shown on a map accompanying the application. It is an irregular shaped polygon which runs along parts of the adopted roads Sun Lane, Tichborne Down, Linnets Road, Benenden Green, Windermere Gardens and Sun Hill Crescent. A crescent-shaped arc runs between Beneden Green and the western end of Windermere Gardens, bisecting several properties and a recreation ground.

27. It is questionable whether the area identified in the application would meet the requirement for a locality. In *Paddico,* Vos J, drawing on decisions in several other cases, summarised the meaning of *'locality'* as *'meaning an administrative district or an area within legally significant boundaries'.* This does not apply to the area identified in the Orchard Close application.

28. The area put forward in the application would appear to more closely resemble a neighbourhood than a locality. But given that the area shown bisects residential streets, houses, gardens and a recreation ground, it is also doubtful that the area is sufficiently precise to be a qualifying neighbourhood. In the *Cheltenham Builders* case (at paragraph 85), Sullivan J stated that:

> *"It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood….I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."*

29. In the *Laing Homes* case, it was held that the identification of the relevant locality (or neighbourhood within a locality) was a matter of fact for the registration authority to determine, and that it should be able to decide that question in the light of all the evidence, whether or not the answer corresponded with the locality (or neighbourhood) put forward by the applicant. In that case, Sullivan J stated (at paragraph 143 of the decision) that:

> *'The purpose of giving notification of an application to the owner and occupier and to the public…is to elicit further evidence and information, in addition to that contained in the application…The Registration Authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence.*

It would therefore appear that, notwithstanding the above, in the event that the other requirements of Section 15(2) are met, it would be open to the County Council to itself identify a suitable locality, or neighbourhood, to be recorded as part of the registration process. Possible options include the civil parish of New Alresford, or the ecclesiastical parish of St John the Baptist (locality) or the area of housing that lies between Jacklyns Lane and Sun Lane (neighbourhood).

30. The distribution of users throughout a locality or neighbourhood is not a pivotal factor, it simply has to be demonstrated that there has been use by a 'significant number of the inhabitants' of the locality. In *Paddico* at first instance, Vos J stated that he was not impressed with the suggestion that the distribution of residents was inadequately spread across the specified localities. He noted that *'not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration.'* Such is the situation with the Application Land.

31. Notwithstanding officers' concerns about the neighbourhood identified in the application, it would be possible to overcome this issue through further liaison with the applicant (as per Paragraph 6(4) of the 2007 Regulations) or by the identification by officers of a suitable locality or neighbourhood (see Paragraph 29). And it is considered that, should a suitable locality or neighbourhood be identified, the number of users would be sufficient to represent a 'significant number of inhabitants' from either that locality or neighbourhood.

'As of Right…'

32. Qualifying use must be 'as of right', that is, without force, without secrecy and without permission. There is no suggestion that use by local inhabitants has been by force or by stealth, but it is asserted by WCC that, following the ruling in *Barkas,* the application should be refused on account of user having been 'by right', rather than 'as of right', which would render the use permissive.

33. In *Barkas,* the application land of approximately two hectares was acquired as part of a larger parcel of land amounting to fourteen hectares by the local council using their powers under the Housing Act 1936, which enabled a local authority *"to acquire any land … as a site for the erection of houses".* The majority of the fourteen acres was developed and laid out and maintained the application land as "recreation grounds" pursuant to section 80(1) of the 1936 Act. The land continued to be held under the relevant successor provisions to Section 80(1), culminating in Section 12(1) of the Housing Act 1985.

34. In the leading judgment when the matter was considered by the Supreme Court, Lord Neuberger said:

> [Paragraph 20] *"In the present case, the Council's argument is that it acquired and has always held the Field pursuant to Section 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any "inhabitants of the locality" having indulged in "lawful sports and pastimes" "as of right", as they have done so "of right" or "by right". In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully…and the 20-year period referred to in Section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under Section 12(1) of the 1985 Act.*
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> [Paragraph 21] *In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as Section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise.*
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> [Paragraph 24]*…where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."*

35. *Barkas* also had the effect of the reversing the precedence of an earlier case relating to the registration of land as village green, which had been considered by the House of Lords. In *R (Beresford) v Sunderland City Council (2003)* it had been argued by

Sunderland City Council that by mowing grass and erecting seating on land in its ownership, it had given implied permission for people to use that land, which was therefore inconsistent with use 'as of right'. The Lords had at the time rejected this argument and held that the land should be registered as a town or village green, overturning an earlier decision by the Court of Appeal.

36. In *Barkas,* the earlier ruling in *Beresford* had formed a central part of the arguments forwarded by the appellant seeking the registration of the land. But in revisiting the case, the Supreme Court decided that *Beresford* had been wrongly decided insofar as it related to the question of use 'as of right' and should therefore no longer be relied on. In addressing the decision reached in *Beresford*, Lord Neuberger drew a parallel with his conclusions in respect of the *Barkas* case (Para 24 of the decision, as quoted above), and said:

> [Paragraph 49] *It seems to me clear on the facts…that the city council and its predecessors had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right": it was "by right".*

Lord Carnwath also addressed *Beresford,* and made particular reference to acts of encouragement by a local authority:

> [Paragraph 84] *"If land in the ownership of a public authority had been validly registered as a village green, it might well be a reasonable inference that acts of maintenance were attributable to that status. But that has no relevance to the position during a period of public use before registration, when there were no village green rights, actual or notional. The explanation for acts of maintenance by the authority during that period has to be found elsewhere. The reasonable inference was not that the public had no rights, but that the land had been committed to their use under other powers."*

37. The consequence of the decision in *Barkas* is that where land is held and laid out for recreational purposes pursuant to statutory powers, members of the public have a statutory right to use that land for recreation. Use of that land will therefore be 'by right' and not 'as of right'. In determining that *Beresford* should no longer be relied upon in this regard, the Lords effectively ruled that where a public authority lays land out for public recreation, and by doing so encourages such use, that use will also be 'by right'.

38. Even more pertinent to the facts of this application are the proceedings in *Naylor.* In that case, it was held that use by the public of land that was privately owned but maintained as open space by the relevant district council through some prior arrangement was also 'by right', and that in so doing, the district council *"…did what it did properly and lawfully in pursuance of some statutory power enabling it to do so…"*. John Howell QC, sitting as a Deputy High Court Judge, stated (at Paragraph 39 of his decision):

> *"In my judgment, therefore, it makes no difference to the right which the public has to use the land that it is made available for public recreational use by a local authority by virtue of an arrangement it has with the landowner which does not give the authority itself any estate or legal interest in that land. While such an arrangement subsists, the landowner has permitted (or has at least authorised the local authority to permit) the public to use the relevant land for recreational purposes. The local authority is empowered to permit such use by virtue of the enactment under which it acquires its*

rights for that purpose (as being consequential thereto). Permission to use the land for recreational purposes is communicated to the public (if that is required) by the local authority making the land available for use for such recreational purposes. While such an arrangement subsists and the land is made available for use by the public for recreational purposes by the local authority pursuant to it, neither the landowner nor the authority could assert that a member of the public using it for such purposes was a trespasser. Members of the public would not be using it "as of right"; they would be using it "by right" for a purpose for which they had been lawfully invited to use it. Use by members of the public would be "precario" in the narrower sense of permission from the landowner (or from a person the landowner had authorised to give it) and "by right" to the extent that that term may be wider."

39. Further, the Judge found (at Paragraph 45) that it was not necessary for the district council to have an interest in the land before undertaking the duties associated with maintaining the land as public open space:

"A local authority may undertake the entire or partial care, management and control of any such open space or burial ground under section 9(b) of that Act, whether or not it has acquired any interest in it. The authority is not required to acquire any estate, interest, right or easement in it before it may undertake such things. It may make an agreement for those purposes under section 9(c) with any persons who may themselves be authorised to reach such an agreement with the authority under the earlier provisions of the 1906 Act…or who are otherwise able to make such agreements with it."

40. In the present case, WCC asserts that the land was dedicated and laid out expressly for the purposes of public open space pursuant to statutory powers, and that it has been maintained as such ever since. This arrangement has been in place for the entirety of the relevant period. As a consequence, it is argued by WCC, for the reasons set out in *Barkas* use of the Application Land will have been 'by right' and not 'as of right'.

41. Officers are satisfied that the Application Land was reserved during the planning and development process expressly for the purposes of public recreation, and that through the legal agreements between Percy Bilton Ltd and Winchester City Council, the latter was authorised to continue to manage the land for this purpose, with the provisions of the Open Spaces Act 1906 providing the relevant statutory basis. The Application Land is therefore subject to a statutory trust in favour of the public and members of the public have a right to go onto the land for the purpose of recreation.

42. As per *Barkas*, users of land acquired and held in such a way would not be considered 'trespassers', because their use was pursuant to a statutory right to do so. It follows that use of the Application Land in this case will have been 'by right', and not 'as of right'. This point alone is fatal to the application.

43. Officers also consider that the Supreme Court's overturning of *Beresford* means that use of the Application Land will have been 'by right' as a result of the way the land has been managed. Use of the Application Land can be said to have been 'by right' because public use has been facilitated and encouraged by landscaping and regular maintenance by WCC. The land therefore appears to fall within the scenario set out by Lord Carnwath when he stated that acts of maintenance by a public authority to facilitate use of the land implied a permission to use it, and *"not that the public had no rights, but that the land had been committed to their use under other powers".*

'Lawful Sports and Pastimes…'

44. It is common ground between the parties that the land has been used for the purposes of lawful sports and pastimes prior to and throughout the entirety of the relevant period.

'On the Land…'

45. There is no dispute between the parties that all of the Application Land has been enjoyed by the public throughout the relevant period.

'For a period of at least twenty years…'

46. The twenty-year period leading up to the submission of the application is 1988 – 2018. There is no suggestion that the land has not been used by the public for the entirety of this period. Indeed, it would have been contrary to the agreement that WCC had entered into for public use of the land to have been interrupted or prevented in any way.

Conclusions

47. There is clear evidence that the Application Land has been used for lawful sports and pastimes by a significant number of local inhabitants, for a full twenty-year period running up to the submission of the application (1998–2018). The land has been maintained as public open space, with public use encouraged by the regular maintenance of the land by WCC.

48. It is however considered that use of the Application Land has not been 'as of right', by virtue of the basis on which it was created and subsequently held. Following the rulings in *Barkas* and *Naylor,* use is deemed to have been 'by right', on account of it having taken place on land managed by a local authority that was provided specifically for the purpose of public recreation. As a consequence, the relevant proviso in Section 15(2)(a) of the Commons Act 2006 has not been met.

49. Further, as per *Barkas,* the fact the Application Land was laid out and maintained as public recreational space will also have rendered use 'by right' (as per the decision that *Beresford* had been wrongly decided on this point). Again, it would follow that the requirement for use to be 'as of right' under Section 15(2)(a) of the Commons Act 2006 has not been met.

50. In light of the above conclusions, it is not considered necessary for any further deliberation regarding the identification of the locality or neighbourhood (see paragraph 31). An amendment of the application to resolve any uncertainty on the issue of locality would not materially affect the outcome, given the conclusions as to the quality of user evidence.

51. Having considered all of the evidence and submissions received from interested parties, as well as other available evidence and relevant case law, it is considered that the application to register the Application Land as a town or village green the land should be refused.

REQUIRED CORPORATE AND LEGAL INFORMATION:

Links to the Strategic Plan

Hampshire maintains strong and sustainable economic growth and prosperity:	yes/no
People in Hampshire live safe, healthy and independent lives:	yes/no
People in Hampshire enjoy a rich and diverse environment:	yes/no
People in Hampshire enjoy being part of strong, inclusive communities:	yes/no
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because the County Council, in its capacity as Commons Registration Authority, has a legal duty to decide whether the register of towns and village greens should be amended.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document	Location
File: VG 271 – Orchard Close, New Alresford	Countryside Access Team Elizabeth II Court Winchester SO23 8UL

EQUALITIES IMPACT ASSESSMENT:

1. Equality Duty

The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act with regard to the protected characteristics as set out in Section 4 of the Act (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation);
- Advance equality of opportunity between persons who share a relevant protected characteristic within Section 149(7) of the Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic within Section 149(7) of the Act (see above) and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant protected characteristic that are connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic that are different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionally low.

2. Equalities Impact Assessment:

Hampshire County Council, in its capacity as in its capacity as Commons Registration Authority, has a legal duty to decide whether the register of towns and village greens should be amended. It is not considered that there are any aspects of the County Council's duty under the Equality Act which will impact upon the determination of this application.