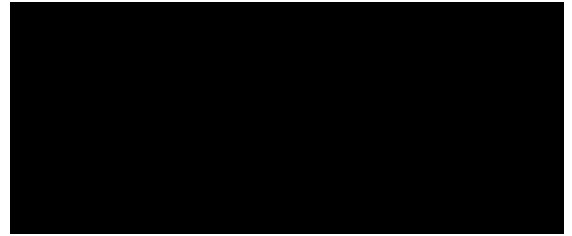




Mr H Goodchild
Map Review Manager
Hampshire County Council
Countryside Access Team
Castle Avenue
Winchester
SO23 8UL

Your Ref: VG271
Our Ref: JM003102



11 April 2024

Dear Mr Goodchild

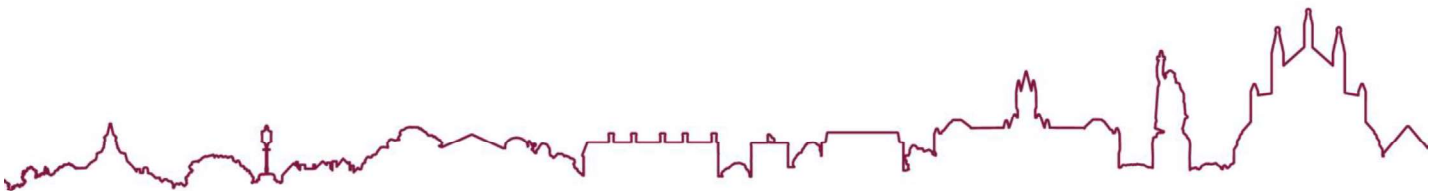
Application made to register land at Orchard Close, New Alresford as a town or village green

Application reference: VG271

By an application (“the Application”) made under section 15(2) of the Commons Act 2006, Elizabeth Dow of 15 Orchard Close, Alresford, the applicant named in the Application (“the Applicant”) seeks to register as a village green land at Orchard Close, New Alresford (“the Application Land”).

The Application was made to Hampshire County Council as the Commons Registration Authority (“the Registration Authority”). The Application was received by the Registration Authority on 5 December 2018 and given the reference VG VG271.

Winchester City Council (“the Council”) is the Local Planning Authority for the area and maintains the Application Land as public open space. The nearby roads including Orchard Close are understood to be publicly maintained.



The Council has had the opportunity to consider and wishes to provide the following comments on the Application. The Registration Authority is invited to consider these comments as preliminary matters in its determination of whether the Application should be rejected at this stage. The Council reserves an entitlement to supplement or to amend these comments and if considered appropriate to confirm any 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 section 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 continuing up to the date of the Application.

That the Application Land has been used as public open space for recreation and pastimes for many years is not in dispute. The initial comments set out below are concerned, principally, with the qualifying requirement that use of the Application Land should be *as of right*. In other words, without the permission of the party owning or controlling the land.

Status of the Application Land

The Application Land was dedicated for open space by the then owner Percy Bilton plc following on the residential development of a wider area of land at Titchborne Down, Alresford under planning permission Ref No W/9014/5 dated 14 June 1988.

A planning Agreement between the then owner and the Council dated 24 December 1987 provides for the landscaping and laying out of the land; and a Deed of Dedication between the same parties dated 19 March 1992 provides for the dedication of the land to the Council.

The 1987 Agreement required that the Application Land be laid out and dedicated as public open space and that the owner provide a financial contribution to the Council which then became responsible for ongoing maintenance of the Application Land. In 1992 the owner formally dedicated the land to Council so that the land became part of the Council's open space and amenity land and so in effect the Application Land is held in trust for this purpose.

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 the Council and can only be used as open space/amenity land as a result of the covenants in the 1987 Agreement which were made under Section 111 of the Local Government Act 1972 and Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 and the consequent formal dedication of the Application Land by way of the 1992 Deed.

It is understood from recent Land Registry searches that the underlying ownership of respective parts of the Application Land were acquired in 2017 and 2019 by private parties. Such ownership remains subject to the covenants and dedication provided in the 1987 Agreement and 1992 Deed.

The Application Land has been held and made openly available by the Council as an area of public open space and laid out and maintained as such throughout the period of 20 years up to the date of the Application and ongoing. Subsequent to the laying out and dedication of the Application Land, the Council has in practice maintained the Application Land as open space for public recreation purposes including through regular landscaping maintenance and grass cutting.

The planning policy status of the Application Land is consistent with the land having been made and continuing to be available for such open space and recreational purposes. The land remains protected from development by Local Plan policies including Policy CP7 and DM5. Under Policy CP7 there is a presumption against the loss of any open space, sports or recreation facility. Policy DM5 specifically identifies Orchard Close as open space and would only allow for development which is for a facility which is ancillary to the function of the open space and which would maintain or enhance the contribution of the open space to the character of the wider area.

It is apparent from the Application form that local residents use of the Application Land is consistent with this being for recreational purposes openly and with the permission of the Council. As stated in the Application form, the Application Land “is already protected by existing covenants and continues to be maintained as public open space and amenity land by Winchester City Council.”

It is clear from the above that:

- a) the Application Land (including as parts of wider areas of land) was dedicated to the Council in 1987 and 1992 and is held in trust by the Council as public open space;

- b) the Application Land has thereafter been retained, controlled, maintained and made available by the Council pursuant to its statutory functions to provide land held for public recreation purposes.

Copies of the deeds referred to above and further information referred in this letter can be provided on request.

Comments on the Application

It is well established in law that where land is held or made available by a local authority as recreational open space pursuant to a statutory power, 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 laid out and formally dedicated as open space and amenity land pursuant to statutory powers identified above. 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 recreation purposes.

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.

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* (above) and *Beresford* (above)).

Disposal of the Application

The Registration Authority is therefore requested to consider the Council's comments above as preliminary issues and to determine the Application at this stage without the time and expense which would be needed for a public inquiry.

Yours faithfully



Public Law Manager, former Service Lead – Legal