HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	17 November 2021
Title:	Application for registration of land known as 'Coles Mede', Otterbourne, as a town or village green (Application No. VG266)
Report From:	Director of Culture, Communities and Business Services

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Purpose of this Report

1. The purpose of this report is to assist Members in determining whether to accept an application to record land known as Coles Mede, in the Parish of Otterbourne, as a town or village green.

Recommendation

2. That the application to register as a town or village green the land, shown edged blue on the plans 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. The Regulatory Committee is asked to consider an application for the registration of land known as 'Coles Mede', in Otterbourne, as a town or village green. The application was advertised and attracted objections, from the landowner and local residents. The applicant was given the opportunity to rebut 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 recommended that the application can be determined without the need for a public inquiry to be held.

Legal framework for the decision

Section 15 - 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.

Registration of greens: exclusions

15(C)(1) The right under Section 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land ("a trigger event").

15(C)(2) Where the right under Section 15(1) has ceased to apply because of the occurrence of a trigger event, it becomes exercisable again only if an event specified in the corresponding entry in the second column of the Table set out in the relevant Schedule occurs in relation to the land ("a terminating event").

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.

RELEVANT CASE LAW

R (on the application of Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs and another; and R (on the application of NHS Property Services Ltd) v Surrey County Council and another - Supreme Court [2019]

This Supreme Court decision confirms that town or village greens cannot be registered where there is statutory incompatibility was based on two conjoined cases:

The *Lancashire* case concerned an application to register land adjacent to a Primary School held for educational purposes by the local authority as a town or village green. Not all of the Application Land was being used at the time of the application by the school.

The *NHS* case concerned an application to register an area of woodland adjacent to a hospital as a town or village green. The land in question was held for healthcare purposes by NHS Property Services Ltd, although it was not being used at the time the application was made.

The Supreme Court allowed the appeals by a majority of three to two. The specific public interest contained in the statutory purposes for which the land in both cases was held outweighed the public interest in registering the land as a town or village green.

The decision centred around the court's interpretation of 'statutory incompatibility', considered in an earlier Supreme Court decision in *R (Newhaven Port & Properties Ltd) v East Sussex County Council [2015]*. In the *Newhaven* case the court found a beach which fell within the area of a working harbour, could not be registered as a town or village green because use of land as such was incompatible with the statutory operational purposes of the harbour, for which the beach was held.

The court's interpretation of the majority judgment in *Newhaven* was that land acquired and held by a public authority for statutory purposes could not be registered as a town or village green if those purposes were (or would be) incompatible with the land being used as a town or village green. It was also held that the test is not whether the land has been allocated by statute for statutory purposes, but whether the land has been acquired for statutory purposes.

The Supreme Court's decision means that where there is a conflict between the statutory purpose of publicly-owned land and the registration of it as a town and village green, the statutory purpose will prevail.

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

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.

Description of the Land (please refer to the map attached to this report)

5. The land which is the subject of the application VG266 ('the Application Land') is shown edged blue on the plan annexed to this report. It consists of approximately 0.18 hectares (0.44 acres) of land. The land is owned by, and is registered to, Winchester City Council ('WCC').

Background to the Application

6. The application was submitted in 2015 by a member of the public. The form states that the Application Land should be registered as a town or village green because it has been used by a significant number of the inhabitants of a locality (or neighbourhood in a locality) for lawful sports and pastimes for at least 20 years, and they continue so to use it. Due to a backlog of applications the matter was not taken up for investigation immediately but was subsequently expedited under the County Council's policy for prioritising village green applications, due to development proposals relating to the land.
7. The applicant identifies the 'locality' served by the Application Land (as is a requirement under Section 15(2) of the 2006 Act) as being a neighbourhood of several residential streets situated to the west of Main Road, between the local school and church to the south, and the local shop and Post Office to the north, and has provided a map outlining this area (see Appendix 2).
8. The Application Land has existed in its present form since the 1930s, when the majority of the houses on Coles Mede were built. It is now bounded to the south-east by a service road which connects to Coles Mede, a cul-de-sac which abuts the Land to the north-east and north-west. The Land currently accommodates a bench, two dog waste/litter bins and a red telephone box. Adjacent to its south-west corner is a row of five garages which open onto a forecourt, which is connected to the service road by a metalled path (the garage and forecourt area, though also owned by WCC, does not form part of the Application Land).

Issues to be decided

9. For the application to register the Land as a town or village green to be accepted, the legal tests under Section 15(2) of the Commons Act 2006 must be met. That is, '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 parts of the legal test must be satisfied for registration to take place.

User Evidence

10. The application is supported by the evidence of 32 people, who completed user evidence forms detailing use of the land between 1940 and 2015.

11. The majority of users attest to having accessed the land on a daily basis, with reasons given including playing games with children and grandchildren, dog walking, picnicking and attending village events (e.g. carnivals/fetes).

12. Most of the use falls within the relevant period for the purposes of Section 15(2), that is 1995 – 2015. The vast majority of users claim to have seen other people using the Land while visiting the Land.

13. None of the 32 users stated that they sought permission to use the Land, nor where they challenged or physical prevented from doing so.

Landowner Evidence

14. Upon advertisement of the application on 2 October 2020, objections were received from WCC, Otterbourne Parish Council, and five local residents. These objections are discussed below.

Winchester City Council

15. WCC, in its capacity as landowner, provided substantial submissions to support its objection (included as Appendix 1), accompanied by documentary evidence detailing when, and the purpose for which, the Land was acquired (Appendix 2). This includes:

    i. Copy of a conveyance dated 24 December 1936
    ii. Copy of a conveyance dated 31 May 1938
    iii. Copy of a valuation report prepared for Winchester College on 4 August 1936
    iv. Copy of a valuation report prepared for Winchester College on 22 February 1938
    v. Copy of a valuation report prepared for Winchester College on 19 January 1945
    vi. Copies of extracts from records of Otterbourne Parish Council between 1936 and 1945
    vii. Copy of Winchester Rural District Council Regulations as to allocation of Tenants for Council houses dated 1 September 1937

16. In a further submission of 29 April 2021, WCC also provided two additional pieces of evidence – a report to Cabinet by the Head of New Homes Delivery dated 13 June 2012, and a report to the Cabinet (Housing) Committee by the Head of New Homes Delivery dated 11 October 2016.

17. WCC's objection includes a commentary on the acquisition of Coles Mede to accompany the documentary evidence, which can be summarised as follows.

18. The Application Land forms part of a wider parcel of land acquired by Winchester Rural District Council (WRDC) - the statutory authority that preceded WCC - from Winchester College through two separate conveyances completed in 1936 and

1938. The decision to acquire the land was made by the Housing Committee of WRDC. WCC points to contemporaneous records (namely Otterbourne Parish Council minutes and valuation reports prepared for Winchester College) which demonstrate that the land was acquired for the purposes of building houses.

19. The area was subsequently developed, and the Application Land was laid out as open space forming part of a new housing estate [this is corroborated by a comparison of the Ordnance Survey County Series 25 inch to 1 mile maps of 1932 and 1946 (see Appendix 3), the former of which shows the area as undeveloped open fields, and the latter showing newly constructed dwellings and road which is labelled 'Coles Mede']. WCC states that the Application Land *"has thereafter and at all times been maintained as open space."*

20. WCC states that the statutory powers under which the Application Land was acquired were the Housing Act 1925 and The Housing Act 1936. Section 58 of the 1925 Act conferred a power on local authorities to acquire land for the erection of dwelling houses, and Section 59(1) further enabled authorities that had acquired land for such purposes to *'lay out and construct…open spaces on the land'*. Equivalent provisions were included in the 1936 Act under Sections 73 and 79(1)(a) respectively.

21. WCC also asserts that the Application Land is still held for the same statutory purpose that it was first acquired. In support of this assertion WCC has provided the report from the Head of New Homes Delivery to Cabinet dated 13 June 2012, which sets out the proposed new build programme for council houses between 2012 and 2015. Paragraph 2.2 of the report states that *"…in a District like Winchester with high demand for housing and low availability of land, there will be significant issues in finding suitable development sites. The first choice of land to develop is and should be land which is already in the Council's ownership."* Land at Coles Mede appears in a list entitled 'Proposed Development Programme 14/15' at Appendix 1 to the Report, and is described as *"in fill site overlooking green".*

22. The report from the Head of New Homes Delivery to the Cabinet (Housing) Committee dated 11 October 2016, entitled *"Disposal of Land at Coles Mede, Otterbourne"*, discusses an approach made by a developer to acquire and develop part of the Application Land, and notes that the freehold title currently rests with WCC.

23. In an email dated 29 April 2021, WCC's Senior Environmental and Planning Lawyer confirmed that they had found no evidence of the appropriation of the Application Land for a different purpose. The response states:

> *"An appropriation of land held by the City Council is required to have been formally undertaken in accordance with WCC's normal procedures, namely by way of a report to Committee and in many cases (including any appropriation of the Coles Mede TVG application land) public consultation would also have been required (please see s.122 (2A) Local Government Act 1972). The appropriation would then have been recorded in Council minutes. I have checked the Council's records and can confirm that I have found no appropriation of the land which is the subject of the Coles Mede TVG application from being held for housing purposes to an alternative purpose recorded in the City Council's minutes. I therefore remain satisfied that no such appropriation has taken place."*

24. WCC's grounds of objection can be summarised as follows:

i. Where land is held or made available by a local authority as recreational open space pursuant to an express statutory power, use of that land by the public will be *by right* and not *as of right,* as per *Barkas.* Such is the case in this instance (*Ground 1*).

ii. Even if the Application Land was not laid out as open space pursuant to statutory powers (which is not accepted), then the fact it has been laid out and maintained as open space so as to facilitate recreational use will mean such use will have been *by right* and not *as of right* (*Ground 2*).

iii. The Application Land was acquired, and has since been held, for statutory purposes. WCC is therefore entitled to use the land for general housing purposes notwithstanding that it is currently set out as open space. The decision in the *Lancashire/NHS* cases is engaged in respect of the Application Land. Registration of the land as village green would preclude its future potential use for general housing purposes. It is not necessary, for the principle of statutory incompatibility to be engaged, for there to be a positive intention to use the land for the statutory purposes for which the land is held. The registration of the land is precluded by the decision reached in the *Lancashire/NHS* cases (*Ground 3*).

Otterbourne Parish Council

25. In an initial objection submitted on 5 November 2020, the Parish Council objected to the application *"…on the basis that there is no evidence to support that such use has taken place and that the land in question, which is laid to grass and a variety of trees, does not lend itself to such use. Scrutiny of parish records reveals no evidence of community use and the collective memory of the Parish Council going back in excess of 20 years additionally does not support the view that the local community has engaged in lawful sports and pastimes on the land."*

26. A further statement was received by the Parish Clerk on 1 April 2021, confirming that since their employment in the role as parish clerk on 1 February 2005, the open space at Coles Mede had been maintained by WCC. Maintenance included cutting of the grass and the removal of dead trees and the planting of new ones. Otterbourne Parish Council has at no time been involved in maintaining the Application Land, nor, as far as they are aware, has any other person or body.

Local Residents

27. Five local residents also submitted objections to the application, some of whom were Otterbourne Parish Councillors objecting in their own name. All these objectors assert that they have never observed the land being used for the purposes alleged in the application, either while walking past the land or driving along Main Road.

Response to objections

28. 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 allowing the applicant to meet any objections

received in response to the advertisement of the application. This was done, and the Applicant submitted a response accompanied by additional comments made by their solicitor in January 2021. These are included at Appendix 4, and can be summarised as follows:

i. Only partial copies of the 1936 and 1938 conveyances have been provided – it is impossible to understand the conveyances from the information provided.

ii. The onus is on WCC to demonstrate how the land is held, and the archive material provided by WCC does not adequately demonstrate that the land was acquired for the purposes of delivering housing. If WCC cannot establish that the land is held under the Housing Act or any other statutory power, then the rulings in *Barkas* and *Lancashire* do not apply.

iii. No evidence is provided that the land is laid out as open space pursuant to any Housing Act or any other statutory power. The land was originally appropriated for the delivery of housing, and not for the provision of open space, and as per *R (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs [2015]*, it is not possible to imply a change in appropriation as a result of how the land is being used by the Council. The Council states that the land was laid out as open space pursuant to an express right to do so, but no evidence is provided that the land was laid out for such purposes.

iv. In the event that the Registration Authority finds that the land has not been acquired, laid out and retained as open space under statutory powers, then there is no indication that the land is used with permission, and therefore the Registration Authority should register the land as a village green immediately.

v. In *Barkas,* it was held that that land laid out and maintained as 'recreation grounds' pursuant to Section 80(1) of the Housing Act, 1936 and with the 'consent of the Minister' could not be determined to be used 'as of right', but use must be 'by right'. The Housing Act 1925 does not include clause 80(1) or an equivalent clause, and therefore there is no specific statutory provision that grants rights for public use of the land in a way that is equivalent to *Barkas*. Therefore, the foundation of the City Council's objections based on *Barkas* are invalid in the context of this application and do not justify that use is 'by right'.

vi. As the land subject to this application has not had access restricted and no licence has been issued that grants the right of use, and without the benefit of the statutory powers introduced in the 1936 Housing Act, it does meet the criteria that public use of the land is 'as of right'.

vii. WCC relies upon another case - *R (Beresford) v Sunderland City Council [2004]* - to support their second objection. However, when ruling on the *Barkas* case, Lord Neuberger called into question the reliability of the *Beresford* case, and so as this is no longer considered to be reliable law, any reliance on this case should be dismissed.

viii. As there is statutory provision within the Housing Act 1925 for land to be held and maintained as open space, there is no statutory incompatibility between

this act and the registration of the land as a village green under the Commons Act 2006.

ix. None of the local residents who have disputed that the land has been used for lawful sports and pastimes lives in Coles Mede. Their observations have principally been made from the main road - from which most of the land is screened by trees.

29. In turn, WCC submitted additional comments in reply to the Applicant's response (Appendix 5). These are summarised as follows:

i. *Holding Power* – the evidence on which WCC relies demonstrates that, on the balance of probabilities, the land was acquired, laid out, and at all times maintained as open space pursuant to the powers in the relevant Housing Acts. No appropriation of the land is claimed or relied upon. WCC relied only on statutory powers when acquiring the land (Housing Act 1925 and its succeeding Acts).

ii. *Barkas* – the application land was acquired as housing land and laid out as open space pursuant to powers contained in s59 Housing Act 1926 and s79 Housing Act 1936. No ministerial consent was required. In *Barkas,* the land was laid as a recreation ground for which such consent was required (as set out in s80 Housing Act 1936). If (which is not the case) the application 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.

iii. *As of right* – 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 or pastimes is *by right* and not *as of right.*

iv. *Beresford* was not overruled in *Barkas* in respect of the court's conclusions as to the burden and standard of proof. *Barkas* expressly held that encouragement by a landowner of use of the land is such that 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.

v. *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. Registration of the land as TVG would prevent the application land being developed for housing, which is the statutory purpose for which the land was acquired. A fixed intention to use the land for such purposes is not necessary for the incompatibility argument to be engaged, as made clear in *Lancashire*.

Analysis of the evidence

30. Each limb of the criteria set out in Section 15(2) (see above) must be satisfied for village green rights be recorded over the Land. If any test cannot be satisfied, then the application must be refused. Moreover, in light of recent court decisions it must also be determined whether, irrespective of whether each of the tests in Section 15 is met, the Application Land is in any event incapable of registration on grounds of statutory incompatibility, as is asserted by WCC.

31. Enquiries made of WCC (in its capacity as local planning authority) upon receipt of the application indicated that there was no relevant 'trigger event' relating to the land, and therefore no automatic exclusion can be applied under Section 15C of the 2006 Act.

Sufficiency of use / Locality / 20 years' use

32. It is common ground between the applicants and WCC as main objector that the Application Land has been used for lawful sports and pastimes for a significant period of time (exceeding twenty years), and although disputed by Otterbourne Parish Council and other local residents, 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 the question of sufficiency is not considered relevant to determination, it has not been necessary to consider this evidence further.

33. The locality or neighbourhood cited by the applicant is an area surrounding the Application Land that encompasses the neighbourhoods of Coles Mede, Cranbury Close, Cranbourne Drive and areas to the east and west of Main Road extending to the north and south of the Application Land. This is shown on a shaded plan accompanying the application. The majority of witnesses live within this area. None of the objectors have made submissions in respect of this requirement. Again, in light of other findings it has not been considered necessary to explore this aspect further.

34. In keeping with its representations on sufficiency of use, Otterbourne Parish Council disputes that the Application Land has been used for lawful sports and pastimes for a period of 20 years. Although not specifically addressed in any of the submissions of local residents, it is implicit that objections relating to sufficiency will also relate to the requisite twenty-year period. Consistent with its representations on sufficiency, WCC does not contest that the Application Land has been used for lawful sports and pastimes for the entire relevant period. As with the question of sufficiency of use, this issue is not considered to be pivotal to the determination of the application.

Use 'as of right' (Grounds 1 and 2)

35. Qualifying use must be 'as of right', that is, without stealth, without force and without permission. 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'.

This is disputed by the applicants. There follows a summary of that case, and its impact on this application.

Ground 1 (Barkas)

36. In *Barkas,* the application land in question was known as Helredale playing field and was the subject of an application for village green status. The application land of some two hectares was acquired as part of a larger parcel of land amounting to some fourteen hectares by the local council using their powers under Section 73(a) of the Housing Act 1936, which provided for a local authority *"to acquire any land … as a site for the erection of houses".* The majority of the fourteen acres was developed and, and laid out and maintained the application land as "recreation grounds" pursuant to section 80(1) of the 1936 Act, with the consent of the Minister as required by that section. Sections 73 and 80 of the 1936 Act were repealed and substantially re-enacted in the Housing Act 1957, whose provisions were in turn repealed and substantially re-enacted (albeit with more amendments) in the Housing Act 1985. The land continued to be held under the relevant successor provision to Section 80(1) - Section 12(1) of the Housing Act 1985.

37. In the leading judgment on the case when it was considered by the Supreme Court, Lord Neuberger said:

> *"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.* (Para 20)
>
> *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.* (Para 21)
>
> *…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." (Para 24)

38. Lord Carnwath agreed with this judgment, also emphasising that there were circumstances where publicly owned land could be capable of registration:

> *"Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right.* (Para 64)
>
> *The point can also be tested by reference to the "general proposition"…that, if a right is to be obtained by prescription, the persons claiming that right –*
>
> > *'must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him.'*
>
> *It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that "a right" is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to "warn off" the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights.* (Para 65)
>
> *This does not mean of course that land in public ownership can never be subject to acquisition of village green rights under the 2006 Act. That is demonstrated by the "Trap Grounds" case (Oxfordshire County Council v Oxford City Council – [2006]). Although the land was in public ownership, it had not been laid out or identified in any way for public recreational use, and indeed was largely inaccessible ("… 25% of the surface area of the scrubland is reasonably accessible to the hardy walker": para 1, quoting the inspector's report). It was held that the facts justified the inference that the rights asserted were rights under the 1965 Act.* (Para 66)

39. *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.

40. 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, 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 at Paragraph 37 above), and said:

> *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".* (Para 49)

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

> *"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."*(Para 84)

41. The consequences of the decision in *Barkas* are that where land is held under a statutory provision such as Section 12(1) of the Housing Act 1985, members of the public have a statutory right to use the land for recreation. Use of the land will therefore be 'by right' and not 'as of right'. Furthermore, in determining that *Beresford* should no longer be relied upon, the Lords effectively ruled that where land is held by a public authority, and that authority lays the land out for public recreation, and by doing so encourages such use, that use will also be 'by right'.

42. In the present case, WCC contends that its predecessor, Winchester Rural District Council, acquired the Application Land through two conveyances under the statutory powers of the Housing Acts of 1925 and 1936, and that it still holds the land for that same purpose. As a consequence, it argues, use of the Application Land will have been 'by right' and not 'as of right' (*Ground 1* of its objection).

43. Section 59(1) of the Housing Act 1925 reads:

> *'Where a local authority have acquired or appropriated any land for the purposes of this Part of this Act, then, without prejudice to any of their other powers under this Act, the authority may —*
>
> *(a) lay out and construct public streets or roads and open spaces on the land…'*

This provision was re-enacted as Section 79 of the Housing Act 1936 and, in almost identical wording, as Section 13 of the Housing Act 1985, which remains in force today.

44. In *Barkas,* the land in question had been laid out and maintained as a recreation ground pursuant to Section 80(1) of the Housing Act 1936 with the 'consent of the Minister'. The Applicants assert that as the Housing Act 1925 did not include an equivalent clause, there is no specific statutory provision that would render public use of the Application Land acquired under that statutory provision 'by right', as was held to be the case in *Barkas*. Notwithstanding the fact that such a provision *was* included in the 1925 Act (under Section 107) it is not asserted by WCC that the Application Land was laid out in this way. The capacity for local authorities to lay out open space

was expressly provided for in Section 59 of the Housing Act 1925, Section 73 of the Housing Act 1936 and, most recently, in Section 13 of the Housing Act 1985. None of these provisions required that ministerial consent was sought before laying land out as open space, in contrast to the specific requirement to do so when laying out a *recreation ground*. However, officers consider that there is a direct parallel between the two provisions, in that they both provide for a local authority to set out land acquired under the Housing Acts for recreational purposes. The principle established in *Barkas* is therefore engaged, notwithstanding that the land was set out under a different section of the legislation.

45. Having had regard to the circumstances surrounding the acquisition and development of Coles Mede, as well as the relevant case law, officers are satisfied that the Application Land was acquired as part of a wider area of land for the purposes of providing housing, pursuant to statutory powers, and that these powers also empowered the authority to lay that land out as open space, without the need for any further appropriation or ministerial approval. Adopting the reasoning of the Supreme Court in *Barkas*, users of land acquired and held in such a way could not be considered 'trespassers', because their use was pursuant to a statutory right to do so. It follows that use of the land in this case will have been 'by right', and not 'as of right', and this point alone ought to be fatal to the application.

Ground 2 (Beresford)

46. As a supplementary point, and in the alternative to *Ground 1,* WCC also asserts that the ruling in *Barkas* that the *Beresford* case should no longer be relied upon reinforces the argument that use of the Application Land will have been 'by right', owing to the fact that it has been laid out and maintained as open space (*Ground 2)*.

47. In light of the conclusions regarding *Ground 1* of WCC's objections, the question of whether *Ground 2* is also made out is not considered pivotal. However, officers consider it is arguable that the circumstances of the Application Land are such that the ruling of House of Lords in *Barkas* (in overturning *Beresford*) is of relevance, and applying this ruling*,* use of the land could be said to have been 'by right'. Public use has been facilitated and encouraged by the provision of a bench, waste bins, and by the regular mowing of the grass. 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".* Further, the circumstances in this application appear to be distinct from the position in the *Trap Grounds* case (highlighted by Lord Carnwath), where the land had not been laid out for recreational use and was largely inaccessible.

Statutory Incompatibility (Ground 3)

48. It is also submitted by WCC in objection to the application that, in the wake of the decision of the Supreme Court in the conjoined cases of *R (on the application of Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* and *R (on the application of NHS Property Services Ltd) v Surrey County*

Council [2019] (collectively referred to as *Lancashire),* the Application Land is not capable of being registered because this would conflict with the statutory purposes for which the land was acquired, and is held (*Ground 3*).

49. Both cases were heard together on appeal from the court of appeal. Lancashire County Council, as the local education authority, appealed against a decision by the Secretary of State to register land held by it for educational purposes as village green. In the other case the NHS contested a similar decision by Surrey County Council.

50. Central to the Supreme Court's deliberations in *Lancashire* was the earlier decision of the same court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council [2015].* In *Newhaven,* it had been decided that the provisions of Section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to a working harbour. The question for the court in *Lancashire* was whether the same principle applied to land held by statutory authorities under more general statutes, relating in these cases to education and health services. By a majority of 3 to 2, the Supreme Court held that it did, and that in both cases there was an incompatibility between the statutory purposes for which the land was held, and registration of that land as a town or village green.

51. In *Newhaven*, Lord Neuberger and Lord Hodge said:

> *The question is: 'does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?' In our view it does not. Where Parliament has conferred on a statutory undertaker power to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one"* (Para 93)

52. In the majority judgment in *Lancashire,* Lord Carnwath and Lord Sales endorsed this view:

> *"The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land "acquired by a statutory undertaker", we agree…that there is no reason in principle to limit it to statutory undertakers as such..."* (Para 56)

53. And referring specifically to the circumstances of the *Lancashire* and *NHS* cases, they stated:

> *"[Village green] rights are incompatible with the use of any of [the application land] for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes."* (Para 65)

> *"Similar points apply in the Surrey case…the issue of incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time."* (Para 66)

54. WCC asserts that because the Application Land formed part of land acquired for housing pursuant to statutory powers, and has continued to be held for this purpose, it is entitled to use that land for those purposes. Further, WCC states that registration of the land as village green would preclude the development of the land in this way. For that reason, WCC states that the ruling in *Lancashire* applies in respect of the Application Land, and this is fatal to the application.

55. It is considered that the principle established in *Lancashire* is engaged in respect of the Application Land. The land was acquired for a statutory purpose, and there is no evidence before the County Council to suggest that there has been any subsequent appropriation to another purpose. Although the Applicants argue that the provision in the Housing Acts that enables authorities to lay out land as open space would not conflict with the registration of the Application Land as a village green, to do so would restrict WCC's capacity to subsequently develop any part of the Application Land under the statutory purposes for which it was originally acquired. As discussed above, no appropriation was necessary to set the land out as open space, this being expressly provided for in the Housing Acts. It would still be open to WCC to use the land for another purpose within the statutory powers under which it was held (such as the building of houses). However, this notwithstanding, in accordance with the principle established in *Lancashire,* it is not necessary for WCC to demonstrate that there is a positive intention to develop the land for housing purposes, only that it is held for such purposes (see Paragraph 53 above).

56. As established in *Newhaven* and *Lancashire,* the provisions of the Commons Act 2006 do not override the statutory purpose for which the land was acquired - as Lord Carnwath and Lord Sales stated in the majority judgment in *Lancashire:*

> *"We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in Newhaven surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect."* (Para 61)

As the statutory purpose for which the land was acquired (under the provisions of the Housing Acts of 1925 and 1936) would conflict with the registration of the land under Section 15 of the Commons Act 2006, following the ruling in *Lancashire* it follows that the Application Land is incapable of being registered as a village green.

57. The Applicants highlight the fact that the *Lancashire* case was decided by a narrow majority of three to two, and quote the dissenting view of Lord Wilson in *Lancashire* that, if Parliament's intention had been for public authorities which hold land for specified statutory purposes to be immune from the effects of registration, it would have made specific provision for this within Section 15 of the Commons Act 2006.

However, as WCC has pointed out, Lord Wilson was in the minority, and its objections to the application place reliance on the majority decision, which takes precedence.

Other Matters

58. There follows a discussion of other issues raised during the consultation and exchanges between the parties.

Acquisition of the land

59. The Applicants have questioned whether WCC has adequately demonstrated that the Application Land was acquired for the statutory purposes it contends, and points out that the copies of conveyances provided by WCC make no mention of this purpose. In response, WCC points to two cases to support its assertions that the land was acquired for statutory purposes - the *Lancashire* case, and *Naylor v Essex County Council [2014].*

60. In *Lancashire*, Lancashire County Council had provided copies of records reflecting the management of the land by its Education Department, Land Registry documents showing that it owned the freehold to the land, and copies of conveyances (which made no mention of the purpose for which the land was being acquired). The Inspector at first instance concluded that the information regarding the purposes for which the Application Land was held by Council was 'unsatisfactory'. However, when the case reached the High Court, Justice Ouseley stated that he would have taken a different view:

> *"I rather doubt that, confined to the express reasoning in the DL [the decision letter], I would have reached the same conclusion as the inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding."* (Para 57)

Despite this view, Justice Ouseley was unwilling to conclude that the Inspector's findings had been 'irrational'. However, when the case reached the Supreme Court, the Lords took a different view:

> *In our view, Ouseley J's approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by*

> *deference to the inspector's fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it "not possible to be sure" that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held."* (Para 32).

61. In *Naylor,* which concerned an application to register village green rights on privately owned land that had been managed by a local authority (and the basis for that arrangement), John Howell QC placed reliance on the 'presumption of regularity', stating that *"…it must be assumed, unless there is evidence to the contrary, that the District Council did what it did properly and lawfully in pursuance of some statutory power enabling it to do so*" (Para 27).

62. Although WCC has not been able to produce any evidence which positively identifies the land as having been acquired for housing purposes (such as statutory powers of the Housing Acts 1925 and 1936, officers consider that there is sufficient contemporaneous evidence which demonstrates, on the balance of probabilities, that this was the case. The parish council minutes relating to the scarcity of council housing in the area, the Winchester College valuation reports which confirmed that the College had *"…sold the western half of the field to the Winchester RDC for a housing site in 1936, and a further plot adjoining that area for a similar purpose in 1938",* and by the evidence that the land was developed in the years immediately after acquisition (as shown on Ordnance Survey mapping from the period), all provide corroborative evidence to support WCC's assertions.

Statutory holding power

63. The Applicants state that no evidence has been provided to demonstrate that the land is laid out as open space pursuant to any Housing Act or any other statutory power. They cite *R (on the application of Goodman) v Secretary of State for Environment, Food and Rural Affairs [2015]*, which found that it is not possible to infer a change in appropriation as a result of how the land is actually being used by the Council.

64. As discussed above, the provisions of the Housing Acts of 1925 and 1936 made provision for a local authority to lay out land that had been acquired for the purpose of providing housing as open space, without the need for further appropriation. The provision of both housing and open space (as well as 'public streets or roads') all fell within the ambit of the Housing Acts. In the absence of evidence to the contrary (and WCC has confirmed that it can find no evidence of any subsequent appropriation of the Application Land to a different purpose) it is reasonable to infer that the land continues to be held for the same statutory purpose for which it was originally acquired.

Conclusions

65. There is *prima facie* evidence that the Application Land has been used for lawful sports and pastimes by a significant number of local inhabitants, for a period that includes the twenty years running up to the submission of the application (1985 – 2015). Although this is contested by Otterbourne Parish Council, the assertion is not disputed by the landowner, WCC. As has been noted in this report, the land has been maintained as open space, with public use seemingly encouraged by the provision of waste bins and a bench, which would be consistent with the type of use necessary to meet the legal test.

66. No submissions have been made in respect of the identification of the locality served by the Application Land, but in any event, they are not considered relevant to the determination of the application.

67. Although the Applicants assert that WCC has not proven the purpose for which the Application Land was acquired, the *Lancashire* case affirms that the burden of proof in this matter is the 'ordinary civil test', and so it need only be demonstrated on the *balance of probabilities* that WCC had acquired (and subsequently held the land) under the statutory powers that have been asserted. The contemporaneous evidence indicates the purpose for which the land was acquired, and that it was developed shortly afterwards.

68. As set out in Ground 1 of WCC's objections, it is considered that use of the Application Land has not been 'as of right', by virtue of the statutory provisions under which it was acquired and subsequently held, which specifically provided for the land to be set out as open space. Following the ruling in *Barkas,* use is therefore deemed to have been 'by right', on account of it having taken place on land held by a local authority that was provided specifically for the purpose of public recreation, and so the requirement of 'as of right' under Section 15(2)(a) of the Commons Act 2006 has not been met.

69. WCC also argues that, if it is held that the Application Land was not laid out as open space pursuant to statutory powers then, as a result of the ruling in *Barkas* (in overturning *Beresford*) the fact it was laid out and maintained as open space will also have rendered use 'by right' (Ground 2). Officers consider that the decision in *Barkas* to rule that *Beresford* was wrongly decided, provides support for this argument, and so the requirement of 'as of right' under Section 15(2)(a) of the Commons Act 2006 has not been met.

70. Without prejudice to the above points, it is also considered that the application must fail for reasons of statutory incompatibility (Ground 3). The decision in the *Lancashire* case means that registration of the Application Land as a village green under Section 15 of the Commons Act 2006 would conflict with the statutory purpose for which the land was acquired (and is still held), under the provisions of the Housing Acts.

71. In light of the above, it is considered that the application to register as a town or village green the land, shown edged blue on the plans appended to this report 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 266 – Coles Mede	Countryside Access Team Castle Avenue 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.