Your Reference
VG266
Our Reference

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

20 December 2020

Dear Sir

Registration of the Town Green at The Green, Coles Mede, Otterbourne, Hampshire SO21 2EG ("the Land")

Application Reference VG266

An application was made by Jennifer Larby with the above reference to register the Land as a Town Green ("the Application"). We have recently been copied into the objection letter submitted by Winchester City Council ("the Council") dated 25 June 2020 (a copy of which in enclosed) ("the Objection Letter").

We consider that the objections made by the Council in the Objection Letter cannot currently be made out. We therefore consider that the representations in the letter should be disregarded, and the Application should be granted as soon as possible.

Response to the Council's Grounds of Objection

1. Various appendices were attached to the Objection Letter. In respect of the first two enclosures, namely the Conveyance dated 24 December 1936 and the Conveyance dated 31 May 1938, only the first page of the conveyances have been provided. It is impossible to fully understand the conveyances from that information provided. You will no doubt require full copies of such documents to be provided in order to rely upon them and their terms. Without the full conveyances, we are unable to comment further on their applicability.

2. The Letter of Objection refers to "material within the Council's Archive" demonstrating that the parcels of land were purchased for the delivery of housing. It is unclear from the Objection Letter whether that "material" is the information enclosed with the Objection Letter, or whether it is some further information that neither you nor we have been furnished with. Clearly, the Registration Authority is unable to rely on the statement that the parcels were demonstrated for the delivery of housing without that statement being clearly substantiated. So far as we can see, the documentation provided by the Council plainly fails to adequately do so.

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3. The Council appears to accept that all of the requirements of registration as a village green are met, with the exception of using the land "as of right", and, in particular, whether the use of the land is *precarious.* We therefore do not seek cover any issues other than those raised by the Council.

4. We accept that the Council is correct that the onus to prove that the land is a village green is on the applicant. However, notwithstanding the fact that the Council's objections have been split into three different "grounds", all of those grounds are reliant upon the Council demonstrating that the land is being held for purposes pursuant to the current Housing Act. It is plainly not within the applicant's gift to demonstrate how the land is, or is not, held by the Council. The Council must be required to provide evidence clearly demonstrating how the land is held. Based upon the documentation provided, the Council is yet to do so.

5. The Council's position appears to be that the land is held was acquired for housing purposes at a time when the Housing Act 1925 would have been the relevant legislation. 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 *Goodman*[1], 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.

6. In the event that the Council cannot establish that the land is held under the Housing Act or any other statutory power, then the reasoning in *Barkas* does not apply.

7. The Council seeks to differentiate between Ground 1 and Ground 2, but they are essentially the same.

8. Furthermore, Ground 3 is also predicated on the fact that the land is held for housing purposes pursuant to the Housing Acts. Again, no evidence has been provided to demonstrate this.

9. In the event that the Registration Authority finds that the land has not been acquired, laid out and retained as open space pursuant to the express ability to do so pursuant to the Housing Acts, then there is no indication that the land is used with permission. In that event, the City Council acknowledge that all of the other requirements of the registration of the land as a village green are met, and therefore the Registration Authority should register the land as a village green immediately.

We trust that this is helpful, and we look forward to hearing from you in due course

Yours faithfully

[redacted]

[1] *R (on the application of Goodman) –v- Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin)

[redacted]

Dear Harry,

I am writing in response to the objections laid out by Catherine Knight of Winchester City Council and Otterbourne Parish Council in regards the Village Green registration application VG266 for 'The Green, Coles Mede, Otterbourne'.

I will demonstrate below that the objection presented are invalid and must be rejected.

Firstly, the objection from Otterbourne Parish Council asserts there no evidence that the application meets the tests required for registration under section 15 of the Commons Act 2006.

Evidence submitted with the application prove that the following requirements for registration have been met and the land owner, Winchester City Council, does not contest these:

- The land is used for lawful sports and pastimes
- The land is used by significant number of the inhabitants of a locality or of a neighbourhood within a locality
- The land has been used in this manner for a period of not less than 20 years and continues to be used in this way to the present day

The requirement that use of the land is 'as of right', is being contested and this is addressed below.

As we demonstrate that the objections of the City Council are without basis and that the requirements for registration of The Green under the Commons Act are met, we encourage the County Council as commons registration authority to grant village green status to The Green in line with the powers granted to the public by The Commons Act.

Response 1 – Holding of Land:
The basis of all of Winchester City Council's objections are predicated on the land being held under powers granted by the Housing Act for the statutory purpose of the provision of housing.

They assert this is the case in their letter of objection, yet they provide no evidence to prove the land is held under the Housing Act. As this act is fundamental to all of their objections, there must be a requirement on the City Council to prove the land is being held in line with the requirements of the act, and that the required ministerial consents have been granted.

Without evidence to support this claim, all of the objections presented by the City Council are without basis and should be dismissed.

Response 2 – Barkas
If evidence is found to support this claim and it is accepted that the City Council is holding the land under the powers of the housing act, there are aspects of our application which differentiate it from the case 'R (Barkas) v North Yorkshire County Council [2015]'. Therfore, the City Council's objections that refer to law established in the Barkas case do not apply to our application and should be dismissed.

Specifically, the Barkas case ruled 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'.

In Paragraph 47 of the ruling on Barkas, Lord Neuberger said:

"… the land concerned was acquired and maintained by the local authority as public recreation grounds under a specific statutory power namely section 80(1) of the 1936 Act, now section 12(1) of the 1985 Act, and accordingly members of the public have used the land for recreation "by right".

The documents provided by the City Council along with their objection show that the first parcel of land acquired for the Coles Mede development extends 200 feet from the south-west border in a north-easterly direction. The Green is directly adjacent to this south-west boundary and extends approximately 135 feet to the north-east. Therefore, even allowing for a significant margin of error, the first parcel of land encompasses The Green entirely.

The City Council assert that the first parcel of land was acquired under powers granted by the 1925 Housing Act. The 1925 act 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. In addition, there has been no evidence provided that the ministerial consents required by section 80(1) of subsequent Housing Acts have been granted.

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'.

Response 3 – As of right
The City Council highlights the requirement for us as applicants to provide evidence that use of the land is indeed 'as of right'. I refer to law established in the case 'R v Oxfordshire County Council and others, ex parte Sunningwell Parish Council [1999] UKHL 28'.

The Sunningwell judgement established the term 'as of right' is equivalent to the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner.

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'.

I understand that the City Council has now published a statement that issues licence for use of land they hold in a similar manner to The Green, however, our application predates this statement, so it is not applicable to our application.

Response 4 - Beresford

The City Council mentions another case, namely Beresford, to support their second objection. However, when ruling on the Barkas case, Lord Neuberger called into question the reliability of the Beresford case when he said (in paragraph 80):

'… I would hold that the decision and reasoning of the House of Lords in Beresford should no longer be relied on.'

On these grounds the Beresford case is no longer considered to be reliable law and any reference to this case should be dismissed.

Response 5 – Statutory Incompatibility

On the issue of Statutory incompatibility a key case to consider is R (Lancashire County Council) v Secretary of State and R (NHS Property Services Ltd) v Surrey County Council and another [2019] UKSC 58.

The ruling on these cases was contentious with a number of dissenting views and the supreme court unable to reach a unanimous verdict. It is therefore vital that all factors are considered in detail as divergences from the cases considered in this ruling could be significant.

Significantly, our application differs from the above cases, in that the Housing Act 1925 and subsequent housing acts grant explicit powers for land to be laid out as open space (although as discussed previously, the 1925 act does not grant explicit rights of use). This is acknowledged by the City Council in their letter of objection. However, similar powers do not exist for the above two cases, which were related to provision of education and health services, not housing.

Because of this, The Green can simultaneously be held as open space under the powers of the Housing Act (as it has been for 90 years) and simultaneously be registered as a village green under the powers of Commons Act. There is no incompatibility.

It is clearly true that application of Village Green Status would apply some restrictions to future use of this small piece of land. However, this is the very purpose of village green registration; and a move to grant immunity from the Commons Act for any land held under a housing act is incompatible with the statutory rights of the public.

In Paragraph 126 of the Lancashire ruling, Lord Wilson stated:

“If public authorities which hold land for specified statutory purposes are to be immune from any registration of it as a green which would be theoretically incompatible with their purposes, the reach of section 15 of the Commons Act 2006 Act is substantially reduced. One would expect that, had such been its intention, Parliament would have so provided within the section. In the absence of any such provision, whence does justification for it come?”

As there is statutory provision within the Housing Act of 1925 for land to be held and maintained as open space there is no statutory inconsistency between the Housing Act and the rights of the public to register land as a village green under the commons act 2006.

Yours Sincerely,