

**Wiltshire Council**

**Eastern Area Planning Committee**

**22 March 2018**

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**COMMONS ACT 2006 – SECTION 15(1) AND (2) APPLICATION TO REGISTER  
LAND AS A TOWN OR VILLAGE GREEN – THE PLAY AREA IN MORRIS  
ROAD/COLLEGE FIELDS IN THE BARTON PARK/COLLEGE FIELDS  
RESIDENTIAL AREA, MARLBOROUGH**

**Purpose of Report**

1. To:
  - (i) Consider a report and recommendation, dated 2 March 2018, made by Mr William Webster of 3 Paper Buildings, appointed by Wiltshire Council as an independent inspector to preside over a non-statutory public inquiry to consider an application made under Sections 15(1) and (2) of the Commons Act 2006 to register land at Barton Park, Marlborough as a town or village green.
  - (ii) Recommend that Wiltshire Council accepts the inspector's recommendation in rejecting the application for the reasons set out in the report dated 23 February 2018.

**Relevance to Council's Business Plan**

2. Working with the local community to maintain an up-to-date register of town and village greens to make Wiltshire an even better place to live, work and visit.

**Background**

3. On 18 May 2015 Mr I Mellor, resident of Barton Park, Marlborough, applied to Wiltshire Council as commons registration authority ('CRA') to register the play area in Morris Road/College Fields, Barton Park as a town or village green under Sections 15(1) and 15(2) of the Commons Act 2006. The application land is shown edged red on the plan appended at **Appendix 1**.
4. The applicant land is owned by Wiltshire Council and adjoining land to the north-west is owned by Marlborough College. Further to the statutory notice of the application both parties objected to the application to register the land as a town or village green.
5. Wiltshire Council, in its role as CRA, must determine the application in a manner that is fair and reasonable to all parties and accordingly, at a meeting held on 5 January 2017, Wiltshire Council's Eastern Area Planning Committee resolved that an inspector should be appointed to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough. A copy of the Committee report is appended at **Appendix 2**.

## **Main Considerations for the Council**

6. The inquiry was held on 9 and 10 January 2018. Following the consideration of the documents and the hearing of evidence given in chief and in cross-examination, the inspector's report contains a recommendation to Wiltshire Council which is set out below.

*"It is my recommendation to the registration authority that the application to register should be rejected as the public had a statutory right to use the land for LSP which, as a matter of law, precludes the registration of the application land as a TVG.*

*Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be "the reasons set out in the inspector's report dated 23 February 2018".*

**NB** LSP = Lawful Sports and Pastimes. TVG = Town or Village Green.

7. Wiltshire Council is the commons registration authority and has a statutory duty to determine the application. The burden of proof lies on the applicant for registration of a new green. All the elements required to establish a new green must be properly and strictly demonstrated. The standard of proof is the civil standard of proof on the balance of probabilities that 'a significant number of inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes over the land for a period of at least 20 years and that use is continuing at the time of application'. The council, as CRA, has no investigative duty in relation to village green applications which would require it to find evidence or reformulate the applicant's case. The CRA is entitled to deal with the application and the evidence as presented by the parties (the applicant and landowner and any parties objecting to the application). There are currently no regulations in force which set out a process by which a CRA should determine applications of this type.
8. Section 15(2) of the Commons Act 2006 enables any person to apply to register land as a TVG in a case where:
- (a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years*
  - (b) *they continue to do so at the time of the application.*
9. The elements of the qualifying principles may be broken down to give a list of conditions which must, on the balance of probability, be met to enable registration of the land to occur. These are as follows:

Where

- (i) a significant number...
- (ii) ...of the inhabitants of any locality...
- (iii) ...or of any neighbourhood within a locality...
- (iv) ...have indulged as of right...
- (v) ...in lawful sports and pastimes...

- (vi) ...on the land...
  - (vii) ...for at least 20 years...
  - (viii) they continue to do so at the time of the application.
10. It is a matter of fact that no party disputed that a significant number of the inhabitants of Barton Park, Marlborough had indulged in lawful sports and pastimes on the land for a period exceeding 20years. The only matter that is disputed in this case is whether or not that use had been in a manner that was 'as of right'. The inspector was able to affirm this in the early stages of the inquiry which enabled the inquiry to proceed with the presentation and consideration of only those matters that related to whether the use had been 'as of right' or 'by right'.
11. Officers of the council agree that this was the correct approach with this case and that the only matter of dispute is whether the use had been 'as of right' or 'by right'.
12. As of Right
- Use that is 'as of right' is use that is without force, secrecy or permission (from the Latin *nec vi, nec clam, nec precario*). Again there is no dispute about elements of satisfying this condition and it is not suggested that use has been by force (perhaps by causing damage to fencing or in defiance of signs) or in secret (use of the land has been frequent and visible) by any party; however, it is considered by the objectors that use has been an activity permitted by a statutory provision enacted by the landowner by virtue of the manner in which the land was held.
13. By Right
- Use that is 'by right' is use that is carried out by statutory right, permitted or actively allowed in some other way on the land. This may be by way of signage, by by-laws, by agreements or it may be by way of implication or by virtue of statutory powers held by the landowner and applied to the land. The objectors to this application consider that use of the land has been by right for the relevant period 1995 to 2015 and for a short period of time before that.
14. The core issue in determining this application is whether the public use has been 'by right' within the meaning of the decision of the Supreme Court in *R (Barkas) v North Yorkshire County Council [2015] AC 195*.
15. It has been established in *Barkas* that where land is held by a local authority for statutory purposes which allow it to be used by the public for recreation then public use is 'by right' and hence cannot be qualifying for the purposes of registration of the land as a TVG.
16. It is therefore necessary in this case to closely consider the manner in which Wiltshire Council (and its predecessors Wiltshire County Council and Kennet District Council) acquired, held and managed the land.

17. The inspector's Summary Report and Report appended at **Appendices 3 and 4** respectively, deal with these considerations in detail (paragraph 48 onwards). It is clear that there was a desire to develop land for residential use at Barton Park from the 1970s through the 1980s and early 1990s. The second objector (Marlborough College) identified 15 planning applications affecting land in this area in these years though concludes that the development came forward in two phases, Barton Park west and Barton Park east. The applicant land lies within Barton Park east.
18. It was considered (and not contested) that a number of early permissions were not implemented due to changes in land ownership and that it was not until outline planning permission reference K/86/0020 was approved containing Condition 5 referring back to a Section 52 of the Town and Country Planning Act 1971 Agreement dated 10 February 1983 that anything directly relevant to the TVG applicant land is relied upon (see inspector's report Appendix 4 paras 53-56).
19. The 1983 agreement refers to proposed open space areas coincident with some, but not all, of the TVG applicant land and the 1986 planning permission refers to the provision of open spaces to be provided concurrently with the phases of development in accordance with the 1983 agreement. The outline permission K/86/00020 was taken forward through the approval of the Master Plan 779/4 (submitted on behalf of Miller Homes) upon which 4.5 acres of Public Open Space were clearly identified. These 4.5 acres of Public Open Space are broadly coincident with the TVG applicant land and also closely coincident with the land transferred by Miller Group Ltd to Kennet District Council in 1993.
20. The 1993 transfer to Kennet District Council is an important document insofar as it is the first record of the acquisition of the TVG applicant land by a local authority. The land transferred is clearly marked as "Open Space" in three places in the same parcel and the transfer provides as follows:
  2. *The property is transferred together with the right of way in common with all others entitled to the like rights with or without vehicles over and along all estate roads (until such estate roads are adopted as public highways) constructed on the land comprised in the remainder of title number WT67901 for the purpose only of obtaining access to and maintaining as amenity open space the land hereby transferred.*

The emphasis is not in the original document. The 1993 Transfer is appended at **Appendix 5**.

21. The Inspector considers at paragraph 51 of his report at **Appendix 4** that on the face of it the transfer plainly transfers the land to Kennet District Council to be held as public open space and he considers that there is no scope for ambiguity. Accordingly, there is no requirement for him to consider extrinsic evidence which points to some other holding purpose.
22. However, at paragraph 52 of his report he goes on to state that even if he did go beyond the terms of the 1993 Transfer the outcome would be the same, being entirely consistent with the planning history of the TVG applicant land.

23. Since 1993 the land has been regularly maintained by the local authority in a way which enables it to be used as public open space. No explanation has been offered as to why a local authority would maintain land in this way if it had not been regarded as public open space. A presumption of regularity must apply.
24. The land was maintained by Wiltshire Council between 2009 and 2013 but between June 2013 and September 2016 maintenance was carried out by Balfour Beatty Living Places (as part of a contract with Wiltshire Council) and from September 2016 onwards by another contractor known as *id verde* who continue to maintain the land (grass is cut monthly between March and October/November).
25. There appears to be no doubt that the land has been held and maintained by a local authority since 1993, and, for the whole of the 20 years qualifying period for the purposes of Section 15 of the Commons Act 2006. However, for *Barkas* to apply the committee must consider what statutory power the local authority held the land under.
26. There is no direct evidence as to what powers were used to acquire the land and no council minutes have been found that record this. Given the clear purpose of the land as open space or open amenity space throughout much of the area's planning history it is not consistent that it was acquired by the local authority for planning purposes and the most likely powers are undoubtedly those found within Section 164 of the Public Health Act 1875, Section 9/10 of the Open Spaces Act 1906 or under Section 19 of the Local Government (Miscellaneous Provisions) Act 1976. The term 'open space' is referred to in the Town and Country Planning Act 1990 at Section 336(1) and defined as including *land laid out as a public garden, or used for the purposes of public recreation*.
27. The applicant pointed out in their submissions to the inquiry that Wiltshire Council has never properly designated the land as *public* open space (it was transferred as *amenity* open space), has never erected signs or notices, provided play equipment or devised a play and sports strategy and that the land has been excluded from a programme of planned transfers of local public open spaces to the town council.
28. The inspector, at paragraph 104 of his report at **Appendix 4**, considers the statutory holding powers of Kennet District Council and concludes that they were in a position to lawfully acquire the applicant land for use as recreational open space and to hold it for that purpose. No evidence has been identified that it could have been held for any other purpose and it was certainly used and managed for these recreational purposes by the local authority after 1993.
29. The inspector has found that the application land was always intended to comprise the major part of the public open space provision for the development of Barton Park east and that it has consistently been maintained and used in this way. Accordingly, officers agree with the inspector that the local inhabitants had a statutory entitlement to use the TVG applicant land for recreation and that in these circumstances use was 'by right' and not 'as of right' and is thereby not a qualifying use within the meaning of Section 15 of the Commons Act 2006.

### **Overview and Scrutiny Engagement**

30. The determination of Town and Village Green applications is governed by statutory regulations, relevant case law and non-statutory guidance.

### **Safeguarding Implications**

31. There are no safeguarding implications arising from this report.

### **Public Health Implications**

32. There are no public health implications arising from this report.

### **Corporate Procurement Implications**

33. The procurement implications of processing the application are dealt with under the Financial Implications section below.

### **Equalities Impact of the Proposal**

34. There are no equalities impacts arising from the proposal.

### **Environmental and Climate Change Considerations**

35. There are no known environmental and climate change considerations arising from this report.

### **Risk Assessment**

36. The financial and legal risks are set out in the Financial Implications and Legal Implications sections in paragraphs 37 to 47 below.

### **Financial Implications**

37. There is no mechanism by which a CRA may charge the applicant for processing an application to register land as a town or village green and all the costs for holding a non-statutory public inquiry were borne by the council. There is no budgetary provision for such non-statutory processes.
38. The financial implications associated with the risk of judicial review are considered in the following paragraphs.

### **Legal Implications**

39. Where the CRA decides not to register the land as a town or village green, the only right of appeal open to the applicant is through judicial review proceedings and challenging the lawfulness of the decision in the High Court. The court's permission to bring proceedings is required and the application must be made within three months of the date of the decision to determine the village green application.

40. If the land is successfully registered as a town or village green, the landowner could potentially challenge the Registration Authority's decision under Section 14(1)(b) of the Commons Registration Act 1965 (the 1965 Act), which allows the High Court to amend the register only if it can be shown that the registration ought not to have been made and that it is just to rectify the register. The overall effect is that the registration of the land is deemed to have been made under Section 13 of the 1965 Act and there is a preserved right under Section 14 to apply to the court to rectify the registration of the town or village green without limit of time. The landowner is also able to seek a judicial review of the CRA's decision to register their land as a town or village green.
41. Where the Registration Authority decides not to register the land as a town or village green, there is no right of appeal for the applicant, although the decision of the council may be challenged through judicial review, for which the permission of the court is required and the application must be made within three months of the date of the decision of the council. A landowner could also use judicial review proceedings to challenge the council's decision to register their land as a town or village green.
42. Judicial review proceedings are a complex area of administrative law where as previously stated every aspect of the law and facts relevant to the decision (in this case the relevant statute is the Commons Act 2006 together with village green case law) and the decision making process would be subject to detailed analysis by the High Court. Due to the complexity of such cases the legal costs can quickly escalate. If the judicial review proceedings are not successfully defended, the Aarhus convention (concerning the legal costs for environmental cases) does limit the costs liability so far as the council as CRA is concerned (if the case is lost) to £35,000; however, the CRA would also be required to meet its own legal costs to defend the case (which would be a broadly similar sum if not more depending on the issues that may arise during the proceedings) in addition to the applicant's costs. The applicant's potential maximum costs liability if their case is unsuccessful is £5,000.
43. The issue of 'pre-determination' or approaching decision with a 'closed mind' (or having already made up their mind on the application before considering the evidence and/or inspector's recommendation and making the decision) is a serious allegation and one that a CRA must avoid. There is a potential reputational issue for a Commons Registration Authority if after a legal challenge a court was to make a finding that 'pre-determination' took place before a committee made a formal decision to determine an application to register land as a town or village green.
44. The committee should note that the Growth and Infrastructure Act 2013 amended the Commons Act 2006 to:
  - (i) reduce the period within which a town or village green application can be made (after the requisite 20 years of recreational use "as of right" has ceased) from two years to one year;
  - (ii) allow landowners to deposit a map and statement to protect their land from registration as a town or village green, whilst allowing access to the land;

- (iii) exclude the right to apply to register land as a town or village green under Section 15(1) of the 2006 Act where any of a number of specified events ('trigger events') occurs.
45. If the decision is quashed by the High Court either by consent or after a substantive hearing it will be sent back to the CRA to be re-made.
46. A recent High Court case has considered the procedural issues for determining an application to register land as a town or village green. In March 2016 the High Court considered an application by a parish council for judicial review of the decision of Cheshire East Borough Council concerning an application to record two verges as a town or village green (Somersford Parish Council v Cheshire East Borough Council & Anor [2016] EWHC 619). The application for judicial review was made on the following grounds:
- (i) Cheshire East Borough Council breached the rule of natural justice by acting as its own judge.
  - (ii) Counsel instructed by the borough council was not independent.
  - (iii) There were procedural errors; counsel allowed the borough council to put in evidence out of time and the applicant was given no opportunity to respond to the late evidence.
  - (iv) The council should have held a public inquiry before making its recommendation.
47. The High Court rejected the first two arguments and held that a commons registration authority is entitled to determine a town and village green application providing it instructs independent legal counsel and secondly, legal counsel is deemed to be independent. The High Court held that it was procedurally unfair for the applicant not to have been given a chance to respond to the evidence which was, itself, submitted out of time. In addition, the judge found that the dispute as to whether or not the grass verges were highway was serious enough to necessitate a public inquiry.
48. It is considered that in holding a non-statutory public inquiry and appointing an independent inspector experienced in this area of law Wiltshire Council has acted in a fair and reasonable manner to all parties.

### **Options Considered**

49. Members of the Committee must consider the following possible decisions open to them:
- (i) To register the applicant land as a town or village green.
  - (ii) To reject the application to register the land as a town or village green.



## **Reason for Proposal**

50. Full submissions from the applicant and the two objectors have been made and duly considered by an expert in this area of law at a locally held public inquiry. The recommendation of the inspector is clear and officers agree that on the balance of probability the land was held and maintained by the local authority for the purpose of recreation and amenity. The local authority has lawful authority to hold land in this way and it is likely that it did so. Accordingly, use by the public was by way of statutory provision rather than a process with its roots in the law of trespass. Use of the land was therefore 'by right' and not 'as of right' and thereby does not satisfy the requirements of Section 15 of the Commons Act 2006.

## **Proposal**

51. That the application to register the land should be rejected for the reasons set out in the inspector's report dated 2 March 2018 and appended to this report at **Appendix 4**.

### **TRACY CARTER**

Director – Waste and Environment

Report Author

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Acting Definitive Map and Highway Records Team Leader

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### **The following unpublished documents have been relied on in the preparation of this Report:**

Commons Registration Authority (Wiltshire Council) Inquiry Documents (1 file)  
Applicant's (Mr I Mellor) Inquiry Documents (2 files)  
First Objector's (Wiltshire Council) Inquiry Documents (1 file)  
Second Objector's (Marlborough College) Inquiry Documents (3 files)

**NB These documents will be available for public viewing at:**

**Rights of Way and Countryside, Unit 9, Ascot Court, White Horse Business Park,  
Trowbridge, BA14 0XA**

### **Appendices:**

Appendix 1 Plan showing applicant land  
Appendix 2 Report to the Eastern Area Planning Committee Jan 05 2017  
Appendix 3 Executive Summary to Report of William Webster dated Feb 23 2018  
Appendix 4 Report of William Webster dated Feb 23 2018  
Appendix 5 Transfer of applicant land to Kennet District Council dated Aug 19 1993