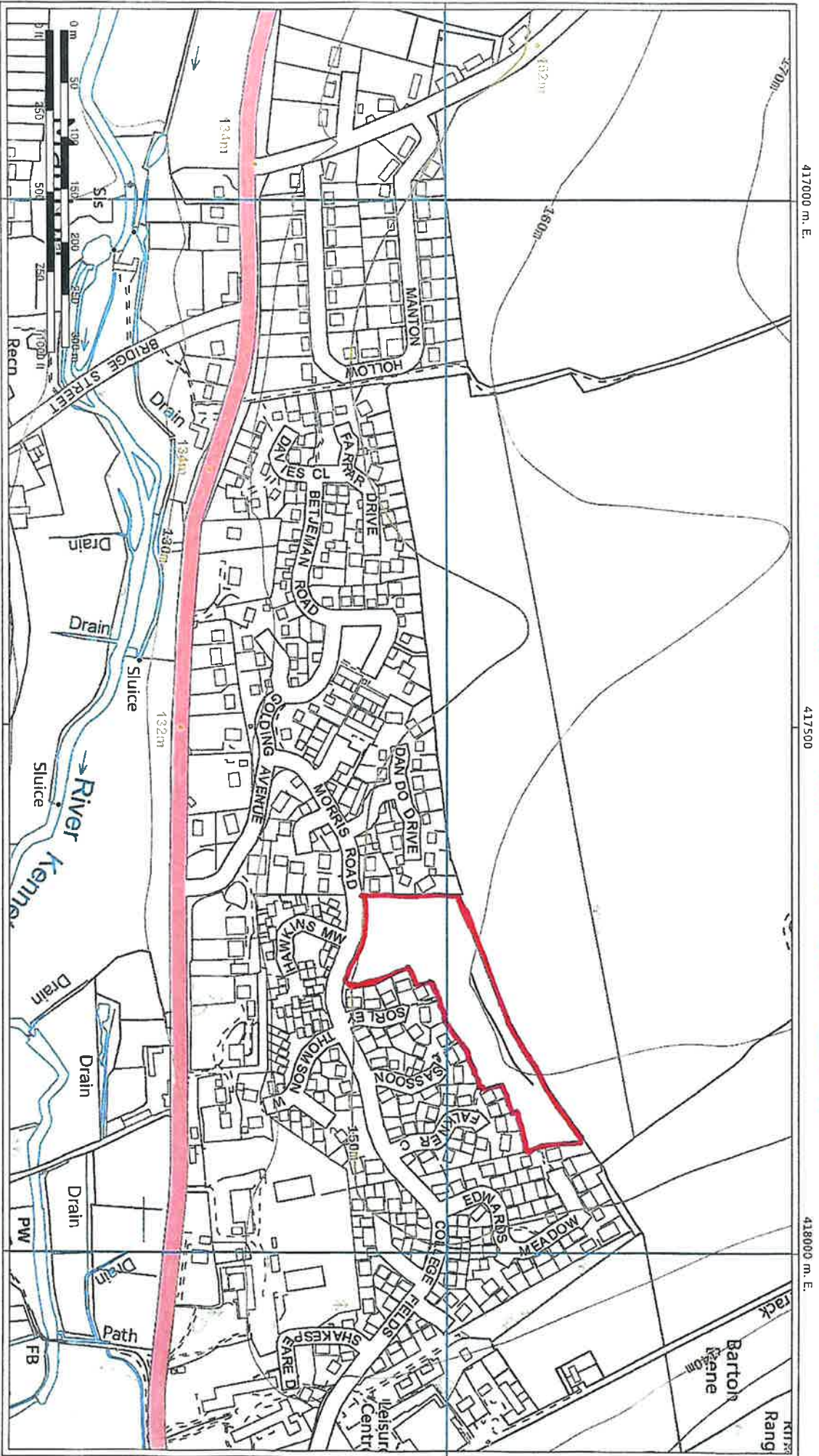


VILLAGE GREEN APPLICATION SITE.



Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
 Ground Scale 1:5,000

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Graphic provides direction of Approximate
 Mean Declination for center of map

Approximate
 Mean
 Declination
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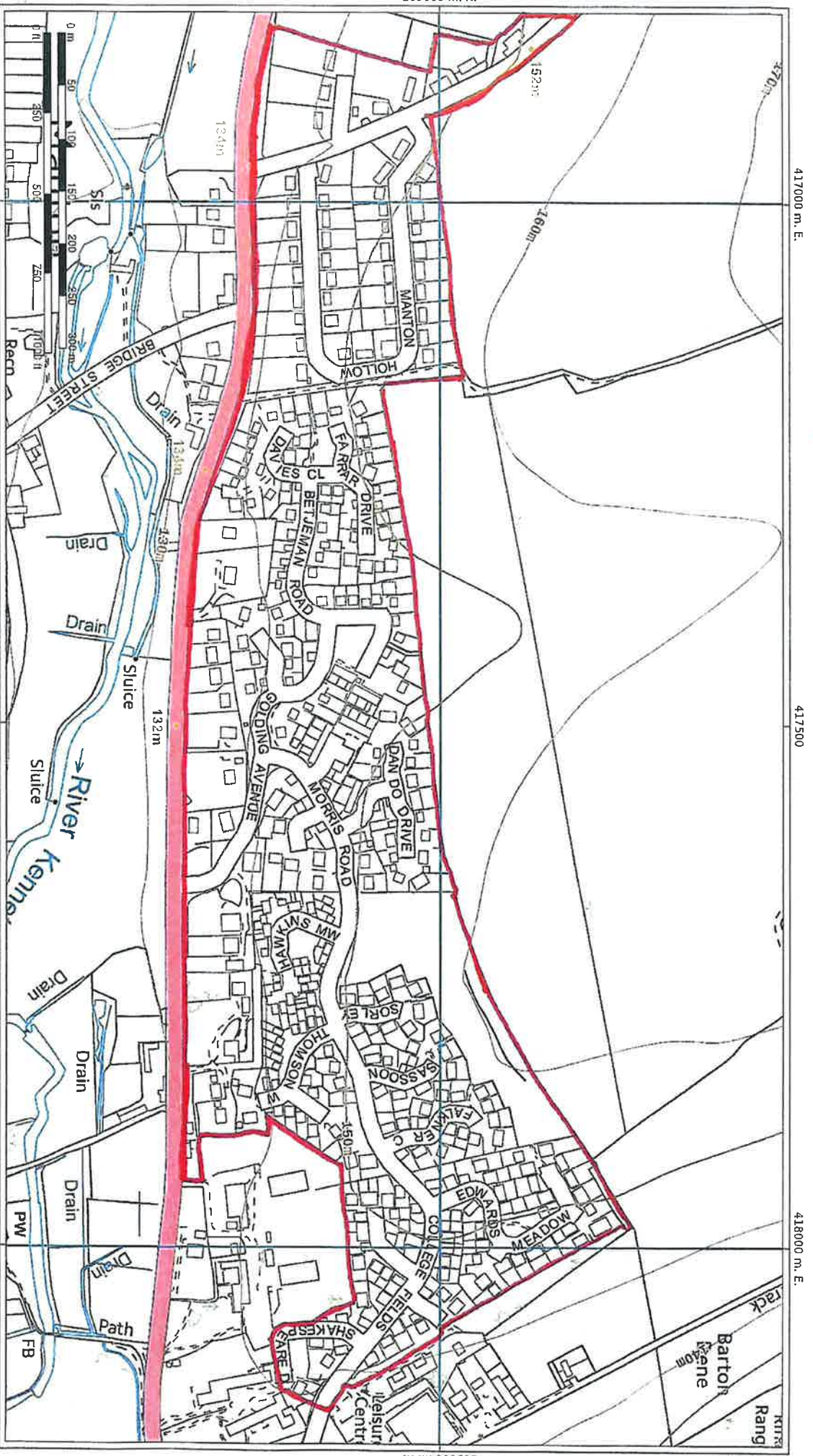
Annual Change
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SN8 ITP

PLAN OF WEIGH BOURE HOOD.



417000 m. E.

417500

418000 m. E.

169000 m. N.

169000 m. N.

417000 m. E.

417500

418000 m. E.

Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
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Approximate
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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

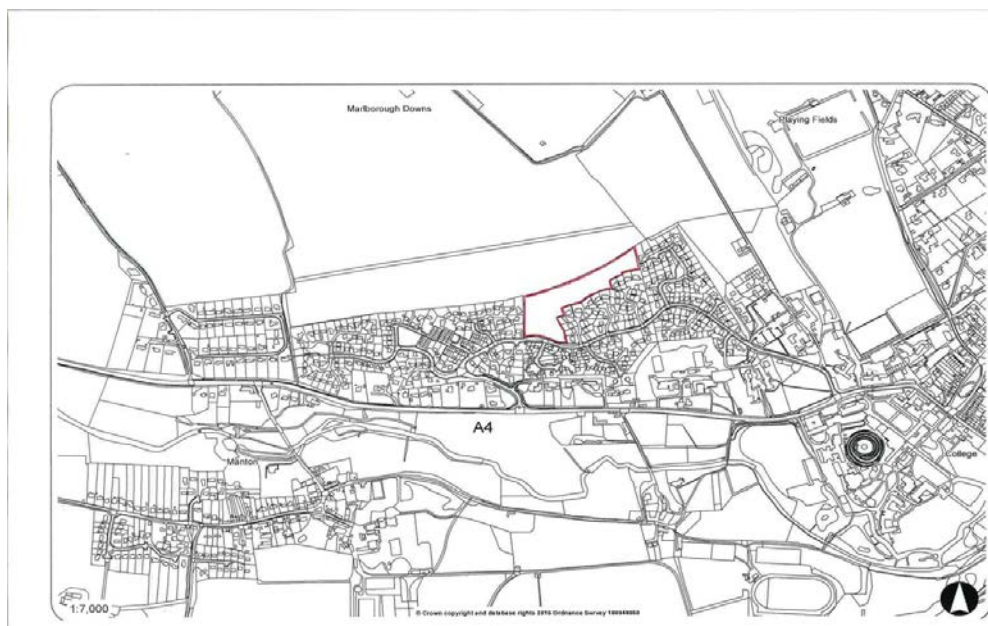
1. To seek approval to appoint an independent Inspector to hold a non-statutory public inquiry and provide an advisory report for the Eastern Area Planning Committee on the application to register land as a town or village green in Barton Park/College Fields, Marlborough.

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, 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 below:



4. The applicant stated on his application form that the land the application relates to was planned as open space with the housing development; it was transferred to Kennet District Council and has been used by the community for over 25 years. Nineteen statements concerning use of the land were submitted with the application in its support. Kennet District Council owned the land from 1993 and ownership was transferred to Wiltshire Council in 2009 when it became a unitary authority.
5. Receipt of the application was advertised in the Wiltshire Gazette and Herald on 30 July 2015 and on site. Two objections were received to the application, one from Wiltshire Council as land owner and the other from solicitors acting on behalf of Marlborough College. Ninety five representations on the application were received by the Council as a result of the public notice posting.

Main Considerations for the Council

6. 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 proved. 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.
7. The application is disputed. Wiltshire Council, as landowner, objects to the application on the following grounds:
 - “1. *The land has been the subject of a series of Planning Agreements under Section 52 of the Town and Country Planning Act 1971, culminating in an Agreement dated 10 February 1983 and a Supplemental Agreement dated 29 March 1985 between Kennet District Council (1) Marlborough College (2) and W E Chivers and Sons Limited (3) whereby Marlborough College agreed to convey to the Council not less than four and a half acres as an open space area which corresponds in location with the site of the application.*
 2. *By Transfer dated 19 August 1993, the land was transferred to Kennet District Council.*
 3. *From 1 April 2009 Wiltshire Council became unitary authority merging Wiltshire County Council with Kennet District Council and the other three District Councils.*
 4. *The land is maintained by Wiltshire Council as a public open space under a current maintenance contract.*
 5. *The application does not satisfy the use “as of right” requirement and the application should therefore fail.”*

8. Section 15 of the Commons Act 2006 provides that to register land as a town or village green it must be shown that:

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.

9. The Supreme Court Judgement given on 21 May 2014 in R (on the application of Barkas) (Appellant) v North Yorkshire County Council and another (Respondents) is the leading authority on whether use has been “as of right”, which satisfies the legal criterion for registration, or “by right”, which does not. In the words of Lord Neuberger:

“ 24...where the owner of the land is a local, or other public authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land “as of right”, simply because the authority has not objected to them 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.”

10. Marlborough College objects to the application for the following reasons:

- (i) Failure to demonstrate use by a significant number of inhabitants of the claimed locality.
- (ii) Failure to demonstrate continuous use (by a significant number) for the whole of the claimed 20 year period.
- (iii) Any claimed use of the claimed land by members of the public has been “by right” not “as of right”.

11. There is a serious dispute regarding the factual evidence in this case, the application is of great local interest and Wiltshire Council owns the land which the applicant seeks to register as a town or village green. The council, as CRA, must determine the application in a manner fair to all the parties. This may be achieved by appointing an independent Inspector who would normally be a barrister who is an expert in village green law to either advise the council on how to proceed with determining the application or to hold a non-statutory public inquiry and produce a non statutory recommendation to the council for the council’s consideration. In holding a public inquiry an independent Inspector considers the evidence and submissions and law relied upon by the Applicant and the Objectors and to report on these to the council with a recommendation as how to determine the Application. The Inspector’s recommendation could then be considered by the Eastern Area Planning Committee. The Committee can either accept the Inspector’s recommendations or if the Committee found the Inspector’s recommendation

has significantly erred in law or in fact could reject the recommendation. However, if the Inspector's recommendation is rejected by Committee and there is no evidence of significant errors in law or fact in the recommendation there would be an increased risk of the Committee's decision being challenged in judicial review proceedings in the High Court.

12. The Committee's attention is also brought to the High Court decision in the case of *Somerford Parish Council v Cheshire East Borough Council (1) and Richborough Estates (2) 2016* where the High Court quashed the local Borough Council's decision not to register land as a new town or village green on the basis of procedural error. The High Court's decision in the *Somerford Parish Council* case reinforces the Court's view that there is a need for commons registration authorities to hold a non-statutory public inquiry where there are sufficient disputes over evidence and/or factual issues.
13. Where a town or village green application is refused by a CRA the applicant can appeal that decision by way of judicial review to the High Court. Applications of this nature usually, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council and to avoid the serious financial costs of defending an action for judicial review it is imperative that the proper procedure is followed by the council in the decision making process.

Overview and Scrutiny Engagement

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

Safeguarding Implications

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

Public Health Implications

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

Corporate Procurement Implications

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

Equalities Impact of the Proposal

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

Environmental and Climate Change Considerations

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

Risk Assessment

20. The financial and legal risks are set out in the Financial Implications and Legal Implications sections in paragraphs 21 to 30 below.

Financial Implications

21. 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 are borne by the council. There is no budgetary provision for such non-statutory processes.
22. The estimated costs of holding a non-statutory public inquiry would include initial read and drafting directions and further directions if considered necessary, site visit, preparation for the inquiry and first day and refreshers (time spent on the inquiry in excess of the original time estimate for the inquiry) writing the report, expenses (capped at 45p per mile travel and hotel accommodation capped at £100 per night. The normal hourly rate is £110 per hour. Total inquiry costs will depend on how long the inquiry will need to sit but are estimated at this early stage to be in the region of £16,000 - £18,000.

Legal Implications

23. 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
24. 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.
25. 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.
26. 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.

27. 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.
28. 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.
29. 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.
30. 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 and any communications with that independent counsel would not be considered to be legally privileged. 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. The decision of the Borough Council was therefore quashed on grounds (iii) and (iv).

Options Considered

31. Members of the Committee must consider the following possible decisions open to them:
 - (i) To appoint an independent Inspector to advise the council on how to proceed with determining the application.
 - (ii) To appoint an independent Inspector to hold a non-statutory public inquiry and produce an advisory report with his or her findings and recommendations for the council's consideration as CRA.

Reasons for Proposal

32. There is a serious dispute regarding the evidence and the application is of great local interest. Wiltshire Council owns the land which the applicant seeks to register as a town or village green. In paragraphs 12 and 13 above the Committee's attention was brought to the High Court judgement in the case of Somerford Parish Council v Cheshire East Borough Council. The case was brought to the High Court on the basis of procedural error by the Borough Council. The case highlights a number of practical points for the Committee to note and consider regarding privilege, equity and the importance of public inquiries in determining an application to register land as a town or village green in disputed cases and where the land is owned by a local authority. The decision of the High Court also reinforces the findings in R (Whitney) v Commons Commissioners and the need for commons registration authorities to hold a non-statutory public inquiry where there are sufficient disputes over factual issues.
33. Where the CRA decided not to register land as a town or village green there is no right of appeal to the council as CRA or for example to the Secretary of State as there is in relation to a planning application. The applicant's course for redress is by way of an application for judicial review made to the High Court. Applications of this nature usually, focus closely on the procedure used in the decision making process. To safeguard both the reputation of the council, and to avoid the serious financial costs of defending an action for judicial review, it is imperative that the council adopts the proper decision making process in dealing with this application.

Proposal

34. To seek approval to appoint an independent Inspector 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.

TRACY CARTER

Associate Director – Waste and Environment

Report Author

CM09762/F

Barbara Burke
Definitive Map and Highway Records Team Leader

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

None

Appendices:

None

WILTSHIRE COUNCIL

COMMONS ACT 2006

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND ON
THE NORTH SIDE OF MORRIS ROAD / COLLEGE FIELDS, BARTON
PARK, MARLBOROUGH AS A NEW TOWN OR VILLAGE GREEN**

Application number: 2015/1

INSPECTOR'S REPORT

EXECUTIVE SUMMARY

1. I was instructed by Wiltshire Council ('WC') to hold a public inquiry and thereafter to provide the commons registration authority ('CRA') with an advisory report in relation to an application made by a Mr Ian Mellor to register a 4.5 acre parcel of undeveloped land ('the application land') on the western outskirts of Marlborough as a new town or village green ('TVG'). The application land is outlined in red on the plan at Appendix 1.
2. The application to register is supported by a significant number of local inhabitants living within a neighbourhood whose area is also edged in red on the plan at Appendix 2.
3. The application is facing objections from (a) WC, in whom such land is vested, and (b) Marlborough College which owns arable farmland on the northern side of the application land. If the latter is registered as a TVG it would mean that it could not be developed which would be no trivial matter to Marlborough College as owner of the land upslope.

4. The application is made under section 15(2) of the Commons Act 2006. In order to justify registration the CRA have to be satisfied (in these circumstances) that a significant number of the inhabitants of any neighbourhood within a locality (which can be an electoral ward or the town of Marlborough) have indulged as of right in lawful sports and pastimes ('LSP') on the land for a period of at least 20 years.
5. Because the application to register has ample support within the local community the objectors had to concede that, with one exception, the elements necessary to justify registration had been made out by the applicant.
6. The exception involved the issue of whether public's use of the application land had been 'as of right' which, put shortly, requires use to be without force, secrecy or permission. If, for instance, use is by permission or by virtue of a statutory right (or publicly based licence) enabling members of the public to go onto the land and to use it for informal recreation, their use will have been 'by right' and non-qualifying for TVG purposes.
7. This question has been addressed recently in the Supreme Court in *R (Barkas) v North Yorkshire County Council* [2015] AC 195. As a result of the decision in *Barkas* it was accepted by the applicant and the objectors that there were, in substance, two questions which needed to be resolved in arriving at a decision on whether the application land would be registrable as a matter of law. The questions were: (a) under what power was the land held following its acquisition in 1993; and (b) did the purposes of acquisition carry with it an entitlement on the part of the public to use the land for recreation?
8. The answers to these questions required me to determine whether, in its acquisition of the land from developers in 1993, Kennet District Council ('Kennet') (from whose ownership the land passed to WC in 2009 on local government reorganisation within the county) would have utilised powers available to them which allowed them to acquire land for use as recreational open space, such as arises under the Public Health Act 1875, section 164, the Open Spaces Act 1906, section 9, or the Local Government (Miscellaneous Provisions) Act 1976, section 9 (the likeliest candidate of the

three being the 1906 Act under which, by section 10, such land is held on trust for the enjoyment of the public as open space).

9. As the land was specifically transferred to Kennet as 'amenity open space' I have taken the view that these words are more than sufficient to support a conclusion that the land was intended to be held by Kennet (in whose shoes WC now stands) as public open space. Indeed, if these words of description were not plain enough already, the plan accompanying the transfer to Kennet also contains the words 'Open Space' in three places within the outline of the land being transferred which can only sensibly be a reference to recreational open space.
10. This being the case it is, I think, obvious that, in acquiring such land for the purposes of recreation, Kennet will have acted pursuant to a suite of statutory powers which enabled it to acquire land for such purposes. On this footing, the application to register must fail as the public will have had a statutory right to use the land for LSP, a right which continues to this day.
11. Such a conclusion is also consistent with (a) the material planning history; and (b) by the way in which the land has been used (and used extensively) and also managed effectively as recreational open space since 1993 by Kennet and WC (for which purposes it had been laid out and prepared by the developer prior to the transfer to Kennet).
12. The planning history starts with the open space provision associated with the development of Barton Park. There were a series of approved planning applications in the 1970s and 1980s for the development which was brought forward in two phases, Barton Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced after June 1988 following approval of reserved matters) within whose curtilage the application land falls. The key permission is an outline planning permission issued in 1986 under the reference K/86/0020, in association with a section 52 planning agreement made in 1983.
13. At condition (b) of the outline permission there is a requirement to provide not less than five and a quarter acres of public open space to serve the proposed

residential development at Barton Park East. The outline permission is linked to the earlier section 52 agreement under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the same agreement made provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space shown within the area edged green on the accompanying plan. This is admittedly not the same shape as the application land but it would have been intended that the eventual open space provision would be identified through the approval of Master Plans at the stage of approval of reserved matters.

14. The 1986 outline permission was duly taken forward through the approval of a Master Plan 779/4 (later revised) upon which 4.5 acres of public open space mirrors the land transferred to Kennet. The Master Plan was approved as part of the reserved matters application for Phase 1 of the Barton Park East development and was again revised in the form of drawing 779/4 rev C in the context of an approval of reserved matters on 15/09/1988 (which concerned Phases 4 and 4a of the development). The third revision of the Master Plan also shows a 4.5 acre parcel of public open space which again corresponds to the land transferred to Kennet. There is also an officers' report on the reserved matters application K/12458/D for the Barton Park East development in which the development site is described by reference to the Master Plan approved for the different phases pursuant to the 1986 outline planning permission where we are told the houses would be grouped 'around 2 areas of open space to create 'village green' arrangements'. In due course, the areas allocated as public open space were laid out and transferred to Kennet.
15. It seems plain that the application land was always intended to comprise the major part of the public open provision for the development of Barton Park East (in line with the obligations on the developer arising from the planning history) and was transferred to Kennet to be held for such purposes.
16. It follows from all this that, following *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants 'as of right' but was in law used for LSP 'by right'. After 1993 the public enjoyed a statutory right to use the application land for recreation and such right is

continuing. In the circumstances, the use relied on by the applicant was not a qualifying use within the meaning of CA 2006, s.15.

17. The applicant (who is an experienced planning consultant) made a number of submissions which were, in my view, successfully rebutted by the arguments advanced by experienced counsel for the objectors.
18. It is then my recommendation to the CRA that the application to register should be rejected.

William Webster

3 Paper Buildings

Temple

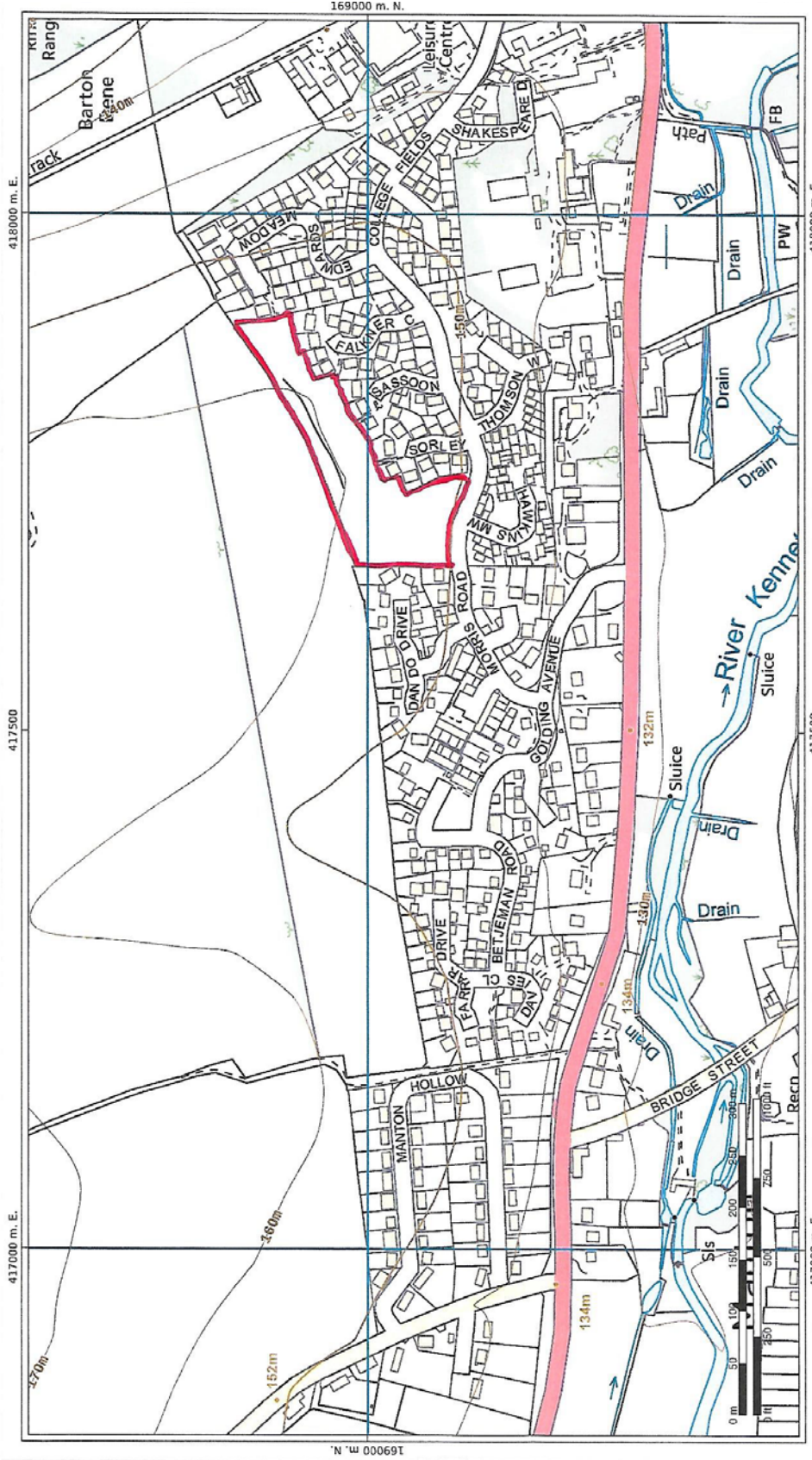
Inspector

2 March 2018

APPENDIX 1

SN8 ITP

VILLAGE GREEN APPLICATION SITE.



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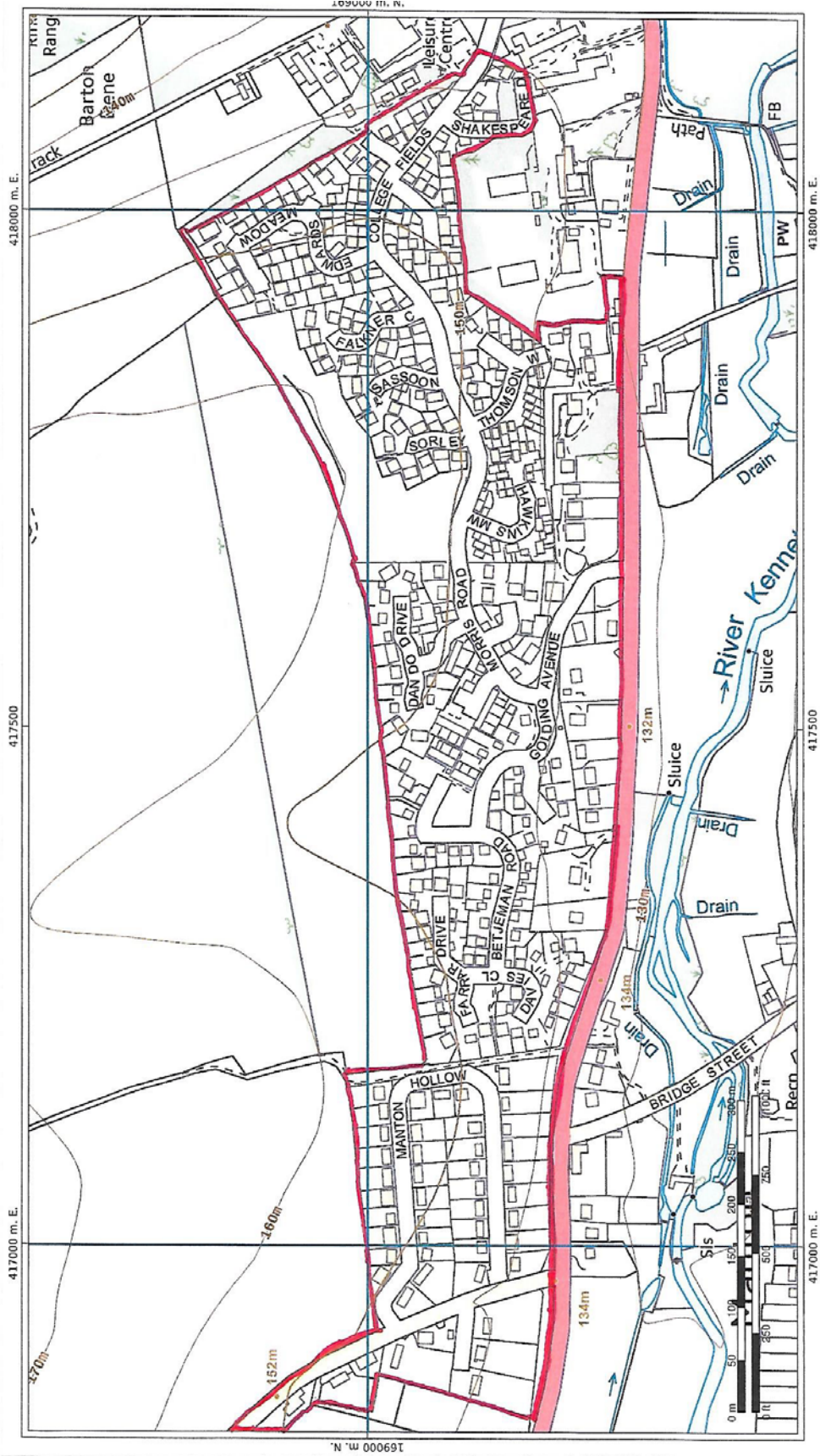
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APPENDIX 2

DMG LIP

PLAN OF NEIGHBOURHOOD.



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WILTSHIRE COUNCIL

COMMONS ACT 2006

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND ON
THE NORTH SIDE OF MORRIS ROAD / COLLEGE FIELDS, BARTON
PARK, MARLBOROUGH AS A NEW TOWN OR VILLAGE GREEN**

Application number: 2015/1

INSPECTOR'S REPORT

Introduction

1. I am instructed by Wiltshire Council ('WC'), acting in their capacity as commons registration authority under Part 1 of the Commons Act 2006 ('CA 2006'), which is the responsible authority for determining applications to register land as a new town or village green ('TVG') under section 15 of that Act.
2. I have been instructed by WC to hold a non-statutory public inquiry to enquire into the facts behind the application and to apply the relevant law to those facts with the aim of providing WC with a report containing a recommendation on whether the application to register should be allowed or refused.
3. Accordingly, I gave directions for the holding of a public inquiry in Marlborough, including in relation to the disclosure and procedure of the inquiry, which was held over two days in Marlborough on 9-10 January 2018.
4. The participants at the inquiry were as follows: (a) the applicant for registration was Ian Mellor (who is an experienced planning consultant and

local resident) who acted in person (albeit with the assistance of a small team, notably a Mr Peter May, who was the only oral witness at the inquiry); (b) WC, acting as first objector and landowner (which has been the case since 1/04/2009 when it became the Unitary Authority for Wiltshire), which was represented by Jeremy Pike of counsel; and (c) Douglas Edwards QC, who acted for Marlborough College, as second objector, which is interested in the application land ('the application land' or 'the land' as the context permits – see location plan in Appendix 1) as owner of neighbouring land on its north-western boundary. I am indebted to these parties for their assistance and conscientious submissions. I am also grateful for the administrative support provided by Sarah Marshall and Sally Madgwick on behalf of the registration authority.

Legal framework

5. Section 15(2) of the CA 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.*
6. One then has to look at the various elements of the statute all of which have to be made out in order to justify registration.

'a significant number'

7. 'Significant' does not mean considerable or substantial. What matters is that the number of people using the application land has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation rather than occasional use by individuals as trespassers (*R v Staffordshire CC, ex parte McAlpine Homes Ltd* [2002] EWHC 76 at [71] (Admin)).

'of the inhabitants of any locality'

8. The term 'locality' is taken to mean a single administrative district or an area within legally significant boundaries. In short, village green rights require to be asserted by reference to a particular locality and would include an electoral ward.

'or of any neighbourhood within a locality'

9. A neighbourhood is a more fluid concept. The expression 'neighbourhood within a locality' need not be a recognised administrative unit. A housing estate can be a neighbourhood (*McAlpine*) but the area must be capable of meaningful description in some way. It was said in *R (NHS Property Services Ltd) v Surrey County Council* [2016] 4 WLR 130 that the cohesion of a neighbourhood is essentially a matter of impression and is not something which can be assessed by using some recognised technique.

'have indulged as of right'

10. The traditional formulation of the requirement that user must be 'as of right' is that the user must be without force, secrecy or permission. The rationale behind 'as of right' is acquiescence. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.
11. The nature of the inquiry is the use itself and how it would, assessed objectively, have appeared to the landowner. One first has to examine the use relied upon and then, once the use had passed the threshold of being of sufficient quantity and suitable quality, to assess whether any of the vitiating elements of the tripartite test applied, judging the questions objectively from how the use would have appeared to the landowner. In short, the use must be to a sufficient extent since use which is:

so trivial and sporadic as not to carry the outward appearance of user as of right

should be ignored (*R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 375D-E).

12. The issue of 'force' does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance, nor has the use in this case been by stealth as the owner would clearly have been aware of its use by the public.
13. 'Permission' can be express e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction (*R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at [5]).
14. It is not alleged in this instance that use of the land was by virtue of an implied licence on the basis of the way in which the land was managed over the years.
15. One turns to what has become the core issue on this application which 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 as, if it has, the public's user will not justify registration as it will not have been 'as of right'.
16. It has been established in *Barkas* that where land is held by a local authority for statutory purposes which allows it to be used by the public for recreation the public's use of the land will be 'by right' and not 'as of right' (meaning 'as if by right') and thus non-qualifying. *Barkas* involved the use of recreational open space under the Housing Acts¹ but the principle is applicable whenever

¹ The Housing Acts 1925, 1936, 1957 and 1985; the current position is that section 12(1) of the 1985 Act (and the earlier Housing Acts contained similar provisions) empowers a local authority to provide and maintain (with the consent of the Minister) in connection with housing accommodation provided by them, recreation grounds which, in the opinion of the Minister, would serve a beneficial purpose in connection with the requirements of the persons for whom such housing accommodation is provided. Section 13(1) (and the earlier housing legislation contained a similarly-worded provision) empowers a local authority to set out an open space on land acquired for housing purposes but without having to obtain ministerial consent. The absence of ministerial consent for the setting out of recreation grounds under the Housing Acts is unlikely to be fatal to the lawful use of such land for recreation in view of the principle that administrative acts are valid unless and until quashed by a court and if the time has passed for them to be challenged then they stand notwithstanding that the reasoning on which they are based may have been flawed (see *R (Noble Organisation) v Thanet District Council* [2005] EWCA Civ 782 at [42] Auld L.J). There is no authority holding that land held for the purposes of the Physical Training and Recreation Act 1937 and the Local Government (Miscellaneous Provisions) Act 1976 would not be registrable but, in light of *Barkas*, it seems highly likely that local inhabitants would also have a legal right to recreate on land acquired or appropriated onto the purposes of s.4(1) of the 1937

land is held for the purposes of a statutory right of public recreation. This arises in the case of land held under section 164 of the Public Health Act 1875² (public walks or pleasure grounds), or section 10 of the Open Spaces Act 1906³ (open spaces – whether vested in the local authority or not).⁴

17. There is no authority holding that land held for the purposes of the Physical Training and Recreation Act 1937 and the Local Government (Miscellaneous Provisions) Act 1976 would not be registrable but, in light of *Barkas*, it seems likely that local inhabitants would also have a legal right to recreate on land acquired or appropriated onto the purposes of s.4(1) of the 1937 Act. I accept that I was disinclined to accept this at the inquiry but, having considered the matter, I consider it probable that land so held would be non-qualifying.

18. Section 4(1) of the 1937 Act authorised local authorities to:

acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands, whether situate within or without their area, for the purpose of gymnasiums, playing fields, holiday camps or camping sites, or for the purpose of centres for the use of clubs, societies or organisations having athletic, social or educational objects, and may use those lands and buildings themselves, either with or without a charge, for the use thereof or admission thereto,

Act. The 1937 Act authorised local authorities to “*acquire, lay out, provide with suitable buildings and otherwise equip, and maintain lands ... for the purpose of centres for the use of clubs ... playing fields ... or organisations having athletic, social or educational objects, and may manage those lands and buildings themselves ... at a nominal or other rent to any person, club, society or organisation for use for any of the purposes aforesaid*”. By s.19(5) of the 1976 Act, land held for the purposes of s.4 of the 1937 Act was to be held thereafter for the purposes of s.19 of the 1976 Act which enables an authority to provide indoor and outdoor recreational facilities to such persons whom the authority thought fit, either with or without a charge.

² *Hall v Beckenham Corporation* [1949] 1 KB 716, where it was held that the corporation was bound to admit any member of the public who wanted to enter the park during the hours that it was open; see also *Blake v Hendon Corporation* [1962] 1 QB 283, where it was held that once land had been acquired under the 1875 Act the public had a right of free and unrestricted use of the park.

³ Section 9 permits local authorities to purchase and manage land for the purpose of it being used as public open space. Under section 10 open space under the Act is to be held and administered in trust to allow such land to be enjoyed by the public as an open space and for no other purpose. Land held for such purposes would not be registrable.

⁴ In *Naylor v Essex County Council* [2014] EWHC 2560 (Admin) the authority did not own the land but had managed and maintained it as if it were public open space for all to use. The court upheld the decision of the inspector that the land should not be registered. The view taken was that the land was most likely to have been managed and controlled either under sections 9 or 10 of the 1906 Act or section 164 of the 1875 Act. The court determined that it made no difference to the rights which the public had to use the land that the use arose by virtue of an arrangement between the landowner and the authority where the authority had itself no legal interest in the land. The view was taken that local inhabitants had been using the land “by right” in the sense of having permission to do so from the landowner pursuant to arrangements made between the landowner and the local authority securing the provision of land and its management as a piece of public open space.

or may let them, or any portion thereof, at a nominal or other rent to any person club, society or organisation for use for any of the purposes aforesaid ...

19. By s.19(5) of the 1976 Act, land held for the purposes of s.4 of the 1937 Act was to be held thereafter for the purposes of s.19 of the 1976 Act which enables an authority to provide:

such recreational facilities as it thinks fit

20. In *Barkas* at [24] Lord Neuberger said this:

I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land to public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of 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 20 years. It would not merely be understandable why the local authority had not objected to public use: it would be positively inconsistent with their allocation decision if they had done so.

Also at [46] he said this:

The field was, as I see it, 'appropriated', in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception.

At [66] Lord Carnwath also states:

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.

This was to be contrasted with *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 where, 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 ... (and where) .. It was held that the facts justified the inference that the rights asserted were rights under the 1965 Act.

21. The question then, arising from the decision in *Barkas*, is whether land has been lawfully allocated under statutory powers for public recreation? If it has then user will not have been 'as of right' as the public will already have an entitlement to use the land for recreation. *Barkas* accordingly makes it clear that the public use of recreational use of land pursuant to a statutory power to provide recreation land would be sufficient to entitle local inhabitants to use the land for that purpose so as to defeat a claim to that use being 'as of right'.

At [23] in *Barkas* Lord Neuberger said this:

Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct.

'in lawful sports and pastimes'

22. The expression 'lawful sports and pastimes' ('LSP') form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (*Sunningwell* at p.356F-357E).

'on the land'

23. The expression 'on the land' does not mean that the registration authority has to look for evidence that every square foot of the land has been used. Rather the registration authority needs to be satisfied that, for all practical purposes, it can sensibly be said that the whole of the land had been used for LSP for the relevant period. The registration authority also retains a discretion to register part only of the application land if it is established that part, but not all, of the application land has become a new green (*Oxfordshire*).

'... for at least 20 years ..'

24. The relevant period in this case is 10/07/1995 – 10/07/2015 (date when application was acknowledged by the registration authority).

Procedural issues

25. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

26. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested at [62] that where there is a serious dispute, the procedure of:

conducting a non-statutory public inquiry through an independent expert should be followed almost invariably.

However, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However, the registration authority must act impartially and fairly and with an open mind.

27. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that it has been long enjoyed by locals as a public open space ('POS') of which there may be an acute shortage in the area.

28. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

29. The procedure in this instance is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007.

30. The prescribed procedure is very simple: (a) anyone can apply; (b) unless the registration authority rejects the application on the basis that it is not 'duly made', it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.
31. It is clearly no trivial matter for a landowner to have land registered as a TVG and all the elements required to establish a new green must be
properly and strictly proved
(R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111 per Pill LJ, and approved by Lord Bingham in R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2).

Consequences of registration

32. Registration gives rise to rights for the relevant inhabitants to indulge in LSP on the application land.
33. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.
34. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede
the use or enjoyment thereof as a place for exercise and recreation.
35. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any
disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green.
36. Under both Acts development is therefore prevented and the land is effectively blighted.

Description of the application land and neighbourhood

37. I made an unaccompanied visit to the application land on the morning of the first day of the inquiry. The land is approximately 4.5 acres in size and comprises a south facing hillside within (as I understand it) the North Wessex Downs Area of Outstanding Natural Beauty ('AONB') on the western outskirts of Marlborough with views over the valley through which the River Kennet passes. On its northern side (beyond an ancient hedgerow), the land abuts arable farmland belonging to the second objector (there is a well-used access point through into the application land on its north-eastern corner from the adjoining field. To the east, there is a housing estate comprising four *cul de sacs* to which, in each case, there is a made up pedestrian path onto the land from the end of the various streets (namely Sorley Close, Sassoon Walk, Faulkner Close and Edwards Meadow). To the south, the land abuts Morris Road which links up with Golding Avenue which has an access onto the A4 (Bath Road).
38. A plan of the claimed neighbourhood will be found in Appendix 2. The relevant area comprises the streets of (running west to east) Manton Hollow, Farrar Drive, Davies Close, Betjeman Road, McNiece Drive, Golding Avenue, Hughes Close, Aubrey Close, Morris Road, Dando Drive, Tennyson Close, Hawkins Meadow, College Fields, Sorley Close, Thompson Way, Benson Close, Sassoon Walk, Faulkner Close, Edwards Meadow, Lynes View, Irving Way, Jeffries Close and Shakespeare Drive. With the addition of the dwellings fronting onto Bath Road, the claimed neighbourhood covers a sizable settlement and it was my firm impression that it comprised a distinctively cohesive area on the western side of Marlborough. A plan was produced on which the location of the applicant's witnesses were plotted and there is a clear spread across the claimed neighbourhood which was, as I understand it, largely, if not wholly, developed more than 20 years before the application was made. No point was taken about this at the inquiry
39. Anyone wanting to use land for recreation has unhindered access onto it via the four *cul de sacs* already mentioned and from Morris Road and, from the north, via the gap in the hedgerow at the north-eastern corner of the

application land. There is no fencing alongside the pavement running along Morris Road and, as a result, there is relatively easy access onto the grassy slope, particularly at its western end off the road, where the gradient is not especially great although it becomes steeper as one heads east approaching Sorley Close. There is little doubt, judging by the tracks on the ground and the relatively gentle slope on the western side that, other than via the *cul de sacs*, most walkers enter the application land at the south-west corner. I myself saw a number of dog-walkers do just this.

40. The application land is a grassed area with seven planted trees in a cluster close to Morris Road. A cluster of saplings has also been planted recently by a local group (known as 'the Marlborough Orchard Group') towards the upper end of the land. There are, however, no recreation facilities, nor any signs and it seems plain that the land is no more than a place to walk on, with or without dogs, although it is quite adequate for children to play games or to be taken for walks in push chairs as the grass is kept short. Even though I was on the land for less than an hour, I observed a number of dog-walkers, most of whom walked up the slope and through the gap in the north-east corner into the adjoining field where there are tracks around the perimeter.
41. The application land is maintained by the local authority as recreational open space and it has obviously been well managed over the years. From what I could judge, the whole of the land is available for recreation, although the bund at the top of the site, close to the hedgerow, is something of a curiosity. The evidence advanced by the applicant points to substantial use being made of the land for informal recreation and this is certain to have been the case over the years.

Core issues

42. It has become unnecessary to devote too much time to the evidence of user as, in the case of WC (as first objector), it was accepted by Mr Pike that, subject to the issue of 'as of right', qualifying use is otherwise made out. Mr Edwards, on behalf of the second objector, did not go quite as far as this on the first day of the inquiry (when he merely agreed that there was no need to

cross-examine the applicant's witnesses) although, in his written submissions, he conceded that neither objector

seeks the rejection of the application on the basis that the application land had not been used for LSP for a period of not less than 20 years, ending with the submission of the application, by a significant number of the inhabitants of a neighbourhood within a locality.

Nor has any exception been taken to the applicant's claimed neighbourhood where the evidential bar is, of course, a comparatively low one nowadays in light of the decision in *R (NHS Property Services Ltd) v Surrey County Council*.

43. It seems to me that it was wholly right and proper for this concession to be made by the objectors as the evidence advanced by the applicant in relation to the use of the land, and its sufficiency for TVG purposes for the requisite period, was unassailable.
44. I put it to the parties at the start of the inquiry that there were, in truth, two core issues for decision.
 - 44.1 For what purpose was the application land held by Kennet District Council ('Kennet') following its transfer to that authority in 1993? As no one is suggesting that there was a later appropriation of the land, it follows that it is the original acquisition purpose which is of interest to the registration authority as the land would thereafter have been held for such purposes.
 - 44.2 Did that acquisition purpose carry with it an entitlement on the part of local inhabitants to use the land for informal recreation? The question here is whether the original acquisition purpose gave rise in law to a public right, or a publicly based license, to use the land for the statutory purpose of public recreation? Whether this was the case will depend on whether the land is held as POS following the use by Kennet of enabling powers arising under any one or more of the following, namely the Public Health Act 1875, s.164, the Open Spaces Act 1906, ss.9/10, and the Local Government (Miscellaneous Provisions) Act 1976, s.19.
45. In light of the foregoing, I propose to consider the applicant's evidence on user, but not in the detail that I might have done had this been a contested

issue, as I have to satisfy myself that, with the exception of the 'as of right' issue, the elements necessary to justify registration of the land as a TVG are made out. I have, of course, already done this in relation to the claimed neighbourhood where I am amply satisfied from what I have seen that it is indeed a neighbourhood in law for the purposes of the CA 2006, s.15.

Applicants evidence of recreational use

46. A total of 186 completed evidence questionnaires were received (in the period February and March 2017) from 179 households. Mr May's analysis (A1/1) discloses that this is just under one-half of the 365 households within the claimed neighbourhood. Of those responding, 58 households have had the same occupants for more than 24 years whereas only 12 residents (or 7%) responding have lived within the claimed neighbourhood for less than 3 years. A total of 77 (or 43%) residents who responded have lived within the claimed neighbourhood for more than 20 years. In terms of the people using the land (as opposed to a household return), the number is approximately 240, virtually all of whom used the land after moving into the neighbourhood, with user commencing after 1985. In his analysis of the questionnaires, Mr May has deduced that 122 households make use of the land on a weekly basis (68%) with another 14 (or 14%) using the land more than once a month from which it follows that 147 households (or 82% of the households responding) use the land more than once a month. In terms of sufficiency and regularity of use, Mr May's analysis is more than adequate to justify registration. Not surprisingly, he reports that dog-walking is the most popular activity with 98 households using the land for this purpose. 103 households report that their children used the land with individual use covering a range of activities from birthday parties, sports to flying model helicopters.
47. I was extremely impressed with Mr May's analysis which was not challenged by the objectors and I accept his conclusions, albeit subject to the 'as of right' issue. In light of this evidence, drawn as it is from the completed questionnaires, it is Mr May's view, with which I agree, that sufficient recreational use has been made out for the requisite period by a sufficient number of persons living within the claimed neighbourhood.

'as of right'

48. The parties have gone to great lengths to assemble an historic record of the origins of the application land. Before turning to the submissions of the parties on this issue, I propose to deal with the relevant planning and conveyancing background as it is, I think, vital to any decision as to the basis on which the land was held by Kennet (to whom the land was initially transferred) and, thereafter, by WC (as the Unitary Authority for the area and as the successor of Kennet and three other district councils following administrative changes implemented with effect from 1/04/2009).
49. The starting point for both objectors was the transfer to Kennet on 19/08/1993 (OBJ/2 at 95). The transferor was The Miller Group Ltd which actually transferred two parcels of land to Kennet. The land shown edged red on Plan 1 is the application land on which, in three places within the same parcel, the words 'Open Space' appear. The land within Plan 2 is undeveloped amenity land in what is now Edwards Meadow between plot Nos.46-47 and which, judging from the up-to-date plan, is still in use as amenity open space.
50. The transfer to Kennet 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*
51. On the face of the transfer the land is plainly being transferred to Kennet to be held by that authority as POS. There is, as it seems to me, no scope for ambiguity here. The question begs, therefore, as to whether, in construing the transfer, it is even necessary for me to consider extrinsic evidence which points to some other holding purpose. As a general rule of construction, extrinsic evidence (i.e. evidence outside the deed) is not admissible to vary or contradict the terms of a deed unless it is necessary to do so because of ambiguity or uncertainty within the deed.

52. In this case I do not consider that I need to go beyond the terms of the deed but, even if I did, the outcome would be just the same and is entirely consistent with the planning history which shows very clearly that the application land had been earmarked as recreational open space to serve the adjoining development.

The material planning history preceding the 1993 transfer

53. I am indebted to Joanne Davis who is an experienced town planner who, on behalf of the second objector, and with the assistance of work carried out by others before she began her own work on this, has collated (not without difficulty) most, if not all, of the available planning documents in her evidence bundle. Mr Edwards helpfully summarised the contents of this file in his closing submissions.
54. It is clear from Ms Davis's work that the land formed part of the open space provision associated with the development of Barton Park. A series of planning applications were approved in the 1970s and 1980s for the development which was brought forward in two phases, Barton Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced sometime after June 1988 following approval of reserved matters) within whose curtilage the application land falls. I am told that a number of early permissions were never implemented due to changes of ownership. However, it is the view of Ms Davis that an outline planning permission under the reference K/86/0020, in association with a planning agreement dated 10/03/1983, are material to the planning history and this is confirmed by recent correspondence from WC's head of planning.
55. The outline permission K/86/0020 will be found at JD/14. It relates to the land edged red identified on the plan number 1160/SK/3 which is at JD/16 – see p.119 (this is Barton Park East). At condition (b) of the permission there is a need to provide not less than five and a quarter acres of POS to serve the proposed residential development at Barton Park East.⁵ The outline

⁵ The parties to that agreement were Kennet and Marlborough College. By operation of s.52(2) and s.33 of the Local Government (Miscellaneous Provisions) Act 1982 the terms of that agreement are enforceable against successors in title to Marlborough College.

permission expressly links this to the earlier section 52 agreement dated 10/02/1983 (JD/9) under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the section 52 agreement make provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space (shown within the area edged green on the accompanying plan which is not the same shape as the application land) which was intended to be transferred to Kennet before any development took place within the area of Barton Park East. It follows (as Mr Edwards rightly says) that, by virtue of permission K/86/0020, the delivery of not less than five and a quarter acres of POS was required as a condition for the delivery of the proposed residential development at Barton Park East.

56. The outline permission K/86/0020 was taken forward through the approval of the Master Plan 779/4 (JD/21) upon which 4.5 acres of POS (coinciding closely with the Plan 1 open space shown on the 1993 transfer to Kennet – see, for these purposes, JD/22 which is a helpful reconciliation showing the application land overlying the open space shown on the Master Plan Rev 779/4A) is clearly identified. The Master Plan was approved as part of the reserved matters application K/11113D (JD/19-22) for Phase 1 of the Barton Park East residential development (see also JD's statutory declaration at paras 43-44 and JD/26). The Master Plan was again revised in the form of drawing 779/4 rev C (JD/24) in the context of an approval of reserved matters on 15/09/1988 (JD/23 – under ref: K/12458/D) pursuant to the outline permission K/86/0020 and the residential development at Barton Park East (which concerned Phases 4 and 4a of the development – see JD statutory declaration at para/46). The third revision of the Master Plan (JD/24) also shows a 4.5 acre parcel of POS which in all material respects corresponds to the application land (see overlay at JD/25) and the Plan 1 land transferred to Kennet as 'amenity open space' in 1993. Mr Edwards also points out that there is correspondence (passing between officers of Kennet and the developers, Miller Homes) showing that the same 4.5 acre parcel (known as the 'main open space area') was required to be laid out to the satisfaction of Kennet prior to its transfer to Kennet in August 1993 (this correspondence was produced by Trevor Slack of WC's legal services at O1/68-93). This is

important material as it plainly identifies the intention to lay out and earmark the same 4.5 acre parcel as POS which was intended to be transferred (for no consideration) to Kennet pursuant to the s.52 agreement entered into in 1983 (it seems that Miller Homes would have planted the group of trees near the road and the bund at the top of the field is no doubt attributable to ground works at the laying out stage). Indeed, there is evidence that it was Kennet's policy to secure POS to meet the needs of new development (JD/35 and O1/14, para/3 – see exhibit/1 to witness statement of Trevor Slack for Kennet policy in requiring provision of open spaces and amenity areas in connection with residential development) which is, of course, consistent with the condition which is referred to by Mr Edwards as an unnumbered condition 5 in the 1986 outline planning permission (K/86/0020) and in accordance with the 1983 s.52 agreement.

57. Mr Edwards also helpfully pointed me to an officers' report on the reserved matters application K/12458/D for the Barton Park East development (JD/26) in which the development site is described by reference to the Master Plan approved for the different phases pursuant to planning permission K/86/0020 granted in 1986 where we are also told that the houses would be grouped

around 2 areas of open space to create 'village green' arrangements

(on which, I note, it was hoped the developers would be contributing play equipment).

58. In the result, the planning history shows that an area corresponding to the application land and to the parcel (in Plan 1) transferred to Kennet in 1993 as 'amenity open space' had been earmarked as 4.5 acres of POS (see reserved matters approval K/15205/D (JD/27-28) and overlay PO11 (JD/33, p.259), planning permission K/16165 (JD/29-30), the overlay PO12 (JD/33, p.260) and the JD statutory declaration at paras.48-51 for a description of these approvals and accompanying drawings). Moreover, there can, in my view, be no question that the land transferred to Kennet in 1993 is materially the same land as was earmarked as 4.5 acres of POS which was intended to be delivered as POS in the antecedent planning arrangements, following the grant of outline planning permission in 1986.

59. The applicant is certainly right when he says that the prospective open space identified on the plan attached to the 1983 s.52 agreement (JD/9) is not the same as that shown in the 1993 transfer. Nothing turns on this for the reason given by Mr Edwards, namely that it was always intended that the eventual open space provision would be identified in accordance with the implementation of the 1986 planning permission and, in particular, was to be identified through the approval of Master Plans. However, and as Mr Edwards rightly says, in approving the location of the eventual open space under the 1986 permission, Kennet could not have fettered its discretion by insisting that the open space was to be in the same position as that shown in the 1983 s.52 agreement. Consistently with this, the 1986 planning permission speaks of the
- open space shown on plans to be submitted pursuant to condition 1 above shall be provided concurrently with each phase of the development in accordance with the Agreement of 10 February 1983 ...'.*

In other words, the condition is expressed as a future commitment.

The application land and its maintenance after August 1993

60. The land has always been regularly maintained by the local authority in a way which enables it to be used as POS. Mr Edwards also questions that if the land had not in fact been acquired and thereafter held as POS then on what legal footing or, rather, pursuant to what statutory holding power, would Kennet and WC have been incurring expenditure in the maintenance of this land. The principle of regularity would clearly be engaged here to trump any charge against these authorities founded upon the unlawful exercise of their public powers.
61. In his witness statement (O1/15, para/9) Mr Slack says that between 2009-13 WC maintained the application land in-house. Between June 2013-September 2016 maintenance was carried out under contract with BBLP and this contract was taken over by maintenance and landscaping contractors known as *id verdi* which continues to maintain the land. It seems that the grass is now cut monthly between March – October/November (O1/105). As I previously indicated, the application land has been well maintained and is a suitable location for informal recreation.

Submissions of the parties on 'as of right'

The objectors

62. On behalf of the second objector, Mr Edwards submits that the application land was transferred to Kennet in August 1993 to be held as amenity open space. He goes on to say that, consistently with this purpose, Kennet must have taken the land pursuant to one of the express statutory powers which entitled it to acquire and hold land as POS for recreational purposes (see those powers identified in paras/16-17 any one or more of which, Mr Edwards says, could have been engaged in this instance by Kennet as an enabling power authorising the acquisition of the application land, and its later use, as POS).
63. Mr Edwards agreed in oral submissions that the purpose specified in the transfer is critical and that any divergence from the expressly stated purpose would have to engage the rules in relation to the admissibility of extrinsic evidence which can only be invoked in cases of ambiguity or uncertainty, neither of which, he says, would arise in this case as the deed is quite clear.
64. In any event, Mr Edwards says that the transfer of this land to Kennet as POS is entirely consistent with (a) the antecedent planning history (which I have already addressed at some length) which is consistent with the identification of the land as POS within the planning history of the residential development which later became Barton Park, as well as the obligations on the developer arising from that planning history, and (b) the way in which the land has been used (and used extensively) and managed by Kennet and its successor, WC, which has been as recreational open space serving the needs of the estates of Barton Park West and Barton Park East.
65. Mr Edwards submits that, following the decision in *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants for LSP after 1993 'as of right' but was in law used 'by right' (and he refers to the dicta in that case at paragraphs [20]-[26], [65]-[66] and [84]-[85]).

66. Mr Edwards accepted my suggestion that there were two core issues in this case which needed to be resolved, namely:
- (a) under what power was the land held following its acquisition in 1993, and
 - (b) did the purposes of acquisition carry with it an entitlement on the part of the public to use the land for recreation?
67. He also flagged up the fact that there was no evidence of any subsequent appropriation (or of any alternative statutory purpose) in this case. He is right about this. We are then addressing the purpose for which the land was transferred to Kennet in 1993 and the consequences that arise from this in village green law.
68. Mr Edwards submits that the application land was plainly transferred to Kennet as 'amenity open space' which, he says, would normally be understood to mean (that is, in the context of the transfer of an open and undeveloped parcel of land to a local authority for nil consideration) use for the purposes of recreational amenity (along with other land) in connection with a new planned residential estate (in this case, Barton Park East). Indeed, the land had already been laid out as POS prior to its transfer to Kennet, as previously explained. This being the case, Mr Edwards argues that Kennet must have been relying on its statutory powers (although none were expressed at the time although, having said that, there is no requirement in law for the transfer to have done so – indeed Mr Edwards is right when he says that transfers and conveyances to local authorities seldom identify expressly the statutory basis of acquisition) which entitled it to acquire, and thereafter hold, land for recreational purposes and the prime candidate for this, he says, would have been the Open Spaces Act 1906, s.9, not least as such land had been laid out by Miller Homes for these purpose before its transfer (namely pursuant to its obligations under planning permission K/86/0020 and the 1983 s.52 agreement).
69. In light of the above, Mr Edwards says that the expressed purpose as 'amenity open space' within the 1993 transfer was sufficient to support a

conclusion that the land was acquired by Kennet for recreational purposes and pursuant to a statutory power by which it was entitled to acquire land for such purposes. It follows that the public had a statutory entitlement to use the application land and that such right is continuing and that accordingly user was (as from 1993) 'as of right' and is thereby not a qualifying use within the meaning of CA 2006, s.15, following the decision in *Barkas*. On this footing, he submits, the application to register must fail as the public had a statutory right to use the land for LSP.

70. Mr Edwards also commented upon a matter that I had raised at the start of the inquiry in relation to the existence of any minute recording a resolution by Kennet to acquire the application land. No such minute has been found. He is also right when he says: (a) it is not uncommon, when there is what he describes as 'a self-standing' decision on the part of a local authority to acquire land, for this to be recorded in an express resolution; but that (b) the absence of any recorded decision is amply explained by the antecedent planning context and, as I am informed, by Kennet's own practice which was to secure the provision of POS for new developments by way of transfers under a s.52 agreement. In other words, the obligation to take a transfer of the land arose in consequence of Kennet's decision to grant planning permission K/86/0020, and the terms of that condition. This meant that there was no express resolution to acquire the land.
71. On behalf of WC, the first objector, Mr Pike's submissions mirror those of Mr Edwards. Put shortly, he submits that the application land was, after the transfer dated 19/08/1993, held by Kennet and thereafter WC for the purposes of public recreation from which it follows that such use would have been 'by right' and not 'as of right'. Mr Pike goes into the decision in *Barkas* at some length in order to make plain why use 'by right' cannot be qualifying use to justify registration.
72. Mr Pike has also analysed the witness statements with some care as he came across a number of the applicant's witnesses (including the applicant himself) who, in their various ways, say that they understood the land to have been laid out or otherwise set aside for use by residents of the Barton Park estate

and that public recreation had always been enjoyed thereon without fetter or restriction. There is no evidence, Mr Pike says, that any use has ever been contemplated or proposed on this land (i.e. since Kennet took ownership of it in 1993) other than its current use as 'open/amenity/recreation space' (para/21).

73. Mr Pike deals with the way in which the application land has been maintained by WC which is the responsibility of WC's Cabinet Assets Committee which holds and is responsible for council property. Until June 2013 all maintenance was undertaken in-house since when it has been the responsibility of contractors. As I have already indicated, the grass is cut regularly, no doubt more often in the growing season, and it is, I think, plain and obvious that a good deal of work has been invested in the maintenance of this land over the years in ensuring that it remains fit for public use. The cost of maintaining the land evidently comes from the budget of WC's Highways and Streetscene Department (and its predecessors). It is, therefore, plain that the land is not, as is claimed by the applicant, the responsibility of WC's Strategic Projects and Development officer or that of the department in question.
74. Mr Pike deals fully with the antecedent planning history prior to the transfer by The Miller Group Ltd to Kennet on 19/08/1993. In common with Mr Edwards, he submits that the very purpose of the acquisition is explicit from the terms of the transfer deed, namely:

The Property is transferred together with the right of way ... for the purposes only of obtaining access to and maintaining as amenity open space the land hereby transferred

75. There is no direct evidence to show why the reference is to *amenity* open space as opposed to *public* open space although amenity green space is commonly found in residential areas. The term 'open space' in the Town and Country Planning Act 1990, s.336(1), is defined as including

land laid out as a public garden, or used for the purposes of public recreation.

I therefore take the expression 'amenity open space' in the 1993 transfer to mean accessible green space of public value located in and around housing which is available for sport and outdoor recreation by the local community. In

my view, there is no measurable difference in practice between the expression 'amenity open space' (as used in the 1993 transfer) or that of POS. They are two ways of saying the same thing, namely to describe land which is available for public recreation.

76. Mr Pike offers a menu of appropriate enabling powers which authorised the acquisition and holding of the application land for public recreation. These have already been addressed herein and it is incontrovertible that such powers were available to Kennet in 1993. Mr Pike rightly submits that there is no evidence that the application land was transferred to Kennet to be held for planning purposes or, for that matter, that it should be held in order that it might be preserved from development which might have an impact on the skyline, given the prominence of the site. Mr Pike goes as far as to say that it would be irrational, in light of the evidence, to suggest that the application land was not held as 'amenity open space'. He says that the antecedent planning history is entirely consistent with such a conclusion in light of the requirement, arising from planning permissions and associated planning agreements, whereby provision had to be made for amenity open space within the Barton Park development.
77. Finally, Mr Pike submits that, in view of the contemporaneous documents and the clear terms of the 1993 transfer, it is unnecessary to rely on the presumption of regularity in order to reach a conclusion as to the statutory holding power. However, even if it was necessary to invoke the presumption, he submits that the result would be just the same as Kennet was in a position to lawfully acquire the land as recreational open space and to hold it for that purpose and there is no evidence to suggest that it was acquired for another purpose. As he puts it, the presumption must result in the conclusion that Kennet lawfully acquired the land and committed it to open space under relevant statutory powers which entitled it to do just that.
78. Mr Pike's conclusions to my two core issues are as follows:
 - (a) that after the 1993 transfer the application land was held by Kennet and then WC for use as POS or as recreation grounds within the meaning of the Public Health Act 1875, s.164, or the Open Spaces Act

1906, s.9/10, or under the Local Government (Miscellaneous Provisions) Act 1976, s.19, and

- (b) that being so, the basis upon which Kennet and WC have respectively held the land since 1993 was such as to confer a public right to use it for recreation which is sufficient in law, following *Barkas*, to preclude its registration as a TVG.

The applicant

79. With the exception of 'as of right', I have read and considered the applicant's submissions on the ingredients of the definition of a TVG which should be met before land is registered as a TVG. I see no need to repeat them in this report in view of the fact that neither objector is seeking to oppose the application to register on the basis that the land had not been used for LSP for the requisite period ending with the submission of the application by a sufficient number of local inhabitants of a qualifying neighbourhood within a locality. I therefore turn to the applicant's submissions on 'as of right' which begin at para/21 of his written submissions.
80. The applicant relies on the absence of permission (either express or implied), on the absence of bye-laws regulating the use of the land, and the absence of an appropriation of the land onto purposes which would have engaged a public right of recreation. He cites *Barkas*, seeking to distinguish the facts of *Barkas* and the position in this case where he argues that as the land was transferred to Kennet as open space 'for planning reasons' under a planning agreement made under TCPA 1971, s.52, the reasoning in *Barkas* does not apply seeing as s.52 did not confer open space status on the land or imply a right of public usage.
81. The applicant submits that Kennet and WC have done nothing (other than grass-cutting and some recent tree-planting) to earmark or designate the application land as POS. It is not, for instance, called an open space or mentioned by name in any public record of local open spaces; nor are there any play or other facilities or made-up paths on the land nor, for that matter, any indicative signage (in contrast to other open spaces in the town which

have been funded by developer contributions or from other sources). The applicant also says that the recent tree planting on the land by the Marlborough Orchard Group has not restricted its use, nor is it consistent with the existence of public rights to use the land, whether by virtue of an inferred license or by statute. As this is not a case involving a claimed appropriation the decision in *Goodman* is, he says, not material. The applicant opines that the lack of care and enhancement by Kennet and WC (other than occasional grass cutting) demonstrates that the land has never been considered to be POS and is of no community value (para/98).

82. The applicant opines that there are sound planning and other grounds which make it unlikely that the application land was ever intended to become a dedicated place for public recreation and/or that such use could not have been 'by right'.
83. The applicant submits that the prominence of land on the south facing skyline (and the approved development is set below the skyline, no doubt so as not to be visible from key vantage points within the AONB) ensured that the local planning authority intended to preserve and protect the land from operational development or a material change of use (the applicant produced a decision from a recovered appeal dating back to 1980 in which the Secretary of State refused the developer's appeal for housing development on the land – the decision stressed the importance of the prominent south facing hillside within the landscape of the AONB (with no permitted development rights)). I understand the applicant to be saying that it was the importance of this that the land was kept in public ownership thereby ensuring that it could never be developed as opposed to any intention on Kennet's part that it should be made available as POS. The applicant submits that none of the foregoing planning objectives required the application land to be made available as POS and have in fact been achieved without the land being designated as POS.
84. The applicant submits that there have never been any planning applications for permission to change the use of the land (and a generic description of development as 'residential development' would not suffice for these purposes) to use as POS. He says that that this would have been necessary if

the land was to have been lawfully made available for such purposes. In other words, he is saying that LSP would not have been 'by right' as it would have been in breach of planning control – note, however, the limitation period for enforcement under TCPA 1990, s.171B(3) (10 years beginning with the date of breach). The applicant opines that neither a planning condition nor a s.52 agreement requiring land to be made available as POS operates to grant planning permission for such use. It seems to me to be open to doubt as to whether a change of use from arable agricultural to public open space would in fact be a material change of use even in the case of land within an AONB.

85. If, as the applicant, planning permission would have been necessary to permit the lawful use of the application land as POS then he argues that none of the permissions, planning conditions or planning agreements ever gave explicit consent for this which he says is important as POS may or may not form part of a planning application for development which includes residential development.
86. The applicant points to the lack of clarity in the early planning documents when it comes to the precise location and extent of the proposed open space and amenity areas (which is admittedly true in the case of the 1983 s.52 agreement at O2/80 and in the case of the earlier planning documents (permission and s.52 agreement) at A2/apps 3&4, which date back to the 1970s).
87. Finally, the applicant submits that the land has not even been properly designated or earmarked as *public* open space (which would have been required under the planning arrangements which antedated the 1993 transfer) seeing as the application land was in fact transferred as *amenity* open space. It follows, he says, that any conditionality attaching to the land under the antecedent planning arrangements was not properly discharged. It presumably follows from this that there can have been no use 'by right'. The point is also made that the entries in the Land Register are silent as to public rights although I might add that TVG rights only crystallise upon registration.
88. In light of the foregoing, it follows, the applicant argues, that even if the application land had been subject to a planning condition or an operative s.52

agreement which required it to be laid out and designated as POS, this never happened whilst the land was vested in Kennet between 1993-2009, which meant that during that period the true status of land was unclear or, as the applicant puts it at para/71, 'left in a drawer for a rainy day'. The position after 2009 is, he argues, no better and he says that WC have been unable to confirm the land's status to him despite requests for clarification (in fact he says that Kennet was fault in not ensuring that proper provision, in compliance with planning policy, was made for POS to serve the Barton Park East development). It follows that as the land had no status, public use cannot have been 'by right' seeing as it had not been designated as POS. As he puts it at para/81:

The intentions of the planning committee were never fulfilled and the condition never discharged.

What he says should have happened was that Kennet should have surveyed the land, designed a play and sports strategy and consulted the town council and the residents. It should then have sought planning permission for a change of use and implemented the works and adopted the land as POS and designated it in one or more of the registers of POS in the area. He says that none of this occurred.

89. The applicant is wrong when he says that the application land has been excluded from a programme of planned transfers of local public open spaces by WC to the town council. I was told at the inquiry that the only area of POS which has been transferred to the town council is Cooper's Meadow (including the public toilets).
90. In conclusion, in answer to the two questions posed by me at the start of the inquiry, the applicant says this:
- (a) the land was never allocated for public recreation in the sense understood by *Barkas*; the land, although transferred to Kennet by reason of a planning permission and linked planning agreement, was never allocated for any specified purpose, let alone a purpose which allowed it to be used 'by right' for recreation. When, in his closing

submissions, I asked the applicant for what purpose the land was held if it was not held as POS, he said (as I understand his case) that it had no formal status other than as a TVG for which purposes it is now held by WC. He did, however, concede that the application land was originally intended to be POS yet he asserted that the 1993 transfer did not actually say this.

- (b) Public use of the land has accordingly been 'as of right'; the land has simply been used by local inhabitants (for the requisite period) as it is there and available for use for LSP without complaint or restriction by the owner. It follows that such user will justify registration as a TVG on the conventional basis as all the necessary elements for this have been met.

Objectors' rebuttal

- 91. In their written submissions the objectors' counsel respond to a number of the applicant's submissions and it would be helpful, I think, if I reviewed these.

Second objector

- 92. Mr Edwards says that the applicant's observation that the land transferred in 1993 is not the same area of land which forms part of the 1983 s.52 agreement (O2/80) is correct. However, he goes on to say (in my view, rightly) that this is not unsurprising as the open space to be delivered pursuant to the 1986 outline planning permission was to be identified in accordance with the implementation of that permission and, in particular, was identified through the approval of Master Plans to which reference has already been made. Mr Edwards argues that in approving the actual location and form of open space pursuant to the 1986 outline permission Kennet could not have fettered its discretion by insisting that that open space be in the same location shown in the earlier 1983 s.52 agreement. Moreover, he says that condition 5 of the 1986 planning permission (K/86/0020) provides that the

open space shown on plans to be submitted pursuant to condition 1 above shall be provided concurrently with each phase of the development in accordance with the Agreement of 10 February 1983 ... (emphasis added)

Mr Edwards submits that, properly construed, condition 5 required, in substance, the delivery of the open space in accordance with the 1983 s.52 agreement. It did not prescribe that the precise location of that open space was to be in exact accordance with the 1983 agreement, not least since the condition is expressed in the future tense, namely that it is 'to be submitted'. I agree with this submission.

93. Mr Edwards also says that the application land was not, as the applicant claims, acquired by Kennet pursuant to s.52 of the TCPA 1971. Mr Edwards is, I think, right when he says that that submission reveals a fundamental misunderstanding as to the construction and purpose of s.52 which provides local authorities with no more than a power to enter into an agreement for the purposes of restricting or regulating the development or use of land. In other words, it is a section that does not empower an authority to acquire and hold land. The fact is that the 1983 s.52 agreement contained incidental and consequential provisions for the laying out of land, for its transfer to the planning authority and for commuted sums to be paid out for future maintenance, which meant (as I accept must have been the case) that the power for Kennet to accept a transfer of land as public open space could only be derived from the powers within the Acts of 1875, 1906 or 1976.
94. Kennet did not acquire the application land under powers enabling it to acquire land for planning purposes which, as Mr Edwards rightly says, are generally used where the intention is to bring forward land for development which was not the case here and, as he puts it, flies in the face of the planning history leading to the 1993 transfer which points towards the provision of POS.
95. The applicant says that the land was acquired, not as POS, but in order to limit its developability owing to its relationship to the wider AONB (in his oral submissions Mr Edwards referred to this as an example of 'unspoken planning policy'). The applicant's point is admittedly a difficult one under this head but Mr Edward's rebuttal, put shortly, is that it would be incompatible with the planning history which identified the application land from an early stage as POS intended to serve the new development at Barton Park East

rather than meeting any landscape or visual impact function. I accept this submission.

96. In response to the applicant's submission that the land was not in fact held by Kennet as POS, as evidenced by the documents behind A2/tabs 34, 35 and 36 (which allegedly show POS within the town), Mr Edwards rightly points out: (a) that the basis of selection of the 'community amenities and open spaces' identified in tab/34 is not disclosed; (b) that the Marlborough Town Council publication at tab/35 does identify the land at tab/35; and (c) the document at tab/36 is expressed as a draft and the applicant has produced only an extract of a much more extensive document (namely The Wiltshire Open Space and Play Area Study – see 1.1 at p.1); again, the basis of selection of land, and whether or not the application land is included, is not disclosed (for instance, the document contains no schedule which identifies what areas of, in particular, amenity green space have been included in the calculation of 'Existing Provision' set out in the table at paras.3.2, p.7).
97. Mr Edwards also submits that the applicant is wrong when he says that there is no planning permission for the use of the land as public open space. Mr Edwards must surely be right when he says that the 1986 outline grant for 'residential development' would have included ancillary development such as roads and open space which, in the case of the latter, was actually authorised by the 1986 permission at conditions 1/5. He also rightly says that the later planning history makes it plain that the provision of open space was fundamental to the delivery of housing on this site. In any event, Mr Edwards says (again, correctly in my view) that whether or not planning permission for use of the land as POS would have been required, or was not given (and he says it was), the point is no longer material anyway as such use had gone on for more than 10 years and thus had become a lawful use in planning terms.

First objector

98. Mr Pike submits that a number of the points relied on by the applicant are irrelevant when it comes to applying *Barkas*: he says

- there is no need for planning permission for POS use in order that such use may be ‘by right’;
- there is no requirement for such land to come within any particular definition of what constitutes ‘open space’ or ‘public open space’;
- there is no requirement for any restrictive covenant or other instrument or deed to exist which confers a right upon the public to use land for recreation;
- there is no requirement for land to be allocated or designated as open space in any plan or study or register; in other words, there was no duty on either Kennet or WC to publicise the fact that the land was held for these purposes – it makes no difference to the basis upon which the land is held.

99. Mr Pike joins with Mr Edwards in challenging the applicant’s assertion that s.52 of the TCPA 1971 would have been the relevant power of acquisition. Mr Pike says that Kennet must have been exercising the suite of powers previously discussed when they took a transfer of the application land and there is no evidence of any competing purpose.

Discussion

100. The applicant has, in my view, clearly made out his case that the application land has been sufficiently used for LSP during the requisite qualifying period by a significant number of local inhabitants within the claimed neighbourhood within a locality comprising either the local ward or the town of Marlborough. Very sensibly the objectors did not raise any issue on this which was, I think, hardly surprising in light of the number of evidence questionnaires (186) and their analysis by Mr May.

101. The contentions of the applicant’s witnesses are entirely consistent with the surrounding circumstances. The application land is unfenced and there has never been any signage forbidding entry. The land is also close to a sizable

settlement and I have no doubt that it is often used by local residents for informal recreation, mainly walking with or without dogs, as I witnessed for myself on my unaccompanied visit. The land is convenient not only for short walks around the perimeter but also for much longer walks on tracks on the neighbouring land to the north owned by the second objector (the gap in the hedgerow revealed considerable wear and is undoubtedly freely used by walkers, as I also observed on my own visit). The use relied on has obviously continued for a number of years, certainly in excess of 20 years prior to the date of application, and there has been no interruption in such use. On the balance of probabilities, and subject to 'as of right' with which I deal separately, I find that the applicant's evidence is more than adequate to justify registration. In summary under this head, the number of people using the application land was, in my view, sufficient to indicate that their use of the land signified that it is in general use by the local community for informal recreation for which purpose the land was, in my view, made available after 1993 by Kennet and, since 2009, by WC.

102. I am able to deal with 'as of right' relatively shortly. This is because I accept the submissions on this by the objectors in preference to those of the applicant.
103. I return to the two key questions which I posed at the start of the inquiry, namely:
- (a) for what purpose was the application land held by Kennet and WC after 1993, and
 - (b) did that acquisition purpose carry with it an entitlement on the part of local inhabitants to use the land for informal recreation?
104. The question at para/103(a) involves a consideration of the statutory holding power. The objectors are, in my view, correct in their contention that because of a suite of powers⁶ Kennet was in a position to lawfully acquire the application land for use as recreational open space and to hold it for that

⁶ i.e. those arising under the Public Health Act 1875, s.164; Open Spaces Act 1906, ss.9/10; and the Local Government (Miscellaneous Provisions) Act 1976, s.19 (which enables an authority to provide such recreational facilities as it thinks fit).

purpose. There is certainly no evidence that it could have been held for any other purpose and it was certainly used and managed for these purposes by Kennet and WC after 1993.

105. It seems to me that the relevant acquisition purpose is plain and obvious from the 1993 transfer to Kennet wherein the property was expressly transferred:

for the purposes only of obtaining access to and maintaining as amenity open space the land hereby transferred

Indeed, the transfer plan describes the Plan 1 land as 'Open Space' in three places.

106. As indicated by me previously, the expression 'amenity open space' describes land which is intended to be available for public recreation and, as we know in this instance, the application land was specifically laid out and planted up for such purposes in order to serve as the main open space for the Barton Park East development. We can see this in the correspondence passing between officers of Kennet and the developers, Miller Homes, prior to the transfer in August 1993 (O1/68-93). As I indicated at the inquiry, it is a general rule when construing a deed that one only looks outside the document to gather its intended meaning where there is ambiguity or uncertainty. In my view, nothing of the kind arises here as the purpose of the transfer is, in my view, plain from the use of the words 'amenity open space'.

107. Even if it was permissible to look outside the transfer to determine for what purposes the application land was intended to be held by Kennet, it is quite obvious from the antecedent planning history that the application land had always been earmarked as intended recreational open space. Mr Edwards helpfully took the inquiry through the documents assembled by Joanne Davis which was of great value to the inquiry.

108. Mr Edwards correctly submitted that the transfer to Kennet of the land as POS was entirely consistent with the material planning history where one starts with the open space provision associated with the development of Barton Park. There were a series of approved planning applications in the 1970s and 1980s for the development which was brought forward in two phases, Barton

Park West (which was developed first) and Barton Park East (whose development comprising some 57 houses commenced after June 1988 following approval of reserved matters) within whose curtilage the application land falls. The key permission is an outline planning permission issued in 1986 under the reference K/86/0020, in association with a section 52 planning agreement made in 1983.

109. At condition (b) of the outline permission there is a requirement to provide not less than five and a quarter acres of POS to serve the proposed residential development at Barton Park East. The outline permission is linked to the earlier section 52 agreement under which the developer was required to make provision for open spaces and amenity areas. Clauses (4) and (5) of the same agreement made provision for the capitalised cost of maintaining not less than four and a half acres of proposed open space shown within the area edged green on the accompanying plan. This is admittedly not the same shape as the application land but I think Mr Edwards is clearly right when he says that it was always intended that the eventual open space provision would be identified through the approval of Master Plans at the stage of approval of reserved matters.
110. The 1986 outline permission was duly taken forward through the approval of a Master Plan 779/4 (later revised) upon which 4.5 acres of POS which mirrors the Plan 1 open space (namely the application land) shown on the 1993 transfer to Kennet. The Master Plan was approved as part of the reserved matters application for Phase 1 of the Barton Park East development and was again revised in the form of drawing 779/4 rev C in the context of an approval of reserved matters on 15/09/1988 (which concerned Phases 4 and 4a of the development). The third revision of the Master Plan also shows a 4.5 acre parcel of POS which corresponds to the application land and the Plan 1 land transferred to Kennet as 'amenity open space' in 1993. There is also an officers' report on the reserved matters application K/12458/D for the Barton Park East development in which the development site is described by reference to the Master Plan approved for the different phases pursuant to the 1986 outline planning permission where we are also told the houses would be grouped around two areas of 'open space to create 'village green'

arrangements'. In due course, the areas allocated as POC were laid out and transferred to Kennet.

111. It seems plain that the application land was always intended to comprise the major part of the POS provision for the development of Barton Park East (in line with the obligations on the developer arising from the planning history) and was transferred to Kennet to be held for such purposes. Consistently with this, the same land has, ever since, been used extensively by local inhabitants of the estates of Barton Park West and Barton Park East as recreational open space and has been managed effectively by Kennet and WC in a way which has facilitated its use for such purposes.
112. It necessarily follows from all this that, following *Barkas*, the application land cannot, as a matter of law, be considered to have been used by local inhabitants for LSP after 1993 'as of right' but was in law used 'by right'. In the circumstances, the objectors are right to contend that Kennet must have been relying on its statutory powers which entitled it to acquire and hold land for recreational purposes (i.e. as 'amenity open space'). The prime candidate for this is (as Mr Edwards rightly says) would have been the Open Spaces Act 1906, s.9, not least as such land had been laid out by Miller Homes for these purpose before its transfer.
113. Accordingly, the objectors rightly contend, in my view, that local inhabitants had a statutory entitlement to use the application land for recreation⁷ and that such right is continuing. In the circumstances, user was (as from 1993) 'by right' and is thereby not a qualifying use within the meaning of CA 2006, s.15, following the decision in *Barkas*.

Recommendation

114. 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.

⁷ And land acquired under section 9 of the Open Spaces Act 1906 is required to be held subject to a recreational trust with a view to its enjoyment by the public as open space under section 10 of that Act.

115. 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'*.

William Webster

3 Paper Buildings

Temple

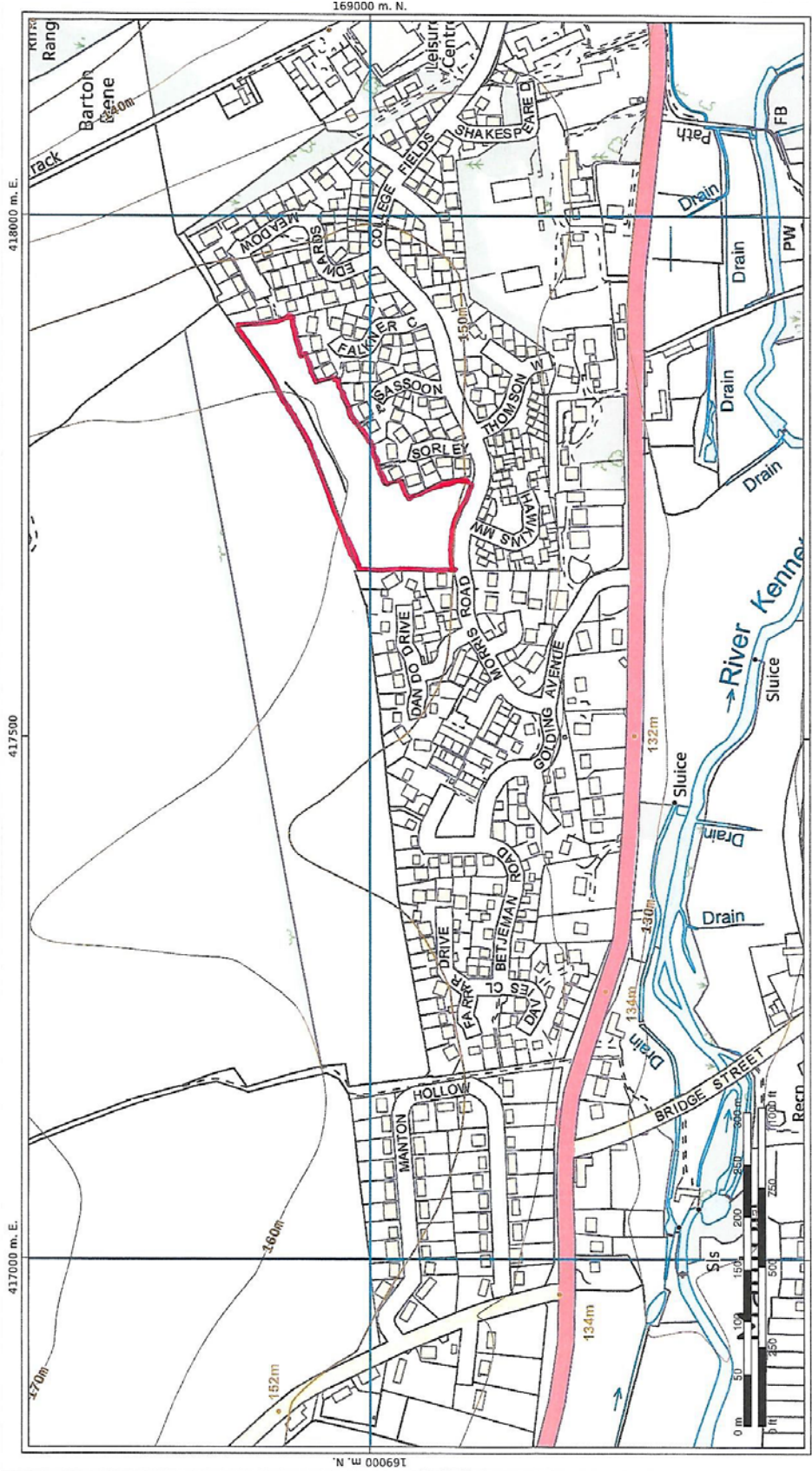
Inspector

2 March 2018

Appendix 1

SN8 ITP

VILLAGE GREEN APPLICATION SITE.



Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
 Ground Scale 1:5,000

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Approximate
 Mean
 Declination
 1°7'46"
 Annual Change
 0°9'42" E
 Graphic provides direction of Approximate
 Mean Declination for center of map

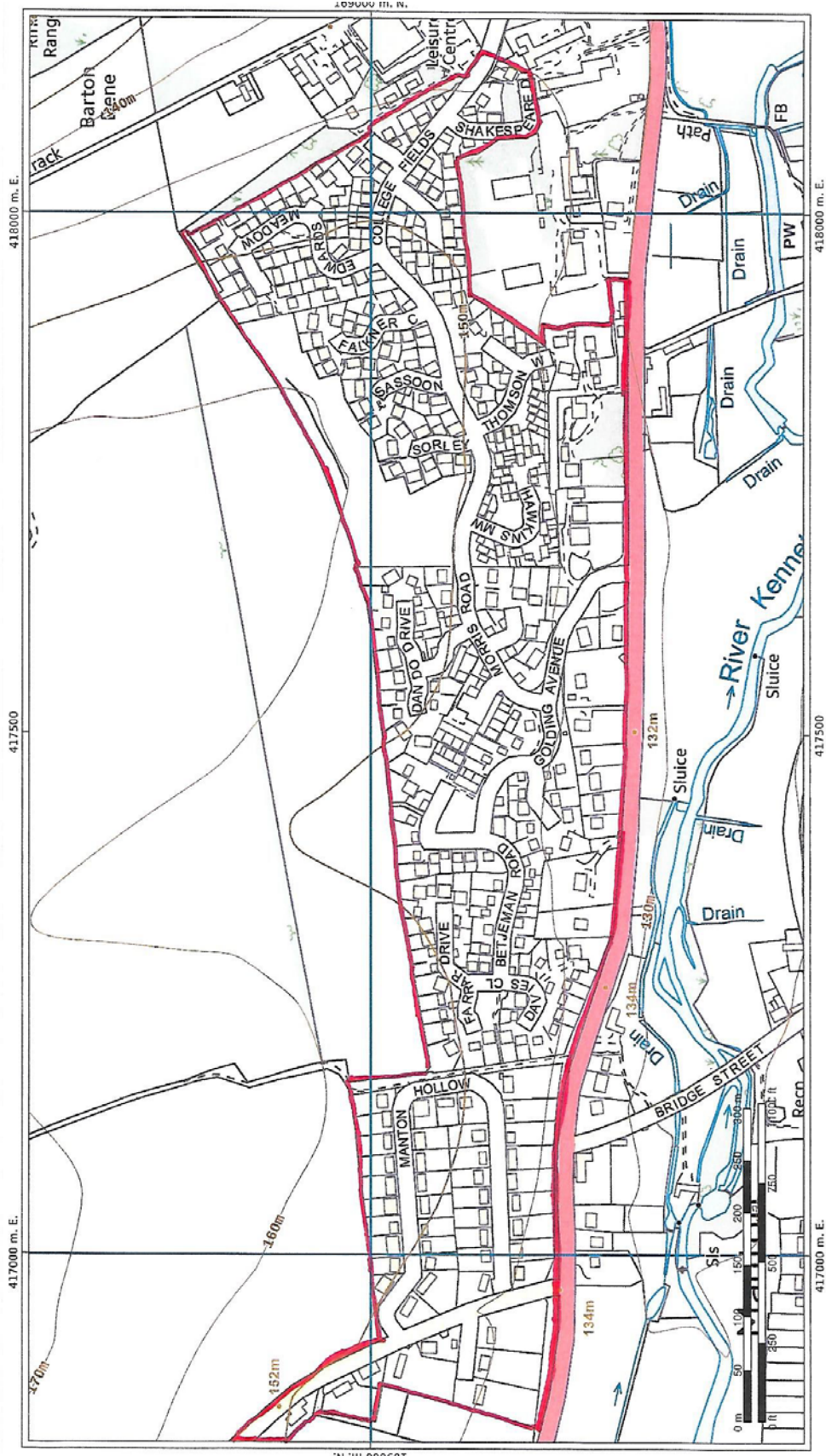
Date of Production: January 23rd, 2017

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Appendix 2

SINO JIP

PLAN OF NEIGHBOURHOOD.



Bottom Left: 1°45'34"W 51°24'58"N Top Right: 1°44'23"W 51°25'22"N
Ground Scale 1:5,000

Approximate
Mean
Declination
0°9'42"E
Annual Change
1'7"46"
Graphic provides direction of Approximate
Mean Declination for center of map

Date of Production: January 23rd, 2017

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Form 43

Freehold or Leasehold

HM Land Registry

KENNET DISTRICT COUNCIL Land Registration Acts, 1925 to 1986

IT IS HEREBY CERTIFIED THAT THIS

IS A TRUE COPY *When the transfer attracts Inland Revenue duty, the stamps should be impressed here before lodging the transfer for registration*

Signed *M. Boden* 03/FEB/94
Designation *District Secretary and Solicitor*

Stamp pursuant to section 28 of the Finance Act, 1931, to be impressed here

*Use form 20 when restrictive covenants are not being created.

TRANSFER OF PART IMPOSING FRESH RESTRICTIVE COVENANTS*

(Rule 135 Land Registration Rules 1925)

The title number allotted to the land transferred will on registration be officially entered opposite.

County and district (or London borough) } WILTSHIRE : KENNET

Title number(s) WT67901

Property LAND ON THE NORTH SIDE OF BATH ROAD

MARLBOROUGH

Date 19th August 1993

In consideration of ONE

(1) Strike out if not required. pound (£ 1.00) (1) the receipt whereof is hereby acknowledged

(2) Insert in BLOCK LETTERS full name(s), postal address(es) and occupation(s) of the proprietor(s) of the land. THE MILLER GROUP LIMITED of MILLER HOUSE 18 SOUTH GROATHILL AVENUE EDINBURGH EH4 2LW

(3) If desired or otherwise as the case may be. (See rules 76 and 77). (hereinafter called "the Transferor(s)") (3) as beneficial owner(s) hereby transfer(s) to:

(4) Insert in BLOCK LETTERS full name(s), postal address(es) and occupation(s) of transfer-ee(s) for entry on the register. THE DISTRICT COUNCIL OF KENNET of BROWFORT BATH ROAD DEVIZES SN10 2AT

(5) On a transfer to a Company registered under the Companies Acts insert here the Companies registration number if entry thereof on the register is desired. (hereinafter called "the Transferee(s)") (5) (Company registration number)

(6) See notes as to plan on page 4. the land shown and edged with red on the (5) plan bound up with it and known as FIRSTLY the land edged red on Plan 1 attached hereto and SECONDLY the land edged red on Plan 2 attached hereto ("hereinafter called "the Property")

being part of the land comprised in the title above mentioned

(95)

(7) Or otherwise as the case may require e.g., on a single transfer "the remainder of the land comprised in the title above mentioned."

(8) Strike out words in italics if not required.

1. The Transferee(s) hereby covenant(s) with the Transferor(s) so as to benefit ^{the remainder of} ~~the land edged with~~ the land comprised in the above title ~~but not the plot boundaries with any part or parts thereof~~ and so far as to bind the land hereby transferred ^{to maintain the Property in} ~~into whosoever hands the same may come but not so as to extend to the transferee(s)~~ accordance with the scheme of maintenance of the Council's Director of ~~personally liable to damages for any breach of a restrictive covenant after he shall have paid~~ Technical Services for the time being in force ~~with all interest in the land hereby transferred~~.

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

96

(9) On a transfer to a sole proprietor, delete this clause. On a transfer to joint proprietors, delete the inappropriate alternative.

The transferees declare that the survivor of them ~~(X)XXXX~~ can give a valid receipt for capital monies arising on a disposition of the land hereby transferred. cannot

(10) If a certificate of value for the purposes of the Stamp Act 1891 and amending Acts is not required, this paragraph should be deleted.

(10) It is hereby certified that the transaction hereby effected does not form part of a larger transaction or series of transactions in respect of which the amount or value or aggregate amount or value of the consideration exceeds £ 60,000

(11) For use when the transferor is a company or corporation. Strike out when not required.

(11) The common seal of

THE MILLER GROUP LIMITED

was hereunto affixed in the presence of



(12) Or other officers authorised by the articles of association, statute, charter, etc. (See footnote).

D. DeLeon (12) Director

Keith M. Miller (12) Secretary *D. DeLeon*

The Common Seal of ~~(X)XXXX~~ signed, sealed and delivered by the said

(13) Signed, sealed and delivered by the said

THE DISTRICT COUNCIL OF KENNET

was hereunto affixed

in the presence of

~~(X)XXXX~~ [Signature] Signature

~~(X)XXXX~~ CHAIRMAN

~~(X)XXXX~~ [Signature] DISTRICT SECRETARY and SOLICITOR



(13) Signed, sealed and delivered by the said

in the presence of

Name _____ Signature _____

Address _____

Occupation _____

MIN No.	176 P+D.C. 16.4.81
CHIEF CLERK	PE

Seal

Bind the plan herein

97

Note: In the case of a company or corporation, unless the transfer has been executed in accordance with section 74 (1) of the Law of Property Act 1925, it should be accompanied by a certificate signed by the secretary or solicitor of the company or corporation that the transfer has been duly executed in accordance with the company's articles of association or the corporation's statute, charter, etc.

(14) The Transferee(s) must execute this transfer in addition to the transferor(s).

(14) Signed, sealed and delivered by the said

.....
.....

in the presence of

Name Signature

Address

Occupation



(14) Signed, sealed and delivered by the said

.....
.....

in the presence of

Name Signature

Address

Occupation



Notes as to transfers of part

1. Except as stated in note 4 below, a plan must be securely bound in the transfer in form 43. This plan, showing clearly the position and extent of the part transferred, should be drawn to a suitable scale, usually of not less than 1/2500. Where necessary, the part transferred should be related by means of figured dimensions to the physical features existing on the ground and shown by firm black lines on the official plan of the transferor's registered title: these may be, for example, road junctions or walls or fences.
2. The transfer plan must be signed by the transferor(s); if a company or corporation, its common seal should be impressed on the transfer plan and attested. The transfer plan must also be signed by the transferee(s) or his or their solicitor(s) (r. 79 of the Land Registration Rules 1925).
3. It will greatly facilitate the registration of the transfer if the preceding application in form 94B for an official search is supported by a plan identical with that intended to be bound in the transfer itself.
4. Neither the application in form 94B nor the transfer in form 43 need include a plan when the part transferred is already clearly defined by means of a colour or number reference on the official plan of the transferor's registered title. It is then permissible to define the part being transferred merely by referring in the form 94B or the form 43 to the colour or number shown on that official plan.
5. Transferors should urge their transferees:
 - (a) to apply for an official search in form 94B not less than 3 or 4 days before the date arranged for the completion of the transfer; and
 - (b) to register the transfer immediately after it has been completed, particularly when there are other pending transactions affecting the transferor's registered title.
6. The application (form A5) to register the transfer must be accompanied, not only by the original transfer, but also by a certified true copy of the transfer including the plan (r. 135 of the 1925 Rules).

98

Plan 1

OFFICE COPY

Wm. L. L. L.
C. L. L.

Wm. L. L. L.
C. L. L.

MON.	1	1	1
NO.	1	1	1
DATE	1	1	1
PL.	1	1	1

8



16-4-51 DATE
 DRAWN BM
 SCALE 1:500
 MILLER HOMES
 COLLEGE FIELDS, MARLBOROUGH, PHASE 2
 PLOT Nos. 40-46 & 69
 SHEET I.D. LEGAL PLAN
 JOB I.D. 779 / 195 C

PLAN 2.



Rev.A. Postal Nos. added
 Rev.B. PLOTS 43-48 added
 Rev.C. PLOTS 49-62 added
 Rev.C. PLOT 63-66 boundary adjustment

6-2-92
 30-3-92
 8-7-92



LEGEND

Visibility Splay
 Vehicular & Pedestrian Access
 Pedestrian Access
 Boundary fence / wall
 PLOT No.
 Postal No.
 Unlicensed Boundary
 Gas Main
 Public Foul Sewer
 Surface Water Sewer