

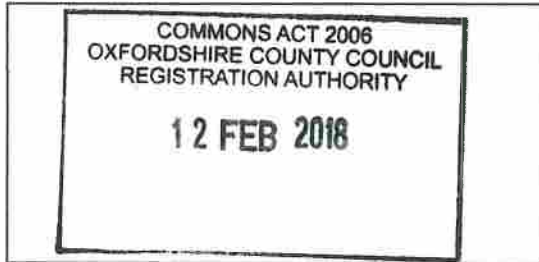
# Annex 1 - Application and Plans

FORM 44

Commons Act 2006: Section 15

## Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:



Application number:

NLREG42

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

### Note 1

insert name of registration authority.

### 1. Registration Authority

To the

OXFORDSHIRE COUNTY COUNCIL

**Note 2**

If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

**Note 3**

This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

**2. Name and address of the applicant**

Name: ANTHONY HURFORD

Full postal address:

1 SINODUN ROAD  
WALLINGFORD  
Postcode OX10 3AA

Telephone number: (incl. national dialling code)

Fax number: (incl. national dialling code) N/A

E-mail address:

**3. Name and address of solicitor, if any**

Name:

Firm:

Full postal address:

Post code

Telephone number: (incl. national dialling code)

Fax number: (incl. national dialling code)

E-mail address:

**Note 4**

For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

\* Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.

**4. Basis of application for registration and qualifying criteria**

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**:

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

**Section 15(2)** applies:

**Section 15(3)** applies:

**Section 15(4)** applies:

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

If **section 15(6)\*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

**5. Description and particulars of the area of land in respect of which application for registration is made**

Name by which usually known:

WILDING ROAD PARK / GREEN

Location:

ON WILDING ROAD OPPOSITE ITS JUNCTION WITH ANDREW ROAD IN WALLINGFORD, AS SHOWN IN MAP EXHIBIT 'A'

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) \*

**Note 5**

The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable it to be clearly identified.

\* Only complete if the and is already registered as common land.

**6. Locality or neighbourhood within a locality in respect of which the application is made**

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

~~SEE MAP EXHIBIT 'B' SHOWING THE NEIGHBOURHOOD~~  
~~WITHIN WALLINGFORD PARISH~~ AA 5LT

**Note 6**

It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

Tick here if map attached:



## 7. Justification for application to register the land as a town or village green

### Note 7

Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

THE GREEN HAS BEEN USED FREELY FOR AS LONG AS PEOPLE CAN REMEMBER. IT HAS BEEN POSSIBLE TO IDENTIFY A NUMBER OF LOCAL RESIDENTS WHO HAVE LIVED WITHIN THE LOCALITY FOR OVER 20 YEARS AND WHO WERE HAPPY TO PROVIDE AN EVIDENCE STATEMENT ATTESTING TO THE LONG-TERM USE OF THE LAND BY LOCAL PEOPLE. THE GREEN IN EARLIER TIMES IS SAID TO HAVE CONTAINED A PLAYGROUND FOR CHILDREN AND THE HARD-STANDING FOR THAT EQUIPMENT COULD BE STILL SEEN UNTIL RECENTLY WHEN SOME GAS NETWORK MAINTENANCE CREWS SET UP AN AREA FOR THEIR MACHINERY WHICH DAMAGED THE HARD-STANDING. THE PLAYGROUND WAS WELL USED BY LOCAL CHILDREN AND THERE IS STRONG FEELING WITHIN THE COMMUNITY FOR A PLAYGROUND TO BE RE-ESTABLISHED. THE NEAREST ALTERNATIVE PLAYGROUND IS CURRENTLY OVER ONE KILOMETRE AWAY SO TOO FAR FOR CHILDREN TO GO INDEPENDENTLY. RE-ESTABLISHMENT OF A PLAYGROUND WILL REQUIRE INVESTMENT WHICH WILL BE MORE ATTRACTIVE ONCE THE GREEN IS PROTECTED BY REGISTRATION. THE GREEN HAS ALSO BEEN USED EXTENSIVELY BY CHILDREN FOR BALL GAMES AND OTHER PLAY ACTIVITIES. IT IS DIFFICULT TO ESTIMATE NUMBERS OWING TO FLUCTUATION IN NUMBERS OF CHILDREN LIVING WITHIN THE LOCALITY, BUT WITH AROUND 160 HOUSES THERE IS LIKELY TO HAVE BEEN AROUND 50 CHILDREN ON AVERAGE OVER THE YEARS. THE GREEN IS ALSO USED FOR COMMUNITY EVENTS SUCH AS THE QUEEN'S JUBILEE AND OTHERS OF NATIONAL IMPORTANCE WHERE IT IS AVAILABLE AS A MORE ATTRACTIVE SPACE FOR A 'STREET PARTY'. SUCH EVENTS ALSO ATTRACTED 50-100 PEOPLE. TODAY THE GREEN IS FREQUENTED BY DOG WALKERS, WHICH CAN CAUSE CONCERN AMONGST OTHER USERS ABOUT FOULING. MOST RECENTLY AN EVENT WAS HELD FOR THE 'GREAT GET TOGETHER' IN MEMORY OF MP JO COX AND IN THE SPIRIT OF BUILDING COMMUNITY, FOR WHICH THE GREEN IS AN IDEAL FOCAL POINT.

**Note 8**

Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

**8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green**

NONE

**9. Voluntary registration – declarations of consent from ‘relevant leaseholder’, and of the proprietor of any ‘relevant charge’ over the land**

NONE

**Note 9**

List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

**10. Supporting documentation**

**Note 10**

List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

MAP 1:1250 SCALE OF LAND BOUNDARY  
~~MAP OF NEIGHBOURHOOD MOST CLOSELY RELATED TO/AFFECTED BY APPLICATION~~  
~~LETTER OF EVIDENCE FROM~~  
LETTER OF EVIDENCE FROM AMY GARDNER, 10 WILDING ROAD  
~~LETTER OF EVIDENCE FROM~~  
LETTER OF EVIDENCE FROM NATHAN GRAY, 22 SINODUN ROAD  
~~LETTER OF EVIDENCE (EMAIL) FROM~~  
~~LETTER OF EVIDENCE (EMAIL) FROM~~  
CONTINUED OVER LEAF

At  
ACT  
ACT

SECTION 10 CONTINUED

EVIDENCE FROM CLAIRE GAUGHAN

EVIDENCE FROM

EVIDENCE FROM ROBERT CALCUTT

EVIDENCE FROM SARAH WADDINGTON

EVIDENCE FROM J. RHODES

EVIDENCE FROM RYAN WHITE

Att  
ACT

**11. Any other information relating to the application**

**Note 11**

If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

EACH OF THE EVIDENCE QUESTIONNAIRES PROVIDED HAS MAPS ATTACHED TO THE REAR FOR RESPONDENTS TO SIGN/MARK AS APPROPRIATE

AH  
JCT

**Note 12**

The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date:

01/02/18

Signatures:

**REMINDER TO APPLICANT**

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

**Data Protection Act 1998**

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.



## Statutory Declaration In Support

*To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.*

<sup>1</sup> *Insert full name (and address if not given in the application form).*

I ~~AM THE~~ ~~PERSON~~ ~~WHO~~ ~~SIGNED~~ ~~THE~~ ~~FOREGOING~~ ~~APPLICATION~~.....<sup>1</sup> solemnly and sincerely declare as follows:—

<sup>2</sup> *Delete and adapt as necessary.*

1.<sup>2</sup> I am ((the person (~~one of the persons~~) who (has) (~~have~~) signed the foregoing application)) ((~~the solicitor to~~ (~~the applicant~~) (<sup>3</sup> ~~one of the applicants~~)).

<sup>3</sup> *Insert name if Applicable*

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

<sup>4</sup> *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.<sup>4</sup> I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

- (i) a declaration of ownership of the land;
- (ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

*Cont/*

<sup>4</sup> Continued

been received and are exhibited with this declaration; or  
(iii) where no such consents are required, a declaration to that effect.

And I make this solemn declaration, conscientiously believing the  
same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said	)	
	)	
ANTHONY HULFORD	)	
	)	
at	)	
Slade Legal	)	
7 St. Martin's Street	)	
Wallingford	)	Signature of Declarant
Oxfordshire	)	
	)	
this	)	
13rd day of May 2019	)	

Before me \*

Signature:

OLIVIA TRAFLETTE

Address:

SLADE LEGAL  
7 ST. MARTIN'S STREET  
WALLINGFORD, OXFORDSHIRE OX10 0AN

Qualification:

Solicitor

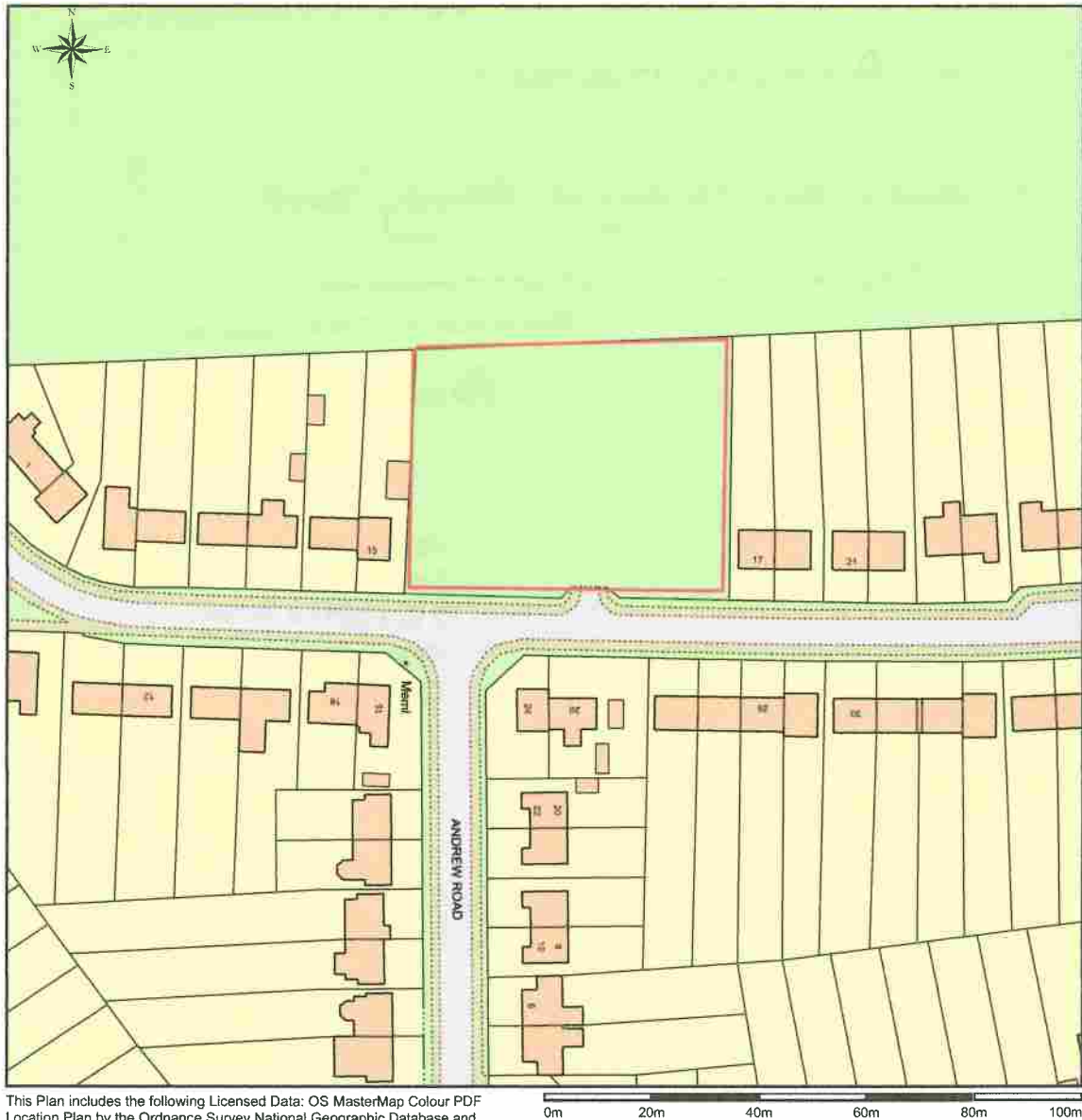
**Slade Legal  
Solicitors  
7 St Martins Street  
Wallingford  
Oxon OX10 0AN**

\* The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

**REMINDER TO OFFICER TAKING DECLARATION:**

*Please initial all alterations and mark any map as an exhibit*



This Plan includes the following Licensed Data: OS MasterMap Colour PDF Location Plan by the Ordnance Survey National Geographic Database and incorporating surveyed revision available at the date of production. Reproduction in whole or in part is prohibited without the prior permission of Ordnance Survey. The representation of a road, track or path is no evidence of a right of way. The representation of features, as lines is no evidence of a property boundary. © Crown copyright and database rights, 2018. Ordnance Survey 0100031673

0m 20m 40m 60m 80m 100m

Scale: 1:1250, paper size: A4



**plans ahead** by **emapsite™**

THIS IS THE EXHIBIT MARKED 'A'  
REFERRED TO IN THE STATUTORY DECLARATION  
OF ANTHONY HURFORD

Made this 1st day of February 2018

Before Me:

JUSANNAH TREHENE

*Solicitor*

Slade Legal  
Solicitors  
7 St Martins Street  
Wallingford  
Oxon OX10 0AP

## Annex 2 - Objection from Landowner

### Legal & Democratic

HEAD OF SERVICE: MARGARET REED



Listening Learning Leading

Principal Officer (Countryside Records)  
Oxfordshire County Council  
Countryside Records  
County Hall  
Oxford OX1 1ND

CONTACT OFFICER: Ian Price  
ian.price@southoxon.gov.uk  
Tel: 01235 422541  
Text phone 18001 before you dial

Your reference:  
Our reference: ITP/ 007915

BY HAND and BY EMAIL  
countrysiderecords@oxfordshire.gov.uk

2 August 2019

Dear Sir/Madam

### **Commons Act 2006, Section 15(1) Application for Registration as a Town Green Land at Wilding Road, Wallingford**

Please accept this letter and the accompanying statement (with attachments) as comprising the council's objection to the proposed registration of land at Wilding Road, Wallingford as a town green.

The council is objecting to the registration of the land as a town green in its capacity as the freehold owner of the land, and the accompanying statement (with attachments) sets out the relevant background to the acquisition of the land by the council, and how the land has subsequently been held, used and maintained under the council's continuing ownership.

On the basis of the facts set out in the statement that accompanies this letter, Oxfordshire County Council is invited and requested to conclude that the circumstances of this case fall fairly and squarely within the clear parameters and principles established by the Supreme Court in the case of *R (on the application of Barkas) v North Yorkshire County Council and another*, 21 May 2014; and to therefore decide that the application for the registration as a town green of the land at Wilding Road must be refused.

For ease of reference, I have enclosed with this letter a copy of the judgment of the Supreme Court in the *Barkas* case. I do not propose in this letter to rehearse the facts of that case, or to quote from it at length. However, in noting the very clear similarities between the facts in *Barkas* and those relating to the land at Wilding Road, as they have been described in the statement accompanying this letter, I draw

attention to the following straightforward principles set out by Lord Neuberger in the *Barkas* judgment, under the sub-heading *Was the public use in this case "as of right"?*

20. *In the present case, the council's argument is that it acquired and has always held the Field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any "inhabitants of the locality" having indulged in "lawful sports and pastimes" "as of right", as they have done so "of right" or "by right". In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or precario, and the 20 year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under section 12(1) of the 1985 Act.*

21. *In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In *Sunningwell* at pp 352H-353A, Lord Hoffman indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.*

24. *I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for twenty years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights.*

Drawing together the essential facts in *Barkas* and the clear principles established in that case, with the essential facts set out in the statement enclosed with this letter regarding the council's land at Wilding Road, Wallingford, the two cases are essentially indistinguishable. In brief summary, such use as there has been of the

council's land at Wilding Road by local inhabitants has not been "as of right" within the meaning of and as required by section 15(2)(a) of the Commons Act 2006. In such circumstances therefore, it is respectfully submitted that the only decision that is properly available to the county council is to refuse to register the land as a town green.

Yours faithfully

Ian Price  
Senior Litigation & Planning Lawyer  
Solicitor

## Annex 3 - Counsels Opinion

APPLICATION FOR REGISTRATION OF A TOWN OR VILLAGE GREEN AT  
WILDING ROAD, WALLINGFORD, OXFORDSHIRE  
APPLICATION NUMBER NLREG42

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### ADVICE

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#### Introduction

1. I am instructed in this case to advise Oxfordshire County Council in its capacity as the commons registration authority for its area (“the Council”).
2. The advice I am asked to provide concerns an application (number NLREG42) (“the Application”) made to the Council for the registration of a town or village green at Wilding Road, Wallingford.
3. The Application was made by a local resident, Anthony Hurford (“the Applicant”) of 1 Sinodun Road, Wallingford and was stamped as received by the Council on 12<sup>th</sup> February 2018 but only deemed to be duly made on 10<sup>th</sup> June 2019.
4. The Application was made in respect of a relatively small (approximately 0.3ha) rectangular plot of land which lies to the north of Wilding Road in Wallingford between numbers 15 and 17 Wilding Road (“the Application Land”). Wilding Road is part of a post-war housing estate which lies on the north side of Wallingford to the east of Wantage Road. The estate is made up of several streets which include Sinodun Road where the Applicant lives.
5. The Application was made on the basis that section 15(2) of the Commons Act 2006 applied. Section 15(2) applies “*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; and (b) they continue to do so at the time of the application.*”



6. As I will come on to in due course below, the key issue in the present case is the requirement that use is “*as of right*”.
7. The Application Land has a grass surface and is level. Its southern boundary is marked by a dwarf brick wall which demarcates the Application Land from the Wilding Road footway (and its associated verge). There is a central gap in the wall at which point there is a narrow, metalled access stub off Wilding Road. The western and eastern boundaries of the Application Land are marked by the boundaries of the adjoining dwellings (numbers 15 and 17 Wilding Road) and their plots. The northern boundary of the Application Land is formed by a steel palisade fence beyond which (to the north) is agricultural land. The Application Land extends in depth (south to north) back from Wilding Road to the same extent as the gardens of numbers 15 and 17 Wilding Road.
8. Photographs of the Application Land reveal that a litter bin and a dog waste bin are stationed on it close to Wilding Road. There is also some remnant hardstanding where there had previously been play equipment. There is a small, tight grouping of two or three trees near the northern boundary of the Application Land.
9. The Application was supported by several completed evidence questionnaires. It is not necessary to rehearse their content for the purposes of this advice.

#### The objection of South Oxfordshire District Council

10. Upon notification and publication of the Application the Council received an objection dated 2<sup>nd</sup> August 2019 from South Oxfordshire District Council (“SODC”). SODC own the Application Land. Their objection (“SODC’s Objection”) was made on the single basis that the circumstances of the Application were indistinguishable from those considered in the Supreme Court case of *Barkas v North Yorkshire County Council*<sup>1</sup> and that use of the Application Land had not been “*as of right*”.
11. *Barkas* was a case where a local authority owner of a playing field had acquired the field and thereafter held it pursuant to powers contained in the Housing Acts (latterly

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<sup>1</sup> [2014] UKSC 31.

section 12(1) of the Housing Act 1985) which enabled it to provide and maintain recreation grounds. The Supreme Court held that (per Lord Neuberger<sup>2</sup>) *“[s]o long as land is held under a provision such as section 12(1) of the 1985 Act ... members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land ‘by right’ and not as trespassers, so that no question of user ‘as of right’ can arise.”*<sup>3</sup>

12. In a wider formulation of the principle involved the Supreme Court also held that (again per Lord Neuberger) *“where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land ‘as of right’, simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 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.”*<sup>4</sup>

13. To similar effect was the reasoning of Lord Carnwath<sup>5</sup> who stated that where *“land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right”*<sup>6</sup> and that *“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.”*<sup>7</sup>

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<sup>2</sup> Baroness Hale, Lord Reed and Lord Hughes agreed with Lord Neuberger.

<sup>3</sup> At paragraph 21.

<sup>4</sup> At paragraph 24.

<sup>5</sup> Who agreed with Lord Neuberger and with whom Baroness Hale, Lord Reed and Lord Hughes agreed.

<sup>6</sup> At paragraph 64.

<sup>7</sup> At paragraph 65.

14. SODC's Objection was supported by a witness statement (dated 30<sup>th</sup> July 2019) of a property surveyor (Melissa Jones) employed by SODC (SODC's Witness Statement") which adduced (as appendices) a number of documents. The documents comprised:

- (a) an official copy of the register of title in respect of the Application Land showing that it is owned by SODC;
- (b) an original conveyance of 12<sup>th</sup> September 1945 of a larger area of land, which included the Application Land, to SODC's statutory predecessor, Wallingford Borough Council ("the 1945 Conveyance");
- (c) two planning applications by Wallingford Borough Council in 1952 for the development of housing on parts of the land acquired in 1945 ("the 1952 Planning Applications") together with the respective plans for each application which labelled the Application Land as a "children's playing field";
- (d) a transfer document dated 7<sup>th</sup> July 1997 between SODC and South Oxfordshire Housing Association Limited ("SOHA") ("the 1997 Transfer") of numerous properties on the housing estate referred to in paragraph 4 above but which also identified "retained land" to remain in the ownership of SODC, which "retained land" included the Application Land as shown on a plan attached to the transfer document which labelled the Application Land as a "playground".

SODC's Witness Statement also included various photographs of the Application Land.

15. The documents were linked in SODC's Witness Statement by a supporting narrative which also provided further factual information. The following points were made.

- (a) Although the 1945 Conveyance recited neither the statutory power under which Wallingford Borough Council acquired the land in question nor the purpose of the acquisition, it was clear that the purpose was for new housing.
- (b) At the time of the acquisition, the Housing Act 1936 ("the HA 1936") was in force and section 73(a) of this act permitted a local authority "*to acquire any land ... as a site for the erection of houses*".
- (c) Section 80 of the HA 1936 provided a supplementary power for a local authority (with the consent of the minister) to provide and maintain a recreation ground.
- (d) Hence it was that Wallingford Borough Council laid out and thereafter maintained the Application Land for recreational use in association with and/or as part of the development of the adjoining housing estate.

- (e) Sections 73 and 80 of the HA 1936 were in turn repealed and substantially re-enacted in the Housing Act 1957 (“the HA 1957”), the provisions of which were later repealed and re-enacted (albeit with more amendments) in the Housing Act 1985 (“the HA 1985”).
- (f) The 1952 Planning Applications made by Wallingford Borough Council were for the development of housing on part of the land it had acquired and the Application Land was shown and identified as a “children’s playing field”.
- (g) Following local government re-organisation in 1974 the Application Land was transferred into the ownership of SODC along with such of the adjoining land as had remained in public ownership since the initial acquisition in 1945.
- (h) The Application Land was retained by SODC when the surrounding houses were transferred to SOHA in 1997. The Application Land was confirmed as “retained land” and was identified on the plan accompanying the transfer document as a “playground”.
- (i) Since having acquired the Application Land following local government reorganisation in 1974 SODC had continued to hold it for public recreation and had maintained it in a manner to facilitate such use. There was a litter bin and a dog waste bin (both marked clearly as the property of SODC) that were both provided, and emptied, by SODC. The grass was mown regularly by SODC. The trees on the Application Land were inspected and maintained by SODC.
- (j) The evidence questionnaires submitted in support of the Application told of informal recreational activities on the Application Land of the type that SODC would expect to see taking place on it. As such, SODC would have had no general cause to prevent or discourage such activities and nor would local residents have expected SODC to do so while the Application Land was retained for such use.

#### The further progress of the Application

16. The Applicant has had the opportunity to deal with the matters contained in SODC’s Objection and Witness Statement as required by regulation 6(4) of the Commons

(Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (“the 2007 Regulations”) but has not provided any response<sup>8</sup>.

17. For its part the Council sought further information from SODC in a letter dated 23<sup>rd</sup> September 2019. The Council asked:

- (a) what the original purpose was of the Application Land being retained and not developed for housing and whether that retention was for a possible access point for future development on land situated immediately to the north;
- (b) whether SODC was able to supply any records dating from 1950 to the present that explicitly recorded the intention of SODC or its predecessor authorities to manage the Application Land as a recreation ground;
- (c) whether, given that the Application Land had no signage to indicate that the Application Land was a SODC controlled and run recreation ground, there were any other recreation grounds that were managed by SODC and signed as such or unsigned like the Application Land.

18. SODC replied by a letter dated 11<sup>th</sup> October 2019. The letter stated the following.

- (a) The purpose of the Application Land being retained and not developed for housing was in order to provide a space for recreational use, explicitly described on the plans that formed part of the 1952 Planning Applications as a “children’s playing field”. SODC’s Witness Statement had explained the statutory power under which a council could acquire land on which to build housing and then put an amount of that land to some useful ancillary purpose other than the direct provision of housing accommodation (such as a recreation ground). Hence it was that post-war housing estates (such as the one at Wilding Road) could be found the length and breadth of the country with small pieces of land (such as the one at Wilding Road) set aside for local community use for recreation.
- (b) As explained and evidenced in SODC’s Witness Statement, the plans that formed part of the 1952 Planning Applications for housing development recorded the intention of SODC’s predecessor authority to use the Application Land as a recreation ground (explicitly as a “children’s playing field”). Also as explained and

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<sup>8</sup> I take this from the Council’s letter to SODC of 23<sup>rd</sup> September 2019 which states that “[f]urther to the expiry of the consultation period within which the Applicant could make representations in relation to SODC’s objection to the above application, no response has been received from the Applicant.”

evidenced in SODC's Witness Statement, the Application Land was retained by the Council when the surrounding houses (or at least those that were still in public ownership) were transferred to SOHA in 1997. As seen on the plan that accompanied the 1997 Transfer, the Application Land was shown as a "playground". In essence, the position was plain and straightforward: while in public ownership the Application Land had been maintained and managed for no purpose other than the one broadly stated by SODC, i.e., as a space for informal recreation provided essentially for the benefit of the adjacent post-war housing development.

- (c) Commensurate with the location, size, nature and level of use of the Application Land SODC had not chosen to display on the Wilding Road recreation ground a plethora of signs designed for the purpose of advertising the Application Land as a recreation ground controlled and run by SODC or to direct local people as to how the Application Land might or might not be used although there were a couple of basic functional features on the Wilding Road site that did bear the name of SODC (i.e., the litter bin and the dog waste bin). Specifically answering the Council's question about signage at other recreation grounds, there were other recreation grounds and facilities elsewhere in SODC's district that were owned and/or controlled by SODC where signs were displayed bearing SODC's name and logo along with other useful visitor information. Riverside Splash Park at Wallingford and the Ladygrove Loop at Didcot were two such examples. SODC's play area at Radnor Road, Wallingford was an example of a recreation space that, like Wilding Road, was sign free.

19. The letter concluded by stating that it was trusted that the point had now been reached whereby the Council could make the decision to refuse the registration of the Application Land as a new green.
20. Before turning to the matters on which my advice is sought, I need to record one other item of evidence. This item of evidence is one which the Council has discovered itself in processing the Application. It has not been submitted to the Council by either the Applicant or SODC. It consists of a notice of refusal of a planning application dated 11<sup>th</sup> November 1960 ("the 1960 Decision Notice"). The planning application was made by a WJ Curtis (of a firm of surveyors and land agents) and sought permission for the

development of some 51 acres of land north of Wantage Road, Wallingford for residential use. The 51 acres includes land to the immediate north of the Application Land. Wallingford Borough Council (acting on behalf of Berkshire County Council) refused the application on the basis that (1) it would involve an excessive and unnecessary expansion of the urban area and was contrary to the local planning authority's proposal for the development of Wallingford as shown on the outline plan for the development of Wallingford and (2) it involved the loss of good agricultural land to which the Ministry of Agriculture objected.

### My instructions

21. My instructions state that my Instructing Solicitor considers that SODC's objection depends on it being established that the Application Land was appropriated for recreational purposes. The following concerns are expressed in that respect.
  - (a) The documentary evidence produced by SODC for the appropriation of the Application Land for recreational purposes is considered to be limited consisting simply of the plans forming part of the 1952 Planning Applications showing the Application Land as a "children's playing field" and the plan accompanying the 1997 Transfer on which the Application Land is marked as a "playground".
  - (b) The evidence of SODC's practice that would show that the Application Land had been appropriated for recreational purposes is also considered to be similarly limited. My instructions state that, while the grass on the Application Land appears to have been mown, and the trees there pruned, by SODC, who have also placed some rubbish bins on the Application Land, there never seems to have been any signage marking out the Application Land as a public park, any creation or maintenance of sports pitches by SODC on the Application Land or any lighting provided. My instructions recognise that historically there was some play equipment on the Application Land but say that it is not known who installed or removed the same and no evidence has been produced that SODC maintained it.
  - (c) Immediately behind the Application Land is a large field which was subject to a failed planning application in 1960 for residential development. This is evidenced by the 1960 Decision Notice which I have referred to in the preceding paragraph. My instructions state that the Application Land appears to provide the only means of accessing the field from public highways and that the Application Land would

therefore “unlock” the field for development. I am told that my Instructing Solicitor suspects that SODC may, in reality, have appropriated the Application Land for purposes connected with the development of the field. My instructions stress that no representations on this point have been received from the parties.

22. My Instructions surmise that the inability of SODC to produce further documentation arises from the fact their offices were destroyed in an arson attack in 2015 and that large numbers of non-digitised records were lost. It is said that, although SODC have not relied on the arson attack by way of explanation, it might explain the fact that SODC have not produced, for example, appropriation resolutions, ministerial consents or maintenance records.
23. My instructions also state that the Council’s Countryside Records Team (who, I understand, are responsible for handling the Application) believe that it would be inappropriate to further probe SODC in case such conduct could be interpreted as “feeding” a case to SODC, which would be unfair to the Applicant.
24. Against the background I have described above the matters which I am instructed to deal with in my advice are as follows.
  - (a) I am asked to confirm as a preliminary point that the Council is entitled to consider the evidence regarding the field behind the Application Land at this stage despite the fact that this evidence was not submitted by either party.
  - (b) I am asked to advise generally on the issues raised in my instructions.
  - (c) I am asked to advise specifically whether the current evidence from SODC is sufficient to justify the Council in rejecting the Application on *Barkas* grounds.
  - (d) If not, I am asked to advise on what further action should be taken by the Council to manage the Application.

### My advice

#### *Matter (a)*

25. My advice in relation to matter (a) above is that, in principle, the Council is entitled to consider the evidence regarding the field behind the Application Land (that is, the 1960



Decision Notice) at this stage despite the fact that this evidence was not submitted by either party. In *Naylor v Essex County*<sup>9</sup> John Howell QC, sitting as deputy judge of the High Court, said that “*an authority can rely to reject an application on matters, however obtained, not contained in written statements from objectors received following notification of it to the public and to those interested in (or occupying) the land to which it relates: see regs 5 and 6 of the 2007 Regulations.*”<sup>10</sup> The deputy judge went on to instance a public inquiry as “*one means by which, if it decides to do so, a registration authority may obtain evidence other than from the applicant and any objector or by which it may test or supplement that which it has received from them in written form. There is nothing in the relevant regulations which precludes it from doing so, or which precludes it from otherwise obtaining evidence, if it decides to do so, provided always that it acts fairly.*”<sup>11</sup>

26. The qualification in the last sentence of the italicised quote above – “*provided always that it acts fairly*” – is important. Were the Council to think of relying on the 1960 Decision Notice to help it in reaching a decision in this case it would be incumbent on the Council to give each of the parties an opportunity to comment on it. Fairness dictates as much. Neither party has seen this document. I also think that it would be necessary for the Council in providing any such opportunity to explain to the parties what it considers to be the potential relevance of the 1960 Decision Notice because, so it seems to me, it is far from self-evident on the face of the document what that potential relevance is.

27. As it is, I do not think that the 1960 Decision Notice is a document which should play any role in reaching a decision on the Application. First, the 1960 Decision Notice has nothing to say about the Application Land. Secondly, the concern expressed in my instructions – a suspicion that SODC may in reality have appropriated the Application Land for purposes connected with the development of the field behind the Application Land – is speculation with no evidential support. Appropriate inferences can be drawn from documentary material but that must be distinguished from speculation or suspicion. In my view it would be quite impossible to draw the inference from the 1960

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<sup>9</sup> [2014] EWHC 2560 (Admin).

<sup>10</sup> At paragraph 62.

<sup>11</sup> Ibid.

Decision Notice that SODC or its predecessor authority had appropriated the Application Land for some kind of purpose connected with the development of adjoining land. Thirdly, it seems to me that the premise on which the Council has based its speculation is not factually correct in any event. That premise is (see paragraph 21(c) above) that the Application Land appeared to be the only means of accessing the development site which was the subject of the 1960 Decision Notice. However, the land which was to be developed was described as land north of Wantage Road and the plan which was submitted as part of the application clearly showed that access to the development site was to be taken off Wantage Road. Fourthly, the suggestion that the Application Land might have been appropriated for purposes connected with the development of adjoining land is not only unsupported by any evidence, it is also contradicted by the evidence (whatever weight is placed on it) that SODC has produced. Fifthly, from the answer that I give below in relation to matter (c), the question of the 1960 Decision Notice is irrelevant in any event.

*Matter (b)*

28. The critical matter in this case is matter (c) and it is a little artificial to separate general advice from the specific advice sought on whether the current evidence from SODC is sufficient to justify the Council in rejecting the Application on *Barkas* grounds. It is, however, convenient to say something at this stage in relation to the issue of “appropriation” which is raised in the questions which I am asked. I think that it is necessary to approach this issue with some care. The word “appropriation” may be used in a narrow sense relating to the situation where land held by a (principal) council for one purpose is then appropriated to another purpose: see section 122 of the Local Government Act 1972 (“the LGA 1972”). Such an “appropriation” cannot be inferred from conduct alone or simply from the way in which a local authority has managed or treated land: see *Goodman v Secretary of State for Environment, Food and Rural Affairs*<sup>12</sup>.

29. However, the word “appropriation” can be used to convey a wider meaning in the context of town and village greens. Its use in this context stems from the decision,

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<sup>12</sup> [2015] EWHC 2576 (Admin).

subsequently disapproved in *Barkas, of Sunderland City Council v Beresford*<sup>13</sup> in which Lord Walker concluded that it was a critical failing in an objection to the registration of a new green on public authority owned land that there was absence of evidence of “*formal appropriation*”<sup>14</sup> of the land as recreational open space. In *Barkas* Lord Neuberger said that Lord Walker had plainly not been limiting the word “appropriate” to a case covered by section 122 of the LGA 1972<sup>15</sup> and that, in *Barkas* itself, the field in question “*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.*”<sup>16</sup> Lord Carnwath made similar observations and went somewhat further. He agreed that Lord Walker had not been using the word “appropriation” in any specific statutory sense<sup>17</sup>, pointed out that, if the word was used in a wider sense, the land in *Beresford* should have been regarded as appropriated to recreational open space<sup>18</sup> but also opined that it was unnecessary to deploy analysis in terms of “appropriation” where a public authority made land available for public recreation under statutory powers which it enabled to do that<sup>19</sup>.

30. In the light of the above, and given that the case advanced by SODC is that the Application Land has always been made available for public recreation under statutory powers which enabled that to be done, it is not, in my view, necessary in the present case for there to be evidence in the form of an appropriation resolution such as might be required to establish an appropriation under section 122 of the LGA 1972.

*Matter (c)*

31. My advice is that the current evidence from SODC is sufficient to justify the Council in rejecting the Application on *Barkas* grounds. My reasons for that advice follow.

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<sup>13</sup> [2003] UKHL 60.

<sup>14</sup> At paragraph 90.

<sup>15</sup> [2014] UKSC 31 at paragraph 42.

<sup>16</sup> At paragraph 46.

<sup>17</sup> At paragraph 79.

<sup>18</sup> At paragraph 85.

<sup>19</sup> *Ibid* and at paragraph 79.

32. I turn first to consider the question of the statutory purpose for which the larger area of land within which the Application Land is included was originally acquired by Wallingford Borough Council as SODC's statutory predecessor. This question is relevant to the issue of the available statutory powers which, in turn, is relevant to the issue of whether use was "*as of right*". I will come to analysis of the relevant statutory powers in due course but consider at this point the factual question of the statutory purpose of the acquisition as shown by the documentary evidence. I consider that SODC's evidence (albeit it is limited) clearly establishes that the land in question was acquired for housing purposes.
33. It is true that the 1945 Conveyance does not record the statutory purpose(s) for which the 16 or so acres of land (including the Application Land) which were then acquired by Wallingford Borough Council were so acquired. Nevertheless the 1952 Planning Applications make it clear that the land must have been acquired for housing purposes. Each of the applications was made by Wallingford Borough Council (as landowner) to Berkshire County Council to construct council houses on part of the land acquired in 1945 and each application described the purpose for which the land was used as "housing"<sup>20</sup>. The acquisition of the land for housing purposes by a local authority as part of a post-war council house building programme is exactly as might be expected. It would also, in my view, be fanciful to think that the land which was acquired by Wallingford Borough Council in 1945 had been acquired for some purpose other than housing but was later appropriated to housing purposes in 1952<sup>21</sup>.
34. There is nothing in the evidence to suggest that the Application Land was, or could have been, acquired for a separate purpose different from the housing purposes for which the whole area of land was acquired. At the time of acquisition in 1945 the Application Land was no more than an undifferentiated part of a larger whole.

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<sup>20</sup> The first application (number 688) was made on 23<sup>rd</sup> September 1952 and proposed the erection of 34 houses consisting of seven pairs of semi-detached houses to the north of Wilding Road and five blocks, each of four houses, on the south side of Wilding Road. The second application (number 689) was made on 24<sup>th</sup> September 1952 and proposed the erection of one pair of semi-detached houses on the corner of Wilding Road and two blocks of flats, each block containing four flats, on Andrew Road (which leads south from Wilding Road).

<sup>21</sup> But, even in that highly unlikely circumstance, the acquired land was held for housing purposes in 1952 as the 1952 Planning Applications demonstrate.

35. I note that the 1945 Conveyance referred to the land to the north of the acquired land as being the site of a proposed bypass and required the boundary in this location to be fenced. However, there is no evidence that the Application Land was, at some point after acquisition in 1945, ever appropriated by Wallingford Borough Council for any purpose connected with the provision of access to the (then) proposed bypass. The fact that the layout plan for each of the 1952 Planning Applications marked the Application Land as a “children’s playing field” is evidence to the contrary. And, to the extent that the bypass proposal was still current at the time of the 1952 Planning Applications and any access to it was to be provided from Wilding Road, the layout plan for application number 688 shows, further east along Wilding Road from the Application Land, a short length of road heading north from Wilding Road hard up to the northern boundary of the land acquired in 1945. This road, which is now known as Doyley Road, would have been the obvious access to the bypass<sup>22</sup>. By contrast with the way in which Doyley Road is shown on the layout plan, the access shown into the “children’s playing field” is the narrow stub access exactly as it exists to this day.

36. Wallingford Borough Council’s power to acquire land for housing in 1945 is to be sourced, as SODC’s Witness Statement contended, to section 73(a) of the HA 1936 which provided (largely as set out in SODC’s Witness Statement) that “[a] local authority shall have power ... (a) to acquire any land ... as a site for the erection of houses for the working classes”. Its power to build houses can be found, initially, in section 72(1)(a) of the HA 1936 which provided that “[a] local authority may provide housing accommodation for the working classes – (a) by the erection of houses on any land acquired or appropriated by them”. The same power was then continued in the HA 1957 which provided in section 92(1)(a) that “[a] local authority may provide housing accommodation — (a) by the erection of houses on any land acquired or appropriated by them”.

37. Wilding Road and the estate of which it forms part make up, from what I have seen on the photographs produced by SODC, an archetypal post-war council housing estate. Over the years many individual properties on the estate were sold off into private

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<sup>22</sup> This point might therefore be added to what I say in paragraph 27 above questioning the Council’s suggestion that the Application Land would have provided the only means of access to development land to the north.

ownership (under Housing Act powers<sup>23</sup>) as the list of conveyances following on from the 1945 Conveyance shows<sup>24</sup>. So much of the estate as then remained in public ownership in 1974 would, as SODC's Witness Statement explained, have been transferred from Wallingford Borough Council to SODC upon local government reorganisation in that year. Eventually, those properties which had not then been sold off into private ownership were transferred under Housing Act powers by SODC to SOHA via the 1997 Transfer (but ownership of the Application Land was retained by SODC). In short, Housing Act powers have been engaged throughout.

38. Turning more specifically to the Application Land, I do not think that there can be any real doubt on the evidence that, as a matter of fact, it has been available to the local population for recreational purposes throughout the period from the construction of the housing estate to the present. The evidence questionnaires, which are not contentious in this respect, speak of recreational use of the Application Land for a period from 1960 to the present day (and also confirm that there were previously swings and a roundabout on the Application Land<sup>25</sup>). The documentary evidence (albeit that it is limited) is consistent with this. The plans to the 1952 Planning Applications show the Application Land as a "children's playing field". The plan accompanying the 1997 Transfer shows the Application Land as a "playground".

39. I also think that the plans that formed part of the 1952 Planning Applications show that it was the intention of Wallingford Borough Council to make the Application Land available to local people as a recreational facility in the form of a "children's playing field" or to allocate it for, or commit it to, such use (to use the terminology of *Barkas*). For my part I do not see what other construction could reasonably be put on these plans which showed the proposed layout of the development. The provision of such a play facility in connection with new housing is, again, very much what one might expect. Similarly, the plan attached to the 1997 Transfer demonstrates, to my mind, that, at this point in time, SODC regarded the Application Land to be a public recreational facility as a "playground". The evidence "on the ground", as it were, reinforces the picture of

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<sup>23</sup> To be found variously in Part V of the Housing Act 1957, Chapter 1 of Part 1 of the Housing Act 1980 and Part V of the Housing Act 1985 as referred to in the 1997 Transfer.

<sup>24</sup> The list of conveyances forms part of appendix 3 to SODC's Witness Statement.

<sup>25</sup> One evidence questionnaire suggests that these were removed in the late 1980s.

the provision of a public recreational facility. It is correct that there has been no documentary material to support the evidence provided in SODC's Witness Statement that the Application Land has been mowed by SODC but there is nothing which suggests that this evidence is unreliable and good reason to think that it is reliable. It would be entirely to be expected that SODC would mow the grass on a piece of land that they owned and that they treated as available for public recreation. It is also wholly consistent with this state of affairs that SODC have provided a litter bin and a dog waste bin on the Application Land<sup>26</sup>. In *Barkas* Lord Carnwath said that, where a public authority had undertaken acts of maintenance of its land during a period of public use of that land, the reasonable inference was that the land had been committed to the public's use under the authority's powers<sup>27</sup>.

40. The next task is to identify the relevant power under which Wallingford Borough Council and SODC were able to do what they have done in providing a public recreational facility. I have already explained why I think that the evidence demonstrates that the Application Land, as part of a larger area of land, was acquired by Wallingford Borough Council for housing purposes acting under the power to do so contained in section 73(a) of the HA 1936 and that council housing was thereafter constructed on the estate under the powers contained in section 72(1)(a) of the HA 1936 and section 92(1)(a) of the HA 1957. One then turns to see what other powers were associated with those that I have just mentioned. SODC point to section 80(1) of the HA 1936 which contained supplementary powers in connection with the provision of housing accommodation by local authorities. This included a power of a local authority "*to provide and maintain with the consent of the Minister ... in connection with any such housing accommodation ... any recreation grounds*". The same power is then found in section 93(1) of the HA 1957 and continues to this day in section 12(1)(b) of the HA 1985.

41. In the present case it seems to me that Wallingford Borough Council was clearly empowered to provide and maintain the Application Land as a recreation ground in the

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<sup>26</sup> And while there is, again, an absence of documentary evidence in relation to the play equipment which used to be found on the Application Land, the fact that there was such equipment is also entirely consistent with the Application Land having been made available by its local authority owner to the public for the purpose of recreation.

<sup>27</sup> [2014] UKSC 31 at paragraph 84.

form of a “children’s playing field” under section 80(1) of the HA 1936 (and/or section 93(1) of the HA 1957 if the playing field was not provided until after this later statute came into force). Similarly, SODC have always been empowered to provide and maintain the Application Land as a recreation ground (or “playground”) under section 93(1) of the HA 1957 and section 12(1)(b) of the HA 1957<sup>28</sup>. It is not an impediment to the conclusions above that there is no evidence that Wallingford Borough Council ever obtained ministerial consent. Unless there is evidence to the contrary (which there is not) it is to be presumed, in accordance with the presumption of regularity, that they did obtain that consent: see *Naylor v Essex County Council*<sup>29</sup> and *Calder Gravel Ltd v Kirklees Metropolitan Borough Council*<sup>30</sup>.

42. The above analysis is sufficient to locate the statutory power which covers the facts of the present case, and it also reflects SODC’s Objection. It further shows that the present case is indistinguishable from *Barkas*, as SODC contend. On that basis the Application cannot succeed. Use of the Application Land by local residents for informal recreation has been the use of a recreation ground provided and maintained successively by Wallingford Borough Council and SODC under Housing Act powers. Users of the Application Land could not have been trespassers on it. Their use of it was pursuant to a public right or a publicly based licence and thus use “*by right*” and not “*as of right*”.
43. It follows that my view is that the Council should now reject the Application on paper without any further process being adopted. I consider that the evidence produced by SODC is sufficient to eliminate any question of a serious dispute about the “as of right” issue and that there is, accordingly, no need for any non-statutory inquiry to be held<sup>31</sup>.
44. I perhaps should add, although my Instructing Solicitor will well appreciate this already, that my role can, of course, only be advisory. The Council will ultimately have to form its own view on whether the evidence adduced by SODC is sufficient to defeat the Application although it will need to carefully consider my advice in coming to its

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<sup>28</sup> The continuity of the law throughout is provided for in section 191 of the HA 1957 and the Housing (Consequential Provisions) Act 1985.

<sup>29</sup> [2014] EWHC 2560 (Admin) at paragraph 27.

<sup>30</sup> (1990) 60 P & CR 322 at pages 338-339.

<sup>31</sup> See *Whitney v Commons Commissioners* [2004] EWCA Civ 951.



judgment. It might be helpful at this point if I say a few more words on some of those potential items of evidence which are not available in this case, or features which are missing on the ground, and summarise points I have already made. I acknowledge that one often sees more by way of documentary evidence in a case of this nature than SODC have produced but that does not mean that what they have produced is insufficient. As to an appropriation resolution, I have already explained in paragraphs 28-30 above that it is not necessary in the present case for there to be evidence in the form of an appropriation resolution such as might be required to establish an appropriation under section 122 of the LGA 1972. Insofar as “appropriation” is used in the wider sense of an allocation or designation of land by a public authority for public recreational purposes under statutory powers, then my view is that the evidence establishes that the Application Land has been so appropriated (although, as Lord Carnwath stated in *Barkas*, this is not a necessary part of any analysis in the present type of case<sup>32</sup>). The absence of evidence of ministerial consent (for the purposes of section 80(1)(a) of the HA 1936) does not, in my view, undermine SODC’s case because the presumption of regularity applies here: see paragraph 41 above. I have also already explained (see paragraph 39 above) the approach which the Council can take to the issue of maintenance, notwithstanding the absence of maintenance records (which would commonly be present, rather than absent, in a case of this nature).

45. Turning to missing features on the ground, I would not be inclined to place any particular weight on the absence of signage. It seems to me that SODC’s point that the absence of signage is commensurate with the location, nature and size of the Application Land as a relatively small piece of recreational open space incidental to a local housing estate is a fair one. Similarly, I do not think that the fact that the Application Land is not lit or that it has never had any sports pitch(es) laid out on it is of any real significance.

46. Before leaving matter (c), there one final point I mention for the sake of completeness and really by way of no more than a postscript. This is that I think that there is an alternative source of statutory power (albeit not one referred to by SODC) by which Wallingford Borough Council and SODC were able to provide the Application Land

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<sup>32</sup> See paragraph 29 above.

for public recreation. I refer here to section 79(1)(a) of the HA 1936. This provided that, where a local authority had acquired any land for the provision of accommodation, it could then, without prejudice to any of its other powers, “(a) lay out and construct public streets or roads and open spaces on the land”. The same power was re-enacted in section 107 of the HA 1957 and continues in force as section 13(1) of the HA 1985.

47. It seems to me that the reference to “open space” which is contained in the above provisions should be construed to be a reference to “public open space”. While there is no definition of “open space” in the HAs 1936, 1957 and 1985, there does not appear to be any good reason of principle why the word “public” which appears before the word “streets” should not be read across to the later words “or roads and open spaces”. In terms of statutory purpose, it is difficult to see what would justify limiting the meaning of “open spaces” to those which were not public or not for public use<sup>33</sup>. Moreover, the view of the inspector who reported in the decision which became the subject of the *Barkas* litigation was that the words “open spaces” in section 79(1)(a) of the HA 1936 enabled the laying out of public open space<sup>34</sup>. This view was endorsed in the first instance decision in the case<sup>35</sup>. The judge also took the view that the emphasis in the relevant provisions of the HA 1936 was on public provision<sup>36</sup>. These views were not affected by the subsequent proceedings in the Court of Appeal and Supreme Court. I would add only that, in my view, the power to maintain land laid out as open space under Housing Act powers is either necessarily implicit in those powers or may be seen as a subsidiary power authorised under section 111 of the LGA 1972.

48. I stress again that the last two paragraphs are intended simply to complete the overall picture. It would not be necessary for the Council to rely on the points I have made in them to reject the Application (were it to take that course).

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<sup>33</sup> I do not regard the fact that ministerial consent was required in order for a recreation ground to be provided under other provisions in the Housing Acts should in some way be regarded as a factor which should be taken to narrow the meaning of what could be done under the alternative power to do something different (albeit potentially similar) – lay out open spaces – under the powers presently under discussion.

<sup>34</sup> See paragraph 122 of the inspector’s report as quoted in the first instance decision in *Barkas* [2011] EWHC 3653 (Admin) at paragraph 7.

<sup>35</sup> [2011] EWHC 3653 (Admin) at paragraph 27.

<sup>36</sup> At paragraph 31.

*Matter (d)*

49. In the light of my advice above, matter (d) does not arise. The only further observation I would make is that, if the Council were not to reject the Application on paper at this stage (and not thereby follow my advice to do so), I would see no real alternative to proceeding to a public inquiry (or some form of hearing) with appropriate directions being set to manage the preparation for, and conduct, of the same. I am not sure what suitable further written process could be devised to conclude the case as an alternative to following the normal approach when an application is not rejected on paper of proceeding thereafter to an oral process.

50. I trust that I have now dealt with the matters raised in my instructions. If I can assist further, my Instructing Solicitor should not hesitate to contact me.

Kings Chambers  
36 Young Street  
Manchester M3 3FT

Alan Evans  
29<sup>th</sup> November 2019

APPLICATION FOR REGISTRATION OF A  
TOWN OR VILLAGE GREEN AT WILDING  
ROAD, WALLINGFORD, OXFORDSHIRE  
APPLICATION NUMBER NLREG42

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**ADVICE**

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Richard Hodby  
Solicitor  
For and behalf of Nick Graham  
Director of Law & Governance and Monitoring  
Officer  
Legal Services Resources Directorate  
Oxfordshire County Council  
County Hall  
New Road  
Oxford  
OX1 1ND

## Annex 4 - User Evidence Bar Chart

User No.	Name	Address	Land uses	From	To	1960s	1970s	1980s	1990s	2000s	2010s
1	Robert Calcutt	31 Westfield Road, Long Wittenham, Abingdon	CP, Dw, FB	1969	1985						
2	Amy Gardner	10 Wilding Road, Wallingford	CP, R, DP, Dw, CC, FB, P, KF	1989	2019						
3	Claire Gaughan	21 St Nicholas Road, Wallingford	CP, R, Dw, TG, CC, FB, Pw, BR	1979	2019						
4	Nathan Gray	22 Sinodun Road	CP, R, Dw, CC, FB, P, KF, Pw	1979	2019						
5	J Rhodes	24 Wilding Road	CP, R, Dw, TG, FB, C, P, KF, Pw	1965	2019						
6	Gillian Sawyer	9 Waller Court, Caversham, Reading	CP, Dw, FB, C	1966	1973						
7	Sarah Waddington	9 Wilding Road, Wallingford	CP, Dw, CC, FB, P, Pw	1986	2019						
8	Ryan White	15 Wilding Road, Wallingford	CP, R, DP, Dw, CC, FB, C, P, KF, Pw, BR, O	1987	2019						

### Key to activities seen on land

Code	Activity	Number
CP	Children playing	8
R	Rounders	5
F	Fishing	0
DP	Drawing and painting	2
DW	Dog walking	8
TG	Team games	2
PB	Picking blackberries	0
CC	Community celebratio	5
F	Fetes	0
FB	Football	8
C	Cricket	3
BW	Bird watching	0
P	Picnicking	5
KF	Kite flying	4
PW	People walking	5
BP	Bonfire parties	0
BR	Bicycle riding	2
CS	Carol singing	0
O	Other	1

### FREQUENCY OF USE:



Relevant 20 year period between bold red lines (1988-2018)