

## The Schedule referred to

The County Council shall observe the following conditions and at their own expense and with all convenient and reasonable speed shall ~~carry out the under-mentioned works for the accommodation of the adjoining land any fences walls or gates becoming the property of and hereafter maintainable at his or their own expense by the owner or owners for the time being of the said adjoining land to which the County Council shall be allowed all necessary access and entry to enable them to execute such accommodation works, videlicet:~~ endeavour to obtain the necessary materials and labour and subject to the same being obtained shall carry out the undermentioned works for the accommodation of the adjoining land any fences walls or gates becoming the property of and hereafter maintainable at his or their own expense by the owner or owners for the time being of the said adjoining land to which the County Council shall be allowed all necessary access and entry to enable them to execute such accommodation works but the County Council shall be under no liability to the owner or owners or his or their successors in title in the event of the materials and labour being unobtainable through circumstances beyond their control, videlicet :-

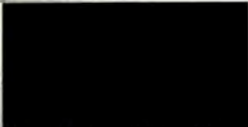
1. Erect on the new boundary line of the highway a four feet three inch chain link fence on concrete posts with ten feet field gate to match in an approved position.
2. Plant a quick hedge on the field side of the new boundary of the highway.
3. Compensate the tenants for the loss of crops.

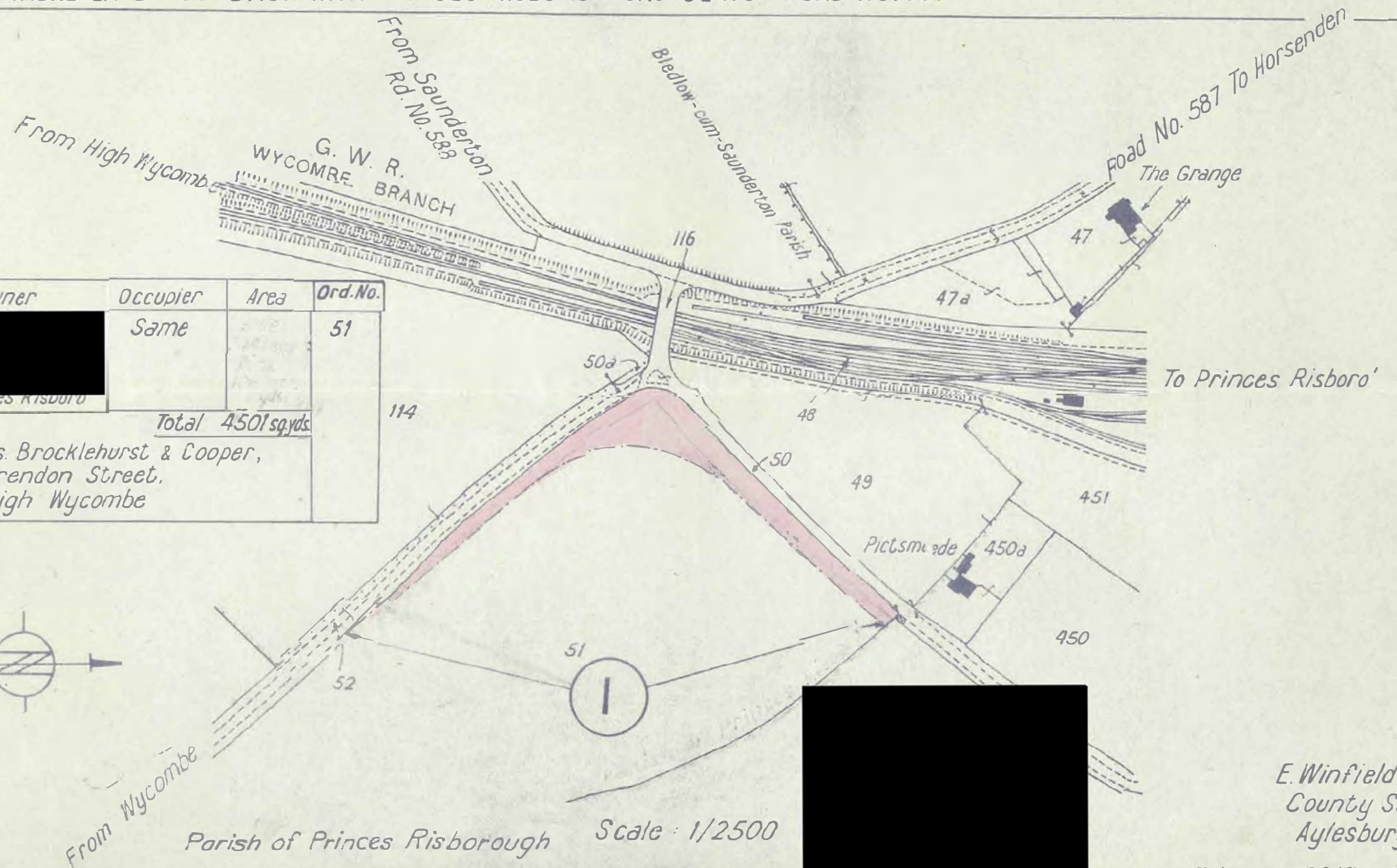
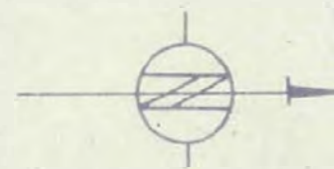
DATED the *Eighteenth* day of *March* — 1947.

RECEIVED

6<sup>th</sup>

WYCOMBE HORSENDEN ROAD NO. 587  
SHOOTACRE LANE - JUNCTION WITH PRINCES RISBORO' - SAUNDERTON ROAD NO. 588

Ref.No.	Owner	Occupier	Area	Ord.No.
1		Same		51
PRINCES RISBORO'				
Agents:		Total 450 1/2 sqyds		
Messrs. Brocklehurst & Cooper, Crendon Street, High Wycombe				



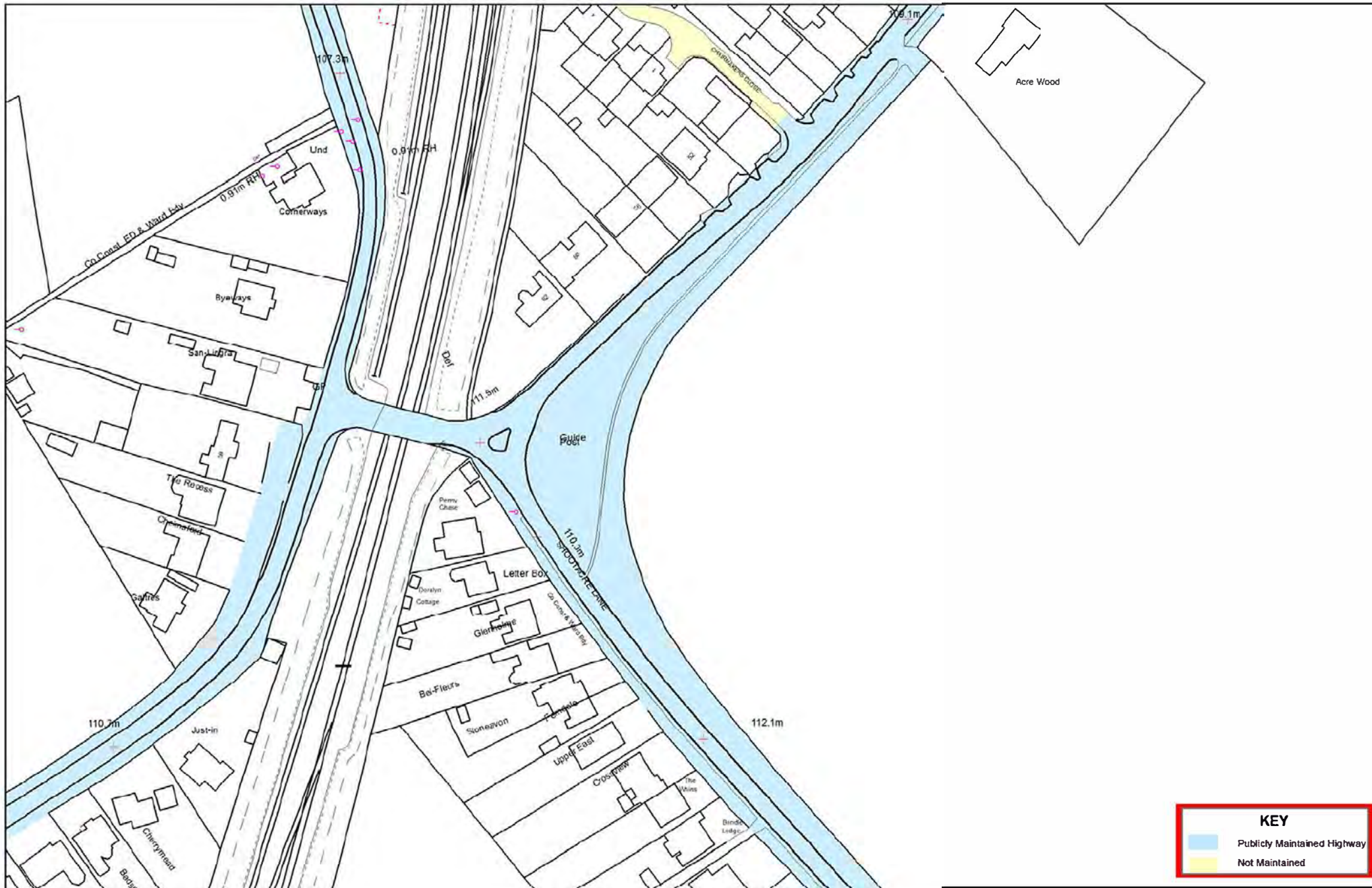
Traced from 1/2500 Ord. sheet XXXVII.11

Parish of Princes Risborough

Scale: 1/2500

E. Winfield,  
County Surveyor,  
Aylesbury.

February 1947 ~~Nov 1946~~



## HIGHWAY EXTENTS PLAN

1:1,500

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**From:** [REDACTED]  
**Subject:** RE: Princes Risborough TVG Application  
**Date:** 14 September 2021 14:46:04  
**Attachments:** [image001.png](#)  
[image002.png](#)

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Dear [REDACTED],

Thank you for your email and Notice .

Please confirm that the Submissions from the Planning and Highway services for BC will be taken into account as though they are in response to the current Notice and will be considered in full when the Registration Authority makes its recommendation. Please also confirm the matter will be decided by Committee and that the Registration Authority will prepare a report with a recommendation . Also that I am furnished with a copy of that report. Lastly please can you indicate the expected date of a decision.

Kind regards

[REDACTED]

[REDACTED]  
**Planning Lawyer**

Democratic, Legal & Policy Services  
Legal Services (Wycombe Team)  
Buckinghamshire Council  
Queen Victoria Road  
High Wycombe  
Buckinghamshire  
HP11 1BB

[REDACTED]

I work two days per week in the office (wed and thurs) and monitor emails inbetween.

---

**From:** [REDACTED]  
**Sent:** 14 September 2021 13:43  
**To:** [REDACTED]  
**Subject:** RE: Princes Risborough TVG Application

Dear [REDACTED]

I refer to the above matter. Please see the attached letter and Notice.

Kind regards

[REDACTED]

Planning and Highways Lawyer (non-practising Solicitor)  
Legal & Democratic Services

Definitive Map Team  
Buckinghamshire Council  
Walton Street Offices  
Aylesbury  
HP20 1UY

13.05.2021  
Ref: WDC-006827

Dear Sirs

**RE- Application to register land at Picts Lane and Shootacre Lane, Princes Risborough as a town or village green (TVG).**

I act on behalf of the Planning Authority and the Highway Authority for Buckinghamshire Council and I write further to our previous correspondence in this matter. In particular, our representations contained within our letter of 16 April 2020 to the Buckinghamshire Council Commons Registration Authority for whom you are now acting, and to correspondence between yourselves and the Applicant for registration in this matter, [REDACTED].

Having considered that correspondence and taken counsel's further advice, we maintain our position on both the trigger event and highways land issues, as explained below. Accordingly, we maintain our contention that the Application should be taken no further as it can be properly and fairly be rejected without the need for holding a non-statutory inquiry.

**THE TRIGGER EVENT**

The trigger events in question are those under paragraphs 3 and 4 of Schedule 1A of the Commons Act 2006 which provide:

**Trigger Event**

3. A draft of a development plan document which identifies the land for potential development is published for consultation in accordance with regulations under section 17(7) of the 2004 Act.

**Corresponding Terminating Events**

(a) The document is withdrawn under section 22(1) of the 2004 Act.

(b) The document is adopted under section 23(2) or (3) of that Act (but see paragraph 4 of this Table).

(c) The period of two years beginning with the day on which the document is published for consultation expires.

#### Trigger Event

4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act.

#### Corresponding Terminating Events

a) The document is revoked under section 25 of the 2004 Act.

(b) A policy contained in the document which relates to the development of the land in question is superseded by another policy by virtue of section 38(5) of that Act.

It appears that:

(1) The Consultation Draft Local Plan was published on 27 June 2016.

(2) The TVG Application was dated 14th August 2019.

(3) The High Wycombe Local Plan was adopted on 19th August 2019.

It is, we understand, accepted by the Registration Authority that the Consultation Draft Local Plan constituted a trigger event under paragraph 3 of Schedule 1A to the Commons Act 2006. However, it is contended by the Applicant that there was a terminating event after two years from its publication.

It is correct that the first trigger event could in the circumstances have only lasted for two years from the publication of that Draft. However, unless there was some hiatus in the plan making process, there would normally be a revised version of a Draft Plan, including one made under regulation 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (made under section 17(7) of the Planning and Compulsory Purchase Act 2004) and submitted to the Secretary of State for Independent Examination which leads to the adopted version of the plan.

The legislation on trigger and terminating events has to be understood and applied in that context. Provided that there was no hiatus, and the plan making process was continuing, it could not have been the intention of the legislation to take away the protection of the trigger event from land being promoted in a Draft Plan after 2 years. The 2 years would apply if no further Draft Plan was published and the Plan was not adopted within that period. As we understand, very few local plans are adopted within 2 years of the original draft being published. As was made clear by the Court of Appeal in *Wiltshire Council v Cooper Strategic Land Ltd.* [2019] EWCA Civ 840, the trigger events provisions should be interpreted in accordance with the legislative purpose and not narrowly (see paragraph 9 of our letter of 16 April 2020).

With respect to the authors, it does not seem to us that paragraph 15-21 of Gadsden, which is relied upon by the Applicant, has taken this into account. It assumes that there is no further trigger event i.e. it does not seem to take account of a new Draft DPD which would ensure that there is no widow of opportunity for a TVG application when the Plan is still being actively pursued. This would mean that the anomaly under paragraph 3 that Gadsden refers to would not arise in such circumstances. As respected a text as Gadsden is, it does not itself have the status of course of decided cases and, as far as we are aware, there is no reported case supporting the interpretation set out in that text and that interpretation would undermine the legislative purpose as explained above and in our letter of April 2020.

The regulation 19 Publication Version of the High Wycombe Local Plan dated October 2017 was submitted to the Secretary of State for Examination in March 2018. The adoption of the Plan, on 19th August 2019, was therefore within 2 years of the publication of that draft development plan document, which was itself a trigger event under paragraph 3 of Schedule 1A applicable at the time of the TVG Application. The Regulation 19 Plan is a different draft development plan document to that published in June 2016. It was consulted on from Monday 16th October 2017 to Monday 27 November 2017. The earlier Draft was not withdrawn as it was followed, in accordance with the statutory framework, by the submission October 2017 Draft.

So, although it appears that the TVG Application may have been made before the Local Plan was adopted, we consider that there was still an extant trigger event which precluded the making of a valid TVG Application.

However, for completeness we should make it clear that the above is on the assumption that the TVG Application was actually made before the Plan was adopted, given that it was dated 14th August 2019 which is just 5 days before that separate trigger event under paragraph 4 of Schedule 1 applied (i.e. adoption of the Plan). The question is when the Application was duly made in accordance with regulation 3(2) of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. That is not necessarily the date on the Application itself. The Registration Authority will no doubt want to satisfy itself on this.

The Highway Land Issue

Even if the above position on the trigger event were not correct, this land cannot be registered as a TVG as it is highway land.

The Applicant sets out the detailed history in his letter of the 19th November 2020. However, that does not seem to take account of the [REDACTED] dedication agreement. This has dedicated the land for ever as a public highway. Indeed, all the other evidence, and in particular the public records showing this as highway land, further support the status of the land in question as highway land. In the circumstances this is conclusive evidence of the status of the Application Land as highway land.

It is noted that in the Applicant's letter it is stated (on page 8) that the onus is on the Council to provide documentary evidence to counter his contentions. That documentary evidence has been provided and therefore Mr Bailey-Kennedy's contentions on the status of the land in this respect are unsustainable. No further factual investigation of this is required.

As this is highway land, it cannot be registered as a TVG for the following reasons:

(1) TVG use would be incompatible with the statutory purpose for which the land is held.

Further or alternatively;

(2) Any recreational use of this land would not be "as of right" but "by right" and therefore not qualifying use for the purposes of section 15 of the Commons Act 2006.

With regard to statutory incompatibility, the Applicant's position does not accurately reflect the legal position which is as set out in our April 2020 representations. As seen from those representations, the test of statutory incompatibility is whether the land has been acquired for highways purposes and it is being held for such purposes, regardless of how the land happens to be used at any given point in time. This is confirmed by paragraph 15-16 of Gadsden (3rd Edition) which states in part, in referring to the Supreme Court's Judgment in the Lancashire CC case:

“...The court held that the principle was applicable to all public authorities with powers defined by statute, including local authorities, and not just statutory undertakers in a narrow sense. The court decided, in short, that where land is acquired and held for defined statutory purposes by a public authority, the 2006 Act does not enable the public to acquire rights over that land by registering it as a green where such registration would be incompatible with those statutory purposes.....The Supreme Court commented that it would be a strong thing to find that Parliament intended to allow the use of land held by a public authority for good public purposes of those powers, where those purposes are incompatible with registration of the land as a green.”

The land has been acquired for and is held as highways land which the highways authority wishes to use for highways purposes as it is entitled to. There could not be a much clearer case of statutory incompatibility preventing registration of the land as a TVG as matter of law.

In addition, (although it is not necessary to rely upon this) any recreational use of the land would not be qualifying use as it is highway land. As set out in paragraphs 16 and 17 of our April 2020 letter, this is clear from the two legal authorities of *Somerford PC v Cheshire East BC* [2016] EWHC 619 (Admin) and *DPP v Jones* [1999] 2 A.C. 240.

#### CONCLUSION

As set out above, we consider that it is clear on undisputable facts the Application cannot succeed either because of the application being invalid owing to a trigger event having occurred, or because of the status of the land as highway and associated arguments’, and thus there is no justification for taking up further time and expenditure in considering the matter further.

The Applicant contends that due process requires that the Application is considered by means of a non-statutory public inquiry. However, in the circumstances of this Application and the land in question, fairness does not require that and this would delay the inevitable rejection of the Application. This itself would result in unfairness to the objector, which is seeking to carry out its public functions on the land and is authorised so to do, and would also be prejudicial to the wider public interest.

We fully understand the need for any TVG Application to be determined fairly. However, that does not require a registration authority to put off the inevitable once it is satisfied that it has all the necessary information and it can base its decision as a matter of law on facts that are not controversial. It is a matter for the Registration Authority but we strongly contend that is the position here. Notwithstanding the Applicant’s concerns, this would in the circumstances be the same whether the objector was a separate landowner or, as here, part of the same Council but responsible for different statutory functions.

We are grateful to you for consideration of the above. If any matter raised by us requires clarification, please do not hesitate to contact the author of this letter.

Yours sincerely

  
Planning Lawyer – Legal



Democratic Legal & Policy Services  
Legal Services (Wycombe Team)  
Buckinghamshire Council  
Queen Victoria Offices  
Queen Victoria Road  
High Wycombe  
Buckinghamshire. HB11 1BB

Date: 16 April 2020

Alex Lempkowski  
Definitive Map Officer  
Planning, Growth & Sustainability  
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HP20 1UA

By email to: [alex.lempkowski@buckinghamshire.gov.uk](mailto:alex.lempkowski@buckinghamshire.gov.uk)

[James.Felton@buckinghamshire.gov.uk](mailto:James.Felton@buckinghamshire.gov.uk)

Our ref PE/006827

Contact: [Patricia.Evans@buckinghamshire.gov.uk](mailto:Patricia.Evans@buckinghamshire.gov.uk)

Dear Alex Lempkowski,

RE: Application to register land at Picts Lane and Shootacre Lane, Princes Risborough as a town or village green.

1. I write on behalf of the former Wycombe District Council Planning Authority (now of course part of Buckinghamshire Council since 1 April 2020) and the Buckinghamshire Council Highway Service.
2. By letter dated 24 September 2019 you sought the views of the relevant planning authorities as to whether a trigger event under section 15C and Schedule 1A of the Commons Act 2006 had occurred in relation to the above

application to register land in Princes Risborough as a town or village green (TVG).

3. The District Council responded to the Registration Authority that there had been no trigger event. However, the Council did also state that if the land was registered *“it could prevent an improvement to the Picts lane Shootacre Lane junction as set out in the delivery plan for the expansion of Princes Risborough and for which funds have been agreed by Homes England....”*.
4. The District planning authority also replied on the basis that there was no trigger event precluding the Application. As explained below, we believe that position was incorrect. Although the Transport, Economy Environment section of the County wrote to the Registration Authority on 7 October 2019 stating that there had been no trigger event it expressly raised the possibility of a trigger event. In particular that letter stated that policy PR3 of the Wycombe District Local Plan adopted in August 2019 (‘the Local Plan’) appeared to include the application land and that this may trigger “event 4”. The letter also recommended that the Registration Authority confirm that this was the case and whether any terminating events had occurred.
5. Since then the legal department has had the opportunity to consider the matter and to take counsel's advice. In light of that, we consider that there are two reasons why the Application Land cannot as a matter of principle be registered as a TVG:

(1) A trigger event has in fact occurred under paragraph 4 of Schedule 1A of the Commons Act in accordance with the principles confirmed by the Court of Appeal in *Wiltshire Council v Cooper Strategic Land Ltd.* [2019] EWCA Civ 840. The trigger event under Paragraph 4 is:

- 4. A development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the 2004 Act.**

This itself removes, as a matter of law, the right to make the application to register the land as a TVG.

- (2) Although the primary purpose of this letter is to address the trigger event issue, it should be noted that the Application Land is highway land and any recreational use would be lawful and “*by right*” rather than “*as of right*” and thus cannot satisfy the statutory requirement under section 15 of the Commons Act. Additionally, and in any event, the use of the land as a TVG is incompatible with the purpose for which the land is held as a highway and thus subject to application of the principle of statutory incompatibility.
6. These points are without prejudice to further contentions we are able to rely upon (including in respect of the trigger events that have occurred).
7. We will now briefly summarise our position on why the right to apply for registration of the Application Land is removed by reason of a trigger event. We also explain why the highways status of the land means that in any event the land cannot be registered as a TVG.

#### **The Paragraph 4 Trigger Event Issue**

8. There are provisions in the Wycombe District Local Plan adopted in August 2019, and in particular (but by no means only) Policy PR5, which are such that there clearly has been a trigger event in accordance with the principles set down by the Court of Appeal in *Wiltshire Council v Cooper Strategic Land Ltd.* [2019] EWCA Civ 840.
9. In the *Wiltshire* case, the trigger event was based upon the fact that the land the subject of the application for registration as a TVG fell within the settlement boundary of Royal Wotton Bassett, which was designated in the Wiltshire Core Strategy 2015 as a Market Town. Core Policy 1 of that Core Strategy identified the Market Towns as having the potential for significant development. Core Policy 2 provided that within the limits of development for Market Towns (as well as Principal Settlements, Local Service Centres and Large Villages) there was a presumption in favour of sustainable development. There was no specific designation or other identification of the application land. However, the High Court and Court of Appeal concluded that this constituted identification of the land for potential development within the meaning of paragraph 4 of Schedule 1A. In doing so, the Court of Appeal held that:

- (1) "Potential" is a very broad concept, is not qualified, and is not to be equated with likelihood or probability ([2019] EWCA Civ 840 at [37]).
  - (2) The change in the legislation introducing trigger events envisaged that the protection for what would otherwise be registered as a TVG would be governed by the planning process, as the registration process had not previously taken into account planning considerations and was often used to prevent or delay development proceeding ([2019] EWCA Civ 840 at [43]). The change is thus intended to avoid the frustration of the delivery of needed development and is in line with the policy underlying the change in the law (following the Penfold Report ([2019] EWCA Civ 840 at [4]-[5])).
  - (3) A narrow interpretation of the meaning of paragraph 4 would cause difficulties in the formulation and adoption of a development plan document ([2019] EWCA Civ 840 at [44]).
  - (4) Although the mere fact that land is within the settlement boundary does not suspend the right to apply for registration of the land as a TVG ([2019] EWCA Civ 840 at [41]), the suspension depends upon the consequences of the land being within the settlement boundary.
  - (5) Policy CPI identified "*the settlements where sustainable development will take place.*" Policy CP2 provided that within the settlement boundary "*there is a presumption in favour of sustainable development.*" These policies clearly identify the land as having potential for development ([2019] EWCA Civ 840 at [45]). Paragraph 4.6 of the Core Strategy states that CP1 and CP2 seek "*to define where development will be most sustainable*". The Wiltshire development plan document did therefore show that the land was identified for potential development.
10. Applying that approach to the current Application, the majority of the Application Land lies with the settlement boundary for Princes Risborough as defined by Local Plan Policy PR5 and shown on the Policies Map. It is significant to note that (with our emphasis):

- (1) Paragraph 3.18 of the Local Plan states that consolidating housing and additional economic development at Princes Risborough will allow the provision of critical infrastructure that will benefit the town as a whole.
- (2) Supporting paragraph 5.3.54 to Policy PR5 states that this policy is needed to identify the boundary of sustainable development and protect neighbouring settlements.
- (3) Policy PR5(1) itself states that built development related to the main expansion of the town will be contained within the settlement boundary in order to protect the physical separation between the expanded town and Horsenden, Longwick, Askett and Smokey Row.
- (4) Paragraph 5.3.56 states that settlement boundaries help direct development towards towns and villages and therefore help protect the countryside from inappropriate development and can promote sustainable development through ensuring that it is focused towards certain locations - they include Princes Risborough.
- (5) PR5(2) states that essential infrastructure required to support the expansion of the town will also be permitted outside the settlement boundary.
- (6) Paragraph 4.14 identifies Princes Risborough (a tier 2 settlement) as one of the four larger settlements in the District which provide the more sustainable locations for development in the District. This is reflected in policy CP3 Settlement Strategy which states:

*The council will direct development in the following way...*

*2a) Princes Risborough: through developing suitable previously developed land within the built up area, and through major residential led expansion on the west side of Princes Risborough including improvements to the town centre, the station area and additional land for business.*

Policy CP12, Climate Change directs development to those places with better services and facilities, which include Princes Risborough (see paragraph 4.128 which refers in that context to policies CP2 and CP3).

- (6) Policy CP4 Delivering Homes identifies Princes Risborough for development of 2,050 homes for the period 2013-2033.
  - (7) Policy CP7, Delivering the Infrastructure to Support Growth, includes (at 2e) and Figure 8) new road infrastructure to support growth at Princes Risborough. Further, Principles for Princes Risborough refers (at paragraph 5b)) to delivering a comprehensively planned extension, demonstrating overall viability, with development supporting infrastructure at the right time in the right places.
11. Therefore, although the main focus of development at Princes Risborough is the Princes Risborough Expansion Area as defined by Local Plan Policy PR3 (PREA) identified as the Area of Comprehensive Development (ACD), outside of which the Application land falls (see Figure 27 on page 187 of the Plan), the Plan also identifies the land within the settlement boundary of Princes Risborough for potential development. This is consistent with the Plan's approach to the presumption in favour of sustainable development (see paragraph 4.6 and policy CP1 Sustainable Development; and paragraph 4.9 and policy CP2; along with policy DM1 of the Adopted Delivery and Site Allocations Plan July 2013) and with the principles upheld in the *Wiltshire* case. Indeed the land is required for highway improvements in relation to bringing forward the PREA/ACD, as explained further below.
12. Paragraph 5.3.16 of the supporting text to policy PR3 refers to other policies including PR8 (Provision and Safeguarding of Transport Infrastructure) and PR17 (Princes Risborough Delivery of Infrastructure which refers to the comprehensive delivery of on and off-site infrastructure for the expansion area). The text states that the policies referred to set out important development principles and requirements which are guiding the production of detailed Capacity and Delivery Plans for town expansion. The objectives of this work, being taken forward by the Council as local planning authority and enabled by capacity funding from the HCA, include to provide a framework for delivery and to further guide the pattern of development including location of facilities and infrastructure. Paragraph 5.3.18 states that planning applications should be consistent with policy and with the Capacity and Delivery Plans for the PREA/ACD and further that the overall Capacity and Delivery Plans will help to

ensure that the areas are developed in a coordinated, comprehensive and timely manner.

13. The Capacity and Delivery Plans referred to in the supporting text to the policies of the Local Plan are what is now the draft Princes Risborough Expansion SPD. The draft SPD refers to improving the capacity of some lengths of existing roads along the route of the relief road including Picts Lane and Shootacre Lane and introducing positive sustainable drainage. The Draft SPD (at 5.5.1) also refers to the HIF grant funding accelerating delivery of the PREA by supporting the construction of highway network improvements between the main expansion area, and Picts Lane, known as the Southern Road Links or SRL. These would, it is stated, include interim safety improvements to Shootacre Lane, pending delivery of the Culverton link early in phase 3. These works may not in fact be limited to being within the settlement boundary.
14. The development plan is therefore identifying and encouraging development within the settlement boundary for development and thus the nexus between the Plan and Application Land is certainly no less than in the *Wiltshire* case; in fact that nexus would seem stronger, as seen from the above. As held in the *Wiltshire* case, it is not a requirement of the trigger event that only the application land is identified as it may be part of a wider area identified. That wider area in our case is the settlement of Princes Risborough where potential sustainable development is identified and beyond for essential infrastructure to deliver the PREA/ADC. Further, the works in relation to Picts Lane and Shootacre Lane are not limited to being within the settlement boundary (see also Policy PR5(2) which, as referred to above, states that essential infrastructure required to support the expansion of the town will be permitted outside the settlement boundary).
15. Thus we consider that there has clearly been a trigger event within the meaning of Paragraph 4 and there is no right to apply to register the Application Land as a TVG.

### **The Highways Land Issues**

16. The whole of the Application Land is held for highways purposes. Separate from the above trigger issue, this is significant in itself as the consequence is that the Application cannot be registered as a TVG.
17. In *Somerford PC v Cheshire East BC* [2016] EWHC 619 (Admin) the authority's refusal to register the land, following the opinion of an independent legal expert, was vitiated by procedural error. The issue was whether the land in question was highway land. However, it is of note that the parties agreed that if it was a highway the authority was entitled to reject the application. Paragraph 6 of the Judgment states:

*6. A central issue is whether the TVG application land is part of the highway. If it is, as found by [REDACTED], then in the circumstances of this case he was entitled to find that it cannot be registerable as a TVG. This is because the use could properly then be found as a use by right, not a use as of right. The one ground upon which Judge Pelling QC refused permission was that the Claimant in due course would ask the Supreme Court to reconsider the decision in DPP v J [REDACTED].*

The last reference is to *DPP v Jones* [1999] 2 A.C. 240 on the basis of which such claimed recreational use would be considered incidental to the right to use a highway and therefore not "as of right" for the purpose of section 15.

18. Those issues are probably now of subsidiary importance in themselves, given the confirmation of the Supreme Court's approach to the issue of statutory incompatibility in the appeals by *Lancashire County Council* and *NHS Property Services Ltd* [2019] UKSC 58. In those cases, which were considered together, the Supreme Court held that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a TVG could not be registered as such. The test of "statutory incompatibility", as stated in *R. (on the application of Newhaven Port and Properties Ltd) v East Sussex CC* [2015] UKSC 7, was not whether the land had been allocated by statute itself for particular statutory purposes, but whether it had been acquired for such purposes and was for the time being so held, regardless of how the land happened to be used at any particular point in time (including any qualifying recreational use if proven, which is not

conceded). This is also, independently of the other issues, fatal to the Application.

## **Conclusion**

19. The changes made by the Growth and Infrastructure Act 2013 in respect of introducing “trigger events” into the Commons Act 2006 were not accompanied by associated changes to the legislative provisions relating to the procedure for determining applications for registration.
20. It is of course acknowledged that you have previously consulted the planning authority on the trigger issue in accordance with the Defra Guidance before acknowledging that the Application has been validly made and giving notice in Form 45 in accordance with regulation 5 of the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007/457. The potential for a paragraph 4 trigger event was raised, as referred to at the beginning of this letter. For the above reasons, we consider that there has been a trigger event in accordance with paragraph 4 of Schedule 1A. We have sought to set out the position quite fully on that issue but would be happy to address further any aspect which the Registration Authority may require clarification of or assistance with.
21. We acknowledge that it would only be fair to provide the Applicant an opportunity to respond to our further representations on this matter in light of the above representations before concluding on this issue. However, even if you have already made a decision on the trigger issue, that of course does not prevent you from reconsidering the issue. Indeed it would with respect be incorrect not to reverse that decision, if it were now to be accepted that there had been a trigger event prior to the making of the TVG Application. This is because, as the Defra Guidance states, if the right is excluded by a trigger event (in the absence of a terminating event) then an application should not be accepted. The Guidance gives the rationale for this as being to avoid time and money being spent advertising and making representations in relation to an application where it subsequently turns out that there was no right to apply. This rationale still applies of course. It also applies to the highways land issue.

22. Therefore, for the above reasons (and without prejudice to other matters that the planning and highways authorities are entitled to rely upon) the Application should be rejected.

Yours sincerely

P Evans

For and on behalf of Jenny Caprio

Head of Legal Services (Wycombe Team) and Deputy Monitoring Officer

Deputy Chief Executives Directorate

Buckinghamshire Council

Democratic, Legal & Policy Services

Legal Services (Wycombe Team)

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HP11 1BB

Enquiries to: Charles Power  
Email: charles.power@wycombe.gov.uk  
Direct line: 01494 421513  
Our ref: CDP/19/07344/CONSA  
Your ref: ALEX LEMPKOWSKI  
Date: 17.10.2019

Buckinghamshire County Council  
County Hall  
Walton Street  
Aylesbury  
HP20 1UA

Dear Sir/Madam

**Proposal: Consultation on application for a Town or Village Green under Section 15(1) of the Commons Act 2006 for Shootacre Lane and Picts Lane**  
**At: Shootacre Lane & Picts Lane Princes Risborough Buckinghamshire**  
**By: Buckinghamshire County Council**

Thank you for consultation on the above which we received on 24.09.2019.

I would advise you that the Council wishes to object for the following reasons:

- 1 Based on the information provided it is not clear if the road realignment of Shootacre Lane which has taken place pursuant to the Section 278 agreement on planning application 06/05177/FUL has been taken into account on the submitted plan for the proposed Village Green. If the plan takes the realignment into account then there are no other trigger or terminating events on the land.
- 2 If this registration request were successful it could prevent an improvement to the Picts Lane Shootacre Lane junction as set out within the delivery plan for the expansion of Princes Risborough and for which funds have been agreed by Homes England. Given the phasing and viability challenges this would risk undermining the phased delivery of the Princes Risborough relief road and the delivery of community infrastructure necessary for the expansion area as set out in Local Plan Policy PR3 - Princes Risborough Area of Comprehensive Development including Relief Road.

Yours faithfully

*Penelope Tollitt*

PENELOPE TOLLITT  
Head of Planning and Sustainability  
For and on behalf of the Council

Contact: [REDACTED] DDI No. 01494 421513

App No : 19/07344/CONSA App Type: Consultation from Statutory Authorities

Application for : Consultation on application for a Town or Village Green under Section 15(1) of the Commons Act 2006 for Shootacre Lane and Picts Lane

At Shootacre Lane & Picts Lane Princes Risborough Buckinghamshire

Date Received : 24/09/19 Applicant : Buckinghamshire County Council

Target date for Decision 22/10/19

### **1. The Application**

- 1.1. This is an initial consultation by Buckinghamshire County Council to determine whether there have been any trigger or terminating events on the land subject to a Village Green registration request.
- 1.2. The land is a grassed highway verge on and near the junction of Picts Lane and Shootacre Lane Princes Risborough.
- 1.3. The Local Planning Authority is required to identify if the site has been subject to any trigger or terminating events as set out in Schedule 1A of 2006 Commons Act (as inserted by Schedule 4 to the 2013 Growth and Infrastructure Act).

### **2. Relevant Planning History**

- 2.1. 06/05177/FUL - Erection of 1 pair of 3 bed semi-detached, 1 pair of 4 bed semi-detached and 1x 4 bed detached dwellings, 6 x 2 bed & 2 x 1 bed flats in two blocks, creation of new access & alteration to highway layout with associated landscaping and car parking on Land To Rear Of 46 To 52 Picts Lane Princes Risborough – application refused – appeal allowed - implemented

### **3. Issues and Policy considerations**

- 3.1. The above planning application was subject to a S278 agreement which moved the line of the road. It is unclear from the plan provided with the application as to whether this re-alignment has been taken into consideration and whether part of the application forms part of the realigned roadway. If it does this would potentially be a trigger – although the road has been moved and all works would appear to have been completed.
- 3.2. There are no specific policies, specific site allocations or emerging Neighbourhood Plan documents which would result in a trigger.

- 3.3. The expansion of Princes Risborough by around 2500 homes forms part of the adopted Local Plan policy framework. Policy PR3 – Princess Risborough Area of Comprehensive Development Including Relief Road - sets out that as part of the planned expansion of the town a new relief road as a complete alternative to the existing A4010 shall be provided by the development.
- 3.4. Policy PR17 –Princes Risborough Delivery of Infrastructure – sets out how the infrastructure is to be delivered and phased. It states that the development will be assessed against the Council's capacity and delivery plans for the area.
- 3.5. The Council published the capacity and delivery plans within the Princes Risborough Expansion Supplementary Planning Document (PRESPD) (Consultation Draft) for public consultation in June 2019. Further work and consideration of responses is being undertaken prior to adoption of the PRESPD.
- 3.6. There is a reference within the PRESPD to the land that is the subject of this application. This indicates that it will be necessary to phase the delivery of the relief road as the development progresses to avoid unacceptable impacts on the highway network whilst ensuring that the development remains viable. (The development has qualified for Housing Infrastructure Funds (HIF) as it is considered to be marginally viable.
- 3.7. The delivery plan sets out a phasing that demonstrates how this can be done. It includes a section of road between Picts Lane and A4010 known as the Culverton Link' (shown on Figure 4 of the Indicative Phasing Plan in the PRESPD) that is to be provided early in the third phase of delivery, (anticipated by construction of 1396 homes).
- 3.8. Prior to the completion of the Culverton link it is proposed to access the expansion area from the south via Picts Lane and Shootacre Lane. An improvement to the horizontal alignment of the Picts Lane/Shootacre Lane junction has been proposed as part of phase one of the relief road in order to accommodate the expected additional vehicular movements, including, potentially some construction traffic, before the Culverton Link is completed.
- 3.9. £12m HIF has been secured from Homes England to progress phase one of the relief road. The business case put forward to Homes England for the funding included within its scope an improvement to the Picts Lane/Shootacre Lane junction.
- 3.10. Work on the design and planning application for phase one of the relief road is underway, led by Balfour Beatty under contract to BCC and this junction improvement is being considered as part of that process. The improvement would require some or all of the land subject to this registration request
- 3.11. If this registration request were successful it could well prevent an improvement to this junction as set out within the delivery plan and for which funds have been agreed by Homes England. Given the phasing and viability challenges this would risk undermining the phased delivery of the relief road and the delivery of community infrastructure necessary for the expansion area.

### **Recommendation: Objection**

From:

[REDACTED]

Date:

28 January 2022 09:31:06

istration, "The Green", Shootacre Lane, Princes Risborough. Application No.138.

Dear Ms Hackling,

Please see below a letter which is self explanatory. The top copy will be posted to you. No doubt you will hear from Mr Hayes shortly.

Yours sincerely,

Stephen Bailey-Kennedy

[REDACTED]

Ela Hackling,  
Definitive Map Officer  
Highways and Technical Services  
Buckinghamshire Council  
Walton Street Offices  
Aylesbury  
HP20 111A

17 January 2022

Dear Ms Hackling

Village Green registration application: "The Green", Shootacre Lane, Princes Risborough  
Application no: 138

Thank you for your email of 10 December 2021 which attached objections to the above application.


Firstly, I authorise [REDACTED] to respond to the objections on my behalf. [REDACTED] will write to you direct regarding this.

Secondly, I would like to formally hand over the role of applicant in this matter to [REDACTED] so that any future correspondence or formal notices are sent to him. I feel that this would be more appropriate now, as I have moved away from the area.

[REDACTED] has agreed to the above. He is already involved with the application as he completed one of the evidence questionnaires which accompanied the application and has been a local resident for more than 20 years.

I would be grateful if you could confirm that this is acceptable. Please let me know if any further steps are required from myself or [REDACTED] in order to implement the hand over.

Yours sincerely  
[REDACTED]



Ela Hackling  
Definitive Map Officer  
Highways and Technical Services  
Buckinghamshire Council  
Walton Street Offices  
Aylesbury  
HP20 1UA

27 January 2022

Dear Ms Hackling

**Village Green registration application: "The Green", Shootacre Lane, Princes Risborough  
Application no: 138**

Thank you for your email of 10 December 2021 which attached objections to the above application.

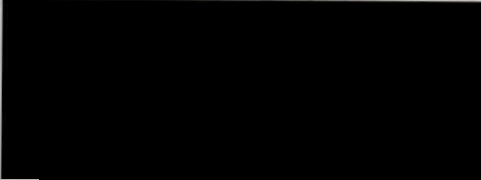
Firstly, I authorise [redacted] to respond to the objections on my behalf. [redacted] will write to you direct regarding this.

Secondly, I would like to formally hand over the role of applicant in this matter to [redacted] so that any future correspondence or formal notices are sent to him. I feel that this would be more appropriate now, as I have moved away from the area.

[redacted] has agreed to the above. He is already involved with the application as he completed one of the evidence questionnaires which accompanied the application and has been a local resident for more than 20 years.

I would be grateful if you could confirm that this is acceptable. Please let me know if any further steps are required from myself or [redacted] in order to implement the hand over.

Yours sincerely



Ela Hackling  
Definitive Map Officer  
Highways and Technical Services  
Buckinghamshire Council  
Walton Street Offices  
Aylesbury  
HP20 1UA

28 January 2022

Dear Ms Hackling

**Village Green registration application: “The Green”, Shootacre Lane, Princes Risborough  
Application no: 138**

The applicant, Stephen Bailey-Kennedy, has authorised me to reply on his behalf to your email of 10 December 2021. This letter sets out our response to each of the objections attached to your email, and has been drafted with assistance from a lawyer.

**1. The objections**

Your email attached the following objections to the application:

- Letter dated 17 October 2019 from Penelope Tollitt, Head of Planning at Wycombe District Council (the “**2019 objection**”);
- Letter dated 16 April 2020 from Jenny Caprio, Head of Legal Services at Buckinghamshire Council (Wycombe Team) (the “**2020 objection**”); and
- Letter dated 13 May 2021 from a planning lawyer (name redacted) at Buckinghamshire Council, acting for the Planning Authority and Highway Authority (the “**2021 objection**”).

In summary, the objections are as follows:

- (i) a trigger event under s15C of the Commons Act 2006 occurred, which excludes our right to apply to have the land registered as village green;
- (ii) registration as village green could prevent improvement to the junction of Picts Lane and Shootacre Lane junction;
- (iii) the land cannot be registered due to statutory incompatibility, as it is held for highways purposes; and
- (iv) the land is highway so any recreational use would be “by right” not “as of right”.

## 2. Summary

As this letter is lengthy, our response to each objection is summarised briefly in the table below.

Trigger event	This objection is irrelevant. The Ombudsman found that the Registration Authority could not withdraw from its 4 December 2019 decision letter – this stated that the right to apply “is not excluded” by reason of a trigger event.
Junction improvement	This objection is irrelevant. Objections should only cover issues which are relevant to the initial registration of the land. The Planning Authority’s wish that the land should not be registered (to facilitate development) is not relevant.
Statutory incompatibility	Neither of the key elements of the statutory incompatibility test have been established: there is no evidence that the application land is owned by the Council; nor has any specific statutory provision been identified which is incompatible with registration as village green.
The land is highway so any recreational use would be “by right” not “as of right”	<p>This letter identifies several reasons why the application land (other than the metalled footpath crossing it) is not highway – these are listed on page 11.</p> <p>Even if the land is highway, the objection should still not succeed. This is because the use would only be “by right” if the land had been deliberately made available <u>for public recreation</u> (as in the <u>Barkas</u> case). The application land was not made available for public recreation but was dedicated as highway. Although there may be some limited overlap, highway rights and public recreation rights are fundamentally different.</p>

This letter refers to Buckinghamshire Council as the “**Council**”. The Council is also the registration authority (the “**Registration Authority**”) for the purposes of the Commons Act 2006; the highways authority for the purposes of the Highways Act 1980 (the “**Highways Authority**”); and the local planning authority (the “**Planning Authority**”) for the purposes of the Town and Country Planning Act 1990.

In this letter, the land which is the subject of this application is referred to as the “**application land**”.

### 3. Objection 1 - Trigger event

Each of the objection letters suggest that one or more trigger events under s15C of the Commons Act 2006 may have occurred, which exclude the right to apply to have the land registered as village green.

The issues concerning these potential trigger events have been covered at length in previous correspondence.<sup>1</sup> Our position is that no valid trigger event occurred in relation to the application land.

We complained to the Local Government and Social Care Ombudsman (the “**Ombudsman**”) in March 2021 and the trigger event issue was finally determined by a decision of the Ombudsman dated 9 September 2021.<sup>2</sup>

The Ombudsman found that there was no provision which would enable the Registration Authority to withdraw from its 4 December 2019 decision letter, which stated that the right to apply “is not excluded” by reason of a trigger event. The Ombudsman recommended that the Registration Authority should proceed with the formal consideration of the application.

The Ombudsman’s decision was accepted by the Council. The position in relation to trigger events is therefore now settled and cannot be revisited.<sup>3</sup> Those parts of the objection letters which relate to trigger events are now irrelevant.

### 4. Objection 2 - registration could prevent junction improvement

The 2019 objection states that:

*“if this registration request were successful it could prevent an improvement to the Picts Lane / Shootacre Lane junction as set out within the delivery plan for the expansion of Princes Risborough... given the phasing and viability challenges this would risk undermining the phased delivery of the Princes Risborough relief road and the delivery of community infrastructure necessary for the expansion area”.*

The objection letter does not give any reason why the potential impact of registration on future development or highways improvement on the land is a relevant matter which affects registration of the land. The objection is really only stating the Planning Authority’s preference that, in order to facilitate future development, the land should not to be registered as village green.

This objection is irrelevant. Relevant objections should concern only matters which affect the initial registration of the land, for example the criteria for registration as set out in s15 of the Commons Act 2006, or some other legal or factual matter connected with those

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<sup>1</sup> See in particular the letter from Stephen Bailey-Kennedy to James Felton at Buckinghamshire Council dated 19 November 2020.

<sup>2</sup> LGO reference 20 013 942.

<sup>3</sup> The Ombudsman's report and findings of maladministration and injustice are binding unless successfully challenged by judicial review, see R. (on the application of Gallagher) v Commission for Local Administration in England [2010] EWHC 2824 (Admin).

criteria. The planning department's preference for future development is not an issue which should affect whether the land can be registered.

## 5. Objection 3 - statutory incompatibility

The 2020 objection asserts that "the whole of the application land is held for highways purposes" and states that the consequence is that the land cannot be registered as village green. Similarly, the 2021 objection states that the land cannot be registered as village green because this would be "incompatible with the statutory purpose for which the land is held".

Both objection letters refer to the decision of the Supreme Court in R. (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58.

The 2021 letter goes on to provide a quotation relating to the Lancashire judgement from Gadsden and Cousins on Commons and Greens:

*"The court decided, in short, that where land is acquired and held for defined statutory purposes by a public authority, the 2006 Act does not enable the public to acquire rights over that land by registering it as a green where such registration would be incompatible with those statutory purposes. The test is whether the land has been acquired by the public authority pursuant to its statutory powers, and is held for the purposes of those powers, where those purposes are incompatible with registration of the land as a green."*<sup>4</sup>

As is apparent from the above text, the statutory incompatibility test is whether:

- (i) the land has been acquired by the public authority pursuant to its statutory powers; and
- (ii) is held for the purposes of those powers, where those purposes are incompatible with registration of the land as a green.

### Ownership of the land

It is clear from the statutory incompatibility test set out above that the public authority must actually own the land. The Supreme Court in the Newhaven case said that:

*"The question is: 'does section 15 of the 2006 Act apply to land which has been acquired [our emphasis] by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?'"*<sup>5</sup>

Similarly, the Lancashire case refers to land which had been "acquired" by a public authority, either compulsorily or by agreement. Both the public authorities involved in that case owned the land outright.

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<sup>4</sup> Gadsden and Cousins on Commons and Greens 3<sup>rd</sup> Ed., paragraph 15-16 "Statutory incompatibility". Note that the last part of the quotation set out in the 2021 objection letter is inaccurate.

<sup>5</sup> R. (on the application of Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7, Lord Neuberger and Lord Hodge explaining the majority reasoning at para 93.

Ownership of the application land cannot be verified by the Land Registry as the land is unregistered. The usual way to demonstrate good title to unregistered land is to provide an epitome of title, in other words a chronological list of the documents comprising the title together with copies of the documents and plans.<sup>6</sup>

We have specifically asked the Council to provide such evidence on several occasions.<sup>7</sup> Despite ample opportunity the Council has never provided this evidence, nor any other documentary evidence which verifies that it owns the land.

The only documentary evidence that has been provided by the objectors in this regard is a “Receipt for compensation money, dedication and undertaking to complete a formal surrender” dated 18 March 1947, signed by Mr Albert Thomas Goodearl (the “**1947 document**”);

Mr Goodearl does the following under the 1947 document:

- (i) acknowledges receipt of £93 from Buckinghamshire County Council as compensation for its “acquisition or utilisation” of an area of land broadly corresponding with the application land “in connection with the formation, construction or improvement” of Shootacre Lane and Picts Lane;
- (ii) dedicates the land “for ever as a public highway”; and
- (iii) undertakes “if and when required to execute at the expense of the County Council any document which may be necessary for the purpose of effecting the transfer of my said interest to the County Council or as shall be directed or for dedicating the said land as part of the public highway”.

The 1947 document was registered on 29 March 1947 as a Class C (iv) land charge under the Land Charges Act 1925. This category of land charge is an “estate contract” which includes “a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right”.

While the 1947 document may have given Buckinghamshire County Council an option to purchase the land, it does not itself effect a transfer of ownership. The document provides that the land would remain in Mr Goodearl's ownership until he was required to execute additional legal documentation to transfer title. It states that Mr Goodearl undertook “if and when required [our emphasis] to execute... any document which may be necessary for the purpose of effecting the transfer”. No evidence has been provided that such a transfer document or conveyance was ever executed.

The 1947 document leaves open the possibility that the road improvements being contemplated could be completed without a transfer of ownership. The document states that the compensation is for the “acquisition or utilisation [our emphasis]” of the land. This, together with the conditional “if and when required” transfer wording, suggests that

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<sup>6</sup> Halsbury's Laws of England, Volume 23 (2016), paragraph 113 “Method of deduction in unregistered land”.

<sup>7</sup> See the requests in the letters from Mr Bailey-Kennedy to James Felton dated 18 September 2020 (page 3) and 19 November 2020 (page 5).

Buckinghamshire County Council considered that it could choose to simply utilise the land for the road improvements without acquiring ownership.

In other words, there is nothing to suggest that the Council must necessarily be the owner of the application land. It is quite plausible that the option to acquire the land was never exercised by the Council.

### Statutory vesting

Although none of the objection letters assert that the land is “highway maintainable at public expense”, this claim has been made in previous correspondence sent to Mr Bailey-Kennedy by the Council.<sup>8</sup> This claim is disputed and the issues around this are outlined in section 8 below.

This issue could be relevant to the issue of statutory incompatibility as, under s263(1) of the Highways Act 1980, “every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway”. It might be argued that this statutory vesting counts as the “acquisition” of the land by a public authority for the purposes of the statutory incompatibility test.

This argument should not succeed. This is because statutory vesting has a lesser effect than owning or acquiring the land. This is made clear in Halsbury’s Laws of England, which states:

*“The effect of the statutory vesting of a highway in the highway authority is not to transfer the fee simple absolute in the land to the authority, but only to vest in it the surface of the highway and so much of the soil below and the air above as may be reasonably required for the control, protection and maintenance of the highway.”<sup>9</sup>*

The distinction between “acquisition” and “vesting” is also apparent from the Highways Act 1980 itself. Part XII (sections 238-271) of that Act is headed “Acquisition, Vesting and Transfer of Land”: this indicates that acquisition, vesting and transfer are each distinct legal processes.

Statutory vesting under s263(1) of the Highways Act 1980 affects only the property in the surface of the highway and the soil below and air above as described in the extract from Halsbury’s above. If the highway were ever statutorily extinguished and no longer subject to a public right of way, it would cease to be “vested” in the highway authority and merge back into the freehold of the original owner at the time of dedication and adoption (or that owner’s successor-in-title).

In contrast, a statutory acquisition of land (for example under s239 of the Highways Act 1980 “Acquisition of land for construction, improvement etc. of highway: general powers”) would transfer ownership of the whole three-dimensional soil and air space, below and above the land surface. If the highway and right of way were extinguished in the future, the

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<sup>8</sup> Letters from James Felton to Mr Bailey-Kennedy dated 13 September 2020 (page 2) and 12 November 2020 (page 2)

<sup>9</sup> Halsbury’s Laws of England, Volume 55 (2019), paragraph 22 “Vesting of highways in highway authorities”.

highway authority would continue to own the freehold as originally acquired. The highway authority could then choose to use it for some other purpose or dispose of it.<sup>10</sup>

Statutory vesting of highway is therefore a different and lesser interest in the land than acquisition - there is nothing in the Lancashire case which suggests that statutory vesting is equivalent to “acquisition” for the purposes of the statutory incompatibility test.

### Burden of proof

It is important to note that the burden of proof is on the landowner to establish that the statutory incompatibility test has been met. This is explained in Emmet & Farrand on Title:

*“As to ascertaining the statutory purpose for which a public authority holds land, it should be noted that the Court of Appeal in Lancashire/NHS Property Services held that it is for the landowner to prove the statutory purposes for which it claims to have acquired or appropriated the land and which, it argues, are incompatible with registration of the land as a town or village green, and that the standard of proof is the civil standard of the balance of probabilities ... the majority in the Supreme Court in Lancashire/NHS Property Services did not disagree on the burden and standard of proof.”*<sup>11</sup>

As set out above, the objection letters fail to provide any evidence that the Highway Authority has acquired the application land. This is a prerequisite for the first element of the statutory incompatibility test. As such, the objections about statutory incompatibility have not been substantiated and these objections should not prevent registration of the application land.

### Incompatibility of specific statutory purposes with registration of the land as a green

In order to meet the second element of the statutory incompatibility test it is necessary to identify the specific statutory provisions in question and analyse whether the statutory purposes for which the land is held are incompatible with registration as a village green. See for example Gadsden and Cousins on Commons and Greens which states that:

*“In each case the relevant statutory provisions must be interpreted with care so as to permit of an analysis as to whether the statutory purposes for which the land in question is held would be defeated by registration.”*<sup>12</sup>

None of the objection letters identify any specific statutory provision setting out the statutory purposes for which the application land is held. Other letters sent directly to Mr Bailey-Kennedy from the Highway Authority stated that the application land was acquired

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<sup>10</sup> This distinction between acquisition and vesting is explained in “Highways and Compulsory Purchase”, Professor Emeritus Keith Davies, Rights of Way Law Review, September 2000, pages 19-20.

<sup>11</sup> Emmet & Farrand on Title (2021), Volume 1, paragraph 131 “User as of right”.

<sup>12</sup> Gadsden and Cousins on Commons and Greens 3<sup>rd</sup> Ed., paragraph 15-15 “Statutory incompatibility”. This also refers to the judgement in R. (on the application of Cotham School) v Bristol City Council [2018] EWHC 1022 (Admin) at para 91.

and held “for highways improvement purposes”.<sup>13</sup> We asked for further details of the specific statutory provision setting out the statutory purposes for which the land is held.<sup>14</sup> Despite ample opportunity the Highway Authority has failed to provide any details.

The failure to identify a specific statutory provision or a relevant statutory purpose is a further reason the objection about statutory incompatibility has not been substantiated and why this objection should not prevent registration of the application land.

## **6. Objection 4 – the application land is highway**

Both the 2020 objection and 2021 objection assert that the application land is highway land, so any recreational use would not be “as of right” but “by right” and therefore not qualifying use for the purposes of s15 of the Commons Act 2006. This section considers whether the application land is highway, section 7 below looks at whether the use of the land is “as of right”.

As an initial point, neither the Commons Act 2006 nor its predecessor the Commons Registration Act 1965 precludes highway from being registerable as a village green. There are many examples of registered village greens which include highway.<sup>15</sup>

The application land is a grassy area adjacent to the metalled roadways of Picts Lane and Shootacre Lane. A metalled footpath crosses the application land – it appears that this was created between 1960 and 1977.<sup>16</sup> This footpath does not follow the route of Picts Lane and Shootacre Lane, instead it follows the line of the ditch and hedge which marks the boundary with the adjacent agricultural land. This provides a shorter pedestrian route between Picts Lane and Shootacre Lane.

### The historic maps

It is useful to look at the historic ordnance survey maps over the period 1885-1977 (see attachment).

It is clear from these maps that there were existing highways on Picts Lane and Shootacre Lane before 1947. On all of the maps before 1960, the boundary of these highways are marked by solid lines – this indicates a fence, hedge or ditch. The application land clearly did not form part of the highway at this time - it was on the other side of the fence or hedge and included as part of the agricultural land.

The 1960 maps indicate that there had been a change on the ground, as the line of the fence or hedge forming the boundary of the agricultural land has moved. The boundary of

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<sup>13</sup> Letters from James Felton to Mr Bailey-Kennedy dated 13 September 2020 (page 2) and 12 November 2020 (page 1).

<sup>14</sup> See the requests in Mr Bailey-Kennedy’s letters to James Felton dated 18 September 2020 (page 3) and 19 November 2020 (page 5).

<sup>15</sup> Shirley, Rob (1994) Village greens of England: a study in historical geography, Durham theses, Durham University gives several examples from decisions of the Commons Commissioners: *Re Land in North Street, Hundon, Suffolk*; *Re Kings Norton Village Green, Birmingham*. *Re The Greens, Burnham Market, Norfolk*.

<sup>16</sup> The metalled footpath does not appear on the 1960 ordnance survey map but does appear on the 1977 map (see attachment).

the Shootacre Lane and Picts Lane roadways are now shown as dashed lines. This indicates that there was no longer any fence or hedge separating the roadway from the application land. The metalled footpath over the application land is first shown on the 1977 map.

#### Dedication and acceptance by the public

Two elements are required for creation of a highway: dedication by the owner and acceptance by the public. Halsbury's Laws of England states that:

*"A way becomes a highway by reason of a dedication by the owner of the soil of the right of passage to the public and of an acceptance, generally by actual use of the way, of the right by the public."*<sup>17</sup>

It is clear from the 1947 document that Mr A T Goodearl dedicated the application land as highway. Ideally evidence should also be provided by the Highway Authority to verify that Mr Goodearl had good title to the application land and the necessary capacity to dedicate it as highway.

It appears that the metalled footpath over the application land has been accepted by public use as a highway. However, there are several uncertainties about whether the right to use the rest of the application land as highway has been accepted by the public.<sup>18</sup> These issues are explored below.

#### There is no regular way

Other than the metalled footway over the application land, there is no particular route or way over the application land: it includes no road carriageway and no other footpaths. Halsbury's Laws of England states that: "If there is no regular way, but people merely go where they like, there is no highway".<sup>19</sup>

The position here is that, other than the metalled footpath, there is no "way" over the application land that has been accepted as highway by public user.

#### Presumption that the metalled track alone forms the highway

Since the change to the boundary of the agricultural land referred to above (in the period 1947-1960) there has been no physical feature indicating the limits of the highway around Shootacre Lane, Picts Lane and the application land. In such a situation Halsbury's Laws of England provides that:

*"Where a metalled road crosses uninclosed land, there being no ditch or physical feature to indicate other limits to the highway, the proper inference is that the metalled track*

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<sup>17</sup> Halsbury's Laws of England, Volume 55 (2019), para 142 "Doctrine of dedication and acceptance".

<sup>18</sup> It is only acceptance by the public that counts here. Under the modern law, it is possible for a highway authority to accept dedication of a highway on behalf of the public: Secretary of State for the Environment, Transport and the Regions v Baylis (Gloucester) Ltd [2000] 3 PLR 61, 80 P & CR 324. This does not apply to the 1947 document because highway authorities had no statutory power to accept dedication on behalf of the public until s71 of the Highways Act 1959 came into force: Somerford PC v Cheshire East BC [2016] EWHC 619 (Admin) para 57.

<sup>19</sup> Halsbury's Laws of England, Volume 55 (2019), para 4 "No public right to wander".

*alone forms the highway, unless public user of adjoining land for the purposes of traffic is proved.”<sup>20</sup>*

Only the metalled footpath over the application land has been accepted by public user for the purposes of traffic. The other parts of the application land have instead been used for the purposes of lawful sports and recreation.

#### Highways improvement land is not part of the highway itself

The Council’s own correspondence indicates that the application land was wanted<sup>21</sup> for “highways improvement purposes”,<sup>22</sup> but, other than the metalled footpath, no highway improvements appear to have taken place on the application land.

The case law provides that, in circumstances where land next to the highway has been acquired for highways improvement purposes, that land is not necessarily part of the highway itself. The Encyclopedia of Highway Law and Practice states that:

*“The verge of a highway may be just as much part of the highway as the metalled surface. On the other hand, even where land has been acquired by a local highway authority for the construction and improvement of the highway, it is not always the case that it will actually be part of the highway—land may be acquired to mitigate the adverse effects of a highway or for future highway works. Whilst a strip by the side of a road may, therefore be part of the highway this is not always the case even if it is owned by the highway authority.”<sup>23</sup>*

In the present situation, the application land was wanted for future highway improvements which, it appears, have never taken place. Even though the application land is adjacent to the existing highway, it has not been accepted by public user for the purposes of traffic or passage (except the metalled footpath) and so it does not form part of the highway.

#### The s278 drawing

The 2019 objection refers to an agreement under s278 of the Highways Act 1980 concerning a housing development adjacent to Picts Lane (now Chairmakers’ Close) and the realignment and/or improvement of Picts Lane in connection with this development. A copy of the s278 agreement dated 3 January 2007 has been supplied by the Registration Authority together with a 1:200 scale drawing reference 2006-430-S278 showing the highway alterations (the “**s278 drawing**”).

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<sup>20</sup> Halsbury’s Laws of England, Volume 55 (2019), para 232 “Presumption where metalled track exists”.

<sup>21</sup> It appears that the Council did not in fact acquire the land but merely had an option to purchase it, see section 5 above.

<sup>22</sup> Letters to Mr Bailey-Kennedy from James Felton dated 13 September 2020 (page 2) and 12 November 2020 (page 1).

<sup>23</sup> Encyclopedia of Highway Law and Practice (2021) para 1-003 “The physical extent of the highway”, which gives the following case references in support: Morston Whitecross Limited v Falkirk Council [2012] C.S.O.H. 97; Elmford Ltd. v City of Glasgow Council (No. 2) 2001 S.C. 267; Strang Steel v Scottish Ministers 2014 G.W.D. 40-729; LTS/COMP/2013/12.

It appears from the s278 drawing that the application land was not classed as highway by the Highway Authority at that time. This shows only a narrow strip of verge next to the highway, with the limits of the grass verge either coloured green or marked as “edge of grass verge” and “top of grass verge”. The application land is not coloured green or otherwise marked as verge: it is marked simply as “grass”.

#### Is the application land highway?

As described above, there are several reasons why the application land (other than the metalled footpath running across it) is not highway. In summary, these are:

- (i) although the land has been dedicated as highway, only the metalled footpath has been accepted as highway by public user;
- (ii) other than the metalled footpath, there is no regular “way”;
- (iii) as the metalled footpath crosses over unenclosed land, there is a legal presumption that the metalled track alone forms the highway;
- (iv) the application land was wanted for “highways improvement purposes” - previous cases indicate that such land does not form part of the highway; and
- (v) the s278 drawing indicates that, in 2007 at least, the application land was not considered to be highway by the Highways Authority.

#### **7. Objection 4 - recreational use “by right” not “as of right”**

The objections state that the application land is highway<sup>24</sup> and that as such any recreational use of the application land is “by right” not “as of right”.

Qualifying use for village green registration must take place “as of right”; this means that use must have taken place without force, without secrecy and without permission (*“nec vi, nec clam, nec precario”*).

It is clear that in the present application the use of the application land was not forcible or secretive. Nor did the recreational use take place with the permission of the landowner: the 1947 document only gave permission for highway use, it did not give permission for the public to use the land for recreation. Furthermore, the landowner gave permanent permission to use the land as highway. Permanent permission does not make the use “precario” for the purposes of registration as village green. This is explained in Gadsden and Cousins on Commons and Greens as follows:

*“For use of land to be precario, the permission must be capable of being withdrawn at the will of the landowner, i.e. by virtue of a license which the landowner has granted in favour of the users, which could be withdrawn at any time. If the permission given is of*

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<sup>24</sup> Highway status is disputed, see section 6 above. In this section 7 we assume for the sake of argument that the land is highway.

*a permanent or dedicatory nature, it will not be capable of rendering use of the land precario.”<sup>25</sup>*

However, there is now a fourth legal requirement for user to be “as of right”. This is explained in Emmet & Farrand on Title as follows:

*In Barkas v North Yorkshire CC [2014] UKSC 31 ... the Supreme Court, in effect, introduced a fourth requirement for user to be as of right, by drawing a distinction between user “as of right”, and user by right, and by holding that user will not be as of right if by right. It is not clear whether this requirement is intended to be separate from (and additional to) the requirement that the use must be “nec precario”, in other words without the landowner’s licence or permission.”<sup>26</sup>*

The 2020 objection and the 2021 objection suggest that, if the application site is highway, any public use of it is “by right”, by virtue of the right to use it for highway purposes. This objection is disputed because the use would only be “by right” if the land had been deliberately made available for public recreation. Although there may be some overlap, a right to use land for highways purposes is fundamentally different from a right to use the land for public recreational purposes or for lawful sport and pastimes. These points are explained further below.

User “by right” only applies where is a public right to use the land for recreation

The cases make it clear that user “by right” only applies where the land is specifically made available for public recreation. In the Barkas case, a local authority owned the land and provided a recreation ground in under s80 of the Housing Act 1936, which gave local authorities power to provide a recreation ground for the inhabitants of council houses. The Supreme Court held that the application to register it as village green failed because the use was “by right” rather than “as of right”, and that this must necessarily be the case whenever the land in question is held by a local or public authority which has lawfully allocated the land for public recreational use.

Emmet and Farrand on Title states that the point in Barkas is that “if there is a public right to use the land for recreation [our emphasis], then the local inhabitants’ use must be “by [that] right” and not as of right.”<sup>27</sup> In the Goodman<sup>28</sup> case, the judge pointed out that Barkas does not apply unless the local authority formally holds the land for recreational purposes, so that there is a public right to use it as such.

In the present application, it appears that the land is not owned by a local authority. It has not been allocated specifically for public recreational use. Even if there is a public right to use some or all of the application land as highway, there is no public right to use the land for

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<sup>25</sup> Gadsden and Cousins on Commons and Greens 3<sup>rd</sup> Ed., para 15-72 “Nature of the permission”. Emmet & Farrand on Title (2021), Volume 1, para 131.02 “User ‘by right’ not user ‘as of right’” confirms this and states that the Beresford decision is still good law in relation to the permission of the landowner.

<sup>26</sup> Emmet & Farrand on Title (2021), Volume 1, para 131.02 “User ‘by right’ not user ‘as of right’”.

<sup>27</sup> Emmet & Farrand on Title (2021), Volume 1, para 131.03 “Implied licence”.

<sup>28</sup> R. (Goodman) v Secretary of State for Environment, Food and Rural Affairs [2015] EWHC 2576 paras 18-29.

recreational purposes. As such, the recreational use is not “by right” and so the objections on this ground should not be sustained.

#### Difference between highways rights and public recreation rights

The primary public right is to use the highway to pass and repass. The extent of the public right to use the highway other than for passage is unclear. This is explained in Halsbury’s Laws of England as follows:

*“There is a public right of peaceful assembly on the highway where this does not unreasonably impede the public right of passage and it may also be lawful to carry out other activities on the highway provided these are not inconsistent with the public right of passage.”<sup>29</sup>*

A footnote to the above paragraph in Halsbury’s refers to Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240 and states that “at present the extent of the activities which may be lawful as a result of this decision is unclear and previously decided cases may still be of relevance”.

The uncertainty around the extent of the activity which might be lawful on the highway is also illustrated in the decision of Lightman J in the Oxfordshire case:

*“How far the public have rights of user over a public highway extending beyond that of passing and repassing is as yet unclear. The House of Lords in Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240 held that the existence of a public right of way entitled the public not merely to pass and repass, but may include the right of public assembly so long as such assembly does not unreasonably obstruct the highway. Lord Irvine of Lairg LC expressed the view that the public might use and enjoy the highway for any reasonable purpose provided that the activity did not constitute a nuisance or obstruct the highway, but no one else agreed with his view.”<sup>30</sup>*

Although there may be some limited overlap between highway rights and recreational rights, these are clearly two fundamentally different sets of rights. A public right to use land for recreation will evidently include a much wider range of recreational activities than might be included as incidental to the primary highway right of passage.

#### **8. Is the application land highway maintainable at public expense?**

None of the objection letters assert that the land is “highway maintainable at public expense”. This assertion has, however, been made in previous correspondence sent to Mr Bailey-Kennedy by the Council.<sup>31</sup> It is not clear what the Highway Authority’s current position is on this matter and what significance it might have to the potential registration of the application land.

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<sup>29</sup> Halsbury’s Laws of England, Volume 55 (2019), para 359 “Use otherwise than for passage”.

<sup>30</sup> Oxfordshire CC v Oxford City Council & Robinson [2004] Ch. 253 at para 101.

<sup>31</sup> Letters to Mr Bailey-Kennedy from James Felton dated 13 September 2020 (page 2) and 12 November 2020 (page 2).

We dispute whether the application land is highway maintainable at public expense and can provide full reasoning and evidence for this. In order to avoid making this letter any longer, we do not include the details here but we would wish to do so in the future if this issue is part of the objection from the Highway Authority.

In summary, the key reasons why the application land is not highway maintainable at public expense are:

- (i) there is no evidence that it has been formally adopted as highway (the metalled footpath over the application land does not appear to meet any adoptable standard of footpath);
- (ii) the list of streets and corresponding map under s36(6) of the Highways Act 1980 show only the metalled roadways of Shootacre Lane and Picts Lane, not the application land; and
- (iii) the s278 drawing referred to above does not indicate that the application land is highway.

## **9. Next steps**

Could you please let me know the next steps for the determination of the application?

Mr Bailey-Kennedy has stated that he wishes to hand over the role of applicant to me: I agree to this. I would be grateful if you could confirm that this is acceptable.

Yours sincerely

Philip Hayes

Attachment: Extracts from historic ordnance survey maps showing the application land over the period 1885-1977.

## Helen Francis

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**From:** Ela Hackling  
**Sent:** 13 January 2023 13:37  
**To:** Helen Francis; Claire Hudson  
**Subject:** FW: [EXTERNAL] Re: Objections to Village Green application - Shootacre Lane

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**From:** Philip Hayes  
**Sent:** 13 January 2023 13:36  
**To:** Ela Hackling <ela.hackling@buckinghamshire.gov.uk>  
**Cc:** Mr Ewan Nelson  
**Subject:** Re: [EXTERNAL] Re: Objections to Village Green application - Shootacre Lane

Dear Ela,

Thank you for your email, which I've now had a chance to discuss with other residents concerned.

My understanding is that when Mr Bailey-Kennedy and other residents were drawing up the additional information for Form 44, it was not appreciated that the south-eastern part of Shootacre Lane (beyond Shootacre Corner) falls within Lacey Green civil parish. Only one dwelling on Shootacre Lane - Shootacre House - actually falls in Lacey Green civil parish. I believe that if this had been known at the time, the additional information would have stated that the neighbourhood also fell within the locality of the Lacey Green civil parish.

There was also some concern at the time about whether it was acceptable to refer to more than one locality or whether only one specific locality had to be identified. That is why the additional information includes alternative wording saying that the neighbourhood falls entirely within the locality of the Wycombe District council area. However, since then we have learned that it is acceptable to identify a neighbourhood which falls within one or more localities (para 27 of *Oxfordshire County Council v Oxford City Council* [2006] 2 A.C. 674).

So to answer your question, I believe that if the points above had been known at the time the form/supporting information was being prepared, it would have stated that the neighbourhood falls within the localities of the Princes Risborough, Bledlow-cum-Saunderton and Lacey Green civil parishes. If possible, we would like to proceed on that basis.

I trust this clarifies the matter, but do get in touch if you have any further questions.

Kind regards,  
Philip Hayes

On Wednesday, 11 January 2023 at 15:09:23 GMT, Ela Hackling <[ela.hackling@buckinghamshire.gov.uk](mailto:ela.hackling@buckinghamshire.gov.uk)> wrote:

Dear Mr Hayes,

Further to my email to you yesterday a point of clarification has come up concerning the "neighbourhood within a locality" that you rely on as part of your village green application. In the

additional information which supported the application Mr Bailey-Kennedy referred to; *“This neighbourhood is within the localities of the Princes Risborough civil parish and the Bledlow-cum-Saunderton civil parish. Alternatively, the neighbourhood is wholly within the single locality of the Wycombe District Council area as shown on the ordnance survey mapping.”* Please can you clarify which locality you are relying on. If it's the former locality please confirm whether this should include Lacey Green civil parish.

I look forward to hearing from you at your earliest convenience.

Kind regards.

**Ela Hackling**

Definitive Map Officer

Highways and Technical Services, Communities

Buckinghamshire Council

Tel: 01296 382153

Email: [ela.hackling@buckinghamshire.gov.uk](mailto:ela.hackling@buckinghamshire.gov.uk)

Buckinghamshire Council, Walton Street Offices , Aylesbury, Bucks HP20 1UA

Visit our Website: [www.buckinghamshire.gov.uk](http://www.buckinghamshire.gov.uk)

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**From:** Ela Hackling  
**Sent:** 10 January 2023 14:52  
**To:** Philip Hayes  
**Cc:** Claire Hudson <[Claire.Hudson@buckinghamshire.gov.uk](mailto:Claire.Hudson@buckinghamshire.gov.uk)>  
**Subject:** RE: [EXTERNAL] Re: Objections to Village Green application - Shootacre Lane

Dear Mr Hayes

Happy New Year. I wanted to let you know we have date confirmed for meeting of The Strategic Sites Committee, where your Village Green application will be presented. It is on the 16<sup>th</sup> March 2023 at 2pm.

## PROPERTY DATA CARD

P.M.R. Ref.

2/39/94.

C.V.L.A. File No.

1. Location and Description	LAND ADJOINING THE E. SIDES OF SHOOTACRE LANE & PICTS LANE PRINCES RISBOROUGH.		
2. Name and Address of other party	MR. A.T. GOODGARD.  PRINCES 'RISBOROUGH'.	3. Consideration	
4. Date of Vesting Deed	18TH MARCH, 1947.	5. Purpose of Acquisition	ROAD IMPS.
6. Tenure and Transaction	FREEHOLD DEDICATION.	7. Holding Committee	PLAN. & TRANS.
8. Site Area	3763.29 SQ.MTRS.	9. Deed No.	D.841
10. O.S. Reference	SP 7802 & 8002	11. B/f Card prepared (leases only)	— 144

12.

Dealings and Current Use:—



## Bledlow-cum-Saunderton Parish Council

Clerk: Tracey Martin [clerk@bcspc.org.uk](mailto:clerk@bcspc.org.uk)  
PO Box 234, Chinnor OX9 0ES Tel:  
[www.bledlow-cum-saundertonparishcouncil.org.uk](http://www.bledlow-cum-saundertonparishcouncil.org.uk)

Mrs H Francis  
Definitive Map and Highway Searches Team Leader  
Buckinghamshire Council  
Walton Street Offices  
Aylesbury  
Bucks  
HP20 1UA

11<sup>th</sup> October 2021

Dear Mrs Francis

**RE: Village Green Notice - VG33 - land on side of junction between Shootacre Lane and Picts Lane, Princes Risborough**

Following a discussion at our Parish Council meeting held on 7th October it was agreed unanimously to support the application made by residents of Bledlow - cum - Saunderton Parish Council to have the parcel of land described above declared as a Village Green.

Although the site itself falls outwith our Parish boundaries (the boundary runs along Shootacre Lane), residents of the Parish, particularly those living along Shootacre Lane, Bledlow Road and Horsenden Lane, will benefit from the proposals, hence our support.

Kind regards

**Tracey Martin**  
**On behalf of Bledlow cum Saunderton Parish Council**  
**Parish Clerk**

## Helen Francis

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**From:** Ewan Nelson  
**Sent:** 25 May 2023 12:23  
**To:** Sally Taylor  
**Cc:** Philip Hayes; Helen Francis  
**Subject:** [EXTERNAL] Strategic Sites committee meeting 8 June 2023  
**Attachments:** vg33-shootacre-lane-notice.pdf

[Please note this has been sent from an **external source** - treat with caution and **do not open** attachments / use links until you are sure this is a trusted communication see intranet/IT for advice.]

Dear Sally

I understand that the Strategic Sites committee will be considering the Shootacre Lane/Picts Lane village green application at the above meeting. I would like to register to speak at the meeting, as a supporter of the application.

I have checked the council's constitution, which states that the procedural and speaking arrangements for the Strategic Sites committee are the same as the Planning Committees Procedure Rules. Those rules state that "members of the public who have previously made written representations objecting to **or in support** of the application" will be invited to speak.

So far as I am aware, there is no specific procedure for members of the public to make written representations in support of village green applications. The public notice (see attached for ease of reference) only asked for written **objections**.

I am therefore now making the following written representation in support of the application: I support the village green application on the basis that the facts and the evidence show that all of the requirements for registration in s15(1) of the Commons Act 2006 have been met. I am copying this email to Helen Francis, so that she is aware of my written representation in support of the village green application.

I trust the above is acceptable and look forward to hearing from you in relation to the arrangements for speaking at the meeting.

Many thanks

Ewan Nelson