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| **Application Decision** |
| Site visit made on 30 November 2021 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 December 2021** |

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| **Appeal Ref: COM/3272496**  **Dunsfold Common and Dunsfold Green, Gratton Chase, Dunsfold, Surrey**  Register Unit No: CL162  Commons Registration Authority: Surrey County Council |
| * The application, dated 31 March 2021, is made under Section 38 of the Commons Act 2006 for consent to construct works on common land. |
| * The application is made by Mr Ben Crozier on behalf of Kitewood Investment Limited. * The works comprise the upgrade of an existing vehicular access, including scraping leaf litter from the soil surface, laying a geotextile and cellweb and laying a road surface constructed of tarmac with a buff colour anti-skid surface or similar. |
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Decision

1. Consent is refused.

**Preliminary Matters, background and application**

1. Section 38 of the Commons Act 2006 (the 2006 Act) prohibits restricted works on common land unless consent is obtained. Restricted works include works for the resurfacing of land.
2. Common Land unit CL162 is a linear common on a broadly north/south axis which extends through the village of Dunsfold. The section of common near to the proposed works is predominantly woodland. However, an access road is located to the south which was itself the subject of a section 38 consent, reference COM/3154098 dated 11 January 2017. This provides access from Dunsfold Common Road to a recently constructed housing development[[1]](#footnote-1) lying outside of the common to the east. It is in the order of 42 dwellings with associated public open space. The existing access road and residential development are referred to as Gratton Chase.
3. A further planning application[[2]](#footnote-2) has been submitted to Waverley Borough Council which seeks permission to construct 21 dwellings on a triangular parcel of land to the east of the common, but north of Gratton Chase. The south western corner of the proposal includes an access spur from the existing access road, part of which lies within the common. This is the subject of the application before me.
4. The application is described as the upgrade of an existing vehicular access. It would provide for a curving 5m wide road surface with tarmac base and buff colour anti-skid layer and granite sett edging[[3]](#footnote-3) of approximately 17m in length. In addition, a 1.5m wide tarmac footpath would be introduced on the southern side of the road. I have assessed the proposal on the basis that no lighting is proposed, albeit that this conflicts with low level bollard lighting shown in the indicative lighting strategy in the Design and Access Statement. In these respects, the proposed access road would be similar in appearance to the previously consented works for Gratton Chase.
5. In addition, the submitted details[[4]](#footnote-4) show tactile paving where the footpath adjoins the existing access road, with corresponding tactile paving on the existing footpath to signal a crossing point. It is also proposed to extend a pipe under the proposed access road and relocate a headwall with railings. This would necessitate raising the existing ground levels. The comparative long section[[5]](#footnote-5) provided indicates that this would be up to approximately 0.8m.
6. I carried out a site visit accompanied by representatives of the applicant and Waverley Borough Council. The application has been determined on the basis of the written evidence, the comments submitted and my observations of the site.

Main Issues

1. I am required by Section 39 of the 2006 Act to have regard to the following in determining this application:

(a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);

(b) the interests of the neighbourhood;

(c) the public interest[[6]](#footnote-6);

(d) any other matter considered to be relevant.

1. Section 39(3) of the 2006 Act provides that consent may be given under section 38 in relation to all or part of the proposed works, and subject to such modifications and conditions relating to the proposed works as are thought fit. In addition, section 39(4) allows for the cumulative effect with previous consented section 38(1) works to be considered.
2. I have also had regard to the Common Land Consents Policy issued by the Department for Environment, Food and Rural Affairs in November 2015 (the 2015 policy) as this sets out the Secretary of State’s policy in relation to the determination of section 38 applications.

Representations and Objections

1. Three representations were made in response to the advertisement of the proposal from the Open Spaces Society (OSS), Natural England (NE) and Waverley Borough Council respectively. The OSS object as they consider there is no need to use additional common land to provide for access to the houses proposed. Even if there were, they state an application should have been made under section 16 of the 2006 Act to provide for an exchange of land. They also raise concerns that the public would be excluded from the land during construction.
2. NE state that they do not see any direct nature conservation benefits arising from the proposal and that there would be a small scale reduction in the existing wildlife habitat that would impact on the landscape. They point to an increase in traffic using the existing access road, which could mean people having to wait longer to cross the road to walk safely between areas of common land. They also suggest that an application under section 16 would be preferable.
3. Waverley Borough Council are the freeholder of the land. They raise a general objection based on their responsibilities as a guardian of common land and invite further discussions regarding the works applied for.
4. I shall consider the substantive matters raised in the following parts of my determination that consider the statutory criteria.

***The interests of those occupying or having rights over the land***

1. The extracts from the register of common land[[7]](#footnote-7) provided show that there are no rights of common registered over unit CL162. Consequently, there would be no interference with rights of commoners. Waverley Borough Council are the owner of the land and have objected to the proposal. However, this appears to relate to the wider value and purpose of common land rather than their direct interests as landowners. Those are matters which I shall consider subsequently.
2. I am also provided with a copy of a deed[[8]](#footnote-8) of grant allowing a right of way for agricultural purposes to the owner of the land to the east. However, the proposed works to the access are predicated on the land in question being developed for housing, which on the face of it would displace the need to access the land for agricultural purposes.
3. Accordingly, there is little before me to indicate that there would be notable direct benefit or harm to those occupying or having rights over the land.

***The interests of the neighbourhood***

1. The 2015 policy indicates that the issues to be considered in this context include whether the construction of the works means that local people will be prevented from using the common in the way they are used to and whether they would interfere with the future use and enjoyment of the land as a whole.
2. I observed that there were some tracks through the woodland, but the proposed access route was not obviously part of a regular walking or riding circuit. Moreover, aside from construction, which is likely to be of a short duration, local people would still be able to access the land.
3. However, at present the land has a predominantly natural appearance due to the presence of trees and vegetation. I observed the field gate and track of compacted soil and some stone surfacing. The part of the track on common land was mostly covered with leaf litter at the time of my visit, commensurate with an access infrequently used by vehicular traffic. Its restricted width and informal appearance was subordinate to the prevailing woodland character. The proposal would result in a considerably wider road and footway necessitating additional hard surfacing and alterations to the land levels. In addition, as it is proposed to serve nearby dwellings, there would be an increase in the frequency of traffic. Consequently, the character and appearance of the land affected would change giving the overriding impression that it would form part of the housing development rather than the woodland at the common.
4. Whilst I accept that the amount of traffic generated by the proposed 21 dwellings would probably be modest, this would be in addition to the 42 dwellings already served by the existing access road at Gratton Chase. Cumulatively the level of vehicular traffic movement nearby would be more noticeable to those seeking to use the common for the purposes of recreation. It would also increase potential conflict with vehicular traffic that could affect the ease of moving across the common.
5. Furthermore, in combination with the presence of the existing access road, the additional concentration and encroachment of such suburban characteristics would dilute the woodland character at the edge of the common. In these regards there is some overlap with matters considered under public rights of access.
6. Accordingly, these factors, albeit limited in extent, would interfere with the level of future enjoyment of the common as a whole by the people of the neighbourhood.

***The public interest***

*Nature conservation*

1. The woodland habitats at and near the site form part of the Dunsfold Common Site of Nature Conservation Interest (SNCI). NE consider that there would not be any nature conservation benefits arising from the proposal, which given their expertise, carries considerable weight.
2. Moreover, the ecological information[[9]](#footnote-9) provided shows the site provides suitable habitat for foraging and commuting bats, badger, reptiles, nesting birds, great crested newt and hedgehog. It is stated that the proposal would result in the small-scale loss of woodland habitat[[10]](#footnote-10). The tree information[[11]](#footnote-11) confirms that 5 trees would be removed, including one of moderate quality. However, at my site visit it was apparent that some tree clearance had already recently taken place in the vicinity of the application site. Even so, the presence of additional hard surfacing and likely increased frequency of vehicular traffic would not maintain the existing level of natural vegetation and tree cover.
3. I acknowledge that the proposals would only affect a small area and so would not have a significant adverse effect on the nature conservation of the common as a whole. However, of itself, this is not persuasive evidence that no harm would result. Furthermore, such an argument might be repeatedly used to justify incremental small scale works that cumulatively would significantly undermine the biodiversity of the common.
4. The reports provided conclude that appropriate mitigation could be provided in relation to the likely effects on habitat and species. These include measures to provide a buffer between the proposed adjacent housing development and the SNCI, using native species in the landscaping proposals as well as provision of bat tubes, bat boxes and hibernacula. However, it is not clearly shown which mitigation measures would take place on the area of common land affected. As it is unlikely that there would be sufficient room to plant replacement trees in proximity to the proposed widened access route, it is reasonable to suppose that much of the proposed mitigation would take place on the land to the east that is not common land.
5. Therefore, the proposal would fail to maintain the existing woodland habitat and natural vegetation at the site and hence, would result in a small amount of harm to nature conservation.

*Conservation of the landscape*

1. The increased width of the road and associated footway, use of sealed surfacing materials, changes to topography and reduction in trees and vegetation would permanently and adversely diminish the prevailing natural informal appearance of the site. The impact would be exacerbated by its connection to the existing access road and proposed proximity of additional housing as these would convey a more suburban character and appearance.
2. Although due to the screening from nearby woodland, the modest scale of the proposal would not be apparent in the wider landscape, it would nevertheless be clearly visible from the existing access road and common land in the immediate vicinity. Therefore, there would be localised harm to the landscape. My finding is reinforced by the landscape impact appraisal[[12]](#footnote-12) provided which concludes that there would be limited adverse effects on landscape character and visual amenity.
3. My attention is drawn to the presence of the existing access track for agricultural purposes. My observations were that the compacted soil and stone surfacing, presence of leaf litter, limited width, proximity of trees and undergrowth to the track gave it a low key, inobtrusive appearance that did not detract from the sense of containment and verdant character resulting from the woodland on common land either side of the existing access road. By comparison the works proposed would provide a road network with much greater prominence.
4. The finding that the degree of harm would not be significantly adverse does not negate the harm that I have identified. Nor does it, in isolation, provide adequate justification for limited adverse effects. In this case, there would also be cumulative harm with the access road already provided which the Inspector in the previous section 38 decision noted would introduce an urban feature.
5. Furthermore, paragraph 4.3 of the 2015 policy states that the Secretary of State will wish to know what alternatives have been considered to the application proposed. In contrast to the previous Inspector who was satisfied that two alternatives to crossing the common had been assessed, it is not persuasively explained in this case why further harm to the common could not be avoided altogether. The appellant states[[13]](#footnote-13) that there are no credible alternative accesses available, and the proposed works are the only practical means of providing access to the development site. Two alternative access routes to the current proposal were considered workable by the applicant’s transport consultant[[14]](#footnote-14). Whilst I accept that these are generally more circuitous, the alternatives proposed access to the intended residential site from Gratton Chase further to the east, thereby avoiding works on common land.
6. It is not adequately explained why a less circuitous route using the existing access across the common but providing access slightly further to the east outside of the common was not considered. Such a route would be reasonably direct and therefore unlikely to discourage cyclists. Whilst such a route would be likely to have some impact on trees and habitat (outside of the common), there is little substantive evidence that this would be significantly more adverse than the proposal before me, nor that appropriate mitigation could not be achieved. Neither is there evidence to show that the associated cost implications would be prohibitive.
7. The applicant points out that they do not enjoy rights over the alternative ‘red route’ shown and it is unclear whether such rights could be obtained. However, the information before me does not show that any approaches or concerted attempt to find out was carried out prior to making the application. Therefore, I am not convinced that a robust exploration of potential alternatives has been undertaken. Consequently, I am not assured that no feasible opportunity exists to achieve access to the proposed residential development which could avoid further works on common land.
8. Overall, I find that the proposal would result in localised harm to the landscape character of the common.

*Public Access*

37. Other than for a limited period during construction, public access would remain, and the proposed topographical changes would incorporate gradients that would allow for this. The likely increase in the frequency of traffic could lead to occasional conflicts between vehicular traffic and users of the common, which would tend to manifest in users having a short wait to cross the space safely. Therefore, generally the proposal would not present a notable physical barrier to continued public access, but there are wider experiential implications for users of the common.

38. Paragraph 5.8 of the 2015 policy refers to whether the works are consistent with the use and enjoyment of the land as common land. Therefore, in addition to physical access, the enjoyment derived from experiencing common land is an important component of its recreational value. Under the heading of ‘Protecting commons- our policy objectives’, paragraph 3.1 of the 2015 policy refers to safeguarding commons for current and future generations to use and enjoy and ensuring that the special qualities of common land are properly protected.

39. As outlined above, the proposal would appear as suburban encroachment onto common land and would result in some localised harm to the natural environment and landscape. As such, the works would not be consistent with the use and enjoyment of the land as common land. Moreover, it follows that, to a commensurate extent, the proposal would impair the public enjoyment of the common for recreational purposes.

*Protection of archaeological remains and features of historic interest*

40. An archaeological desk-based assessment[[15]](#footnote-15) has been provided. This concludes that there is low potential for prehistoric, Roman and Saxon/early medieval, medieval and post-medieval remains. Whilst there is moderate potential for post-medieval boundary features, they would be likely to be of negligible significance. There is nothing before me to undermine those findings. Accordingly, there is little basis to consider that the proposal would result in any material harm to archaeological remains or features of historic interest.

***Other matters considered to be relevant***

41. The access is proposed to serve a development of 21 houses, which if permitted would boost local housing supply. In some respects, this is redolent of the previous section 38 application to upgrade the access track to serve the development now constructed at Gratton Chase. The Inspector in that case considered the access to be necessary to allow that development to proceed and she gave weight to the wider public benefits arising from the development. The applicant points out that by comparison, the section of access road proposed in this case is considerably smaller.

42. Nevertheless, there are some obvious differences in circumstances which lead me to give reduced weight to the wider public benefit arising from the 21 houses development in this case. Firstly, the proposed residential development is smaller than that given weight in the previous section 38 consent. Consequently, by comparison the extent of public benefit, including quantum of affordable housing, is less than was before the previous Inspector. Additionally, although the applicant refers to the provision of significant new public open space, by comparison to the previous residential development, this is not obviously apparent from the layout provided. Crucially, unlike the previous section 38 application, I am not provided with a resolution from the Council to grant permission in principle, nor a draft legal agreement to secure planning obligations. In the absence of these, the wider public benefits derived from such a development are significantly less certain.

43. Secondly, I have considered the cumulative impact of the proposal in addition to the works previously consented that resulted in the access road at Gratton Chase. Finally, as indicated above, I am not satisfied that similar public benefits could not be achieved by alternative means that would avoid harm to the common. Taking these factors together, little weight is given to the wider public interest derived from the proposed 21 houses residential development.

44. I am mindful that representations consider that the section 16 procedure for the deregistration and exchange of common land ought to have been used in this case. However, I am required to consider the application before me on its own merits against the relevant statutory criteria and my decision has been made on that basis.

**Overall balance and Conclusion**

45. I find that the proposed works would result in localised but permanent harm to nature conservation and the landscape. Furthermore, they would not be consistent with the use and enjoyment of the land as common land and little weight is given to the wider public benefits highlighted. Therefore, the proposal would conflict with the policy objective[[16]](#footnote-16) of allowing such works only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.

46. Therefore, having regard to the statutory criteria, 2015 policy and the written representations, I conclude on balance that consent for the works applied for should not be granted.

Helen O’Connor

Inspector

1. Planning reference WA/2016/1766 dated 17.2.17 [↑](#footnote-ref-1)
2. Planning reference WA/2021/0413 [↑](#footnote-ref-2)
3. Drawing number 623-D01, Appendix I, Applicants’ submission [↑](#footnote-ref-3)
4. Appendix E of Transport Statement prepared by Velocity Transport Planning dated February 2021, Appendix D, Applicants’ submission [↑](#footnote-ref-4)
5. Profile, drawing 4770-1110-T-007 Rev D [↑](#footnote-ref-5)
6. Section 39(2) of the 2006 Act provides that the public interest includes the public interest in: nature conservation; the conservation of the landscape; the protection of public rights of access to any area of land; and the protection of archaeological remains and features of historic interest. [↑](#footnote-ref-6)
7. Appendix B, Applicants’ submission [↑](#footnote-ref-7)
8. Dated 1.12.1989 [↑](#footnote-ref-8)
9. Draft Ecological Walkover Survey & Ecological Impact Assessment prepared by ECOSA dated January 2021, Appendix E, Applicants’ submission [↑](#footnote-ref-9)
10. Paragraph 4.2, Draft Ecological Walkover Survey [↑](#footnote-ref-10)
11. Arboricultural Assessment & method statement prepared by Barrell tree consultancy dated March 2021, Appendix H, Appellants’ submission. [↑](#footnote-ref-11)
12. Paragraph 5.3.1, Landscape & Visual Impact Appraisal – Addendum, prepared by PJC Consultancy dated March 2021, Appendix F, Appellants’ submission. [↑](#footnote-ref-12)
13. Letter dated 2.6.21, paragraph 1.3(c) and letter dated 21.7.21 paragraph 1.5 [↑](#footnote-ref-13)
14. Letter dated 22.9.21 from Velocity Transport Planning – red and green routes [↑](#footnote-ref-14)
15. Prepared by Pre Construct Archaeology, dated March 2021, Appendix G, Applicants’ submission [↑](#footnote-ref-15)
16. Paragraph 3.2, 2015 policy [↑](#footnote-ref-16)