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| **Application Decision** |
| Site visit made on 10 May 2022 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 May 2022** |

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| **Appeal Ref: COM/3283255**  **Hare Lane Green Common, Esher, Surrey**  Register Unit No: CL264  Commons Registration Authority: Surrey County Council |
| * The application, dated 16 September 2021, is made under Section 38 of the Commons Act 2006 for consent to construct works on common land. |
| * The application is made by Luminous Property Group. * The works comprise re-surfacing and widening works to create a raised footway along Littleworth Road. |
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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 re-surfacing of land.
2. Common Land unit CL264, known as Hare Lane Green (the Common), is on the eastern side of Esher and amounts to approximately 2.121 hectares in area. To the north of the Common, planning permission (reference 2020/2095) has recently been granted for the redevelopment of Claygate House, comprising 62 flats. It is a condition of the planning permission that the raised pedestrian path along Littleworth Road shown in drawing DPA-7053-04 rev B is constructed prior to occupation of the flats. The southern section of the raised pathway falls within the Common and amounts to approximately 40m2.
3. The works propose the installation of a raised, widened footway along Littleworth Road that would in the main sit above the existing pavement. It would be surfaced in permeable tarmac/block paving (or similar) and set into a pre-cast concrete kerb. A 1 in 20 gradient ramp is included at the southern end to provide access to the raised footway, with 1.4m high pedestrian railing along the carriageway side. Temporary 2m high Heras fencing preventing public access around the extent of the works would be required for about 4-5 days to allow for the safe construction of the proposed works.
4. Most of the proposed works also fall within adopted highway land. It has been put to me that those elements of the works would benefit from an exemption under section 38(6)(a) of the 2006 Act, whereby the prohibition on works under s38(1) does not apply to works on any land where those works are carried out under a power conferred in relation to that particular land by or under any enactment. The applicant states that the works within the adopted highway are capable of being carried out under a section 278 agreement of the Highways Act 1980 (the 1980 Act) associated with the grant of planning permission. It is asserted that the powers of a Highway Authority to enter into an agreement for the execution of works to an adopted highway under section 278 of the 1980 Act would fall within s38(6)(a) of the 2006 Act.
5. However, s278 of the 1980 Act provides a general power for Highway Authorities to enter into agreements as to the execution of works. It does not specifically refer to the works proposed in this case, nor more pertinently to the particular land concerned. Consequently, based on the evidence before me I am not persuaded that the provisions of s278 of the 1980 Act are sufficiently explicit in relation to the application land to fall within the scope of the exemption claimed under the 2006 Act. Accordingly, I have determined the application based on the proposed works that fall within the Common, irrespective of whether they also fall within the adopted highway.
6. I carried out a site visit accompanied by representatives of the applicant and the Open Spaces Society (OSS). 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 (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);

(d) any other matter considered to be relevant.

1. I have had regard to the Common Land Consents Policy issued by the Department for Environment, Food and Rural Affairs dated 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. Substantive representations were made in response to the advertisement of the proposal from the OSS, Elmbridge Borough Council, Natural England (NE) and Surrey County Council, whereas Historic England and Claygate Parish Council indicated that they had no comments.
2. Although they do not object to the proposed temporary fencing, the OSS do object overall, as they dispute the need for the raised footway and consider it would run counter to the 2015 policy. They contend that the proposed scheme, which increases the width and raises the height of the footway, and includes railings, would be visually intrusive and the proposed engineered scheme would not be justified on the basis of tree protection or public safety in this context.
3. Elmbridge Borough Council have commented as landowners and managers of the land. They do not object to the widening of the footway and consider it unlikely that the works would reduce the current enjoyment of the Common by the public and consider that it would be likely to increase foot and cycle traffic across the Common. They go on to make further comments regarding practical arrangements for carrying out the works as well as maintenance costs.
4. NE raise no objection to the works and consider that they would result in wider public benefits by providing a safer more accessible footway onto the Common along a section of Littleworth Road where the existing footpath is narrow. They stress that appropriate measures should be in place for the protection of trees.
5. With reference to the County Historic Environmental Record, the historic environment planning team at Surrey County Council have no archaeological concerns regarding the proposals.
6. 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 provided show that there are no rights of common registered over unit CL264. Consequently, there would be no interference with rights of commoners arising from the works. Elmbridge Borough Council does not object to the principle of the application in its capacity as landowner. 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. The proposed works mostly concern a small part of the Common that is already primarily experienced as a footway, and which opens out to the main body of the Common further to the south. Therefore, aside from construction, which is likely to be of a short duration, local people would be able to access the land and use it in a broadly similar way to which they are accustomed. This would primarily be in relation to accessing or egressing the Common at its northern end. It would not interfere with the recreational use of the main body of the Common to the south.
3. The 2015 policy also allows for the consideration of whether the proposed works would add something that would positively benefit the neighbourhood. The proposed works would be likely to improve pedestrian accessibility to the Common for local people. However, as these potential benefits would not be confined to people in the neighbourhood, I have considered them more fully later in my decision under public access.
4. Accordingly, I am satisfied that the proposal would not result in harm to the interests of the neighbourhood.

***The public interest***

*Nature conservation*

1. The site does not form part of a national or locally designated site for nature conservation and most of the Common appears as open grassland. For the most part the physical works would sit over an existing surfaced footway and so would be unlikely to impact on nature conservation. However, there would be some limited encroachment into vegetation along the eastern edge of the proposed widened footway. This would mostly affect an area of undergrowth close to a group of trees as well as some turf of the common.
2. The resultant reduction in available habitat would be minor and therefore, would be most unlikely to have a noticeable or adverse effect on the nature conservation of the Common as a whole. Furthermore, the evidence before me indicates that the works incorporate measures to safeguard the established trees that are outside but close to the northern boundary of the Common.
3. Therefore, overall, the proposal would have a neutral impact on nature conservation.

*Conservation of the landscape*

1. At present the Common has an attractive verdant and natural appearance due to the presence of grass and trees, including the contribution of a considerable number of established trees framing the edges of the Common. My observations were that the natural and informal characteristics of the Common prevailed notwithstanding the subordinate presence of the carriageway and footway of Littleworth Road. The appearance of the application land is consistent with these prevailing characteristics due to the proximity and presence of adjacent trees and vegetation and the relatively inobtrusive appearance of the footway.
2. The proposal would result in a wider footway necessitating an increased area of hard surfacing. This would to an extent encroach into vegetation along the eastern edge of the present footway, thereby reducing its softening effect. In addition, alterations to the land levels would considerably elevate the height of the walkway relative to the carriageway and would be edged in brickwork. In turn this would necessitate a graded ramp and a 1.4m high galvanised steel guardrail along the raised level to enclose pedestrians. Taken in combination these factors would convey a markedly engineered impression at odds with the otherwise natural and informal appearance of the Common. Consequently, the works would have a harmful discordant and disproportionate appearance in this context.
3. Although the area of land directly affected would be relatively modest, the works would nevertheless be highly visible on the approach to, as well as from within the Common given that they would form part of the highway. The prominent effect would be exacerbated as the works would link with the longer proposed footway that would continue outside of the Common to the southern access to Claygate House. In that sense, the works on common land would be read as part of that wider development. Consequently, they would have an urbanising effect that would permanently and adversely diminish the prevailing character of the Common. Hence, there would be localised harm to the landscape.
4. My attention is drawn to the presence of protected and established trees close to the northern and eastern edges of the application land. It is asserted that the raised height of the footway is necessary to avoid harmful works within their root protection areas. I acknowledge that the Council’s Senior Tree Officer finds that the raised footway scheme would provide adequate protection that would enable the retention of mature trees. Nevertheless, the comments relate to the entirety of the footway proposals and hence, are not confined to the section of works relating to common land. Neither do the comments expressly refer to or rule out alternative methods that could provide adequate protection for trees.
5. 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 proposal. The applicant contends that there is no other way to deliver footpath widening in this location in an alternative or lesser way without either impacting on protected trees or causing detrimental impact to highway safety. In this respect it is stated that widening of the footpath at its existing level would be likely to cut into the retaining wall and earth bank behind which is the root protection area of two protected chestnut trees (T48 and T49). Reference is also made to detailed design discussions taking place with Highway and Tree Officers during the consideration of the planning application, and of the unacceptability of the gradient of a shorter steeper ramp to cater safely for wheelchairs and pushchairs.
6. I acknowledge that the applicant was attempting to strike a difficult balance between competing factors to facilitate the development nearby. Moreover, generally there is certainly public benefit in retaining and protecting trees wherever possible. Nevertheless, the two protected chestnut trees highlighted lie outside of the Common, and the detailed discussions would have been in relation to the entirety of the footpath works along Littleworth Road. From the information supplied it appears that the design approach gave paramountcy to avoiding impacts on the root protection areas of all trees, and it is not clear what account was given to the status of common land during the discussions referred to. Such an assumption would reduce the potential for the consideration of alternative designs that may otherwise have included some impact on and/or mitigation of some trees. Consequently, the extent of harm to trees that would be likely to arise from widening of the footpath at its existing level within the Common as opposed to the entirety of its length is not specified.
7. Overall, insofar as it relates to works on the Common, I am not assured that there are no other less intrusive means by which a widened footway might be provided whilst also striking a reasonable balance in terms of protecting or mitigating any impact on trees.
8. Accordingly, I find that the proposal would result in localised but permanent harm to the landscape character of the Common.

*Public Access*

32. Other than for a limited period during construction, public access would remain. Moreover, the widening of the surfaced footway would improve the provision for pedestrians along a section of Littleworth Road where the footway is somewhat narrow and is confined to the eastern side of the road. I observed that the restricted width presently makes it more difficult for pedestrians to pass comfortably, or for those using mobility aids, pushing pushchairs or walking alongside small children to travel without risk of straying onto the carriageway, thereby encountering conflict with vehicular traffic and ultimately, to the detriment of their safety. The works proposed would be likely to improve the ability, comfort and safety of pedestrians walking to and from the common, which in turn could encourage the greater use of the land.

33. Furthermore, the proposed widening of the footway would potentially benefit persons with a protected characteristic. I am mindful of the public sector equality duty under Section 149 of the Equality Act 2010 which requires me to have due regard, amongst other things, to advance the equality of opportunity between persons who share a relevant protected characteristic and persons who do not. This factor undoubtedly weighs in favour of the proposed works.

34. However, 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 the Common 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.

35. As mentioned above, the extent and visibility of the physical alterations in this case would have an urbanising effect which would have wider experiential implications for users of the Common seeking to enjoy the natural environment and landscape. As such, I judge that the works would not be consistent with the use and enjoyment of the land as Common land which tempers the weight that the improved pedestrian access carries.

36. Overall, whilst the proposal would improve public access to the Common, this would, due to the nature of the works proposed, diminish the way it is presently experienced. Therefore, I attribute moderate favourable weight to the improved public access that would be wrought by the works.

*Protection of archaeological remains and features of historic interest*

37. There are no scheduled monuments or listed buildings on the land, and it does not fall within an identified area of high archaeological potential. 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***

38. The raised pathway is proposed in part to serve the nearby recently approved residential development. It is a condition of the planning permission that the path is provided prior to the occupation of the approved flats. The reason given for the condition is in order that the development does not prejudice highway safety and to improve pedestrian accessibility around the development site. The approved residential scheme would boost local housing supply and reuse previously developed land. These matters would confer wider public benefits and therefore attracts some weight in favour of allowing the proposal.

39. Nevertheless, I am not convinced that broadly similar public benefits could not be achieved by alternative means that would be less harmful to the character of the Common. As such, limited weight is attributed to the wider public interest derived from the permitted residential development.

**Overall balance and Conclusion**

40. Paragraph 3.2 of the 2015 policy seeks the outcome that works take place on common land 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. I have found that the works proposed would not maintain or improve the condition of the common. Whilst they would confer some wider public benefit, they are not for the most part temporary. Furthermore, I judge that the combination of the physical and engineering works on the Common would have a prominent urbanising impact that would result in localised, permanent harm to the landscape. As such, I cannot agree that they would have no significant or lasting impact. Therefore, the proposal would conflict with a policy objective set out in the 2015 policy.

41. Paragraph 1.3 of the 2015 policy expects adherence to the policy but does allow for departures from it as appropriate based on the merits of the case. I have considered whether the wider public benefits arising from the proposal would justify a departure in this case. However, ultimately, I am not convinced that the proposal necessarily represents the only means by which they might be reasonably achieved and the degree of benefit arising from improved public access would be relatively modest. The identified benefits cumulatively carry moderate weight in favour of the proposal.

42. Balanced against that is the disproportionate visual impact the works would have upon the special qualities of the Common. Consequently, I find that the benefits in this case would not be sufficient to override the 2015 policy objectives which primarily seek to protect common land.

43. 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