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| **Application Decision** |
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| **by Richard Holland** |
| **Appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 3 August 2022** |
| **Application Ref: COM/3291892****Weston Green Common, Esher, Surrey**Register Unit No: CL268Commons Registration Authority: Surrey County Council* The application, dated 28 January 2022, is made under Section 38 of the Commons Act 2006 (the 2006 Act) for consent to carry out restricted works on common land.
* The application is made by Carter Jonas LLP for Igloo Land Ltd.
* The works to provide vehicular/pedestrian access on land at Merrywood comprise:
1. the laying of an additional 38 square metres of tarmacadam to form a carriageway with below ground services; and
2. erection of temporary Heras fencing around the working area for the duration of the works.
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**Decision**

1. Consent is granted for the works in accordance with the application dated 28 January 2022 and the plans submitted with it subject to the following conditions:
2. the works shall begin no later than 3 years from the date of this decision; and
3. the land shall be fully reinstated within one month from the completion of the works.
4. For the purposes of identification only, the location of the proposed works is shown in red on the attached plan.

**Preliminary Matters**

1. I have had regard to Defra’s Common Land consents policy of November 2015 (the Defra policy) in determining this application under Section 38, which has been published for the guidance of both the Planning Inspectorate and applicants. However, every application will be considered on its merits and a determination will depart from the policy if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the policy.
2. Planning permission has been granted by Elmbridge Borough Council for residential development at Merrywood with associated bin stores, cycle stores, landscaping and amenity spaces following demolition of existing house and outbuildings (Decision 2020/1795 of 5 October 2021).
3. The application is made under Section 38 of the 2006 Act and seeks consent for what the applicant describes as an ‘easement’ across common land to facilitate vehicular access to the Merrywood residential development site. However, Section 38 is not concerned with the granting of easements. It is clear that the application relates to the resurfacing of an area of common land with tarmac and the erection of temporary fencing; these constitute restricted works for which consent under section 38 of the 2006 Act is required. This proposal is referred to as the ‘works’ in this decision.
4. This application has been determined solely on the basis of written evidence. I have taken account of the representations made by Elmbridge Borough Council (EBC), Natural England (NE), Open Spaces Society (OSS), Thames Ditton and Weston Green Residents Association (TDWGRA), Esher Sixth Form College (ESFC) and other interested parties.
5. I am required by section 39 of the 2006 Act to have regard to the following in determining this application:-
6. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
7. the interests of the neighbourhood;
8. 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); and
9. any other matter considered to be relevant.

**Reasons**

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

1. EBC is owner and custodian of the common land and commented about the application in its capacity as proprietor of the freehold title. EBC advised that it had been in discussions with the applicant with regard to granting an appropriate easement for the works and had an agreed set of Heads of Terms between the parties, subject to the granting of Section 38 consent. I am satisfied that the owner of the land does not, in principle, object to the works.
2. The common land register records no rights of common. Rights that were provisionally registered in March 1969 were disputed and became void on 3 February 1977. I am satisfied that no persons with rights of common would be affected by the works.
3. The register records several claimed rights of vehicular access over the common to residential properties and a right claimed by South Eastern Electricity (now UK Power Networks) to access the common for infrastructure maintenance and repair purposes. The applicant advises that all those recorded in the commons register as having a legal interest in the land were consulted about the application. There is no evidence before me to suggest that the interests of any such party will be harmed by the works.

***The interests of the neighbourhood and public rights of access***

1. An existing tarmac driveway gives vehicular access from Weston Green (a residential street) to the property known as Merrywood, which is to be demolished for housing re-development of the site (as referred to in paragraph 4 above). The driveway lies within the common land boundary. The rest of the Merrywood site lies outside the common. The applicant wishes to widen the driveway by forming a 5.5m wide carriageway that will cover 38m² of common land with tarmac. The interests of the neighbourhood test relates to whether the works will impact on the way the common land is used by local people and is closely linked with interests of public access.
2. Weston Green is a cul de sac marking the western boundary of the common. The main area of the common is on the eastern side of the street. The application land lies at the north western tip of the common. I consider that the only reason any person would have to walk over this part of the common, other than for general air and exercise, would be to visit the Merrywood property or to enter and exit the new housing estate once it is completed. Nevertheless, local people and the public alike will continue to be able to walk over the application land once the re-surfacing works are completed, should they so wish, and I conclude that the works will have a negligible impact on the interests of the neighbourhood and public rights of access.
3. NE suggests that the works will affect a public footpath which the applicant has identified as Footpath 11 and advises that it is unused and currently overgrown. Although it is not clear whether the works will affect the footpath, this is a matter controlled by other legislation.
4. The Heras fencing will enclose part of the common and exclude public access from it for nine weeks while the resurfacing is carried out. I am satisfied that the impact of the fencing on public access will be short term and that it is needed for public health and safety reasons whilst the works are carried out.

***The public interest***

*Nature conservation and conservation of the landscape*

1. Small areas of grass verge on each side of the existing driveway will be tarmacked over. NE advises that the application land is not subject to any statutory designations requiring its consent/assent and does not see that the works will have any significant impact on biodiversity or on any designated site outside of the application area. I am satisfied that the works will not harm nature conservation interests.
2. The application land occupies a small area separated from the main area of the common by a residential street and is visible from limited angles. The works include establishing new grass verges on either side of the carriageway to match the other verges adjacent to other accessways off of Weston Green. The applicant says an Ash tree, which is to be removed as part of the works, straddles the common land boundary but adds that the boundary is poorly marked on the register map; I agree that it is. It is therefore unclear whether the tree is located on the common. However, if the tree does lie within the common I do not consider that its loss would so harm the appearance of the common that consent should be refused for this reason. I conclude that whilst there will be a small increase in tarmacked area, the landscape of the common will not be seriously harmed.

*Archaeological remains and features of historic interest*

1. There is no evidence before me to suggest that the works will harm archaeological remains and features of historic interest.

**Other matters**

1. OSS initially objected to the application on the basis that it should have been made under Section 16, and not Section 38, of the 2006 Act to deregister and exchange common land as this would allow for the provision of replacement land. Whilst it may be that a Section 16 application could have been made, the applicant applied under Section 38 and has taken a different approach to providing alternative land for public access, as set out below. Furthermore, common land legislation does not preclude the granting of consent for the proposed works under the provisions of Section 38. There is therefore no sound reason for declining to determine the application, which has been decided on its merits.
2. The applicant advised that to mitigate the additional area of hard surfacing an equivalent area of land, currently within the private curtilage of Merrywood, will become common land. This is not a requirement of Section 38 but, following representations made by OSS, the applicant agreed to apply to Surrey County Council under section 15 of the 2006 Act to register the mitigation land as a town or village green. However, regardless of the outcome of such an application, this is not a matter for my consideration in determining this application.
3. Many interested parties contend that access to a housing development at the Merrywood site from Weston Green is unnecessary as access could instead be from the south via Weston Avenue or from the west via Hampton Court Way, without crossing common land. However, none have pointed to a specific alternative access route and it is not obvious from the application plan where such an access point could be. In response the applicant advised that all the properties fronting Weston Avenue and Hampton Court Way are in private ownership and that the only road frontage to Merrywood is Weston Green. I am satisfied that no viable alternative access route has been demonstrated.
4. TDWGRA and other interested parties contend that the works are incompatible with a Deed of Grant executed between Esher Urban District Council and Surrey County Council on 25 April 1972 for access to Merrywood from Weston Green. Many parties also contend that there is historical precedent for access easements along Weston Green to be for single properties only. However, the granting of consent under Section 38 does not convey any permission or approval that may be needed under any other legislation. Interested parties are also concerned about the increase in traffic arising from the Merrywood housing development but this matter is not relevant to my decision.

**Conclusion**

1. The Defra policy states that *“where it is proposed to construct or improve a vehicular way across a common, consent will be required under section 38 if the works involve the ‘laying of concrete, tarmacadam, coated roadstone or similar material’ (other than for the purposes of repair of the same material). Such an application may be consistent with the continuing use of the land as common land, even where the vehicular way is entirely for private benefit, because the construction will not in itself prevent public access, or access for commoners’ animals”.* I am satisfied that the works accord with the Defra policy.
2. I conclude that the proposed works will not significantly harm the interests set out in paragraph 7 above. Consent is therefore granted for the works subject to the conditions set out in paragraph 1.

**Richard Holland**

