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| **Application Decision** |
| Site visit made on 28 March 2023 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 April 2023** |

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| **Application Ref: COM/3309337****Lyneham Green, Lyneham, Wiltshire**Register Unit No: CL47Commons Registration Authority: Wiltshire Council |
| * The application, dated 13 October 2022, is made under Section 38 of the Commons Act 2006 for consent to construct works on common land.
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| * The application is made by Gladman Developments Limited.
* The works comprise construction of part of the bellmouth of a new access road, construction of footway, installation of services (pipes, cables, (ducts)) and temporary fencing as part of a proposed new residential development.
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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, the erection of fencing and the digging of ditches and trenches.
2. Common Land unit CL47 comprises mostly linear parcels of land on both sides of the roads at the conjunction of Chippenham Road, Calne Road and the Green in the village of Lyneham. This application concerns a linear section of CL47 measuring approximately 203m2 on the south side of Chippenham Road.
3. Outline planning permission (reference APP/Y3940/W/20/3253204) was granted on appeal on 22 November 2021 for a major development on land to the south of the proposed works. This includes the erection of up to 200 dwellings, up to 2600m2 of business uses and up to 600m2 of community uses. Access was approved as part of the permission and shows a vehicular access point and footway onto Chippenham Road. Condition 4 of the outline permission requires the development to be carried out in accordance with the plans showing the proposed site access arrangement.
4. Some of the proposed access works and associated service provision overlaps a linear strip of common land CL47 adjacent to Chippenham Road and this corresponds with the substance of the application before me. The works proposed involve the construction and tarmac surfacing, kerbing and associated road markings of approximately 85m2 of the bellmouth and tarmac surfacing, kerbing and tactile paving for about 40m2 of footway. In addition, between approximately 3-5m of respective pipes and cables are proposed to be laid to allow for the passage of foul, water, electricity and gas. A trench of approximately 35m in length is proposed to provide a connection and route for telecommunications cabling. Temporary safety fencing of approximately 196m in length is also proposed to prevent access during the construction period and is intended to remain in place for a 16 week period.
5. I carried out a site visit accompanied by representatives of the applicant and Bellway Homes. 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 Open Spaces Society (OSS) and Natural England (NE).
2. Both the OSS and NE initially registered objections to the proposal on broadly similar grounds. Each points to aspects of the 2015 policy and consider that a proposal of this nature should more appropriately be the subject of an application made under section 16 of the 2006 Act, a process by which the affected land would be de-registered as common land and a corresponding area of land registered as a replacement.
3. The OSS accept it is reasonably necessary to create access to the outline development site. However, they consider that the works proposed would not be for the management, improvement or protection of the common, nor are they consistent with traditional uses of the common. They contend that the works would not maintain or improve the condition of the common and would result in a permanent harm. Therefore, in the absence of suitable replacement land, the proposal runs contrary to the stated objective in the 2015 policy to ensure that the stock of common land and greens is not diminished.
4. NE acknowledge that the land is not presently well suited for use by people wishing to exercise their public right of access. However, the proposal would have an urbanising effect on the common and immediate landscape. Furthermore, no obvious nature conservation benefits would arise.
5. Further representations were received in response to the applicant’s subsequent suggestion that an area of identified compensatory land within the outline planning permission (shown on drawing number 22493/1101B, measuring approximately 225m2) was made the subject of a separate application for town or village green. Both the OSS and NE give general support to such an approach. NE confirm that on the basis the compensatory land would mitigate the loss, they raise no objections to the present application.
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 information before me indicates that there are no rights of common registered over unit CL47, nor any relevant leaseholders, occupiers or parties with other rights over the land. On that basis, there would be no interference with rights of commoners arising from the works. The land is owned by Lyneham and Bradenstoke Parish Council (PC) who have been notified of the proposal and have not objected, although no proof is provided to show their agreement.
2. Nevertheless, there is nothing 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. There is no definition within the 2006 Act of the term ‘neighbourhood’. In this case, the common is most likely to be used by residents of Lyneham. However, there is likely to be an overlap between the interests of those residents and those of the wider public.
2. 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 the works would interfere with the future use and enjoyment of the land as a whole. As such, in this section I have considered the direct impact of the works on the common land, leaving points made regarding wider benefits accruing from the adjacent major development (not on common land) to be considered under other relevant matters.
3. The proposed works concern a thin strip of the common that runs adjacent to Chippenham Road. It is primarily experienced as highway verge comprising rough grass, shrubs and hedgerow. Its limited size, shape and proximity to the road would render it generally unsuitable for notable recreational use. The applicant points out that unlike some other parts of Lyneham Green, the land is not designated as Local Green Space in the Lyneham and Bradenstoke Neighbourhood Plan, Made October 2021 (NP). Although not determinative, this would tend to reinforce my finding.
4. Furthermore, the presence of a surfaced footway on the opposite side of Chippenham Road makes the use of the common as a pathway unlikely. Hence, the enjoyment of the land by local people is primarily likely to be derived from its visual appearance, with its undeveloped nature and vegetation contributing towards rural character.
5. The proposed works would facilitate the creation of a vehicular access and so would introduce areas of hard surfacing onto the common land which in turn would displace the present greenery. Moreover, the use of the access by traffic, which given the scale of the outline development permitted would be considerable, would further dilute the rural character of the common. As such, the proposed works would have a clearly visible, permanent urbanising effect.
6. In addition, the temporary safety fencing would prevent any access onto the land for a period of 16 weeks, and the future frequent presence of vehicles using the access would thereafter generally further hinder future access, save than by the proposed footway.
7. Accordingly, although the degree of use and enjoyment provided by the common land affected to local people is likely to be limited, the proposal would result in permanent harm to it. Therefore, it would be detrimental 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 land affected comprises rough grassland. The physical works would permanently displace a strip of rough grassland and hedgerow, but following the laying of cables, some areas of grass verge would remain. Moreover, the linear strip lies close to Chippenham Road, and there is little to suggest that it supports or houses species of particular biological interest.
2. The resultant reduction in available habitat would be minor and therefore, would be unlikely to have an adverse effect on the nature conservation of the common as a whole. Nevertheless, owing to the introduction of hardstanding, removal of vegetation and likely increase in vehicular movements there would be some erosion of natural habitat. Therefore, limited harm would result to nature conservation.

*Conservation of the landscape*

1. The strip of common that would be affected by the works generally has the appearance of a verdant highway verge adjacent to Chippenham Road. Although not remarkable, it is presently seen against the backdrop of open fields and the softening effect of the grass, shrubs and hedgerow contributes positively towards the rural character of the area.
2. However, it is relevant that outline planning permission exists for the fields to the south of the common to be developed in employment and residential uses, which would alter the immediate context and rural backdrop. This is a factor that I have taken into account as part of my assessment.
3. Even so, the proposed works would permanently change part of the surface of the common to tarmac. Furthermore, associated kerbing, road markings and tactile paving would be introduced. Combined with the presence of vehicles using the access point, these factors would have an urbanising effect on the land. Moreover, the area of land across which the works are proposed is stated to be 203m2, which is not insignificant.
4. The proposed site access arrangement drawing illustrates that the access configuration with associated visibility splays would markedly alter the character and appearance of this section of Chippenham Road, within which the common land is situated. Hence, the urbanising changes would be readily apparent from Chippenham Road.
5. Moreover, although temporary, the safety fencing would of necessity need to be highly visible.
6. Therefore, I find that the proposal would result in localised but permanent harm to the landscape character of the common.

*Public Access*

1. NE advises that Lyneham Green is designated as open access land under the provisions of the Countryside and Rights of Way Act 2000, whereby a right of access on foot is available to the public at all times.
2. Temporary fencing is proposed for a period of 16 weeks to cover the new road, utility diversions, lowering and new supply installations. Public access over the area edged in red would be prevented during this time. I am satisfied that the proposed fencing strikes a reasonable balance between the need to temporarily separate the public from the works area in the interests of site safety and security and the need to minimise restrictions on public access.
3. Other than the temporary fencing, public access would remain as part of the highway. However, the presence of the vehicular access would result in traffic movements that could lead to conflicts between vehicular traffic and users of the common. That could manifest in users of the common being segregated and having to wait to cross the space safely. In addition, the increased presence of vehicular traffic would have a marked impact on the way the common is experienced. The introduction of a section of surfaced footway leading to a pedestrian crossing over Chippenham Road would not entirely negate these detrimental effects.
4. Consequently, although the proposed works would not present a physical barrier to continued public access, the presence of road infrastructure and vehicles would likely act as a deterrent. Paragraph 5.8 of the 2015 policy asks whether the works would be consistent with the use and enjoyment of the land as common land. In this instance, the proposed works would predominantly facilitate and provide access to adjacent major development, and consequently I find they would not be of a nature or scale consistent with those purposes.
5. I recognise that, given the limited width, proximity to the road and presence of alternative surfaced footway, that it is improbable that the public would frequently access the strip of common land that is the subject of this application for the purposes of recreation. Nevertheless, the area of common land that is proposed as part of the carriageway would represent a reduction in public access. Consequently, I find that the proposal would have a limited adverse impact on public access to the common overall.

*Protection of archaeological remains and features of historic interest*

37. There are no scheduled monuments or listed buildings on the land, and there is nothing before me that would lead me to suppose it falls within an 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 works are required as part of the access for the recently approved major development. The approved scheme would boost local housing supply in an area where supply was found to be deficient. It would also provide affordable housing, land for employment, community uses, areas of public open space and landscaping. The development would confer economic, social, and environmental public benefits and therefore, this attracts weight in favour of allowing the proposal. Hence, this is a matter which I have considered in the overall balance.

39. 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 explains that an application under section 16(1) of the 2006 Act to deregister the common land and register an alternative parcel was not an option available, as they do not own the land that is the subject of this application. The owners are the PC.

40. It is stated that attempts were made to contact the PC following the grant of outline consent in November 2021 but that the PC did not respond to approaches. I am not informed of when or how many approaches were made, nor of the content. Therefore, it is not clear to me that a concerted effort was made to engage with the PC with the clear objective of pursuing a section 16 application.

41. The appellant raises concerns that the PC, who opposed the outline planning permission, may seek to extract a ‘ransom payment’. However, this is based on a verbal discussion during a PC meeting that took place after the present application had been submitted. It is not for me to pronounce on what might constitute reasonable terms between the respective parties to a potential section 16 application. However, I consider that it is reasonable to anticipate that this alternative had been properly considered before being rejected, and the onus lies within the applicant to produce that evidence. Moreover, as the applicant points out, the PC have not objected to this application. Based on the information before me, I have concerns that the applicant’s choice to pursue a section 38 application in this case was more closely associated with expediency than adherence to the 2015 policy. As such, discounting a section 16 application was in my view, somewhat premature.

42. Nevertheless, the applicant states that subject to the present application being successful, they will apply under section 15(8) of the 2006 Act to register a rectangular parcel of land within the consented outline scheme, measuring approximately 225m2 as town or village green.

43. This land is identified on drawing number 22493/1101B and is contiguous with a larger area of CL47, although is presently separated by a ditch and wire fencing. The land lies south east of the proposed works in this case, and is indicated as public open space on the development framework plan of the outline permission. Its rectangular shape and position away from the road and adjacent to existing nearby common land that is designated as Local Green Space in the NP would make it more suited for recreational purposes. Consequently, if registered as town or village green (TVG), its size, shape and position would be likely to adequately mitigate for the adverse impact arising from the works proposed in this case. Cumulatively, such an occurrence would increase the overall stock of common land.

44. Paragraph 4.7 of the 2015 policy indicates that the Secretary of State will take into account any matter which is relevant. The registration proposed by the applicant is entirely predicated on the approval of the works that are the subject of this application. Hence, it is a matter of relevance. Nevertheless, the weight attributed to it will depend upon the certainty of such an application being successfully made, and it is in this regard that I have serious concerns.

45. No mechanism has been explicitly suggested by the applicant that would successfully secure the registration of the land proposed as TVG prior to the proposed works taking place. The possibility of a condition is mentioned, but no specific wording has been proffered for my consideration, other than by the OSS.

46. It would be the applicant’s intention only to apply for TVG registration at the end of the outline development, whereas the proposed works are required at the outset. Even if the end of the outline development could be precisely defined, the applicant’s estimated period of 4 years amounts to a considerable period of time. Furthermore, as this is only an estimate, the time that might elapse between such events could be longer. Any time associated with a section 15 application process would prolong matters further.

47. Moreover, this assumes that such a section 15 application would be successful, which the applicant concedes cannot be guaranteed. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 brought to my attention do not set extensive criteria for such a process. Nevertheless, they would require the Commons Registration Authority to be satisfied that the applicant is the owner of the land and that any other necessary consents have been obtained. The applicant alludes to the offered land being handed onto a Management Company as part of the public open space associated with the outline development. Accordingly, it is not necessarily the case that such an application would be straightforward.

48.The suggested condition wording from the OSS refers to the applicant using its ‘best endeavours’ to register the land as TVG following the completion of the proposed works. It does not establish a specific date by which the status of the land as TVG must be secured, nor what might be the consequences if it were not. Accordingly, I consider the condition wording to be too imprecise to be an effective mechanism to address the harm in these circumstances.

49.These factors raise considerable uncertainty as to when such an application might be made, and whether it would ultimately be successful. Hence, doubt remains as to whether it could be secured. Even if matters proceed as the applicant suggests, a considerable period could elapse between the commencement of the proposed works and provision of the TVG. It follows that this significantly reduces the amount of weight that can be given to the offer of replacement TVG land.

**Overall balance and Conclusion**

50. 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 in this case would not maintain or improve the condition of the common. Whilst they would confer some wider public benefit in facilitating the implementation of the outline permission, they are not for the most part temporary.

51. Furthermore, I judge that the physical works to create an access on this section of common land would have a noticeable urbanising impact that would result in localised, permanent harm to the landscape. As such, they would have a significant and lasting impact. Moreover, the creation of the access would facilitate and increase vehicular movement on the common which would not be consistent with its status. Therefore, the proposal would conflict with the outcomes set out in paragraph 3.2 of the 2015 policy which counts heavily against the proposal.

52. 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. I accept that delivering the benefits inherent in the outline permission are predicated upon achieving suitable access to the site, and there are no obvious alternative routes brought to my attention that would be less harmful to the common. This factor weighs in favour of the proposal.

53. Nevertheless, paragraph 3.2 of the 2015 policy is clear as to wider public benefits. Effectively, works having a permanent impact must confer a wider public benefit and that impact must not be significant. Hence, permanent works on a common which require section 38 consent are to be avoided if possible unless their effect is to maintain or improve the condition of the common.

54. The applicants are disqualified from applying under section 16(1) of the 2006 Act as they do not own the common land upon which the works are proposed. However, this of itself is insufficient to convince me that the fundamental safeguards set out in the 2015 policy should be overridden, as these are circumstances that could arise with some frequency. To do otherwise would be to the cumulative detriment of the overall stock of common land and would too easily circumvent the 2015 policy objectives. Moreover, the applicant has not provided a convincing explanation that a section 16 application in collaboration with the owner of the land would be out of the question. Hence, I am not satisfied that this alternative approach has been adequately explored which counts against the proposal.

55. Nevertheless, I have had regard to the offered separate application under section 15 of the 2006 Act to register a parcel of nearby land as TVG. If successful, this would be in addition to the common land that is the subject of this application thereby, increasing the overall stock of land by approximately 225m2. Moreover, the configuration of the land proposed as town or village green would be generally advantageous in terms of its usability and it would border other more substantial areas of common land within CL47.

56. However, I am not persuaded that an adequate mechanism exists that would secure the status or appropriate timing of the offered TVG. In the absence of this, I cannot be certain that the harm I have identified to the common would be avoided. Hence, it attracts limited weight.

57. 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