



## Application Decision

Site visit held on 21 July 2015

by **Sue M Arnott FIPROW**

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 21 September 2015

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### Application Ref: COM 659

### Land at Amberswood Common, Ince-in-Makerfield, Wigan

### Register Unit Nos.: CL68 & CL102

### Registration Authority: Wigan Borough Council

- The application, dated 15 January 2015, is made under Section 16 of the Commons Act 2006 to deregister and exchange land registered as common land.
  - The application is made by Wigan Borough Council.
  - **The release land** comprises 135,800 m<sup>2</sup> of land on the south eastern side of Seaman Way and south western side of Manchester Road near Hindley, Wigan.
  - **The replacement land** comprises 197,500 m<sup>2</sup> of land<sup>1</sup> to the south and south west of Seaman Way and to west of the release land.
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### Decision

1. The application to deregister and exchange common land at Amberswood Common (Register units CL68 and CL102) is refused.

### Preliminary Matters

2. Section 16(1) of the Commons Act 2006 ("the 2006 Act") provides, amongst other things, that the owner of any land registered as common land may apply for the land ("the release land") to cease to be so registered. If the area of release land is greater than 200m<sup>2</sup> a proposal must be made to replace it with other land to be registered as common land ("replacement land").
3. In this case the release land extends to some 135,800 m<sup>2</sup>, comprising two distinct areas: 110,360 m<sup>2</sup> to the north, formerly used as a refuse tip and unavailable to the public because of inherent dangers, and 25,440 m<sup>2</sup> to the south which is identified as the corridor through which the intended Amberswood Relief Road will pass. All the land at issue here is owned by the applicant, Wigan Borough Council (WBC).
4. I carried out an inspection of the release land and the replacement land accompanied by Mr David Round and Mr Mike Orrell of WBC, and objectors Mr David Earley, Ms Hazel McGuinness and Mrs Alison Thorpe each of whom were accompanied (by Mr Don Earley, Mr J Atherton and Cllr Mr Elliss respectively).
5. Several of the objections challenge the validity of the application on the basis that this is the wrong procedure to be followed. They argue that Paragraph 7

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<sup>1</sup> This area was reduced from 207,400 m<sup>2</sup> as a result of a revision requested by WBC by email dated 22 July 2015.

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- of Schedule 2 to the 2006 Act is the appropriate mechanism for correcting an error on the Register of Common Land, not Section 16.
6. In response, WBC points out that there is no evidence to show that the land in question was wrongly registered as common land. It is not argued that an error was made when the land was first registered in 1972. A previous Council subsequently utilised part of the common for tipping without the necessary authority but that does not invalidate the initial registration.
  7. Having examined WBC's proposals, I consider the process provided by Section 16 for deregistration and exchange to be entirely appropriate here.

### **Main Issues**

8. In determining this application I am required by Section 16(6) of the 2006 Act to have regard to the following:
  - (a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);
  - (b) the interests of the neighbourhood;
  - (c) the public interest;<sup>2</sup> and
  - (d) any other matter considered to be relevant.
9. In considering these matters I must also take note of the relevant advice in the Department for Environment, Food and Rural Affairs *Common Land Consents Policy Guidance* published in July 2009 ('the Policy Guidance'). This explains a fundamental principle applied to the deregistration and exchange process, that "*...our stock of common land and greens is not diminished – that, on balance, any deregistration of registered land is balanced by the registration of other land of at least equal benefit.*"
10. The Policy Guidance lists various benefits deriving from the nation's common land that are to be encouraged and sets out the relevant policy objectives. I note those particularly relevant here are:
  - Biodiversity valued, safeguarded and enhanced;
  - People enjoy, understand and care for the environment;
  - Improved local environment quality; and
  - Sustainable, living landscapes with best features conserved.

### **The application**

11. WBC made this application essentially for two reasons: firstly, to address a problem inherited from a predecessor authority which has resulted in the site of the former tip on the common being left in a dangerous condition requiring the area to be secured and unavailable to the public, and secondly in anticipation of a new road that is proposed to cross Amberswood Common.

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<sup>2</sup> Section 16(8) 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.

12. The application is to deregister the full extent of the former tip area which extends to 110,360 m<sup>2</sup> together with an adjoining area of some 25,440 m<sup>2</sup> forming a corridor intended to accommodate the proposed new road.
13. No planning application for this development has yet been submitted. However the Amberswood Relief Road is identified in the Future Transport Strategy for Wigan as an important link in the future road network.

*The release land*

14. All the release land lies within common land parcels CL68 and/or CL102<sup>3</sup>. The registration of both CL68 and CL102 was recorded as final on 1 August 1972, being undisputed common land together totalling some 47.428 hectares. WBC acquired ownership of both parcels, part in 1985 and part in 1998. The Register records no rights of common over the relevant part of the land.
15. Part of the release land was fenced off when it was used as a waste disposal site in 1983 under the jurisdiction of a former authority. No formal common land exchange was pursued at that time. The site now contains leachate extraction wells and a methane flare stack which pose serious dangers to the public and consequently the area remains secured by a high steel paling fence. Although the public have been excluded from the site for over 30 years, WBC intends that the area will one day be re-opened to the public. However the time frame for leachate and methane levels to reduce to a non-hazardous level is not known. The surface is now mostly grass-covered with few trees.
16. Whilst this part of the release land has not been accessible to the public for many years, the Policy Guidance advises that I should assume the security fence which surrounds the site is, in the absence of proof to the contrary, unlawful and that it will not endure. In these circumstances I am to consider the proposed exchange as if the release land were an integral part of the common and properly available for public use.
17. The second area within the release land lies immediately to the south of the site of the former tip. This strip of land runs through what is now mostly informal woodland with ponds and drainage channels in an area reclaimed and landscaped after previous industrial activity, the site having been an open cast coal mine from 1958 to 1963. It lies within the Greenheart Regional Park (part of the Red Rose National Forest Area) and is within the Green Belt for planning purposes but no other statutory designations apply. The part of the release land required for the proposed new road is designated as a Site of Biological Importance<sup>4</sup>.
18. The road corridor is largely along the line of a clearing in the woodland, chosen so as to limit the number of mature trees that would need to be removed and minimise its visual effect. Whilst this area offers open access for the public<sup>5</sup> on a statutory basis, a number of informal paths and tracks run through or across it but none are recorded on the definitive map as public rights of way.

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<sup>3</sup> The exact boundary between the two registered common areas is not clear but there is no dispute that the release land is common land.

<sup>4</sup> A non-statutory designation used to protect locally valued sites of biological diversity.

<sup>5</sup> Both Natural England and the Open Spaces Society submit that Section 193 of the Law of Property Act 1925 applies to this common and that therefore the public enjoys a right of access on foot and on horseback. Under the Commons Act 2006, s17(5), (6) and (8), all s193 rights would automatically transfer from the release to the replacement land should the application be successful, unless otherwise stated.

### *The replacement land*

19. In exchange for the former tip area and the intended road corridor, WBC offers replacement with a much larger area of land adjacent to the remaining common land, resulting in a net gain to the community of some 6.17 hectares of protected open access land. It also abuts the Queen Elizabeth Playing Fields, dedicated in celebration of Her Majesty Queen Elizabeth II as a public playing field and recreation ground for the benefit of the inhabitants of Wigan and thereabouts. WBC intends that together these areas should create a vast area of land protected from development for the benefit of the public.
20. It shares a similar history to the release land, being land reclaimed after the close of the open cast mine on the site. It is also predominantly planted woodland and the majority is designated as a Site of Biological Importance. It lies within the Green Belt and the Greenheart Regional Park (and Red Rose National Forest Area) but no other statutory designations apply to the area.
21. Whilst the replacement land is currently available for use by the public on the basis of WBC's 'Open Fields' policy, it does not benefit from the statutory protection afforded to the release land<sup>6</sup>. One definitive public footpath crosses this area in addition to the many informal paths and tracks.

### **Representations**

22. A public notice was published in the Wigan Observer on 20 January 2015 and was posted on the site at the main points of entry onto the land for the statutory 28 day period. The application was made available for public inspection at Wigan Town Hall and at Ince Community Centre as well as on Wigan Borough Council's website. In addition, consultation letters were sent to 25 interested parties.
23. Nine representations were received as a result of the published notice of the application. Six were from people living in the neighbourhood who object to the requested deregistration (some of whom accompanied me on my site visit). Representations from three organisations (English Heritage, Natural England and the Open Spaces Society) offered comments on the proposal but no objection.

### **Assessment**

24. In considering the various criteria required by Section 16(6) of the 2006 Act (as set out in paragraph 8 above) I have also had regard to the national policy objectives outlined in the Guidance.

#### *The interests of those occupying, or having rights in relation to, the release land*

25. No rights are recorded over the land other than private rights of access for maintenance purposes which will be unaffected by deregistration.

#### *The interests of the neighbourhood*

26. The 2006 Act does not define the term 'neighbourhood' but in this context I consider the relevant area will extend to the communities which surround the

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<sup>6</sup> Note 7 of the Application Notes states "We would not expect to see the stock of public access land diminished by an offer of replacement land that was already subject to some form of public access..."

- site, including the residents of Hindley, Platt Bridge, Spring View and Lower Ince.
27. The Policy Guidance recommends several matters that should be taken into account when assessing the impact on 'the neighbourhood'. It asks:
- *Does the proposed replacement land ... add something that will positively benefit the neighbourhood?*
  - *Does the loss of the release land ... mean that local people will be prevented from using the common in the way they used to?*
  - *Does the ... removal of the release land from its status as a common interfere with future use and enjoyment (whether by commoners, the public or others) of the land as a whole?*
28. It is not disputed that in practice, the replacement land is already available to the local community as woodland with open access but that right of access has no legislative basis. It is enjoyed on the basis of WBC policy, rather than as a statutory right. Registration of this area as common land would afford the replacement land the same degree of protection against inappropriate works as already applies to CL68 and CL102.
29. Although WBC gives no indication that its 'open fields' policy is likely to change in the foreseeable future, I recognise this would nonetheless be a change which could benefit the local community in the long term.
30. The objectors argue that if the release land is deregistered, they will not be able to use the common as they do at present. The issues raised in this context coincide with those which fall under the 'the public interest' heading and I will therefore address the access implications for both local people and the public together below (at paragraph 40).
31. Assessing the effect of deregistration of the release land on future use and enjoyment of the common *as a whole* is difficult to evaluate. The boundaries of CL68 and CL102 are not physically defined on the ground; the common is not used as one single entity, and it is not separated from adjacent areas which are similar in character but carry different status.
32. CL68 and CL 102 appear to be two separate land parcels though both numbers apply to both parcels. The southernmost portion encompasses land known as Ince Moss whereas the northern section is centred on Amberswood Common. Deregistration of the release land would cut in two this northern portion.
33. However, in practice the land is already divided by the security fences which enclose the former tip area. This leaves the area of common at the junction of Manchester Road and Seaman Way segregated from the main part of Amberswood Common in terms of public access although the paling fences will offer no barrier to most fauna and flora.
34. I conclude from this that local people have not had the opportunity to enjoy the registered common as a whole since at least 1983. That is not to say their future use would be unaffected by the proposal, only that the integrity of the registered common land unit (as opposed to the broad area generally referred to as Amberswood Common) is not a significant factor as far as 'the neighbourhood' is concerned.

35. The objectors argue that there would be a number of other detrimental effects on the local community (as distinct from the public at large) that would result from the construction of the proposed new road, such as an increase in pollution, noise and constraints on local events. Those will be matters for the planning authority when it determines the intended planning application for the road but the focus here is the effect of deregistering and exchanging common land, not the merits or disadvantages of the intended use of the release land.
36. I conclude that some of the effects of deregistering the release land on the interests of the inhabitants of the neighbourhood may be positive in the long term. I find that local people do not use the whole of the registered unit(s) as one entity at present but the effect on the neighbourhood of the proposal in terms of access will be similar to those considered below for the public.

*The public interest*

37. The four statutory criteria I must consider under the heading 'the public interest' include (a) the public interest in nature conservation, (b) the conservation of the landscape, (c) the protection of public rights of access and (d) the protection of archaeological remains and features of historic interest.
38. I firstly note that, in relation to (d), English Heritage has confirmed that no listed buildings, registered parks and gardens or scheduled ancient monuments will be affected by the proposed deregistration and exchange of common land here.
39. No issues have been raised specifically in relation to (b) conservation of the landscape separate from those generally associated with nature conservation. As a wooded area on a relatively level site, views are generally contained within the site, rather than long distance, either in or out of the woods.
40. Turning to public access (c), the Policy Guidance recommends (at 3.9.3) that when considering the effect the proposals will have on those wishing to use the common for recreation and access, it should be assumed that the release land will cease to be available for public use unless a legally binding provision is intended to be made to assure continued use.
41. No such provision has been indicated here. In the case of the former tip area, the public do not have access at present and it is likely to remain inaccessible for the foreseeable future (though the Guidance asks me to assume it is available for public use).
42. As regards the land required for the proposed new road, it would (if approved and constructed) become a public highway incorporating a 3.5m wide path for cyclists and pedestrians and thus be accessible to all. If the road is not approved or constructed, the land may well remain as it is, available to the public on the basis of WBC's 'Open Fields' policy. This policy was adopted in 1974 with the aim of ensuring that all of the Council's land (public land) is accessible wherever possible. However this is not legally binding. Thus the Guidance requires me to presume that, if deregistered, the public would have no further access to the release land.
43. In summary, this condenses into a somewhat convoluted question: assuming the whole of the common land parcel is available for public access at present (which it is not), what would be the effect of closing to the public the release

- land (some of which is actually open and some not) and substituting the replacement land (all of which is already open for public use but not by right).
44. The objectors argue that the proposed road will divide the common and crossing it will be difficult for many users. Further they say WBCs proposals are contrary to its "Policy CP2 Open Space, Sport and Recreation".
  45. WBC responds by explaining that a five year management plan for Amberswood Common is being prepared though not yet complete, and that "The proposed road will bring a shared use facility for horses and cyclists, new and improved footpaths, particularly to the lake, a visitor car park and improved ecological habitat. Overall the proposals will see improved access into Amberswood and help encourage greater use of the Amberswood open space".
  46. Both argument and counter argument assume that the public will continue to have access to the release land (excluding the tip) when the Policy Guidance requires me to make no such assumption.
  47. Although it is not a definitive public right of way, a well-used path runs broadly along the line of the proposed road through the release land, linking Seamans Way with the main lake area and the multi-user trail along a former railway line approaching from Manchester Road. If the section through the release land were no longer accessible, other routes could be found through the woodland to maintain the east-west connection although they would be longer.
  48. Whilst the objectors claim that some of the footpaths crossing Amberswood Common have become public rights of way through long usage, no claims have been made to register any such routes on the definitive map. Some objectors refer to the dedication of public rights of way under Section 31 of the Highways Act 1980, but unless applications are made and supported by sufficient evidence to justify the making and confirmation of definitive map modification orders, I can make no assumptions about the legal status of these paths.
  49. However until the management plan is produced there is no clear indication of how this area will be 'improved' in terms of the network of paths that are to be upgraded to form meaningful alternatives to the loss of the main path through the release land.
  50. In general terms, the character of the replacement land is similar and likely to offer the type of informal recreation enjoyed by visitors to the release land (excluding the tip). The Open Spaces Society has not objected to the proposal since it recognises that a greater area is being exchanged for a smaller site, most of which is not currently available for access.
  51. Under this heading the Policy Guidance asks: *Will the impact include an adverse effect on the enjoyment of the remaining part of the common or green?* In this case that is a difficult question to answer. In practice, for the last 32 years or so, the registered common land has been divided so that the area to the north of the release land (at the junction of Manchester Road and Seamans Way) has been separated from the main Amberswood Common because of the security fencing around the tip. Therefore in terms of public access, people have not been in the habit of using the common as a whole for a considerable time.
  52. Therefore my conclusion is that whilst, in theory, deregistering the release land would leave a large gap in the middle of the common such that connections

- between the north and southern parts would not be possible, this would actually be of little consequence since this is not how people use it. Indeed in reality they will not be able to walk or ride from north to south for the foreseeable future because of the dangers of the tip. This is not a case where enforcement action could be taken to re-open the site to the public; it is a matter of concern for public safety which will endure and therefore I hesitate to make the assumption required by the Policy Guidance as to its future accessibility.
53. However the implications for movement east-west though the road corridor area are more significant. Whilst I accept WBC's assurances that this will be fully addressed in the detailed plans for the new road, these plans and the assessments which will support them are not available to me now. Neither is the anticipated management plan for the whole of Amberswood Common.
54. Although I consider it entirely possible that a satisfactory solution can be found such that the outcome will benefit the public in terms of access to (and within) Amberswood Common in general and the registered common land parcels in particular, the evidence to support WBC's plans is not yet in place.
55. In terms of the protection of public rights of access and particularly in relation to 'land of equal benefit' issue, the replacement land may have the capacity to fulfil the requirements but, given the assumptions I must make, I have to conclude that the information available to me at present is not sufficient to show how this will work.
56. The last element of the 'public interest' to be considered is (d) the implications of the proposed deregistration and exchange for nature conservation.
57. On this issue, the Policy Guidance invites me to consider "*whether there are potential benefits to nature conservation from carrying out the proposals, and whether Natural England or other competent person agrees with the assessment of any proposed benefits*". Also I need to ask "*what will be the impact of the replacement land in relation to nature conservation compared with the release land?*" and "*whether Natural England agrees with the assessment*".
58. On these points, WBC highlights the comments of Natural England: "Despite being a restored landscape the replacement land is biodiversity rich. It is part of a local site of biological importance and includes a mosaic of habitats. The exchange land has greater potential for biodiversity in the foreseeable future than the release land." Further, "The management plan, written in partnership with Groundwork and the local Wildlife Trust, will further improve biodiversity. The scheme, if given consent, will bring resources into the area that will encourage improvements."
59. Whilst I respect and take note of these comments, Natural England makes no reference to any specific assessments or any surveys undertaken on which its views are based. Although it refers to the value of the replacement land, it makes little comment on the ecological value of the release land (which I understand also contains a site of biological importance) other than to note that the potential for improving its landscape value is limited due to the priority of confining and controlling hazardous emissions. This comment is obviously limited to the tip area but it offers no guidance on the ecological value of this site, nor its role as an open area within the common land unit, separating woodland to the north and south.

60. Several objectors make submissions on the likely effect of the proposed road on nature conservation interests at Amberswood Common and the migration of small amphibians around the site in particular. Further, they point out that the conclusions of ecological survey work at Amberswood undertaken in 2013 have not yet been published. Although none of these people claim any expertise in this field, they highlight the absence (to date) of reliable ecological and biological survey data and recommendations.
61. WBC is confident that the Environmental Impact Assessment for the Amberswood Link Road will identify the work required to protect and improve the ecology of the area. This, together with the mitigation plan for the proposed new road, will be scrutinised by Greater Manchester Ecology Unit and other specialist bodies as part of the planning application process and is expected to be as thorough in terms of its requirements as that recently approved for the Phoenix Way and Seaman Way Link Road.
62. In addition, WBC is working in partnership with Groundwork and with the community group 'Friends of Amberswood' and the Lancashire Wildlife Trust on the management plan for Amberswood Common which will aim to improve biodiversity across the area.
63. The difficulty is that at present none of these plans are yet complete.
64. The Environmental Impact Assessment should indicate the effect the proposed road would have on nature conservation interests in the wider Amberswood Common area and thus be helpful in demonstrating the effect of deregistering the release land on those interests. The mitigation plan should identify how, and to what extent, practical measures can be put in place to reduce the negative effects of the proposed new road on biodiversity in the area; that information should indicate how the replacement land might play a beneficial role in limiting any detrimental effects of deregistering the release land. The management plan aims to identify ways in which both biodiversity and public access across the whole of Amberswood Common can be improved for the future. This should help to illustrate how both parts of CL68/120 would function as a unit within the overall common if the release land were deregistered.
65. Although it need not necessarily be a determining factor when deciding whether or not the deregistration and exchange applied for is granted in every case, here the absence of planning permission for the intended road makes the future use of the release land uncertain. That, in turn, makes an assessment of the effects on the remaining parts of the common hard to establish.
66. The Policy Guidance asks: *Will the impact include an adverse effect on the enjoyment of the remaining part of the common ... (e.g. if development of any release land might ... impair the conservation of wildlife on the remaining part)?* That is a question which cannot be confidently answered without the information which is currently being prepared.
67. In determining this application I must have regard to the Secretary of State's statutory duty to conserve biodiversity (as required by Section 40 of the Natural Environment and Rural Communities Act 2006), and further the conservation of the Section 41 list of features of principle importance for conserving biodiversity.

68. In the absence of the relevant supporting information, I cannot reach a sound conclusion on the effects of the proposed deregistration and exchange on the nature conservation interests of the registered common CL68/CL120. Consequently, it would be inappropriate to grant consent at this time.

*Other relevant matters*

69. This criterion allows other issues to be taken into account when assessing an application. The Policy Guidance advises that this may include looking at the wider public interest such as may arise where a major infrastructure project is proposed. I have therefore considered whether the Amberswood Link Road is a relevant factor here.

70. Objectors submit that the application for deregistration has been made on the presumption that the planning application for the Amberswood Link Road will be successful. WBC responds that the planning application will be subject to full public consultation and that no presumption is being made. The planning application will be in accordance with Wigan Council's Future Transport Strategy which is a crucial document that aims to improve the connectivity and therefore economic prosperity of the Borough's residents. The Environmental Impact Assessment will produce an ecological mitigation statement open to professional and public scrutiny.

71. The Council argues that it has demonstrated in principle the need for the new road and the overall borough transport network with the publication of its adopted Future Transport Strategy but it acknowledges that it will need to submit detailed planning applications in respect of the individual road connections including the Amberswood Link Road.

72. Whilst I recognise that the Future Transport Strategy, approved by Wigan Borough Council in 2013 after extensive public consultation, provides strategic support for the Amberswood Link Road, until the proposals have planning permission there is no certainty as to the precise effects of the road, especially in terms of lighting, crossing points and other mitigation measures to address concerns over the impact on nature conservation interests and public access. More specifically it is the Environmental Impact Assessment which is in the process of being prepared to support the planning application and the associated mitigation plan that will provide the necessary data.

73. It is clear that WBC has invested time and resources into Amberswood Common and is committed to protecting and enhancing the area, working in partnership with local groups in preparing a five year management plan for the area.

74. However, in the absence of these crucial documents, I find the weight of the Future Transport Strategy not sufficient to override concerns arising from the unanswered questions, particularly as regards the effects on nature conservation interests.

**Any other matters**

75. It is clear that all the objectors oppose the Amberswood Link Road scheme. They argue that, contrary to the requirements of the National Planning Policy Framework (paragraph 90) it would not preserve the openness of the Green Belt. Some argue also that the health of local inhabitants will be affected by

the new road, and that access to nature and natural areas is increasingly recognised as important to the well-being of individuals and communities.

76. I reiterate the Amberswood Link Road is not at issue here. These are essentially arguments for consideration by the planning authority if and when a planning application for the road is submitted.

### **Conclusions**

77. Having regard to these and all other matters raised in the written representations, and to the criteria in section 16(6) of the 2006 Act, I conclude that granting the application would result in a net gain in terms of the area of registered common land but a loss in terms of available public access.
78. However, the fact that a significant area of the release land is unlikely to be available to the public for recreation for a considerable period of time because it is unsafe should be weighed in the balance. So too should the additional statutory protection that would be afforded to the replacement land as a result of the exchange, over and above the present access arrangements which are based on WBC's 'Open Fields' policy.
79. There are no common right holders and therefore no registered interests to be considered. As regards the public interest there are no historical, archaeological or landscape conservation interests affected by the proposals.
80. However, I find there is not yet sufficient information available to fully inform my assessment as to the effects on nature conservation interests and the interests of the public and the relevant neighbourhood in relation to public access.
81. I conclude that the effects of deregistering the release land coupled with registration of the replacement land cannot be fully assessed, particularly in relation to nature conservation and public access, without the anticipated Environmental Impact Assessment for the proposed Amberswood Link Road and the associated Mitigation Plan, and also the Management Plan for Amberswood Common.
82. I consider there is the potential for there to be a negative effect on the neighbourhood and the public interest in relation to access and nature conservation. Until that impact is identified and assessed, and mitigation and management measures fully explored, I consider it would be premature to grant the Order requested. I therefore conclude that the application should not be granted and no Order of Exchange should be made.

*Sue Arnott*

**INSPECTOR**