



Application Decision

Accompanied site visit held on 21 September 2015

by **Heidi Cruickshank BSc MSc MIPROW**

Appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 19 October 2015

Application Ref: COM 706

Upper Ham Common, Worcestershire

Register Unit No: CL 72

Commons Registration Authority: Worcestershire County Council

- The application, dated 30 March 2015, is made under Section 16 of the Commons Act 2006 for consent to deregister and exchange common land.
 - The application is made by Kerry Misters¹, represented by Osborne Clark.
 - **The release land** comprises an area 687.5 m² of land, which is a strip of approximately 10 metres wide near the northern end of the common land, running generally easterly from the bank of the River Severn.
 - **The replacement land** comprises 786.5 m² of land adjoining the eastern boundary of the existing common.
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Decision

1. The application to deregister and exchange common land at Upper Ham Common, Register Unit No. CL 72 is refused.

Preliminary matters

2. In objection the Open Spaces Society ("the OSS"), suggested there had not been appropriate consultation prior to the application, with particular reference to *A Common Purpose: A guide to Community Engagement for those contemplating management on Common Land*² and the Commons Toolkit Guidance Note 11. I agree with the applicant that these documents relate to the management of common land and consent for works, generally under section 38 of the Commons Act 2006 ("the 2006 Act"), and that this matter does not invalidate the application.
3. Planning applications relevant to this application for exchange were made to the planning authorities on 29 May 2013. In response to OSS comments, the applicant said that the applications would be determined by 30 September 2015 and so I asked for confirmation of the decisions. I was informed that there had been an agreement with the planning authorities for a further extension to their determination, to 31 December 2015. I make this decision bearing in mind that applications have been made but not yet determined.
4. In relation to the OSS comment that the application for exchange was premature, with respect to relevant planning applications, I agree with the applicant that this is a matter for them to determine, at their own risk.

Procedural matters

5. I carried out a site inspection of the release land and replacement land accompanied by representatives of the landowner.

¹ Also referred to as Kerry Ruff

² Second edition, 2012

Main issues

6. Section 16(1) of the 2006 Act provides that the owner of registered common land may apply for land ("the release land") to cease to be registered. If the area of release land is more than 200m² there must be a proposal to replace it with other land to be registered as common land ("replacement land").
7. The Department for Environment, Food and Rural Affairs *Common Land Consents Policy Guidance*³ sets out the benefits which common land should deliver, and the outcomes that it considers must be ensured by the consents process under section 16 of the 2006 Act. The policy in relation to applications to deregister "...is not to allow our stock of common land and greens to diminish...the purpose of section 16 [is] to enable registered land to be released in exchange for replacement land of equal value."
8. I am required by section 16(6) 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 release land;
 - (b) the interests of the neighbourhood;
 - (c) the public interest, which includes the interest in nature conservation, conservation of the landscape, protection of public rights of access and the protection of archaeological remains and features of historic interest;
 - (d) any other matter considered to be relevant.
9. The arguments in objection were that the application was contrary to the public interest for a number of reasons, including having been made prior to the granting of associated planning permission, without which the exchange would be unnecessary; that the location of the exchange unnecessarily divided the common; and, the effect on public and commoners rights.

Reasons

Description of the land

10. Upper Ham Common ("the common") lies directly adjacent to the eastern bank of the River Severn (the river") with the city of Worcester to the north and the village of Kempsey to the south. The common is in two parts, due to changes to the Register of Common Land ("the RCL") following objections to initial registration removing the central section of the originally registered area. The section of common affected by this proposal is the northern area.
11. The land in the general vicinity is farmland and the majority of the affected part of the common has the appearance of a farmed field. It lies at a lower level than the land to the east, beyond which the A38, Worcester Road, runs generally parallel to the river. The area between the higher land and the common is rough sloping land with trees and scrub. There is a Yacht Club adjacent to the northern boundary, with that boundary indistinct due to trees and scrub, which appear to be on the common. A public footpath, which I understand is promoted as the Severn Way, runs alongside the river. Trees and scrub along the bank prevent direct access to the river.

³ July 2009

Background

12. The exchange is sought to enable works to install a buried flood bypass/ storm overflow drainage pipe/culvert under the common to discharge into the river ("the works"). The works themselves are associated with a proposed major mixed use development on land to the east/north east of the common ("the development").

The release land

13. The area of land sought for release is 687.5 m² and comprises a strip running generally north-east to south-west parallel to but offset from the northern boundary of the common. The western end is bell shaped to allow for the proposed construction of a headwall on the river. This land is generally grassland, with a strip of rougher land, trees and scrub on the river bank.
14. The applicant refers to the release land as an easement strip accommodating the drain, the works to construct it and future maintenance.

The replacement land

15. The 786.5m² of replacement land is on the eastern boundary of the common and in two sections on either side of the continuation of the proposed works, and associated easement strip, to the north-east of the common.
16. The applicant indicates an intention that the entirety of the easement strip, between both areas of the release and replacement land, will be used for grazing by the commoners and public access on a permissive basis.

Assessment

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

17. Although there is some confusion between the RCL and a typed record I am satisfied that rights exist for at least 65 commoners and comprise rights of pasture for sheep, cattle, horses, pigs, poultry, geese and ducks. There is also one right to take estovers, although the right of pannage⁴ has been deregistered. The applicant accepts some of the rights are exercised. None of the commoners raised concerns with regard to the application.
18. The applicant intends that the release land will be returned to grazing and public access, with no physical obstruction to the passage of people or animals once the works are complete. Whilst I note this, I consider that the OSS are correct in their view that the exchange of land results in the common being bisected. I take account that what would be an isolated area of common remaining to the north of the access strip is comparatively small. However, I agree with the OSS that any permissive access can be withdrawn and so consider that the lack of permanent access is not in the interests of those with rights on the common, such that those rights are prejudiced by the proposed exchange resulting in the subdivision of the common.
19. It is unclear who occupies the land for the purpose of cropping grass but, if it is the landowner, then it appears there would be no prejudice; they would benefit from the application and would not seem to be prevented from continued use of the land.

⁴ The right to feed animals, usually pigs, in woodland

20. On balance, I consider that the interests of persons having rights in relation to the release land, and potentially occupiers, will be adversely affected by the proposal, due to the way in which the land will be legally, if not physically, sub-divided.

The interests of the neighbourhood

21. Some proposed works on common land do not benefit the common but nevertheless there is a potential underlying public benefit or wider benefit on the local community. The applicants seek to place weight on the provision of the development to deliver local housing, improvements to local infrastructure, public transport and education, as well as additional temporary and permanent jobs, contributing to the economic development of the area. I understand that the works, which directly affect the common, are designed to reduce substantially the risk of flooding to the surrounding communities and are part of the mitigation measures required to allow the development to proceed. Once completed the works would be capable of adoption and so add to or improve the drainage infrastructure, which it is suggested would benefit the local community and the public generally.
22. I understand it to be the case that the development is subject of a draft allocation within the South Worcestershire Development Plan, comprising approximately 10% of the Plan's requirement for new housing. However, I do not consider that I am able to place significant weight on this in relation to the potential wider public benefits, when the Plan is only in draft and the applications have not yet been determined.
23. Although there would be an overall increase in the area of common land as a result of exchange, I am not satisfied that the proposed replacement land adds something that will positively benefit the neighbourhood. The effect of the exchange is to bisect the common, meaning that commoners and local people would be prevented from using the common, including the replacement land, as a whole, interfering with future use and enjoyment.
24. The development, and therefore the works required in association with it, may be found to be in the wider interests of the neighbourhood, if planning permission is granted. However, placing appropriate weight on the value of the common, as the application will result in legally bisecting the common, even if only in relation to a small area, I do not consider that this is in the overall interests of the neighbourhood.

The public interest

Nature Conservation

25. According to the 1992 Biological Survey of Common Land part of the common was a Site of Nature Conservation Interest. The applicant notes that the river is designated as a Local Wildlife Site, however, I agree that this is not within the common itself.
26. Given that the majority of the release land is single-sward managed grass, cropped and apparently grazed, there is limited conservation interest. The scrub areas to the east and west are of more varied biological interest. Overall, I am satisfied that the nature conservation value of the common would not be affected by the proposed exchange.

Conservation of the Landscape

27. The applicant indicates an intention to return the release land to the current condition, once the works are completed. I understand that a hedge has been removed between the two areas of land and it is stated in the application that the intention is for the replacement land to be incorporated within the cropping and grazing regime over the rest of this part of the common. I do not consider that there will be significant landscape changes as a result of the proposed exchange of land.

Protection of the public rights of access to any area of land

28. A public right of way is affected by this application, crossing the western end of the release land. As such, the highway authority was required to be a joint signatory to the application, which was achieved by an update on 16 June 2015, signed on behalf of Worcestershire County Council. The exchange would not remove the public right of way and separate application(s) may be required to allow the works to take place.

29. The existing common is a generally open area, likely to be used by the public given its proximity to both Kempsey and Worcester, with easy and attractive access from either conurbation via the footpath alongside the river. Whilst walkers would still have legal access across the easement on the footpath itself, I consider that wider public access over the northern-most part of the common would be limited by the removal of the release land from the RCL, which would remove the right of access. I do not consider that the replacement land provides any enhancement in this respect, as it is also bisected by the easement strip, thereby limiting its viability for this use.

30. I note the stated intention to provide permissive access over the easement strip but I consider that, without a legal obligation in this respect, the public rights of access over the common are degraded and prejudiced.

The protection of archaeological remains and features of historic interest

31. No reference has been made to archaeological remains or features of historic interest that would be affected by the proposed exchange of land.

Conclusions

32. I consider that granting the application would be against the interests of those having rights in relation to the release land, the interests of the neighbourhood, as I cannot place weight on the potential wider benefits, and against the public interest with regard to rights of access. I am not satisfied that I can place weight on the intention to allow access across the release land following the works without a legal agreement in place.

33. Taking account of the exchange of land proposed, I am not satisfied that the replacement land confers sufficient public advantage to balance the permanent removal of a strip of land across the width of the common.

34. 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, therefore, that the application should be not granted and no Order of Exchange should be made.

Heidi Cruickshank

Inspector