

Application Decision

Site visit made on 17 November 2015

by Heidi Cruickshank BSc MSc MIPROW

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

Decision date: 5 January 2016

Application Ref: COM 690 Clee Liberty, Shropshire

Register Unit No. CL4

Registration Authority Shropshire Council

- The application, dated 20 March 2015, is made under Section 38 of the Commons Act 2006 for consent to construct works on common land.
- The application is made by Mr R French, represented by FBC Manby Bowdler LLP.
- The works comprise the improvement of an existing access track by laying of 2 tyre tracks, 0.5 metres wide and 150 millimetres deep, using permeable ground membrane and granite chippings.
- The proposed works will cover an area of approximately 932 square metres.

Decision

1. The application is refused.

Preliminary matters

Guidance

2. The application was made when the relevant Department for Environment, Food and Rural Affairs ("defra") guidance was the "*Common Land Consents Policy Guidance, July 2009*¹". However, on 16 November 2015, the day prior to my site visit, defra published the "*Common Land consents policy, November 2015*²" ("the policy").
3. As the Planning Inspectorate seeks to adhere to this policy in determining applications under section 38(1) of the Commons Act 2006 ("the 2006 Act"), I considered it fair to provide an opportunity for all parties to comment on any points arising from the updated policy. I provided appropriate opportunity for this, to ensure that no interested party was prejudiced by the timing of this updated policy.

Procedural matters

4. I carried out a site inspection of the relevant land accompanied by the applicants, representatives of the landowner, Clee St Margaret Parish Council ("the Parish Council") and two commoners, one of whom made an objection in the relevant period and whom I shall refer to as the objector.

The Land

5. Clee Liberty ("the common") is registered in the Register of Common Land under the Commons Registration Act 1965. The common lies to the east of

¹ Version 1.2

² Reference PB 14079

the village of Clee St Margaret and has an area of approximately 228 hectares, contiguous to other registered common land to the north-east.

6. The works relate to access to the property Thornwell, which is owned by the applicant and situated to the south of the common. I note the concerns of the objector to reference to the track as either 'new' or an 'upgrading' in relation to the application for planning permission³. I use the term 'track' to refer to the land over which the application before me is made. Planning permission has been granted for the "*upgrading of track to improve vehicular access to existing dwelling.*" It is understood that the permission is for the laying of granite chippings in twin wheel-tracks between points A and B⁴.
7. The track runs generally west – east along the southern boundary of the common. The western end, point A, links to an existing track which provides access over the common from the common gate⁵ at the top of Stoke Bank, the road running between Clee St Margaret and Stoke St Milborough. The application track passes the property The Sands and, in part, follows the line of a public footpath. The eastern end, point B, joins a public bridleway running generally north-west – south-east, continuing off the common to the south. This bridleway is promoted as part of the Jack Mytton Way.
8. The common is an upland area of varied habitat and is within the Shropshire Hills Area of Outstanding Natural Beauty ("AONB").

Main Issues

9. Section 38 of the 2006 Act provides that a person may apply for consent to carry out restricted works on land registered as common land. Restricted works are any that prevent or impede access to or over the land, including new solid surfaces, such as for an access road.
10. I am required by section 39 of the 2006 Act to have regard to the following in determining the 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; and
 - d. any other matter considered to be relevant.
11. Section 39(2) of the 2006 Act provides that the public interest includes the public interest in:
 - a. nature conservation;
 - b. the conservation of the landscape;
 - c. the protection of public rights of access to any area of land; and
 - d. the protection of archaeological remains and features of historic interest.

³ Application No. 15/00158/FUL, Shropshire Council

⁴ As identified in the maps submitted as part of the application

⁵ Referred to by the objector as Yeld Gate

Reasons

The interests of those occupying or having rights over the land

The landowners

12. The owners are the Parish Council and only allow vehicular access onto the common where required for access purposes. In such cases they support the laying of stone in twin wheel-tracks to prevent wide areas of mud, where drivers try to avoid ruts. They support this application.
13. There is nothing to indicate that the works would be either directly beneficial to the Parish Council or against their interests as landowners and so I consider the matter to be neutral.

Registered rights of common

14. There are 42 registered commoners with rights over the common, of which apparently only 4 have been active in the last 10 years. The registered rights include the grazing of sheep, cattle and horses, turbary, estovers and sporting rights. There seems to be some misunderstanding as to the extent of commoners' rights over public rights of way. Such routes usually differ from 'roads' in being unsurfaced and generally indistinguishable from the surrounding land. I am satisfied in this case that the right of common is likely to include rights over the track also crossed by the public right of way.
15. It is argued on one hand that the limiting of vehicles to a specific route will improve grazing areas, as it will negate the need for vehicles to find alternative routes to avoid rutting and mud. I note the support for this from the Hill Management Forum, which includes representatives from the Parish Council, the Commoners' Association and individual parishioners. In the alternative it is argued that grazing for commoners will be lost over the area laid with stone.
16. The loss of 932m² of grazing from an area of around 228 hectares would not appear to be significant. I agree that there will be some adverse effect upon those with rights of common, to whose interests the 2006 Act requires me to have particular regard, due to some loss of grazing land, although I consider that loss to be minimal.

Private rights

17. In relation to private rights I have been informed that the Parish Council has provided a licence for a right of access over the track and that there is an agreement for the grant of an easement. No documentation regarding the licence or agreement has been submitted and so I have no information as to the extent or duration of the rights granted, or expected to be granted. Nonetheless, I accept that the application is made to improve access to Thornwell and is likely to be beneficial to the owners of that property in terms of access across the common itself.

Conclusions

18. Overall the impact on the interests of those occupying or having rights over the common are balanced, with some negatives and some positives. I shall deal with the public rights, in relation to access, later in this decision.

The interests of the neighbourhood

19. The applicant referred to use of the track by 'a number of properties' and it does seem that the proposed works may be beneficial to the residents of The Sands and Upper Hill House, which the objector refers to as two properties, although I was unable to identify any others. No-one from other properties has indicated any interest in the proposal and it is not known whether or not they have rights over this particular track. Therefore, I cannot give this weight as supportive of the application.

The public interest

Public Access

20. The public have access rights across the common as a whole under the Countryside and Rights of Way Act 2000 ("the 2000 Act"). As noted, part of the track is recorded as public footpath and it joins a promoted bridleway at point B. It is not unusual for rights of way to cross land concurrently with private access and, generally, the terrain should ensure that motorists could see non-vehicular users and allow for their safe passage. The downside is the possibility that the improvements would allow increased speed and volume of traffic in a very rural area.
21. Despite these concerns, having walked the existing access track to which the proposed track joins at point A, I am satisfied that improvements to the surface of the part of the public footpath would be beneficial to path users' convenience and enjoyment. It was easier, where there was also vehicular access, to walk on the existing track, rather than the common land generally, in the wet and muddy conditions found at the time of my site visit.
22. I am satisfied that the proposed works would not have a negative impact on the general public access on foot under the 2000 Act, across the common as a whole, other than in respect of the matters of potential increased volume and speed of vehicles on this section of the common.

Nature Conservation

23. The use of granite, rather than limestone, was shown by the condition set out in the planning permission to relate to maintaining the ecological value of the Local Wildlife Site. This arose from Shropshire Wildlife Trust, who questioned the use of the initially proposed limestone hard-core in this area of acid grassland and heathland. I am satisfied that these nature conservation interests have been addressed.

Landscape

24. In relation to visual impact I took the opportunity to view the site from the high point of Nordy Bank⁶, to the north of the track. Due to constraints of weather, and hence visibility, this was undertaken unaccompanied, just prior to the accompanied visit. The existing track from Yeld Gate is visible from this, and surrounding, land and I consider that the proposed track will also be visible from the junction at point A before it runs onto the generally concealed area along the southern boundary of the common. It may also be

⁶ An iron age hill fort

visible as it approaches point B, although the terrain could provide screening. It will, of course, be visible when close to, or using, it.

25. I consider that the construction of a physical track would introduce an element of urbanisation onto the common, which is essentially an open and natural setting, situated within an AONB. Although I accept that the siting of the track mitigates the extent of the impact, I consider that the application is not in the interests of the public with regard to the landscape.

Protection of archaeological remains and features of historic interest

26. There is no indication that any such features are directly affected by the proposed works. Nonetheless, I note that the location will have an urbanising effect upon the landscape visible from Nordy Bank, which I consider to be a negative impact on the public interest.

Conclusions

27. The policy objectives seek to safeguard commons for current and future generations to use and enjoy; ensure that the special qualities of common land are properly protected; and, improve the contribution of common land to enhancing biodiversity and conserving wildlife. I am satisfied that the proposed works may have a positive impact in assisting public access where that are shared vehicular rights. There is no indication of a negative effect on nature conservation. However, taking account of the negative visual impact, I consider that, overall, the public interest is adversely affected by the proposal.

Other matters considered to be relevant

28. The application relates to access over the common to Thornwell, however, the property is not sited on, or directly adjacent to, the common. As referred to by the objector access to the property also requires use of land to the south, over which I noted there had been some vehicular use, partly coincident with the bridleway. This had resulted in the formation of ruts, suggesting such use would not be sustainable in the long-term without works here also. I have not been informed of any application for works on this land, which would allow continued access from the common to Thornwell.
29. As a result, I am not satisfied that it has been shown that the proposed works on the common would achieve the aim of easier access to Thornwell for residents, visitors or emergency services. At most, it would provide access to the field gate at point B, which I recognise to be the limit of the area over which I have jurisdiction in this decision. Whilst this may be a 'closer proximity', there is no information before me that either legal or physical access would be possible beyond that point. Neither is there any provision for vehicles to turn around at point B, meaning that they may need to reverse back along the track, with potential safety implications.
30. It was indicated in objection that historically access to Thornwell had not been over this track but from Thorn Lane to the south, via either Bockleton Court, which lies to the south-west of the property, or alternatively over the track to the south, which now forms part of the bridleway, the Jack Mytton Way, also known as New Road.

31. As set out by paragraph 4.3 of the policy, "*The Secretary of State will wish to know what alternatives have been considered to the application proposal...If these options were considered and rejected, the Secretary of State may seek an explanation.*". For the applicant it was argued that the track was the only practical means of achieving access to the property, with no suitable alternative available, as those suggested were over private land with no right of access. However, there was no information as to whether any attempts had been made to agree such rights or licence in any other location, as oppose to over this common, which is also privately owned land. If such alternatives were possible this may allow access from the south, avoiding any detriment to the common, with no impact on grazing or recreation and without the additional visual intrusion and urbanisation.
32. I consider that the proposed works have not been demonstrated to be the only practical means of access to Thornwell. I am not satisfied that consenting to the application in relation to the common land, which will have negative impacts upon that land and the public interest, will achieve the stated aims of the application in any event, due to the apparent need to use other privately owned land to the south of point B.

Other matters

33. Concerns regarding the right and power of the Parish Council to grant private access rights over the common are not a matter before me.
34. The concern that there may not have been appropriate consultation with respect to the planning permission is a separate matter for the planning authority. I agree with the applicant that in the absence of any challenge by way of Judicial Review the permission appears to be valid.
35. Whether or not the property is to be sold, and the potential financial implications of this, are not relevant matters.
36. The Parish within which the property is situated is not relevant to the matter of where access should be sought.
37. I have not given weight to these matters in relation to my decision.

Conclusions

38. The proposed track would result in some loss of land for grazing. I consider that the addition of another track would further urbanise the common and have a negative visual impact. The negative impacts upon the interests of the commoners and the public could potentially be avoided by the applicant seeking alternative access to the property. Granting of the application does not appear to result in the access sought to Thornwell in any event.
39. For these reasons, I consider that it is not expedient to give consent to the proposed works. Accordingly, in exercise of the powers conferred by section 39 of the 2006 Act, and of all other enabling powers, consent is not given to this application.

Heidi Cruickshank

Inspector