

Application Decision

Site Visit held on 24 September 2019

by Helen Slade MA FIPROW

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

Decision date: 26/11/2019

Application Ref: COM/3221451

Durdham Down, Bristol

Register Unit No: CL5

Commons Registration Authority: Bristol City Council

- The application, received on 18 January 2019, 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 Jonathon Baker, on behalf of The Downs Committee, c/o Democratic Services, City Hall, Bristol, BS1 5TR.
 - The works comprise:
 - The demolition of existing public conveniences;
 - The erection of a building to comprise café, public conveniences and education booth with hard surfacing provision for outside seating;
 - Temporary fencing enclosing a construction area of 687 square metres;
 - The total area of the permanent building and surfacing to be 205 square metres.
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Decision

1. Consent is refused.

Preliminary Matters

2. Following advertisement of the proposal, 42 objections were made. Representations were received from The Open Spaces Society and Historic England offering no objections, and eight parties submitted comments in support of the proposal. The local MP, Darren Jones, also submitted comments following feedback from his constituents. I have taken all these comments into account.
3. I carried out an unaccompanied site visit on 24 September 2019. The weather on the day was overcast and it was drizzling intermittently. I nevertheless walked extensively around the area of Durdham Down to familiarise myself with the general area and the locations mentioned in the correspondence.
4. This application has been determined on the basis of the written evidence, the comments submitted by the parties and my own observation of the site. I have also taken into account the provisions of The Clifton and Durdham Downs (Bristol) Act 1861 ('the 1861 Act') and the Clifton and Durdham Downs Bylaws (effective 11 April 2003) ('the Bylaws'). The applicants submitted a copy of a Management Plan for the area for 2019 to 2023 and a document entitled The Gorge and Downs 5 Year Work Plan (which appears to cover the same period) but have since indicated that this is a draft update of the previous five-year Management Plan (2012-2017). I have therefore worked to the earlier

document ('the 2012-17 Management Plan') and its Five Year Work Plan,¹ as the draft document has not yet been ratified and brought into force.

Description of the site

5. The application site lies in the south-west corner of an area of land registered on the Commons Register ('CR') as Durdham Down. Both the CR and the application indicate that the common is owned by The City Council of Bristol, as provided for by the 1861 Act; but it is managed by a joint committee known as the Downs Committee, also provided for by the same Act. The total area of the common is 212 acres (or 85.793 hectares).
6. The site of the application itself is currently occupied by a dilapidated stone-faced building which serves as a public toilet block. The current building footprint is 49 square metres and there is a surfaced path leading to it from the adjacent highway (Seawalls).
7. I have not been made aware of any relevant protective environmental or landscape designations affecting Durdham Down itself, but the site lies adjacent to the Avon Gorge Site of Special Scientific Interest ('SSSI'). It is its proximity to the Gorge which gives this part of the Downs its popularity with locals and visitors as it affords a spectacular view of the Clifton Suspension Bridge and the Gorge in general. There is provision for road-side parking at this location, and an extensive paved view-point area alongside the highway.
8. The application does not give details of any rights of common or whether they are exercised. However, the CR indicates that there are several commoners with rights to graze significant numbers of sheep between them. The applicant has since clarified that these rights are apparently exercised only infrequently, and symbolically, at five yearly intervals.

The Application

9. The application is twofold. Primarily it is for the demolition of the existing toilet block and its replacement together with a café and an education booth. The development would encompass the present footprint and extend it to include a decking area on which movable outside seating would be placed. The overall development site of 205 square metres would extend to include the site of an existing stone built drinking fountain, which is a listed structure. The building footprint itself would cover an area of 76 square metres within the overall site.
10. The secondary application is for the temporary fencing associated with an area to be enclosed during the construction period. This area amounts to 687 square metres and runs from the build site to the adjacent highway at Seawalls. The fencing would consist of safety Heras-type fencing and the applicant anticipates that this would be in place for 24 weeks or so.
11. Planning permission was granted by Bristol City Council on 14 March 2019,² and is accompanied by a number of conditions designed to ensure the protection of the natural environment and the interests of the local residents. The conditions include pre-commencement conditions relating to the construction phase.

¹ Provided at my request

² Planning Reference No. 18/04727/F

Main Issues

12. 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;³ and
 - d. any other matter considered to be relevant.
13. Section 39(3) provides that consent may be given under Section 38(1) in relation to all or part of the proposed works, and subject to such modifications and conditions relating to the proposed works as are thought to be fit.
14. In determining this application, I have had regard to the latest edition of Defra's Common Land Consents Policy⁴ ('the 2015 Policy') 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.

Reasons

The interests of those occupying or having rights over the land

15. The Durdham Downs Commoners were consulted as required and no objections have been made by any party benefitting from rights of common on, over or across the land. I consider that the proposed development would have a negligible effect on the grazing rights, given the large area of the common and the fact that the rights are not generally exercised.

The interests of the neighbourhood

16. The 2015 Policy indicates that issues to be considered in this context include whether or not the proposal will offer a positive benefit to the neighbourhood, whether or not the works would result in the loss of existing use, and whether or not there would be an interference with the future use and enjoyment of the common, whether by commoners, the public or others.

Whether or not there will be a positive benefit to the neighbourhood

17. The current facilities on the site are open 24 hours a day and are subject to mis-use and vandalism. During my site visit I was able to see the results of this, and the measures currently taken to try to mitigate them (for example, the provision of waste facilities for sharps). There appears to be no dispute amongst the parties that the area is subject to antisocial behaviour of one sort or another, particularly during hours of darkness.
18. Nevertheless, there is also general agreement from the correspondents that the provision of toilets at this location is very necessary. Even on a rather dull and

³Section 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.

⁴ Common Land Consents Policy (Defra November 2015)

overcast day, such as the day on which I conducted my site visit, I was aware that there was a significant amount of normal use of the toilet facilities and, given the size of the common and the location of the site, this is not surprising. Local people were using the common for recreational running, dog walking and general walking during my visit, and cyclists and vehicles were using the adjacent highway, some of them stopping to rest on the seats provided. Given the weather and the time of year there were few people who might be described as tourists, but it is not hard to imagine the area busy with people admiring the view and generally relaxing on the common in better weather and at weekends and holiday time. Furthermore, I note the existence of an extensive area of football pitches on the opposite side of the road from the application site, which suggests a high level of use of the area at certain times of the week even during the winter months.

19. The applicant asserts that providing a café to encompass the replacement toilet would improve the problems of mis-use of the area by ensuring that it is properly managed and supervised. It is intended that the facility would be staffed from 8.00 in the morning until 19.00 in the evening Monday to Saturday, and from 10.00 to 16.00 on Sundays and Bank Holidays. The staff would keep the area litter free and ensure that the toilet block is clean. The toilets would remain available for 24 hours a day, but unobtrusive infra-red CCTV would be installed to monitor the area at night. It is intended that the venture should be self-funding and also contribute to the costs incurred in the general management of the common, in the face of government funding cuts which have resulted in lower contributions from the local authority for that purpose.
20. The objectors consider that the presence of the café would result in noise nuisance and additional litter. There are also concerns about additional vehicular movements and parking problems, and the possible loss in trade for other cafés in the vicinity. Reference is made to the proximity of the nearest café, on which there are differing views as to how far away it is. I walked to the nearest one that was at hand (on Stoke Road adjacent to the Water tower and pavilion) and I am satisfied that the distances given by the applicant are accurate (1.15km as the crow flies or 1.4 km walking via the paths). I am not aware of any objection having been raised by the proprietor of that establishment.
21. Complaints have been made by a number of the objectors that the establishment of a commercial business contravenes the terms of The 1861 Act. I can find no specific provision in the said Act which prohibits the operation of a commercial enterprise. The 1861 Act does provide for Bylaws to be made, and Paragraph 6 of the current Bylaws states that '*No person shall on the Downs, without the consent of the Downs Committee, sell or offer or expose for sale, or let to hire, or offer or expose for letting to hire, any commodity or article.*' The applicant has stated that the proposed facility is to be run as a social enterprise, with any profit being returned to the management of the Downs. Nevertheless, the Bylaws appear to provide specifically for the running of a commercial premises or business, with the consent of the Downs Committee. As the Downs Committee is the applicant in this case, I cannot see that the proposal is in any way contrary to the Bylaws or the 1861 Act.

22. The Five Year Work Plan indicates that an investigation into the technical and financial options to provide a secondary visitor point at Seawalls with a café and toilet was to be undertaken.⁵ The cost of construction was estimated at the time the plan was drawn up (2012) to be £500,000. I have not been provided with any results from a study (if indeed one has been done) to support the claims of the applicant as to the need for the café, likely footfall or the funding projections.
23. I have no doubt that if a café is opened it would receive custom, but in the absence of any information or feasibility study it is not possible to ascertain whether or not it would be likely to attract additional people to the area, although I agree with the objectors that it would be likely to do so. On the other hand neither should it be assumed that more people would necessarily be detrimental to this corner of the Downs. The application for planning permission, and the application for the consent I am considering, have provided opportunities for comment and, despite the numerous objections, there has also been a degree of support for the provision of a café and new toilets.
24. I accept that the introduction of more people to the area at certain times might increase the noise nuisance, and the lack of detail provided about the nature of the educational facility means that it is difficult for me to ascertain the likely impact of that particular aspect of the proposal. The 2012-2017 Management Plan indicates that there is already considerable use of The Downs as a whole for educational purposes, and the proposed provision of a 'booth' suggests a space for educational display panels rather than a classroom space. Nevertheless, the introduction of a formal educational space might invite larger groups to be present for periods of time during the day, which might introduce noise as a result. This would be during daylight hours, most probably during the working week, and not at night and might therefore be less intrusive to the surrounding residents than implied in the objections. Nevertheless, no details have been supplied to assist in understanding the function of this aspect of the proposal.
25. The introduction to the 2012-2017 Management Plan sets out the Themes and Visions of that plan, which include ensuring that anti-social behaviour is controlled, and its impact reduced. I consider that the proposal from the applicant is a considered attempt to mitigate the problems of this nature experienced in the area. Other aims relate to providing the maximum opportunities for education and enjoyment of The Downs, and to ensure that they are well managed and well resourced. Whilst these aims are laudable, and I consider that the proposal accords with these intentions, I find the lack of detail provided by the applicant makes it impossible to determine whether or not there would be a positive or a negative impact on the neighbourhood. There also remains an issue as to what would happen to the building if it were found not to be viable as a café.
26. No evidence has been submitted to support the claim that the income generated will be sufficient to finance an operation requiring staff on hand for up to 11 hours a day on most days of the week and the monitoring of a CCTV system. The benefits to the area and the common claimed by the applicants rely on the success of the proposal in these respects. I am therefore unable to

⁵ Number 7.1.8 and 7.1.9

conclude that, on the evidence provided, it can be demonstrated that the proposal would provide positive benefits to the neighbourhood, either in terms of the common itself or the local community.

Loss of existing use or interference with future use and enjoyment of the common

27. There is no evidence that any of the rights holders exercise their rights over the particular area of the common affected by the application except symbolically on rare occasions. The proposal would consequently not interfere with any existing use. It might reduce very slightly the area available for possible grazing in the future, but it would not diminish the overall area of the registered common. The loss of any potential grazing would be insignificant in this context, even during the construction period when a larger area would be fenced off for health and safety reasons.
28. The works applied for would impede access by the public insofar as the present site is occupied by a smaller building. The proposed building would be open to the public during operational hours and the public conveniences would be available at all times; thus the public would still have access to some of the site occupied by the proposed building at all times, and for the rest of the building for a large part of each day.
29. However, if the café proved not to be viable and was consequently not maintained properly or adequately managed, it might adversely affect the enjoyment of that particular part of the common by perpetuating and possibly exacerbating the problem that exists at the moment; it might become a focus of undesirable activity.
30. The temporary fencing would interfere with public access during the construction period but this is estimated to be approximately 24 weeks. Even if that period were to over-run, it would not result in any permanent interference.
31. In summary, the proposal would result in minimal or insignificant loss of potential grazing, and insignificant interference with public access. There might be an impact on the immediate neighbours due to the introduction of a formal café, but in the light of other activities which already take place in the area (including formalised sport such as football matches) I consider that the impact would be no greater than at present, and might in fact be better controlled if the facility remained viable.
32. However, this assessment relies on the assumption that the funding stream would match the claims of the applicant. In the absence of any figures on which to base such an assessment, I have to conclude that there is a risk that the enterprise would not produce the income needed to ensure the sustainability of the business, and that the future use and enjoyment of this part of the common could be adversely affected, in those circumstances.

The public interest

Nature conservation

33. There are no benefits to nature conservation from this proposal. The building is intended to have a 'green' roof, but there is no suggestion that this would enhance nature conservation. It would merely mitigate the introduction of a hard surface feature, and perhaps help to blend the building into the surrounding area.

34. The proposed works would reduce very slightly the area of grassland on the common, but the affected area is already subject to management for amenity purposes and not for the purposes of nature conservation.
35. Comments have been made in relation to the proximity of the site to the Avon Gorge Site of Special Scientific Interest but Natural England have made no adverse comments. I note that the planning permission includes a number of conditions designed to ensure that nature conservation issues are adequately protected. The applicant would need to discharge these conditions to ensure compliance with the planning permission.
36. I consider that there would be no adverse implications in respect of nature conservation in respect of this application.

Conservation of the landscape

37. A number of issues were raised in connection with the effect on the surrounding landscape, both in terms of the views out or across the site, and the setting of nearby buildings. Many feel that the café would be more visible and intrusive in the landscape than the current building, and that it would be out of keeping with the surroundings.
38. I accept that the present building, despite its dilapidated state, is reasonably unobtrusive, and the proposed building, although being constructed largely in glass, would be more obvious because of its larger footprint. Clearly the outside seating would have a greater impact than just the building itself; and when the café is being used, it will certainly be more obvious than the current structure. It will be possible to see people inside and outside, and the view through the structure will be impeded. At night, low level lighting will be required for security purposes, and although I note the planning condition requiring compliance with guidance on Obtrusive Light Limitations for Exterior Lighting Installations for Environmental Zone – E2, I have not been provided with the details of that guidance and nor have I been provided with any indication that the condition has yet been discharged. Nevertheless, there is currently no lighting in the vicinity, apart from that emanating from nearby properties, so any new lighting source would be more noticeable.
39. However, the current toilet block is not invisible, and neither is it attractive. The proposed building is of a lighter and more airy construction, and presumably the intention would be to ensure that it was well-maintained. The inclusion of the listed fountain in the proposals would also draw attention to that feature and enhance its appearance. However in the absence of any financial information it is unclear to me how the maintenance is to be funded and sustained.
40. Concerns have been expressed about the proximity of the structure to the adjacent listed property, Towerhirst. The present toilet block does nothing to enhance the setting of that property, and I consider that the proposed building might be an improvement in terms of appearance, although I do accept its operation as a café might result in noise disturbance to the residents at times.
41. It cannot be denied that the proposed development would alter the ambience and the appearance of this corner of the common by introducing an artificial source of light, and a building which would more noticeable than the one that currently exists. Given the quietness of this area at present, I can only

conclude that the proposed building would be an intrusion into the landscape that is likely to be viewed as a negative impact by those who currently enjoy it for that reason. I agree with the views expressed that there are other facilities within easy reach which would provide refreshments if required, and which would avoid any detrimental impact on the landscape of the common in this location.

Public Access

42. Public access to the application site would not be prevented by the proposed works except at certain times of the day and, temporarily, during the construction period.

Archaeological remains and features of historic interest

43. No archaeological features have been brought to my attention, and Historic England had no comments to make.

Overall Assessment

44. The 2006 Act, together with earlier legislation, enables government to safeguard commons for current and future generations to use and enjoy; to ensure that the special qualities of common land, including its open and unenclosed nature are properly protected; and to improve the contribution of common land to enhancing biodiversity and conserving wildlife. The consent process, in respect of applications under Section 38 of the 2006 Act, seeks to ensure that any use of common land is consistent with its registered status, and that works take place on common land only when 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.
45. The application in this case would not appear to be maintaining or improving the condition of the common, although it is claimed that it would contribute financially to that end. However, the lack of any empirical data is a serious impediment to properly evaluating that potential benefit. The impact of the structure would be lasting and, if not maintained properly, might result in a situation similar to the one that exists at present: a dilapidated structure which is not attractive and may be the target for vandals.
46. Whilst the proposal, if a success, would be unlikely to have any significant adverse effect on some of the public interest aspects of the criteria or on the rights of the commoners, it would not contribute to the conservation of the landscape. I consider that the alleged benefits to the neighbourhood have not been sufficiently supported by credible evidence.

Other matters

47. A number of the objections relate to the alleged conflict of the proposal with local planning policies, and the perceived difficulties that would arise due to additional vehicular traffic; particularly parking problems both at the site itself and in surrounding residential streets.
48. These matters are issues which would have been considered by the Local Planning Authority ('LPA') when determining the planning application. I must apply the relevant criteria to this application for consent, as set out above.

There is no clear evidence that the proposed building would attract large numbers of extra vehicles but, if problems arose, the local authority and the Police have powers to deal with unauthorised or illegal parking. The LPA will have considered the matter against its own policies and the conditions applied are a recognition of the need for the proposal to be carried out in accordance with those policies.

49. Nevertheless, I must apply the policies relating to the legislation under which I am considering the matter, and my decision has been made on that basis.

Conclusion

50. Having regard to the criteria set out in paragraphs 12 to 14 above, and all the written representations, I conclude that consent for the works applied for should not be granted because of the potential harm to the local neighbourhood and the landscape, and because the alleged benefits have not been adequately demonstrated.

Helen Slade

Inspector