



Application Decision

Site visit held on 1 May 2018

by **Sue M Arnott FIPROW**

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

Decision date: 27 June 2018

Application Ref: COM/3190392

Leigh Common, Wimborne Minster, Dorset

Register Unit No.: CL 1

Registration Authority: Dorset County Council

- The application, dated 1 December 2017, is made under Section 38 of the Commons Act 2006 for consent to carry out restricted works on common land.
- The application is made on behalf of Lewis Wyatt (Construction) Ltd.
- The works comprise the construction of a new vehicular access to proposed housing, education and other development on land to the south of Leigh Road, Wimborne.

Summary of Decision: The application is granted.

Preliminary matters

1. I visited the land referred to in the application on Tuesday 1 May 2018 accompanied by Ms L Southwood and Mr D Wyatt (representing the applicants, Lewis Wyatt (Construction) Ltd) and Ms N Harper of Natural England (NE).
2. For the purposes of identification only, the location of the works is shown outlined in red on the attached plan.

Main Issues

3. In general terms Section 38 of the Commons Act 2006 (the 2006 Act) prohibits the carrying out of certain restricted works on common land without the appropriate consent. Restricted works are defined as including the re-surfacing of land which may consist of "*the laying of concrete, tarmacadam, coated roadstone or similar material on the land*".
4. In determining this application for such works made under Section 38, Section 39 of the 2006 Act requires that I have regard to the following:
 - (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;¹ and
 - (d) any other matter considered to be relevant.

¹ 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.

5. I must also have regard to Defra's Common Land Consents Policy² which has been published for the guidance of both the Planning Inspectorate and for applicants. However, every application is considered on its merits and a determination will depart from the policy only if it appears appropriate to do so. In such cases, the decision should explain why it has departed from the policy.

The application

6. This application is made on behalf of Lewis Wyatt (Construction) Ltd. It proposes the widening of the existing carriageway of the B3073 Leigh Road within the highway verge (which is registered common land) so as to create a new signal controlled road junction into a development site immediately to the south of the common, also incorporating a new pedestrian footway on the east side of this junction leading to a new pedestrian crossing.
7. A public notice was published in the Bournemouth Daily Echo on 1 December 2017 and on the site giving brief details of the proposal. The application was publicly displayed at the Allendale Community Centre for the statutory 28 day period. Consultation letters were sent to interested parties as required, including various departments of Dorset County Council, Colehill Parish Council, Natural England, Historic England and the Open Spaces Society.

Representations and objections

8. Four responses were submitted in response to notice of the application.
9. Colehill Parish Council confirmed it had no comment to make on the proposal.
10. Dorset County Council (Highways) indicated that it was not in a position to comment on the proposal since it was in receipt of two applications under Section 19(2)(a) of the 2006 Act seeking the de-registration of the land in question on the grounds that it is recorded as part of the highway. The Council further indicated that, in the absence of these two applications, it may well have objected to the effective loss of common land proposed by the (Section 38) application but it gave no reasons. Without an explanation, I am unable to give any weight to this comment. Neither can I anticipate the outcome of the applications for de-registration since these are not before me and can have no bearing on my determination of the Section 38 application.
11. Both Natural England (NE) and the Open Spaces Society (OSS) have registered objections to the proposal on similar grounds. Each points to aspects of the Secretary of State's Common Land Consents Policy which indicates 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 (released) as common land with a corresponding area being designated as common as a replacement.
12. This is under-pinned by the clear Defra policy statement that the process should aim to achieve the following outcomes:
 - *Our stock of common land and greens is not diminished (so that any deregistration of registered land is balanced by the registration of other land of at least equal benefit)*

² Published November 2015

- *Works take place on common land only when they maintain or improve the condition of the common or, exceptionally, where they confer some wider public benefit and are either temporary in duration or have no lasting impact;*
 - *Any use of the common or green is consistent with its status as common land or village green.*
13. Both organisations argue that in this case, given the scale and nature of the proposed development adjacent to the common, it would be feasible for replacement land to be designated in exchange.
14. In addition, NE submits that although the public would still have access to the land if altered to a road junction, it would not be available for the traditional use of the common for air and exercise and there would be no benefit to users of the common; neither will there be any benefit to the biodiversity of the common. Instead, 2224m² of the common will be lost in perpetuity with a resultant loss of natural habitat. Further, the natural and pleasant backdrop to Leigh Road provided by this piece of common would be lost.
15. The OSS accepts that works are necessary to provide and improve access from the development site. However it notes that the planning application contains provision for setting aside amenity land and open space within the development but none of this will be assured by the long-term protection that applies to common land.
16. It highlights paragraph 5.15 of the Consents Policy: the Secretary of State's *"expectation is that applications for such infrastructure projects on common land are more likely to be successful under Section 16(1), so that an exchange of land is proposed and can be considered on its merits. An application for consent to such works under Section 38(1) will rarely be granted unless there are convincing reasons why an application under Section 16(1) cannot or ought not to be pursued."*
17. Further OSS does not accept that any part of the common on the south side of Leigh Road is highway land; it says there is insufficient evidence to support this assertion. The proposal will adversely affect the public rights of access to the common on foot and on horseback for quiet recreation, losses which could, to some extent, be compensated by the provision of replacement land.
18. In determining this application, I have taken full account of the information submitted on behalf of the applicant, by the objectors and by all other interested parties in the written representations.

The application site

19. The total area of land registered as CL 1 (Leigh Common) extends to some 9.1 hectares (22.512 acres). It is located primarily on the north side of Leigh Road where it consists mostly of woodland (designated as a Local Nature Reserve), bounded to the north by housing and a dismantled railway, to the west by housing, and to the east by the Bytheway Field, an area of public open space with car parking facilities and a children's playground. The common on the south side of Leigh Road effectively consists of the highway verge, wider in some places and narrower in others where it is crossed by numerous individual driveways affording access across the common to private dwellings. At the

- south eastern corner of the main common area, and to the south of Bytheway Field, CL1 extends eastwards as a finger of land on either side of the B3073 carriageway for the most part but then solely on the southern side at its easternmost end. A pedestrian footway, separated from the carriageway by a strip of grass, extends along the full length of highway through the common on the north side but not on the south.
20. A scheme of management under the Commons Act 1899 Act is in operation, giving the local authority powers to manage, conserve and protect the common from encroachments. Notices at gates into the main (fenced) area of Leigh Common confirm that the site is managed on behalf of the Hanham Estate by East Dorset Countryside Management Services.
21. The proposed works which are the subject of this application lie opposite BytheWay Field where the common exists on both sides of the highway. In advance of my inspection, the proposed limits of the extended carriageway had been marked on the ground so that it was easy to establish the extent of the intended change.
22. Immediately to the east, where the common lies only on the south side of the road, an application was made to the Secretary of State on 7 February 2017 by a different developer for similar works associated with development of adjacent land to the south. Consent under Section 38 of the 2006 Act was granted on 20 September 2017³. On the date of my visit to the site, none of the authorised works had commenced on the common.

Reasons

Relevant considerations: Policy

23. Although "any other matter considered to be relevant" is listed last in my paragraph 4 above, these being the matters to which I must have regard in determining this application, I intend to address this first. Under this heading I propose to examine the policy issues referred to in two of the objections.
24. The Defra Common Land Consents Policy states (at paragraph 5.7) that *"commons should be maintained or improved as a result of the works being proposed on them. The Secretary of State sees Section 38 as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character. In other words, consent under Section 38 should be seen as a gateway, which enables the construction of works which are sympathetic to the continuing use and enjoyment of common land, but which reinforces controls on development which are inappropriate or harmful."*
25. Paragraph 5.19 continues: *"... this policy note explains the Secretary of State's policy in relation to consents generally. It should not be assumed that, where this policy indicates that a consent might be appropriate in the circumstances specified, an application in those circumstances will necessarily be granted. Such applications will be considered on their merits in relation to the context, this policy, and the criteria set out in the relevant legislation."*

³ Application Decision COM/3169414

26. Publicly available guidance issued by the Planning Inspectorate⁴ advises on the type of works likely to be covered by Section 38 consent, distinguishing between:
- C.** *Works (...) which are for the management, improvement or protection (or to the negligible detriment) of the common or are otherwise consistent with the traditional uses of the common (e.g. grazing, public recreation), for which a Section 38 application may be needed; and*
- D.** *Works that are not consistent with the traditional use of the common, or for its management, improvement or protection, for which a deregistration and exchange application under Section 16 of the 2006 Act may be more appropriate.*
27. Whilst this may indeed be considered 'guidance' as opposed to 'policy', the Defra Common Land Consents Policy makes clear, in paragraph 5.15 (dealing with infrastructure projects), that "*an application for consent to such works under Section 38(1) will rarely be granted unless there are convincing reasons why an application under Section 16(1) cannot or ought not to be pursued.*" Similarly, in 5.16 (improvements to public services), "*the expectation is that applications for such purposes on common land are more likely to be successful under Section 16(1), so that an exchange of land is proposed and can be considered on its merits*".
28. It seems to me that both the Defra Common Land Consents Policy and the additional guidance notes referred to imply that a proposal of the type in the application before me should be dealt with by the Section 16 deregistration and exchange route.
29. Given the stated policy of the Secretary of State, a clear explanation is required as to why an application under Section 16 "*cannot or ought not to be pursued*".
30. In response, the applicants' agent explained that an application under Section 16(1) would have to have been made by the County Council as the land in question forms part of the highway. He reports that "the County Council was not minded to participate in this exercise and has not even had a Senior Definitive Map Officer (including responsibilities for Common Land) in its office for months ... A complete impasse would have been reached if the S16(1) route had been sought to be followed." He points out that the site needs to come forward as part of the adopted development plan and that the local planning authority wishes to see this strategic housing and school site progressed, being reliant upon it for its 5-year housing land supply.
31. The agent submits that "This is a most unusual case; there is no absolute need for an exchange of land for this highway verge 'non-functional fragment' of the separate, more distant, purposeful and continued intact principal body of the Common. No meaningful benefit would arise even if an exchange using S16(1) had been a practical proposition. Furthermore one must not lose sight of the significant area of open land and enhanced habitat which will be forthcoming as an integral part of the planning proposal."

⁴ Common Land Guidance Sheet 1a

32. He also points out that the application “quite reasonably takes its cue from the Inspector’s decision COM 3169414 dated 8 August 2017. Indeed the applicant held back on its submission pending this decision as a means of double-checking and to have complete comfort on the application approach to be followed.”
33. As I noted at paragraph 24 above, Section 38 is intended to protect common land, rather than enabling it to be used “*for purposes inconsistent with its origin, status and character*”. The construction of a signal controlled road junction is in no way consistent with the traditional use of Leigh Common as a whole (although not wholly inconsistent with its status as highway verge); neither is it necessary for its management, improvement or protection.
34. The works would not maintain or improve the condition of the common; they are clearly *not* temporary in nature and nor would they have no lasting impact, even if the adjoining major development is judged to confer some wider public benefit. Although there would be no loss of registered common land, the granting of consent under Section 38 as requested would result in a reduced area having the character of common land with no replacement⁵.
35. In short, there are (arguably) clear policy reasons to reject an application for this proposal under the Section 38 procedure.
36. However, it has to be acknowledged that the Secretary of State has recently granted Section 38 consent to an almost identical proposal for an adjoining development site. Further, a lack of resources within the commons registration authority should not provide justification for a loss of valuable common land but the explanation offered by the applicants’ agent suggests this application is a pragmatic solution to a very real problem facing development of land within a challenging timeframe. Not least, the legislation itself does not preclude the granting of consent for the works proposed here under the provisions of Section 38.
37. As I noted in paragraph 5 above, every application is considered on its individual merits and a determination may depart from the policy if it is appropriate to do so. Although in other circumstances the policy arguments for rejecting this application may hold firm, in this case I consider the factors listed in the previous paragraph must lean in favour of a departure from the published policy.

The interests of those occupying, or having rights in relation to, the common

38. The owners of the land have been notified of the proposal and have not objected (although no proof is provided of their express agreement)⁶.
39. To the best of the applicant’s knowledge and belief, there are no registered common rights exercised over this part of the common.
40. Although the Common Land Register records grazing rights for up to 55 cows attached to two local properties, it seems unlikely that animals could ever be

⁵ The proposed development will include public open space but this will not enjoy statutory protection

⁶ Whilst it has been suggested that the highway authority owns the relevant part of the common, the application form lists two other parties as owners.

safely kept on the land in question, given its nature as unenclosed highway verge and its proximity to busy traffic on the B3073. It is reported that the opposite verge on the north side (which is wider) is occasionally mown for hay but this does not occur on the southern verge.

41. Whilst, in theory, the installation of a major road junction at this point would significantly affect the ability of graziers to run their cattle on this part of the common, the practicalities of doing so at present render this notional disadvantage somewhat academic.
42. There have been no objections submitted from either of the registered graziers. No adverse effects of the proposal on the holders of rights to graze cattle have been highlighted and I conclude that the proposal would have no substantive adverse effect in terms of the overall availability of common land capable of being grazed.

The interests of the neighbourhood

43. There is no definition within the 2006 Act of the term 'neighbourhood'. In a situation such as this, the common is likely to be used mostly by residents of the surrounding settlements of Wimborne Minster, Colehill and Leigh. Yet this covers quite an extensive area to the extent that it is difficult to differentiate between the interests of local people from 'the neighbourhood' and the public living in the locality.
44. I note that Colehill Parish Council has not objected to the proposal. It is not clear whether East Dorset District Council was consulted directly on the present proposal but the applicant points to its granting of planning permission for the proposed new highway junction (reference 3/14/1097/FUL). The District Council's Planning Committee Report noted that "This proposed junction is the planned means by which the New Neighbourhood and Sports Village on land south of Leigh Road is intended to be served to accord with the adopted Christchurch and East Dorset Local Plan Part 1 – Core Strategy" (Policy WMC8). The highway authority, Dorset County Council, supported the application. Permission was granted on 26 May 2015.
45. The applicant submits that the principle aspect of the proposal affecting the neighbourhood would be the visual effect of the replacement of a limited area of grass with a paved surface but that this would be outweighed by the benefits accruing from the proposal. These include enabling the delivery of a strategic site from within an adopted development plan that has been through public scrutiny and examination by an Inspector.
46. I shall address the issues surrounding access to and within the common in more detail below when examining the public interest since such considerations will, here, be similar to those experienced by people from the neighbourhood. Likewise, the effect of the works in visual terms falls to be considered under 'Landscape conservation' matters.
47. However, in general terms any negative effects on the neighbourhood will have been taken into account when the planning application was determined. No other specific issues have been raised in connection with this application.

48. In conclusion, it seems to me that the benefits that will be derived by local people (and those living within the neighbourhood in particular) from the new community facilities that will be provided within the proposed development on the south side of Leigh Road are a factor to be weighed in the balance when determining the present application.

The public interest

Archaeological remains and features of historic interest

49. There is no evidence to suggest that any archaeological remains or features of historic interest would be affected by the proposed works and there are no submissions to the contrary. I am satisfied that there is no evidence before me to indicate that the works will harm any such interests.

Nature conservation

50. In its objection, NE commented that the proposed new road junction will offer no benefit to the biodiversity of the common but will result in the loss of 2224m² of natural habitat. Whilst that is the total area of registered common land that would be affected by the proposed works, less than half that area would be surfaced with tarmac; the remaining part would be grassed as at present. Although that may not be grassland of the same 'natural' quality as presently exists, albeit immediately adjacent to a busy vehicular highway, there is no evidence to suggest that this area contains any species of particular biological interest.
51. On the site visit Ms Southwood drew my attention to an old oak tree within the hedgerow that forms the southern boundary of CL1 which would be safeguarded during the construction works although not under formal Tree Protection Order.
52. Whilst there is little doubt that there will be an overall loss of natural habitat for flora and fauna resulting from the proposed works, the quality of land affected and its location are such that the weight I attach to this loss is not substantial when considered within the context of the common as a whole. In summary I am satisfied that the works will not harm nature conservation interests to any significant extent.

Landscape conservation

53. In its objection NE highlights "the natural and pleasant backdrop to the Leigh Road" provided by this part of the common that would be lost if consent is granted. Similarly, OSS submits that the proposed roadworks will "encroach on significant elements of the rustic features of the common", in particular "the continuous strip of green common between the road and the common boundary on the south side", thereby diminishing the place of Leigh Common in the local landscape. It argues that the proposal will "create a greater sense of the road as an intrusion into the rustic character of the common."
54. The applicant's case is that the works proposed will have "a minimal effect on the landscape of the common as they will be largely screened by vegetation from the main part of the common". The works are "situated in part of the common of a completely different character from the rest, being dominated by Leigh Road itself."

55. I agree that this eastern corridor of the common has a very different character to the main woodland area, and that, in essence, it constitutes roadside verge in visual terms (if not in law⁷). The proposed road junction may be seen from the periphery of the woodland but the works for which consent is sought, in effect the change of surface to tarmac, is unlikely to be noticeable from that distance. However the standard equipment associated with a major road junction – traffic lights, pedestrian crossing operating system, protective barriers, bollards, traffic signage, etc – will transform the character of the approach to Wimborne along the B3073 and change the nature of the common at this point.
56. These changes to the highway layout already have planning permission⁸. The actual works for which consent is sought under Section 38 of the 2006 Act will have an impact on the landscape along this corridor but widening the existing carriageway (with tarmac) and constructing a connecting (tarmac) road is not wholly incongruous being alongside an existing public road. If no other ancillary works were to take place, then the effect would be quite limited, yet the additional facilities are essential in order to safely operate a road junction to serve a development of this magnitude.
57. On balance, I accept there would be a substantial change in the character of the common at this eastern extremity as a result of the works proposed, not least because consent has already been granted for a similar junction adjacent to the application site. However I do not believe this would affect in any way the woodland which forms the main area of the common. Further, I consider that the continued existence of the common on the northern side of Leigh Road opposite the proposed new road junction will go some way towards reducing the ‘urbanising’ effects of the highway paraphernalia within the CL1 corridor.

Public rights of access

58. NE has confirmed that Leigh Common is subject to Section 193 of the Law of Property Act 1925 through which the public enjoy the right to air and exercise, this being interpreted by the Courts as including the right on foot and on horseback.
59. The applicant submits that public access to the common will not be hindered by the proposed works and that people will still be able to access the land as part of the highway. NE points out that, as a road junction, access would clearly not be available for the traditional use of the common for air and exercise. This argument is echoed by the OSS which contends that the proposed works would adversely affect the public rights of access to the common on foot and on horseback for quiet recreation.
60. On this issue I agree with the objectors in principle but in reality it must be recognised that the land in question effectively functions as highway verge⁹ rather than as open common. I reject the applicant’s submission that public access will not be restricted by the works but, again, there is a difference

⁷ I note here that the OSS challenges the applicant’s statement that the application land is recorded as part of the highway. No documentation has been provided with the application to support the applicant’s claim. However, for the purposes of determining this application, it is not essential that the status of the land is proven one way or the other.

⁸ I understand a current planning application for amendments is awaiting determination. This seeks minor alterations to the layout of drains at the proposed road junction but no changes are proposed that are material to this application.

⁹ I refer again to Footnote 7

between theory and practice; the land may well continue to form part of the highway and therefore traffic of all kinds will have a lawful right to use it, but the frequency of vehicular use, the layout of the junction and the Highway Code all operate to segregate users into separate zones for safety.

61. There have been no representations from prescribed organisations representing walkers or horse riders. The existing pedestrian footway on the north side of the carriageway would continue. Whilst safe pedestrian access across the B3073 would be accommodated at the proposed new crossing, there has been no suggestion that horse riders make use of this section of the common at present and consequently would be in any way disadvantaged by the loss of the wide grass verge or the proposed works on the south side.
62. In terms of recreational use of Leigh Common as a whole, on the basis of the evidence before me I find the effect of the proposed works is likely to be minimal. Taking into account also the reasonable needs of people with disabilities who may use the common, I conclude that public access for air and exercise will effectively be lost over the part of the application land that is proposed to become part of the carriageway but this is a nominal loss, given that its use at present is clearly limited by its proximity to the B3073.

Conclusions

63. On the basis of the submissions, and from my observations on site, I conclude that the works proposed would (a) have little effect on the interests of persons having rights in relation to the land and no substantive adverse effect in terms of the overall availability of common land capable of being grazed; (b) not be detrimental to the interests of the neighbourhood overall inasmuch as there will be benefits from the new community facilities that will be provided within the proposed development; and (c) not cause significant harm to historical, archaeological, landscape or nature conservation interests or, in practical terms, to public access.
64. I accept that the Defra Common Land Consents Policy implies that Section 38 of the 2006 Act is not the appropriate mechanism to grant consent for works of this nature but for the reasons I have explained in paragraphs 36 and 37 above, in this particular case I have concluded that an exception should be made and that the application should be granted.

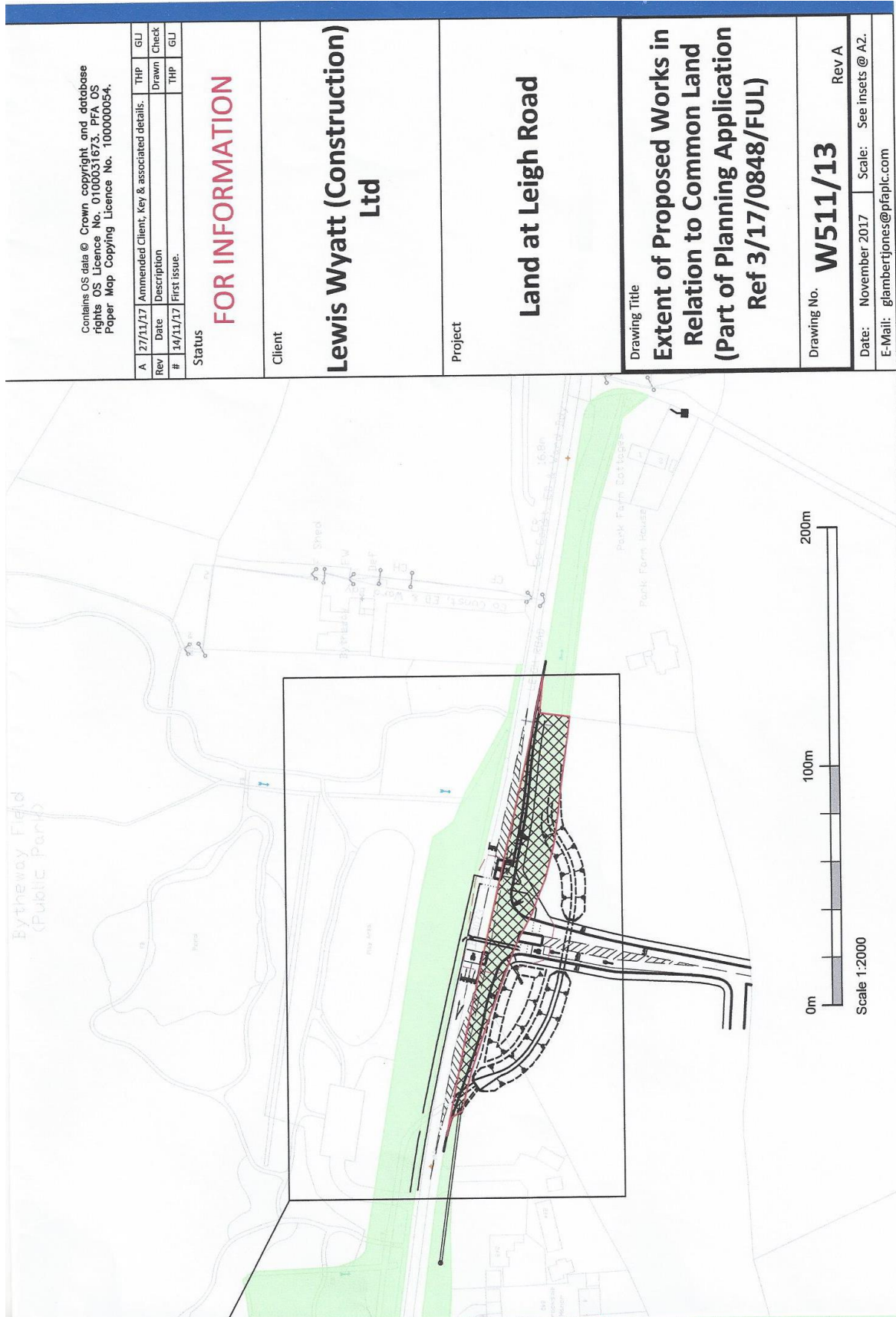
Formal Decision

65. Consent is granted under Section 38 of the Commons Act 2006 for the works sought by the application (COM/319092) dated 1 December 2017 and the plans submitted with it.

Sue Arnott

INSPECTOR


APPENDIX A




NOT TO ORIGINAL SCALE

KEY:

NOTES

 Leigh Common Land

 Area of Common Land affected and the subject of the Section 38 application.