



## Application Decision

Site visit held on 17 July 2018

**by Sue M Arnott FIPROW**

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

Decision date: 22 August 2018

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**Application Ref: COM/3192666**

**Padworth Common, West Berkshire**

**Register Unit No.: CL 32 (part) & CL 111**

**Registration Authority: West Berkshire Council**

- The application, dated 13 December 2017, is made under Section 16 of the Commons Act 2006 to deregister and exchange land registered as common land.
- The application is made by Mrs C West.
- **The release land** comprises 2790 m<sup>2</sup> of land on the northern edge of Padworth Common and to the south of Hunters Lodge.
- **The replacement land** comprises 2901 m<sup>2</sup> of land located to the east of the release land and west of Rectory Road, Padworth Common.

**Summary of Decision: The application is granted.**

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### Preliminary Matters

1. Section 16(1) of the Commons Act 2006 (the 2006 Act) provides, amongst other things, that the owner<sup>1</sup> of any land registered as common land or village green may apply for the land (*the release land*) to cease to be so registered.
2. In this case the release land extends to some 2790 m<sup>2</sup> of land registered as part of Padworth Common but which lies within an area that has formed the garden of Hunters Lodge since the 1980s. Registered in two parts, within CL 32 the release land extends to 470 m<sup>2</sup> alongside some 2320 m<sup>2</sup> of CL 111.
3. In exchange, an area of 2901 m<sup>2</sup> of former common land is proposed (as *the replacement land*) in an area known as Pound Green, adjacent to the Padworth Common boundary at its north eastern corner and west of Rectory Road.
4. During my inspection of the release land and the replacement land I was accompanied by Mr and Mrs West (the applicant), Mr Todd (her agent), Mr Warner of the Padworth Common Advisory Committee, Mr Cooper (attending on behalf of Mr Smith), Mrs Faulkner and Mr Jacobs.
5. The initial application was subsequently amended to take account of objections and representations. For the avoidance of doubt, the areas now at issue are

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<sup>1</sup> One of the objections questions ownership of the land affected. Despite the Commons Commissioner in 1978 being not satisfied that any person was the owner of CL 111, Land Registry documents have been submitted to confirm the applicant's ownership.

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those identified in red (the release land) and light green (the replacement land) on the plan (dated 11/5/18) included at Appendix 1 to this Decision.

### **Main Issues**

6. 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 (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.

### **The application**

7. Essentially this exchange is sought to rectify a situation which has existed for many years.
8. Both the release land and its intended replacement were once part of a larger area of common land parcels (CL 32 & CL 111) that were formally deregistered in the early 1980s. This followed the merger of the freehold title with the rights in common on 18 February 1980 after acquisition of the property by the applicant.
9. The application explains that the applicant believed the status of the release land to have been resolved by her lawyers at the same time; this misunderstanding led to her mistaken belief that it was not common land. Subsequently the land was enclosed as part of the Hunters Lodge garden and has remained so since the early 1980s although access via a gate in the deer fencing was not locked until relatively recently.
10. The OSS points out that the enclosure of the release land was unlawful, even if not deliberate. It argues that West Berkshire Council (WBC) is responsible for maintaining the common "*free from all encroachments and shall not permit any trespass on or partial or other enclosure of any part thereof*"<sup>3</sup> and should have taken action. However the applicant states that enclosure has never been challenged, either by the local authority, by residents or by commoners<sup>4</sup>.
11. The legality of enclosure of part of the common within the curtilage of Hunters Lodge is not at issue here; nor does any need for planning permission to change the use of the common to a garden fall within my jurisdiction.

#### *The release land*

12. The release land lies to the south of Hunters Lodge and has formed the property's domestic garden for over 30 years. It is enclosed by mature hedges, trees and fencing that separates it from the common which lies to the south.

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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.

<sup>3</sup> Article 4 of the 1946 Scheme of Management [see paragraph 16]

<sup>4</sup> I have noted that one of the objections suggests that representations have been made but no details have been provided of reports to WBC or of responses.

13. The land in question is positioned to the north of, but not adjoining, a shingle surfaced track which leads from Rectory Road to the neighbouring property, Oxenheath. The two parcels (of CL 32 and CL 111) comprise of mown lawn, mature shrubs, and sloping grassland around a large pond.
14. The registration of parcels CL 32 and CL 111 became final on 1 August 1972. The Register records rights to graze cattle and rights of estovers and turbury (and one pony on CL 32).
15. Whilst rights are clearly registered over these parcels of common land (as amended in 1981), the applicant argues that there is no public access to the release land as it falls within the category of 'garden', thus qualifying as 'excepted land' under the Countryside and Rights of Way Act 2000 (the 2000 Act). NE agrees with that proposition in relation to CL 111 but contends that access is still available to CL 32 (despite a majority of the 470 m<sup>2</sup> within the release land being located in the garden).
16. On 12 November 1946 a Scheme of Management for Padworth Common was entered into by the Rural District of Bradfield under the Commons Act 1899 and confirmed by the Minister on 20 December 1946<sup>5</sup>. Although the accompanying map is now faded and less than clear, it seems the area covered by the Scheme included the part of CL 32 now at issue (and the proposed replacement land) but not CL 111. Management of Padworth Common is now vested in West Berkshire Council and the Scheme is overseen by the Padworth Common Advisory Committee and operated on the ground by the Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust (BBOWT). It is also a Local Nature Reserve.

#### *The replacement land*

17. The land offered as a replacement is an area of open land between Hunters Lodge and Rectory Lane, bounded by mature hedges, trees and fences to the north and west, the public road to the east and the common (CL 32) to the south<sup>6</sup>. It is partly mown grassland with several semi-mature trees. It is crossed by a public footpath (PADW/14/2) that is marked by a line of short green posts and the gravelled driveway to Hunters Lodge.
18. This area, known locally as Pound Green, was previously registered as common land forming part of CL 32. The plot was formally deregistered in 1981 and any common rights over it extinguished with the agreement of the commoners following the sale to the applicant.
19. Sub-section 16(5)(b) of the 2006 Act requires that "*the replacement land must not already be registered as common land or as town or village green*". It appears there is some confusion as to the status of this land since it may be shown on some maps (in particular 'Magic' mapping) as common land.
20. However, the commons register clearly records its deregistration and therefore it is undoubtedly no longer registered as common land. Consequently there is nothing to prevent it now being offered as replacement land so that it again becomes part of the registered common.

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<sup>5</sup> The Register records an amendment on 31 May 1951 but details are not available.

<sup>6</sup> With the exception of its south eastern corner which is omitted since ownership cannot be proved.

21. As I have already noted, Padworth Common is subject to a scheme of management under Part 1 of the 1899 Commons Act. At the time this Scheme was drawn up, the replacement land was part of the common and therefore is shown on the plan attached to the Scheme. It seems that this was not amended in 1981 when parts of CL 32 were deregistered so that the replacement land is still shown on the plan, ostensibly forming part of the land to which the Scheme applies.
22. Thus there is a degree of uncertainty as to whether Pound Green remains subject to the Scheme or not.
23. In fact the Scheme begins by describing the land to which it relates, defining this as "Padworth Common" as the same is "... delineated in a plan ... and thereon coloured green, being "a Common" within the meaning of the Commons Act 1899."
24. In my view, once the replacement land ceased to fall within that definition, then it lay outside the Scheme, irrespective of its continued depiction on the plan. Whilst the matter is not beyond doubt, I take the view that the Scheme does not apply to the replacement land as it is not registered common land.
25. No formal designations, statutory or otherwise, apply to the replacement land.

### **Representations**

26. As required by the statute, a public notice was published in the Newbury Weekly News on 14 December 2017 and on the site. The application was publicly displayed at the offices of West Berkshire Council in Newbury and at the main points of entry to the land affected and maintained for the statutory 28 day period. Consultation letters were sent to interested parties as required, including West Berkshire Council, Padworth Parish Council, Padworth Common Advisory Committee, Natural England, Historic England and the Open Spaces Society.
27. Responses were received from Natural England (NE), the Open Spaces Society (OSS), the Padworth Common Advisory Committee (PCAC), Mrs A Faulkner and Mr R and Mrs M Smith. In reaching my conclusions I have considered all the issues raised in these representations.

### **Assessment**

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

28. The terms of reference of the Padworth Common Advisory Committee confirm that Padworth Common is now managed with two main objectives: for quiet exercise, recreation, reflection and study, and for the conservation of the natural beauty of the environment and the wildlife of the area. This differs substantially from its original purpose as a common, supporting the rights and activities registered by the commoners.
29. The applicant understands that no grazing has been carried out in the recent past on any part of Padworth Common within the vicinity of the release or replacement land. Further, no attempt had been made to exercise these rights within the garden during the thirty years and more that she has lived at the property.

30. However, an objection from the owners of Springhill Farm who hold rights on Padworth Common suggests that it has simply not been possible to graze stock on the release land because of access being barred by a locked gate.
31. The objection also questions the likelihood of grazing taking place on the line of the footpath across the replacement land. However the applicant points out that many public rights of way exist over commons without any diminution of available grazing.
32. I recognise that the right to graze cattle on the release land still exists as it does on the whole of the common. Aside from the lawfulness of the garden enclosure, the fact is that the extent of suitable vegetation for grazing currently available on the replacement land is likely to exceed that within the release land. Even if no more than a theoretical proposition given the management aims for the common, as a simple mathematical calculation the release land has more to offer. I accept that the practicalities of grazing roadside land with no hard boundary would constrain such activities, but the release land minus its boundary fence would present the same difficulties once animals are left to wander at will. Indeed the same potential danger exists across the whole common where busy public roads are not fenced.
33. Any rights of turbury would now need to be exercised within the constraints of the management regime for the common. It is not suggested that such activities either have been, or realistically could be, exercised in relation to the release or replacement land. The collection of firewood (estovers) is theoretically as feasible on the proposed replacement as on the release land, possibly more so.
34. In conclusion, I consider the proposed exchange would not have any noticeable effect in terms of the overall availability of common land capable of being grazed and no significant effect on other registered commoners' rights.

### ***The interests of the neighbourhood***

35. There is no definition within the 2006 Act of the term 'neighbourhood'. In a rural situation such as this, the parish of Padworth may be the most appropriate area to consider. However, as the Padworth Common Advisory Committee includes common right holders, parish councillors and representatives of the main landowners in the area, I consider this body to be well placed to represent people living in this particular neighbourhood.
36. In its comments it expressed concern at the confusion over the status of the replacement land since this is currently shown on the 'Magic' map as already having public access rights under Section 15 of the 2000 Act, suggesting it had never been deregistered.
37. It also reported that the public has never been denied access to the replacement land at Pound Green, despite its formal deregistration as common land, and therefore the public would not actually be gaining extra land as a result of the exchange.
38. Other comments from local people suggest that there would be no tangible benefit, whilst the applicant argues that the replacement land would offer a safer place for the public than walking or riding along Rectory Lane, a narrow and busy public road.

39. I address below the likely effects on public access in general, but in terms of the implications of the proposed exchange for people living in the locality, I am not persuaded there would be any negative effect upon the way local people make use of the common. Further, the clarification of access rights on all mapping sources can only be of benefit to all concerned.
40. I am satisfied that the effect of deregistration of the release land on the interests of the inhabitants of the neighbourhood would be negligible and that the replacement land may be of greater potential value to the local community than the release land.

### ***The public interest***

41. There are no submissions which suggest that any features of archaeological or historical interest will be compromised by the proposed exchange. Neither have any particular landscape conservation issues been raised here.

### *Nature Conservation*

42. Natural England has confirmed that Padworth Common consists of wet, dry and humid lowland heath, oak and pine woodlands, a permanent pond and several seasonal ponds, and a wet alder woodland forming part of Padworth Gully.
43. However the release land has been maintained as a domestic garden since the 1980s and now is of a quite different character, although the large pond may offer an additional habitat for aquatic and related species.
44. The replacement land is described as being semi-improved, with mown grass and several planted as well as self-seeded trees. Although NE suggested that the grass had been sown as an extension of the adjacent garden, the applicant confirms it was not, although it has been regularly mown. Indeed the rare plant 'Upright Chickweed' [*Moenicha Erecta*] is said to have been found here.
45. Whilst the replacement land is of a different character to the main common, the applicant suggests this is more likely to be representative of the original open landscape when it was grazed. She further submits that it has the potential to become part of the mosaic of the common by creating a glade which will provide different ecological benefits. In response to NE's suggestion that the nature conservation value of the land might be improved with the removal of non-native trees from the site, the applicant has agreed to do so if required.
46. One of the objections argues that the return of the pond to the common would be beneficial to nature conservation, especially as it does not lie within the Scheme area and could potentially be kept as a more secluded area to benefit wildlife. In response, the applicant submits that the pond will be retained and that nature conservation interests will remain even if it is not part of common.
47. That may be true, but it would not enjoy the same level of protection. However the pond within the release land is not the only such feature on the common providing a water source for wildlife and grazing cattle (if any).
48. On balance, and in the absence of any evidence that such nature conservation interests that do exist within the release land would be harmed to any significant extent, I am satisfied that the replacement land has greater potential to develop as a more open habitat for a slightly different range of species to those found on

the present common where tree and ground cover is more dense. If accepted as falling within the remit of the Scheme, the future management of this land will be a matter for BBOWT under the guidance of the Padworth Common Advisory Committee.

#### *Public Access*

49. Firstly I note that there is no right of access for the public over the release land. This is exempt from the effects of Section 15 of the 2000 Act and indeed it is not shown as accessible land on the 'Magic' maps referred to by several parties. Therefore despite being registered common land, it is not open to the public (only to commoners in the exercise of their registered rights) although to add to the confusion, the Ordnance Survey does show it as land with public access.
50. There is no right of access over the replacement land (despite being shown as such on the 'Magic' map) although Padworth Common Advisory Committee have commented that the public has enjoyed 'de facto' access over the land even after it was deregistered. Mr Warner (Committee Chair) has lived in the area for over 40 years and has always had access to the land at 'Pound Green'. It is argued that the public is not gaining new access through the exchange.
51. There has been some debate over whether or not the replacement land is equal to or greater than the release land. I am satisfied now that the revised plan confirms that what is intended is larger than the present (garden) area. There would therefore be no reduction in the overall extent of the common; in fact there would be a marginal increase.
52. The most significant difference is that the replacement land would be available by right for public use beyond the limits of the public footpath that crosses it, whereas the release land offers no opportunity for access at all.
53. If again brought within the Scheme which applies to the majority of Padworth Common, then the scope for public access would be extended even further. Under Article 5 of the Scheme, people enjoy more rights over land to which it relates, not solely access on foot as provided under Section 15 of the 2000 Act. Under the Scheme, "*The inhabitants of the district and neighbourhood shall have a right of free access to every part of the common and a privilege of playing games and of enjoying other species of recreation thereon, subject to any byelaws made by the Council under this Scheme*". For example, horse riding would thereby be allowed on the land, offering an opportunity to ride off-road, rather than along Rectory Lane.
54. Concern has been expressed by some objectors that the applicant may in future choose to develop the replacement land as part of her garden or to enclose it, thereby compromising the public's right of access.
55. I have noted the applicant's assurance that this is not her intention. However, even if that were not the case, the relevant legislation should afford protection against any such developments.
56. I have also noted the concern expressed by OSS that if the exchange goes ahead, access to the replacement land under Section 15 of the 2000 Act would not come into force until the relevant Access Maps are formally reviewed nationally, a task which has been postponed with no prospect of an update in the foreseeable future. This, they argue, makes it all the more important that the

replacement land is covered by the Scheme, thereby providing protected public access.

57. In reaching my conclusions I am satisfied that overall the public would make better use of the replacement land, given its position, than the release land. I accept the arguments that the release land would be available for public use today had it not been converted to a garden and unlawfully enclosed many years ago, but even had that not occurred, the potential for providing safer off-road passage as an alternative to Rectory Lane would still be a benefit worth considering.
58. I also accept that the public has in fact enjoyed these benefits for many years because they have not actually been prevented from doing so. However having *a right* to enjoy the replacement land is a significant advantage in terms of the protection it offers both to the land itself and to the public who want to use it.
59. In short, I am satisfied that the public would benefit from the exchange in terms of access, even if only considering access on foot.
60. Adding to the equation the potential for other types of user to gain access to the replacement land only strengthens the argument for the exchange. However, I do not have jurisdiction over the Scheme and I have no power to require (as a condition of consent) that the replacement land is formally recognised as covered by the Scheme, despite the applicant's stated willingness for this to happen. Moreover, the release land is not covered by the Scheme and it is not a simple matter of transferring its provisions to the replacement land.
61. The Scheme is operated by West Berkshire Council and it is for that authority to decide whether any amendment to its Scheme is both necessary and appropriate. The fact that it has never been formally removed from the accompanying plan raises the question as to whether if, once returned to the status of common land, it could automatically resume its place within the Scheme without any modification. Undoubtedly it is my view that the replacement land should be covered by the Scheme but, since it is not within my remit, I shall decline to comment on whether or not any further change is needed.

***Other relevant considerations***

62. It is clear that there is inconsistency in the information on public access in this location provided on maps of various types. Some of these maps are more readily corrected and updated than others. The regrettable delay in updating the national Access Maps cannot be a reason to defer an exchange which is justified on all other grounds, although the implications for the transfer of access rights is wholly unsatisfactory from a public perspective.
63. I have considered whether it would be appropriate to number the replacement land as CL 32 or CL 111; to re-use both would make no practical sense and there are implications for the holders of rights on the respective parcels. The only representation from any party holding rights on the common makes no comment on this point.
64. All those with rights registered on CL 111 also hold similar rights on CL 32. Only one party is listed with only rights on CL 32 (Ms A M Ide) including turbarry, estovers, and grazing for three cattle and one pony. There is no



evidence to suggest these rights have been exercised in recent times. Since CL 32 extends to some 28 hectares, the loss of 470 m<sup>2</sup> (being that part of the release land within CL 32) would still leave a significant area in which to (theoretically) exercise such rights, whereas to remove all rights attached to CL 111 with no direct substitute would be unreasonable.

65. In the circumstances it seems to me pragmatic to regard the replacement land as a substitute for the present CL 111 (being part of the release land) so that all rights listed for this parcel would transfer to the new CL 111.

### **Conclusions**

66. On the basis of the submissions, and from my observations on site, I conclude that the proposed deregistration of the release land and substitution with the replacement land would have a minimal effect on the interests of those holding rights on the common and on people living in the neighbourhood. Further I find that the public interest would not be adversely affected and that there may be opportunities for increasing the nature conservation and recreational value of the common as a result of the exchange. Overall, having regard to the criteria in Section 16(6) of the 2006 Act, I conclude that the application should be granted.

### **Formal Decision**

67. The application to deregister and exchange land is granted in accordance with the terms of the application (Ref: COM/3192666) dated 9 November 2017 and the accompanying drawing (no. P16217-500Q.DWG dated 11 May 2018), and that an Order of Exchange should be made.

*Sue Arnott*

**INSPECTOR**

**ORDER**

On behalf of the Secretary of State for Environment, Food and Rural Affairs and pursuant to Section 17(1) and (2) of the Commons Act 2006, **I HEREBY ORDER** West Berkshire Council, as commons registration authority for the area in which the release land and the replacement land are situated:

- (a) to remove the release land forming part of Padworth Common in the Parish of Padworth (Register Unit No. CL 32 (part) and CL 111) from its register of common land and village green, and
- (b) to register the replacement land as common land (as Register Unit No. CL 111).

**First Schedule***The release land*

<b>Colour On Plan</b>	<b>Description</b>	<b>Extent</b>
Edged red on the plan at Appendix A and identified thereon as "Release Land"	Land to the south of Hunters Lodge off Rectory Road, Padworth, forming part of Padworth Common (Register Units CL 111 and CL 32 (part)) at Padworth, West Berkshire.	2790 m <sup>2</sup>

**Second Schedule***The replacement land*

<b>Colour On Plan</b>	<b>Description</b>	<b>Extent</b>
Edged light green on the plan at Appendix A and identified thereon as "Exchange Land"	Land to the east of Hunters Lodge adjoining Rectory Road, Padworth, to form part of Padworth Common (Register Unit CL 111) at Padworth, West Berkshire.	2901 m <sup>2</sup>

**APPENDIX A**



NOT TO ORIGINAL SCALE