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| **Application Decision** |
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| **by Richard Holland** |
| **Appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 31 January 2023** |
| **Application Ref: COM/3295093**  **Garway Common, Herefordshire**  Register Unit No: CL118  Commons Registration Authority: Herefordshire County Council   * The application, dated 9 March 2022, 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 Garway Parish Council. * Phase 1 of the works to renovate the existing playground comprises retention of the existing metal slide and replacement of the other play structures with a multiplay unit (5.63m x 4.08m), monkey bars (2.40m x 1.21m), carousel 1.2m x 1.2m, spinning seesaw (2.61m x 0.43m), rope swing (5.62m x 3.22m) and 3 seat swing (5.40m x 2.40m). Materials to be a mixture of soft and hardwood, recycled ocean plastic and steel. * Phase 2 of the works comprises a 300m² bark surfaced playground extension (20m x 15m) and installation of a 5.2m high net pyramid tower (6.5m x 6.5m), 2.4m high fitness equipment (4.5m x 7m), a wooden treehouse around the existing slide, a weather proof table tennis table, extra picnic tables and the placement of football posts on the recreational area of the common near to the playground. * 70m of temporary 2m high inter-linked steel health and safety fencing enclosing an area of 300m² will be erected during each phase. | |

**Decision**

1. Consent is granted for the works in accordance with the application dated 9 March 2022 and the plans submitted with it subject to the following conditions:
2. the works shall begin no later than 3 years from the date of this decision; and
3. all temporary fencing shall be removed and the land shall be fully reinstated within one month from the completion of the works.
4. For the purposes of identification only, the location of the proposed works is shown in red on the attached plan.

**Preliminary Matters**

1. I have had regard to Defra’s Common Land consents policy of November 2015 (the Defra policy) in determining this application under Section 38, 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.
2. This application has been determined solely on the basis of written evidence. I have taken account of the representations made by the Open Spaces Society (OSS), Diana Higginbotham and Margaret Watson.
3. I am required by section 39 of the 2006 Act to have regard to the following in determining this application:-
4. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
5. the interests of the neighbourhood;
6. the public interest. (Section 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); and
7. any other matter considered to be relevant.

**Reasons**

***The interests of those occupying or having rights over the land***

1. The existing playground is at the common’s western boundary within what is known as the recreational area of the common. The proposed playground extension does not adjoin the existing playground but is nearby. It sits where the recreational area meets an area of scrub and straddles both. Approximately 150 square metres of scrub would need to be cleared in order to accommodate the playground extension.
2. The common is owned by the applicant, Garway Parish Council (GPC), and it follows that the the proposed works are in its interests. GPC considers that the location of the proposed extension offers a good compromise between the loss of recreational land and what it describes as ‘shrubby growth’.

1. The common land register records various rights of grazing, pannage, turbary and estovers over the common. GPC consulted the Garway Commoners’ Association and the occupants of all the recorded rights holder addresses.
2. GPC advised that one rights holder frequently grazes cattle but not on the recreational area of the common or the scrub affected by the proposals and I am satisfied that this is the case. Whilst the grazier is not identified, I am also satisfied that all those with rights of common had the opportunity to comment about the potential impact of the proposals on grazing rights. No such comments were received.
3. GPC further advised that other rights holders occasionally exercise rights of estovers, which published Government guidance (‘Managing Common Land’) describes as the right to take specific timber products from the land, like whole trees or firewood. Of these rights holders, only Mrs Watson commented about the application. Mrs Watson contends that removal of ‘woodland’ in order to facilitate the proposed playground extension affects her rights as she sometimes collects wood from the common.
4. GPC submitted photographs showing the area that would need to be cleared and I am satisfied that it is more accurately described as an area of scrub rather than woodland, as there are trees immediately behind it but none within it. It is nevertheless an area over which Mrs Watson has a right of estovers and GPC advised that 0.31% of the common will be lost to such rights if the area is cleared. I consider that the proposals will cause some limited harm to Mrs Watson’s rights and to others who may exercise such rights.

***The interests of the neighbourhood and public rights of access***

1. The interests of the neighbourhood test relates to whether the works will unacceptably interfere with the way the common land is used by local people and is closely linked with interests of public access.
2. The Phase 1 works are to improve an existing playground and it is not contested that the playground is well used by local residents. No party has objected to the Phase 1 works and I am satisfied that they will improve an existing recreational facility and are in the interests of the neighbourhood. As the proposed play structures will replace existing ones I consider it unlikely that there will be any additional impediment to public access over the land.
3. The Phase 2 works will encroach into an area that is part ‘recreational’ land and part scrub. The works will also have some wider impact as it is proposed to erect football posts and additional picnic benches on the recreational area. OSS observes that the proposal is likely to be beneficial to health, wellbeing and child development in the neighbourhood. Mrs Watson does not object to the use of some of the recreational land for the playground extension, if one is needed, and observes that it has no other specific use.
4. I am satisfied that the Phase 2 works are also in the interests of the neighbourhood as they seek to improve facilities on an area of the common that is already used for recreation. Whilst the works will remove an area of scrub from general public access I consider that any harm caused to public access over the common will be very small.
5. Each phase will take approximately three weeks to complete, during which the proposed temporary fencing will be in place. I am satisfied that such fencing is appropriate on health and safety grounds and that it will be removed on completion of the works, which can be secured by attaching a suitable condition to the consent.

***The public interest***

*Nature conservation and conservation of the landscape*

1. Mrs Higginbotham raised concerns about the loss of a small oak tree, which she took to be within the proposed playground extension area. The applicant’s photographs show no trees within the area and GPC confirmed that it is not aware of any such oak tree. GPC advised that two trees that are close to the playground, a field maple and a silver birch, will not be affected by either phase of the works. The common is not subject to any statutory conservation designations and there is no evidence before me to suggest that nature conservation interests will be harmed by the works.
2. The common has no special designated landscape value and most of the works will be within an established recreational area. The works to the existing playground will not significantly change the common’s appearance, although the new play structures are likely to be more prominent. Whilst the playground extension’s positioning directly in front of the woodland will soften its visual impact to an extent it will introduce a new artificial feature into the landscape. I consider that overall the works will have some small impact on landscape interests.

*Archaeological remains and features of historic interest*

1. There is no evidence before me to suggest that these interests will be harmed by the proposed works.

**Conclusion**

1. I conclude that the proposed works are unlikely to harm nature conservation and archaeological/historic features interests. The works will cause some harm to public access and to the landscape. I accept that the works will also, to some extent, curtail the exercising of commons rights, particularly estovers. However, the needs of commoners and other users of the common have to be balanced. Overall, I conclude that the harm to the common, and the curtailment of commoners’ rights, will not be significant and is outweighed by the benefit to the wider local community of enhancing the recreational value of the common. Consent is therefore granted for the works subject to the conditions set out in paragraph 1.

**Richard Holland**

