



Application Decision

Site visit made on 15 November 2023

by David Wyborn BSc(Hons) MPhil MRTPI

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

Decision date: 12 December 2023

Application Ref: COM/3294347

Land at Redhill and Earlswood Commons, Surrey.

Register Unit No: CL39

Commons Registration Authority: Surrey County Council

- The application, dated 3 March 2022, is made under section 38 of the Commons Act 2006 for consent to carry out restricted works on common land.
 - The application is made by Mr Peter Brownjohn of WS Planning & Architecture on behalf of Mr Howard Stark of 16 Whitepost Hill, Redhill, Surrey RH1 6DA to construct works on common land.
 - The application works are described as landscape design to front garden of property, and re-instatement of common land in front of property at 16 Whitepost Hill, Redhill, Surrey RH1 6DA.
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Decision

1. Consent is granted for the proposed works so far as they relate to the common land, in accordance with the application dated 3 March 2022 and the plans submitted with it, subject to the condition that the works shall begin no later than 3 years from the date of this decision.

Preliminary Matters, Background and Application

2. Redhill and Earlswood Commons (CL39) consists of a series of differing sized parcels of land generally to the very broadly south of the centre of Redhill. In this case, the section of common land that would be affected by the proposed scheme is located within the parcel generally north of the main part of Whitepost Hill road. This part of the common includes areas of open grassland and woodland.
3. This application proposes works on common land in front of the residential property, 16 Whitepost Hill. The application area is shown outlined in red on the attached plan. No 16 is one of a row of dwellings which front this part of the common. These buildings are accessed via a single width vehicular drive which enters and crosses the common from Elm Road. The Commons Register includes that a past owner of No 16 claimed rights to access 16 Whitepost Hill over the common.
4. The evidence shows that in the past there was a driveway and separate footpath to No 16 that crossed the reasonably narrow section of common between the general access drive and the front garden of the dwelling. Subsequently, the surface materials of the paving slab footpath and the loose finish to the vehicular drive were changed to the small paviour finish that is on

site at the present time. Records have not been identified to show that these works were approved on the common, although these works appear to be reasonably longstanding.

5. Planning permission was granted (Application 20/00058/HHOLD) in December 2020 for the now proposed works to the frontage area within the common and also to an area within the front garden of No 16, which is beyond the common. In terms of the common, the plans show the realignment of the vehicular access so that it has a more accommodating entrance angle and there is a related reshaping of the contours of the adjoining areas. The vehicular access drive would be finished in a bonded resin finish and the landscaping would be finished in grass. The paved pedestrian path would be retained.
6. Section 38 of the Commons Act 2006 (the 2006 Act) prohibits restricted works on common land unless consent is obtained. Restricted works include works for resurfacing of land, including the laying of concrete, tarmac, coated roadstone or similar material, other than the repair of an existing surface of the same material. Accordingly, the works including to realign the drive with the bonded finish and, in this case, the associated recontouring, require consent.
7. I undertook an accompanied site visit to view, but not discuss, the proposed works. Those making representations had the opportunity to attend, but did not wish to exercise that option, and at the site visit I was accompanied by the applicant's agent.

Procedural Issues

8. The Open Spaces Society (OSS) has set out detailed comments including objecting to the application because of the effect of the Surrey Act 1985 on the decision making process. It is explained that Redhill and Earlswood Commons were formerly regulated by an order made under the Commons Act 1876. The OSS explain that while this was revoked by schedule 2 of the Surrey Act 1985 (the 1985 Act), s11 of that 1985 Act continues to regulate the management and use of the commons, and the OSS believe that the part of the common outside No 16 is part of that regulated area.
9. The OSS refer to, and seek to interpret, s11 of the 1985 Act which sets out constraints to works on the common and that it is for the Council, in this case, Reigate and Banstead Borough Council, to authorise any works to this common. The OSS consider that the wording of s11 may prevent any restricted works on this part of the common from taking place or, alternatively, they may only go ahead with the consent of the Council. Consequently, the case is made that any consent under s38 would be of no effect in relation to the statutory context of this common and the Secretary of State should not purport to grant consent for works which either do not require consent or are incapable of being given lawful effect.
10. However, it is for the person wishing to carry out the works to firstly decide if s38 consent is necessary and to seek any separate consents that may be required. It would not be appropriate, in the absence of a legal determination, to reject an application on the basis that a third party considers it unnecessary. The OSS raise the issue that any S38 consent given would be incapable of being given lawful effect, although the OSS do not rule out the possibility that the regulator of the Surrey Act 1985 might be empowered to consent to the works if such consent were to be sought.

11. Indeed, the informative attached to the planning permission explains that the planning consent does not purport to give consent from Reigate and Banstead Borough Council, as landowner, to the common land works. The informative goes on to state that following consent from the Secretary of State, the applicant must obtain a licence from the Council to carry out works on the common land. This approach, therefore, appears to confirm the appellant's understanding of the need to seek a consent under s38 and then the need for agreement and a licence from the Council. In these circumstances, based on the information before me, I consider that there is no substantive reason why the submitted s38 application should not be determined.

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 (which includes the 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
 - d) any other matter considered to be relevant.
13. Section 39(3) of the 2006 Act provides that consent may be given in relation to all or parts of the proposed works and subject to such modifications and conditions relating to the proposed works as are thought fit.
14. Defra's Common Land Consents Policy (the Consents Policy), published in November 2015, sets out the policy objectives for protecting common land and the approach when considering applications for works on common land. I will have regard to this policy document in my considerations.

Reasons

Representations and Objections

15. Two local residents raise concerns with the proposals, principally on drainage grounds. These include representations from the occupants of 15 Whitepost Hill, the adjoining property down the slope from No 16. There are concerns raised, following the extension works to No 16, including with the provision of the hardstandings within the front garden, that rain now drains and accumulates in significant amounts both on the gravel section to the side of the frontage area, which is up against the side of No 15, and at the base of the front of No 15. The concern is raised that the provision of the works on the common would exacerbate this situation and the adjoining owner sets out practical drainage proposals to seek to address the existing and anticipated problems. It is argued that this matter should be resolved as part of this commons land application.
16. There is also a concern, set out in both representations, that when works to the dwelling were undertaken, it is believed that a drainage pipe alongside the general access drive to the dwellings was damaged/blocked. The

representations explain that this pipe drained spring water from the common and now water flows along the surface of the general access drive, eroding sections of its surface, making worse potholes in places and causing danger during cold and frozen weather. It is argued that this application is an opportunity for this to be resolved.

The interests of those occupying or having rights over the land

17. The Register identifies that, in the past, there were commoners who had rights of common, but these rights became void on 8 August 1979. The Register does not now identify anyone with rights over this part of the common. Consequently, no commoners would be affected by the proposed works.

The interests of the neighbourhood

18. There is no definition of the concept of "neighbourhood" within the terms of the 2006 Act. However, in general terms works should only be permitted on common land if 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 (paragraph 3.2 of the Consents Policy).
19. In this case, there is a longstanding vehicular access and a separate footpath to No 16 from the general access drive across the common. The linking vehicle access section to No 16 would be angled differently compared to the present situation on the ground. This would increase, albeit to a small extent, the open grassed space to the broadly south of the proposed drive compared with the present arrangement. Correspondingly the landscaped space between the drive and footpath would be reduced. The situation before and after would make no material difference to those local residents walking and others using the common. The proposal would lead to no material increased impediment to the use of the common. I consider, given the localised and limited nature of the proposal, that the scheme would comply with the Consents Policy because it would maintain the condition of the common.

The public interest

Nature conservation

20. At the present time, some sections of the land immediately in front of the house are a little overgrown and the scheme would result in these areas being finished in a grassed surface. The landscaped gap between the vehicular access and the existing footpath would be narrowed but this would be compensated by a larger area of grassland to the general south where a section of the present drive would be removed. There is no clear evidence to conclude that the interests of nature conservation would be adversely affected by the scheme.

Conservation of the landscape

21. The area within the common in front of the dwelling is visually associated with the property because it lies within the space between the property and the general access drive across the common. The house forms a backdrop to this frontage area. The works would be seen and experienced in this context. The development would make a modest adjustment to the drive and provide, generally, more subtle contours of the land across this area. This would help assimilate the works more sympathetically into the landscape than the existing

situation. The surface material for the drive would be visually preferable to the pavements which have a somewhat suburban visual appearance. Taking all these matters into account, I conclude that there would not be any detrimental effects on the conservation of the landscape that would result from the proposal.

Public access

22. In terms of public access, the proposal, as explained above, would lead to no material difference compared with the existing situation; potentially to a modestly improved situation because of the slightly enlarged area of grassland to the south of the realigned drive and the more subtle contours generally across this land.

Archaeological remains and features of historic interest

23. There is no evidence that there are any archaeological remains or features of historic interest that would be affected by the proposal.

Other Matters

24. Drainage concerns and objections have been raised, and are summarised above. The replacement driveway would be angled, as with the present proposal, such that water would likely flow down towards the dwelling or onto the adjoining landscaping strip. It would, therefore, not directly flow towards the neighbouring property at No 15.
25. Furthermore, the effect of the proposal in terms of drainage on the adjoining property appears to have been considered as part of the planning application which approved these works. For instance, condition 4 of the permission requires a land drain or alternative surface water drainage shall be installed on the retaining side of the Ironstone wall to a design to be agreed in writing with the Council's property team. The reason for the condition is in order to reduce surface water run-off and prevent flooding or related issues elsewhere. It is for the Council to receive details and agree in writing to the specifications. If this permission is commenced and the requirements not undertaken then the Council is able to take enforcement action, if expedient to do so. There is also an informative attached to this permission which advises that it is the responsibility of the applicants/owners to ensure that the existing surface water drainage within the front garden of 16 Whitepost Hill is adequate to contain surface water run-off within the curtilage of 16 Whitepost Hill to prevent flooding or related issues at neighbouring properties.
26. In these circumstances, the planning permission appears to have considered the substantive drainage issues that may result from the overall scheme. It would not be reasonable for the common land consent regime to seek to duplicate the planning process, or propose an alternative approach to that which has been considered and permitted under the planning permission.
27. In terms of the other drainage issue, at my site visit, I noted the flow of some water down the general access drive that passes across the common. The comments of local residents indicate that this is a result of damage/blockage to the pipe that previously accommodated spring water. I do not know whether this is the case. Even if it was, this situation is not a result of the works that are the subject of this proposal, as those works on this part of the common are yet to take place. I note the points that local residents raise, however, it would

not be reasonable to seek to resolve a problem elsewhere on the common, albeit reasonably close by, that is not directly related to the scheme the subject of this decision.

Conclusion

28. Drawing together all the issues that have been considered above, the proposed works are reasonably modest and would not have any material level of adverse effects compared with the existing situation. I conclude that the realignment of the access drive to No 16 and the accompanying recontouring and landscaping would maintain the common in this location. Having regard to the advice in paragraph 5.9 of the Consents Policy, the scheme would provide a practical means of achieving access to land adjacent to the common and the finished surface of the drive would be aesthetically preferable to the present situation. I do not consider that there are any alternative schemes that would be preferable.
29. In the light of the above analysis, I conclude that the application should be granted.

David Wyborn

INSPECTOR



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