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| **Application Decision** |
| Site visit made on 29 October 2024 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 7 November 2024** |

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| **Application Ref: COM/3340053**  **Part of Witley Common (Mousehill Down and Rodborough Common), Surrey**  Register Unit No: CL144  Commons Registration Authority: Surrey County Council |
| * The application, dated 1 March 2024, is made under Section 38 of the Commons Act 2006 for consent to carry out works on common land. |
| * The application is made by Mr Paul Fitzsimons and Mrs Susannah Fitzsimons. * The works comprise the laying of tarmac on 250 linear metres (875m2) of the existing unmade surface on Lower Moushill Lane. |
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Decision

1. Consent is refused.

**Preliminary Matters, Background and Application**

1. 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 the resurfacing of land.
2. Common Land unit CL144 amounts to approximately 165 hectares and has a predominantly wooded character. The application relates to a stretch of common land at the north of the unit that forms part of Lower Moushill Lane. The lane is a public bridleway but also provides vehicular access to several residential properties situated along it. This includes the home of the applicants. At present the section of lane that is the subject of this application has an unmade surface, comprising mainly of a compacted mix of quarried stone and earth of a brown/sandy colour.
3. It is proposed to introduce black tarmacadam along an approximately 250 metre stretch of the existing lane between properties known as Riddens and Wood End. The description of the proposed works also refers to 3 speed bumps. At the northern end it is stated the surface would join an existing length of tarmacadam along Lower Moushill Lane understood to have been laid in about 2021.
4. I carried out a site visit accompanied by the applicants, a representative of the British Horse Society (BHS) and an objector to the works. The application has been determined on the basis of the written evidence, the comments submitted and my observations of the site.

Main Issues

1. 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; 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.

(d) any other matter considered to be relevant.

1. I have had regard to the Common Land Consents Policy issued by the Department for Environment, Food and Rural Affairs in November 2015 (the 2015 policy) as this sets out the Secretary of State’s policy in relation to the determination of section 38 applications. Paragraph 1.3 of the 2015 policy indicates that the Planning Inspectorate seeks to adhere to the policy in determining such applications and whilst it is possible to depart from it, an explanation must be provided for not following the policy.

Representations

1. Representations were made in response to the advertisement of the proposal ranging from supportive comments, those of a neutral nature to those that objected.
2. Correspondence in support from seven parties mostly came from people who lived nearby and are familiar with using Lower Moushill Lane. They outlined the poor condition of the surface of the lane and presence of mud and potholes such that they consider it to be a health and safety risk to all users. An increase in delivery vehicles, general car use and/or changing weather conditions has exacerbated the situation. Reference is made in some cases to various solutions to improve durability having been unsuccessful, and that following repairs, the condition of the lane quickly deteriorates. Incidences of taxi drivers refusing to drive down the lane owing to the surface are cited, which has compromised the safety of residents. Others are concerned that emergency vehicles may find access difficult.
3. There is a consensus in the supportive comments that the proposal would provide a necessary longer term solution to the concerns raised, and that it would have little impact on the landscape. It would benefit all users, both residential and recreational, by making it easier to navigate the terrain. One writer confirmed that the recently tarmacked section of Lower Moushill Lane has posed no problems when using her horse. In addition, residents who have a right of estovers over this part of the common (at Mousehill Down) confirm that they have never exercised those rights and that the proposal would not alter this.
4. Representations of a neutral nature include those of Witley & Milford Parish Council, who indicate that they wish to make no comment on the proposal. The Countryside Access Team from Surrey County Council (SCC) state that the Council seeks to balance the public rights whilst catering for the needs of residents. They confirm that the recently tarmacked section of the bridleway to the north was undertaken without consent. They further report that no decision has been taken as to whether SCC, in its role as Highway Authority, would allow the surface of the bridleway to be altered as requested. The Archaeological Officer from SCC confirms there is no indication that the works would impact upon buried archaeological remains and raises no objection. Neither is any objection made by the Surrey Hills AONB Planning Advisor having regard to the effect on the Surrey Hills National Landscape.
5. Natural England (NE) states that the site is on the boundary of the Surrey Hills National Landscape and Witley Common is part of Rodborough Common Local Nature Reserve. The common is subject to s193 of the Law of Property Act 1925 whereby members of the public have a right to access the common for air and exercise, including a right of access on horseback. The Heat Strava map indicates that the application site is heavily used for recreational purposes. Whilst they do not consider there would be any nature conservation benefits, they consider there would be minimal impact to pedestrians. They recommend the involvement of the BHS in relation to equestrian users. NE further consider there would be some visual impact to the landscape, but they expect that would lessen over time to eventually blend in with the pre-existing road and landscape. They conclude the works would be unlikely to have long term adverse effects on the landscape or biodiversity.
6. The BHS object to the proposal and does not recommend the proposed surfacing for existing bridleways, but rather the use of polymer-bound aggregate-rubbercrumb surfaces for multi-user routes. These are a better alternative to any sealed surface because it is safer and more comfortable for horses as well as other recreational users. Advisory notes are provided in relation to access and rights of way and surfaces for equestrian routes. This includes advisory mitigation in a range of highway scenarios where sub-optimal surfacing for horses might be required. However, the advice expressly states that it does not confer acceptance of asphalt for bridleways which have historically had an unsealed surface. This is because sealed surfacing can be dangerously slippery, and its hardness is uncomfortable for horses. This can lead to injury or other harmful physical effects on horses. Concerns are raised that without edging the proposed surface will break up. The BHS further point out that the existing tarmacked surface to the north was undertaken unlawfully. They state that the works will need the consent of the Highway Authority who have recently rejected similar applications.
7. The Open Spaces Society (OSS) object to the works stating that the use of tarmacadam would be entirely inappropriate. It would be less suited to walkers, joggers, mountain bikers and especially equestrian users at a key access point to the commons. They contend the works would result in a quasi-public road that would attract additional traffic, increased traffic speeds and more parking. There is no necessity for a vehicular road to be bonded with tarmacadam, historically roads lacked any hot bonded surface relying on metalling (stone dressing) which can be improved without consent. Repairs to potholes are minor in nature and residents will have acquired their property in the knowledge of the nature of the access road. Speed bumps are unlikely to be as effective at reducing vehicular traffic speed than the unsealed surface. The lane should remain a bridleway both in designation and character.
8. Two further objections state that the section of the lane in question is frequently used by horse riders. Tarmacadam is not a suitable surface for a bridleway as it is slippery for horses, and traffic speeds would increase. Cars would also be more likely to park on the lane. These factors would cause safety problems. It is stated that the existing surface was not experienced as dangerous despite regularly using it as an equestrian, walker and cyclist. The only users affected by potholes are motor vehicles and their needs should not be prioritised. The proposed tarmacadam surface would be out of keeping with the character of the common, which is demonstrated by the visual impact of the unauthorised surfaced section. It could also lead to pressure for further surfacing works.
9. I shall consider the substantive matters raised in the following parts of my determination that covers the statutory criteria.

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

1. Setting aside public access, which I shall consider later under the specific criterion, the application land is used as an unmade lane for residential access. The proposed works would facilitate this function.
2. The applicants confirm that they are the owners of the application land and that the works would be beneficial to them in accessing their property, which lies adjacent. Other nearby residents have rights of access to their properties over the land, most of whom are supportive.
3. The extracts from the register of common land show that there is a right of estovers over Mousehill Down registered to the property known as Mousehill Corner. The residents at Mousehill Corner have confirmed that they do not exercise those rights and that they consider the proposals would be advantageous.
4. Accordingly, the works would not harmfully interfere with the interests of those occupying or having rights over the land.

***The interests of the neighbourhood***

1. The term ‘neighbourhood’ is not defined in the 2006 Act, but the 2015 policy indicates that the issues to be considered in this context include whether the construction of the works means that local people will be prevented from using the common in the way they are used to and whether they would interfere with the future use and enjoyment of the land as a whole. Benefits to the neighbourhood can also be taken into account.
2. There are residential properties along Lower Moushill Lane in proximity to this part of the common, the occupants of which form part of the neighbourhood (including the applicants). Consequently, there will be some cross over with the interests of those occupying or having rights over the land which I have already considered above.
3. Moreover, there are wider factors, such as the impact on the landscape, that will impact people in the neighbourhood as well as others. To avoid duplication, I shall consider those factors later under the heading of public interest.
4. Several representations have been received from people living close by. There are mixed views on the merits of the works, but most of the residents indicate that they consider the works would be beneficial in terms of improved and safer vehicular access to their properties. Whilst that is understandable, it primarily represents a benefit as a householder but does not necessarily relate to their future use and enjoyment of the common per se. However, I recognise that the relationship of nearby residents with the section of the lane in question is not neatly compartmentalised into the future use and enjoyment of their property as opposed to the wider common, rather it is experienced as a whole.
5. The land in question would remain in use as a lane and a means of access to properties and the common. The works required are predicted to take 2 working days, meaning that disruption to access would be for a short duration. Therefore, setting aside matters that I shall consider under the public interest, the works would not prevent local people from using the common in the way they are used to, and many would welcome them.

***The public interest***

*Nature conservation*

1. The application land has an unmade surface devoid of vegetation and is therefore likely to make a very limited contribution towards the biodiversity of the common. That would be unlikely to change as a result of the works. This is reinforced by the comments of NE, who consider that there would not be any nature conservation benefits arising from the proposal but equally consider long-terms adverse effects on biodiversity to be unlikely.

*Conservation of the landscape*

1. My observations of this part of the common were that the sporadic and limited presence of built form combined with the prevalence of trees and natural vegetation resulted in a strong countryside character and appearance. Natural and uncultivated features were the prevailing influence that make the most important contribution to its attractive character.
2. The application land relates to a lane that has an unmade surface and is largely comprised of compressed natural stone and mud. The combination of its limited width, inconsistent texture and colour results in an informal and organic appearance that has a low-key presence in the rural surroundings. Although it is a man-made feature, the absence of formal surface treatments, hard edges, road markings and lighting means that aesthetically it cannot be mistaken for a conventional road. As such, the presence of this section of the lane treads lightly in the rural context, deferring to the natural surroundings. Whilst I observed there were potholes and some with puddles, they were not so prevalent as to detract aesthetically from the overall impression.
3. The use of black tarmacadam to provide a smooth sealed surfacing material would permanently and adversely diminish the informal appearance of a sizeable section of the lane. It would appear more starkly as an obviously engineered incursion. The colour, texture, finish and inclusion of speed bumps would convey urban characteristics that would contrast harmfully with the natural surroundings.
4. I observed this to be the case with the unauthorised section of hard surfacing on the lane that is in situ to the north. Connecting to and continuing that section would augment the harmful effect, as would an abrupt cessation at the southern end.
5. The visual effects would be obvious to local people who regularly use the lane. It would also impact on recreational users of the lane who include walkers, cyclists and horse riders. The lane provides a well-used route that leads to areas of common land beyond, and so would be seen by significant numbers of people.
6. Whilst the surface may weather over time, that would not negate the detrimental visual effect altogether. On this point, my judgement differs from NE. I accept that the relatively modest extent of the works would be unlikely to have wider landscape impact on the special qualities of the Surrey Hills National Landscape, but that would not prevent localised harm arising.
7. Paragraph 5.9 of the 2015 policy refers to works relating to vehicular ways across common land. Amongst other things, it states that by their nature such works will have an impact on the enjoyment of the common by introducing an urbanising feature into what will normally be an essentially open and natural setting. Nevertheless, it goes on to acknowledge that in some circumstances, a paved vehicular way may be the only practical means of achieving access to land adjacent to the common and that where an existing unsurfaced means of access is already in use, a sympathetic paving proposal may be aesthetically preferable. For the reasons outlined, in this case the works would erode rural characteristics and give undue prominence to urban ones. Hence, I find it would not be aesthetically preferable to the unmade lane.
8. Overall, I find that the proposal would result in localised harm to the landscape character of the common and would be likely to undermine the enjoyment of the landscape by recreational users of the common.

*Protection of public rights of access*

1. Paragraph 5.7 of the 2015 policy stipulates that commons should be maintained or improved as a result of the works being proposed on them. It explains that the ability to undertake works confers additional protection on the designation rather than enabling common land to be used for purposes inconsistent with its origin, status and character. Section 2 of the 2015 policy lists the reasons why common land is important, one of which is the recreational purposes its serves by giving access to open space and nature.
2. It follows that it is relevant to ask whether the proposed works are consistent with the use and enjoyment of the land as common land. Contrasting examples are given in the 2015 policy (paragraph 5.8) whereby works to facilitate grazing of a common by a rights holder would be consistent, whereas an application to extend a private dwelling onto common land would not.
3. It is put to me that the works in this case would facilitate safer access for recreational users, and that the potholes and puddles associated with the regular deterioration of the unmade surface of the bridleway are hazardous for horse riders, cyclists and walkers. Anecdotal evidence is provided to suggest opposing views in this respect, but no technical evidence is provided to demonstrate that the condition of the unmade surface is dangerous for recreational users of the common. Moreover, had there been serious concerns in this respect, it would have been reasonable to anticipate that the Countryside Access Team from SCC would have raised this in their representation. In any event, uneven terrain is frequently encountered by recreational users of common land.
4. Even if improvements to the surface could be made for recreational users accessing the common, I am not persuaded that the tarmacadam surface represents an appropriate response. In considering the likely effect on horse riders, I have given greatest weight to the observations of the BHS given their specialist interest and expertise. They do include a specification for asphalt that is less slippery in the BHS Advice for Access and Rights of Way (p13 Surfaces for routes used with horses), but my reading is that this is a suggested compromise in certain circumstances rather than a recommendation. Hence, in terms of the likelihood of slipping and injuries to horses, the proposed surfacing, even with quartzite grit rolled into the completed surface, would be a retrograde step.
5. Moreover, the resultant appearance and smoother surface of the lane would, for most vehicle drivers, be synonymous with more typical road conditions. Motor vehicles would be able, and more likely, to progress at increased speeds than at present. I am not convinced that 3 speed bumps would remove that likelihood. Given the restricted width of the lane, it is probable that increased vehicular speeds would make walkers, cyclists and horse riders feel more vulnerable. This could marginalise their use of the route or deter them from using it to access the common. In addition, should conflict between recreational and vehicular users of the lane occur, increased speeds could make them more serious in nature.
6. I accept that the works would improve vehicular access to several residences which would be convenient and more cost-effective owing to greater durability. However, it is not shown that the works are consistent with the use and enjoyment of the land as common land. Rather, these circumstances come closer to the second scenario in paragraph 5.8 of the 2015 policy which failed to meet that requirement. Whilst the works would be beneficial for vehicular access, this would be at the expense of public rights of access to the common.
7. It is highlighted that no objections were raised from walkers and cyclists in response to notifications for the application. Paragraph 4.7 of the 2015 policy confirms that representations received will be taken into account, but that it should not be assumed that a lack of objection means there would be no adverse impacts.
8. Therefore, although the works would not present a physical barrier to continued public access, I am not convinced they would meaningfully assist in the safety of recreational users seeking access to the common, rather the opposite for equestrian users. In addition to physical access, the enjoyment derived from experiencing common land is an important component of its recreational value. Instead, there would be harmful experiential implications for users, that would impair the public enjoyment of the common for recreational purposes.

*Protection of archaeological remains and features of historic interest*

1. There is no evidence before me to suggest that the land in question has archaeological remains or features of historic interest. Accordingly, there is little basis to consider that the proposal would result in any material harm in this respect.

***Other matters considered to be relevant***

1. The applicants explain that maintenance of the potholes and unmade surface of the lane has become increasingly burdensome, with responsibility for the repairs and associated costs falling upon local residents. Although the number of dwellings has remained static, over time the number of vehicle movements has increased. Deliveries mean more and larger vehicles use the lane. Combined with wetter weather, repairs have proven less effective, and potholes appear shortly after repairs are undertaken.
2. The works would represent a more durable improvement to the vehicular access arrangements for some residential properties along Lower Moushill Lane. This would be more cost effective and convenient to those occupants, their visitors and delivery drivers seeking access.
3. Paragraph 4.3 of the 2015 policy states that the Secretary of State will wish to know what alternatives have been considered to the application proposed. The applicants say they have looked at numerous options for repair. They have concluded that rubber crumb is not an option for motorised vehicles. Furthermore, restricting the width of the tarmacadam whilst leaving a strip of unsealed surface for other users would not suit the dimensions of the land available. They also contend such an approach would result in an unsealed surface becoming contaminated with debris as the tarmacadam breaks up at the edges.
4. However, other representations refer to alternative potential solutions including continuing a programme of on-going repairs to the unmade surface. This is a complex subject matter, where the attributes, cost and availability of a range of surfacing materials could be relevant. It is not adequately demonstrated why a lesser intervention better suited to the status and character of common land cannot be achieved. Consequently, I am not convinced that no feasible alternative option exists that would better prioritise national policy objectives for protecting common land.
5. Undoubtedly, the regular need for repairs and associated costs is a source of frustration to the applicants. Nevertheless, the level of positive weight attributed to this factor is tempered by my findings above. Overall, this matter attracts a minor degree of weight in favour of the works.

**Overall Balance and Conclusion**

1. Section 3 of the 2015 policy sets out the government’s policy objectives in relation to protecting common land. Amongst the outcomes sought is that works take place on common land only where they maintain or improve the condition of the common or whether they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.
2. I have found that the works would cause localised but permanent harm to landscape character that would diminish the experience of recreational users seeking public access. Neither am I convinced that there would be a meaningful wider public benefit, rather it is probable that the proposed surfacing would be less safe for horse riders. On that basis, the works would not be consistent with the use and enjoyment of the land as common land. Therefore, the proposal would conflict with the government’s policy objective.
3. That conflict weighs heavily against allowing the works. The minor weight given to the other relevant matters brought to my attention is insufficient to justify determining the application other than in accordance with government policy. Therefore, having regard to the statutory criteria, the 2015 policy and the written representations, I conclude on balance that consent for the works applied for should not be granted.

Helen O’Connor

Inspector