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Application Decision

Inquiry held on 27 July 2010

by Heidi Cruickshank BSc MSc MIPROW

Appointed by the Secretary of State an Inspector appointed by the Secretary of State pursuant to Regulation 3(1) of The Deregulation and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007 to hold a public inquiry and to determine the application.

Decision date: 03 November 2010

Application Ref: COM152 Westfield Common, Woking

Register Unit No. CL121

Registration Authority Surrey County Council

- The application, dated 17 February 2010, is made under Section 16 of the Commons Act 2006 to deregister and exchange common land.
- The application is made by Peter Bryant, Head of Legal Services, on behalf of Woking Borough Council, as owners of the release land and Steve Evans on behalf of Surrey County Council, as owners of the replacement land.
- **The release land** comprises 387 m² of land to the west and south of 45 Westfield Way, Woking, forming part of Westfield Common.
- **The replacement land** comprises 562 m² of land to the north of the release land, forming the garden of the derelict property Oaklands and adjoining land to the south.

Summary of Decision: The application is refused.

Procedural Matters

Site visit

1. I made an unaccompanied site inspection on 26 July 2010 and no-one requested a further accompanied site visit at the close of the Inquiry on the following day.

Availability of evidence

2. On opening the Inquiry one party indicated that only on arrival at the venue had he received copies of the proofs of evidence submitted by Woking Borough Council ("the Borough Council")¹ and so had not had time to look at it. There are no regulations requiring exchange of documents prior to an Inquiry but it was confirmed all parties had been sent a letter from The Planning Inspectorate, dated 11 June 2010, explaining that documents produced prior to

¹ Acting on behalf of the joint applicants

the Inquiry would be placed on public display, along with the application. The Borough Council confirmed that the documents had been available to the public as soon as they were produced, the Surrey Wildlife Trust ("the SWT") report the documents only being available two weeks before the Inquiry.

3. The Borough Council said that it was for the objectors to make their own case and that the responses received from this party during the consultation period suggested that he was familiar with the arguments. It was suggested that if it would be helpful their witnesses could be recalled to allow further questions later in the Inquiry schedule, although in the event this was not necessary.
4. I considered the possibility of adjourning for a period to allow this objector time to familiarise himself with the documents, however, he declined the offer, asking that note be taken of his displeasure and that the Inquiry continue. No-one else requested an adjournment in connection with this matter.
5. Having discussed the matter at the Inquiry, and taking account that the objectors were informed that relevant documents would be on deposit, I am satisfied that no-one was prejudiced in continuing with the Inquiry.

Consultations responses

6. There was reference to an objection from the Open Spaces Society ("the OSS"), but I did not have a copy of this. It was agreed that nothing new could be submitted following the close of the Inquiry but if there was a missing document then a copy should be sent; an e-mail dated 23 March 2010, that had been sent to The Planning Inspectorate, was forwarded. As the OSS objection should have been sent to the Borough Council with all other objections I arranged for this to happen following the close of the Inquiry, also giving the OSS the opportunity to make a 'second round response'.
7. The OSS knew the date of the Inquiry, as they contacted The Planning Inspectorate to confirm it, and so I am satisfied that they could have attended if they wished to. Taking account of this, and allowing time for representations as set out above, I am satisfied that there has been no prejudice to the case made by the OSS and I have taken account of it in determining this application.

Reasons

8. Section 16(1) of the Commons Act 2006 ("the 2006 Act") provides, among other things, that the owner of any land registered as common land may apply for the land ("the release land") to cease to be so registered. If the area of the release land is greater than 200m² a proposal must be made to replace it with other land to be registered as common land ("the replacement land").
9. The Department for Environment, Food and Rural Affairs *Common Land Consents Policy Guidance* ("the *Guidance*") published in July 2009 sets out the benefits which common land should deliver, and the outcomes that it considers must be ensured by the consents process under section 16 of the 2006 Act. The outcome relevant to deregistration is that "*...our stock of common land and greens is not diminished – that, on balance, any deregistration of registered land is balanced by the registration of other land of at least equal benefit.*"
10. 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;
 - (b) the interests of the neighbourhood;
 - (c) the public interest, which includes the interest in nature conservation, conservation of the landscape, protection of public rights of access and the protection of archaeological remains and features of historic interest;
 - (d) any other matter considered to be relevant.
11. The *Guidance* lists some of the considerations which should be taken into account in relation to the above and of relevance in this case are the following:
- i. Does the proposed replacement land add something that will positively benefit the neighbourhood?*
 - ii. Are there potential benefits to nature conservation from carrying out the proposals? It may be appropriate to consider indirect benefits.*
 - iii. What will be the impact on the landscape if the proposals proceed? Will the impact include an adverse effect on the enjoyment of the remaining part of the common or green (e.g. if development of any release land might spoil the view or impair the conservation of wildlife on the remaining part)?*

The application

The Common

12. Westfield Common ("the Common") includes a number of areas of land lying within the area of Westfield to the south of Woking Town Centre, recorded in the *Register of Common Land* under the Commons Registration Act 1965. This application relates to two sections of the Common lying to the north and south of the road Westfield Way, which runs from Westfield Common (road) into the housing estate of Westfield Way. The Borough Council, and others, have referred to 'Westfield Common South' and 'Westfield Common North' in relation to these two parcels of land and I will refer to them in this way.

The development

13. The application has been sought to release land on Westfield Common South allowing it to be used as one of three vehicular and pedestrian access points serving a maximum of 450 units at reserved housing land at Moor Lane, Westfield, as set out in the planning permission reference PLAN/2009/0764, issued on 18 November 2009. The land for the Moor Lane development ("the development") lies to the east of both the release and replacement land.
14. The development is a private finance initiative (PFI), known as the Priority Homes Project and was initiated to address Woking's housing need, with 60% of the provided housing to be affordable. An outline application for residential development was considered in 2006 under reference 2006/0399 and agreed in principle, although I understand that certain legal agreements remain outstanding. I believe that application(s) for the reserved matters will be made in December 2010. The reserved matters, which will set out the precise development layout, are not yet in the public domain however the two potential developers, The Evolution Consortium and The Place Partnership have allowed

some relevant details of their proposed schemes to be submitted. These are still subject to detailed planning consent.

15. Concerns were raised regarding the likelihood of the development due to changes in the planning process following the abolition of Regional Spatial Strategies, conformity with the Local Development Plan and flood risk, among other things; however, I consider that these matters would be more appropriately addressed to the planning authority. Whilst I understand the argument that there would be no need for the exchange if there was no development I consider that it is appropriate for me to determine this application, particularly in light of the approval in principle at the outline stage.

The release land

16. The 387m² of release land is registered at the Land Registry as being freehold land in the ownership of the Borough Council. It is part of Westfield Common South and lies within a Site of Nature Conservation Interest ("SNCI"), this designation being due to the status as 'wet woodland'.
17. The affected area lies directly to the front and side of houses off Westfield Way and is partly laid as an informal vehicular and pedestrian access to these properties, with a tarmac pavement and a wood-bark and gravel 'road'. To the west of this is a ditch, which was dry at the time of my site visit, whilst the south-eastern area is partly wooded with undergrowth, although subject to an amount of garden and household waste. It should be noted that the section of gravel road immediately to the north of the release land, leading onto Westfield Way in front of numbers 42 and 43, is not part of the registered common.
18. A small triangle of land to the east will not be required as part of the access road construction, however, it was included in the release land area so that an area would not be isolated from the rest of the Common.

The replacement land

19. The 562m² of replacement land lies to the north of the release land east of Westfield Common North. It is owned by Surrey County Council ("the County Council"), who also own the development land and are joint applicants for the exchange. At the time of the Inquiry the replacement land was partly the garden of a derelict house, Oaklands, Balfour Avenue, and partly a field, where there was evidence of recent use as grazing for horses. This is 45% larger than the release land.

Representations

20. Fifteen objections to the exchange application were received². It was clear that many people were concerned primarily with the effect of the development on the area as a whole, including the Common. It was argued that if the exchange of land did not gain consent then the lack of access would prevent the development and this would be in the interests of the neighbourhood.
21. The main issues lying between the parties related to the relative value, particularly in relation to nature conservation and landscape, of the proposed replacement land in comparison to the existing area of common. Other matters at issue are whether this was the only, or the correct, option for the required access.

² A public notice appeared in the Woking News and Mail on 18 February 2010.

Assessment

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

22. There are no rights of common registered in respect of the land, although there are two claims of rights of easement in relation to the Bristol Reversionary Trust Settlement and the then South Eastern Electricity Board. The successor bodies were notified of the Inquiry and given the opportunity to make representations, however, nothing was submitted. It was the understanding of the Borough Council that these easements would not be affected by the proposed exchange and no evidence was presented to show that this was not the case. I am satisfied that the proposal would not affect these easements.
23. This area currently provides informal access to the properties alongside, numbers 44 and 45 Westfield Way, however, the intention is to make a road, which will also allow access. The Borough Council suggested that the proposal might be beneficial to these properties in providing formal access, however, I give little weight to this as there is no evidence before me to show whether or not their use was by lawful authority in any event.

The interests of the neighbourhood

24. Although the 2006 Act does not define the term 'neighbourhood' the *Explanatory Memorandum to the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007* refers to this as the 'local inhabitants'. The majority of objections were from people identifying themselves as living in Westfield and so are, I consider, representative of the 'neighbourhood'.
25. Westfield Common North and South are sited within a generally suburban area with residential roads to the north, west and south and agricultural land, along with the Westfield Way Estate, to the east. The common land is clearly used as an amenity for local people with evidence of both informal routes and a recorded footpath on Westfield Common South. There were also indications of less desirable use, such as the dumping of rubbish within the release land and lighting of a fire elsewhere.
26. Many objectors believed that the development itself would be detrimental to the neighbourhood, whilst the Borough Council pointed out that this land had been reserved for housing over a thirty year period and affordable housing would be provided, which they considered would be beneficial for local people. I heard some arguments that the development should not take place, however, I consider that the issues raised would be more appropriately considered at the planning stage and are not matters that I can take into account.
27. I agree with the Borough Council that the release land seems to be of limited recreational value and there is no reason why the replacement land could not be of equal value. However, I do not consider that I can give weight to the proposals for the development apparently showing around 1 hectare of large open spaces in addition to formal play areas and verges, as this may occur in any case within the development and is unrelated to the Common, although it may be that this would satisfy the concerns of the OSS that the area of replacement land should be greater due to the increased number of people living close to the Common, leading to increased pressure.

28. I do not consider, on the balance of probabilities, that it has been demonstrated that the replacement land adds something that will positively benefit the neighbourhood.

The public interest

Nature Conservation

29. Given the designation of this part of the Common as a SNCI the Borough Council commissioned appropriate arboricultural and ecological surveys. I understand that wet woodland is a UK and Local BAP (Biodiversity Action Plan) priority and uncommon in Surrey, but that this area is a poor example due to degradation. It was said that the loss of trees, bird, reptile and bat foraging habitat on the release land would be compensated by the positive management of the wooded areas of the Westfield Common North and South as a whole, particularly the protection of two oak trees situated within the exchange land.
30. I do not place weight on the argument that the exchange will be of particular benefit to the oak trees identified as I understand that they are subject to tree preservation orders in any case. I note the arboricultural report identified these as 'very significant trees' that needed to be afforded careful consideration throughout the development process.
31. It was the findings of the arboricultural survey work under British Standard 5873:2005, 'Trees in relation to construction', that the majority of affected trees are low quality and so low priority for retention. The two category B trees were assessed as being of moderate quality but unremarkable. It was suggested that the loss could be mitigated by replanting as part of the wider scheme, although it appears that this is not intended to be within the replacement land.
32. The application suggested that the replacement land would be cleared and grassed but SWT have indicated that it should be left to scrub over. I give a little weight to the concerns of some objectors that the replacement land would become part of the 'managed' land of the development rather than part of the Common. The position on the margin of the Common reflects the location of the release land and I accept the argument of the Borough Council that there is a balance to be struck between a softer transition between the development and the replacement land and a hard boundary that may define the common but appear to be harsh; however, I consider that the replacement land itself should be clearly identifiable as separate from any managed areas of the development and any 'transition' needs to occur within the development and not within the replacement land itself.
33. Although suggested that there may be further species affected than the low numbers of common reptiles, such as slow worms and a grass snake, that were found during the surveys, I am satisfied that the surveys were carried out correctly. I note that mitigation measures in respect of these species, and others if found during works, were included within the planning permission for the access road in any event.
34. It was argued that the loss of some features of local nature conservation value were outweighed by benefits in the planned management to enhance the biodiversity of the SNCI. It was also said that the nature conservation value of the replacement land, when managed as part of the wider habitat, would over time become as bio-diverse as the remaining area of the Common and could

potentially be considered for inclusion in SNCI in time. Whilst I consider that this wider management plan might provide an indirect benefit I do not believe it is the type of benefit envisaged by the Guidance.

35. I note that the Borough Council undertakes to work with SWT to agree a mitigation and improvement strategy in the form of a Management Plan for North and South Westfield Common, which should improve the ecology of the Common. The Management Plan is to be included in the reserved matters of the development and it was argued that whilst there is some uncertainty in relation to the development and legal matters at present, the fact that there was no current legal agreement should not be given less weight than the evidence from the Borough Council to say that they would enter into the agreement. However, the Guidance suggests that weight can only be given to pre-existing legally binding agreements.
36. There is no provision for the inclusion of binding conditions in a decision to grant an application to deregister and, in the absence of a legal agreement, I cannot be satisfied at this time, on the balance of probabilities, that the public interest in relation to nature conservation will be met in the provision of replacement land of equal value.

Conservation of the Landscape

37. As noted, many of the concerns raised related to the potential changes that might arise as a result of the proposed development. I accept that the surrounding landscape, and therefore views from either the release or the exchange land, could be affected if the development goes ahead, however, as the development is not part of the Common I consider that I am unable to give weight to these possible changes.
38. There were comments that the development could be prevented if the application to exchange this land was not granted. I consider that although this was one of the Borough Council's preferred access routes refusal of this particular application is unlikely to prevent the development. I do not consider that it is the role of the Secretary of State in determining applications under section 16 of the 2006 Act to influence the planning process in this way.
39. I do not consider that I can give weight to potential consequential changes to the Common as a result of development on adjoining land, or indeed potential positive benefits that might arise from the demolition of Oaklands. I give a little weight to the potential negative effect on the enjoyment of the remaining part of the common due to the development of a road over the release land.

Protection of the public rights of access to any area of land and the right to air and exercise

40. I was told that there may be an unrecorded right of way over the release land, linking into the rest of Westfield Common South. It was confirmed that there was no application to record such a right, and one party suggested that due to the fact that the public had a right of access over the Common it would not be possible to record a public right of way in any case. Regardless of whether or not there is an unrecorded right, the Borough Council confirmed that there would be pavements on either side of the road to be constructed and, therefore, pedestrian links to the rest of Westfield Common South would be retained and possibly enhanced over the release land. The access road itself would be adopted as a public highway.

41. It was said that the replacement land was not in the same area but the two plots are not a great distance apart, although on opposite sides of Westfield Way. As pedestrian access would be provided over the release land it does not seem to me that the replacement land, which will become an integrated part of the Common, and therefore subject to the provisions within the Scheme of Management dated 9 December 1924, was inferior in this respect.
42. I should note that the developers' plans both indicated foot and/or cycle links on the replacement land; such matters may require consent under the 2006 Act and so I have not given them any weight.

The protection of archaeological remains and features of historic interest

43. The archaeological desk based assessment dated 26 May 2009, by Hyder Consulting (UK) Limited, identified an entry in the Surrey Sites and Monuments Record, SMR No. 458, fragments of a Late Bronze Age urn. This appeared to be on the release land, however, the entry refers to it being in Downsvie Avenue, which the Borough Council identified as being at least 370m away.
44. Given that no objection was made by English Heritage, and a method statement has already been agreed with the County Archaeologist, I am satisfied that any archaeological features on the release land would be protected.

Other matters considered to be relevant

45. There were some concerns that development of the release land would occur before the replacement land was available for public use, however, I understand that it was the intention of the County Council to make the replacement land available as soon as practicable, taking account of the nesting season in relation to the date of clearance of the site, and that it could be made available to the public as soon as consent was granted.
46. The Borough Council have indicated that as a result of the development they will obtain 190 affordable housing units and I believe that some weight should be given to the wider public benefits to arise from this. However, there was no evidence before me that refusal of this particular consent would mean that the development could not proceed and so I have given it little weight.

Any other matters

47. Arguments were made that the adjacent roads would not be able to absorb increased vehicular movement arising from the development and one objector commissioned an assessment of traffic levels in relation to the junction of Westfield Road and Balfour Avenue. I consider that these matters would need to be dealt with through the planning process and, as permission has already been granted to this access, I have not considered it further.
48. Concerns regarding the implications of the development on public services, such as schools and doctors, or what is alleged to have occurred in relation to other developments in the area, are not matters that I am able to consider.
49. It was suggested that the release land was incorrectly classified and should be recorded as a village green and that the replacement land was already common land; I have determined the application on the basis of designations in the Commons Register.

50. I note that there were small discrepancies in the areas identified between the application and the consultation: the release land was given as 341 m² in the consultation letter but 387 m² in the application and the replacement land 570m² and 562m² respectively. The Inquiry advertisement gave the areas as stated in the application and, as I am not intending to grant consent, I am satisfied that there is no prejudice in this case.

Conclusions

51. Having regard to these and all other matters raised at the Inquiry and in the written representations, and to the criteria in section 16(6) of the 2006 Act, I conclude that granting the application would provide a potential benefit to the neighbourhood in allowing access to the development, which is intended to provide affordable housing. However, in terms of nature conservation I am not satisfied, on the balance of probabilities, that I can place weight on the intention to manage the replacement land in such a way that it would provide land of at least equal benefit to the release land. I conclude, therefore, that the application should be refused and an Order of Exchange should not be given.

Formal Decision

52. The application to deregister and exchange common land at Westfield Common, Register Unit No.CL121 is refused.

Heidi Cruickshank

Inspector

APPEARANCES

For the Applicants:

Mr T Davey of Counsel, instructed by Woking Borough Council
who called:
Miss S Elder

Mrs A Hogan

In Objection:

Mr B Corney on behalf of Westfield Common Residents Association

Mr A Heggie

Mr J Martin

Mr R Shatwell

Mr C Weeks

DOCUMENTS

- 1 The application
- 2 Woking Borough Local Plan 1999 (with amendments September 2007)
- 3 Land ownership, Woking Borough Council
- 4 Consultation response from Open Spaces Society, 23 November 2009
- 5 Letter and attachments from the Department for Communities and Local Government, re: Revocation of Regional Strategies, 6 July 2010
- 6 Section of Local Plan (printed on-line 19/01/2008)
- 7 Annotated map showing footpath position