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## Application Decisions

Hearing and site visit held on 25 September 2014

**By Martin Elliott BSc FIPROW**

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

**Decision date: 11 February 2015**

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### **Application Ref: COM 505**

Register Unit: CL111

Registration Authority: The Council of the London Borough of Ealing

- The application, dated 5 August 2013, is made under Article 12 of the Greater London Parks and Open Spaces Order 1967 to carry out restricted works on common land.
- The application is made by Alison Luff on behalf of The Council of the London Borough of Ealing, Perceval House, 14-16 Uxbridge Road, London (the Council).
- The works comprise: (i) the erection of temporary fencing, (iii) the renewal of all footways within Haven Green.

### **Application Ref: COM 569**

Register Unit: CL111

Registration Authority: The Council of the London Borough of Ealing

- The application, dated 3 April 2014, is made under Article 17 of the Greater London Parks and Open Spaces Order 1967.
- The application is made by Alison Luff on behalf of The Council of the London Borough of Ealing, Perceval House, 14-16 Uxbridge Road, London.
- The application seeks the removal of 250 m<sup>2</sup> of common land to be replaced by 429 m<sup>2</sup> of land in exchange, resulting in a net gain of common land of 179 m<sup>2</sup>, to allow for the widening of the footway on the southwest side of the Haven Green 'diagonal'.

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## Decisions

### **COM 505**

1. The application is refused.

### **COM 569**

2. The application is refused.

### **Preliminary Matters**

3. I held a public hearing at Ealing Town Hall on 25 September 2014. I carried out an unaccompanied site inspection of Haven Green and the application land on the afternoon of 24 September and a further unaccompanied site inspection following the close of the hearing.
4. During the lunch adjournment of the hearing the Council had discussions with the objectors in respect of the extent of the common and the release and replacement land. Following the close of the hearing the Council submitted amended plans in relation to the extent of the common and the release and replacement land. The additional plans and correspondence were circulated to

the parties and in reaching my decisions I have had regard to the amended plans and the subsequent submissions.

5. Friends of Haven Green (FoHG), made the point that the area of common land at Haven Green was identified in the applications as being 17,929 sq m whereas a previous application (COM 43) identified the area as 19,820 sq m. The Council indicate that the area identified in the applications arises from more recent calculations as to the area of the common. There is no evidence that the differences in the areas renders the application misleading or that anyone will have been prejudiced.
6. FoHG also made the point that, in response to the questions in the applications regarding existing works and structures on the common, the Council had failed to refer to all the structures on the common including the cycle hub, cycle racks and CCTV poles. Whilst I note that some structures on the common have not been identified in the applications I do not consider that this has any bearing on my consideration of the application. Again there is no evidence as to any prejudice arising from their omission.
7. Questions have also been raised as to the ownership of the common. At the hearing the Council stated that they were the owners of the common. Post hearing correspondence from the Council included an indenture dated 22 November 1878 confirming the conveyance of the common from the Ecclesiastical Commissioners to the Ealing Local Board now Ealing Council.
8. Objectors made representations in respect of the consultations carried out by the Council. Whilst I note these concerns it is apparent that the necessary statutory consultations in respect of the applications have been carried out.
9. Of considerable concern to the objectors and other members of the public was the previous management of the common by the Council and the effect which developments in the area such as the proposals for Ealing Broadway Station would have on the common. Concerns were also raised as to the presence of unauthorised structures on the common. Whilst I note these concerns they are not matters which I can take into account or address in my decision.

### **Main Issues**

10. Article 7 of the Greater London Parks and Open Spaces Order 1967 (the 1967 Order) provides that a local authority may in any open space provide and maintain a variety of facilities for public recreation subject to conditions.
11. Article 12 of the 1967 Order provides that in the exercise of powers under Article 7 the local authority shall not, without the consent of the Minister, erect, or permit to be erected, any building or other structure on any part of a common.
12. I am required by section 39 of the 2006 Act, in respect of applications under Article 12 of the 1967 Order, 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<sup>1</sup>; and
  - d. any other matter considered to be relevant.
13. Article 17 of the 1967 Order provides that for the purpose of construction, widening or alteration of any street a local authority may utilise, alienate or exchange the land for other land.
14. In a case where land is utilised in this article, debit the account relating to the construction, widening or alteration of the street with an amount representing the whole or a portion of the value of the land so utilised. Under Article 17(5) the land that becomes a street ceases to be part of the common and under Article 17(6) any exchange land is added to the common.
15. I have had regard to Defra's Common Land Consents Policy Guidance<sup>2</sup> in determining these applications 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 guidance if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the guidance.

## Reasons

### COM 505

16. Part of the application seeks to resurface the footpaths over Haven Green. The application does not extend to the widening of the footway on the south western side of the Haven Green 'diagonal' (the south west diagonal footway) which is considered under the application COM 569.
17. The Council indicated that it intended to resurface the paths with a similar material to the existing surfacing and that provided on an experimental section of footpath. In my view such works are not restricted and do not require consent. However, it was put to me by the objectors that the footpaths as currently laid out have, at some point, been widened. The earlier widening of the paths would constitute restricted works, as would any subsequent work to that land, and would require the appropriate consent. Following the hearing the Council confirmed that the shared cycle/footpath leading in a south-easterly direction from opposite Gordon Road across the common had been widened by 30 cm; this amounts to the surfacing of an area of 34 m<sup>2</sup>.
18. The application under Article 12 is to seek consent to provide and maintain a variety of facilities for public recreation as set out in Article 7 of the 1967 Order. Article 7 provides for the provision of formal facilities such as, for example, swimming baths and bathing places. Article 7 does not provide for the construction of paths over a common and I do not consider that the construction of a path, or its subsequent widening, amounts to the provision of facilities for public recreation as set out in, or intended to be provided by, the Article. Consequently the application should not be approved in respect of the effective construction of any path across the common.

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<sup>1</sup> 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.

<sup>2</sup> Common Land Consents Policy Guidance (Defra July 2009)

19. The application also seeks approval for the erection of temporary fencing to facilitate the regeneration of vegetation on the common following the widening of the south west diagonal footway and the removal of the plastic matting.
20. As noted above the application under Article 12 is to seek consent to provide and maintain a variety of facilities for public recreation as set out in Article 7 of the 1967 Order. In my view the provision of temporary fencing does not amount to a provision of facilities for public recreation as identified in Article 7. The works are to facilitate the regeneration of vegetation and it is of note that the provision of temporary fencing for the regeneration of vegetation is specifically provided for under Article 9 of the 1967 Order. It follows that the application for consent under Article 12 for the erection of temporary fencing under Article 7 should not be approved.
21. Bearing in mind the above I have not considered further the issues outlined at paragraph 12 above.

## **COM 569**

### ***Background***

22. In 2010 the Council undertook a comprehensive study exploring options for improvements in the vicinity of Ealing Broadway Station. The aim being to address future interchange needs in the area in the light of the significant forecast increases from Crossrail. The study also sought the enhancement of the visual and physical connections between the station and Haven Green as well as to ensure no net loss of open space at Haven Green.
23. The preferred option based on a series of improvements and upgrades is, amongst other elements, to remove the R65 bus terminus area to the east of Haven Green and to widen the south west diagonal footway. The widening of the footway is to improve pedestrian safety, access and circulation as well as to rehabilitate worn out and compacted areas of Haven Green along this section of footway. The Council advised that the grass adjacent to the footway had become worn away and the soil compacted. This is said to have resulted in large areas of unattractive and hazardous areas of exposed earth which become muddy during rainfall leading to the pooling of water and trip hazards.
24. The Council state that the widening of the footway would allow bus stops to be set back against the existing kerb-line to meet existing and planned demand and avoid further degradation of Haven Green.
25. Of particular concern to the objectors is the extent of the common land and confusion as to the land proposed to be exchanged. The Council provided information as to the methodology used to produce the common land boundary. Whilst I note the methodology used, it is the commons registration plans which provide the basis as to the extent of the common. The maps should be interpreted on the basis of the physical features recorded thereon and at the scale at which the maps are produced. The Council also advised that the boundary of the common had been taken as the centre of the boundary line shown on the registration map. However, this approach is incorrect. The registration documents indicate that the common is marked with a green verge line inside the boundary shown on the map. This marking accords with The Commons Registration (Objections and Maps) Regulations 1968 which state that the green verge is marked to the inside of the boundary.

26. As noted at paragraph 4 above the Council submitted additional plans following the close of the hearing as to the extent of the common and the areas of release and replacement land. In my view plan 1 of 5 (drawing number 22688701\_100) provides a good representation of the extent of the common as shown on the registration documents and is consistent with the plan accompanying the application made in 1968.
27. The Council has provided further plans as to how the changes proposed by the application. The Council advises that the changes are now limited to:
- i) the widening of the Haven Green south west diagonal footway;
  - ii) the removal of the R65 bus stand and the straightening of the kerb-line to provide a link along the eastern side of the green from the taxi rank/cycle hub;
  - iii) the extension of the common land boundary to include the footway along the north side of the Haven Green diagonal to offset changes identified at sub paragraphs i and ii above;
  - iv) the removal of the northwest corner path which would provide additional greenspace within Haven Green.

### ***Consideration of the proposals***

#### *South west diagonal footway*

28. The additional plans provided by the Council indicate that the widening of the footway on the south side of the diagonal will take up 137 m<sup>2</sup> of the common. The subsequent correspondence from the Council indicates that the widening of this footway has been reduced by 0.5 metres. The reasons for the widening of the footway are summarised at paragraphs 23 and 24 above.
29. Although it is argued by the objectors that the footway has been increased in the past the Council say that they have no evidence that the footway has been widened. I have not been provided with sufficient evidence that demonstrates that the footway has been widened. However, the works proposed to be facilitated by the application relate to the area of common to the south west side of the existing path. Any consent to the application would not provide authority for any previous widening of the footway if indeed this took place. I am required to consider the merits of the application and any previous widening of the path is not a matter for my consideration.
30. In my view the widening of the footway will address the issues outlined at paragraphs 23 and 24 above. However, there will be a loss of common land as the widened section of footway will form part of the adjacent highway and will be removed from the common.

#### *Removal of R65 bus stand*

31. The R65 bus stand currently stands on land registered as part of the common. The proposal to remove the bus stand will provide for the restoration of this part of the common to greenspace. The Council indicate that this area will be grassed over. The application seeks to remove 95 m<sup>2</sup> from the common at this location so as to improve the footway along the eastern side of the common to facilitate north to south movements.

*Haven Green Diagonal (north side)*

32. The footway on the north side of the Haven Green diagonal is identified by the Council as being 133 m<sup>2</sup> in area. The Council have acknowledged that the footway along the north side of the Haven Green diagonal is an adopted highway. Whilst it is proposed by the Council that this should be provided as replacement land, given that it is a public highway, it should not be registered as common land. As such the land is not appropriate as replacement land.

*Northwest corner path*

33. The area covered by this path is 38 m<sup>2</sup> and the path is on land which forms part of the Common. Although the removal of this path and any subsequent restoration would increase the greenspace on the common the land over which the path crosses is already common land. Consequently the land cannot be utilised as replacement land.

*Bike Hub 'lozenge'*

34. The plan submitted by the Council<sup>3</sup> showing the land to be 're-designated' as common and land to be 're-designated' as public highway (drawing number 22688701\_101) identifies an area of land 9 m<sup>2</sup> predominantly at the south eastern area of land described by the parties as the 'lozenge' as being re-designated as highway. However, this was not included in the initial application and the Council have provided no information as to the reasons for removing this from the land area of the common. Given the circumstances the land remains part of the common. The plan also identifies slivers of land as land to be re-designated as common land. Having regard to all of the evidence before me I consider that this land already forms part of the common.

*Replacement land in vicinity of R65 bus stand*

35. This area of land is identified as 70 m<sup>2</sup> and currently forms part of the R65 bus stand and part of the footpath which runs in a south west to north east direction over the common. The public appear to have access to this land albeit that access to the land occupied by the bus stand would not always be available.

***Conclusions on proposals***

36. As noted above Article 17 of the 1967 Order provides that in a case where land is used under this article the land to be provided in exchange should amount to the whole or proportion of the land utilised for any proposal. This suggests that it is not necessary for an equal amount of land to be provided in exchange. However, guidance produced by the Planning Inspectorate<sup>4</sup> outlines an expectation that, in almost all cases, suitable exchange land should be offered. Further, that Article 17 cases should generally involve an area of land that is at least as large as the land to be taken and which is equally advantageous to those with an interest or rights over the land. This is consistent with Defra's objective that commons should be safeguarded for current and future generations and that the special qualities of common land should be protected. To achieve this Defra advises<sup>5</sup> that the consent/approval process is in place to ensure that the stock of common land is not diminished and that any

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<sup>3</sup> Appended to an Email from the Council dated 10 November and prepared at my request.

<sup>4</sup> Common Land Guidance Sheet 2b, Special Consent provisions (other than National Trust Land)

<sup>5</sup> Common Land Consents Policy Guidance, Defra, July 2009

deregistration of land is balanced by the registration of other land of at least equal benefit. Further that works on land only take place when they maintain or improve the condition of the common or, exceptionally, where they confer some wider public benefit and are either temporary or have no lasting effect. It is also expected that any use of common land is consistent with its status.

37. Having regard to all of the above, the applicant now seeks to release 232 m<sup>2</sup> of common land. The replacement land, bearing in mind my observations at paragraphs 32 and 33 above, amounts to an area of 70 m<sup>2</sup>, a net loss of common land of 162 m<sup>2</sup>. Even if the slivers of replacement land identified around the 'lozenge' are included (see my observations at paragraph 34 in this respect) this does not significantly alter the total loss of common land. In any event the land identified is directly adjacent to the carriageway and the road utilised by queuing taxis and is not of equal value to the land to be released. The replacement land is confined to an area of land in the vicinity of the R65 bus stand. The area is partly occupied by the bus stand and part is currently available and used by the public. The registration of this land as common land will protect this land as part of the common and the removal of the bus stand will allow the area to be grassed thereby improving the quality of the greenspace. Whilst the quality of the area, once the bus stand has been removed and the land grassed as proposed by the Council, is similar to the release land the area of land is around one third of the land to be released.
38. I note the suggestion of the FoHG that areas of the common which have in their view already been encroached upon should be taken into account in respect of the area of land for which an exchange is required. Whilst I note this point I am required to consider the application before me. Alleged previous encroachments and the erection of unauthorised structures are not matters for my consideration; the areas involved cannot be included in my assessment.
39. Taking into account all of the evidence the approval of the application will, as outlined in paragraphs 23 and 24, provide a number of benefits. However, I have not been provided with evidence to suggest that any benefits will be of such significance such as to, on balance, outweigh the disbenefits arising from the loss of common land.

## **Conclusions**

### **COM 505 and COM 569**

40. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that the applications should be refused.

*Martin Elliott*

INSPECTOR

## APPEARANCES

### **Ealing Council:**

Mr N O'Donnell	Assistant Director of Strategic Transport
Mr L Deacon	Steer Davis Gleave
Mr C Bunting	
Ms A Luff	

### **In opposition to the applications:**

Mr G Phelan	Chairman of Friends of Haven Green
Mr French	Friends of Haven Green, also representing the Open Spaces Society and Haven Green Conservation Area Advisory Panel on Heritage Issues
Mr J Edmonds	Central Ealing Residents' Association
Councillor I Proud	Elected member for Cleveland Ward
Mr N Woolven	Save Ealing's Centre

## DOCUMENTS

- 1 Correspondence from Mr G Phelan of Friends of Haven Green and Mr N O'Donnell 16 September 2014 and correspondence from Mr N O'Donnell to Mr Hummerston 11 September 2014
- 2 Commons Register plan (1:10,000 scale)
- 3 Land Registration documents