

**Adroddiad**

Ymchwiliad a gynhaliwyd ar 5 & 6/09/17

Ymweliad â safle a wnaed ar 05/09/17

**gan Vicki Hirst BA(Hons) PG Dip TP  
MA MRTPI**

**Arolygydd a benodir gan Weinidogion  
Cymru**

**Dyddiad: 24.10.2017**

**Report**

Inquiry Held on 5 & 6/09/17

Site visit made on 05/09/17

**by Vicki Hirst BA(Hons) PG Dip TP MA  
MRTPI**

**an Inspector appointed by the Welsh  
Ministers**

**Date: 24.10.2017**

COMMONS ACT 2006

APPLICATION TO DEREGISTER PART OF MYNYDD GARN-GOCH COMMON, GARDEN VILLAGE, GORSEINON, SWANSEA (CL44) AND PROVIDE REPLACEMENT LAND

Cyf ffeil/File ref: COM/3170168

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**File Ref: COM/3170168**

**Site Address: Mynydd Garn-Goch Common, Garden Village, Gorseinon, Swansea**

**Register Unit: CL44**

**Registration Authority: City and County of Swansea Council**

- The application, dated 22 February 2017 is made under Section 16 of the Commons Act 2006 to deregister and exchange land registered as common land.
- The application is made by the Trustees of the Somerset Trust c/o Persimmon Homes Limited.
- The release land comprises 0.71 hectares of land, part of Garn-Goch Common, Garden Village, Gorseinon.
- The replacement land comprises 0.81 hectares of land located at Garden Village, Gorseinon.
- The application is made to enable the construction of a roundabout to facilitate access to a proposed development for a residential-led, mixed use development comprising of: approximately 750 residential units; provision of 1 no. primary school; A1/A3 and D1 floor space; open space including parks; natural and semi-natural green space; amenity green spaces; facilities for children and young people, outdoor sports provision including playing pitches; and associated services, infrastructure, accesses, engineering, ecological mitigation and landscaping works.

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**Recommendation: That the application be granted and a Deregistration and Exchange Order be made.**

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**Procedural Matters**

1. Section 16 of the Commons Act 2006 (the 2006 Act) provides, amongst 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 200m<sup>2</sup> a proposal must be made to replace it with other land to be registered as common land (the Replacement Land).
2. The application, the subject of this report, is made under Section 16 of the 2006 Act and was advertised in the South Wales Evening Post on 24 February 2017. Notices were posted at the main entries to the lands and sent to various consultees and relevant documentation was deposited at Dragon House, Parc y Ddraig, Penllergaer Business Park, Swansea<sup>1</sup>.
3. I undertook an accompanied site visit on 5 September 2017 and carried out unaccompanied visits to the surrounding area.

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<sup>1</sup> Doc 1

## The Site and Surroundings

### *The Release Land*

4. The Release Land comprises 0.71 hectares of the overall common land unit (CL44) which amounts to some 165.79 hectares<sup>2</sup>. The overall common is subject to rights for the grazing of sheep, cattle and horses and for the taking of ferns for bedding distributed between some 25 rights holders<sup>3</sup>. In addition the public have a right of access to the common for air and exercise under Section 193 of the Law of Property Act 1925<sup>4</sup>.
5. The Release Land fronts Hospital Road to its eastern boundary with an industrial estate on the opposite side of the road. Parcels of undeveloped land outside of the common are located adjacent to the land to the south, south west, west and north west. To the south east lies a row of houses with a strip of common running from the south eastern corner of the Release Land between the front of these houses and Hospital Road. The common has become fragmented by development and roads, and other parts of it are located to the north west, north, east and south east of the Release Land but, with the exception of the area adjacent to Hospital Road, are not contiguous with it. A strip of ancient woodland is located to the immediate south of the Release Land with a further area situated to the south west. The Release Land is heavily wooded and is not crossed by any public rights of way. The majority of it is unfenced.

### *The Replacement Land*

6. The Replacement Land comprises 0.81 hectares and is located approximately 60 metres to the south of the Release Land to the rear of the gardens of the houses fronting Hospital Road. It comprises an area of predominantly rush pasture with some shrub cover and is unfenced in the main. It is not crossed by any public rights of way.

## The Proposals

7. The deregistration is proposed to facilitate the construction of a new roundabout and access to serve a proposed development for a residential-led, mixed use development. The proposed development comprises approximately 750 residential units, 1 no. primary school, A1/A3 and D1 floor space, open space including parks, natural and semi-natural green space, amenity green spaces, facilities for children and young people, outdoor sports provision including playing pitches and associated services, infrastructure, accesses, engineering, ecological mitigation and landscaping works. The development is the subject of a planning application<sup>5</sup> that is yet to be determined. The application has been submitted in outline but with the access included. Notwithstanding that the application, the subject of this report, is made to facilitate the access to the development, the applicant has requested that an Order be made for de-registration and exchange even if planning permission is subsequently refused<sup>6</sup>.

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<sup>2</sup> Doc CH1

<sup>3</sup> Doc 2 & CH1

<sup>4</sup> Doc 3

<sup>5</sup> Council ref 2016/1478

<sup>6</sup> Doc I17, Paragraph 58

8. Prior to the submission of the planning application pre-application consultation was carried out with the local communities<sup>7</sup>. An access appraisal of several possible options for accessing the development was undertaken. These are detailed in the Transport Assessment<sup>8</sup>. It was concluded that a strategic access point off Hospital Road would respond to the local communities' concerns regarding an access through Garden Village and other concerns expressed by the local highway authority regarding the ability of the highway network to accommodate the development from other possible access points.

## **The Statutory Requirements and Guidance**

9. Section 16 (6) of the 2006 Act requires that in determining this application regard should be had to the following:
  - 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<sup>9</sup>;
  - d) any other matter considered to be relevant
10. The Welsh Government has published guidance for the Welsh Ministers, the Planning Inspectorate Wales, commons registration authorities and applicants for consent<sup>10</sup> (the Guidance). It provides advice in relation to the determination of casework in relation to common land in Wales.

## **The Case for the Applicant<sup>11</sup>**

The material points are:

### Introduction

11. The applicant is Persimmon Homes Ltd (the applicant). The Trustees of the Somerset Trust are the owners of the Release Land. Persimmon is the owner of the Replacement Land, and also the applicant for planning permission for residential-led mixed use development (the development) including a new school, on land at Garden Village, Gorseinon, Swansea (the development site). The development site includes the Release Land. There is considerable need for the new housing, and the new school which the development will provide.
12. The applicant applies under section 16 of the Commons Act 2006 (the 2006 Act), for an Order under section 17 of the 2006 Act removing the Release Land from the register of commons and village greens (the Register), and adding the Replacement Land to the Register (the application).

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<sup>7</sup> Doc DJL1 & Doc 4, Appx 9 – 23

<sup>8</sup> Doc 4, Appx 5, & Doc DJL1, Appx 1

<sup>9</sup> Section 16 (8) 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>10</sup> Welsh Government – Common Land Consents Guidance, August 2014

<sup>11</sup> Doc I17

13. The Release Land is a relatively narrow strip of land close to a busy highway (Hospital Road), unfenced, and populated with broadleaved woodland with an understorey of bramble. There are no signs of recent human activity or grazing by animals. It is an unattractive place for recreational walking or for grazing. It does not appear to be used by anyone.
14. The Replacement Land is a mere 60 metres from the Release Land. It is rush pasture with some shrub tree cover, and adjoins existing common land. It is set away from the road, and is more open than the Release Land. It presents a more pleasant opportunity for air and recreation, and better grazing potential.
15. There are large areas of registered common land in the vicinity. As may be seen when observing the common from, for instance, the Garnogoch Hospital, or the Battle of Gower sign on the Hospital Road, there is little evidence of recent grazing of the wider common, which is generally unfenced and is becoming overgrown, and little evidence of general public use. There does appear to be some grazing of the common land to the west of Pleasant Road, that land being open, and fenced along much of its boundary.
16. Section 16(6) specifies certain matters which the appropriate national authority – in this case the Welsh Ministers – shall have regard to in determining the application.
17. The Welsh Government document Common Land Consents Guidance of August 2014 provides guidance on the government's approach to these statutory considerations, and the applicant has of course had regard to that guidance.
18. These submissions return to the requirements in section 16 further below.
19. The applicant's Outline Legal Submissions dated 8 August 2017<sup>12</sup> considered the following matters:
  - the potential for an Order under section 17 of the 2006 Act being made conditional or including conditions;
  - the potential for a s106 planning obligation to be used in connection with the section 16 application and any future section 17 order;
  - the legal position regarding rights of access over the common land which lies between the public highway and the entrance to the Replacement Land; and
  - the approach to balancing the statutory considerations specified in s16.
20. These submissions will refer to those matters as necessary below.
21. The applicant's case is that, in particular:
  - there is very little if any use of the Release Land by the public, or by those who have rights of common (those rights of common are herbage (grazing) and estovers (taking fern for bedding))<sup>13</sup>;

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<sup>12</sup> Doc 5

<sup>13</sup> Doc 2

- the Replacement Land is situated approximately 60 metres from the Release Land, immediately adjacent to other parcels of registered common land, and in an area which contains a considerable amount of common land;
- the Replacement Land is at least as suitable for public access and recreation, and the relevant rights of common, as the Release Land;
- in fact the less overgrown and more open nature of the Replacement Land means that it is more suitable for public access and rights of common than the Release Land in its current state;
- the applicant is prepared to carry out fencing and other works to make the Replacement Land even more suitable for grazing, whilst maintaining its suitability for public access;
- given the short distance between the Release Land and the Replacement Land, the relative merits of the two parcels of Land, the apparent absence of use of the Release Land by anyone, and the fact that there is a considerable amount of other registered common land in the local area which also appears to be little used, the interests of the neighbourhood will not be harmed or diminished by the deregistration of the Release Land and the Registration of the Replacement Land;
- more generally, there is no disbenefit in terms of public access, grazing, ecology or any other matters, arising from the location and condition of the Replacement Land;
- replacing the Release Land with the Replacement Land will lead to, at worst, a neutral change, but in fact there will be a positive impact from the registration and exchange, in terms of the interests of the neighbourhood, commoners, and the general public, because the Replacement Land is more suitable for public access and exercise of rights of common; and
- there is also considerable public interest and benefit in the development going ahead on the development site, and that benefit can only be realised if this application is approved and an Order is made under section 17 of the 2006 Act to deregister the Release Land and register the Replacement Land.

#### The Applicant's Evidence

22. The applicant's witnesses produced their proofs of evidence after the objections to the application had been submitted. Accordingly, their evidence responded to those objections (as did the applicant's letter of 25 April 2017 to the Planning Inspectorate)<sup>14</sup>. No further written representations were submitted by any objector.

#### Mr Hadley's evidence<sup>15</sup>

23. In oral evidence Mr Christopher Hadley explained that the grazing rights (and rights to take ferns for animal bedding) on Mynnydd Garn-Goch common CL44 are as listed in the Register for CL44. The register lists the rights and their allocation to graziers, but

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<sup>14</sup> Doc 6

<sup>15</sup> Doc CH1

not any level of actual usage at any time. The rights of common are not (apart from one particular grazier)<sup>16</sup> limited to any particular part of CL44.

24. The process of public consultation did not reveal any person who claimed to be actively grazing animals on the common. At no time during the informal or formal consultation carried out by the applicant, or during the application and Inquiry stage, has any grazier on the Commons Register for CL44 come forward and expressed concern that they would be unable to exercise grazing rights due to a shortage of grazing as a result of the proposed exchange, or because of any suggested inadequacy of the Replacement Land.
25. In particular, neither the Garn-Goch Commoners Association nor the West Glamorgan Commoners Association have expressed concern or suggested that the proposed exchange will adversely affect the area of grazing land available to the grazing rights holders on CL44.
26. The wider common appears to be under-grazed in general as can be seen at the central and southern areas of common near Hospital Road, which are not securely fenced and show no signs of grazing in recent years i.e. the last 5-10 years. The northern area of CL44 adjacent to Pleasant Road does appear to be grazed at present, and is fenced.
27. The Release Land is populated by a deciduous tree over-storey with bramble scrub cover underfoot. It represents very little if any grazing value to livestock. A busy main road runs alongside. The Release Land has no visible sign of grazing. Mr Hadley considered that it had not been grazed in decades, perhaps 50-70 years, judging by the nature and type of the growth on the Release Land.
28. CL44 is not a contiguous common; it is rather a number of separate areas of land split up by public roads and industrial and residential building developments. The unfenced fragmented common land intersected by main roads makes many areas of CL44 neither suitable nor safe for use by grazing animals due to road traffic pressure. In the absence of fencing in theory the only grazing livestock that could utilise the existing common would need to be tethered for them to be safe from passing traffic and not represent a hazard to road users. Tethering is not a recognised commercial farming practice and is only really practical for individual horses.
29. The Replacement Land is 0.10 ha larger than the Release Land, with open rush pasture and fewer trees. Whilst wet in places, it offers more potential grazing for livestock than the Release Land. The Replacement Land is away from the main road but adjoins the existing common and can be accessed from the existing common (it is contiguous with existing CL44 common land to the south of Hospital Road) and the Hospital Road itself.
30. There has been criticism on grounds of, '*quality*' from the Open Spaces Society (OSS)<sup>17</sup>. Mr Hadley did not agree with that criticism. From an agricultural point of view the Replacement Land offers more grazing potential, he considered, and is of at least the same if not better quality than the Release Land. The OSS apparently see quality in visibility terms, criticising the fact that the Replacement Land is not visible to anyone and stating that, "*the new site is an open field with poor unattractive gorse and*

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<sup>16</sup> Doc CH1, para 49, pg 13, Table 1

<sup>17</sup> On PINs application file

*no trees*". This description is not correct as the Replacement Land does have some trees and shrubs; it is only partially an open field; and does not have any gorse.

31. Turning to other points raised in objection<sup>18</sup>, to which Mr Hadley responded:

- (1) It has been suggested that the Replacement Land *contains a major gas line, which is why no development has been made on the land; also a stream runs round the back of the houses, making the land swamp like when it swells from rain.* Mr Hadley noted that the gas pipe line does not run in the entrance vennel, it is further out in the field far away from where a cattle grid or gates might be installed were they needed. There is no 'stream' running through the Replacement Land as far as one can see (particularly in the current relatively wet conditions) and wetness is a feature on other areas of common land and would not prevent animals grazing on the Replacement Land.
- (2) There are concerns that *the land requested as replacement, leads directly on to people's gardens; the access for cattle and public would be between two houses and to get the cattle in to this "new" common land location a farmer would have to stop traffic to reverse back in to the lane to drop and pick up cattle, causing even more chaos on the street.* Mr Hadley considered that the Replacement Land does not (as is obvious) lead directly on to back gardens, and does not include any residential properties as one objector has suggested. The drop off area for delivering livestock to the Replacement Land is safer than that available for delivery to the Release Land because there is adequate space utilising an existing common land strip, vehicular access over which (for graziers delivering to or collecting animals from the Replacement Land), will be granted by the existing common land and Replacement Land owners.
- (3) There have been some general objections that people with rights of common had not been contacted by the applicant or directly consulted on the application. Mr Hadley explained that the Commons Register was the source of information on those that held grazing rights over CL44. All those listed on the Register as having rights of common were written to at the initial informal consultation stage. If the Register is not up to date that is not a matter that the applicant can rectify. Those objectors who have raised this point (e.g. Mr and Mrs Fussell) have clearly become aware of the application, indeed Mr Fussell wrote to the Inspectorate to say that if there was to be a public inquiry he would attend it. He did not.

Dr Henson's evidence<sup>19</sup>

32. The evidence of Dr Kate Henson was called by the applicant because there have been objections to the proposed deregistration that raised ecological issues. An Ecological Appraisal Report<sup>20</sup> and an Outline Dormouse Mitigation Strategy<sup>21</sup> have been submitted with the application. These are concerned with the overall development site that is the subject of the planning application but nonetheless include an assessment of both the Release and Replacement Lands.

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<sup>18</sup> As 17

<sup>19</sup> Doc KH1

<sup>20</sup> Doc 7, Appx 3

<sup>21</sup> Doc 9

33. There are no international or national statutorily designated sites located on or adjacent to either of the parcels of land. The Release Land is bordered on the outside of its southern boundary by a linear length of ancient woodland that is connected to a larger area to the south west. This Ancient Woodland is likely to be the wooded boundaries of an abandoned field pasture. The remainder of the Release Land comprises secondary, broadleaved woodland some 50 – 70 years old.
34. Dr Henson considers the woodland on the Release Land to be species poor with a sparse under storey. No ancient woodland indicator plants were found and it has no precise correspondence with the woodland communities and sub-communities accepted within the National Vegetation Classification Survey. Dr Henson considers it to only have any significance at site level.
35. The Replacement Land contains rush pasture, dense scrub and tall herb vegetation habitats. Dr Henson considers the rush pasture to be botanically diverse with an intrinsic ecological value that is significant at the local level. Whilst over grazing can result in ground disturbance and the destruction of the sward, some grazing would assist with maintaining the rush pasture and limiting the encroachment of scrub and enhancing the botanical value. Some works would be required to facilitate grazing and access onto the land. However, given the very minimal nature of these works comprising some clearance of scrub, rush pasture and non-native species the impact of such works on habitat and species would be negligible.
36. In terms of species, the Ecological Assessment found no evidence of protected species on either the Release or Replacement Lands. There was evidence of two unoccupied dormice nests within habitats to the south and south east of the Release Land and there is a possibility that dormice would use both parcels of land for foraging and dispersal. Several trees on the south western boundary of the Release Land are considered suitable for future use by roosting bats. Other species, such as breeding birds and reptiles were found to be typical of species found at an urban edge locality and such species are only pertinent to this Inquiry by virtue of the legal protection afforded to them under the Wildlife and Countryside Act 1981 (as amended).
37. The proposed mixed use development would result in some losses and impacts to habitats and species in the short term but these would be sufficiently addressed by the required retention, enhancement and creation of new habitats proposed in the planning application. These measures would ensure the favourable conservation status for these species and wildlife more generally.
38. Dr Henson responded to the following objections in particular:
  - (1) *The release of common land will lead to the future loss of ancient woodland if planning consent is forthcoming.*

It is generally accepted that ancient woodland comprises 'irreplaceable' habitat whose loss cannot be compensated for, representing a habitat of high ecological value. However there is no ancient woodland on the Release Land, and the deregistration of the Release Land will not, of itself, lead to any impact upon any ecological receptor. Development will only proceed if planning permission is granted by the Council. The Ancient Woodland Inventory identifies woodlands as being Ancient where they are believed to have been in existence for over 400 years, and in Wales, includes sites which have been wooded continuously since the 1830s. However its inclusion on the inventory does not 'prove' ecological value, rather it

should be seen as a proxy for areas of greater ecological diversity. A detailed botanical assessment of the area of ancient woodland to be affected has assessed its intrinsic ecological value to be significant at the local level only. Planning policy, whilst requiring ancient woodland to be protected from development where it would result in significant damage, also requires for weight to be attached to its nature conservation interest, so as to avoid placing unnecessary constraints on development. It is arguable that appropriate mitigation alongside compensation would be acceptable with respect to ancient woodland loss, with such measures deemed acceptable to include large scale woodland planting alongside the protection, restoration and long-term management of retained woodland, including any areas of ancient woodland remaining. Such measures have been proposed as part of the wider ecological strategy relating to the planning application, with the principles of loss and proposed mitigation/compensation deemed acceptable by the Council, given that the wider benefits of the proposed development are considered to outweigh the proposed ancient woodland loss.

(2) *There will be impacts upon European Protected Species (EPS) such as dormice and bats*

Impacts upon EPS as a result of the common land exchange alone are not anticipated to be material, let alone significant, given the lack of impacts arising from current levels of use (i.e. absence of use) by commoners of the release land parcel. Nevertheless the Replacement Land parcel does offer more suitable grazing habitat to commoners relative to the Release Land, and thus could be subject to greater levels of use in future should the section 16 application be consented. Having said that the Replacement Land was grazed up to 10-12 years ago, and could be grazed in future should the landowner wish. Similarly there is the right for commoners to graze the Release Land, if it continues to be registered as common land. Should planning consent for the wider development site be approved in future however, then impacts upon EPS could be more significant due to habitat loss proposed, but that will be a matter for the Council to address when it determines the planning application. All impacts arising upon EPS across the wider development site, including the Release and Replacement Land parcels, will be mitigated through the implementation of the ecological strategy proposed as part of the planning application and as summarised at Section 5 of Dr Henson's Proof of Evidence. The Outline Dormouse Mitigation Strategy<sup>22</sup> prepared for the wider development site and recently submitted to the Council expands on those principles set out within the ecological strategy, and further confirms how no net loss to biodiversity will arise, demonstrating how net gains will be achievable so as to ensure the favourable conservation status of EPS will be maintained. Records of dormice on the wider development site including the Release and Replacement Land are very low (1 or 2 individuals), and did not constitute hibernation or breeding activity. Dr Henson considers that this species will be maintained in favourable status if the development (with proposed mitigation) is carried out. The bat assemblage on the site is, as Dr Henson explained, fairly typical, and the mitigation proposed for dormice, which included considerable new tree planting, would also be effective for bats.

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<sup>22</sup> Doc 9

- (3) *The Replacement Land does not offer a conservation benefit to the local community, and/or is inferior to the Release Land with respect to its nature conservation value.*

In ecological terms, both land parcels support a similar range of protected and notable species, including dormice, bats, reptiles and breeding birds. With respect to habitats, each land parcel supports different habitat types; nevertheless the intrinsic ecological value of the Release Land has been assessed as being of site level importance only, whilst that of the Replacement Land parcel is considered to be of local level importance. The Replacement Land parcel is comparatively of greater nature conservation interest than that of the Release Land parcel, and should not be considered inferior in ecological quality to that of the Release Land. More generally, it is considered that the granting of the section 16 application would facilitate the wider development (if planning permission is granted) and would lead to significant nature conservation benefits to the local community by virtue of those benefits delivered as part of the wider development proposals.

Mr Lloyd's evidence<sup>23</sup>

39. The evidence of Mr Daniel Lloyd explained the background to the proposed development, and the evolution of the development proposal which resulted in the need for the Release Land to be deregistered and replaced with other land to be registered as common land. He also explained why there is a pressing need, in the public interest, for the proposed development to proceed.
40. The local planning authority (LPA) supports the principle of development on the development site, and the principle of such development including a vehicular access over the Release Land. The Council's draft Local Development Plan (LDP) is on deposit and has been submitted to the Welsh Government. As a consequence, it must be considered to be sound by the Council. The Council has been supportive of the principle of housing development on the development site since the "preferred strategy" stage of the LDP. At p71 of the Deposit LDP the development site is identified as site SD B Gorseinon<sup>24</sup>; the map which accompanies this allocation shows a principal site access being obtained through the Release Land.
41. In oral evidence Mr Lloyd responded to the following points raised by objectors:

- (1) *Lack of justification for the proposed access to the development being made over the Release Land*

As Mr Lloyd explained, numerous access options have been considered during the evolution of the development proposals since Persimmon have been involved with the development site promotion dating back to 2013. These potential access options are detailed in the Access Constraints Diagram<sup>25</sup>. The principle constraints and determinants to the siting of strategic access have been based on significant and comprehensive technical assessment and investigative work undertaken in respect of: ownership and Common Land; impact on residential properties (and feedback from extensive public consultation); highway issues; ecology; and woodland. The proposed strategic access point at Hospital Road (Access point 7 on the Access

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<sup>23</sup> Doc DJL1

<sup>24</sup> Doc I5

<sup>25</sup> Doc DJL1, Appx 3

Constraints Diagram) has had regard to these considerations. The work undertaken by the Applicant's Highways consultants was based upon an earlier highways capacity assessment undertaken by the Council and its consultants, Arup. As explained above the principle of a highways access through the Release Land is recognised by the draft Deposit LDP site allocation policy.

(2) *Highway infrastructure is not adequate for the traffic associated with the proposed development.*

The highway and infrastructure issues which may be a consequence of the proposed development have been considered by the Council and will be considered again when the Council determines the planning application. The development will facilitate works to key junctions located in close proximity to the development, including in particular Junction 47 of the M4 which currently has capacity issues. These junction works have now been agreed with the local authority highways department, and will lead to improvement to the wider highway network. Ultimately, this is a planning matter for the LPA, and has little relevance to the section 16 Commons Act application.

(3) *The Release Land has historical value not least because of its proximate location to the Battle of the Gower.*

An Archaeology and Heritage Assessment was carried out in relation to the planning application<sup>26</sup>. The assessment was carried out over the whole development site, which includes both the Release and Replacement Land. The assessment concluded that the site does not contain any world heritage sites or registered battlefields; there are no recorded features of archaeological or heritage interest; and although there is some possibility that unrecorded buried archaeological remains exist within the development site, it is unlikely that any such remains would be of sufficient importance to warrant preservation. The assessment also details that no in-principle archaeological constraints to the proposed development of the development site have been identified. The response from CADW noted that the proposed development would not have an impact on any scheduled ancient monuments. Furthermore, a geophysical survey was carried out along with trial trenching at the request of the Glamorgan Gwent Archaeological Trust (GGAT)<sup>27</sup>, and this has identified no significant archaeological interests. Whilst the Release Land was not subject to geophysical surveying due to its thick tree cover, the planning permission will, if granted, contain a condition requiring an archaeological watching brief when works are carried out, including over the Release Land. Mrs Rosser suggested in questions to Mr Lloyd that there was a ditch in which excavations had revealed Roman artefact remains, but she brought no evidence of such remains, or their location. Mr Lloyd confirmed that GGAT had not reported finding any such artefact remains during their trial trenching work, although Mrs Rosser maintained that GGAT did make such a discovery.

42. Mr Lloyd explained that the area which appeared to represent the relevant "neighbourhood" for the purposes of section 16(6) was the Kingsbridge electoral ward, within which both the Release Land and the Replacement Land are located.

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<sup>26</sup> Doc 7, Appx 2

<sup>27</sup> Doc I8

Nevertheless there may be use of Common CL44, in so far as there is any general public use of the common, by residents of the Penllergaer and Gorseinon Wards, and the applicant has provided details of those wards<sup>28</sup> should it be necessary to consider the effect on any other potentially relevant neighbourhood.

*Evidence or Oral Representations from member of the public*

43. None of those members of the public who made oral representations suggested any alternative "neighbourhood" which ought to be considered for the purposes of section 16(6).
44. None of those members of the public who made oral representations claimed to have used the Release Land for air and recreation, or exercising rights of common. None of them suggested that they were even occasional users of the wider common land unit CL44.
45. There was no suggestion in these oral representations that *anyone* had used the Release Land for any purpose, and in particular grazing animals, in recent years or indeed at all in living memory.
46. No persons with rights of common over CL44 attended the inquiry to make a representation. That is consistent with the position as understood by the applicant, namely that the commoners whose identity is recorded on the commons register, and the two Commons Associations who were consulted, do not object to the section 16 application.
47. Those members of the public who did make oral representations, namely Mr Fitzgerald, Councillor Evans, and Mr Smith referred primarily to matters to do with the potential traffic impact of the proposed development. Those matters were of little if any relevance to the section 16 commons application, and Mr Lloyd had already addressed those matters in so far as the applicant needed to respond to them. Mrs Rosser did not in fact make any oral representation to the inquiry, despite the various questions she had asked of the applicant's witnesses in relation to agriculture, access, ecology and archaeology.

Section 16

48. Regarding subsection (6)(a), there is no one in occupation of the Release Land other than the owner. There are persons who have rights of common over the Release Land, and in so far as has been possible those persons have been consulted during the course of the application. That consultation, and the responses generated by it, is described in the Consultation Report of November 2016 appended to the application<sup>29</sup>. The public also have a general right of access for air and recreation.
49. Regarding subsection (6)(b), there would appear to be three (potentially) relevant neighbourhoods, namely the City of Swansea electoral wards of Kingsbridge, Penllergaer, and Gorseinon. Mr Lloyd considered that the Kingsbridge ward was probably the relevant neighbourhood for these purposes.

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<sup>28</sup> Doc I4

<sup>29</sup> Doc 4

50. The issue of what was the relevant neighbourhood was considered briefly by the High Court in *R (Tadworth and Walton Residents' Association) v SSEFRA* [2015] EWHC 972 (Admin)<sup>30</sup>. The court held, in summary, that the identity and extent of the relevant neighbourhood(s) was a matter of judgement for the Inspector, and that it was a fair approach to proceed on the basis that any adverse effect of proposed deregistration (and exchange) might be experienced most by those living closest to the land concerned.
51. The interests of those neighbourhoods, relevant to this application, would appear to comprise principally the opportunity for public access to the Release Land and Replacement Land, and the comparative merits of the two parcels of land in terms of their condition, location, and accessibility.
52. The Release Land offers some public amenity and visual amenity value, as an area of relatively dense woodland adjacent to a busy road in an area where there are light industrial and warehouse-type units. However it is dark and overgrown in appearance, does not appear to be used at all by the public for walking or recreation, and is atypical of the wider common either side of Hospital Road which is much more open and pleasant in outlook.
53. The Replacement Land does not offer much visual amenity from the main road as it is set back from that road, but when one is on the Replacement Land it has a similar feeling to the wider areas of CL44, and presents a more pleasant walking and recreational experience.
54. Anyone who lives in this neighbourhood or local area would or could expect to see animals on the commons, or animals being loaded or unloaded from vehicles if the commons (including the Release Land) are actively grazed. The exchange of the Release Land for the Replacement Land would in that sense make no difference to the residents of the houses on Hospital Road. In truth it does not seem likely that the Replacement Land would be subject to much if any grazing use – even though it is clearly more suitable for that use than the Release Land – because there is generally very little grazing on CL44 notwithstanding the fairly extensive grazing rights which are held by the commoners.
55. Regarding subsection (6)(c), the public interest would appear to include the potential nature conservation interest of the Release Land and the Replacement Land, and the public's right of access to the Release (and if registered, the Replacement) Land. (There is obvious overlap between the considerations that are relevant to subsections 6(a)-(c).)
56. Dr Henson's evidence on ecological matters, which was unchallenged, is that the Release Land is of generally lesser diversity, and ecological interest and value, than the Replacement Land. Of course the future condition of either parcel of land would depend upon amongst other things the level of grazing upon it, but both can be grazed now (the Release Land by the commoners, the Replacement Land by the landowner; and of course the Replacement Land was grazed by a licensee until approximately 10-12 years ago). Dr Henson noted that grazing was an appropriate land management option, in ecological terms, for rush pasture such as the Replacement Land. The existing common does not show signs of overgrazing despite the extensive grazing

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<sup>30</sup> Doc 8

rights upon it; quite the opposite in fact. There is no reason to suppose that the Replacement Land would suddenly become subject to ecologically harmful overgrazing.

57. As an aside, Mrs Rosser suggested in her questions to Mr Hadley that there would be nothing to regulate the extent of use by commoners of the Replacement Land, if it was registered. This point goes nowhere, because that is the nature of any common land which is subject to rights of common. The commoners on any piece of common land have to arrange their own affairs and ensure that their rights coexist in an appropriate fashion. If there are disputes as to who can exercise what right and when, the Garn-Goch-Commoners Association (which is the association for CL44) is precisely the sort of body which one would turn to in such a circumstance. That Association has not suggested that there are existing pressures and disputes as to the exercise of common rights on CL44.
58. Finally, subsection 6(d) refers to any other matter considered to be relevant. An obvious relevant consideration is the need for the development, and the benefits of that development to the local area, and Swansea as a whole, as well as the wider public interest, if it comes forward. Mr Lloyd's evidence explains why there is a pressing need for housing, and a new school, and why the Council is encouraging this planning application to come forward even though the draft Deposit LDP is not yet the statutory development plan, and even though the proposal is a departure from the now time-expired UDP. Swansea clearly considers that it needs these houses, and it needs them soon.

#### Potential future works on the Replacement Land

59. The Applicant was prepared to offer further works on the Replacement Land (namely fencing, the provision of water, and a cattle grid or other grazing/access related requirements).
60. The Applicant wishes to ensure that its position is clear on this point. These works are not necessary to ensure that the Replacement Land is equivalent to the Release Land, because the Release Land contains none of these features in the first place. They would constitute a further enhancement to the Replacement Land, in terms of the potential for grazing upon it. None of the commoners or the commoners' associations have asked that any works be undertaken, or any funds be provided to ensure that works could be undertaken in future if necessary.
61. Nevertheless the applicant was prepared to offer a Unilateral Undertaking pursuant to section 106 of the Town and Country Planning Act 1990 to secure these enhancements to the Replacement Land. The Council, which would be the party able to enforce the obligations in the Undertaking, indicated that it was content with the terms of the Undertaking.
62. Following discussion of the Unilateral Undertaking during the Inquiry, the applicant has considered the reservations expressed by the Inspector, which were principally that if the Ministers in due course conclude they do not have the power to make a section 17 Commons Act Order conditional, and therefore if the Order would have to take effect shortly after any decision to make such an Order rather than at some future date, the applicant might not have time to carry out the works on the Replacement Land before that land became a registered common. The effect would be that the applicant would be obliged by the Undertaking to carry out works on the Replacement Land, after it

was registered as common land and those works might themselves require consent under section 38 of the 2006 Act.

63. In light of this, the applicant has decided to offer two alternative Unilateral Obligations which would enable works to be done on the Replacement Land. The applicant's position has been, throughout, that fencing and other works on the Replacement Land are not necessary in order to make the land "equivalent" to the Release Land or the wider common CL44, because the Release Land and the majority of the wider common CL44 are not securely fenced and do not feature cattle grids, gates or a water supply.

64. Nevertheless, the applicant offers two alternative undertakings:

- (1) an undertaking [ref no. 3170168-1]<sup>31</sup> to provide a further sum of money to the Garn-Goch Commoners' Association, over and above the sum which the Association had previously requested for future maintenance of the common. That further sum will be sufficient for the commoners to carry out any works that they may consider necessary on the Replacement Land, such as but not limited to fencing, gates stiles and/or a grid, and the provision of a water supply. The commoners do not apparently consider these works are necessary as matters stand, but if there is a sum available to them to carry out the works, and in due course they conclude that the Replacement Land is needed for grazing and that any of these works would be necessary, they would be in a position to carry them out. The Ministers can therefore conclude that works are not, as matters stand, necessary to ensure that the Replacement Land is suitable for the exercise of grazing rights, but if that position were to change in future then the very people who are entitled to exercise those rights, the commoners, would have the means to carry out works. It would be a matter for them to decide what works, when, and on what land, and whether they needed to seek a section 38 consent for any works; or
- (2) alternatively, an undertaking [ref no. 3170168-2]<sup>32</sup> which requires the applicant to carry out certain works, similar to those contemplated in (1) above. The applicant would like to have an opportunity to carry out such works *before* the Replacement Land is registered, and to that end asks the Ministers to make an Order which comes into effect 6 months after the date upon which the decision is issued (if the decision is to make an Order). The Ministers will have to decide whether or not they can, and are prepared, to make an Order which delays its effect for a period. If the Ministers decide that such an undertaking is appropriate, then they may decide not to delay the effect of the Order. The Undertaking would require the applicant to carry out the works within 12 months. It would be a matter for the applicant to obtain any section 38 consent if it were needed (depending on the works). As far as fencing is concerned the applicant owns most of the land surrounding the Replacement Land and so could erect much of the necessary fencing on land which is not common land. It is unlikely that a water trough would need section 38 consent. Fencing which does not in fact prevent or impede access to the common land (and appropriate gates need not prevent or impede access to the land) should not require consent under section 38.

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<sup>31</sup> Doc PI2

<sup>32</sup> Doc PI3

65. A separate section 106 Unilateral Obligation [ref no. 3170168-0]<sup>33</sup> will also be provided, to ensure that the previously agreed sum of £20000 is paid to the Garn-Goch Commoners' Association, and to ensure that the commoners are granted the right to cross the existing common land immediately south of Hospital Road (as per the letter from the Badminton Estate<sup>34</sup>) with vehicles, to move livestock to the Replacement Land, should they wish to do so. It will be a matter for the commoners and the local authority to discuss whether the occasional reversing of a lorry off the Hospital Road to the entrance to the Replacement Land, without any works involved, is a material change of use such that planning permission is required for it. As it is unlikely that the commoners will start grazing the Replacement Land if it is registered, it is also unlikely that such a question will ever arise.
66. In light of the above, the Ministers are asked to accept undertaking 3170168-0 in any event.
67. The Ministers are also asked to expressly confirm in their decision whether or not they accept undertaking 3170168-1, or alternatively 3170168-2; or neither. Those undertakings are of course offered as alternatives, and not as concurrent undertakings.
68. For completeness, there does not appear to be any controversy as to whether or not a section 106 undertaking can be used in relation to a section 16 Commons Act application. In *R (Tadworth and Walton Residents' Association) v SSEFRA [2015] EWHC 972 (Admin)*<sup>35</sup> the High Court heard a challenge to an order deregistering a parcel of common land (and registering other land as replacement land) (see paragraph 1 of the Judgment). In that case the applicant offered a section 106 undertaking to secure certain ecological measures for the purposes of the section 16 application (see paragraph 48 and 49 of the Judgment). The local residents' association sought to challenge the decision to deregister the common land Order on the basis that, amongst other things, the Inspector had misunderstood the section 106 agreement and the circumstances in which it would come into effect. The court rejected the claimants' challenge, and it should be noted that there was no suggestion by the parties or the court that there was any reason why a section 106 obligation could not be entered into for the purpose of a section 16 application and a section 17 Order.
69. The Applicant proposes that these s106 Undertakings should be conditional (in their operation) upon the grant of an Order pursuant to section 17 of the 2006 Act to remove the Release Land from the commons register and register the Replacement Land as common land.

#### Conditionality

70. Finally, the Applicant requests that consideration be given to whether, if an Order under section 17 is to be made in response to the applicant's section 16 Application, such an Order should be in terms that it comes into effect only if planning permission is granted for the development. The Ministers do have the power to impose conditions. It may be concluded that a section 17 Order would not be necessary in the absence of planning permission being granted for the development.

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<sup>33</sup> Doc PI1

<sup>34</sup> Doc I3

<sup>35</sup> Doc 8

71. The Ministers are referred to the applicant's Outline submissions<sup>36</sup>, section 2. It should also be noted that the 2014 Guidance on Common Land Consents refers to the possibility of the Ministers imposing conditions on section 16/17 and section 38 Orders (see paragraphs 3.6-3.8).
72. The applicant submits that the Government's guidance is correct, and that the power to impose a condition(s) upon a section 16/17 consent exists: that power can "fairly be regarded as incidental or consequential to" the power to grant a section 16/17 order.
73. For those reasons the applicant suggests that the Ministers should consider whether any Order which is granted should be conditional, so that it only comes into effect if planning permission for the development is granted. Nevertheless the applicant would wish a section 17 Order to be granted even if the planning permission is not ultimately granted.
74. The applicant suggests that the Order could be drafted so that it comes into effect on a certain date, in any event. The purpose of doing so would be to allow the applicant time to carry out the works contemplated by Undertaking 3170168-2, before the Replacement Land is registered, if the Ministers decide to make an Order and accept undertaking Undertaking 3170168-2. There is no reason why the Ministers could not make an Order which comes into effect on a particular date. The applicant would ask that such date be 6 months after the date upon which the decision letter is issued.

#### Conclusion

75. The Release Land is barely used, if indeed it is used at all, by the public, or for grazing. The Replacement Land is more suitable for these purposes, and no less conveniently situated than the Release Land. There would be no public disbenefit, and there would be public benefit, if the Release Land was deregistered and the Replacement Land registered in its stead.
76. The Release Land is key to the development for which planning permission has been sought. If planning permission is granted there will be considerable public benefit in terms of the provision of new housing and a school. That development cannot proceed if the Release Land remains a registered common.
77. There are compelling reasons to make the Order sought by the applicant, and no compelling reasons to refuse it.

#### **The Cases for Interested Parties that appeared at the Inquiry**

##### The Case for Mr Fitzgerald (speaking as a local resident)

The material points are:

78. The residents of Garden Village would not suffer the traffic resulting from the proposal that Penllergaer would experience. The location is highly sustainable with many people working along the M4 corridor and this results in horrendous traffic problems. The Transport Assessment<sup>37</sup> summarises capacity at Chapter 8.2.2, Table 8.6.3 and shows that the capacities of 11 junctions are exceeded in the flows with 2 junctions near

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<sup>36</sup> Doc 5

<sup>37</sup> Doc DJL1, Appx 1

capacity. The resulting impact is the reason for the common land application opposition.

79. The community areas all send one county councillor to the Council but Penllergaer has its own 11 councillors and there are a number of other community areas near the development. There needs to be clarification of the county council areas.
80. The applicant has said that the LDP must be sound as the Council has taken it forward. This is incorrect as the plan does not follow Welsh Government guidelines and is therefore unsound. The residents have received barrister advice that the plan is unsound.

*The Case for Councillor Evans (speaking on behalf of his Ward)*

The material points are:

81. Councillor Evans is a resident of Garden Village and is well aware of the areas around the development. He is concerned about the traffic impacts. Traffic may go through Llanelli and link back through either Kingsbridge or Penllergaer.

*The Case for Mr Smith (speaking as a local resident)*

The material points are:

82. Mr Smith has lived in Garden Village since 1972. Junction 2 in the Access Constraints Diagram<sup>38</sup> should not be an inward or outward access. It is located on the brow of a hill and the road becomes very congested with tailbacks to the M4. Traffic lights would cause further problems and there is poor visibility. This road is also used as a bypass.

## **Written Representations**

The material points are summarised below:

83. The Planning Inspectorate received some 19 representations in response to the notification of the application. These letters are on the case file.
84. Cadw states that there are no scheduled monuments or registered historic parks and gardens within the vicinity of the proposed development and therefore raises no comment on the application.
85. Penllergaer Community Council is concerned at the amount of proposed developments in and around Penllergaer which will impact adversely on residents particularly as a result of congestion of the highway infrastructure.
86. Gorseinon Town Council objects as the commoners are objecting to the proposal, the proposal would result in the loss of ancient woodland which provides a wildlife feature and an important environmental feature adjoining the main road that is a benefit to the local area. The proposed alternative area is occupied by properties and would offer no environmental or conservation benefit to the local area or the same level of public access. It offers no benefit in protecting, enhancing or improving the common and is purely an enabling device to provide access to the intended housing development.

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<sup>38</sup> Doc DJL1, Appx 3

There are considered to be alternative access points from Hospital Road that the developers could utilise that would not result in the loss of the woodland.

87. The Open Spaces Society (OSS) considers the Replacement Land to be inferior to the Release Land. The Release Land is visible to local people and is covered in trees, hedges and vegetation and is attractive for its landscape and opportunities for informal recreation and children's play. In comparison the Replacement Land is hidden behind a row of houses and is a boring field lacking in attractive features.
88. The Garn-Goch Commoners Association originally made representations that the Replacement Land presents increased management requirements and potential issues arising from the proximity to residential properties. The applicant subsequently made a financial offer (and which is discussed further below) to deal with the increased management of the replacement land. This is considered to be acceptable to the Association and its objection was withdrawn.
89. H. Byron Davies (former MP) objects to the proposal as it would result in the loss of an ancient woodland and disruption to existing habitat and endangered and protected species. The exchange land is purely scrub land and is not suitable habitat for these animals.
90. Other letters from local residents raise concerns regarding the loss of ancient woodland and the effect of its loss on the visual amenities of the area; the impact on protected species such as bats and dormice; the development will cause traffic congestion; the Replacement Land is not comparable to the Release Land and is unsuitable for grazing as it is very wet; a gas line runs through the area; the Battle of Gower took place nearby; there are alternative access points available; and there is no need for the land exchange with the driving force for the application being profit from the development.

### **Conditions and Obligations**

91. The applicant has requested that consideration be given to making any Order under Section 17 for the deregistration and exchange conditional on it only taking effect if planning permission is granted for the development. In this respect reference is made to case law<sup>39</sup> and paragraphs 3.6 – 3.8 of the Guidance. Notwithstanding this request the applicant has requested that an Order be granted even if the planning permission is not ultimately granted. It is also suggested that the Order could be drafted so that it only comes into effect on a certain date which would enable works to be carried out without the potential need for consent under Section 38 of the 2006 Act. These works have been put forward under a Unilateral Undertaking. It is suggested that this date be 6 months after the date upon which the decision letter is issued.
92. The applicant has submitted three duly signed Unilateral Undertakings dated 11 September 2017<sup>40</sup>. The first (reference 3170168 – 0)<sup>41</sup> provides an obligation to provide the sum of £20,000 to the Garn-Goch Commoners Association for the future management and maintenance of the Replacement Land. It also provides an obligation to secure the grant of a right to the Commoners to cross with vehicles the part of

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<sup>39</sup> Doc 8

<sup>40</sup> Docs PI1, PI2 & PI3

<sup>41</sup> Doc PI1

common CL44 between Hospital Road and the Replacement Land to facilitate the delivery and collection of livestock to and from the Replacement Land.

93. The second (reference 3170168 -1)<sup>42</sup> provides an obligation to pay a further sum of £15,000 to the Garn-Goch Commoners Association to enable any further works they may require to the Replacement Land to render it suitable for the exercise of the Rights. A breakdown of the type of works and costs has been provided<sup>43</sup> and includes works such as perimeter fencing, clearance of undergrowth, purchase and fitting of gates and installation of pipework for a water supply to the land.
94. The third (reference 3170168 – 2)<sup>44</sup> provides obligations to install a livestock grid and/or stile and/or suitable gate arrangement on or leading to the Replacement Land to enable access for cattle, sheep and horses and members of the public on foot and horseback, fencing and a water trough attached to a piped-water supply to the Replacement Land. All would be provided within 12 months of the grant of the Order.
95. Undertaking 1 would not come into effect if a decision is made that Undertaking 2 should be effective and Undertaking 2 would not come into effect if a decision is made that Undertaking 1 should be effective.
96. The applicant requests that Undertaking 0 be accepted in any event and Undertakings 1 and 2 as alternatives or not at all.

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<sup>42</sup> Doc PI2

<sup>43</sup> Doc I15

<sup>44</sup> Doc PI3

## CONCLUSIONS

97. These conclusions are based on the evidence submitted and given at the Inquiry and the written representations summarised above, and my findings at the accompanied and unaccompanied inspections of the site and surroundings. In my conclusions, numbers in [ ] refer to paragraphs earlier in this report. Based on the provisions of the Commons Act 2006 I consider that the main considerations upon which this decision should be based are:

- a) *The effect of the proposal on the interests of persons having rights in relation to, or occupying the release land and in particular those persons exercising their rights of common over it;*
- b) *The effect of the proposal on the interests of the neighbourhood;*
- c) *The effect of the proposal on the public interest, including that of 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) *Whether there are other relevant matters, and in particular, the proposed development on the release land that should be taken into account.*

*The effect of the proposal on the interests of persons having rights in relation to, or occupying the Release Land and in particular those persons exercising their rights of common over it;*

98. The overall Common is subject to grazing rights and rights to take ferns for bedding with the rights distributed between some 25 rights holders. The applicant contends that these rights have not been exercised on the Release Land for a considerable period of time [4,21, 23, 24, 25, 26].
99. It is evident that the Release Land is not currently fenced around its whole perimeter and it fronts a busy road. Furthermore, Mr Hadley's view<sup>45</sup> is that given the size and maturity of the trees on the land it is unlikely that it has been grazed for some 60 – 70 years [5, 26, 27].
100. I noted on my site visit to the Release Land that the land is heavily wooded with relatively mature broadleaf trees with a ground cover of predominantly bramble. This is substantiated by Dr Henson's evidence. I found no evidence of livestock or recent grazing and there was little ground herbage suitable for grazing. My visits to other parts of the Common provided a clear comparison of areas that were evidently grazed (in particular the northern part of the Common adjacent to Pleasant Road) with tightly grazed grassland and evidence of hoof poaching and manure. Notwithstanding that other parts of the Common are grazed, much of the overall Common is unfenced with many areas appearing either ungrazed or lightly grazed with young scrub and trees evident [33, 34].

101. I also note that none of the written representations from interested persons or those that attended the Inquiry have claimed to be actively grazing the Release Land [24,

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<sup>45</sup> Mr Hadley Evidence in Chief

78-90]. On the evidence before me I concur with the applicant's view that the Release Land has not been used for grazing for a considerable period of time and is unlikely to be used for such purpose. It would not provide suitable grazing land given its unfenced and predominantly wooded nature.

102. The Replacement Land is predominantly rush pasture and in my assessment would provide better potential for grazing than the Release Land. It is also slightly larger in area than the Release Land. Although residents' comments that the land is wet are noted, I have no evidence before me that it is so boggy to render it un-useable by livestock. It is currently unfenced, but this is no different to the existing position with the Release Land. Furthermore, the applicant has offered to provide money to the Garn-Goch Commoners Association to fence the land or fence the land itself [6, 29, 59, 61, 62, 63, 64, 90, 94].

103. The applicant proposes to provide access to the land between Nos 10 and 11 Hospital Road for use by the commoners and which would connect with the strip of common land that runs to the front of the properties fronting Hospital Road. The owner of this common land, Badminton House, has provided confirmation that this would be granted<sup>46</sup>. This would enable a vehicle to pull off the highway to deliver or collect livestock and which would provide a more satisfactory arrangement than stopping on the highway as is the case with the Release Land [31, 92].

104. I find that the graziers would gain a benefit from the proposal in that a more suitable area of land for grazing would be provided with improved access. I conclude that the proposal would not unacceptably interfere with the interests of those having rights over the land or exercising their rights of common over it.

*The effect of the proposal on the interests of the neighbourhood.*

105. There is no definition of neighbourhood in the 2006 Commons Act. The applicant considers that the relevant neighbourhood to both the Release and Replacement Land is the Kingsbridge electoral ward in which both are located. Details of the wider wards of Penllergaer and Gorseinon have also been provided<sup>47</sup>. Attention has also been drawn to the judgement of *R (Tadworth and Walton Residents' Association) v SSEFRA [2015] EWHC 972 (Admin)*<sup>48</sup>. In that case the court upheld the Inspector's findings that published guidance makes it clear that the term "neighbourhood" should be taken to refer to the local inhabitants. He took the term to refer to the local inhabitants to the common as a whole although clearly the impact of the proposed exchange is likely to be greatest on those living closest to the Release and/or Replacement land [42, 43, 49, 50, 51].

106. In this case, the overall common is likely to be used by residents residing in the neighbourhoods of Kingsbridge, Penllergaer and Gorseinon. Nonetheless, the Release and Replacement Lands are very small parts of the wider overall common area and, given the fragmented nature of the Common, the exchange of land is likely to impact on the existing future use and enjoyment of people either living or working mainly in very close proximity; in particular those residents living in the properties fronting Hospital Road or working in the nearby industrial estate [4, 5, 28].

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<sup>46</sup> Doc I3

<sup>47</sup> Doc I4

<sup>48</sup> Doc 8

107. A main consideration in relation to the neighbourhood is the ability of local people to use the common now and in the future in the way they are used to<sup>49</sup>. This will often relate to access to the land and I consider public rights of access below under the public interest.

108. I have considered the effects of the use of the Replacement Land on residents living to the north of the land. The land is located directly behind the gardens of properties fronting Hospital Road; however given the absence of grazing and recreation on the Release Land, the under grazed nature of much of the overall Common, and the relatively small size of the Replacement Land it is unlikely that it would be used for any intensive grazing or recreation activities that would be harmful to residents' living conditions. Similarly, whilst an access between Nos 10 and 11 is proposed for the delivery/collection of livestock, given the small size of the land concerned any activity is unlikely to be significant in scale and would not result in any adverse effect on residents [6, 31, 54, 86, 92].

109. I note representations from the wider neighbourhood and the comments of those individuals that spoke at the Inquiry. With the exception of those matters expressly referenced in this report, these largely relate to the impacts of the proposed housing and mixed use development on the area [44, 45, 46, 47, 78-90]. These fall outside the scope of the current application and are for the local planning authority to decide in determining the planning application. In terms of the impacts of the exchange of common land I am satisfied that it would not unacceptably impact on the interests of the neighbourhood.

*The effect of the proposal on the public interest, including that of 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.*

110. There are no international or national statutorily designated sites located on or adjacent to either of the parcels of land.

111. A number of interested persons have raised concerns regarding the impact of the loss of Ancient Woodland. Planning Policy Wales recognises that ancient and semi-natural woodlands are irreplaceable habitats of high biodiversity value which should be protected from development that would result in significant damage<sup>50</sup> [86, 89, 90].

112. It is apparent that the proposed development, should it go ahead, would result in the loss of part of the Ancient Woodland. However, the Ancient Woodland is located outside the Release Land and the proposal for the common land exchange before me would not directly result in its loss. It is for the local planning authority to determine whether the loss of the Ancient Woodland associated with the proposed development is appropriate as part of its considerations of the planning application [11, 38].

113. The Release Land comprises secondary, broadleaved woodland some 50 – 70 years old. Dr Henson's evidence found this to species poor with a sparse under storey with no ancient woodland indicator plants being found. I have no reason to disagree with her assessment that the woodland only has any significance at site level. Given its poor species diversity I do not find that its deregistration would have any significant

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<sup>49</sup> Welsh Government Common Land Consents Guidance, August 2014

<sup>50</sup> Paragraph 5.2.9, Planning Policy Wales, Edition 9, November 2016, Paragraph 3.9.2

impact on the woodland habitat interests. Furthermore, taking account of its fragmented nature and its atypical habitat type with the overall common its deregistration would not affect its connectivity with the wider common in habitat terms [33, 34].

114. The Replacement Land contains rush pasture, dense scrub and tall herb vegetation habitats. The rush pasture is considered to be botanically diverse with an intrinsic ecological value that is significant at the local level. I concur with this view and find that grazing would assist with maintaining the rush pasture and limiting the encroachment of scrub and enhancing the botanical value. Whilst over grazing could result in reductions in suitable habitats for nesting, foraging, dispersal and refuge for species, benefits to species could arise through appropriate levels of grazing. Given the low current levels of grazing that take place on the Common and the lack of grazing on the Release Land I consider it highly unlikely that over grazing would occur on the Replacement Land sufficient to result in a reduction in such habitats. I consider that grazing of the Replacement Land would be positive in habitat terms [35, 38, 56, 57].

115. Some works would be required to provide access onto the land and to make it suitable for grazing. However, these works would be relatively minor in nature and I concur with Dr Henson's view that the impact of such works on habitat and species would be negligible [35].

116. In terms of species, I note that there was evidence of two unoccupied dormice nests to the south and south east of the Release Land and there is a possibility that dormice would use both parcels of land for foraging and dispersal. There are also several trees on the south western boundary of the Release Land that are suitable for use by roosting bats [36, 38].

117. The Section 16 application would not directly result in negative impacts on the favourable conservation status of protected species. It has the potential, in the absence of any development, to result in positive impacts as a result of grazing of a more botanically rich and locally significant parcel of land than the Release Land. Whilst the purpose of the application is to facilitate access to a proposed development which may have impacts on habitats and protected species the determination of that application is not for me. The adequacy of the proposed mitigation measures that have been put forward as part of the planning application are for the local planning authority to assess and determine [35, 37, 38].

118. Other species, such as breeding birds and reptiles were found to be typical of species found at an urban edge locality and I have no reason to disagree with Dr Henson's evidence that such species are only pertinent to this Inquiry by virtue of the legal protection afforded to them under the Wildlife and Countryside Act 1981 (as amended).

119. I am satisfied that the proposal for an exchange of common land would not result in harm to the public interests in nature conservation terms [32, 56].

120. In respect of effects on the landscape, as set out above the Release Land comprises an area of secondary broadleaf woodland. I note the concerns that the loss of the woodland would be detrimental to the appearance of the area and that it provides an important feature in the locality [5, 27, 86, 87, 90].

121. The Section 16 application does not propose the loss of the woodland in itself; this would be the result of any development that takes an access through this area. In the absence of such permission, I have no reason to believe that the woodland would be lost even if the common land exchange takes place.
122. As set out above, the planning application for the development is yet to be decided and it is for the local planning authority to determine whether the loss of the woodland to facilitate access to the development is appropriate with regard to the development plan and all material considerations including the submitted landscaping proposals to mitigate any impacts.
123. Notwithstanding the above, woodland is not a typical feature of the wider registered common and due to the fragmented nature of the Release Land from the overall common, I do not find that the loss of the woodland would have a significant harmful impact on the character of the wider common. There would be some minor changes to the visual appearance of the Replacement Land should it be grazed but it is set back from the highway and any visual impacts would be negligible. The proposed access point would be located between two properties and whilst some fencing, gate and/or cattle grid may be required this would not be out of place within the context of the existing housing development [52, 53].
124. I am satisfied that there would be no harm to the public interest in landscape terms.
125. Turning to public rights of access, the public have rights of access to the Release Land and are able to access the land from Hospital Road. Nonetheless, I have no evidence before me that the Release Land has been used for public recreation. There are no public rights of way over it and from my observations on my site visit I found no evidence of any tracks or regular trampling that would be expected from its use by the public. The undergrowth results in the land being very difficult to traverse and is impenetrable in places. I have no reason to believe that the Release Land has been or is likely to be used for public recreation [13, 21, 52].
126. The Replacement Land, whilst also not containing any public rights of way, would offer the potential for better public access than the Release Land. It is a more open area than the Release Land with easier walking conditions and is more consistent with the open grassland nature of the wider common. I find that there would be some benefits to public access arising from the exchange of land [14, 21, 52].
127. The Archaeology and Heritage Assessment submitted with the planning application found that the sites do not contain any World Heritage Sites, scheduled monuments, registered parks or gardens, registered battlefields or listed buildings. Cadw has confirmed that there are no scheduled monuments or registered historic parks and gardens within the vicinity of the Section 16 proposal. Furthermore, the Assessment confirmed that there are no recorded features of archaeological or heritage interest within the sites [41, 84].
128. Whilst several representations have been made in respect of the Battle of Gower site, I have no evidence before me that this took place on either the Release or Replacement Land and I visited the memorial for this battle on my site visit and found it to be located some distance away to the west [90].
129. Mrs Rosser suggested in questions that there was a ditch on the Release Land that revealed Roman artefacts but she did not provide any evidence in this respect. On the

evidence before me, I note that there is some possibility that unrecorded buried archaeological remains exist within the overall development site. I also note the request of the Glamorgan Gwent Archaeological Trust (GTTA) for a geophysical survey to be carried out prior to the determination of the planning application. However, it has not made such a request in relation to the Section 16 application. The Release Land, where the Roman artefacts are alleged to have been found, would not be affected by the proposals before me as the exchange in itself would result in no change in the use of this land. Whilst the Replacement Land may be grazed in the future, I have no evidence before me to suggest that there are any features on this site that would be affected by such activities. The application for development would take into account the potential for impacts on such remains and I have no reason to believe that the various reports that have been provided would not be taken into account in considering the planning application [41].

130. On this basis I am satisfied that the common land exchange would not result in harmful impacts on archaeological remains and features of historic interest.
  131. Overall, I conclude that in relation to matters of public interest, there would not be any unacceptable impacts.
- Whether there are other relevant matters, and in particular, the proposed development on the release land that should be taken into account.*
132. Much of the applicant's case is based on the need for a proposed development which the Section 16 application would facilitate access to. A considerable number of representations have also referred to this development and raised concerns in relation to the impacts of the development itself. I have referred throughout my report to this proposal and which at the time of writing, had not been determined. There is no certainty that the development will go ahead, irrespective of the outcome of the Section 16 application. The outcome of the planning application is required to be determined in accordance with the development plan unless other material considerations indicate otherwise and I express no view on the outcome of that application [7, 8, 11, 21, 39, 40, 41, 78-90, 85, 86, 90].
  133. In the absence of any planning permission any associated harm/benefits that might arise from any future development cannot be taken into account in assessing the Section 16 application. There is no certainty that the development will go ahead and therefore there can be no balancing exercise to be carried out between any harm/benefits arising from the common land exchange weighed against the harm/benefits of the development. In this context, I find no reason to consider whether the Order should be made for deregistration and exchange of the common land in the absence of the planning permission and the Section 16 application before me should be considered on its own merits and with regard to the criteria set out in the 2006 Act and referred to above.
  134. I am satisfied that no other relevant matters have been put forward that should be taken into account.

#### *Conditions and Obligations*

135. In the event that the Welsh Ministers decide to make an Order the applicant has requested that consideration be given to whether this should be conditional on the planning permission being granted [19, 70, 91].

136. The applicant has referred to the Guidance and case law in respect of the ability to impose conditions [71-74]. However, given my conclusion that it is not appropriate to take the planning application into account and the Section 16 application should be considered on its own merits as set out above, I find no reason to consider this further or provide a view on whether conditions can be imposed.
137. The applicant has submitted three Unilateral Undertakings under Section 106 of the Town and Country Planning Act 1990. I have had regard to the High Court's judgement in *R (Tadworth and Walton Residents' Association) v SSEFRA* [2015] EWHC 972 (Admin)<sup>51</sup> and I am satisfied that a Unilateral Undertaking under Section 106 of the Town and Country Planning Act 1990 can be offered for the purpose of a Section 16 application [63-69].
138. In respect of the first Undertaking (reference 3170168 – 0) I find a contribution to the Garn-Goch Commoners Association who are the relevant body for the management of the overall common to be reasonable, necessary and relevant to the proposal. The contribution will enable the Replacement Land to be properly managed and maintained for the benefit of all commoners with rights and those wishing to exercise their rights for public access. Furthermore the securing of a vehicular right of access for commoners to the Replacement Land to deliver and collect livestock is reasonable and necessary to enable vehicles to stop off the highway in the interests of highway safety [65, 92, 103].
139. The second Undertaking (reference 3170168 - 1) provides an obligation to pay a further sum of £15,000 to the Garn-Goch Commoners Association to enable any further works that may be required to the Replacement Land to render it suitable for the exercise of the rights. The breakdown of costs<sup>52</sup> provided illustrates the works that would be required to make the land suitable for the exercise of Commoners rights. The third Undertaking is offered as an alternative to the second and provides an undertaking for the landowner to carry out similar works within 12 months of the grant of the Order [64, 93, 94].
140. Given my conclusions that the Commoners Rights and rights of public access have not been exercised for many years on the Release Land, the under grazing of the wider Common and the relatively small size of the Replacement Land there is doubt as to whether the Replacement Land will be used for the exercising of Commoners rights and public rights of access particularly in the short term. As such I find no compelling reason for works to be carried out to facilitate the use of the land particularly for grazing within the next twelve months as proposed under the third Undertaking. Public access would be available to the land once an Order is granted in any case.
141. Nonetheless, as the Replacement Land does offer more potential for grazing than the Release Land, there is a real prospect that Commoners may wish to exercise their rights over a longer period and the obligation would provide money for the appropriate provision of works to facilitate those rights in that event. It is noted that there may be other processes to follow (ie a Section 38 application) but the monies would be able to be used for the most suitable option to enable the rights to be exercised at the appropriate time. I have taken into account the applicant's view that the works are not

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<sup>51</sup> Doc 8, Appx 5

<sup>52</sup> Doc I15

necessary to ensure the Replacement Land is equivalent to the Release Land [60], but given the more suitable characteristics of the Replacement Land for grazing I find it entirely reasonable that funds are available to enable commoners rights to be exercised should they wish to do so in the future [100, 101].

142. As such, the payment of a fund to the Garn-Goch Commoners Association to facilitate works in the event of the Commoners wishing to exercise their rights would appear to be a more reasonable approach and would enable the land to remain open and unfenced unless required for grazing. Accordingly I find Undertaking 3170168 – 1 to be necessary and appropriate and should become effective on the deregistration of the Release Land and registration of the Replacement Land. In such circumstance Undertaking 3170168 – 2 would not become effective and consideration of this not coming into effect for six months is not required [74].

## **Conclusions**

143. Whilst the application has been made to facilitate access to a proposed development, this has yet to be granted planning permission and therefore I have not taken it into account in the consideration of the Section 16 application.

144. Nonetheless, I conclude that the proposal for deregistration and exchange of the common land would not unacceptably interfere with the interests of those having rights over the land or exercising their rights of common. The proposal would not unacceptably impact on the interests of the neighbourhood and would provide improved opportunities for public access. I conclude that there would not be any harm to the public interest arising from nature conservation, landscape or archaeological remains or features of historic interest. The proposal would be in conformity with the Welsh Government's policy objectives and Guidance in relation to deregistration and exchange of common land [104, 109, 131].

145. I have taken into account all information submitted to the Inquiry. I have also taken into account the three Unilateral Undertakings and find two of them to be reasonable and necessary and accord them significant weight. I have considered the request for the Order to be conditional on the grant of planning permission but have not considered this further given my conclusions in relation to the relevance of the planning application [136, 138, 142].

146. I have taken into account all other matters raised but find none that would lead me to a different conclusion. I conclude that the application should be allowed and that a Deregistration and Exchange Order should be made.

## **Recommendation**

147. I recommend that the application to deregister and exchange common land at Mynydd Garn-Goch Common, Garden Village, Gorseinon, Swansea is granted in accordance with the terms of the application Ref COM/3170168 dated 22 February 2017 and the plans submitted therewith and that an Order pursuant to Section 17 of the 2006 Act be made.

*Vicki Hirst*

INSPECTOR

## **APPEARANCES**

### **FOR THE APPLICANT:**

Mr J Pike, of Counsel

Instructed by Persimmon Homes

He called

Mr C Hadley BSc (Hons) Agric MBIAC

Director, Savills

Dr K Henson BSc (Hons) PhD, MIEEM

Associate, the Environmental Dimension  
Partnership Ltd

Mr D J Lloyd

Strategic Land and Planning Manager,  
Persimmon Homes, West Wales

### **INTERESTED PERSONS:**

Councillor W Evans

Ward Member (speaking on behalf of ward)

Mr A S Fitzgerald

Local Resident

Mr W Smith

Local Resident

## List of Documents Referenced in Report

<b>Reference</b>	<b>Description</b>
CH1	Mr C Hadley – Summary, Proof of Evidence & Appendices
KH1	Dr K Henson – Summary, Proof of Evidence & Appendices
DJL1	Mr DJ Lloyd – Summary, Proof of Evidence & Appendices
1	Application Notification and Press Advert
2	Register of Common Land – CL44
3	Application Form
4	Application Documentation
5	Outline Legal Submissions
6	Applicant's Response to Objections, dated 25 April 2017
7	Post Submission Documents
8	Case Law
9	Outline Dormouse Mitigation Strategy, August 2017

## List of Documents Received at the Inquiry

<b>Reference</b>	<b>Description</b>
I1	List of Appearances on behalf of Applicant
I2	Applicant's Opening Statement
I3	Letter from the Badminton Estate, dated 8 August 2017
I4	Kingsbridge, Gorseinon & Penllergaer Ward Profiles
I5	Policy SD B: Land north of Garden Village Allocation - Extract from Swansea Local Development Plan 2010 – 2025: Deposit Plan, July 2016
I6	Register Map of Common Land CL44
I7	Guidance Note – Planning Applications for Non-Householder Residential Development, November 2015
I8	Land to the north of Garden Village, Gorseinon, Swansea Geophysical Survey, January 2017
I9	Email from Rob Dunning, Glamorgan-Gwent Archaeological Trust Ltd, dated 6 September 2017

I10	Land north of Garden Village Swansea (Bryngwyn Fields, Kingsbridge) Written Scheme of Investigation for Archaeological Evaluation
I11	Minutes of the City and County of Swansea Council Planning Committee, 10 November 2015
I12, I13, I14	Draft Unilateral Undertakings x3
I15	Costs for Works to Replacement Land
I16	Data and Email dated 6 September 2017 regarding OS data key
I17	Applicant's Closing Submissions

### **List of Documents Submitted after the Inquiry**

<b>Reference</b>	<b>Description</b>
PI1, PI2, PI3	Signed and dated Unilateral Undertakings x3
PI4	Applicant's Documents Index