



Application Decision

by J P Tudor BA (Hons), Solicitor (non-practising)

an Inspector appointed by the Welsh Ministers

Date: 25/11/2024

Reference: CAS-03021-N7X6M4

Site address: Whitchurch Common, Whitchurch, Cardiff

- The application dated 20 December 2023 is made under section 38 of the Commons Act 2006 ('the 2006 Act') for consent to carry out restricted works on common land.
 - The application relates to Whitchurch Common (CL1) and the Commons Registration Authority is Cardiff Council.
 - The application is made by Cardiff Council.
 - The proposed works are ground investigation works (boreholes and trial pits) to inform a flood alleviation scheme design.
 - A site visit was made on 6 November 2024.
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Decision

1. The application is allowed, and consent is granted for ground investigation works (boreholes and trial pits) to inform a flood alleviation scheme design in accordance with the application dated 20 December 2023 and the plans submitted with it and subject to the following conditions:
 - i) The works shall begin no later than five years from the date of this decision.
Reason: To ensure that the works are commenced within a reasonable time frame.
 - ii) The works shall be completed within 20 weeks of commencement.
Reason: To ensure minimal disruption to those exercising their rights on common land.
 - iii) All temporary fencing shall be removed, and the land reinstated to its previous condition within one month of the completion of the works.
Reason: To ensure the site is reinstated in the interests of those exercising their rights on the common and to ensure the landscape is retained.
 - iv) An archaeologist shall be appointed during the work. Any archaeological finds shall be sampled, investigated, and recorded as a public record.
Reason: To identify and record any features of archaeological interest discovered during the works, in order to mitigate the impact of the works on the archaeological resource.

Procedural Matters

2. In determining this application under Section 38 of the 2006 Act, I have had regard to the Welsh Government's Common Land Consents Guidance, August 2014 ('the Guidance'), which contains advice relevant to decision-makers and applicants.

Preliminary Matters and Background

3. Cardiff Council ('the Council') advises that the purpose of the proposed temporary ground investigation works is to provide information to assist in determining whether a future flood alleviation scheme ('FAS') would be feasible, and to inform the engineering design of such a scheme. The Council advises that it is considering a FAS to address known flood risk issues affecting the Whitchurch area. The application is a revised version of an earlier proposal which involved more extensive works.
4. The proposed works would consist of two trial pits and two boreholes. The individual trial pits would be no more than 3 metres long, 1 metre wide and 3.5 metres deep. The boreholes are to be drilled to the rockhead (anticipated to be up to 7 metres below ground level) and would be no more than 120mm in diameter. The trial pits and boreholes would, among other things, facilitate: investigation of the geometry of an existing wall and its foundations, collection of soil samples for analysis, infiltration and other tests, installation of a plastic standpipe for groundwater monitoring and sampling.
5. The works would not be permanent and would be time-limited, with 4-8 weeks anticipated to complete the primary works and 6-12 weeks post completion for the collection of ground water samples. There would be temporary Heras-type fencing, about 2.5-3 metres high, for security and public safety but it would only enclose the trial pits and borehole locations with the enclosures big enough to hold associated plant, such as an excavator or drill rig and Land Rover. When the ground investigation had been completed the work areas and affected land would be reinstated to their original condition.

Summary of Representations

6. In response to consultation letters sent to relevant parties and the publication of a notice of the proposal, a number of representations were received:
7. Cadw advised that there are no scheduled monuments, registered parks and gardens or world heritage sites within 500 metres of the application area and it, therefore, had no comment.
8. The Open Spaces Society ('OSS') has no objection to the proposed ground investigation works. However, it did go on to indicate that it would object to any more substantial works that might be associated with a FAS on the common.
9. Glamorgan-Gwent Archaeological Trust (GGAT) advise that the Historical Environment Record shows the common as an open space with farms, a smithy, chapel, and public house set around the common, with a mill leat and mill in the vicinity. As some of those features are not visible as aboveground remains, it advises that there should be an archaeological watching brief during the ground disturbance works, to be secured by an appropriate condition.
10. A member of the public who lives in the area indicates that they are objecting to the application but their letter focusses on the requirement for a FAS, which they dispute. Another local resident expresses similar concerns about a FAS but acknowledges that the current application relates only to temporary works associated with a ground investigation, while stating that an FAS would necessitate a further application for a separate consent, which is acknowledged by the Council. The representation also refers to three investigation points located remote from the Brook and more towards the centre

of the Common, but the Council advises that these relate to the previous scheme and have been removed from the current revised application.

Main Issues

11. In determining this application for consent, I am required by Section 39 of the 2006 Act to have regard to:
 - a) The interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising their rights of common over it);
 - b) The interests of the neighbourhood;
 - c) The public interest (including nature conservation, the conservation of the landscape, the protection of public rights of access and the protection of archaeological remains and features of historic interest); and
 - d) Any other matter considered to be relevant.
12. Common land is a finite resource and the Welsh Government has indicated that it should not be developed unnecessarily, access to it should not be prevented or impeded unnecessarily, and the proper management of it should be encouraged.

Reasons

The interests of persons having rights in relation to the land

13. The applicant advises that there is no record of any common rights registered over the common. Therefore, unsurprisingly, no Commoners and no Commoners' Association have been identified, with Cardiff Council stated to be the sole undisputed landowner.
14. However, I understand that the public have a right of access to the common for air and exercise under s.193 of the Law of Property Act 1925. The common is bisected by Merthyr Road and College Road. There are several informal paths crossing the Common that are maintained by Cardiff Council. There is also a registered public right of way crossing the common on its eastern fringe.
15. The applicant advises that the public right of way and the other informal footpaths crossing the Common would not be obstructed by the works and no closure of them would be required while the works were being carried out. Moreover, the proposed testing sites are located along the western fringe of the common, well away from the main recreational areas.
16. Nevertheless, there would be some interference with public access. However, given that the total area of the common is 28,270 sq. m or 2.827 ha, the proposed works would occupy only very small portions, with the remainder of the common available for public access.
17. Therefore, given the small areas of the common affected by the two trial pits and two boreholes and associated plant, together with the temporary nature of the works, I find that the interference with public rights of access would be negligible. As such, the proposed works would not unacceptably interfere with those public rights or interests.

The interests of the neighbourhood

18. There is no definition of neighbourhood in the 2006 Act. The Guidance requires consideration to be given to whether the works mean that local people will be prevented from using the common in the way that they are used to. Furthermore, the Guidance requires consideration to be given to whether the works would interfere with the future use and enjoyment of the land as a whole.

19. The common is in the midst of a built-up residential area and is likely to be used by local residents and visitors for recreation while the paths across it also provide short-cuts or more direct routes to bus stops and surrounding streets.
20. However, the locations of the proposed works would occupy relatively small areas and not interfere with or obstruct existing paths, public rights of way or the main recreational areas of the common. Moreover, they would be temporary and the affected areas would be reinstated to their previous condition after completion of the works. Therefore, I consider that the works would have a limited effect on the way people are used to using the common and would not affect future use and enjoyment of the land as a whole.
21. Accordingly, I conclude that the proposed works would not unacceptably affect the interests of the neighbourhood.

The public interest

Nature Conservation

22. The land is not in an area designated for its nature conservation interest and there is no evidence before me to indicate that the proposed works would impact on such interests. The land comprises mostly grassland and would be reinstated to its previous condition after completion of the works, which can be required by condition. Natural Resources Wales was consulted about the proposal but no comment was received from it. I note that the Council's Parks Services department referred to the protection of existing trees but there is no clear indication that trees would be directly affected by the proposed works. However, if that were in question, I am satisfied that the Council, as a responsible public body, would seek and adhere to further advice provided by its Parks Services department. Overall therefore, I am satisfied that these time-limited ground investigations would not harm the public interest in nature conservation terms.

Conservation of the Landscape

23. In respect of the impact on the landscape, based on the evidence before me, the site does not lie within an area designated for its landscape interest. It also comprises several parcels of land some of which are adjacent to or bisected by a number of roads, including Merthyr Road, which was very busy at the time of my site visit on a weekday afternoon. Notwithstanding, the common forms an attractive, open, green space within an otherwise built-up area.
24. The proposed ground investigation works would have a visual impact for their duration, with the presence of Heras-style fencing around the testing sites and associated plant, such as an excavator or drill rig and vehicles. However, the works are at a limited number of locations along the western fringe of the common and would occupy small areas of land. Overall, the adverse effects would be relatively limited, given those factors, the overall size of the common, the temporary nature of the works and the proposed restoration of the land on completion.
25. In view of the above, I conclude that the proposed works would have a minor and temporary negative impact on the landscape.

Protection of archaeological remains and features of historic interest

26. Cadw indicated that there are no scheduled monuments, registered parks and gardens or world heritage sites within 500m of the application area and it, therefore, offered no comment. No issues have been raised regarding any other aboveground features of historic interest in the area.

27. As referred to above, GGAT recommended that the works should be subject to an archaeological watching brief, given that the Historic Environment Record for the common indicates that there is potential for archaeological remains to be encountered. Such a watching brief could be secured by means of an appropriate condition.
28. On that basis, I do not consider that the works would have an adverse effect on archaeological remains or features of historic interest.

Protection of public rights of access

29. I agree with the applicant that for site security and public safety reasons it would not be practical to leave the proposed trial pits and borehole sites unfenced during the works. However, I understand that public access to the vast majority of the common would be unaffected while public rights of way and other paths would not be obstructed. Moreover, any public access would only be affected for a relatively short temporary period over small areas of the common. Therefore, the impact would be minor.

Conclusion on effects on the public interest

30. Overall therefore, I conclude that the works would not unacceptably affect the public interest.

Other Relevant Considerations

31. As explained above, the proposed temporary ground investigation works are to provide information to assist in determining whether a future FAS would be feasible, and to inform the engineering design of such a scheme. I note the representations made by OSS and local residents expressing concerns about the prospect of an FAS being implemented on the common. However, any such FAS, if considered feasible and necessary, would be subject to a separate future application where its effects on the common could be fully considered. Therefore, concerns regarding a possible future FAS, the design or extent of which is currently unknown, are not directly relevant to the proposed initial ground investigation works which are the subject of this application.
32. While the proposed ground investigation works would not, in themselves, benefit the common or improve its condition, it would be in the public interest for any future decision about a FAS, and its design, to be based on sound information, which these ground investigation works would contribute towards.
33. On balance, I consider that the potential benefit arising from the works to inform a future decision on a possible FAS outweighs the minor harms that I have identified.
34. I have considered the advice in the Welsh Government Circular 016/2014 'The Use of Planning Conditions for Development Management' in considering the need for conditions.
35. A condition requiring the development to be commenced within five years is reasonable and necessary. The application indicates that it would take 4-8 weeks to complete the principal works and 6-12 weeks post completion for the collection of ground water samples. Therefore, I have included a condition for the overall works to be completed within 20 weeks of commencement to provide sufficient flexibility, while ensuring the time period is restricted so that they are completed in a timely fashion. Furthermore, a requirement for the removal of temporary fencing and the reinstatement of the common within one month of completion of the works is reasonable and necessary. It would ensure that the common is returned to its previous state as soon as possible and that any interference with public access or effects on the landscape would be minimised. While I note GGAT's suggested condition regarding an archaeological watching brief, I am unable to impose a condition in that particular form requiring the discharge of further

information, as that would not be within the jurisdiction of the Welsh Ministers or the Council in a common land case. Nevertheless, the Council has stated that it would appoint an archaeological consultant to perform the necessary functions set out by GGAT. Therefore, I have imposed a condition, which I consider to be sufficient given the scale of the proposed works, requiring the appointment of an archaeologist to identify and record any features of archaeological interest discovered.

Conclusion

36. I have considered all matters raised. I find no matters that lead me to conclude other than that the proposal is acceptable. The works would be in conformity with the policy objectives set out in the Guidance. For the reasons given above, I allow the application and grant consent for the proposed works subject to the conditions specified in paragraph 1 of this decision.

37. In reaching my decision, I have taken into account the requirements of sections 3 and 5 of the Well-being of Future Generations (Wales) Act 2015. I consider this decision is in accordance with the Act's sustainable development principle through its contribution towards one or more of the Welsh Minister's well-being objectives as required by section 8 of that Act.

JP Tudor

INSPECTOR