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Our ref: WA/2022/03032
Date: 4th July 2024

Dear Matthew Gibbins,

**RE: COMMON LAND CL-162 APPLICATION UNDER S.38 COMMONS ACT 2006
COOMBEBURY COTTAGE, DUNSFOLD GU8 8**

Waverley Borough Council objects to this application for restricted works to the Registered Common CL-162, and requests that this application is refused as non-compliant with DEFRA policy.

The Council notes that a similar application concerning this development was refused (COM/3311552) on 22nd June 2023, and a separate unrelated development proposal nearby was refused on 20th December 2021 Ref COM/3272496 (discussed below). The Council considers that the reasons for refusing consent in those cases apply to the present application.

By an agreement dated 1st September 2010, certain areas of the registered common CL-162 were leased from Waverley Borough Council to Dunsfold Parish Council. Since that time, the Parish Council has undertaken management and maintenance of the Common in accordance with the terms of a Commons Management Plan agreed from time to time with Waverley Borough Council.

The Borough Council wishes to make the following comments on the application for restricted works to the Registered Common CL-162.

Prematurity – legal challenge ongoing

The planning permission (LPA Ref: WA/2022/03032; Appeal Reference APP/R3650/W/23/3332590) for the erection of up to 53 dwellings on which the applicant relies as part of its wider public benefit argument is the subject of a recently announced statutory review by Waverley Borough Council pursuant to s.288 of the Town & Country Planning Act 1990. Pending outcome of that statutory review, an application under s.38 for permanent restricted works is premature. The existence of the challenge renders any claimed public benefit from the proposals uncertain.

The Council invites the Inspector to read the appeal decision in full, particularly where the landscape harms are discussed. The Council remains opposed to the proposed development. Present housing development activity in the village would see Dunsfold deliver more than its new housing requirement, even without the development of this particular site. This site is outside the existing village settlement boundary and is not allocated in any adopted or emerging development policy at borough or parish level. To be more specific, it has never featured, and is highly unlikely to feature, in a draft Neighbourhood Plan (which is currently undergoing revision). The proposed development was acknowledged by the planning appeal Inspector to contradict several planning policies, particularly on landscape impacts. The proposal remains deeply unpopular within the local community, viewed as unnecessary (see also re housing supply below), and is damaging to the intrinsic beauty of the area. Furthermore, and unlike other proposed development locations in the village, it would result in a new enlarged access road over common land.

Waverley Borough Council has deemed this decision worthy of a legal challenge. The Council's professional judgment is that the decision is unsound.

This application can be distinguished from the facts of Miller Close COM/3203592 26th October 2018 and Gratton Chase COM/3154098 29th November 2016, where planning consent was initially granted by Waverley Borough Council, and development at these locations was supported by the Local Planning Authority. Furthermore, the Council is encouraged to see in recent years a robust stance on the protection of common land by Inspectors appointed by DEFRA, and where the cumulative impact on the overall character of the common from similar developer proposals is being recognised.

Housing supply

The housing supply pressure within the Borough is in a large part down to substantial delays in the delivery of Dunsfold Park, a "new village" development of up to 2,600 homes, located approximately a mile (as the crow flies) from the present site, and which has been allocated in the Local Plan (Part 1) 2018. Substantial progress on development is now being made, with housing construction due to commence in 2025. As a result, the Council's expectation is that the borough's housing supply (including affordable and custom/self-build) will dramatically improve in the coming months as Dunsfold Park progresses. Considering this, the Council is of the view that permanent and harmful restricted works to the common at this location to facilitate further housing development is simply unnecessary and unwarranted.

Outline permission only

Notwithstanding the above wider points, the planning permission granted on appeal is outline only - *all matters are reserved* for subsequent application to and agreement with Waverley Borough Council. Matters presented as benefits from the works such as tree planting numbers, type and location and affordable/custom housing provision are, it considers at this stage, too uncertain and remote to properly factor into a consideration of whether permanent restricted works sought comply with DEFRA policy. Whilst the

Council appreciates the applicant's intentions as to such detail, these are matters which are yet to be determined as a planning matter. It is entirely possible that intentions may change over time. The Council considers it would be improper to link a s.38 consent to detailed matters which are within the remit of the separate planning regime where different considerations apply.

The applicant also makes a reference to £1.7m of CIL contributions but provides no detailed explanation of this statement.

The Council now turns to more detailed aspects of the application:

New village green – wider principle

The Council has deep concerns about the proposed new village green area and how this has been presented both in the planning application process and in the present s.38 application.

Within the planning documents, the area has been referred to variously as “area offered as common land”, “village green” and “public open green space” (see Appendix 1), leading to confusion as to what the applicant proposes. The Council notes that the S.106 Agreement provided does not appear to require the registration of the “public open green space” as a village green; registration appears to be left to the discretion of the owner/operator; such a step is not enforceable by Waverley Borough Council. The Council therefore questions why paragraphs 5.4 and 5.17 of the common land supporting statement refer to registration being “secured” by or within the S.106 Agreement.

Furthermore, the Council remains doubtful that registration of a new village green area can properly form a condition to any consent under s.38 should it be granted, given that such a condition does not concern either existing registered common land or the restricted works. To do so would seem to be outside of the intended remit of s.38.

In the Council's view, a new “village green” within the development does not mitigate the fact that the restricted works sought will create an urban feature and reduce the recreational enjoyment of the registered common at this location. It also creates practical complications, in that ownership and maintenance of the village green will be vested in a separate management company and not a public body as the rest of the registered common CL-162 currently is.

The Council is also concerned that the broader practical effect of consent in this case would be to undermine the statutory process for deregistration under s.16 of the Commons Act 2006, which requires both consent of relevant common landowners and an evaluation of the equivalence of any replacement land offered. This could set an unwelcome precedent, unintended by legislation or DEFRA policy. Pursuing negotiation with common landowners and a joint s.16 application makes little commercial sense if there is a possibility of achieving statutory consent under s.38 and the new land offered can count towards the benefit from those restricted works without further assessment.

The Council notes that the applicant does not provide any convincing reason for why s.16 has not been explored, except for the applicant's view that there is no "need" to de-register the land, presumably because the applicant is awaiting the outcome of this application to determine need. Yet, the Council's view is that the land would remain "common land" in name only, depleted of the qualities that designation is intended to protect, and adding to the cumulative urbanisation of the common arising from similar accesses across the common at Gratton Chase, Nugent Close and Miller Close. As the Inspector noted in the refusal in COM/3311552, the proposal will reduce the area of common available for recreational use and will introduce a more urban feature.

DEFRA policy

The proposal to expand the access driveway cannot reasonably be said to be for the management, improvement or protection of the registered common. Prima facie, it therefore contradicts DEFRA policy in relation to s.38 consent.

The Council maintains that the enlarged permanent access will cause landscape harm to the area, both on its own and cumulatively when taken in the context of recent development activity involving common land. Accessing new housing development is not one of the "public benefit" examples contemplated in the DEFRA guidance. The Council broadly agrees with the Inspector's assessment in COM/3311552 as to the detrimental impact of the works, which are also consistent with the refusal of an access in COM/3272496.

The practical effect of the proposals is to turn existing common land into a driveway access for private residences. By its nature it impacts public enjoyment by reducing the area of common land available for recreation, causes loss of habitat and introduces an urbanising feature into a natural setting. Consent for the works would cause fragmentation of the common in practice, in the Council's view removing the qualities for which statutory protections were given.

Although the applicant claims benefit to some specific elements of its wider proposals in developing the land to the rear of the access, the principal objective and effect of the restricted works is to double the size of the existing access in order to create a substantial access road for private benefit (namely, the developer's commercial interest in building out the housing development, and private access to new properties).

Habitat/biodiversity/nature conservation

The whole area of the Common functions as a vital wildlife corridor, alongside the Dunsfold Common Road. Badgers, deer and foxes are frequently seen foraging and hunting. In autumn and winter, tawny and barn owls can be heard, and bats are visible hunting at dusk. The village is also home to a breeding pair of swans and amphibians, including Great Crested Newts.

The interlinked habitat mosaic is of high local wildlife value for which the Common was designated a Site of Nature Conservation Interest (SNCI) by Surrey County Council in 1998.

The Council has concerns about deficiencies in the applicant's supporting ecological information, and which were highlighted in the planning application process. The Council is particularly concerned as to the information on amphibians. Paragraph 4.79 of the Ecological Impact Assessment states:

The data search showed one record of great crested newt within 2km of the site within the past 15 years. This record was from 2013 and approximately 1800m from the site. No records were returned for any other newt species. One record for common toad (Bufo bufo) within 2km of the site within the past 15 years was returned.

Surrey Hills AONB (National Landscape)

The Surrey Hills AONB (National Landscape) is currently the subject of a boundary extension review, which is currently in the advanced stages. The proposed development including common land is firmly within a larger area identified by Natural England consultants as meeting the criteria for inclusion within that expanded boundary (Candidate Area 13). The Council has a reasonable expectation that the area will become part of a newly expanded National Landscape when the process completes (anticipated in 2024). As a result, the Council considers that the statutory duty to conserve and enhance the AONB ought to now apply on a precautionary basis to those areas which are the subject of a substantially completed process for inclusion. This is to ensure that the integrity of the areas identified for inclusion is preserved pending the formal outcome of the process.

Recreation/amenity

The Council considers that a busy road junction at this location is detrimental to the use and enjoyment of the common. The provision of an alternative walking route around the perimeter appears to undermine the applicant's position that the access road will remain open for use by the public as common land – it seems intended to divert the public from exercising their right of access on the common. The utility of an additional circuitous walking route, when a network of paths and open access on the common to a registered footpath already exists is doubtful. It appears to distract from the amenity loss to the common land.

Likewise, extension of the pavement either side of the access road appears to have limited public benefit, save for the occupants of the new houses, if they choose to use public transport. Anecdotal evidence suggests that public transport use in the village is generally low, including the new digital on demand bus service.

The application seeks to include certain changes to the boundary treatments, a new footpath and works to footpath 281, none of which are restricted works to Common Land nor do they enhance the user experience of the affected common land in question.

Waverley Borough Council considers these to have limited relevance to the merits of the application.

Refusal in COM/3272496 - 20th December 2021

An application for a new (substantially smaller) access to proposed development further south was refused by the Planning Inspectorate on 20th December 2021 Ref COM/3272496 for several different reasons – the Council considers that this is material to the current proposal.

In that decision, the Inspector also noted:

- harm to the landscape character and visual amenity from the proposed access.
- cumulative impact of vehicular traffic from the proposed housing, together with cumulative landscape harm from an urban feature.
- the character and appearance of the land would be affected by the access.
- loss of woodland habitat, providing foraging and commuting habitat for bats, badger, reptiles, nesting birds, great crested newt and hedgehog; and
- the access would permanently and adversely diminish the prevailing natural informal appearance of the [access] site. This would be exacerbated by the connection to the existing access and would convey a more suburban character and appearance.

These are also relevant observations to the present application.

Conclusion

The reasons for refusing consent in COM/3311552 remain relevant and engaged in this application, particularly the urbanising impact. The public benefit arguments offered by the applicant are brought into doubt by the ongoing litigation, and detailed items (trees, open space etc) remain uncertain and subject to future planning applications for their delivery. There appears to be no mechanism to ensure the delivery of the benefits stated, and a grant of s.38 consent would risk undermining the proper statutory process/evaluation of replacement land provided by s.16.

Yours sincerely,

Michael Eastham (MRTPI)
Principal Planning Officer
Waverley Borough Council

Appendix 1 – Section 106 terms (extract)

<p>“Public Open Space”</p>	<p>means the area of open space for public use to be provided on the S106 Site as part of the Development in the indicative location shown highlighted yellow on Plan 3;</p>
<p>“Public Open Space Specification”</p>	<p>means a written specification for the size and other relevant details necessary for the provision of the Public Open Space which may include provision for the Public Open Space to be voluntarily registered as a village green under s 15(8) of the Commons Act 2006;</p>



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4. Public Open Space

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- 4.1 To submit the Public Open Space Specification to the Borough Council for its agreement on or prior to the Commencement of Development.
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- 4.2 To provide the Public Open Space in accordance with the approved Public Open Space Specification and the approved Management Plan on or before Occupation of any Dwelling.
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- 4.3 To transfer all such land upon which the Public Open Space is located to the Management Company by way of transfer or lease such transfer or lease to contain covenants requiring the management and maintenance of the Public Open Space in accordance with the Management Plan.
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- 4.4 To keep the Public Open Space open to the public in perpetuity SAVE THAT it may be closed to public access in the event of an emergency or to carry out maintenance.