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Our ref: CY02/JB13/47016.8/TRACE

Your ref:

25 June 2021

When telephoning please ask for: Cathryn Tracey

Dear Sir / Madam

COMMONS ACT 2006 – SECTION 16
Walton Common and Tilbury Fort Common (CL228)

Application reference: COM/3273818

Further to receipt of the objections in respect of the application we respond as follows:

General

The s16 application is being made in order to facilitate development being secured in a Development Consent Order (DCO). Neither the Applicant nor developer, Thurrock Power Limited (TPL), (and from the objections letters this also includes the Open Spaces Society and Historic England) want the de-registration of the common and provision of replacement land to take effect prior to the grant of the DCO.

The common land application was made because the guidance advises that s16 applications can take up to 12 months to be determined and TPL could not risk securing the DCO and then having to wait a further 12 months before it could progress with the development. TPL is also mindful of creating a scenario where those who would be consulted on the application would be required to re-engage with a further application on the same issues that are already being considered in the DCO process. Therefore, the common land application was made at a time to ensure that the decision would be made at a similar time to the DCO.

However, it would appear that PINS are able to consider this application in a significantly shorter timescale than TPL anticipated. It is for the reasons above that we request that once the representations process has concluded that the application is effectively paused through delay to the scheduling of the site visit until March 2022 when the outcome of the DCO application is known.

The DCO is important to the s16 application because many of the concerns of the objectors form an integral part of the development securing consent in the DCO. In addition it is not possible for TPL to provide the commitments sought in the commons process without a DCO as the development proceeding is necessary for the commitments to be funded by the developer.

The DCO process considers the same tests that are set out in the Commons Act 2006 and Natural England and Historic England are involved in this process. The Open Spaces Society had the opportunity to be involved in this process but we understand that they have not taken this up. However TPL has committed to sharing the objections and it's response to those objections with the inspector who is considering the DCO application. TPL will continue to share the information submitted to the s16 application with the DCO application for as long as the examination into the DCO application is able to accept the information. This will ensure that the DCO

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Examining Authority has before it all the submissions made to the s16 application in considering the commons impacts of the powers sought in the DCO.

Historic England (HE)

This objection focusses on the historic value of the common land. Enclosed with this letter is the applicant's response to this objection. It is drafted by the heritage experts for the applicant. The applicant notes that issues in relation to the historic landscape are within the remit of Thurrock Council, not HE, and the Council have not objected to this application.

HE consider that a section 38 application should be made to undertake trial trenching on the common land to establish the value of any buried archaeological interests, if any, before the development is consented. The applicant submits that the key principles to be considered under the DEFRA guidance¹ in relation to section 38 works are that:

"Commons should be maintained or improved as a result of the works being proposed on them. The Secretary of State sees section 38 as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character".

"consent under section 38 should be seen as a gateway, which enables the construction of works which are sympathetic to the continuing use and enjoyment of common land".

Trenching works would not be intended to benefit the common itself in any way, but rather would be undertaken to support applications which would, if granted, be inconsistent with commons status (which is why a section 16 application is being pursued). The justification for any trenching works is important in establishing whether they comply with the policy The DEFRA guidance provides that "In deciding whether to grant consent to carry out works on common land, the Secretary of State will wish to establish whether the proposed works are consistent with the use and enjoyment of the land as common land". Trial trenching would require the opening of large, step-sided trenches in the common land. Trenching would require the use of machinery, the creation of safe working areas for machinery and the storage of excavated soils. Those works would require (for health and safety) exclusion of public access over the trenched areas, the working areas around them and soil storage areas. These works would by their nature interfere with the rights of commoners, the neighbourhood and the public to which regard must be had under section 39.

The Planning Inspectorate guidance sheet 1a provides that the "best option" for works which are not consistent with the use and enjoyment of the land as common land is section 16 deregistration and exchange. Under that categorisation it specifically includes "ditches, trenches....or other works which are not consistent with the use and enjoyment of the land as common land". The applicant's approach in pursuing this application rather than section prior section 38 consent for trenching is therefore entirely consistent with the relevant guidance.

The applicant entirely rejects HE's assertion that the value of potential remains cannot be assessed without full trial trenching. The applicant has taken a precautionary approach to its archaeological assessment, and has seen no evidence or reasoned case produced by HE to support its assertion that there are likely to well preserved remind of importance within the common. That position is contrary to the results of the applicant's investigatory work, including intrusive borehole sampling, undertaken on the site so far.

HE is submitting that the applicant should have extensively trenched a common which it asserts has intrinsic historic and landscape value prior to any grant of consent necessitating that, and in an area which HE has submitted should not be developed. Those submissions are inconsistent. The work done on this site indicates that the results which would guide intrusive investigation (which will be undertaken pre-construction) are at a depth which would require wide, side stepped trenches in marshy land. Trial trenching of the scale sought would cause harm to the common and interfere with any remains in situ. The applicant is not in any way trying to avoid undertaking the necessary archaeological evaluations and any necessary trial trenching and this will

¹ Common land consents policy as published by the Department for Environment, Food & Rural Affairs

be secured by the DCO if granted. Rather, the applicant is proposing to do the works after the grant of a DCO consent when the interference with the landscape is justified and when the rights of common, including public rights of access, have been transferred to the replacement land and will not be interfered with. If the DCO is granted the works would be carried out in accordance with a written scheme of investigation secure by the DCO and specifically designed to ensure that any archaeological interests that may exist are recorded and preserved.

Natural England (NE)

This objection can be categorised into two parts, relating to access and the future ecological management of the replacement land.

Access

The comments made by NE relate to the effect that the proposals will have on those wishing to use the replacement common land for recreation and access. NE acknowledge that a permissive route is proposed to provide access to the replacement land for the community of Tilbury via Fort Hill Road but assert that should this route be revoked by the landowner the community will need to walk some 1.7km in order to access the common from the opposite (eastern) boundary.

As previously stated in the Common Land Report, access to the existing common land by members of the public for the purposes of outdoor recreation requires traversing the common land along Fort Hill Road and Parsonage Common and crossing the railway line, the gates on either side of which are currently padlocked (although TPL do not know who has done this). This is a distance of approximately 1937 metres (Route 1 on Figure 1).

The provision of the replacement land firstly increases the amount of common land resource by approximately 1.5 ha (i.e. 10.1 ha of exchange land compared to 11.6 ha of replacement land) but also improves access to that replacement land by providing access from Parsonage Common. It does not worsen the position for the public and benefits the public by no longer requiring the crossing of the live railway. Should a walker from Tilbury wish to access the replacement land by taking the route via the common land along Fort Hill Road and Parsonage Common, this route would be 1802 metres long (Route 2 on Figure 1). This is 135 metres shorter than the current route to the common.

There is the proposal to provide a footbridge over the ditch and a permissive path to the replacement land as part of the development which is proposed and which necessitates the de-registration of the common land. This journey would be 109 metres long (Route 3 on Figure 1), providing a significantly shorter distance for the community of Tilbury and a significant benefit to the neighbourhood. However, the area suffers from a significant amount of fly tipping, fly grazing and other illegal and anti-social activities. To prevent these occurring on the replacement land it is necessary for the landowner to retain control over the proposed access and therefore it is not possible to formally offer this as part of the s16 application and register the land as common land. The permissive path is secured as part of the DCO application and therefore it is not proposed to offer this as part of the s16 application. The benefit of the permissive path can only be provided in the event that the wider development secures consent.

Ecological concerns

In respect of the ecological concerns raised, the development as proposed would include an ecological management plan in respect of the development including over the replacement land. This will be secured in the Development Consent Order and, because there is no need for the common land to be deregistered unless and until the DCO is granted the applicant is not offering a s106 agreement (or other agreement) to secure this. The DCO ecological management plan would be subject to approval by the Council and they will have powers to enforce its implementation and continuing delivery through the planning system. It is accordingly not necessary to duplicate that control.

However, in order to demonstrate that the replacement land would be satisfactorily managed we confirm that it is the intention of TPL to create habitat on the replacement land of similar species composition, structure and function as the existing common land, i.e. semi-improved grassland to be managed by annual hay cutting.

TPL undertook quadrat surveys of Walton Common (reported in APP-091 Ecological desk study and survey report, Section 3.4 of the Environmental Statement for the DCO). This found that the Walton Common grassland most resembled a mixture of MG1b (*Arrhenatherum elatius* grassland, *Urtica dioica* sub-community) and OV24b (*Urtica dioica*-*Gallium aparine* community, *Arrhenatherum elatius*-*Rubus fruticosus* agg. sub-community). The applicant therefore intends to use an appropriate seedmix (either by purchase of a commercial meadow seedmix or purchase of a 'bespoke' seedmix containing the main grass species in similar proportions to that occurring on site. This will provide the best opportunity to create a like-for-like replacement area of common land.

With regards to biodiversity value, it should be noted that separate habitat creation proposals for semi-natural meadow grassland, scrub and other features such as bee banks, log piles and hibernacula is proposed in other areas of the DCO application. The ecological interest of the release land in terms of species such as reptiles, invertebrates and breeding birds is mainly concentrated on the ditches and associated marginal vegetation rather than the main area of grassland managed by cutting. The provision of the replacement land and additional meadow grassland and other habitats in other areas of land within the DCO application provides a much greater combined area of grassland than currently existing.

The proposed approach to grassland creation on the replacement land is as follows:

- Harvest arable crop, remove all arisings
- Undertake a deep plough to mix the topsoil layer with a similar depth of subsoil, to dilute the nutrient concentration in the top layer of soil
- Depending on timing, a further cultivation may be employed to plough in the first flush of germinating weeds
- Harrow to create medium tilth
- Roll to produce firm surface for seeding
- Seed grassland autumn / spring

Management in first year would be:

- Undertake regular cutting between April – September to 40-60mm height, to control annual weeds, and remove of arisings
- If necessary undertake spot treatment to control perennial weeds (e.g. docks)

Management in second and subsequent years would be:

- Take hay crop in mid-late summer and remove arisings, which is the current management practice on the release land.
- Monitoring of sward establishment and species composition will be undertaken for the first 5 years following sowing, and management actions can be adjusted as necessary (e.g. more frequent cuts may be employed, such as an Autumn cut, if growth of weedy species is too vigorous).

Open Spaces Society (OSS)

The OSS objection raises a number of points relating to the access, historic value and ecological management of the replacement land that have been addressed above. Therefore we only address the points that have not been covered elsewhere.

They also raise a number of points about the rights over the common land. The common land register sets out the rights over the common and these are reflected in columns 2 of Table 1. The register has not been updated but as part of the land referencing exercise undertaken to satisfy the compulsory acquisition requirements in

the DCO process, diligent enquiry was made of those with common rights registered in the common land register. This resulted in the identification of those who have been consulted and notified of this application.

The OSS have raised a query of the wording used in column 3 which suggests that some rights are no longer part of the common. While this wording could have been clearer this column can be omitted without affecting the understanding of who is listed on the common land register. Furthermore it is also considered that none of the rights over the common should be attached to land for the reasons set out below.

All rights over the common are governed by the West Tilbury Commons Conservators (WTCC) pursuant to the Commons Regulation (West Tilbury) Provisional Order Confirmation Act 1893 and the subsequent Award undertaken by the valuer in 1895.

The valuer's role was to determine the "adjustment of rights" and make an award setting out the persons by whom, the stock by which and the times at which rights of common of pasture were to be exercised; and the persons by whom, the mode and places in which and the times at which rights of common of turbary (the right to dig turves or peat out of another's soil), taking of estovers (the right to take wood from another's land for the sustenance of the commoner's house or agriculture), taking of minerals or other interference with the soil were to be exercised. The Award comprised rights of pasture only and these were divided into a total of 500 "stints" (one stint being a right of pasture for one sheep, five stints being a bullock, seven and half stints being a horse and two and a half stints being a donkey). None of these stints are or can be attached to a land holding as the stinted rights do not transfer with ownership of land but require acquisition (and payment) each year.

The applicant is the owner of the common and the current stint holder for all of the 500 stints. They have purchased all 500 stints for a number of years and envisage that this will continue, although it is accepted that this is not a certainty. They consider that the Commons Register represents a snapshot of the relevant stint holders under the 1893 Act as at the date of registration of the common land pursuant to the Commons Registration Act 1965. The Commons Register is not therefore an accurate reflection of the current ownership of the rights affecting the common land as these are annually created by purchase of the stints.

As the common land application provides replacement land which would be subject to the same rights trusts and incidents as the release land, the number of stints and the way they are managed would not be affected.

In respect of the point relating to the management of the common by the WTCC and their role, it is not relevant to the common land application made. Neither the applicant nor TPL have the ability to influence how the WTCC operate, however the replacement land would be subject to the same rights trust and incidents as the release land.

We disagree with the statements that the replacement land will be inaccessible or that the replacement land has been designed to be so. These are factually incorrect statements as has been demonstrated above.

If you require a hard copy of this letter or the enclosures please contact Cathryn Tracey who will arrange for this to be provided.

Yours faithfully



BURGES SALMON LLP

Enc: Figure 1
RPS Response to Historic England Objection
Chapter 7 – Historic Environment of the Environmental Statement



Legend

- Replacement land
- Common land
- Release land
- Replacement land
- Route 1
- Route 2
- Route 3
- Railway line

Date: 14/07/2020
Created by: MS
Checked by: JT
Doc no: 10872-0246-003
Scale: A1@ 1:2,500
Reference System: OSGB36
Projection: BNG

0 100 200 Metres

Rev	Date	Remark

Thurrock Flexible Generation Plant
Section 16 Application – Pedestrian Access routes to
Walton Common and the Proposed Exchange Land
Figure 1