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**From:** Hugh Craddock <[REDACTED]>  
**Sent:** 20 July 2021 09:03  
**To:** Margoum, Naoual <[REDACTED]>  
**Subject:** COM/3273818

Hi Naoual

Thank you for sight of the applicant's response to objectors' comments.

First, I should explain that the society is not involved in the DCO process because it was not notified of it. Despite detailed engagement in consultation in 2017 and 2019, we were not notified of the DCO application. We are a national conservation body, and cannot be alert to every development process. We rely on notification of proposals affecting common land, but uniquely in relation to DCOs, we are not required to be notified in such cases, and were not notified — notwithstanding our previous engagement.

We are pleased to learn of Historic England's detailed objection to the proposal — please would you send us a copy? We note the applicant's rebuttal that 'that issues in relation to the historic landscape are within the remit of Thurrock Council, not HE'. Please would you ask the applicant to explain what professional expertise the council has in relation to the historic landscape, and what statutory provision excludes Historic England from raising issues in relation to the historic landscape?

We note that, in its dedicated responses to the Historic England objection, the applicant (broadly speaking) contends that there is no evidence of the commons' existence prior to the tithe survey. This is incorrect. First, the order confirmed by the Commons Regulation (West Tilbury) Provisional Order Confirmation Act 1893 states that:

...the common is waste land of the manor of West Tilbury, of which manor George Richard Burness, Esquire, is the lord

Land described in 1893 as 'waste land of the manor' is land which always has been waste since time immemorial — that is the classical provenance of common land, and it plainly is the position here. Secondly, the applicant cites the 1777 Chapman and Andre map and the 1805 Ordnance Survey drawing in evidence that the commons did not (at the date of those maps) exist. But the 1777 map merely shows the commons as 'marsh', entirely consistent with waste (perhaps showing that waste at that time was far more extensive than shown in the tithe survey half a century later). And the field patterns on the 1805 OS drawing are explained in *The First Ordnance Survey map*, Hellyer and Oliver, 2015, as follows:

Although the adoption of the two-inch scale and omitting '*the true* forms of the fields' for the mapping of Essex in 1799 was intended to speed up survey work, the surveyors continued to record some field boundaries, and some of these found their way onto the published maps. ...At present the apparently selective inclusion of these boundaries is baffling.

Thus, while the 1805 OS drawing does show field patterns which respect the presence of the commons, no reliance can be placed on them, or on purported internal boundaries. In short, the West Tilbury commons have always been here.

We infer that Historic England considers 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 portentously contends that

such an application would be contrary to the Secretary of State's policy guidance. But of course, the purpose of the works would be 'sympathetic to the continuing use and enjoyment of common land', because they would be intended to establish whether the exchange should be permitted at all. Ironically, the applicant then states that Historic England's 'position is contrary to the results of the applicant's investigatory work, including intrusive borehole sampling, undertaken on the site so far' — presumably the applicant takes the view that 'intrusive borehole sampling' does not require s.38 consent and does not interfere with the use of the land as common land, but trial trenches would unacceptably interfere?

In short, some trial trenches might show that the exchange should be refused, and the common protected. That seems to us to be entirely consistent with the guidance, and we should not object to such an application (subject to proper provision for reinstatement). Insofar as the applicant suggests that Historic England's proposals for trial trenching are inconsistent, we prefer to rely on the opinion of the public body with statutory responsibility for the conservation of the historic environment. Instead, the applicant proposes to carry out archaeological works after the exchange and DCO have been granted, when it will be too late to conserve whatever is found there.

In response to Natural England's criticism of the access arrangements to the common, the applicant suggests that, should the arrangements for permissive access from Tilbury to the replacement land fall through (as they very well may), the public will still have access to the replacement land via a shorter route than at present to the release land — by 1,802m vice 1,937m. We invite the inspector to walk (we emphasise *walk*) this route on his site visit and assess its suitability for himself.

We do not accept that any access provision which is permissive, which can be withdrawn at any time, and which involves a bridge over the drain (on the east side of Fort Road) which would require maintenance, is of any significant value. Only access which is assured, whether through the dedication of a publicly-maintainable footpath, a properly-constituted s.106 agreement, or a perpetual agreement under s.39 of the Wildlife and Countryside Act 1981, is of value. No such assured access is on offer.

We note (p.4) that the replacement land will be managed to create 'semi-improved grassland to be managed by annual hay cutting', and conclude that, therefore, there is no intention that the replacement land will be subject to the exercise of rights of common by grazing in the usual way.

We are grateful to the applicant for the explanation of table 1 in the common land report. However, the position is not satisfactory. First, it appears that the stints exercisable on the commons were registered under the Commons Registration Act 1965 as attached to land. In *Gadsden and Cousins on Commons and Greens*, 3<sup>rd</sup> ed., it is stated (para.3–77):

The better view, therefore, appears to be that the registers under the 1965 Act are conclusive as to the attachment of a right of common to land, where the right is so registered, and that the ownership of that right may be derived from the determination of the ownership of that land in the usual way.

It may well be that some or all of the stints have been acquired by the applicant since registration under the 1965 Act, but if so, it seems that few if any of those acquisitions have been registered in the register held under the 1965 Act. We therefore have only the applicant's assurance that he is the owner of all 500 stints, whereas the register suggests a position entirely to the contrary, and no further evidence has been supplied. We note in particular that the register details 18.75 stints (entries 20–22) exercisable by the local authority, and question whether these have indeed been severed and assigned to the applicant. In short, we think it fair to question whether the applicant is indeed the owner of all the stints, and to ask for the register to be updated (on applications made under r.29 of the Commons Registration (General) Regulations 1966 (SI 1966/1471), for the purposes of s.13(c) of the 1965 Act, to evidence his claim. In the absence of such applications, we suggest the Secretary of State should rely on the register as casting doubt on the applicant's claim to ownership of all the stints.

The applicant states that the West Tilbury Commons Conservators 'and their role, ... is not relevant to the common land application made.' But the Common Land Report itself rightly

states (para.3.2.11) that: 'the replacement land would be managed by the WTCC in accordance with the West Tilbury Commons Bye-laws.' How can the role and practices of the Conservators not be relevant to the exchange? Yet we are told nothing of the Conservators. We should be.

In summary, the applicants have failed to address key concerns about the heritage of, accessibility to, management of, and rights exercisable over, the release and replacement land. We see no reason to depart from our opinion, in our first objection, that:

...this exchange will not secure 'the registration of other land of at least equal benefit', and will be contrary to the interests of other rights holders, the neighbourhood (which we take to comprise Tilbury), and the public interest factors specified in s.16(8). It should be refused.

regards

Hugh

*Hugh Craddock  
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The Open Spaces Society has staff with exhaustive experience in handling matters related to our charitable purposes. While every endeavour has been made to give our considered opinion, the law in these matters is complex and subject to differing interpretations. Such opinion is offered to help members, but does not constitute formal legal advice.

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