

The Commons Team
The Planning Inspectorate
3A Temple Quay House
Temple Quay
Bristol
BS1 6PN

One Glass Wharf
Bristol BS2 0ZX

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

By email only: [REDACTED]

Our ref: CY02/JB13/47016.8/TRACE

Your ref: COM/3273818

13 August 2021

When telephoning please ask for: Cathryn Tracey

Dear Planning Inspectorate

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

Application Reference: COM/3273818

Further to receipt of Natural England and the Open Spaces Society's responses to the Applicant's letter dated 25 June 2021, we respond, on behalf of the Applicant and their agent Thurrock Power Limited (TPL) as set out below.

Natural England (NE)

Natural England have commented on access to and management of the replacement land.

Access

NE have restated that they consider the proposed permissive path should either be included as part of the replacement common land or that a public right of way should be created.

The common land application red line boundary is unable to be amended without making a new section 16 application. In the event that the permissive path land was included as replacement common land, this would give rise to issues about the ability of animals to access and graze this land. It would also provide public access to the common up to the boundary with the public highway, Fort Road, which as described below would, in all likelihood, lead to fly tipping and other illegal use of the replacement common land.

We note NE's suggestion that fly tipping will only occur if vehicular access can be taken to the land but the landowners have legitimate concerns that this would not be the case. The landowners have provided us with photographs (see enclosure) taken on 2 April 2021 of instances of fly tipping that have occurred on the common land that forms part of parcel CL228 on Coopers Shaw Road and along Fort Road. As is evident from the photographs, the level of fly tipping in the area is significant and it should be noted that some of these photographs were taken along the part of Fort Road which would be immediately adjacent to the replacement common land.

WORK\41964476\v.2

Classification: Confidential

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

We note the suggestions that access could be controlled by gates, bridges, stiles etc. but the landowners have informed us that a stile on their land that provides access for the public was recently destroyed to enable access by motorbikes. The landowners accordingly do not accept that such controls will be effective in practice.

The permissive path crosses a working agricultural field and it is of great concern to the landowners that if a public right of way is created as part of the DCO or this application then this could lead to problems with illegal access which may impact not only the farming enterprise around the common land, but also the condition and use of the common land.

The West Tilbury Commons Conservators (WCC) have informed us that illegal activity occurs frequently on the common and that this makes the common an unattractive place for others to use for recreation and exercise. The WTCC are currently having to address an unlawful encroachment of part of the common land parcel CL228, which they have limited resources to tackle.

The WTCC support the landowners' concerns regarding the provision of unfettered access to the common directly from Fort Road and their view is that significantly more than bollards would be required to ensure such access wasn't abused.

Notwithstanding the points mentioned above, the landowners have agreed to provide a permissive path in order to trial the very methods suggested by NE and to establish if access can be controlled to prevent anti-social behaviour and abuse of the common. If the permissive path is not abused, the landowner will retain it. Given the potential liability for cleaning up fly tipping on their agricultural land and the replacement common land, and the lack of resources that the WTCC and the local authority has to police and monitor public rights of way in an area where there is very little legitimate public use of the common, the landowners are justifiably concerned that they could be left with a significant liability if a right of way is created that cannot later be restricted.

NE suggests that the alternative route to access the common via the public road and Parsonage Common is "neither a practical or reasonable alternative", however, this is the current access to the release land, and the application is having no impact on this other than the removal of having to cross a live railway line. WTCC have confirmed that they are able to ensure access to those legally entitled to it.

The Applicant's position remains that the replacement land is accessible to the public, is no less advantageous than the release land, is shorter in distance and also considerably safer.

Management of the replacement land

In respect of the future management of the exchange land, the environmental management plan which will be secured as part of the DCO application will ensure that the initial establishment of the replacement land is undertaken. Any future management of the land for access and recreation will fall to the WTCC pursuant to their powers under the Commons Regulation (West Tilbury) Provisional Order Confirmation Act 1893 (the 1893 Act). Indeed, the WTCC are charged under the 1893 Act with managing the common and it is not appropriate for this application to override that statutory obligation.

Open Spaces Society (OSS)

Contrary to their submission, the OSS were notified that the DCO application had been accepted by way of section 56 notice sent to the case officer's email address as provided to TPL in previous correspondence and the OSS consultation responses (being [REDACTED] on 2 July 2020).

The OSS have made a number of points in respect of the objection from Historic England which, other than the point below, the Applicant considers have already been fully addressed in our response dated 25 June 2021.

Heritage

TPL's heritage advisors have confirmed that although the 1770 map shows the whole of the area encompassing the commons as 'Marsh', this does not mean that it can automatically be seen as 'waste land of the manor' and

therefore likely to be common land under the 'time immemorial' terminology. Rather, it means that it was undrained and wet land which was probably subject to tidal influences.

Whilst it is accepted that the surveyors producing the 1805 map may have included some field boundaries and not others, it is very unlikely that they plotted field boundaries where none existed. Hence where the 1805 map shows field boundaries within the land parcels subsequently identified as common it is highly probable that such boundaries existed at the time of survey. If the land had remained as marsh, with no internal divisions (as per the 1777 map) then no field boundaries would have been indicated on the 1805 map. This is supported by the quotation from Hellyer & Oliver (2015) provided in the OSS response, which states 'the surveyors continued to record some field boundaries, and some of these found their way onto the published maps'.

Consequently it remains the case that the five commons are not shown as such on any maps of the area predating the 1840 West Tilbury Tithe Map.

Section 38 Consent

The Applicant's position in respect of obtaining consent under section 38 was set out in our representation of 25 June 2021. However, it should be noted that the borehole sampling undertaken in the area was not undertaken on common land as that would require a section 38 consent. Any archaeological finds that may be discovered during the construction of the development undertaken as part of the DCO will be dealt with pursuant to a written scheme of investigation which has already been agreed with Thurrock Council as the relevant statutory body through the DCO process.

Access

In respect of access to the replacement land, the OSS make the same points that NE make and which are addressed above. The only additional point is that the OSS suggest there should be a further agreement such as a section 106 agreement. The Applicant does not consider this to be necessary.

Management of the Common

In respect of the management of the replacement land, it is envisaged that it will be used in the same way that the release land is used. Whether or not grazing rights are exercised is a matter for the stint holders and the WTCC.

The suggestion that the register should be updated is not one to be considered as part of this application. We have set out below our further explanation in respect of the stints for completeness as these were submitted to the DCO process.

The common land registered parcel CL228 has been common land since at least 1892 when the 1893 Act was made to confirm a provisional order. The 1893 Act provided that there would be an adjustment of rights over the common and that a valuer would determine these. This happened in 1895 and compensation provisions were included for any person suffering loss as a result of the adjustment of rights.

The adjustment of rights resulted in 500 stints being created. The stints need to be purchased in order to be able to exercise the rights. The WTCC was created pursuant to the 1893 Act to manage the common. The WTCC continue to manage the common and administer the purchase of the stints on an annual basis. The sole purchaser of the stints are the Coles (who are the applicant for this application although TPL is progressing the application).

Notwithstanding the requirement to register all common land pursuant to the Commons Registration Act 1965 (the 1965 Act) it is the 1893 Act that governs the regulation of the common. This is evidenced by the fact that the 1893 Act has not been repealed and a note in the land section of the common land register states that "*the land comprised in this register unit is regulated by a provision order confirmed by the Commons Regulation (West Tilbury) Provisional Order confirmation*". Unfortunately the very bottom of the page has been omitted

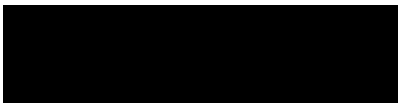
from the copies provided so the sentence stops part way through, but nonetheless it makes it clear that the common land in the register is governed by the 1893 Act.

Furthermore during the registration process pursuant to the 1965 Act the appointed commons commissioner rejected a claim for a right on the basis that no stint money had been paid (page 5 of his decision which is in the appendices to the Common Land Report which was submitted with the application). He also notes that the then secretary of the WTCC supported the registrations as determined by the commons commissioner because they accorded with the information available to the WTCC. This can only mean that the registration of the rights at this date reflected those who had purchased the rights of common *for that year*. It is not clear why the rights were noted on the register as being attached to land as this is clearly not the case when the stints are to be purchased annually.

Consequently, the only people needing to be served with notice of the application being made were the WTCC, via the clerk, as the body in charge of managing the common, the stint holder(s) and the land owner which was done. Due to the unusual nature of commons register entry in this case, the DCO statutory consultation process however took a risk-averse approach to consultation. All those people on the common land register including their successors in title and all new property owners where the land mentioned in the common land register has since been developed for housing were consulted in order to ensure that no defect in consultation was created. Nobody responded to this consultation stating that they believed that they had any right over the common land other than the landowner and sole stint holder.

We understand that this is the last point for representations to be made, however, if the Inspector requires any further information to assist their consideration of the application please contact Cathryn Tracey using the details above.

Yours faithfully

A black rectangular box redacting the signature of the sender.

BURGES SALMON LLP

Encl: Photographs of fly tipping.