Thames Tideway Tunnel
Thames Water Utilities Limited

Application for Development Consent

Application Reference Number: WWO10001

Examining Authority's Second Written Round of Questions and Requests for Information

Supporting Appendices

Common Land - Counsel's Opinion

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Thames Tideway Tunnel
Creating a cleaner, healthier River Thames

THAMES WATER UTILITIES LIMITED

A D V I C E

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1 PRELIMINARY

1.1 We are asked to advise Thames Water Utilities Limited in connection with the draft Thames Water Utilities Limited (Thames Tideway Tunnel) Development Consent Order. That order provides for the acquisition of subsoil lying beneath Putney Common. We are asked:

(a) whether such land should have been included in Part 5 of the Book of Reference as common land; and

(b) whether by virtue of the provisions of section 131 of the Planning Act 2008 it is necessary for the acquisition of such land to be subject to special parliamentary procedure.

1.2 For the reasons set out below, our answers to these questions are:

(a) no; and

(b) no.

2 INTRODUCTION

2.1 The Thames Tideway Tunnel is a new sewer which is being promoted by Thames Water Utilities Limited to address the problem of the lack of capacity

in the existing sewerage network. The tunnel will start at Acton Storm Tanks in the west of London and generally follow the route of the River Thames to Limehouse, where it will continue north-east to Abbey Mills Pumping Station near Stratford. There it will be connected to the Lee Tunnel, which will transfer the sewage to Beckton Sewage Treatment Works. The tunnel will be between 6.5 and 7.2 metres in diameter and 25.1 kilometres (15.6 miles) long. It will be bored at a considerable depth – typically it will be 66 metres beneath the surface of the ground. A short length of the tunnel passes under Putney Common at a depth of approximately 34m.

2.2 The tunnel is to be authorised by a development consent order made under the Planning Act 2008. An application for an order in the terms of a draft Thames Water Utilities Limited (Thames Tideway Tunnel) Development Consent Order was made on 28 February 2013 and is currently subject to examination by the examining authority. The Order is in the usual form: Part 1 addresses preliminary matters, Part 2 authorises construction and use of the tunnel, Part 3 authorises the acquisition and temporary possession of land and Part 4 contains miscellaneous and general provisions. We understand that the draft Order is currently being revised but that none of the proposed changes have any bearing on those articles relevant to the matters which we have been asked to consider (which we set out below).

2.3 Article 27 of the draft Order provides as follows:

> *"(1) The undertaker may acquire compulsorily so much of the Order land as is required for the authorised project or to facilitate it, or is incidental to it.*

(2) As from the date on which a compulsory acquisition notice under section 134(3) (notice of authorisation of compulsory acquisition) of the 2008 Act is served or the date on which the Order land, or any part of it, is vested in the undertaker, whichever is the later, all rights, trusts and incidents to which that land or that part of it which is vested (as the case may be) was previously subject shall be discharged or suspended, so far as their continuance would be inconsistent with the exercise of the powers under this Order.

(3) Any person who suffers loss by the extinguishment or suspension of any private right of way under this article shall be entitled to compensation to be determined, in case of dispute, under Part 1 of the 1961 Act.

(4) This article is subject to article 29 (acquisition of subsoil only), article 30 (acquisition of subsoil below 9 metres) and article 34 (temporary use of land for carrying out the authorised project)."

Article 29 of the draft Order provides as follows:

"(1) The undertaker may acquire compulsorily so much of, or such rights in, the subsoil of the land referred to in article 27(1) (compulsory acquisition of land) as may be required for any purpose for which that land may be acquired under that provision instead of acquiring the whole of the land.

(2) Where the undertaker acquires any part of, or rights in, the subsoil of land under paragraph (1), the undertaker shall not be required to acquire any interest in any other part of the land ..."

Article 30 of the draft Order provides as follows:

"(1) This article applies to the land specified in Schedule 13 (land of which only subsoil more than 9 metres beneath surface may be acquired).

(2) In the case of land to which this article applies, the undertaker may only acquire compulsorily under article 27 (compulsory acquisition of land) so much of, or such rights in, the subsoil of the land as may be required for the purposes of the authorised project.

(3) Where the undertaker acquires any part of, or rights in, the subsoil of the land to which this article applies, the

undertaker shall not be required to acquire a greater interest in the land or an interest in any other part of it.

(4) References in this article to the subsoil of land are references to the subsoil lying more than 9 metres beneath the level of the surface of the land; and for this purpose 'level of the surface of the land' means –

(a) in the case of any land on which a building is erected, the level of the surface of the ground adjoining the building;

(b) in the case of a watercourse or other water area, the level of the surface of the ground nearest to it which is at all times above water lever; or

(c) in any other case, ground surface level."

Article 34 of the draft Order provides as follows:

"(1) *The undertaker may, in connection with the carrying out of the authorised project –*

(a) Enter on and take temporary possession of –

(i) the land specified in columns (1) and (2) of Schedule 14 (land of which temporary possession may be taken) ..."

2.4 Section 131 of the Planning Act 2008 provides as follows:

"131 Commons, open spaces etc: compulsory acquisition of land

(1) This section applies to any land forming part of a common, open space or fuel or field garden allotment.

(2) This section does not apply in a case to which section 132 applies.

(3) An order granting development consent is subject to special parliamentary procedure, to the extent that the order authorises the compulsory acquisition of land to which this section applies, unless—

(a) the Secretary of State is satisfied that one of subsections (4) to (5) applies, and

(b) that fact, and the subsection concerned, are recorded in the order or otherwise in the instrument or other document containing the order.

(4) This subsection applies if—

(a) replacement land has been or will be given in exchange for the order land, and

(b) the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land.

(4A) This subsection applies if—

(a) the order land is, or forms part of, an open space,

(b) none of the order land is of any of the other descriptions in subsection (1),

(c) either—

(i) there is no suitable land available to be given in exchange for the order land, or

(ii) any suitable land available to be given in exchange is available only at prohibitive cost, and

(d) it is strongly in the public interest for the development for which the order grants consent to be capable of being begun sooner than is likely to be possible if the order were to be subject (to any extent) to special parliamentary procedure.

(4B) This subsection applies if—

(a) the order land is, or forms part of, an open space,

(b) none of the order land is of any of the other descriptions in subsection (1), and

(c) the order land is being acquired for a temporary (although possibly long-lived) purpose.

(5) This subsection applies if—

(a) the order land does not exceed 200 square metres in extent or is required for the widening or drainage of an existing highway or partly for the widening and partly for the drainage of such a highway, and

(b) the giving in exchange of other land is unnecessary, whether in the interests of the persons, if

any, entitled to rights of common or other rights or in the interests of the public.

...

(11) If an order granting development consent authorises the compulsory acquisition of land to which this section applies, it may include provision—

(a) for vesting replacement land given in exchange as mentioned in subsection (4)(a) in the prospective seller and subject to the rights, trusts and incidents mentioned in subsection (4)(b), and

(b) for discharging the order land from all rights, trusts and incidents to which it is subject.

(12) In this section—

"common", "fuel or field garden allotment" and "open space" have the same meanings as in section 19 of the Acquisition of Land Act 1981 (c. 67);

"the order land" means the land authorised to be compulsorily acquired;

"the prospective seller" means the person or persons in whom the order land is vested;

"replacement land" means land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public.

2.5 Although it is only section 19 (4) of the Acquisition of Land Act 1981 which is referred to by section 131 of the 2008 Act, it will be convenient to set out section 19 in its entirety. It provides as follows:

"19.— Commons, open spaces etc.
(1) In so far as a compulsory purchase order authorises the purchase of any land forming part of a common, open space or fuel or field garden allotment, the order shall be subject to special parliamentary procedure unless the Secretary of State is satisfied—

(a) that there has been or will be given in exchange for such land, other land, not being less in area and being equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, and that the land given in exchange has been or will be vested in the persons in whom the land purchased was vested, and subject to the

like rights, trusts and incidents as attach to the land purchased, or

(aa) that the land is being purchased in order to secure its preservation or improve its management.

(b) that the land does not exceed 250 square yards in extent or is required for the widening or drainage of an existing highway or partly for the widening and partly for the drainage of such a highway and that the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public,

and certifies accordingly.

(2) Where it is proposed to give a certificate under this section, the Secretary of State shall direct the acquiring authority to give public notice of his intention so to do, and—
(a) after affording opportunity to all persons interested to make representations and objections in relation thereto, and
(b) after causing a public local inquiry to be held in any case where it appears to him to be expedient so to do, having regard to any representations or objections made,
the Secretary of State may, after considering any representations and objections made and, if an inquiry has been held, the report of the person who held the inquiry, give the certificate.

(2A) Notice under subsection (2) above shall be given in such form and manner as the Secretary of State may direct.

(3) A compulsory purchase order may provide for—
(a) vesting land given in exchange as mentioned in Subsection (1) above in the persons, and subject to the rights, trusts and incidents, therein mentioned, and
(b) discharging the land purchased from all rights, trusts and incidents to which it was previously subject [...] [4]

except where the Secretary of State has given a certificate under subsection (1)(aa) above.

(4) In this section—
"common" includes any land subject to be enclosed under the Inclosure Acts 1845 to 1882, and any town or village green,
"fuel or field garden allotment" means any allotment set out as a fuel allotment, or a field garden allotment, under an Inclosure Act,

"open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground.

2.6 Regulation 5 (2) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (SI 2009 No 2264) ('The Regulations') provides as follows:

"(2) The application must be accompanied by—

...

(d)where applicable, the book of reference;

...

(i) A land plan identifying-

...

(iv) where the land includes special category land and replacement land, that special category and replacement land ...

..."

2.7 Regulation 7 provides as follows:

"(1) In these Regulations "book of reference" means a book, in five Parts, together with any relevant plan, and which—

(a) in Part 1 contains the names and addresses for service of each person within Categories 1 and 2 as set out in section 57 (categories for purposes of section 56(2)(d)) in respect of any land which it is proposed shall be subject to–
(i) powers of compulsory acquisition;
(ii) rights to use land, including the right to attach brackets or other equipment to buildings; or
(iii) rights to carry out protective works to buildings;
(b) in Part 2 contains the names and addresses for service of each person within Category 3 as set out in section 57;
(c) in Part 3 contains the names of all those entitled to enjoy easements or other private rights over land (including private rights of navigation over water) which it is proposed shall be extinguished, suspended or interfered with;
(d) in Part 4 specifies the owner of any Crown interest in the land which is proposed to be used for the purposes of the order for which application is being made;

(e) in Part 5 specifies land—
(i) the acquisition of which is subject to special parliamentary procedure;
(ii) which is ***special category land****;*
(iii) which is replacement land;
and, for each plot of such land within which it is intended that all or part of the proposed development and works shall be carried out, the area in square metres of that plot.

(2) In this regulation—
"land"includes any interest in or right over land ..."

(emphasis supplied).

2.8 By virtue of regulation 2, "special category land" means

> "*the land identified as forming part of a common, open space, National Trust land or fuel or field garden allotment and on the plan entitled "Special Category Land Plan" and forming part of the land plan;"*

3 THE PARTICULAR FACTS OF THE PRESENT CASE

3.1 There are eight plots of land about which we are asked to advise. They are identified in the Book of Reference as being owned and occupied by the Wimbledon and Putney Commons Conservators ("the Conservators"); the Conservators are the registered owners of these plots. As regards 5 of the plots, it is proposed that the matter proceed by way of Thames Water being given a power to enter on and take temporary possession of land under article 34 of the draft order. This minor intervention does not involve the compulsory acquisition of land and so neither section 31 of the 2008 Act nor regulation 5 of the 2009 regulations applies to these cases. Accordingly it seems to us that we do not need to be concerned further with these plots. The remaining plots are 75, 77 and 78, all of which involve the acquisition of subsoil. Plot 75 is described in Part 1 of the Book of Reference as 2 square metres below public

footway and shrubbery (Beverley Brook Walk); Plot 77 as 8 square metres below public footway and shrubbery (Beverley Brook Walk); and Plot 78 as 31 square metres below public footway and shrubbery (Beverley Brook Walk). The areas are calculated by taking the greatest width of the land required for tunnel as supplying the multiplier for width. Although it is the case that these plots were not included in Part 5 of the Book of Reference, nevertheless they were enumerated in Part 1 of that document, which has been publicly deposited in accordance with the Regulations. The question we are asked about in connection with the Book of Reference solely concerns the Part within which the plots should have been entered.

4 GENERAL BACKGROUND OF THE LAW OF COMMONS

4.1 The history of common land goes back to before the Norman Conquest. However, contrary to popular belief, common land is not, at common law, land that is subject to public rights. Instead the word “common” indicates that a particular piece of land is subject to rights of common. These are rights which may be different both in kind and in extent but will be exercisable over the same piece of land. A typical common is land which is or was owned by the Lord of the Manor and is subject to rights of grazing for cattle, sheep and poultry.

4.2 At the end of the eighteenth and beginning of the nineteenth century, common land was subject to pressure for inclosure. Although in legal theory, common land did not represent a public resource, the practice did not match the legal reality; in particular common land was used for recreation. At an early stage, Parliament sought to ensure that when land was enclosed, provision for alternative recreational land was made. Later in the nineteenth century, public

opinion became concerned that it might not be appropriate to enclose common land at all, and Parliament reflected that concern by passing legislation that protected commons. This could be general in its application, such as the Commons Act 1876 or specific, such as the Wimbledon and Putney Commons Act 1871[1]. The Metropolitan Commons Act 1866 sought to protect commons in the area of Greater London.

4.3 The first provision protecting commons from compulsory purchase was section 22 of the Commons Act 1899. This did not inhibit the making of a compulsory purchase order itself but prevented land from being inclosed by virtue of the development that such an order authorised or facilitated, subject either to specific parliamentary authorisation or the consent of the Board of Agriculture. Section 22 required the Board of Agriculture to undertake an exercise weighing benefit against need before it gave its consent.

4.4 The modern law in relation to the compulsory purchase of commons[2] is derived from the provision made in paragraph 11 of Part III of Schedule 1 to the Acquisition of Land (Authorisation Procedure) Act 1946[3]. This was in very similar terms to the law now set out in section 19 of the Acquisition of Land Act 1981. Its effect is summarised in Clayden *Our Common Land: the Law*

[1] The 1871 Act was passed following the compromise of litigation involving the application of the Metropolitan Common Act.

[2] Note that the complicated provisions as regards the procedure for acquiring any rights that exist over a common are of longer standing.

[3] In the time available, we have not been able to carry out any extensive research into the background to specific protection for common land at this time. However, we doubt if this would materially advance matters. The provision was made to protect open spaces and commons and was evidently concerned with them as surface level resources. The more particular circumstances for this protection to be afforded to commons would be interesting but not of greater relevance.

and History of Common Land and Village Greens (6th edition: 2007) as follows:

> "*Section 19 of the Acquisition of Land Act 1981 provides that if common land is subject to a compulsory purchase order by a public authority, the authority must give to the common, in exchange, land which is not less in area and "equally advantageous" to commoners and public, or submit the order to Parliament under special parliamentary procedure."*

It should be noted that the 1946 Act and its successor extended the same protection to open space as it did to commons.

5. DISCUSSION

5.1 It seems to us that there is a particular reason, relating to the interpretation of the Wimbledon and Putney Commons Act 1871, that arises in the present case as to why it may be the case that the subsoil to be acquired should not have been included in Part 5 of the Book of Reference nor be the subject of special parliamentary procedure. However before we consider that particular reason, we think that it will be helpful to consider the matter more generally, namely on the basis that the acquisition of subsoil lying beneath Putney Common is no different from the acquisition of subsoil lying beneath a common which is not subject to its own statutory regime.

5.2 It seems to us that the way article 27 of the draft order works is that it potentially authorises the acquisition of all the interests in any of the plots identified in the book of reference. This would, on ordinary principles, include rights in the subsoil. However if land is being acquired for a bored tunnel at considerable depth, acquiring land at the surface could not be justified. It is in this context that one reads articles 29 and 30. It seems to us that article 29 (1)

recognises that in certain circumstances it will not be necessary to acquire more than the subsoil; and article 29 (2) provides that the undertaker shall not be required to do so. Article 30 goes further: in respect of identified plots where the tunnel is at a depth of more than 9 metres, this power of acquisition is specifically limited to acquisition of part of the subsoil. Plots 75, 77 and 78 are identified in Schedule 13 to the draft Order as being subject to article 30. Thus the first question that we are asked, namely whether the subsoil being acquired should have been included in Part 5 of the Book of Reference, resolves itself into the question of whether the acquisition of the subsoil involves the acquisition of special category land within the meaning of article 5 of the 2009 regulations, i.e whether it is land forming part of a common. It seems to us that the second question that we are asked, namely whether it is necessary for the acquisition of such land to be subject to special parliamentary procedure resolves itself in the same way. The difference is that section 131 (12) takes one back to a definition of common land in the 1981 Act whereas the 2009 Regulations do not contain a definition of common land. However we do not think that it is plausible to suggest that the draftsman of the 2009 Regulations thought that they would apply to different land from that which to which the 2008 Act applied (the 2009 Regulations are, of course, made under the 2008 Act).

5.3 We should begin by noting the Latin brocard *cuius est solum, eius est usque ad coelum et ad infernos* (the owner of the surface of the land owns everything up to the sky and down to (the centre of) the earth). This was recently generally endorsed by the Supreme Court in *Bocardo SA v Star Energy UK*

Onshore Limited[4] in the context of subterranean works[5]. Thus, on the face of it, the Conservators are the owners of the subsoil that is to be acquired.

5.4 It seems to us, however, that the brocard does not provide the answer to the questions that we are asked. To say that the owner of the surface of the land in question is the owner also of subsoil beneath the surface does not provide the answer to the question as to whether that subsoil is special category land and, more particularly, is common. It seems to us that there are two possible interpretations of what "common" means in the context of the 2009 Regulations and section 131 of the 2008 Act. The first is that means all the entirety of the spatial interests in a particular piece of land which is appropriately described as being, at its surface, a common. The second is that it means only the surface interests in such land.

5.5 It seems to us that using language in its natural and ordinary meaning it is not natural to refer to the subsoil with which we are concerned as being common, or even forming part of a common. It seems to us a more natural use of language to speak of it being subsoil lying beneath a common. The point, of course, is that what makes land a common are the characteristics which it has on the surface, and legal rights which may be exercised in respect of its surface[6]. The same point can be made in respect of the other categories of special category land identified in section 131, namely open space and fuel or

[4] [2011] 1 AC 380.

[5] The deepest of these was 2,800 feet below the surface of the ground.

[6] Rights of common may include a right of turbary, namely a right to cut peat (from the surface of the land).

field garden allotment. It involves a particularly odd use of language to refer to subsoil as open space rather than as land lying beneath open space[7].

5.6 It is also necessary to consider in this context the provisions of section 131 providing for the provision of replacement land. The position is that it is not necessary for the acquisition of land to be subject to special parliamentary procedure if it is possible for suitable replacement land to be provided. The first matter to note is that section 131 (12) in defining replacement land envisages that the loss of the land to the public and, in the case of common land, persons entitled to rights of common (if there are such), will be disadvantageous – hence the definition of replacement land as land which is no less advantageous than the land taken. No disadvantage enures either to the public or any commoners from the acquisition of subsoil beneath a common. Moreover if the acquiring authority were to seek to provide replacement land, the provision of replacement subsoil would be an empty form, of no benefit to the public or any commoners.

5.7 We also think that the argument that common means the surface interest in a common derives support from *Housden v Wimbledon and Putney Commons Conservators*[8]. In that case, the Court of Appeal interpreted "commons" in section 35 of the Wimbledon and Putney Commons Act 1871 as meaning the physical area of open space rather than the land itself or the rights and interests in the land. (Note that the Court was interpreting the meaning of the word commons rather than common simply because the Act applied to two

[7] We understand that neither DCLG nor the Examining Authority have queried the non-application of section 131 to the acquisition of subsoil lying beneath open space.

[8] [2008] 1 WLR 1172 (CA).

commons rather than one (ie Wimbledon Common and Putney Common)). This is consistent more generally with the second meaning of common which we identify in paragraph 5.4 above.

5.8 Against this background, we prefer the second meaning of common which we advance above. We consider that, seen in context, common within the meaning of sections 131 of the Planning Act 2008 and section 19 of the Acquisition of Land Act 1981 does not include subsoil. To conclude that it did would not seem to us to be sensible conclusion because it involves holding that Parliament envisaged that it might be sensible to provide replacement subsoil in circumstances such as these. Since we do not think that there is any reason which compels us to reach a conclusion that is not sensible, we prefer an interpretation of the relevant sections which is consistent with the natural use of language and is sensible.

5.9 We turn next to consider the specific provisions of the Wimbledon and Putney Commons Act 1871.

6. THE WIMBLEDON AND PUTNEY COMMONS ACT 1871

6.1 Wimbledon and Putney Commons are regulated by legislation which is unique to those commons. As we understand it, the position is that the Act was passed following litigation in which the issue was whether the Lord of the Manor, Earl Spencer, had the power to develop the commons for housing. The Act vested the Commons (as defined in the Act) in Conservators who were then subject to the duty to protect them from enclosure and development.

6.2 The preamble to Act recited:

> *"WHEREAS there are in the county of Surrey open spaces of large extent, unenclosed and unbuilt on, known as Wimbledon Common, (in which Wimbledon Green and Putney heath are commonly and in this Act included,) and Putney Lower Common, (in this Act jointly referred to as the commons):*
>
> *And whereas it would be of great local public advantage if the commons were always kept unenclosed and unbuilt on, their natural aspect and state being, as far as may be, preserved;*
>
> *And whereas a small part of Wimbledon Common is situate within and is or is alleged to be part of the wastes of the Manor of Battersea and Wandsworth, and the residue thereof and Putney lower Common are situate within and are or are alleged to be parts of the wastes of the Manor of Wimbledon;*
>
> *And, whereas the Right Honourable John Poyntz Earl Spencer (in this Act referred to as Earl Spencer) is or claims to be entitled in fee simple in possession to those manors;*
>
> *And whereas it is expedient that provision be made for the transfer from Earl Spencer of his estate and interest in the commons, to a body of Conservators to be constituted so as to represent both public and local interests, whose duty it shall be to keep the commons for ever open and unenclosed and unbuilt on, and to protect the turf, gorse, timber, and underwood thereon; and to preserve the same for public and local use, for purposes of exercise and recreation, and other purposes;*
>
> *And whereas plans have been prepared for the purposes of this Act, showing (among other things) the respective areas of the commons, and the same are signed in duplicate by the Right Honourable Lord Redesdale, the Chairman of Committees of the House of Lords;*
>
> *And whereas it is expedient that the body of Conservators to be constituted as aforesaid be empowered to raise a competent revenue principally by means of rates to be levied upon such property as will be primarily benefited by the operation of this Act;*
>
> *And whereas a series of road maps has been prepared for the purposes of this Act, distinguishing the roads and footpaths on and leading to Wimbledon Common, and the distances from Wimbledon Common of one quarter of a mile,*

one half of a mile, and three quarters of a mile, measured along the roads and footpaths leading thereto, and the said road maps have been authenticated in duplicate as aforesaid;

And whereas it is expedient that provision be made for payment to Earl Spencer, his heirs and assigns, in consideration of such transfer as aforesaid, of a perpetual annuity of one thousand two hundred pounds, to be raised by a rate to be levied from time to time on the tenants or occupiers for the time being of dwelling houses of the clear annual value (with or without lands adjacent thereto) of thirty-five pounds and upwards, situate in the parish of Putney or within three quarters of a mile from Wimbledon Common, measured as aforesaid;

And whereas it is expedient that various powers and duties be conferred and imposed on the Conservators to be constituted as, aforesaid:

And whereas Earl Spencer has consented to the provisions of this Act, so far as the same affect his rights and interests."

Section 4 of the Act provides as follows:

"For, the purposes of this Act, the commons shall be taken to be the open spaces known as Wimbledon Common with Wimbledon Green and Putney heath included and Putney Lower Common, as the same respectively are particularly described in this Act."

Section 8 provides as follows:

"There shall be a body of Conservators for carrying this Act into execution, the full number of whom shall be eight, and who are hereby incorporated by the name of the Wimbledon and Putney Commons Conservators, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to take and hold, and to dispose of (by grant, demise, or otherwise) land and other property (which body corporate is in this Act referred to as the Conservators)."

Section 32 provides as follows:

"the commons, with the buildings and inclosures comprised within the ambit thereof, as respectively shown on the

deposited plans, being thereon coloured green, and as respectively described in the third schedule to this Act, with their respective rights, members, and appurtenances, are by this Act and as on and from the passing thereof vested in the Conservators for all the estate and interest therein which immediately before the passing of this Act were vested in or belonged to Earl Spencer."

Section 34 provides as follows:

"The Conservators shall at all times keep the commons open, unenclosed, and unbuilt on, except as regards such parts thereof as are at the passing of this act inclosed or built on, and except as otherwise in this Act expressed, and shall by all lawful means prevent, resist and abate all encroachments and attempted encroachments on the commons, and protect the commons and preserve them as open spaces, and resist all proceedings tending to the inclosure, or appropriation for any purpose of any part thereof."

Section 35 provides as follows:

"It shall not be lawful for the Conservators, except as in this Act expressed, to sell, lease, grant, or in any manner dispose of any part of the commons."

Section 36 provides as follows:

"the Conservators shall at all times preserve, as far as may be, the natural aspect and state of the commons, and to that end shall protect the turf, gorse, heather, timber, and other trees, shrubs, and brushwood thereon."

Section 37 provides as follows:

"the conservators shall not cut turf, or dig gravel mould, or soil, or fell or cut Gorse, heather, timber, or other trees, shrubs, or brushwood on the common for profit, except subject, and according to such restrictions and regulations as the First Commissioner of Works from time to time prescribes, and all money received in respect thereof shall be carried to the Conservancy Fund under this Act."

Section 54 provided as follows:

> *"As long as the four volunteer corps occupy and use as aforesaid the ranges, they shall as far as possible preserve the surface of the common, and protect the turf, gorse, heather, timber, and other trees, shrubs, and brushwood thereon, and they shall not at any time remove or destroy or dig up, or suffer to be removed or destroyed or dug up, any turf, gorse, timber, or other tree, shrub, or brushwood, gravel, or other substance thereon, except in case of fire or other great emergency, or (as regards gravel or other substance) of material being required for repair of butts or other conveniences for rifle shooting, or in such other case (if any) as may be from time to time agreed on between them and the Conservators, or determined by arbitration; and as regards the digging up, of gravel and other substances, the corps respectively shall only dig up the same or suffer the same to be dug up at places from time to time agreed on or determined as aforesaid, and the corps respectively shall in all cases within this section act subject and according to such restrictions and rules as may from time to time be agreed on or determined as aforesaid."*

Section 68 provided as follows:

> *"The Conservators may from time to time purchase by agreement or accept a grant of and hold any land having been or reputed to have been formerly part of or adjoining to Wimbledon Common or Putney Lower Common, and any such land when vested in the Conservators shall be for the Purposes of this Act deemed part of the commons."*

6.3 By virtue of section 72 Earl Spencer was to receive a perpetual annuity of £1,200. This was evidently compensation in respect of the vesting under section 32 of his interest in the commons in the Conservators[9].

Section 103 provided as follows:

> *"Notwithstanding anything in this Act, the commons shall continue to be deemed metropolitan commons, within The Metropolitan Commons Act, 1866, and accordingly any provisions supplemental to this Act for the better*

[9] We understand that the annuity has now been redeemed under the terms of section 79 of the Act.

> *preservation and management of the commons may from time to time be made by a scheme under The Metropolitan Commons Act, 1866, on a memorial in that behalf presented to the Inclosure Commissioners for England and Wales by the Conservators, but not otherwise."*

Section 109 provides as follows:

> *"Nothing in this Act or in any byelaw of the Conservators shall take away abridge, or prejudicially affect any estate or right of Earl Spencer in or over any of the waste lands of the Manor of Battersea and Wandsworth or of the Manor of Wimbledon, except the commons."*

6.4 As referred to at paragraph 5.7 above, the meaning of the Act was the subject of consideration by the Court of Appeal in *Housden v Conservators of Wimbledon and Putney Commons.* The issue in those proceedings was the power of the Conservators to grant an easement under section 8 of the Act; the Conservators considered that this was prohibited by the terms of section 35 of the Act. The Court of Appeal considered that this was too narrow approach. Mummery LJ said:

> *The environmental purpose can be protected and promoted without adopting a narrow, literal interpretation of the 1871 Act. The legislative text should be read sensibly in context. In this way full effect can be given, so far as a fair and reasonable reading of the statutory language allows, to the stated purpose and the scheme devised to attain it*[10]*.*

Mummery LJ held that the Conservators did have such a power. His reasoning was two-fold as follows:

> "*23 First, looking at the aim of the 1871 Act broadly, the grant would not be incompatible with the conservators' overriding duty to conserve the commons as an unenclosed,*

[10] See paragraph 20 of his judgment.

unbuilt on, open space. The access way would not cease to be an open space if the claimants were granted an easement over it. The grant of an easement would not entitle them to enclose or build on the access way. The easement would not interfere with the ability of members of the public to continue to enjoy the part of the commons across which the access way runs.

24 Secondly, looking at the detail of the matter, the wording of section 35 is, in my judgment, reasonably open to an interpretation enabling the conservators to grant easements in circumstances consistent with the conservation of the commons in their existing state as an open space."

6.5 Section 4 identified the commons as "the **open spaces** known as Wimbledon Common with Wimbledon Green and Putney Heath included and Putney Lower Common" as shown on a map. Section 32 vested "the commons" with their "rights, members and appurtenances" in the Conservators. Although section 32 describes the extent of the vesting by parity with the "estate and interest" of Earl Spencer immediately before enactment, that provision must be construed by reference to the general scheme of the Act including the status of the land as metropolitan common[11]. Moreover, the Conservators, as their name makes clear, were charged with conserving the Commons: sections 34, 36 and 37 spell out the scope of their powers. In particular and for obvious reasons, they are not given a general right to exploit any part of the Commons nor, specifically, any mineral deposits which might lie under them. Their powers of digging and cutting are closely circumscribed by section 37 and by section 36 they are to preserve the natural aspect and state

[11] Note that although the Metropolitan Commons Acts did not provide for public access, it was envisaged that such access would be secured by virtue of schemes made under the Acts. In due course public access for air and exercise was secured by virtue of section 193 of the Law of Property Act 1925.

of the commons (without which it is impossible to envisage mineral exploitation, certainly at the date of enactment). As has been seen, Mummery LJ, translating this scheme into twenty first century language in *Housden*, spoke of the "environmental purpose." He and Carnwath LJ construed and applied the provisions of this "obscure 19th century statute[12]" by regarding "the Commons" as referring "*not so much to the land itself or to the rights and interests in the land, as to the physical area of open space, which is to remain unenclosed and unbuilt upon"* (Mummery LJ at paragraph 26) and "*a physical concept, not a legal right"* (Carnwath LJ at paragraph 74). This purposive approach taken by the Court of Appeal assists in deciding how to view the extent of the "land" or "interest in or right over land" in the specific case of this statutory common.

6.6 It seems to us that the effect of the 1871 Act was to declare (vest) the surface of the land to be Commons and to vest them in the Conservators for the statutory "environmental" purpose. The extent of the Commons and the scope of the Conservators' powers of dealing have always to be construed in the context of those purposes, a principle which the Court of Appeal enunciated and then applied in relation to the apparent inconsistency between sections 8 and 35 of the Act. It seems to us very hard to argue that "the commons" should mean one thing in section 35 of the Act and another in section 32, Inclusion of the subsoil within the statutory purpose was unnecessary and certainly not achieved in express, particular terms. The seemingly general words of section 32 have to be considered in the light of the definition in section 4, the particular provisions relating to digging in succeeding sections

[12] Carnwath LJ para. 73

and, overridingly, in the context of the "environmental purpose." Use of the subsoil was neither required nor calculated to facilitate the statutory "environmental purpose".

6.7 In our judgment it flows from this analysis that the subsoil lying beneath the common cannot sensibly be regarded as being common within the meaning of section 131 of the 2008 Act. Section 131 must be applied in the context of the 1871 Act which establishes the statutory framework for this particular common. It would be absurd to conclude that "common" had different meanings under the two Acts. This conclusion is of course also consistent with the more general conclusion that we have reached at paragraph 5.8 above. This is the particular reason which we refer to at paragraph 5.1 above why we consider that the answer to the two questions which we are asked is as at paragraph 1.2 above.

6.8 We should add that it might appear from the terms of the Act that the Conservators are not the owners of the subsoil because it was never conveyed to them and that, in fact, the owner might be a successor in title to Lord Spencer. However, as noted above, the Conservators are the registered owners of land and on the usual principles that ownership extends to the subsoil[13]. We have no reason to call any part of the Conservators' ownership into question and of course Thames Water Utilities Limited have acted on the basis that the Conservators are the owners. What matters, for the purposes of both sets of legislation, is the nature and extent of the common rather than the separate matter of ownership.

[13] See paragraph 5.3 above.

7. THE EFFECT OF SECTION 131 (5) OF SECTION 131 OF THE 2008 ACT

7.1 Even if the acquisition of land beneath a common were considered to involve the acquisition of a common (which we do not consider to be the case), the question would still arise as to whether section 131 (5) would operate to exempt the land from the need for special parliamentary procedure. The position is, of course, that no more than 41 square metres of subsoil beneath the Putney Common are being acquired under the order and no other subsoil beneath a common or at surface level is being acquired. We think that the correct basis for approaching section 131 (5) is to view each piece of special category land separately, by which we mean each **area** of common etc (i.e the matter is not determined by the identification of separate plots in the Book of Reference). If all special category land were aggregated, it would make it difficult if not impossible sensibly to consider the provision of replacement land, even discounting issues about how to provide replacement land which is subsoil. The position in this regard is perhaps clearer in section 19 of the 1981 Act, and we do not think that it is plausible that Parliament could have intended that there should be any difference between the 2008 and 1981 Acts in regard to the 200 square metre exception[14]. Finally, we should note that if it were appropriate to aggregate different categories of special category land, then it might seem that it would be appropriate to leave out of account in such

[14] Nothing in the *Notes on Clauses* would suggest that there is intended to be a difference. Arguably each individual piece of common should be disaggregated (as opposed to the total area of the common being acquired), but one can see that there might be a contrary argument that it would inappropriate that, in respect of a particular common, the requirement to provide replacement land (or for the matter to proceed by way of special parliamentary procedure) could be avoided in circumstances where the total area of the pieces of common being acquired exceeded 200 square metres.

aggregation special category land in respect of which the Secretary of State was satisfied that section 131 did not apply by reference to section 131 (4A).

7.2 We consider that because in the circumstances of the case no more than 41 square metres of common land are being acquired under the draft Order, section 131 (5) would apply and that the Secretary of State should be so satisfied. However hitherto, of course, the view has been taken that what is involved to not bring section 131 into play and, as explained above, we agree with this view.

SUMMARY

In our view it was not necessary for subsoil lying beneath Putney Common which is subject to compulsory acquisition under the development consent order to be included in Part 5 of the Book of Reference as common land; nor for the acquisition of such land to be subject to special parliamentary procedure. This is because we consider that, seen in context, common within the meaning of section 131 of the Planning Act 2008 does not include subsoil. We think that the acquisition of subsoil in these circumstances is more naturally viewed as the acquisition of land lying beneath a common and that the word common should be taken as applying to the relevant surface interest; and we do not consider an alternative interpretation, involving a requirement to provide equivalent subsoil to be sensible. Further, we consider that this construction derives support from *Housden v Wimbledon and Putney Commons Conservators.* More particularly, it seems to us that commons as defined in the Wimbledon and Putney Commons Act 1871 and as interpreted in ***Housden*** has reference to the surface interest of the common only. Finally, if the acquisition of land beneath a common were considered to involve the acquisition of a common (which we do not consider to be the case), we consider that section 131 (5) would operate to exempt the land from the need for special parliamentary procedure. This is on the basis that only 41 square metres of subsoil are being acquired (i.e. less than 200 square metres).

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