



## Application Decision

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by Vicki Hirst BA(Hons) PG Dip TP MA MRTPI

an Inspector appointed by the Welsh Ministers

Date: 27/10/2023

Reference: CAS-02347-D5R3K9

Site address: Clyne Common, Fairwood and Clyne, Swansea

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- The application dated 16 November 2022 is made under section 38 of the Commons Act 2006 (the 2006 Act) for consent to carry out restricted works on common land.
  - The application relates to Clyne Common (CL 15) and the Commons Registration Authority is The Council of the City and County of Swansea.
  - The application is made by The Council of the City and County of Swansea (the Council).
  - The proposed work is a shared path for use by equestrians, pedestrians and cyclists, a low-level wall and information board.
  - A site visit was made on 3 May 2023.
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### Decision

1. The application is refused.

### Procedural Matters

2. The Open Spaces Society (the OSS) has queried the need for consent for the section of path crossing Murton Green as it is subject to a Scheme of Regulation and Management of common land under the Commons Act 1899. This allows the Council to carry out certain works on the common without consent.
3. The Council has responded that it has made the application as the Scheme of Regulation may not cover all elements included in the project and, as the works will likely affect the commoners' rights, consent would be required.
4. It is not for me to determine whether the proposed works require consent under an application made under Section 38 of the 2006 Act. As such, and given the Council's position that consent is required, I have proceeded to determine the application.
5. Queries have also been raised as to the need for other consents under the Order of Limitation for the common and which, it is suggested, should be considered in tandem/prior to this application under Section 38. However, any such required consents are not before me. My determination under Section 38 does not negate the need to obtain any other consents and does not affect my determination with regard to the tests set out in the 2006 Act. It is for the applicant to satisfy themselves on such matters and not to undertake works without all appropriate permissions in place.

## **The Application**

6. The application seeks consent to provide a shared use path (SUP) between the settlements of Mayals, Bishopston and Murton on the southern side of the B4436. The works would include the re-alignment of a stretch of open ditch with reprofiling of the ground to achieve the required ground levels.
7. The path would be 3 metres wide with up to 1.5 metre verges on either side. It would be constructed of granular material topped with a porous recycled rubber crumb resin bound surface. The existing stock proof fence between Campion Gardens and Mayals Road would be set back by approximately 7 metres from the southern edge of the SUP to provide a safety strip for animals. The path would be available for use by pedestrians, cyclists and equestrians.
8. In response to the publication of the application letters of support and objection were received. At the consultation stage, a large petition of support was submitted.

## **Main Issues**

9. In determining this application for consent, I am required by Section 39 of the 2006 Act to have regard to:
  - a) The interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising their rights of common over it);
  - b) The interests of the neighbourhood;
  - c) The public interest (including nature conservation, the conservation of the landscape, the protection of public rights of access and the protection of archaeological remains and features of historic interest); and
  - d) Any other matter considered to be relevant.

## **Reasons**

### ***The interests of persons having rights in relation to the land***

10. Clyne Common extends to some 1858 acres. There are some 59 commoners with rights to use the overall common, in the main for grazing and estovers. Other individuals have rights to cut turf and other vegetation, to fish and one for driving. The applicant advises that no record is kept of those exercising their rights. Nonetheless, I noted on my site visit that there was evidence of cattle, horse and sheep grazing on the wider common and the representation from the Gower Commoners Association (the Commoners Association) confirms the rights are being exercised.
11. I noted on my site visit that an existing fence already effectively removes a strip of common from use for grazing adjacent to a large section of the B4436. Notwithstanding some dispute as to whether this fence has consent, and noting the Council's comment that the proposal has been designed to not result in a loss of grazing, in my assessment the proposal would result in the loss of a wider section of the common being available to those exercising their rights given the width of the path and associated works. Fencing would be set back to provide a refuge for animals straying onto the road and would remove the ability of this land to be used for those exercising their rights. The proposal would also result in the loss of a further area of common at Murton Green through the provision of the SUP to the eastern side of Murton Green Road.
12. An objection to the loss of common has been received from the Commoners Association which represents the commoners' interests. Whilst I acknowledge that the loss of

common is relatively small in the context of the overall area of common, I nonetheless concur with its concerns at the loss of common for those exercising their rights for grazing.

13. The Commoners Association also raises concern that the proposed SUP would remove the existing safety margin between the road and the common that provides a refuge for animals that escape onto the road.
14. Whilst I note the plans indicate that a 7 metre gap is proposed between the southern edge of a large length of the SUP with a new stock proof fence at the 7 metre extremity, stretches of the route would contain either a 300mm deep swale or gabions in this gap to facilitate drainage and to achieve the required levels. The gabions would also be fronted by a timber post and rail fence next to the SUP which would preclude access for animals at these points. Those areas not affected by gabions and swales, would be planted with shrubs and trees, although the Council has commented that it would be willing to abandon such planting to enable more free access for livestock.
15. It is my view that the proposals would adversely affect the ability of animals to safely escape from the road and the new SUP. In particular the swale and gabions would inevitably interfere with their quick escape when they find themselves trapped on the road and SUP. Given the difficulties of escape back towards the open common, animals are more likely to escape back onto the road, particularly when they encounter users of the SUP so close to the road. I do not find the Council's suggestion to provide escape gaps below the timber fence to be satisfactory to address this risk as animals are more likely to run back to the highway rather than climb under the fence. I find the proposal would result in a risk to livestock which would affect the commoners' rights to use the common for grazing.
16. I also note the proposals do not include additional safety margins in locations where they do not already exist, particularly at the western end of the proposed path and on the stretch leading into Murton. I note the Council's contention that this is no different to the existing situation and would require the removal of a substantial amount of vegetation with an associated loss of habitat and ecology. I concur with that likelihood, however some further provision for refuges and safety margins in this location would remove the potential for further conflicts between animals, vehicles and those using the proposed SUP.
17. The public also have rights to use the common for air and exercise. I am satisfied that the proposal would benefit those with such rights given that it is intended to facilitate access for different users and provide a safe route across the common between settlements.
18. The Welsh Government's Common Land Consents Guidance (the Guidance) states that in deciding whether to grant consent to carry out works, it should be established whether the works are consistent with the future use of the land as common land. In this regard, whilst the proposal would still allow public access with additional benefits, it would not be consistent with the use of the common by graziers for the reasons given above.
19. I find the loss of common land and risks to livestock would result in an interference with the rights of commoners to use the common for grazing their animals. I have no reason to believe that the SUP could not be redesigned to enable safer use of the common for grazing.

### ***The interests of the neighbourhood***

20. There is no definition of neighbourhood in the 2006 Act. The Welsh Government's Common Land Consents Guidance, August 2014, (the Guidance) requires consideration to be given to whether the works mean that local people will be prevented from using the common in the way that they are used to. It also requires consideration to be given to

whether the works would interfere with the future use and enjoyment of the land as a whole.

21. As set out above the works would provide benefits for the use of the common for recreation. Whilst of a different nature to use of the unsurfaced wider common, access to the overall common would remain and I am satisfied that the works would have a very limited effect on the way that people are used to using the common. I do not find the proposal would interfere with the future use and enjoyment of the land as a whole.
22. I conclude that the proposal would not unacceptably affect the interests of the neighbourhood.

### ***The public interest***

#### **Nature Conservation**

23. Section 7 of the Environment (Wales) Act 2016 (the Environment Act) requires the Welsh Ministers to prepare and publish a list of the living organisms and types of habitats which, in their opinion, are of principal importance for the purpose of maintaining and enhancing biodiversity in relation to Wales. They must take all reasonable steps to maintain and enhance those listed. Furthermore Section 6 requires a public authority to seek to maintain and enhance biodiversity in the exercise of its functions and in doing so promote the resilience of ecosystems.
24. The common is not subject to any statutory designations. However, it is located within 1km of a Special Area of Conservation (SAC) and two Sites of Special Scientific Interest (SSSI).
25. The SUP would be located within the non-statutorily designated Common and Golf Course Site of Interest for Nature Conservation (SINC) and within 1km of seven other SINCs and a Wildlife Trust Reserve (WTR). The Common and Golf Course SINC through which the path would cross is designated for its wet and dry heathland, species-rich grassland, and bracken communities. The designation covers some 276 hectares.
26. A Preliminary Ecological Appraisal (PEA) was submitted with the application, and which includes an extended Phase 1 Habitat Survey. The survey was carried out prior to the details of the scheme being finalised. Whilst the PEA finds it is not anticipated that there would be any direct or indirect impacts on any statutorily designated sites, it identifies that the SUP would have the potential to result in direct impacts on SINC habitats, priority habitats listed under Section 7 of the Environment Act and bat foraging routes and roosts.
27. Given the distance of the SUP from statutorily designated sites and the nature of the works which are localised in nature and of a limited scope, I concur with the findings of the PEA that there would not be harmful effects on statutorily designated sites arising from the proposed SUP.
28. Sites registered as SINCs have no statutory protection but are nonetheless identified by local authorities as having local nature conservation value. For similar reasons to those given above, I find the proposal would not have any harmful effects on those SINC located away from the site. However, the proposal would result in the loss of approximately 1.2 hectares of habitat within the SINC boundary. There would also be potential indirect impacts on habitats from the associated drainage works and during the construction phase.
29. Furthermore, similar direct and indirect impacts are likely to occur to four priority habitats listed under the Environment Act, namely lowland acid grassland, lowland heathland, hedgerows and wet woodland and mixed scrub.

30. The PEA recommends a number of safeguarding and mitigation measures to address the above potential impacts, including measures to be outlined in a Habitat Creation Plan, minimising areas of habitat removal, pollution prevention measures and production of a Construction and Environmental Management Plan (CEMP). It also states that further ground investigation surveys will inform the drainage scheme design to ensure there are no changes to hydrology that might impact off-site priority and locally designated habitats. A bat survey is recommended where trees are to be felled/pruned.
31. The PEA also identifies the limited opportunities for meaningful enhancement but recommends some potential enhancement opportunities along the route that could be discussed with the Council's ecologist.
32. No further ecological information has been provided in respect of the detailed scheme now before me, including the results of the recommended further surveys and details of the proposed mitigation and enhancement measures.
33. From my own observations on site, I agree with the findings of the PEA that the proposal would result in direct and indirect impacts on the SINC and priority habitats listed under Section 7 of the Environment Act. Such impacts are important considerations that should be taken into account in considering the acceptability of the specifics of the proposal prior to consent being granted. In the absence of the further information recommended in the PEA in relation to the detailed design of the SUP, I am unable to reach a conclusion that the proposal would not have an adverse impact on the SINC and priority habitats and would meet the statutory requirements set out in the Environment Act.
34. It was evident from my site visit that a number of trees would need to be felled/pruned to facilitate the SUP and I have no evidence that a bat survey has been carried out. In the absence of such a survey, the loss of scrub and trees along the route has the potential to impact on important foraging habitat and potential bat roosts. I therefore cannot conclude that there would not be an impact on bats which are a protected species.
35. A number of representations have been made that the proposed recycled rubber surface would not be environmentally acceptable. I note the material is derived from vehicle tyres destined for landfill and in that respect would be a sustainable material. However, I have no evidence before me as to the potential runoff of the material into the adjacent habitats and any associated impacts on ecology. I am therefore unable to reach a conclusive view on its acceptability to nature conservation interests.
36. On the evidence before me, I am not satisfied that the proposal would satisfy the duties incumbent on public authorities in the Environment Act. It has not been demonstrated that the proposal would maintain and enhance biodiversity. For the reasons given I conclude that the proposal would be harmful to nature conservation interests.

#### Conservation of the Landscape

37. In respect of the impact on the landscape, the site does not lie within an area designated for its landscape interest. However, the boundary of the Gower Area of Outstanding Natural Beauty (the AONB) follows the northern side of the B4436 opposite the proposed route of the SUP. Given the close proximity to the AONB I have had regard to the statutory purpose of AONBs to conserve and enhance the natural beauty of the area as set out in Section 85 of the Countryside and Rights of Way Act 2000 (the CROW Act).
38. The area of common over which the SUP would pass is, in the main, an attractive open tract of heathland interspersed with trees and scrub. The B4436 already cuts across the common between Mayals and Bishopston and has introduced a man-made element that starkly contrasts with the natural landscape over which it crosses. Its impact is mitigated

to some extent by the regenerated scrub and trees on either side of the road that provide a softening impact to its visual appearance.

39. The proposed SUP would be situated adjacent to the existing highway with only a small strip of land dividing it from the carriageway. Whilst this is proposed to be planted with low level planting and wildflowers, the proximity of the path to the existing road would exacerbate its visual impact further through its increased width and man-made appearance and result in an urbanising effect on the open common. The loss of the scrub and established trees would also have a harmful effect on the visual appearance of the area, and which would not be replicated in the proposed low level planting proposals.
40. Whilst the path itself would be located outside the AONB boundary, it would be highly visible from within it. I am not satisfied that the design of the scheme has minimised the impacts that would arise for the reasons given above. I find the proposal would not conserve or enhance the natural beauty of the AONB.
41. Furthermore, the section of path proposed into Murton would be situated on the eastern side of the road which currently is an attractive mixture of open grassland and semi-mature trees. It would result in a further man-made feature on the common. An existing path follows the western side of the road. I note the Council's comments in respect of concerns that were raised by Bishopston Community Council in relation to sighting difficulties in the vicinity of the community centre should the path be located on the western side. However, from my own observations on site I do not find such problems would be insurmountable. The provision of the path on the western side would negate the need for an entirely new path and its associated visual impacts and loss of common. It would also appear to negate the requirement for a culvert/bridge over the stream.
42. In my assessment, the provision of a path on the undeveloped side of the road would result in an urbanising effect to the common and would be harmful to its open, natural appearance.
43. Taking these matters into account I conclude the proposal would have a harmful impact on the landscape.

#### *Protection of archaeological remains and features of historic interest*

44. The applicant states that no Scheduled Ancient Monuments would be affected by the proposal. No response to the application has been made by Cadw and on the evidence before me I have no reason to believe the proposal would have any adverse effects on archaeological remains or features of historic interest.

#### *Protection of public rights of access*

45. As I have found above, the works would benefit public rights of access through allowing further access over the common between Mayals and Bishopston. Existing public rights of way across the common and the right of access to the wider common would not be affected.

#### ***Conclusions on the Public Interest***

46. I conclude that the proposal would result in harm to nature conservation interests and the landscape. It would neither conserve or enhance the natural beauty of the statutorily designated AONB. It would not comply with the duty incumbent on public authorities in the Environment Act to maintain and enhance biodiversity.

#### ***Other Relevant Considerations***

47. I have taken into consideration the applicant's Integrated Impact Assessment Report and reasons for the application. I am satisfied the proposal would provide an important link

between settlements as part of the Active Travel network being provided under the requirements of the Active Travel (Wales) Act 2013 (the Active Travel Act). It would provide a link to other parts of the network including the new Active Travel facility in Mayals Road and would benefit a wide range of users. It would also provide a safer route between Mayals and Bishopston for users who currently have to travel on the highway. It would encourage the use of more sustainable forms of transport.

48. In these regards, the proposal would be in accord with the Welsh Government's statutory requirements in relation to Active Travel and in encouraging a reduction in use of the private car and promoting the use of sustainable modes of transport. It would clearly be in the public interest in these regards and would provide a safer link between settlements. I give these matters considerable weight.
49. However, such benefits need to be balanced against any associated harm arising from the proposal. I have found the proposal would interfere with the commoners' rights to use the common for grazing. I have also found the proposal would be harmful to nature conservation and landscape interests and would not meet the statutory requirements set out in the Environment Act and CROW Act. Such matters are also in the public interest.
50. In this particular case, I find the impacts on the commoners' rights, nature conservation and the landscape to be compelling. I find they outweigh the benefits of providing this particular SUP across the common. On the evidence before me and taking note of advice in paragraph 3.5 of the Guidance, I find that the application does not propose the best possible outcome. A different approach/design could result in a more acceptable outcome. I have considered the possibility of imposing conditions in this respect but do not consider that conditions would overcome the harm that I have identified would arise from this particular proposal.

### **Overall Conclusions**

51. I have taken into account all other matters raised including the public consultation that was carried out to inform the design and the associated support for the proposal. I find no matters that lead me to conclude other than the proposal is unacceptable. The works would not be in conformity with the policy objectives set out in the Guidance or the requirements of legislation. For the reasons given above, I refuse the application.
52. In reaching my decision, I have taken into account the requirements of sections 3 and 5 of the Well Being of Future Generations (Wales) Act 2015. I consider this decision is in accordance with the Act's sustainable development principle through its contribution towards one or more of the Welsh Minister's well-being objectives as required by section 8 of that Act.

*VK Hirst*

INSPECTOR