

## IN A MATTER UNDER THE COMMONS ACT 2006

### **LOVERS WALK, SOUTHAMPTON COMMON**

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#### **ADVICE**

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1. I am asked to advise Highfield Residents' Association (“**HRA**”) in respect of proposed development on Southampton Common. I am told that Southampton Common (“**the Common**”) is one of the largest urban commons in the country. Southampton City Council (“**SCC**”) are proposing to widen an existing path, known as Lovers Walk (“**LW**”) which is situated to the east of the Common, to create in effect a cycle “super highway”.

#### **Brief Factual Background**

2. The Common is some 146ha in size and is located to the north of the city, bounded by the districts of Shirley, Bassett, Highfield and Portswood. It became common land in the 13th Century. In 1844 it was designated as a public park and reference is made to the Common in the Hampshire Act and the Southampton Corporation Acts 1910, 1931 and 1971 detail the public use of the Common.
3. The Council made a planning application (Reference 5/02327/R3CFL) which was validated on 7<sup>th</sup> December 2015. The application sought planning permission for the widening of the existing path known as Lovers Walk that runs north - south on the eastern side of the Common between Burgess Road and Westwood Road, Southampton. There were also other works proposed

including the construction of a bus stop waiting area for passengers on The Common in Highfield Road.

4. The application asserted that the proposed works consisted primarily of the widening of the existing surfaced path by amending the existing metaled path surface to facilitate the safe and convenient use of the path by pedestrians and cyclists for both leisure and utility use. It was further asserted that the paths on the Common have very high pedestrian and cycle usage and LW is substantially narrower than many of the other prime routes. The edges of LW were said to have suffered from severe erosion due to the high usage by pedestrians and cyclists.
5. The application refers to both sections of path being approximately two metres wide throughout and which sustain a high level of both pedestrian and cycle use (up to 500 combined users in peak hours), even though the South Section is currently not designated under the local Byelaw as a cycle route. The proposed works were to accommodate the existing usage demand by widening the path to sections of between two and a half and three and a half metres in width, providing a full width shared path.
6. It was not proposed to provide a "segregated" cycle track and pedestrian path as Local Transport Note 1/12 (Sept12) - *Shared Use Routes for Pedestrians and Cyclists* – suggests as that would necessitate a two metre wide pedestrian path alongside a three metre wide cycle track (if two-way cycle flows are relatively even), totaling a five metre width, which is not possible on the LW route due to woodland and habitat preservation and sections of wetland/marshland, as well as impact on Common Land amenity space.
7. It was proposed to cover the existing tarmac construction with chipped material (of around a 10mm grade) to allegedly soften the appearance of the path in its largely woodland setting. This surface had been selected as it is said it would be hard wearing, practical for future maintenance, and is comfortable for pedestrians and cyclists. In addition, the edges of the path, which are retained with edging, would be improved by blending into the

adjacent green verges, thereby removing the abrupt and hazardous edges of parts of the existing paths.

8. I understand that application to have been withdrawn in May 2016 but those instructing suspect that a fresh submission will be made in due course.
9. I have attempted to view the relevant planning documents on the Council website but my attempts have been generally frustrated after several hours. I have been able to access some of the associated documents but not all. If those instructing are able to provide me with hard copies of the relevant documents, should that be considered necessary I can consider them further.
10. I understand that there were a number of objections to the planning application for the proposed widening of LW, including from the Southampton Commons and Parks Preservation Society (“SCAPPS”) and from Simon Hill MRTPI, the later being in a personal capacity although intended to be on behalf of HRA. The objections focused ostensibly on the following:
  - i. That the proposed works would urbanise and harm the Character of the Common;
  - ii. That they would increase cycle/pedestrian conflict by encouraging faster cycling by transit cyclists to the detriment of walkers and other recreational users of the Common;
  - iii. That the proposed works would be inconsistent with the principle that the Common is principally for the recreation of users.
11. I understand that there is also a desire on the part of the University to improve existing access steps linking the corner of the Highfield Campus to LW, such works impacting upon the Common, although no planning application has as yet been made.
12. I have been provided with an extract from the Estates Gazette summarising a successful challenge brought in 1969 against Southampton Corporation in relation to proposed car-parks and access roads that were to be built on the

Common to serve the zoo and Cowherds Inn. I have fully considered this extract in arriving at my conclusions below.

13. I understand that I am asked to advise on the following:
  - i. Whether the principles that determined a judicial review brought by SCAPPS in 1969 would still apply to any proposal to carry out works on the Common today;
  - ii. Whether the proposals for LW are contrary to s.10 of the Open Spaces Act 1910; and
  - iii. Generally in respect of objections to any renewed planning application.
  
14. There is a distinction between the need for planning permission to carry out the proposed works to LW and the need for consent to carry out restricted works on the Common. At present I am not aware of any reason why the Council will not require both for the widening of LW. Paragraph 13(i) and (ii) above would appear to relate to any application for Consent under the Commons Act 2006 and paragraph 13(iii) obviously relates to any planning application for the same works. I am not in possession of adequate documentation to comment in detail on the merits of any planning application to extend LW but have considered the submissions of Simon Hill MRTPI, in the context of the now withdrawn planning application.

#### **Statutory and Policy Position**

15. The principal statutory provision relating to works on commons land is the Commons Act 2006. The HRA have also drawn my attention to the Public Health Act 1875 and the Open Spaces Act 1906, which were relevant to the outcome of the 1969 judicial review.

16. The Commons Act 2006 at s.38 provides, in so far as is relevant:

### **38 Prohibition on works without consent**

(1) A person may not, except with the consent of the appropriate national authority, carry out any restricted works on land to which this section applies.

(2) In subsection (1) “restricted works” are–

- (a) works which have the effect of preventing or impeding access to or over any land to which this section applies;
- (b) works for the resurfacing of land.

(3) The reference to works in subsection (2)(a) includes in particular–

- (a) the erection of fencing;
- (b) the construction of buildings and other structures;
- (c) the digging of ditches and trenches and the building of embankments.

(4) For the purposes of subsection (2)(b) works are for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material).

(5) This section applies to–

- (a) any land registered as common land;
- (b) land not so registered which is–
  - (i) regulated by an Act made under the Commons Act 1876 (c. 56) confirming a provisional order of the Inclosure Commissioners; or
  - (ii) subject to a scheme under the Metropolitan Commons Act 1866 (c. 122) or the Commons Act 1899 (c. 30);
- (c) land not falling within paragraph (a) or (b) which is in the New Forest and is subject to rights of common.

(6) The prohibition in subsection (1) does not apply to–

- (a) works on any land where those works, or works of a description which includes those works, are carried out under a power conferred in relation to that particular land by or under any enactment;

- (b) works on any land where the works are carried out under a power conferred by or under any enactment applying to common land;
- (c) works authorised under a scheme under the Metropolitan Commons Act 1866 or the Commons Act 1899 without any requirement for any person to consent to the works;
- (d) works for the installation of electronic communications apparatus for the purposes of an electronic communications code network.

(7) In subsection (6)(a) the reference to an enactment does not include Part 2 of this Act.

(8) For the purposes of subsection (6)(b), an enactment applies to common land if it is expressed to apply (generally) to—

- (a) registered common land;
- (b) common land; or
- (c) any common or commons, commonable land, land subject to inclosure under any enactment or other land of a similar description.

(9) Subject to the following provisions of this Part, consent given to works under subsection (1) of this section constitutes consent for the purposes of that subsection only.

17. The Commons Act 2006 at s.39 provides, in so far as is relevant:

### **39 Consent: general**

(1) In determining an application for consent under subsection (1) of section 38 in relation to works on land to which that section applies, the appropriate national authority shall have regard to—

- (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
- (b) the interests of the neighbourhood;
- (c) the public interest;
- (d) any other matter considered to be relevant.

(2) The reference in subsection (1)(c) to the public interest includes the public interest in—

- (a) nature conservation;

- (b) the conservation of the landscape;
- (c) the protection of public rights of access to any area of land; and
- (d) the protection of archaeological remains and features of historic interest.

(3) Consent may be given under section 38(1)–

- (a) in relation to all or part of the proposed works;
- (b) subject to such modifications and conditions relating to the proposed works as the appropriate national authority thinks fit.

(4) In considering the effect in relation to any land of proposed works under this section, the appropriate national authority may consider that effect in conjunction with the effect in relation to that land of any other works for which consent has previously been given under section 38(1) above or section 194 of the Law of Property Act 1925 (c. 20).

(5) Where the appropriate national authority imposes any modification or condition in relation to any consent given under section 38(1), it may on the application of any person carrying out or proposing to carry out works in accordance with the consent vary or revoke that modification or condition.

(6) Regulations may specify a time limit for the making of applications under subsection (5).

(7) Consent may be given under section 38(1) in relation to works which have been commenced or completed; and any consent so given has effect from the time of commencement of the works.

18. The Public Health Act 1875 at s.164 provides, in so far as is relevant:

**164. Urban authority may provide places of public recreation.**

Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

Any local authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such

byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the local authority or constable.

19. The Open Spaces Act 1906 at s.10 provides, in so far as is relevant:

**10. Maintenance of open spaces and burial grounds by local authority.**

A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

- (a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and
- (b) maintain and keep the open space or burial ground in a good and decent state.

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

20. The Department for Environment, Food and Rural Affairs publication entitled “*Common Land Consents Policy*”, dated November 2015 is also a relevant document and provides a useful summary of the approach that must be taken where consent is sought for works on common land. Any objection to an application for consent to carry out restricted works on commons land should adopt the principles in this document as a framework for that objection.

**Discussion**

21. The statutory and policy provisions set out above relate to the consent that is required to carry out restricted works on the Common. The extension of LW will, in my opinion constitute restricted works, by application of ss.2(b) and 4



Commons Act 2006. As initially proposed in the now withdrawn planning application the proposed works were works for the resurfacing of land as they involved the laying of concrete, tarmacadam, coated roadstone or similar material on the land.

22. I anticipate that that it is highly likely that works to extend LW will also require planning permission to be obtained.
23. I respond as follows in relation to the three matters posed in my instruction.

**Whether the principles that determined a judicial review brought by SCAPPS in 1969 would still apply to any proposal to carry out works on the Common today**

24. The challenge in 1969 was brought on three limbs; that the proposed works were unlawful without consent for the relevant Minister, that s.134 of the Southampton Corporation Act 1931 forbade driving on the Common except upon certain specified roads and that in constructing the proposed works the Southampton Corporation would be in breach of the duties under s.164 Public Health Act 1875 and s.10 Open Spaces Act 1906.
25. I do not consider that the first two limbs are of relevance in the current matter. There is no doubt in my mind that the initially proposed works will require the relevant consent from the Secretary of State. In terms of the second limb, at present I am unclear as to the status of the Southampton Corporation Act 1931 and indeed there are a web of further byelaws which interact to control activities on the Common and impose duties on the Council in relation to the Common. However, the proposals included in the withdrawn planning application did not relate to motorised vehicles and as such it is likely that the findings in the 1969 judicial review that were founded upon the Southampton Corporation Act 1931 are of little relevance to the proposed widening of Lovers walk, at present.
26. I consider that the principles of the third limb as set out in the brief report from the Estates Gazette are equally applicable today as they were in 1969.

Both s.164 Public Health Act 1875 and s.10 Open Spaces Act 1906 remain in force. However, s.38 Commons Act 2006 now provides a statutory framework for the granting of consent for restricted works and should consent be granted under s.38 a challenge brought on the basis that the consented works are contrary to s.164 and s.10 is likely to fail, provided the Inspector determining the application has taken into account both of those statutory provisions. The more recent consolidating 2006 act is likely to be considered to be a complete code, any consent granted under s.38 being granted having taken into account the provisions of s.164 and s.10, provided an Inspector has proper regard to the provisions of s.38 and s.29 Commons Act 2006.

27. However, that is not to dismiss the importance of s.164 and s.10; they are still in force and the duties imposed therein must be satisfied. Addressing the duties and obligations set down in s.164 and s.10 should form part of the consideration of the criteria under s.39 Commons Act 2006.
28. In order for consent to be granted under s.38 the provisions of s.39 must be taken into account. These criteria can be summarised as follows:
  - (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
  - (b) the interests of the neighbourhood;
  - (c) the public interest, which includes the public interest in:
    - nature conservation
    - the conservation of the landscape
    - the protection of public rights of access to any area of land, and
    - the protection of archaeological remains and features of historic interest;
  - (d) any other matter considered relevant

29. One of the other important considerations is whether there has been a proper and adequate assessment of possible alternatives to the proposed restricted works.
30. As elaborated upon in the 2006 DEFRA consents policy document the 2006 Act operates to safeguard commons for current and future generations to use and enjoy, to ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected and to improve the contribution of common land to enhancing biodiversity and conserving wildlife.
31. In order for consent to be granted for restricted works, such as those proposed to LW it must be demonstrated that the works will not diminish the stocks of common land and greens so that any deregistration of registered land is balanced by the registration of other land of at least equal benefit, that any use of common land or greens is consistent with its status (as common land or green), so that works take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.
32. In objecting to proposals under s.38 Commons Act 2006, HRA should focus on the following, as a minimum:
  - i. The necessity of the proposed works and the adequacy or otherwise of the consideration of possible alternatives, such alternatives obviating the need to diminish the stock of common land;
  - ii. Whether to proposed widening of LW is in the interests of the neighbourhood or confers a wider public benefit. Any assertions that such a benefit would be conferred should be carefully examined, the mere widening of LW to accommodate a greater number of cyclists and pedestrians should be supported by proper and adequate evidence that there is a need for such increased capacity, if there is no actual need then it is arguable that there would be no wider public benefit

- iii. Whether the proposed widening of LW accords with the relevant nature conservation requirements. The Council explicitly accepted that a widening to 5m would detrimentally impact upon woodland and habitat preservation, upon sections of wetland and marshland and also have the effect of reducing amenity space. The initial proposal was to widen LW to between 2.5 and 3.5m, and it is arguable that such a widening would have only a marginally lesser impact than the accepted impact of a 5m widening;
- iv. Whether the proposed widening of LW conserves the landscape. This is unlikely, any widening is likely to have a detrimental impact upon the landscape. The Council sought to address this by claiming that the current LW is in a poor state, particularly along its edges. Evidence should be obtained to contest such an assertion. Even if the edges may, in places be tidied up, the overall effect of such a widening is very likely to be detrimental to landscape conservation;
- v. Whether the proposed widening of LW protects the public access to the Common. The proposal has nothing to do with access to the Common and allowing an increase in users of LW, particularly cyclists may be argued to impede public access to the Common, notwithstanding that the very act of widening LW will reduce the area of the Common;
- vi. Whether the proposals are reasonably necessary to enable the public to enjoy the Common (applying s.164 Public Health Act 1875 and s.10 Open Spaces Act 1906). I consider this unlikely as the proposals in the initial planning application had nothing to do with allowing the public to enjoy the Common but rather to a wider travel plan that would, it was asserted benefit the wider city.

**Whether the proposals for LW are contrary to s.10 of the Open Spaces Act 1910**

33. The preceding paragraphs have addressed this point. Section 10 of the Open Spaces Act 1910 is still in force and will apply to the proposed works to LW, and most likely the desired steps works and it will be necessary for the Council to show that the proposed works are reasonably necessary to enable

the public to enjoy the Common. As set out above, these considerations are very likely to be subsumed into the statutory considerations under s.39 Commons Act 2006, but they are still very relevant considerations and the duties imposed under s.10 must not be breached.

**Generally in respect of objections to any renewed planning application**

34. It is extremely difficult to comment on what objections may be relevant to a planning application that has not been made. However, I have considered the written submission of Simon Hill MRTPI dated 28<sup>th</sup> December 2015 made in relation to the now withdrawn application to widen LW and in simple terms I cannot improve upon that submission.
35. The submissions made by Simon can be briefly summarised as follows:
- i. Urbanising effect;
  - ii. The specific harm that would be caused along the route in identifiable locations;
  - iii. Inadequate detail in the application to enable a full and adequate consideration of the potential impacts;
  - iv. Increased conflict between cyclists and pedestrians as a result of increased numbers and increased cycling speeds;
  - v. Lack of coherent justification;
  - vi. Failure to consider appropriate and available alternatives;
  - vii. Existing safety issues for cyclists using LW;
  - viii. Clear conflict between the primary purpose of the Common, for the recreation of the local community, and the creation of a cycle “super-highway” which conflicts with that statutory duty
36. These submissions are comprehensive and detailed. However, I can advise further if and when a further planning application is made by the Council.
37. I trust that the matters set out above adequately deal with the questions raised by HRA. However, if I have misunderstood the questions raised in my written

instructions and the various supplementary emails please let me know and I will advise further.

**Michael Rudd**  
**Kings Chambers**  
**Manchester-Birmingham-Leeds**  
**3<sup>rd</sup> August 2016**

**IN A MATTER UNDER THE  
COMMONS ACT 2006**

**LOVERS WALK,  
SOUTHAMPTON COMMON**

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**ADVICE**

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**Michael Rudd**  
Kings Chambers  
(Manchester-Birmingham-Leeds)  
3<sup>rd</sup> August 2016

**Highfield Residents' Association**

**Bar Council  
Direct Public Access Provisions**