

Commons and Town Greens Sub-Committee

Meeting to be held on 22 September 2011

Electoral Division affected: Whitworth

Section 16 Commons Act 2006

Application to de-register common land CL165 at Crook Hill, Whitworth, Lancashire and to provide replacement land

(Appendices 'A', 'B', and 'C' refer)

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Executive Summary

To consider whether the County Council joins in as applicant with an application to de-register a corridor of Common Land on CL165 in connection with that part of the application land which is a publicly maintainable highway.

Recommendation

That the Sub-Committee agrees to Lancashire County Council becoming a joint applicant in an application already submitted to the Secretary of State under section 16 of the Commons Registration Act 2006 for the de-registration of a corridor of common land on CL165 to allow the construction of a wind farm at Crook Hill and for the designation of replacement land making it clear that it is as an owner in respect of the highway land only and noting concern as to the sufficiency of exchange land and that the Secretary of State should ensure that the agreement to re-register sufficiently binds the land, that the affect on public access is not understated and that there is still a requirement for an agreement to be entered into with the developer as to the works being done on highways within and near the application land.

Background and Advice

Coronation Power Ltd is proposing to develop a wind farm at Crook Hill which is situated on the edge of the County of Lancashire. The proposed development site covers registered common land within the boundaries of Lancashire County Council, Calderdale Metropolitan Borough Council and Rochdale Metropolitan Borough Council.

A number of planning applications have been submitted to each of the authorities in relation to the development within their respective administrative boundaries. For Lancashire the Planning Authority is Rossendale Borough Council.

Coronation Power Ltd submitted an appeal to the Secretary of State in 2009 regarding non-determination and refusal of planning applications submitted to Calderdale, Rochdale and Rossendale. The Secretary of State allowed the appeals and granted planning permission.

Coronation Power Ltd has subsequently submitted planning applications to revise the approved schemes to the three planning authorities. Rochdale MBC granted permission and issued a decision notice on 23rd June 2011. Calderdale MBC resolved to approve the application in July subject to a number of conditions. Negotiations on those conditions are continuing with United Utilities and a formal decision notice has not yet been issued (as at 1st September 2011). Rossendale have not yet determined the application they have received, having deferred a decision until the outcome of an application regarding rock extraction at Middle Hill Quarry has been determined by Rochdale MBC.

As planning permission for the wind farm development has been granted by the Secretary of State, Coronation Power Ltd now need to resolve the issues surrounding the carrying out of construction works. Section 38 of the Commons Act 2006 prohibits 'restricted works' on Common Land without consent from the Secretary of State.

The common land affected by the development within Lancashire is unit CL165. The main construction work required on CL165 relates to the construction of an access route to the turbines on Crook Hill. Instead of applying for consent to carry out such works on Common Land, the owner of CL165, Mr Dearden, Lord of the Manor has applied for a corridor of land to be de-registered and no longer recorded as Common Land. The corridor to be de-registered accommodates the route of the proposed access road but also includes existing lengths of public highway (Appendix 'C' refers). The corridor initially follows the line of the highway called Landgate and is also crossed by a number of public footpaths and bridleways as it continues to the County boundary. The area of highway affected is 4,260.2 square metres (0.426 ha) and Coronation Power Ltd have included the land with highway rights on the surface in the application to remove it from the area of registered Common Land (Appendix 'A' refers).

Under s16 Commons Act 2006 the owner of any land registered as common land is the person who can apply to the Secretary of State for the land to cease to be so registered. If the release land is more than 200 square metres the application must include a proposal that some replacement land be registered as common land in place of the release land. In determining the application the Secretary of State shall have regard to interests of those having rights on or occupying the release land; the interests of the neighbourhood; the public interest (including nature conservation, conservation of landscape, protection of public rights of access and protection of archaeological remains and features of historic interest); and any other relevant matter. Consents of any leaseholders or charge holders of the land are required and owners of replacement land have to join in the application.

Under S61 an "owner" is the holder of the legal estate in fee simple.

It is advised that although the surface of publicly maintainable highways is vested in the County Council, the title is not a pure fee simple but is a determinable fee simple. It is considered that this is sufficient title to be an "owner" under the Commons Act.

The Application, which is already submitted, applies for common land to be de-registered (release land) and offers exchange land to be new common land (replacement land). The application affecting a corridor of land on CL165 in Lancashire may result in the release of 6.98ha of land (which includes the 0.462ha of highway). An area of 1.6ha is being offered as replacement land immediately adjacent to CL165 and within the County boundary. The application also seeks to de-register common land on CL166, CL172 and CL168 being about 22.82ha. A further area of 2.397ha is being offered as replacement land but this is outside the Lancashire boundary and within the boundary of Rochdale MBC at Long Clough Farm, Littleborough to the south of CL168.

The Applicant realises that the replacement land is a lot less than the release land and following completion of the construction work it is planned to re-register the released land that is not required for the day to day operation of the wind farm. Within CL165 the area of land to be re-registered is 4.98ha. 2.0ha of land is to be removed from the register as it will not be available for use as common land as a result of the wind farm operational requirements. It is stated that all land will be re-registered once the wind farm is de-commissioned.

Summary of land position

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| • Area to be de-registered (released) | 6.98ha |
| • Area to be removed
(deregistered until the wind farm is de-commissioned)
(includes the access tracks) | 2.00ha |
| • Area to be re-registered on completion of construction work | 4.98ha |
| • Area to of replacement land within Lancashire
(although shown as 1.68ha on plan) | 1.60ha |
| • Shortfall of | 0.40ha |

Attached at Appendix 'A' is a plan of the proposed wind farm site and layout of turbines and access roads and showing the area of CL165 and the area of replacement land within Lancashire.

The Application which has been submitted is attached at Appendix 'B'.

Highways within the corridor of release land are shown on a plan at Appendix 'C'.

The fact that some of the land within the corridor of release land is highway raises a particular issue.

The surface of all highways (whatever sort, vehicular, footpath or bridleway) which are publicly maintainable is vested in the Highway Authority by virtue of S263

Highways Act 1980. This is advised to be sufficient interest to mean that it is the Highway Authority who is the owner in respect of the highway land. For the highway land to be considered for de-registration it is therefore suggested that the highway authority be also an applicant.

If the Highway Authority does not join the application it is possible that the Secretary of State will have to leave the highway land out of the application and it would remain as part of the Common Land. The Sub-Committee will note that there is a suggestion that there may be a need even for a Highway authority to apply for consent for works where the highway is on Common Land. This would need to be investigated and clarified but by joining in the application to de-register seeking de-registration of highway this possible need for consent is removed if the application was successful.

The Sub-Committee are asked to consider the view below of the developer and DEFRA and to note that Lancashire County Council has not objected to the planning application.

In a similar application earlier this year Calderdale MBC was asked as highway authority to join in an application under S16 and agreed to do so.

It is advised that it is the County Council's discretion as to whether to join in the application but it is the case that the authority must exercise its discretion reasonably. In this matter its decision is not to be based on whether a wind farm is thought to be appropriate.

If the view is taken that it would be appropriate to join in the application it is suggested that the Sub-Committee should take the opportunity to state any concerns it has about the S16 application itself given the criteria to be considered by the Secretary of State and to remind the Secretary of State about various matters. Officers have noted some matters in the recommendation but the Sub-Committee may consider others or alternative points to be better made.

Consultations

Coronation Power Ltd have been asked to state why the County Council should be a joint applicant with Mr Dearden in respect of the corridor on CL165 and say as follows –

The applicant still wishes the highway authority to enter into the application and feels it is imperative to do so.

We have carefully considered the law in this area and there is some argument to be made that the authority does need to enter into the application. We believe this is also the stance of DEFRA.

On this basis, the Sub-Committee is advised that it is better to take a careful approach to avoid an important infrastructure project being jeopardised by being at the risk of facing a legal challenge into the validity of its consents in the high court. It is important to ensure that all areas needed for works for the wind farm are de-registered so that we do not fall foul of the s38 of the Commons Act. De-registering all land needed, ensures that there can be no argument that works are prohibited.

This does not of course undermine any future agreements that will need to be agreed with the authority for works to Landgate. Works are likely to be improvement of roads and laying of cables but may be more.

On this basis as the authority has not objected to the scheme and that the de-registration can only be neutral or positive for the authority, we request the authority enter into the scheme.

DEFRA have also made the following statement –

In relation to an application for de-registration and exchange of registered common land under s.16 of the Commons Act 2006, the Secretary of State would expect to see the highway authority join in the application insofar as the release land, or the replacement land, is also publicly maintainable highway. I am assuming that there is no dispute as to whether, in the circumstances contemplated, the highway is indeed publicly maintainable (the position is a little more abstruse in relation to public paths). Here is our analysis:

- S.16 provides in subsection (1): “The owner of any land registered as common land or as town or village green may apply to the appropriate national authority for the land (‘the release land’) to cease to be so registered.”
- ‘Owner’ is interpreted in s.61 as “references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate.”
- Under s.263(1) of the Highways Act 1980, highway maintainable at the public expense, together with the materials and scrapings of it, vest in the authority who are for the time being the highway authority for the highway.
- According to *Halsbury’s Laws of England* paragraph 227, the interest vested in the authority under s.263(1) is a legal estate in fee simple determinable in the event of the street or road ceasing to be a public highway and, according to footnote 7 of that paragraph, the Law of Property Act 1925 s.7(1) treats this interest as a fee simple absolute for the purposes of that Act.
- Therefore, the interest of the highways authority does fall within the definition of ‘owner’ in s.61(3) of the 2006 Act, being the holder of the legal estate in fee simple in the release or replacement land.

It’s worth referring to the judgment of the Court of Appeal in *Tithe Redemption Commission v Runcorn UDC* (1954) especially as it was quoted with approval in another very recent Court of Appeal case — *R (oao) Smith v Land Registry* [2010] EWCA Civ 200. Admittedly the Court of Appeal in *Smith* did not examine the argument as to whether or not the court in *Runcorn* was correct to rule that the Local Government Act 1929 was a “similar statute” within the meaning of section 7 of the Law of Property Act 1925 and hence was operational in vesting the fee simple absolute in the highways authority. However, Lady Justice Arden in *Smith* did quote paragraphs from Evershed MR’s judgment in *Runcorn* with approval, and herself state “...this court held in *Tithe Redemption* that the statutory vesting of a highway in the highway authority operated to vest in the highway authority a determinable fee simple in the surface of the land.”

The extract from Halsbury's is a little confusing, because paragraph 227 begins: "The effect of the statutory provisions vesting highways in highway authorities is not to transfer the fee simple absolute in the land to the authority...but merely to vest in the authority the property in the surface of the street or road." But what the passage (and its footnotes) is in fact emphasising, is that section 236 does not directly transfer the fee simple, but rather the effect of section 7 of the Law of Property Act 1925, as interpreted by the Court of Appeal in the *Runcorn* case, is to vest the fee simple absolute in the authority.

While I have acknowledged that the position may seem odd, it is also relevant to the functions of the highway authority. Should land become common land (if it is replacement land, and the owner must therefore join in the application under subsection (5)(c)), then the effect of the change of status would mean that the highway authority would have to apply to the appropriate authority for resurfacing and possibly other maintenance works under s.38. Similarly if highway land is released from its status as common land, the authority will no longer be under such an obligation.

Implications:

This item has the following implications, as indicated:

Risk management

Legal

The section 16 application is required to allow the construction of a wind farm for which there is planning approval in place from the Secretary of State. Should a decision be taken to not join the application with Coronation Power Ltd then Lancashire County Council could be seen to be frustrating the planning process and preventing approved development leading to legal challenges and possible financial penalties along with damage to Lancashire County Council's reputation.

Local Government (Access to Information) Act 1985

List of Background Papers

Paper	Date	Contact/Directorate/Tel
File 3.643		Jane Turner, Office of Chief Executive, 01772 532813

Reason for inclusion in Part II, if appropriate

N/A