



Application Decision

by **Edward Cousins BA, BL, LL.M, Barrister**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 11 October 2021

Application Ref: **COM/3236108**

Land at The Sands, Durham

Register Unit: CL29

Registration Authority: Durham County Council

- The application, dated 22 August 2019, is made under Section 16 of the Commons Act 2006 ('the 2006 Act') to de-register and exchange land registered as a common.
 - The application is made by the Durham County Council.
 - **The release land** comprises 1,675m² (0.17ha) of land. It is 5.76% of an area of registered common land (CL29) known as The Sands which is 29.074 m² (2.91ha).
 - **The replacement land** known as Land East of Rivergreen Centre, Aykley Heads comprises 18,371m² (1.84ha) of land.
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Decision

1. The application is granted in accordance with the terms of the application dated 22 August 2019, and the plan submitted therewith dated 20 August 2019.

Preliminary Matters

2. Section 16(1) of the 2006 Act provides, inter alia, that the owner of any land registered as common land may apply for the land ('the release land') to cease to 'be so registered. If the area of the release land is greater than 200m² a proposal must be made to replace it with other land to be registered as a town or village green ('the replacement land').

The Inquiry

3. This Inquiry was scheduled to open on 11 May 2021. However, it was cancelled due to the Covid-19 pandemic. Having regard to the Government Covid-19 restrictions, the hearing date was then re-organised, and the Inquiry was ordered to be heard as an online virtual event. Following the test event/pre-Inquiry meeting held on 23 March 2021, I opened the Inquiry on 11 May 2021. The Inquiry closed on 7 July 2021, having sat for six days.

Site Visit

4. I made an unaccompanied site inspection on 1 December 2020. I was able to view both the release land and the replacement land. No request was made for an accompanied site visit at the close of the Inquiry.

Procedural Matters

Lawful authority

5. Mr Whale, of Counsel, ('Mr Whale') was instructed on behalf of the Durham County Council ('the County Council'). During the course of his cross-examination of a number of witnesses, and in his subsequent submissions, Mr Whale sought to persuade the Inquiry that no evidence had been adduced whatsoever to the effect that none of the following parties, namely the Trustees and Wardens of the Freemen of the City of Durham ('the Freemen'), the City of Durham Parish Council ('the Parish Council'), the City of Durham Trust ('the Trust'), the Durham Markets Company ('Durham Markets'), the St Nicholas Community Forum ('the Community Forum') or the Open Spaces Society ('the OSS') had ever met after 20 August 2019 to formally resolve either to object to the Application, or to identify grounds of objection.
6. In my judgment, the fact that formal resolutions may not have been made by one or more of these bodies prior to objections being lodged to the Application is unfortunate, but not crucial to this Decision. It is clear from the evidence, both oral and in documentary form, that these named Objectors have opposed the Application throughout. A Public Inquiry is a formal process to hear the Application and the objections thereto, and to reach a conclusion on the evidence. However, the process is not to be perceived as being on the same footing as Court proceedings. Accordingly, this Decision is made based on the evidence adduced during the Inquiry.

The future use of the County Council's HQ Building

7. The future use of the County Council's HQ Building is the subject matter of a pending review by the County Council. This review follows the change of political control in the governance of the County Council resultant upon Local Government Elections on 9 May 2021. It was in this context that shortly before the commencement of Day 5 of the Inquiry Ms Allan, of Counsel, ('Ms Allan') instructed on behalf of some of the Objectors, raised an issue to the effect that she might seek the adjournment of the Inquiry pending the outcome of the County Council's review following the change in governance.
8. That application was duly made, and subsequently failed. The written Decision on the Adjournment Application is dated 5 July 2021 and was handed down by me prior to the sixth day of the Inquiry on 7 July 2021.
9. The fact that there has been a change of political control in the governance of the County Council following the Local Government Elections on 9 May 2021, is, in my judgment, an irrelevant consideration insofar as this Decision is concerned. It has no effect whatsoever on the determination of the Application, which is made based on the evidence adduced during the course of the Inquiry.

The Application

The Application is made by the County Council, in its capacity as the owner and occupier of both the release land and the replacement land. The release land is 0.17 ha, and the replacement land is 1.84 ha.

The release land

The release land comprises a small parcel of land to the east of the substantially completed new County Council HQ Building.

The replacement land

10. The replacement land is enclosed by fencing, gated, and comprises undulating grass land.

Reason for the Application

11. As Mr Whale submits, the reason for the Application for de-registration and exchange is to seek to regularise the de facto position on the ground, and to permit the continuance of the new HQ Building scheme for which planning permission was granted. As part of the scheme, the release land is to be used as a car park for the primary use by Members of the County Council,¹ and also for the siting of a water storage tank. In such circumstances, although the use of the release land may be for different purposes than has been the case hitherto, it will continue to have a hard surface which has been the position for many decades.

Release land – the 'base line'²

12. The release land is covered in a hard surface, and over the decades has had various uses, most recently as a municipal coach park. That use ceased in February 2019 when planning permission was granted for the relocation of the coach park elsewhere. On 1 April 2019 planning permission was granted for the County Council's new HQ Building. This permission included the felling of trees on the perimeter of the release land. On 12 August 2019 the release land was enclosed by fencing and transformed into a builders' compound.
13. I accept the submission made by Mr Whale that the Application should be determined based on the assessment of the state of the release land as of 11 August 2019. This represents the appropriate 'base line' position for the Inquiry.
14. I therefore find for the purposes of this Inquiry that the Application is not to be determined on the basis that the release land is currently in use as a municipal car park, or as a builders' compound.
15. Moreover, I find that the trees felled on the perimeter of the release land were felled pursuant to the planning permission dated 1 April 2019, and as such were lawfully felled.
16. Finally, I should mention that Ms Allan has contended in paragraph 22 of her Closing Submissions, that the release land has been the subject of a continuing trespass by the County Council, and that its use and occupation is to be construed as being unlawful. I reject that analysis not least by reason of the fact that a landowner cannot trespass on their own land unless there is some breach of any lawful requirements.

¹ There was some debate during the course of the Inquiry whether members of the Public could have access to the proposed Members' car park for parking and also access on foot. It was indicated on behalf of the County Council that the Public would still be able to access the new car park on foot as a 'cut through' via 'gaps' for pedestrians, and to be able to 'push buggies around'. There was no evidence that the Public would not be able to use the car park for parking, although its primary purpose is to be for Members' use.

² For an analysis of the release land, see paragraphs 4 – 17 of the 'Statement of Common Ground' made between the County Council, and 'the Freemen, and 'the Parish Council.

17. I therefore find for the purposes of this Decision there has been no such breach, and the use and occupation of the release land for different purposes over the decades cannot be construed as having been unlawful. Indeed, the Freeman have expressly authorised or accepted such occupation for differing purposes.
18. Further, the fact that there was a building on the release land historically occupied by the Royal Observer Corps, and more recently used as a car park, did not prevent the release land from being registered as common land. The implication therefore is that such use and occupation was not considered to be unlawful by the Commons Commissioner when making the order to register the whole of the land comprising The Sands in the Commons Register, and subject to the registered rights.
19. In my judgment, I therefore consider that the assumption which could be made by the Secretary of State when considering an application under Section 16(1) of the 2006 Act that enclosure or works are unlawful, is not justified in the present circumstances.

Main Issues

20. Section 16(6) of the 2006 Act sets out the criteria to which I must have regard on behalf of the Secretary of State when assessing an application for exchange of common land. I now turn to the criteria set out in section 16(6)(a)-(d) of the 2006 Act, and the Reasons for my Decision.
21. I am required by section 16(6) of the 2006 Act to have regard to the following in determining this application:
 - (a) the interests of persons having rights in relation to, or occupying, the release land.
 - (b) the interests of the neighbourhood.
 - (c) the public interest.
 - (d) any other matter considered to be relevant.
22. I will also have regard to published guidance in relation to the determination of the application under section 16.³

Reasons

Background

23. The Commons Register Unit CL29 known as The Sands extends to 2.91ha of which the release land comprises about 6% of the whole. The release land forms part of the Durham City Conservation Area. It has for some decades had a hard surface suitable for the parking of vehicles. In recent history it has therefore remained a small parcel of land unusable for the purposes of a common in any conventional sense. The replacement land lies to the north of the release land and is more than 10 times its size. It is located at Aykley Heads which is approximately 1.8 kms walking distance from The Sands and is about 0.79 km distance as the crow flies. There is an uphill gradient of about 55m from the release land to the replacement land. The replacement land comprises a large area of undulating meadow land set to grass. It is gated and enclosed by fencing. It lies within the Green Belt and is

³ Common Land Consents Policy Guidance, November 2015 Defra.

designated as an Area of High Landscape Value. There are no documented public rights of way across it. Currently it is not legally accessible to the public, although it is seemingly used occasionally on a permissive basis for certain activities.

The interests of the persons having rights over the release land

24. The full criterion set out in section 16(6)(a) is the following – ‘the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it)’. The County Council is the occupier and owner of the release land and makes this Application based on these combined interests.

The Commons Register

25. Insofar as the rights of third parties in relation to or occupying the release land are concerned, the primary party in this regard are the Freeman. However, the Freeman do not own, lease, or occupy any part of the release land. Their rights of common derive from the registration of a grazing right of common over the Register Unit. This is referred to in the Rights Section of the Register of Common Land held by the Registration Authority, namely the County Council. Entry No.1 dated 3 December 1968 in favour of the Freeman defines the particulars of the right of common as being -

‘to graze 20 cows, 60 sheep, 10 goats and 10 horses over the whole of the land contained in this Register Unit.’⁴

26. As Entry No.2 in the Rights Section reveals, this registration became final on 27 October 1981 in accordance with a decision made on 3 June 1981 by the then Chief Commons Commissioner, Mr G D Squibb. It is also to be noted that The Sands was registered in the Ownership Section of the Register Unit on 13 October 1986 in favour of the predecessor to the County Council made in accordance with a direction of Mr A.A. Baden Fuller, Commons Commissioner, pursuant to section 8(2) of the Commons Registration Act 1965.

27. Mr Whale highlights the following wording of the sub-section - ‘... *and in particular persons exercising rights of common over it*’. He submits that it is clearly envisaged that a person or persons to have status must be such a person who *currently* exercises rights of common over the Release Land. In this regard, Counsel makes three submissions: -

- (1) the Freeman do not currently exercise their registered grazing right of common, whether on the Release Land, or anywhere else on The Sands.
- (2) there is no evidence before the Inquiry that the Freeman (or any of them) have exercised the grazing rights of common as specified in the Commons Register anywhere on The Sands since 7th April 1837, at the latest;⁵ and
- (3) the Freeman have surrendered their grazing rights of common over the release land until at least 7 September 2080.

⁴ See page 645 of the County Council’s Bundle.

⁵ See page 57 of the County Council’s Bundle where there is a copy of a Minute referring to the grazing of sheep and cattle by Freeman.

28. In essence, therefore, it is the case for the County Council that the Freeman have no standing insofar as criterion (a) is concerned. I agree with that submission.⁶ Accordingly, in my judgment I consider that the granting of the Application would not be contrary to the interests of the Freeman having regard to evidence. In other words, I find that the proposed de-registration and exchange will have no adverse effect on the interests of persons occupying or having rights in relation to the release land.
29. Further, as will be noted below, I find that the proposed exchange will, on balance, have minimal or limited adverse on the interests of the neighbourhood and the public, and will be offset by the benefit to others, for the reasons stated, below.

The interests of the neighbourhood

30. The 2006 Act does not define the term 'neighbourhood'. However, published guidance⁷ makes it clear that the term shall be construed as likely to refer to the local inhabitants.
31. Both Counsel in their Closing Submissions, and Mr Alan Kind on behalf of the Open Spaces Society, have referred to several definitions of the term for my consideration. I propose to set out various definitions which appear in the source material and referred to by the parties.

True construction and definition of the 'neighbourhood'

32. The Shorter Oxford Dictionary⁸ refers to the neighbourhood as being:
- (a) the people living near to a certain place or within a certain range, neighbours; a community, a certain number of people who live close together,
 - (b) a district or portion of a town, city, or country, especially considered in reference to the character or circumstances of its inhabitants, a small but relatively self-contained sector of a larger urban area.

Section 16 Case law

33. In the *New Addington* case, the Inspector stated that '... it seems appropriate to regard the entire town [i.e., Addington] as 'the neighbourhood' for the purposes of assessing this application.'⁹
34. In the case of *R (Tadworth & Walton Residents' Association) v Secretary of State for Environment, Food & Rural Affairs* (referred to as the *Walton Heath Golf Club* case),¹⁰ relevant passages in the Inspector's Decision at first instance were cited by Holgate J during his appeal judgment. In so far as the Explanatory Memorandum is concerned (to which I have referred above) the Inspector repeated the reference 'neighbourhood' to mean 'the local inhabitants to the common as a whole'. However, he stated that '...clearly the impact of the proposed exchange is likely to be the greatest on those living closest to the release and/or the replacement

⁶ See Appendix 1 being a summary of the case presented by the County Council in relation to criterion (a).

⁷ The Explanatory Memorandum to the Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007, SI2007/2589 at [7.3].

⁸ Ms Allan relies upon the definition contained in the Oxford English Dictionary which contains a similar phraseology.

⁹ PINS Ref: COM/3240827 – *Land west of Central Parade, New Addington, Croydon, CRO OJB*. the decision date was 5 November 2020. This was a village green case.

¹⁰ EWHC 972 (Admin), per Holgate J.

land.....Accordingly. Whilst I have taken account of the interests of all local inhabitants, I have given most weight to the interests of people living in these areas.’¹¹

35. The Inspector concluded that at least six settlements formed part of the neighbourhood (in the singular) of the common, the settlements being Walton-on-the-Hill, Tadworth, Lower Kingswood, Mogador, Buckland, and Reigate.¹² He noted that these various settlements were bisected by the M25 motorway. The release land and the replacement land were 1.3km apart and were divided by the M25 motorway.¹³
36. Holgate J in his judgement made some observations based upon the Inspector’s findings, namely that the release land and the replacement land were of ‘very different character’, some of the footpaths and bridleways affording access were ‘steeply sloping and muddy in wet weather’, whereas other footpaths and bridleways passed close to the M25 motorway and suffered from traffic noise. He further noted that there was no vehicular access or car park close to the replacement land.¹⁴ Holgate J also noted the findings of the Inspector that the replacement land was not ‘as accessible to the release land’,¹⁵ and that it offered ‘a different sort of experience’ and it would be ‘considerably less accessible’ to certain residents, but on the other hand it would be more accessible to others.¹⁶ ‘Overall therefore it would appear that the proposed exchange would result in some adverse effects for some local inhabitants but these would be limited to some extent and at least partially offset by benefit to others.’¹⁷
37. Holgate J then referred to the Inspector’s conclusion that ‘the effect of the proposal would be, to some extent, adverse’,¹⁸ but the Inspector nevertheless granted the application.
38. The question of defining the term ‘neighbourhood’ was described by Holgate J as ‘quintessentially a matter for the judgment of the Inspector’.¹⁹
39. Thus, the challenge to the Inspector’s decision failed in front of Holgate J.

Other case law cited by the parties

40. Mr Kind, on behalf of the Open Spaces Society, cited two authorities, namely the *Cheltenham Builders* case²⁰, and the *Sainsbury’s* case²¹. Neither of these cases

¹¹ Quoted by Holgate J at [23].

¹² At [24]. For the purposes of this Decision, I consider I am not required to take into account any benefit to any neighbourhood different from the neighbourhood of the release land. I agree with Mr Whale that this is an issue which can be safely left for determination in another case and does not fall to be determined in this Decision.

¹³ At [5] – [6].

¹⁴ [26].

¹⁵ [27].

¹⁶ [30].

¹⁷ [31], citing the overall conclusion of the Inspector.

¹⁸ [32].

¹⁹ [83].

²⁰ *R (oao Cheltenham Builders Limited) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), per Sullivan J.

²¹ *Sainsbury’s Supermarkets Limited v National Appeal Panel for Entry to the Pharmaceutical Lists* [2003] SLT 688; [2002] 11 WLUK 836. This was in fact a Scottish case dealing with the necessity or desirability of securing adequate provision of pharmaceutical services in ‘the neighbourhood’ in which the premises were situated. This was an appeal to the Outer House, Court of Session from the Panel, who stated that the definition of ‘neighbourhood’ ‘included areas beyond the boundary, including one of the two pharmacies. The Panel stated that this area, ‘formed a natural neighbourhood within reasonable walking distance of the proposed premises’. The Court of Session refused the petition and stated that the Panel had not erred in it reaching its decision. The Panel went on to state that ‘the ascertainment of the

relate to section 16 of the 2006 Act, and any dicta relied upon can only be of persuasive authority. I note in this regard that in the *Walton Heath Golf Club* case Holgate J declined to rule on whether case law on the meaning of neighbourhood in section 15 of the 2006 Act could or should be read across to section 16, which as he stated, 'raises some difficult issues'.²² I therefore propose to tread with care in relation to submissions made by reference to dicta in such cases.

41. The Objectors place reliance upon the words 'cohesive' and 'cohesiveness' as referred to in the *Cheltenham Builders* case by Sullivan J. He referred to the fact that the registration authority must be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. This test of cohesiveness was applied in *Paddico* where Vos J summarised the position by stating that "a neighbourhood is understood to be a cohesive area which must be capable of meaningful description in some way."²³
42. Mr Whale, in his Closing Statement makes the further point that it is clear that an adverse finding with respect to section 16(6)(b) does not preclude the granting of an application. In the *Walton Heath Golf Club* case the Inspector found that the proposed exchange would result in some (limited) adverse effects for local inhabitants. However, this was not fatal to the Application. Thus, the implicit submission made by Mr Kind that in such circumstances the application must fail in the event of an adverse finding under section 16(6)(b) is therefore incorrect.
43. I conclude that although judicial dicta in these cases is of relevance, it is not determinative to my findings in this Decision.

Assessment of the factual evidence on 'the interests of the neighbourhood'

44. It is now necessary to turn to the perceptions of the word 'neighbourhood' in the contextual framework of the factual evidence adduced by the Objectors. I must state at the outset that the parties demonstrated very different interpretations of this concept. The interests of the neighbourhood are perceived in different ways. Undoubtedly the proposed exchange would result in limited adverse effects to some local inhabitants, but these may be offset by the advantages and benefits gained by others. A balancing exercise therefore needs to be undertaken.
45. The Freemen and the Parish Council both submit that the word 'neighbourhood' means 'the area occupied by the local inhabitants'.²⁴
46. For its part the Trust in its evidence regarded the City of Durham as being a single 'neighbourhood', and perhaps even a wider area.²⁵ It conceded that the replacement land at Aykley Heads, and the release land at The Sands are both within the area considered by the Trust as lying within the same neighbourhood.²⁶

neighbourhood was primarily a matter of facts and circumstances and were suited to resolution by a committee or panel than through rigorous and detailed legal or linguistic analysis and might depend on a great number of factors. In this case the Panel had carefully defined the boundaries of the neighbourhood as a matter of fact giving reasons for the area selected. It would not have been appropriate for the Panel to adopt "reasonable walking distance" as a formal definition, distance could be a useful guide to the extent of a neighbourhood. That appeared to be how the Panel had regarded it.'

²² [96].

²³ [97].

²⁴ See paragraph 21 of their Statement of Case. It is also to be noted that the position of the Trust at the outset of the Inquiry was that the neighbourhood '... is not a line on a plan but "communities with a sufficient degree of cohesiveness" in relation to the land.'

²⁵ See the fourth object for which the Trust was established, namely object D where a stated aim is [T]o aid in preserving and maintaining public rights of way in the neighbourhood of Durham...'

²⁶ Mr Michael Hurlow.

47. Ms Janet George stated that 'my neighbourhood' comprises four streets by The Sands, plus two more, being the extent of the area of the Community Forum. She asserted that Aykley Heads was definitely not part of her neighbourhood. She also stated that there were at least nine resident areas – she perceived them as being 'separate entities'. She stated that the Neighbourhood Plan defines different neighbourhoods and resident areas.
48. Ms Victoria Ashfield claimed that the 'neighbourhood' is what she can see from her window but adding in addition that this is 'very largely equivalent' to the boundary of the old Parish of St Nicholas. In fact, the boundary of St Nicholas Parish does not conform to the stated area that she can apparently see from the window of her house. However, in contradiction to Ms George's evidence, Ms Ashfield then stated that in her perception the opposite side of the River Wear formed part of the 'extended neighbourhood', but not the 'immediate neighbourhood'.
49. Dr Kathryn Banks contended that the 'neighbourhood' is 'the area of The Sands really', but also including in her perception the area of Claypath, and '... where I can walk to with my children', i.e., four streets. Dr Banks then asserted that the 'neighbourhood' is in fact the area of the Community Forum but did not define its extent.
50. In contradistinction, however, Professor Alexandra Harrington considered that the 'neighbourhood' meant 'your immediate environment' i.e., work and school. In general terms she characterised this definition as being Claypath and The Sands, but also '... part of the City - somewhere I go to'.
51. Professor Harrington also included in the definition of 'immediate environment' not only Claypath, but also Gilesgate, and The Sands. However, this did not include the whole City, Neville's Cross, or Aykley Heads.
52. Ms Jean Crowden considered that the City of Durham parliamentary constituency constituted the 'neighbourhood', and that her home village of Hett (an adjoining Parish) lay within it.²⁷ On this interpretation, this would mean that both the replacement land and the release land lie within the same area.
53. Mr Roger Cornwell did not consider that he lived in the neighbourhood of The Sands, even though his house in the Avenue is situated only about one mile from the release land. Instead, he preferred to identify his 'neighbourhood' as lying within the Crossgate area,
54. For their part the County Council submit that the 'neighbourhood' refers to the local inhabitants to the common 'as a whole', and in this regard rely upon the evidence of the Trust, (referred to above), and that of Mr Ogden – the City Council's Rights of Way Officer²⁸
55. Thus, in summary, various interpretations there were made in this regard by the Objectors as to the identification and extent of 'the neighbourhood' during the Inquiry. These centred on whether 'the neighbourhood' conformed to the boundaries of the City of Durham; the City of Durham Parliamentary Constituency; the old Ecclesiastical Parish of St Nicholas; the City of Durham Parish Council; the Plan annexed to the Durham City Neighbourhood Plan; the roads identified by the

²⁷ Hett is about 10km south of the Release Land.

²⁸ Mr Ogden in his evidence stated that both the release land and the replacement land lie within the same Parish within the City of Durham which constituted a single 'neighbourhood' for the purposes of the Application.

Community Forum; or what you can see from one's window. The position was made more complicated by the fact that in some cases the legal boundaries have been modified and altered.

56. In her Closing Submissions Ms Allan accepted that those who gave evidence to the Inquiry identified what they perceived as being the 'neighbourhood' in different terms but asserted that '...it is the same area being identified.'
57. I do not accept this submission. What was striking about the Objectors' evidence was the level of disagreement, contradiction, and lack of consistency between the witnesses as to the perception, identification, and extent of 'the neighbourhood'.
58. Also, during her Closing Submissions Ms Allan sought to adduce in evidence a map delineating the boundary of the Church of England Ecclesiastical Parish of St Nicholas on the basis that this boundary represents the 'neighbourhood'. However, there was no evidence adduced during the course of the Inquiry that sought to rely upon this boundary as the boundary of 'the neighbourhood', and I made a ruling to the effect that this map was inadmissible as no evidence had been led to the Inquiry to that effect. As a consequence, I ruled that the Objectors could not seek to rely upon this map as delineating the 'neighbourhood'.

Conclusion on the 'interests of the neighbourhood'

59. Drawing together the various strands and the interaction between the definition of 'neighbourhood', the case law, and the factual matrix, I have come to the following conclusions: -
- (1) I rely upon the *New Addington* case (a section 16 case) where the Inspector found that the 'neighbourhood' could be perceived as including the 'entire town'. I also rely upon the dicta of Holgate J in the *Walton Heath Golf Club* case, where it is to be noted that the word 'neighbourhood' should be construed as likely to mean 'the local inhabitants as a whole'. The factual background to the *Walton Heath Golf Club* case also demonstrates that areas of a very different character forming different settlements can still, in effect, be construed as the same 'neighbourhood'.
 - (2) Further, in my judgment, the issues raised by much of the factual matrix in the *Walton Heath Golf Club* case is indistinguishable from the facts raised in the present case. In particular I cite the following factors: -
 - (i) the release land and the replacement land were bisected by the M25 Motorway. In the present case the two parcels comprising the release land and the replacement land are bisected by the main London to Edinburgh railway line.
 - (ii) the two parcels lay 1.3km apart. In the present they lie 1.8 kms walking distance, or 0.79km as the crow flies.
 - (iii) the respective parcels were of a very different character in the *Walton Heath Golf Club* case. In the present case the two parcels are also of very different in character - a small area of hard-surfaced land which (with the consent of the Freeman) has not been utilised for the purposes of common land in recent history, as opposed to a large undulating area of open countryside which, I find will be of considerable benefit to the local inhabitants.

- (iv) the replacement land is less accessible to those persons who live close to the release land, but potentially accessible to those who live in the vicinity of the replacement land.
 - (3) The experience offered to the local inhabitants by the use of the replacement land as a common will be markedly different from the historical experience of those using the release land. The replacement land is a wide-open green space of undulating countryside - whereas the release land is a small parcel of hardstanding comprising a former coach and car park over which the public had restricted access, particularly when in use for those purposes.
 - (4) The direct evidence of the public using the release land for air and exercise was sparse. Until its surrender in February 1994 the Royal Observer Corps held a lease of this parcel of land to which the public had no access. Between the mid-1990s and 12 August 2019 when it was possible for persons to gain access for air and exercise, but undoubtedly restricted when the parcel was used for parking of vehicles. Such use as that was adduced was confined to some anecdotal evidence, such as occasional skateboarding, pushing of babies in wheelchairs, and so forth. No evidence has been forthcoming of its use by horse riders.
60. I conclude that the entire City of Durham, as conforming to the boundaries of the Civil Parish of Durham is a cohesive entity and constitutes the 'neighbourhood' for the purposes of this Decision. I therefore agree with the submissions made by Mr Whale to the effect that the release land and the replacement land lie within the same neighbourhood.
61. Thus, in my judgment, in so far as the interests of the neighbourhood under section 16(b) of the 2006 Act are concerned, the 'neighbourhood' is to be construed as extending to the entire City of Durham, namely by reference to the Civil Parish.
62. On balance, I therefore consider that the proposed exchange will have limited or minimal adverse effect on the interests of some local inhabitants to the release land, but this will be offset by the benefit to others in the City of Durham by the inclusion of the replacement land.

The Public Interest²⁹

Nature Conservation

63. It is common ground between the County Council, the Freeman, and the Parish Council that the release land contains no habitats, designations, protected species, protected trees, or protected hedgerows.³⁰ I have already made mention that the trees in and around the release land which were felled prior to 11 August 2019 are an irrelevant consideration for the purposes of this Decision as they form no part of the 'base line'.
64. There was limited evidence in relation to the release land insofar as nature conservation is concerned. The County Council adduced evidence from Mr Stuart Priestley (who is qualified in ecological matters), and his evidence, in effect, was that the nature conservation impacts arising from de-registering of the release land

²⁹ S.16(8) of the 2006 Act provides that the public interest 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 or archaeological remains and features of historic interest.

³⁰ See Statement of Common Ground, paragraph 17.

would be 'negligible'. It is apparent from Mr Priestley's evidence that the key ecological linkages insofar as nature conservation is concerned lie outside the Release Land.

65. In essence, therefore, I am invited to find based on the agreed position contained in the Statement of Common Ground, and Mr Priestley's evidence that de-registration will have a negligible impact on the conservation value of the Release Land.
66. For her part, Ms Allan suggests that no evidence was led by the County Council insofar as the ecological value of the release land at the appropriate stage. I do not accept this submission, not least because of the terms of the agreement contained in the Statement of Common Ground, to which I have referred above.
67. Insofar as the replacement land is concerned, this has no habitats or wildlife designations, protected trees, or protected hedgerows. It is submitted by Mr Whale that all this is agreed in the Statement of Common Ground.³¹ It is also agreed that the replacement land is not provided as a statutory nature reserve under Section 21 of the National Parks and Access to the Countryside Act 1949.
68. Ms Allan was concerned to emphasise the email of the 19 October 2018 from the County Ecologist. This refers to the adverse impacts on the habitat quality on the replacement land caused by trampling, and the disturbance of breeding birds.
69. However, as Mr Priestley explained in his Proof of Evidence, and confirmed during cross-examination, that any potential impacts arising from the registration of the replacement land as common land upon ground-nesting birds can be mitigated using signage, mown paths, and the creation of an additional access point. In such circumstances, as Mr Priestley indicated, any such disturbance could be reduced to a reasonable level and any impact upon breeding would not be significant at a population level.
70. Thus, insofar as the sub-criterion of nature conservation is concerned, I do not consider that the Application raises any nature conservation issues.

Conservation of the Landscape

71. Insofar as conservation of the landscape is concerned, the release land is not subject to any national or local landscape designation. It is not designated as an Area of Higher Landscape Value. The release land lies within the urban area of the City of Durham, and historically appears to have had industrial use. It is identified as 'Developed' in the County Durham Landscape Strategy (2008). Further as it is classified as urban land it was not assessed as part of the County Durham Landscape Value Assessment (2019).
72. It is common ground that the former use of the release land as a coach park does not form part of the landscape baseline. It is, in effect, a parcel of land with a hard surface. I therefore reject the contention that the release land has a 'rural appearance'. Indeed, I can find no support for such a proposition at any stage of its recent history bearing in mind the various activities which have been carried on this patch of hardstanding for many decades. Indeed, as Mr Whale has submitted, a previous Inspector during the course of an earlier inquiry concluded that the release land had an 'urbanised appearance'.³²

³¹ See paragraph 20 of the Statement of Common Ground.

³² See the Applicant's Bundle at page 966, at paragraph 6.9.

73. Accordingly, I reject the contention that the landscape value of the release land is 'medium', or 'could be raised to high', as stated in Mr Hurlow's proof of evidence. As Mr Whale has submitted, Mr Hurlow's valuation relies upon his adaptation of the ICOMOS scale which is guidance used for World Heritage Sites.
74. It is clear, in my judgment, Mr Hurlow's interpretation of the ICOMOS scale in this regard, is unusual. Accordingly, I reject that it has any value and adopt the approach contended for by Mr Lawson and that the landscape impact on the release land of deregistration would be neutral.
75. Insofar as the replacement land is concerned, this is not only designated as Green Belt, but it is also designated as an Area of Higher Landscape Value. It is grass, gated and fenced. I accept the explanation put forward by Mr Lawson in his Proof of Evidence that registration of the replacement land as common land 'would have no effect on the landscape of the replacement land which would retain its character as open grassland.'
76. Indeed, as Mr Whale submits, it is common ground between the County Council, the Freeman, and the Parish Council that registration of the replacement land as common land and its subsequent use of a public access and recreation '... would not give rise to any adverse landscape ... impact ...'.³³
77. Accordingly, I find that the Application does not give rise to any conservation of the landscape issues, and as agreed by Ms Allan would be unaffected by the proposed registration.

Protection of Public Rights of Access to any area of land

78. In the Statement of Common Ground, the following paragraphs are relevant in this regard: -
- (1) *Paragraph 17* – there are no public rights of way over the release land. However, the public will have a continuing ability to access the release land if the Application is granted. They will continue to have a right of access onto and over the balance of The Sands in any event. Furthermore, the public will have a right of access onto and over the replacement land which they currently do not enjoy.
 - (2) *Paragraph 19* – it is agreed that there are permissive footpaths and a permissive cycle path around the perimeter of the replacement land, and that the replacement land is accessed on foot and by vehicle from The Sands, and elsewhere.
 - (3) There will be a net increase in the amount of land over which the public will have access. In other words, there will be no net loss of land if the Application is granted. There is agreement that granting the Application would have no adverse impact on the rights of way network.
79. Accordingly, I reject the submissions made by Ms Allan that the replacement land is already used by the public by reference to the 'stretching' of fences and 'desire lines' crossing the replacement land. It may be that members of the public had been using parts of the replacement land, but in my judgment, such activities are not as of right, but on the contrary could be construed as acts of trespass.

³³ See Statement of Common Ground, paragraph 22.

Accordingly, again, I find that the public do not possess any current rights of way over the replacement land.

Protection of Archaeological Remains and Historic Features

80. As is agreed in the Statement of Common Ground that neither the release land nor the replacement land contains any known archaeological remains, and that granting the Application will have no adverse archaeological impacts upon the release land, the remaining balance of The Sands, or the replacement land.³⁴
81. Further, I find that the release land contains no heritage assets, either designated or non-designated. The release land lies within the Durham City Conservation Area, However, there is no reference in the adopted 2016 Conservation Area Character Appraisal to the release land having any special interest or significance, whether in terms of aesthetic or communal value, or otherwise.
82. In this regard, I reject the contention made by Mr Hurlow that the release land 'could be considered high' in significance, and of 'at least national importance', or even of 'global importance', as he asserted. These adjectives could be construed as having hyperbolic content. Mr Hurlow also made further assertions about the value of the release land in heritage terms, all of which I reject as being unsupportable.
83. I therefore consider that the release land possesses minimal significance in heritage terms.

Conclusion on the public interest.

84. On balance I consider that the overall effect of the proposed exchange will have a positive outcome. The public will be well served by the addition to the existing common land within the City of Durham a large new area of undulating open countryside for air and exercise.

Other Matters

85. The full criterion set out in Section 16(6)(d) relates to 'any other matter considered to be relevant'.
86. Paragraph 22 of the Statement of Common Ground states that registration of the replacement land would not give rise to any adverse visual impact. Further, Mr Lawson concluded that the visual impact of de-registration of the release land would be neutral and that registration of the replacement land as common land in the place of the release land would have no effect on its features, character, or visual appearance. It is also to be noted that, having regard to the evidence as adduced on behalf of the County Council, the points made as to the granting the Application would give rise to socio-economic benefits associated with the use of the HQ Building or use of the current County Hall site as a strategic employment site, are no longer pursued. In effect, this point was abandoned by Mr Whale as their witnesses accepted that these benefits did not depend on the granting of the Application.
87. However, the County Council maintains the position that granting the Application would have the benefit of regularising the de facto position which has existed for several decades for parking until February 2019. The Freeman have expressly

³⁴ See paragraphs 17 and 23.

consented to the use of the release land for municipal parking until September 2080.

88. It is also submitted that granting the application would avoid the additional burden of having to re-site the water storage tank at some cost, together with having to make alternative provision for Members' parking.

Car parking

89. Insofar as car parking is concerned, I disagree with Ms Allan that if the new Members' car park is constructed in accordance with the plans there would be no guarantee that the Members' car park would be made available for public use. On the contrary, it is apparent from the approved planning drawings that there would be no restriction for public access on foot in order to be able to cross the new car park to access the River Weaver even when the barriers were in place by utilising the gaps in the perimeter fencing.
90. I therefore discount the evidence adduced by some of the Objectors, that car parking is a crucial issue in the case. As I have already indicated on more than one occasion during the Inquiry, I do not consider that car parking is a relevant feature to the determination of the Application in any event.
91. Finally, as set out in paragraph 14 of the Statement of Common Ground, the planning merits of the HQ Building are not an issue. At the application stage planning permission was challenged and that challenge failed. The Inquiry is therefore faced with the de facto position that not only was planning permission granted for the construction of the HQ Building, and the use of the release land as a car park, but also the construction of the Council HQ has almost been completed. Further, the new car park will undoubtedly be constructed.

In essence, the reality on the ground is that the County Council HQ Building will not be unbuilt. This was accepted by many of the Objectors. It was also accepted that the coach park will not return. However, the future use of the HQ Building remains subject to the County Council's review. This may possibly be completed in the Autumn, and the use of the HQ Building may be re-determined. However, this is not a matter for this Inquiry. As I have already indicated in my judgment, whatever may happen in the future is irrelevant to the decision which I have to make following this Inquiry. In short, it is not my role to speculate on what may or may not happen in the future.

Conclusion

92. I appreciate that not everyone can be satisfied with this outcome, and strong feelings were expressed by some of the Objectors about the loss of a parcel of common land. I accept that the proposed exchange will affect people in different ways. However, on balance and taking all the factors into account to which I have referred, above, I conclude that the factors in support of the Application outweigh the identified disadvantages. Further, it is apparent that there is no adverse impact occasioned to any person with an interest in the land.
93. Thus, overall, therefore, in my judgment, the proposed de-registration and exchange will have no adverse effect on the interests of persons having rights over the release land, the interests of the neighbourhood, or on the wider public.
94. Accordingly, the Application should be granted.

Order

On behalf of the Secretary of State for Environment, Food and Rural Affairs and pursuant to Section 17(1) and (2) of the Commons Act 2006, **I HEREBY ORDER** Durham County Council as commons registration authority for the area in which the release land and replacement land are situated:

- (a) to remove the release land from its register of common land, by amending the register unit CL29 to exclude the release land.
- (b) to register the replacement land as common land, by amending the register unit CL29 to include the replacement land; and
- (c) to register as exercisable over the replacement land (in addition to remaining exercisable over the remainder of the land comprised in register unit CL29), any rights relating to its status as common land which, immediately before the date on which the release land is removed from the register, are registered as exercisable over the release land and the remainder of the land comprised in register unit CL29.

First Schedule – the release land

Colour on Plan	Description	Extent
Edged Red	The parcel of land comprising 1,675m ² and forming part of register unit CL29 identified as 'release land' edged red on the Plan dated 20 August 2019 annexed hereto.	1,675m ²

Second Schedule – the replacement land

Colour on Plan	Description	Extent
Edged Green	The parcel of land comprising 18,371m ² and forming part of register unit CL29 identified as 'replacement land' edged yellow on the Plan dated 20 August 2019 annexed hereto.	18,371m ²

Edward Cousins

Inspector

APPEARANCES

For the Applicant Durham County Council:

Mr Stephen Whale of Counsel, instructed by Durham County Council
who called:

Mr David Mason	Archaeology
Mr Henry Jones	Planning
Ms Susan Robinson	Ownership and History
Mr Mike Ogden	Rights of Way
Mr Mike Allum	Economics
Mr David Sparkes	Heritage
Mr Gerard Lawson	Landscape and Visual
Mr Stuart Priestley	Ecology

For the Objectors: Ms Nicola Allan, of Counsel, who represented the following Objectors, namely the Freemen of the City of Durham, the City of Durham Parish Council, and the City of Durham Trust

who called:

Mr Phillip Wills	the Freemen of the City of Durham the Freemen of the City of Durham
Mr Michael Hurlow	the City of Durham Trust
Mr Colin Wilkes	the Durham Markets Company
Ms Elizabeth Scott	the City of Durham Parish Council
Ms Victoria Ashfield	the City of Durham Parish Council
Ms Janet George	the St Nicholas Community Forum
Mr Roger Cornwell	the City of Durham Parish Council

Other Objectors who gave evidence

Mr Alan Kind	Open Spaces Society
Ms Jean Crowden	
Mr James Cowan	
Dr Kathryn Banks	
Professor Alexandra Harrington	
Ms Miriam Johansen	letter

INQUIRY DOCUMENTS

1. The Application
2. Applicant's Opening Statement
3. Opening Submissions on behalf of the Freemen, the City of Durham Parish Council, and the City of Durham Trust
4. Closing Submissions on behalf of the Freemen, the City of Durham Parish Council, and the City of Durham Trust
5. Applicant's Closing Statement
6. Mr Alan Kind of the Open Spaces Society who provided the following documents –
 - (1) Opening Statement
 - (2) Summary Statement of Case
 - (3) Statement of Case
 - (4) Summary Proof of Evidence
 - (5) Further Submission dated 30th April 2021
 - (6) Submission on the definition of 'neighbourhood' – singular or plural
 - (7) letter to the Inspector dated 12 May 2021
 - (8) two consent orders CO/1076/2003 and CO/755/05.
 - (9) extracts from rights of way advice note 3, page 2.
7. Statement of Common Ground
8. Proofs of Evidence and Summaries of Proofs of Evidence and other documents supplied by the witnesses referred to in the List of Appearances
9. The Parish Map
10. Bundle of photographs from Mr Cowen

APPENDIX 1

THE RIGHTS OF THE FREEMEN OVER THE RELEASE LAND – SUMMARY

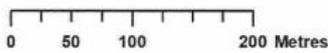
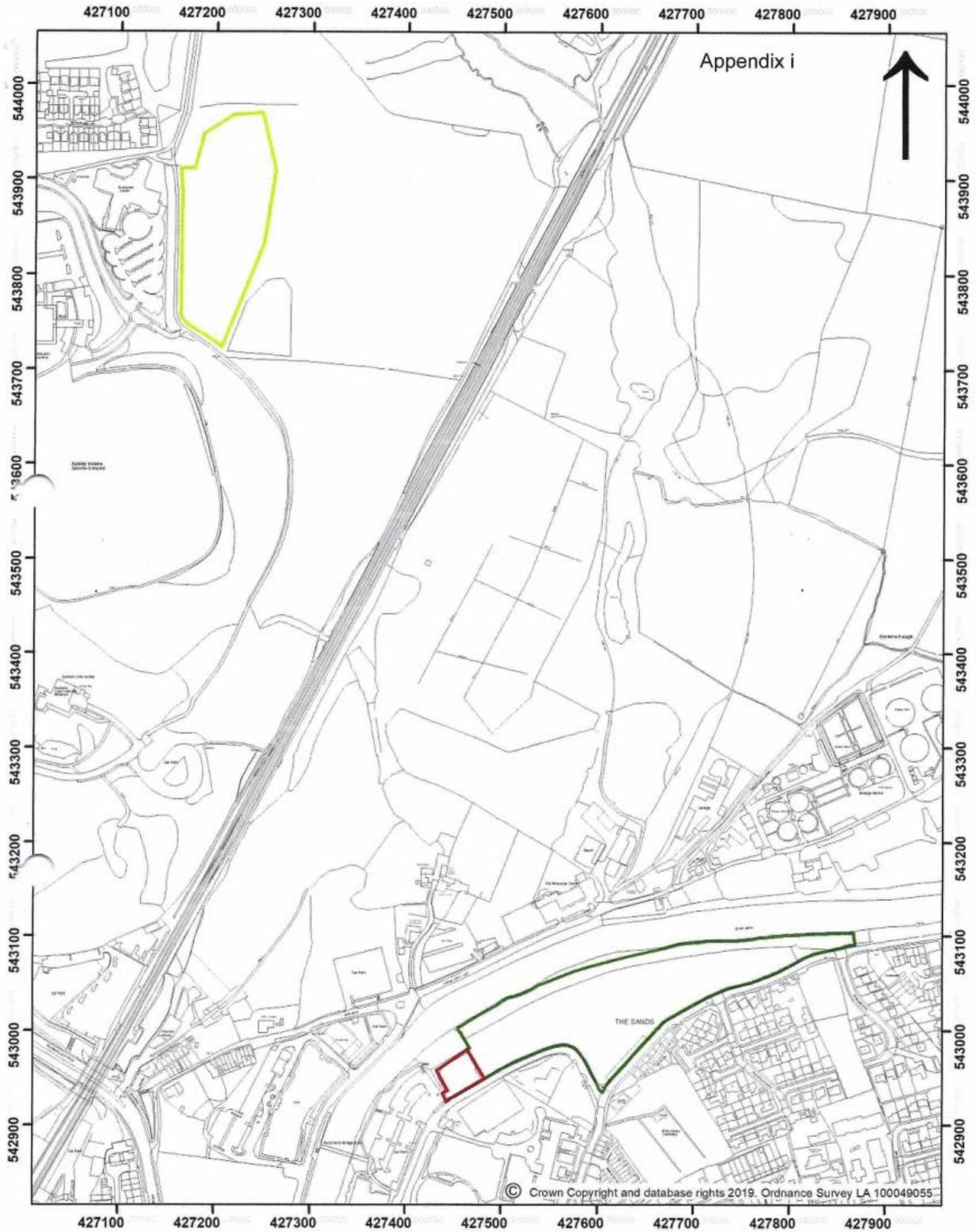
1. The Freeman were established in 1179. The Freeman's registered right of common under the 2006 Act is a right to graze 20 cows, 50 sheep, 10 goats and 10 horses over the whole of the register unit comprising The Sands. However, the historical evidence as to the actual use by the Freeman of the release land pursuant to their registered rights is scant, if non-existent. There is historical evidence that by 1768 a mill race had been established across the release land. It is also evident that the release land was in military use during the Second World War, and that the mill race was in active use until around 1960. History also reveals that the land was used by the Royal Observer Corps from around 1960 onwards, and then it was used as a municipal car park/coach park until February 2019. The Freeman expressly concede that they have not exercised their grazing right of common since the Second World War at the latest.³⁵
2. However, no evidence has been adduced to the Inquiry that any animal has ever been grazed by the Freeman on the release land, or The Sands in general. There is no evidence before the Inquiry that The Sands has ever been grassed for grazing, or that the Freeman have exercised a grazing right of common anywhere on The Sands since 7 April 1837 at the latest.
3. An indenture of 18 September 1850 ('the 1850 Indenture') the Freeman's right of common for all commonable cattle over certain land including The Sands. However, it also recorded (amongst other matters) that it was agreed that the Freeman would be paid compensation for the injury which might be caused to the herbage by the holding of 'Public Fairs'.
4. Pursuant to the agreement dated 3 November 1897 ('the 1897 Agreement'), the Freeman let the herbage growing upon The Sands to the County Council's statutory predecessor. The purpose of this arrangement was to enable The Sands to be used as a public recreation ground in consideration of the payment of rent to the County Council, thereby creating the relationship of landlord and tenant between the Freeman and the County Council. In essence, the Freeman waived their grazing right for the period of the agreement.³⁶
5. Subsequently under the terms of an agreement dated 18 January 1995 ('the 1995 Agreement'), the Freeman have surrendered all their rights contained in, or referred to, in the 1850 Indenture (including their right of common), in so far as it relates to the release land, until 7 September 2080, or as long as the 1995 Agreement continues to have effect.
6. The 1850 Indenture records that The Sands has been used for the holding of Public Fairs and that it would continue to be so used. It does not record that the Freeman have held or will hold Public Fairs. There is nothing in the

³⁵ Statement of Common Ground, paragraph 5.

³⁶ The agreement is still extant.

document to indicate that the Freeman had, or have, a right to hold Public Fairs, or that they would wish to do so. Given that the County Council would pay financial compensation for the injury which may be caused to the herbage by the holding of Public Fairs, and given that the County Council was afforded an entitlement to drain and improve The Sands 'for the better and more convenient holding of such Fairs', it is therefore apparent that the right to hold Public Fairs is a right which is held by the County Council, and does not inure for the benefit of the Freeman.

7. Pursuant to the 1897 Agreement, the Freeman reserved out of the 'letting and tenancy hereby created' the power unto themselves to carry on 'sports and pastimes' on The Sands for a week before and after Easter. There is no reference in this Agreement to the 'Easter Fair' or any other fair. There is no document before the Inquiry which refers to any right of the Freeman to hold a fair. On the evidence, they have no such right. It is apparent that the power reserved to the Freeman under this Agreement is not a right of common. It is a power afforded to the Freeman, not to the general public. If the Application is granted, the Freeman will continue to be able to carry on the fortnight of sports and pastimes on the balance of The Sands. Granting the Application does not therefore prejudice the Freeman's power to carry on these activities.
8. Under the 1897 Agreement, the Freeman also reserved to themselves a power to occupy and let 'sufficient space' within The Sands 'for the purpose of erecting a show, theatre, menagerie, circus or place of similar entertainment.' Again, this is not a right of common, but a power afforded to the Freeman - not to the general public. This only relates to 'sufficient space', not to the whole of The Sands. If the Application is granted, it will leave sufficient space on The Sands for the purpose of erecting a show, theatre, menagerie, circus, or place of similar entertainment. This the grant the Application would not prejudice the Freeman's power to occupy and let land on The Sands for erecting these kinds of entertainment.
9. Further, there is no evidence that the Freeman have any contractual entitlement to park on or station equipment on the release land.
10. If the Application is granted, the two powers referred to in the 1897 Agreement will not transfer to the replacement land. Further, the following entitlements on the part of Freeman would remain, namely, to receive -
 - (a) rent payable under the 1850 Agreement,
 - (b) rent under the 1897 Agreement, and
 - (c) payments under the 1995 Agreement.
11. If the Application is granted, the Freeman's right to exercise their grazing rights of common on the remaining 94% of The Sands would be unaffected.



Overview Plan (Plan 1)
 Date 20/08/2019 Scale 1:5,000

- Release land
 (1,675 m²)
- Replacement land
 (18,371 m²)
- Common Land
 (27,399 m²)

