IN THE MATTER OF 0.17HA OF LAND AT "THE SANDS", DURHAM

AND IN THE MATTER OF AN APPLICATION UNDER SECTION 16(1) COMMONS ACT 2006

APPLICANT'S CLOSING STATEMENT

Ax = pages in Applicant's Bundle

Ox = pages in Objectors'[1] Bundle

[1] "Objectors" (with a capital O) refers to the Freemen, the City of Durham Parish Council and the City of Durham Trust.

Introduction

1. The appointed Inspector is respectfully urged to grant the application by Durham County Council ("DCC") pursuant to its application dated 20 August 2019 and the plan submitted therewith.

Preliminary matters

2. Section 16(1) of the Commons Act 2006 ("the 2006 Act") provides, amongst other things, 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, as in this case, the release land is more than 200m²,[2] the application must include a proposal that land specified in the application ("the replacement land") be registered as common land in place of the release land. The application does include such a proposal. The replacement land is 1.84ha (or 18,400m²), more than 10 times the size of the release land.

The application

3. The application is made by DCC, the owner and occupier of both the release land and the replacement land.[3]

4. The release land comprises a small area of land to the east of the substantially completed new DCC HQ building.[4] It is covered in a hard

[2] It is 0.17ha, which is 1,700m².
[3] Decision to authorise the application at A666-7. Note also paragraph 15 of the Statement of Common Ground ("…DCC has complied with all the procedural requirements…").
[4] The use of the completed building is subject to the outcome of the pending review.

surface. The release land has had various uses over the years, most recently as a municipal coach park. This use ceased in February 2019.[5] On 12 August 2019, the release land was enclosed by fencing and made into a builders' compound.[6] Without any admission of unlawfulness, DCC is content for the Inspector to determine the application on the basis that the state of the release land on 11 August 2019 represents the appropriate baseline position. In other words, the application is not to be determined on the basis that the release land is in use as a municipal coach park or as a builders' compound. Moreover, the trees lawfully felled on the perimeter of the release land pursuant to the 1 April 2019 planning permission for the new HQ do not form part of the appropriate baseline either as Mr Hurlow agreed.[7]

5. The replacement land is enclosed by fencing, gated and set to grass. It has the appearance of undulating meadow land.

6. The reason for the application is to regularise the *de facto* position and permit the build out of the new HQ scheme planning permission without legal qualification. As part of that scheme, the release land is to be used as a car park and for the siting of a water storage tank. The release land would

[5] DCC does not accept *simpliciter* paragraph 111 of the Objectors' closing submissions to the effect that coach park use and common land rights can "co-exist" as there is a "lawful authority" test: section 193(4) Law of Property Act 1925. In any event, and contrary to paragraph 28 of the Objectors' closing submissions, no finding is needed as to whether the coach park use was unlawful. That use is unlikely, on the evidence, to return and it forms no part of the baseline.
[6] Contrary to paragraph 22 of the Objectors' closing submissions, a landowner cannot "trespass" on its own land.
[7] XX of Michael Hurlow.

therefore continue to have a hard surface. The recent change of political administration at DCC does not affect the determination of the application. The Inspector's determination will be on the basis of the inquiry evidence; it will not be on the basis of what may or may not be the outcome of the future options appraisal with respect to the future use of the building under construction.

7. DCC has entered into a Statement of Common Ground with both the Trustees and Wardens of the Freemen of the City of Durham ("the Freemen") and the City of Durham Parish Council ("DPC"). DCC commends it to the Inspector.

Main issues

8. The Inspector is required by section 16(6) of the 2006 Act to have regard to the following in determining the application:

   (a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);

   (b) the interests of the neighbourhood;

   (c) the public interest (as to which, see subsection (8)); and

   (d) any other matter considered to be relevant.

9. The Inspector should also have regard to the published guidance in relation to the determination of the application, namely Defra's November 2015 *Common Land consents policy*.

Some initial observations on the purported objections

10. The purported objections to the application are confusing and confused.

11. One remarkable fact may account for this. There is no evidence whatsoever before the inquiry that any of the Freemen, DPC, the City of Durham Trust ("the Trust"), the Durham Markets Company ("DMC"), the St Nicholas Community Forum ("SNCF") or the Open Spaces Society ("OSS") ever met after 20 August 2019 and formally resolved either to object to the application or to identify grounds of objection.

12. The Freemen are content for the release land to be used as a municipal car park with a hard surface until at least 7 September 2080.[8] They want the release land to be hard surfaced.[9] They have not asserted that the proposed members' car park and storage tank is in breach of the 18 January 1995 agreement,[10] to which they are a party, and which grants DCC full right and liberty to use the release land for the purpose of a municipal car park until 7 September 2080.[11] The Freemen concede that the former coach

[8] XX of Philip Wills.
[9] XX of Philip Wills.
[10] XX of Philip Wills. Agreement at A691-698.
[11] See A693.

park will not come back even if the application is refused.[12] It became apparent during the inquiry that the Freemen's understanding of their own legal rights and powers was wrong in numerous respects.

13. DPC has "no official view" as to its desired surface of the release land, and as for its desired use it "has not discussed that in a formal capacity".[13]

14. The Trust has not turned its mind to the issue of how it would like the release land to be surfaced.[14] It concedes that the former coach park is "unlikely" to return.[15]

15. DMC would like the release land to be hard surfaced, albeit for coaches, whilst conceding that the former coach park is unlikely to return.[16]

16. Janet George of SNCF acknowledged that a hard surface on the release land would be "useful".[17] She would "prefer" it to be used as a coach park but conceded that, on the evidence, the former coach park is "unlikely to return".[18]

[12] XX of Philip Wills.
[13] XX of Cllr Elizabeth Scott.
[14] XX of Michael Hurlow.
[15] XX of Michael Hurlow.
[16] XX of Colin Wilkes. Mr Wilkes' evidence, and that of Councillor Scott, as to the economic impact of the loss of the coach park is irrelevant (just as the economic impacts of the loss of the mill race or the Royal Observer Corps building would be irrelevant).
[17] XX of Janet George.
[18] XX of Janet George.

17. Dr Banks acknowledged that some activities benefit from a hard surface, she "does not have a strong view" on the surfacing of the release land and she "can see the arguments for a hard surface".[19]

18. Professor Harrington is "agnostic" as to the surfacing of the release land.[20]

19. Victoria Ashfield does not mind if the release land is hard surfaced.[21]

20. The objectors' case on the relevant "neighbourhood" is wholly inconsistent.

21. The Freemen, DPC and the Trust went into the inquiry with the position that the neighbourhood "is not a line on a plan" (see paragraph 21 of their Statement of Case[22]). Subsequently, and in flat contradiction of that position, Ms Allan sought to adduce in evidence a map showing the boundary of the Church of England ecclesiastical parish of St Nicholas apparently to support a submission in closing that this boundary represents the "neighbourhood". Given that no-one at the inquiry sought to rely upon this boundary, the Inspector rightly ruled that the map is inadmissible and that the objectors should not seek to rely upon it or its boundary.

22. The Trust regards the city of Durham as being a single "neighbourhood", and perhaps even a wider area.[23] It concedes that the replacement land and

[19] XX of Dr Kathryn Banks.
[20] XX of Professor Alexandra Harrington.
[21] XX of Victoria Ashfield.
[22] O8.
[23] See the fourth of the objects for which it was established, namely object D, at O100.

the release land are *both* within the area considered by the Trust to be the neighbourhood, that is to say they are *both* within the same neighbourhood.[24]

23. Janet George claimed that the "neighbourhood" is four streets in the vicinity of The Sands, being the SNCF area,[25] but added that the neighbourhood plan defines "neighbourhood".[26] Victoria Ashfield claimed it is what she can see from her window, adding that this is "very largely equivalent" to the boundary of St Nicholas parish (in which case it is *not* equivalent). Unlike Janet George, she sees the opposite side of the River Wear as forming part of the "extended neighbourhood" but not the "immediate neighbourhood".

24. Dr Banks claimed that the "neighbourhood" "is the area of The Sands really" whilst also including Claypath "and where I can walk to with my children" before asserting that it is SNCF's area (without saying what this is).[27] By contrast, Professor Harrington considers "neighbourhood" to mean "your immediate environment". Without specifics, she characterised

[24] XX of Michael Hurlow.
[25] The SNCF's area is in fact wholly unclear. Ms Allan sought to submit during the inquiry that it coincides with the area of the Church of England ecclesiastical parish of St Nicholas, rather than "four streets in the vicinity of The Sands".
[26] XIC of Janet George.
[27] XIC of Dr Kathryn Banks.

this as being Claypath and The Sands but also "part of the city, somewhere I go to."[28]

25. Jean Crowden considers that the City of Durham parliamentary constituency constitutes the "neighbourhood" and that her home village of Hett is within it.[29] The replacement land and the release land are *both* within her deemed neighbourhood.

26. By his own admission, Alan Kind (contracted to provide evidence on behalf of and to represent OSS) has not had regard to all the section 16(6) matters and has only done a "partial assessment".[30]

27. It can thus be seen that, as well as the glaring omission of any formal resolution to object to the application after 20 August 2019 or any formal grounds of objection, the purported objections are very inconsistent. The irresistible inference, having read and heard the evidence, is that many of the participants in this case really want the new HQ building to be unbuilt (after all, DPC brought a failed judicial review challenge to its planning permission) and a return of the former coach park. But neither scenario is likely to happen in any event.

[28] XIC of Professor Alexandra Harrington.
[29] Hett is around 10km south of the release land.
[30] XX of Alan Kind.

The interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it)

28. DCC is the occupier (and owner) of the release land. It is in its interests as owner and occupier that the application is granted.

29. The Freemen have a right in relation to the release land. They have a registered grazing right of common[31] over the register unit extending to 2.91ha and known as The Sands (of which the release land comprises around 6%). The Freemen do not own, lease or occupy the release land.[32]

30. Section 16(6)(a) refers in particular to the interests of persons "exercising" (present tense) rights of common over the release land. As to this:

    (i) the Freemen do not exercise their registered grazing right of common, whether on the release land or anywhere else on The Sands;

    (ii) there is no evidence before the inquiry that the Freemen (or any of them) have exercised a grazing right of common anywhere on The Sands since 7 April 1837 at the latest;[33] and

[31] Particulars at A645.
[32] XX of Philip Wills.
[33] XX of Philip Wills. For this date, which pre-dates the reign of Queen Victoria, see O57 (which is a Minute referring to the grazing of sheep and cattle by Freemen).

(iii) the Freemen have surrendered their grazing right of common over the release land until 7 September 2080 at the earliest.[34]

31. This past, present and future merits further attention.

32. The Freemen were established in 1179, 842 years ago.[35] There is no evidence before the inquiry that a single Freeman has ever grazed even a single animal on the release land.[36] Indeed, there is no evidence before the inquiry that it has ever been grassed for grazing.[37] By 1768, the release land was crossed by a mill race.[38] The release land was in military use during WWII, the mill race was in active use until around 1960, the release land was used by the Royal Observer Corps from around 1960 onwards and then it was used as a municipal car park or coach park until February 2019.[39]

33. The Freemen's registered right of common is a right to graze 20 cows, 50 sheep, 10 goats and 10 horses over the whole of The Sands register unit. There is no evidence before the inquiry that the Freemen have ever grazed a single goat or a single horse anywhere on The Sands.[40] To repeat, there is no evidence before the inquiry that the Freemen (or any of them) have

[34] XX of Philip Wills.
[35] XX of Philip Wills.
[36] XX of Philip Wills.
[37] XX of Philip Wills. Paragraph 28 of the Objectors' closing submissions to the effect that the land "returning to grass" may be the reversionary position has no evidential basis.
[38] XX of Michael Hurlow.
[39] XX of Philip Wills and the Statement of Common Ground.
[40] XX of Philip Wills.

exercised a grazing right of common anywhere on The Sands since 7 April 1837 at the latest. To Mr Wills' knowledge, they have not done so.[41] They expressly concede that they have not exercised their grazing right of common since WWII at the latest.[42]

34. An indenture of 18 September 1850[43] recorded the Freemen's right of common for all commonable cattle[44] over certain land including The Sands, but it also recorded (amongst other things) an agreement that the Freemen would be paid compensation for the injury which might be caused to the herbage by the holding of "Public Fairs".[45] Under an agreement dated 3 November 1897,[46] the Freemen let the herbage growing upon The Sands to DCC[47] so that it may be used as a public recreation ground in return for rent.[48] In substance, the Freemen waived their grazing right for the period of the agreement[49] and it is another indication that the Freemen have no interest in exercising their grazing right.[50] Under the terms of the agreement dated 18 January 1995, they have surrendered all their rights contained in or referred to in the agreement dated 18 September 1850

[41] XX of Philip Wills.
[42] Statement of Common Ground, paragraph 5.
[43] A718-721.
[44] A719.
[45] A720.
[46] O31-34.
[47] Strictly, its statutory forerunner.
[48] XX of Philip Wills.
[49] It is still extant.
[50] XX of Philip Wills.

(including their right of common) so far as relates to the release land until 7 September 2080 or as long as the 1995 agreement has effect.[51]

35. 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 Freemen have held or will hold Public Fairs.[52] There is nothing in the document to indicate that the Freemen had a right to hold Public Fairs or that they would do so.[53] Paragraph 2 of the Objectors' closing submissions is wrong as to the interpretation of the 1850 indenture. Given that DCC would pay financial compensation for the injury which may be caused to the herbage by the holding of Public Fairs, and given that DCC was afforded an entitlement to drain and improve The Sands "for the better and more convenient holding of such Fairs",[54] it is obvious that the said right to hold Public Fairs is a right which DCC has but not the Freemen.

36. Pursuant to the 1897 agreement,[55] the Freemen reserved out of the "letting and tenancy hereby created" unto themselves the power to carry on "sports and pastimes" on The Sands for a week before and after Easter.[56] There is no reference in this agreement to the "Easter Fair" or any other fair.[57] There is no inquiry document referring to any right of the Freemen to hold

[51] See A694.
[52] XX of Philip Wills.
[53] XX of Philip Wills.
[54] See A720.
[55] O31-34.
[56] XX of Philip Wills.
[57] XX of Philip Wills.

a fair.[58] On the evidence, they have no such right. The power reserved to the Freemen under this agreement is not a right of common.[59] It is a power afforded to the Freemen, not to the general public.[60] If the application is granted, the Freemen will be able to carry on this fortnight of sports and pastimes on the balance of The Sands.[61] Granting the application does not therefore prejudice the Freemen's power to carry out this fortnight of sports and pastimes.[62]

37. Under the 1897 agreement, the Freemen also reserved to themselves a power to occupy and let "sufficient space" from off The Sands "for the purpose of erecting a show, theatre, menagerie, circus or place of similar entertainment."[63] It is not a right of common, and it is a power afforded to the Freemen not to the general public.[64] It only relates to "sufficient space", not to the whole of The Sands.[65] 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 so granting the application would not prejudice the Freemen's power to occupy and let land on The Sands for erecting these kinds of entertainment.[66] There is no

[58] XX of Philip Wills.
[59] XX of Philip Wills.
[60] XX of Philip Wills.
[61] XX of Philip Wills.
[62] XX of Philip Wills.
[63] XX of Philip Wills.
[64] XX of Philip Wills.
[65] XX of Philip Wills.
[66] XX of Philip Wills.

evidence that the Freemen have any contractual entitlement to park on or station equipment on the release land.

38. If the application is granted, the two powers just described under the 1897 agreement will not transfer to the replacement land. On that basis, and as he concedes, Mr Wills' objections in paragraph 5.2 of his Proof regarding security, ecology and noise are misplaced.[67]

39. If the application is granted, any Freemen's entitlement to rent under the 1850 agreement would remain, the Freemen's entitlement to rent under the 1897 agreement would remain[68] and the Freemen's entitlement to payments under the 1995 agreement would remain.[69] Mr Wills conceded that granting the application would not "directly" cause the Freemen any financial loss.[70] He was unable to point to any indirect financial loss either.

40. There is no resolution of the Trustees of the Freemen that the release land should be grassed if the application is refused, or any inquiry evidence of any Freemen decision that they would like the release land to be grassed.[71] The Freemen have no power to grass the release land.[72] The assertion in paragraph 4.9 of Mr Wills' Proof that the Freemen could "readily enclose"

[67] XX of Philip Wills.
[68] XX of Philip Wills.
[69] XX of Philip Wills.
[70] XX of Philip Wills.
[71] XX of Philip Wills.
[72] XX of Philip Wills.

the release land and graze it in the "hypothetical scenario"[73] that the legal agreements are terminated is simply wrong. The Freemen have no power to enclose the release land. The duty to fence against the common is imposed on occupiers of contiguous land.[74] Any gate, fence, wall or means of enclosure adjacent to a vehicular highway over 1m high would require planning permission,[75] but the Trustees of the Freemen have never resolved to apply for any such planning permission.[76] It would also require Secretary of State consent under the 2006 Act. There is no evidence that any such application is likely.

41. If the application is granted, the Freemen's right to exercise their grazing right of common on the remaining 94% of The Sands would be unaffected although there is no evidence that they are likely to exercise it after a gap of almost two centuries. Doing so is not practical given that it is unenclosed. The replacement land is plainly capable of accommodating the Freemen's grazing right, animals could be transported there using the public highway and a second access point is proposed. Mr Wills could not say if this right would be likely to be exercised on the replacement land.[77] As he freely acknowledged, it has "not been discussed yet".[78] Given the

[73] XX of Philip Wills.
[74] *Gadsden & Cousins on Commons and Greens*, 3rd ed., at 10-79.
[75] *Gadsden & Cousins on Commons and Greens*, 3rd ed., at 10-100.
[76] XX of Philip Wills.
[77] XX of Philip Wills.
[78] XX of Philip Wills.

lack of any grazing for almost two centuries and the Freemen's consistent willingness for over a century to waive their grazing right in return for money, the likelihood is that the Freemen would not exercise their grazing right on the replacement land.

42. It follows from all the above that granting the application would not be contrary to the interests of the Freemen.

43. Members of the public have rights of access for air and exercise to the release land.[79] It is a right which is exercisable on foot or on horseback.

44. There is no evidence that any member of the public has ever accessed the release land on horseback or is ever likely to do so.

45. There is a small amount of direct evidence of the public accessing the release land on foot for air and exercise. It falls within a very limited period, namely the period between the mid-1990s[80] and 12 August 2019. Visitors disembarking from or waiting to board coaches was not user for air and exercise. The same goes for the use of the release land for festival parking and facilities, or for parking more generally. User by market traders was not user for air and exercise. The only witnesses who provided direct evidence of user during the period in question were Janet George,

[79] Law of Property Act 1925 section 193.

[80] On 28 February 1994, the lease for the use of the release land by the Royal Observer Corps was surrendered (see paragraph 11 of the Statement of Common Ground) and on 18 January 1995 the agreement referred to above was executed.

Victoria Ashfield, Dr Banks and Professor Harrington. They provided anecdotal evidence of certain user, such as teenage skateboarding, 6th formers "once or twice" using the release land for basketball or using it whilst eating their lunch, the pushing of babies in pushchairs and the collecting of conkers. It is not clear if the prohibition on driving carriages applies to bicycles.[81]

46. As Dr Banks and Professor Harrington conceded during their cross-examination, correctly, the public would still be able to use the release land for air and exercise if the application is granted. The proposed car park has been designed in such a way as to afford public access even if the car park barriers are down: see the approved planning drawings at A58-59. The public would be able to access the release land using the gap between the barriers and the HQ building, traverse the release land and then exit the same way they entered or via the steps to the riverbank (whereupon they would be able to turn left towards the city centre or right towards the grassed area of The Sands). The public would also be able to do the same in the other direction, which is to say starting from the riverbank.

47. It follows that, if the application is granted, the public's ability to access the release land on foot for air and exercise would remain. The public would also continue to be able to exercise the section 193 statutory right

[81] *Gadsden & Cousins on Commons and Greens*, 3rd ed., at 9-87.

on the 94% balance of The Sands too. The public would of course be able to exercise that statutory right on the replacement land.

The interests of the neighbourhood

48. The 2006 Act does not define "neighbourhood". The Explanatory Memorandum to the Deregistration and Exchange of Common Land and Greens (Procedure)(England) Regulations 2007, SI 2007/2589, refers to "the neighbourhood (i.e. local inhabitants)."

49. In the "Walton Heath Golf Club case",[82] the Inspector cited the Explanatory Memorandum[83] and he took the term "neighbourhood" to refer to "the local inhabitants to the common as a whole". The Claimants had expressly agreed with the Inspector's approach, and the Judge did not query it.[84] In his 5 November 2020 decision regarding New Addington,[85] our appointed Inspector proceeded on the basis that the term "neighbourhood" refers to "the local inhabitants".

50. There is no authority to support the proposition that the case-law on section 15 of the 2006 Act can or should be read across to section 16. The Cheltenham Builders and Sainsbury's cases cited by Mr Kind are not section 16 cases, and the Sainsbury's case is in fact a Scottish case. Mr

[82] R (Tadworth and Walton Residents' Association) v Secretary of State for Environment, Food and Rural Affairs [2015] EWHC 972 (Admin). A copy of the Judgment begins at page 28 of Mr Kind's cases.
[83] See the Judgment at [23] and [82].
[84] See the Judgment at [82].
[85] COM/3240827: Land West of Central Parade, New Addington, Croydon CR0 0JB.

Kind asserts in his closing submissions, wrongly, that there "is not the slightest cause" to depart from the presumption that words used more than once in an Act have the same meaning. On the contrary, there is such a cause. It is the "Walton Heath Golf Club" case.

51. The Freemen and DPC submit that the "neighbourhood" is "the area occupied by the local inhabitants".[86]

52. It states in the leading textbook that "neighbourhood" should be construed as likely to mean "the local inhabitants" and the Walton Heath Golf Club case is cited.[87]

53. DCC submits that "neighbourhood" refers to the local inhabitants to the common as a whole. That submission is consistent with the section 16 case-law and commentary. Mr Kind's submissions on the point are inconsistent with them. For example,

54. The facts of the Walton Heath Golf Club case are instructive. The Inspector concluded that at least 6 settlements formed part of the (singular) neighbourhood of the common (Walton-on-the-Hill, Tadworth, Lower Kingswood, Mogador, Buckland and Reigate).[88] They are split by the M25 motorway. The release land and the replacement land were some 1.3km

[86] See paragraph 21 of their Statement of Case.
[87] *Gadsden & Cousins on Commons and Greens*, 3rd ed., at 10-27.
[88] See the Judgment at [24]. Contrary to paragraph 61 of the Objectors' closing submissions, the Inspector in that case did *not* find that the neighbourhood could include the plural.

apart, also divided by the M25 motorway.[89] They were of "very different character", some of the footpaths and bridleways affording access were "steeply sloping and muddy in wet weather" whereas others passed close to the M25 motorway and suffered from traffic noise.[90] There was no vehicular access or car park close to the replacement land.[91] The replacement land was "not as accessible as the release land",[92] it offered "a different sort of experience" and it would be "considerably less accessible" to certain residents.[93] Under section 16(6)(b), the Inspector concluded that "the effect of the proposal would be, to some extent, adverse"[94] but he nevertheless granted the application and the challenge to his decision failed. It is therefore clear that an adverse finding with respect to section 16(6)(b) does not preclude the granting of an application. Mr Kind's implicit submission that this application "must fail" in the event of an adverse section 16(6)(b) finding is wrong.

55. In the New Addington case, our appointed Inspector found that the release land was situated close to the centre of New Addington and held that it seemed appropriate to regard "the entire town" as the "neighbourhood".[95]

[89] See the Judgment at [5]-[6].
[90] See the Judgment at [26].
[91] See the Judgment at [27].
[92] See the Judgment at [27].
[93] See the Judgment at [30].
[94] See the Judgment at [32].
[95] See paragraph 10 of the decision.

56. In the present case, the release land is close to the centre of Durham. It is appropriate to regard the entire city of Durham as the "neighbourhood" (as does DCC's Mike Ogden).[96] That is the area occupied by the local inhabitants to the common. As recorded above, the Trust's position is that, at the very least, the entire city of Durham is a neighbourhood.

57. In the alternative, the "neighbourhood" is the area of the Durham City Neighbourhood Plan. This area is the same area as the DPC civil parish.

58. Either way, the release land and the replacement land are within the *same* neighbourhood.

59. The issues as to (i) whether or not the term "neighbourhood" in section 16(6)(b) of the 2006 Act is singular or plural; and (ii) whether or not the appointed Inspector may take into account any benefit to any neighbourhood different from the neighbourhood of the release land do not therefore fall to be determined. They are issues which can safely be left to a case in which they do need to be determined.

60. It is helpful to compare and contrast the facts of the Walton Heath Golf Club with this case. In that case, the neighbourhood comprised at least 6 settlements. In this case, it comprises only 1 settlement (or part of only 1 settlement). In that case, the release land was 1.3km away from the

[96] XIC of Mike Ogden.

replacement land. In this case, the distance is only 790m. Objectors in this case have observed that the two land parcels have a river and a railway line in between. In the Walton Heath Golf Club case, the two land parcels were separated by a major motorway. In both cases, the two land parcels are of different character and would afford a different sort of experience. Objectors in this case have stated that the shortest walking route from the release land to the replacement land is in part steeply sloping (if one starts from the release land). That was the case with some of the footpaths and bridleways affording access to the replacement land in the Walton Heath Golf Club case. Unlike in that case, there is no evidence before this inquiry that access to the replacement land would be muddy in wet weather and there is vehicular access to the replacement land in this case.

61. The relative accessibility of the release land and the replacement land in the present case depends upon one's starting point. For some local inhabitants, the replacement land would be more accessible than the release land; for others the position would be the reverse. The objectors' comparison only of walking routes from streets close to The Sands to the release land with walking routes from the same starting point to the replacement land is a false comparison or at any rate a very incomplete comparison.

62. As recorded above, the replacement land will be more than 10 times the size of the release land. Unlike the release land, it is grassed. There is presently no right of public access *over* the replacement land,[97] although there is access *to* it on foot and by vehicle.[98] There is no evidence that DCC is ever likely to close the present permissive paths to the replacement land, there is no evidence of any permissive path agreement[99] or signage, there is no evidence that DCC has deposited a formal statement with a view to precluding registration of these paths as public rights of way and in the unlikely event that DCC did ever seek to close the permissive paths that course of action could be objected to on the basis that public rights of way have already accrued by long user.[100] De-registration of the release land would not prevent people from using the 94% balance of The Sands in the manner to which they have long been accustomed.

63. Overall, the proposal has no adverse effect on the interests of the neighbourhood and if anything it has a beneficial effect given in particular the size and surfacing of the replacement land.

[97] During the inquiry, the Freemen, DPC, the Trust and Mr Cornwell all abandoned their prior claim that there is presently a *right* of public access over the replacement land. Contrary to paragraph 91 of the Objectors' closing submissions, the Objectors cannot rely upon present *trespassory* user to support a submission that registration of the replacement land as common land would not particularly add to the "overall supply".
[98] Reflected in paragraph 19 of the Statement of Common Ground.
[99] These typically include a termination clause.
[100] For these points, refer to the evidence of Mr Cornwell in XX.

The public interest

64. The reference in section 16(6)(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.

(a) Nature conservation

65. It is common ground between DCC, the Freemen and DPC that the release land contains no habitats designations, protected species, protected trees or protected hedgerows.[101]

66. As canvassed above, the trees on or around the release land and lawfully felled prior to 11 August 2019 are immaterial to and form no part of the baseline.

67. The only qualified ecology witness at the inquiry was DCC's Stuart Priestley. His evidence is that the nature conservation impacts arising from

[101] Statement of Common Ground, paragraph 17.

de-registering the release land will be "negligible"[102] and, amongst other points, that the key ecological linkages are outside the release land.[103]

68. The Inspector is respectfully invited to adopt the agreed position in the Statement of Common Ground and Mr Priestley's evidence as to the nature conservation value of the release land (such as it is) and the negligible impact on it of de-registration.

69. The replacement land has no habitats or wildlife designations, protected trees or protected hedgerows, and registration as common land will not adversely impact upon trees or hedgerows. All this is agreed in the Statement of Common Ground.[104] 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.[105]

70. As Mr Priestley explained in his Proof,[106] and as he confirmed during his cross-examination, any potential impacts of registration of the replacement land as common land upon ground- nesting birds can be mitigated by the use of signage, mown paths and an additional access point. This mitigation is consistent with Natural England's position. Any disturbance would, as he explained in cross-examination, be reduced "to a reasonable level" and

[102] Proof, paragraph 4.1.
[103] Rebuttal, paragraph 2.5.
[104] See paragraph 21.
[105] Statement of Common Ground, paragraph 20.
[106] See section 3.

any impact upon breeding success "would not be significant at a population level".

71. The Freemen, like other objectors, are not in a position to submit that the grazing of the replacement land is likely. Indeed, as discussed above, it is unlikely. In the unlikely event that it does ever come to pass, and as Mr Priestley explains, "it is entirely feasible to develop a suitable low intensity grazing regime which protects and enhances the grassland"[107] and grazing "could have nature conservation benefits".[108]

72. Put shortly, the application does not raise any nature conservation issues.

(b) Conservation of the landscape

73. The release land is not covered by any national or local landscape designation.[109] It is not designated as Area of Higher Landscape Value.[110] It lies within the urban area of the city, it is identified as *Developed* in the County Durham Landscape Strategy 2008 and as urban land it was not assessed as part of the County Durham Landscape Value Assessment 2019.[111] The lawfully felled trees do not form part of the appropriate baseline. It is common ground that the former coach park use does not

[107] Proof, paragraph 3.9.
[108] XX of Mr Priestley.
[109] Proof of Gerard Lawson, paragraph 2.5.
[110] XX of Michael Hurlow.
[111] Proof of Gerard Lawson, paragraph 2.6.

form part of the landscape baseline.[112] The landscape baseline is simply a utilitarian or functional 0.17ha parcel of land principally covered in hardstanding. The Inspector should reject Mr Hurlow's assertion in paragraph 30 of his Proof that the release land "retains its more rural appearance". It plainly does not have a "rural appearance", and indeed there is no evidence before the inquiry that it has ever had this appearance. Contrary to Mr Hurlow's position, a previous Inspector concluded that the release land had an "urbanised appearance."[113] As Mr Hurlow accepted in cross-examination, the neighbourhood plan does not relate to the release land and the release land is not within the proposed Emerald Network.[114] The Inspector should also reject Mr Hurlow's assertion that the release land has an "edge of city" landscape quality. As he accepted in cross-examination, there is a new multi-storey car park to the east of the release land as well as the modern housing along the south of The Sands.

74. The Inspector should reject Mr Hurlow's assertion that the landscape value of the release land is "medium" or "could be raised to high".[115] Mr Hurlow's valuation relies upon his adaptation of the ICOMOS scale. This is a scale in guidance for World Heritage Sites (which the release land is not) published by a body advising UNESCO on World Heritage Site

[112] XX of Michael Hurlow.
[113] A966 at paragraph 6.9.
[114] For references to both, see paragraph 30 of his Proof.
[115] See paragraph 27 of his Proof.

matters, as Mr Hurlow conceded in cross-examination. His approach is not an approach endorsed by the Landscape Institute or in "GLVIA3",[116] as he also conceded. Mr Hurlow was unable to point to anyone else who had ever adopted his approach.

75. Mr Lawson, by contrast, has relied upon a recognised approach and the Inspector should adopt his conclusion that the landscape impact on the release land of de-registration would be neutral.[117]

76. The replacement land is Green Belt, and an Area of Higher Landscape Value. It is grassed, with the appearance of undulating meadow land, gated and fenced. Put shortly, and as Mr Lawson explains,[118] registration of the replacement land as common "would have no effect on the landscape of the replacement land which would retain its character as open grassland". Indeed, it is common ground between DCC, the Freemen and DPC that registration of the replacement land as common land and its subsequent user for public access and recreation "would not give rise to any adverse landscape…impact…"[119] Mr Hurlow endorsed this agreement during his cross-examination. Granting the application would have no adverse impact upon the enjoyment of the balance of The Sands.

[116] Guidelines for Landscape and Visual Impact Assessment, 3rd edition, produced under the joint auspices of the Landscape Institute and the Institute of Environmental Management & Assessment. It is the "Bible" for producing Landscape and Visual Impact Assessments.
[117] Proof, paragraph 2.7.
[118] Proof, paragraph 3.6.
[119] Statement of Common Ground, paragraph 22.

77. The application does not, in short, give rise to any conservation of the landscape issues.

(c) The protection of public rights of access to any area of land

78. There are no public rights of way over the release land.[120] For the reasons already explained, the public will have a continuing ability to access the release land if the application is granted. The public will of course have a continuing right of access onto and over the balance of The Sands in any event. In addition, the public will have a right of access onto and over the replacement land, which they do not presently enjoy, which is more than ten times the size of the release land. There is agreement 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.[121] There will therefore be no net loss of land over which the public will have access if the application is granted. On the contrary, there will be a net increase in the amount of land over which the public will have access. There is agreement that granting the application would have no adverse impact upon the rights of way network.[122]

[120] Statement of Common Ground, paragraph 17.
[121] Statement of Common Ground, paragraph 19.
[122] Statement of Common Ground, paragraph 22.

(d) The protection of archaeological remains and features of historic interest.

79. It is agreed in the Statement of Common Ground, paragraphs 17 and 23, 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 balance of The Sands or the replacement land. DCC's David Mason presented evidence that the application does not have any archaeological implications,[123] and no-one took issue with that evidence.

80. The release land contains no heritage assets,[124] whether designated or non-designated.[125] The release land is within the Durham City Conservation Area, but there is no reference to the release land in the adopted 2016 Conservation Area Character Appraisal as having any special interest or significance whether in terms of aesthetic or communal value[126] or otherwise. That Appraisal underwent extensive public consultation, which adds weight to its conclusions as Mr Hurlow accepted.[127]

81. The Inspector should adopt Mr Sparkes' conclusion that the release land possesses minimal significance in heritage terms.[128]

[123] Proof, paragraph 4.1.
[124] Statement of Common Ground, paragraph 17.
[125] Proof of David Sparkes, paragraph 4.1.
[126] See paragraph 2.9 of Mr Sparkes' Proof.
[127] During his XX.
[128] Proof, paragraph 4.1.

82. By contrast, the Inspector should reject Mr Hurlow's contention that the release land "could be considered high" significance and "of at least national importance" (the position he adopted at paragraph 16 of his Proof) and his even more extreme position during his oral evidence that it "could be seen as something of global importance".[129]

83. Mr Sparkes applied Historic England's Conservation Principles, Policies and Guidance in reaching his conclusions. Mr Hurlow described this as "a standard approach". Mr Hurlow has not applied this approach or any other standard approach. As with landscape, he has applied a non-standard approach – which he described as "an adaptation of a standard approach" – which is unique to Mr Hurlow. It relies upon the World Heritage Site Management Plan, although this makes no reference to the release land or to The Sands.[130] It relies upon the Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, even though the release land is not a Cultural World Heritage Property.[131] It relies upon ICOMOS, which advises UNESCO on World Heritage Site matters but not on non-World Heritage Site matters even though the release land is not within a World Heritage Site.[132]

[129] As he asserted during XX.
[130] Conceded in XX.
[131] Conceded in XX.
[132] Conceded in XX.

84. The Inspector should adopt Mr Sparkes' conclusion that granting the application would have "negligible" heritage impact on the release land.[133]

85. The replacement land contains no heritage assets,[134] whether designated or non-designated and it is not within any conservation area.[135] Mr Sparkes concludes that granting the application would have no impact on heritage significance, and the Inspector ought to adopt that conclusion. Indeed, the three parties to the Statement of Common Ground agree that registration of the replacement land as common land would not give rise to any adverse heritage impacts.[136] Mr Hurlow agreed with this point during his cross-examination.

86. Granting the application would not therefore give rise to any issues in terms of features of historic interest or heritage matters more generally. The local heritage of public recreation and events on the balance of The Sands would be unaffected.

Other matters

87. DCC commends, to the Inspector, Mr Lawson's conclusion that the visual effect of de-registration of the release land would be neutral,[137] and that registration of the replacement land as common land would have no effect

[133] Proof, paragraph 4.2.
[134] Statement of Common Ground, paragraph 23.
[135] Proof of Mr Sparkes, paragraph 4.3.
[136] See paragraph 23.
[137] Proof, paragraph 4.6.

on its features, character or visual appearance.[138] There is agreement in the Statement of Common Ground, paragraph 22, that registration of the replacement land would not give rise to any adverse visual impact. As he acknowledged during his cross-examination, Mr Hurlow has not considered the visual impact of granting the application on either the release land or the replacement land.

88. In the light of the evidence, DCC does not pursue the points that granting the application would give rise to socio-economic benefits associated with use of the HQ building or use of the current County Hall site as a strategic employment site. As DCC's witnesses accepted, these benefits do not depend upon the granting of the application. However, DCC maintains the position in the light of the evidence that granting the application would have the benefit of regularising the *de facto* position. After all, the release land was used for parking for many years until February 2019 and the Freemen expressly agree to it being used as a car park until 2080. Granting the application would have the additional benefit of avoiding the significant socio-economic cost associated in the event of refusal with re-siting the water storage tank (the re-design of which would be in the region of £60,000, with the final re-siting cost being dependent upon ground

[138] Proof, paragraph 4.7.

conditions[139]) and having to make any alternative provision for member parking[140]

89. The release land is in a flood risk area, unsurprisingly as it is besides the River Wear, as Squadron Leader Cowan explains in his evidence.[141] As he goes on to explain,[142] supported by photographs, the new HQ building site flooded most recently in February 2020. The replacement land, by contrast, is at a higher elevation and is not at risk of flooding. It is perfectly obvious that the replacement land is preferable to the release land from the perspective of flood risk. Squadron Leader Cowan's denial of this statement of the obvious was illogical. Incidentally, and as the Inspector indicated, his point about parking provision in Durham[143] is irrelevant to the application's determination.

90. As the signatories to the Statement of Common Ground agree,[144] correctly, the planning merits of the HQ building are not in issue. The challenge to its planning permission failed. It will not be unbuilt.

[139] Proof of Stuart Timmiss, paragraph 5.3 (adopted by Mike Allum) and explained by Mr Allum during XX.
[140] Discussed in Mr Timmiss' Proof, and by Mr Allum during his oral evidence.
[141] See his paragraph 3.
[142] See his paragraph 9.
[143] Corrected by Mr Wafer.
[144] See its paragraph 14.

91. DCC considered six alternatives as replacement land. No-one has contended that any of the five rejected alternatives is preferable to the replacement land.[145]

Section 17 and *pro rata*

92. If the application is granted, the Inspector will need to make an order under section 17 of the 2006 Act requiring DCC as commons registration authority to remove the release land from its register of common land and to register the replacement land as common land in place of the release land.

93. Pursuant to subsection (2)(b), the order shall also require DCC "to register as exercisable over the replacement land any rights of common which…are registered as exercisable over the release land." Read literally, and given that the registered right of common does not strictly preclude the Freemen from grazing all the animals in question on the release land, the order ought to require DCC to register as exercisable over the replacement land the right to graze 20 cows, 50 sheep, 10 goats and 10 horses. But so to do would effectively double the Freemen's grazing right, as it could then graze all those animals on the replacement land *and* on the balance of The Sands

[145] Note also paragraph 24 of the Statement of Common Ground.

(or else, consistent with their long practice, seek to convert that doubled right into more money).

94. The undersigned is unaware of any authority on section 17(2)(b) on the issue between DCC and the Freemen as to whether or not in the circumstances of this case any order should adopt the literal approach just described or instead require DCC to register as exercisable over the replacement land the right to graze certain specified animals calculated on a *pro rata* basis (namely 1 cow, 3 sheep, 1 goat and 1 horse). *Gadsden & Cousins* does not discuss the point. The same goes for the *Common Land consents policy*.

95. The purpose of section 17(2)(b) is plainly to ensure *equivalence* of rights before and after registration; it is not to ensure an *enlargement* of rights after registration. Consistent with that purpose, the order should require DCC to register as exercisable over the replacement land the right to graze 1 cow, 3 sheep, 1 goat and 1 horse and to register as exercisable over the balance of The Sands 19 cows, 47 sheep, 9 goats and 9 horses.

96. If the Inspector does feel constrained to adopt the literal approach, one effect of granting the application will thus be a "windfall" to the Freemen. Their suggestion that they would only ever graze animals up to the current limit on either the replacement land or on the balance of The Sands is a

suggestion made without legal constraint, leaving aside the obvious point that they are in fact unlikely to graze any animal anywhere.

Conclusion

97. The appointed Inspector is respectfully urged to grant the application by Durham County Council ("DCC") pursuant to its application dated 20 August 2019 and the plan submitted therewith.

STEPHEN WHALE

LANDMARK CHAMBERS, LONDON

7 JULY 2021