

# British Horse Society: Beecham's Field section 16 exchange

## 1 Introduction

1.1 The British Horse Society (BHS) represents the interests of the 4.3 million people in the UK who ride or who drive horse-drawn vehicles. With 80,000 core BHS members, 34,000 members of affiliated Riding Clubs and the members of Affiliated Bridleways Associations, we have a particular role in promoting recreational riding opportunities.

1.2 The BHS objects to the exchange land application for Beecham's field. In our view, the exchange sought under the application would be prejudicial to:

- the interest of persons having rights in relation to the release land (section 16(6)(a) of the Commons Act 2006), namely riders having a right of access to the land;
- the interests of riders resident in, or keeping horses on livery, in the neighbourhood (section 16(6)(b));
- the public interest as regards those riders who visit Walton Heath from further afield (section 16(6)(c)), where the public interest includes the protection of public rights of access (section 16(8)(c)).

1.3 Walton Heath golf course is maintained in form which is in many ways reminiscent of traditional lowland common land, when it would have been grazed by commoners animals. Unlike many lowland commons in England, robust management has prevented the growth of scrub on the golf course, and has fostered the restoration of extensive areas of heather heathland, now a rare feature of southern common land. It is a pleasure to experience riding on the managed parts of the golf course. We welcome the positive management of the golf course, and believe that recreational access, including on horseback, and a challenging course for golf, can continue to co-exist on the common. Regrettably, the same admirable qualities cannot be said to subsist on those parts of Walton Heath which are not managed for golf, nor on the replacement land.

## 2 The release land

2.1 Beecham's Field is part of Walton Heath common. The common lies within the former urban district of Banstead. The common is therefore land subject to section 193 of the Law of Property Act 1925, because it lies wholly or partly within such an urban district at the date of local government reform in 1974. That means that the public has a right of access to the common for air and exercise.

2.2 In a notable judicial review in the High Court in 1998, *R v Secretary of State for the Environment ex parte Billson*<sup>1</sup>, Mr Justice Sullivan, as he then was, held that the right of access conferred under section 193 was a right exercisable on horseback as well as on foot.

2.3 The BHS' starting point is therefore that horse riders have a legal right of access to the entirety of Walton Heath, subject only to limitations or byelaws which may be imposed under section 193 or otherwise.

2.4 There is indeed such a limitation imposed by the Minister of Agriculture and Fisheries in 1933. Those seeking the order at that time were clearly cognisant of the rights of riders under the 1925 Act, for the only specific restriction imposed upon them was not to "Break in horses by grooms or others". There is an interesting debate about whether the expression 'grooms or others' must be construed *eiusdem generis*, and thus may only embrace those in paid employment, but it need not detain us here: sufficient that there is no restraint of recreational riding. There are however other generic provisions which prohibit injury or disfigurement of the common, loitering on the greens, tees or bunkers, or annoying persons playing golf. There are also special limitations relating to riding on designated gallops, which are now redundant, as the gallops have not been used within living memory.

2.5 None of these provisions prevents riding on any part of the common, unless it would cause damage. The BHS' position is that riders should avoid riding on the tees which might cause damage, and as a matter of common courtesy, avoid riding on the fairways while they are in use except where necessary briefly to cross over to get from A to B. However, as regards the extensive areas of rough and woodland, riders should feel free to use these. And on a quiet early morning or summer evening when there are no players on the course, there is no reason why riders should not ride on the fairways if the ground is sufficiently dry to sustain it without harm.

2.6 Beecham's Field is a potentially valuable resource for horse riders. It provides a rare, extensive sward of short grass which in reasonably dry conditions can be used for riding without quite the same concern about damage or interference which would occur on the fairways. Riders can school their horses in an informal way, or they can use Beecham's Field as a direct route between the village and routes on the common. The BHS regrets the possible loss of the majority of this land, and the concentration of use on the small open portion which would remain to the south of FP96.

2.7 Beecham's Field is not greatly used by horse riders. But it is used. The inquiry has heard from Mr Ken Chivers about use of the field by his family and his knowledge of other riders' use, and the challenges made to such use by the golf club. However, after the Second World War, riding became less commonplace, and

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1 [1998] EWHC Admin 189; [www.bailii.org/ew/cases/EWHC/Admin/1998/189.html](http://www.bailii.org/ew/cases/EWHC/Admin/1998/189.html). A key part of the judgment has been subsequently overturned by the House of Lords in *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, but the finding in relation to section 193 was undisturbed.

knowledge of riders' rights, and awareness of long used bridleways, diminished. That remains the case today. Even now, 16 years after the *Billson* case, few riders are aware of their access rights on common land, and in my observation and conversation, the vast majority believe they are confined to public bridleways or other paths which are made available to them as 'permissive paths'. Word of incidents which Mr Chivers has described to you in which riders have been challenged by golf club staff when riding on Beecham's Field tends to get around, and further discourage use. The notices required to be exhibited around the golf course, displaying the order of limitation, give the impression that use of the heath is tightly restricted — few riders are likely to analyse the limitations to conclude that they are hardly affected.

2.8 Moreover, the release land includes part of the track along the south-east side of Beecham's Field. This track follows the course of what was once part of the gallop (and is marked as such on the large scale OS map). It is no longer used as a gallop. But it does provide a means of access for riders from Deans Lane and other roads which give onto Dorking Road, across Dorking Road, and south to the bridleway network on the south side of Walton Heath and over the M25, as well as east across the golf course along the alignment of the gallop or to reach BW87<sup>2</sup>. Riders seeking to follow a similar route in consequence of the deregistration of the release land would need to ride across the roughs to the south-east of the gallop, which would discourage such use.

2.9 Finally, we take the view that the Secretary of State is entitled to consider the merits of the replacement land in its own right, whatever the existing use of the release land. If the replacement land has the potential to be of value to horse riders, as they have a right to expect of any section 193 common land, but it is not, then we believe that the Secretary of State is entitled to take that into account.

### 3 The replacement land

3.1 The replacement land is a slightly larger area of abandoned fields and woodland to the north of Buckland BW 477. So far as riders are concerned, the proposed exchange has the disadvantages that:

- the existing and new points of entry from rights of way (including BW477) may well be barriers impassable to horses (such as stiles or wicket gates), and even if the applicant's intention is that there will be no such barriers, nothing would prevent the installation of such barriers at a later date;
- internal and perimetral fences will be retained, and some new fencing will be installed — this will prevent access for horse riders to and from the adjacent

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2 There is practical access for riders from Dorking Road onto Beecham's Field at several places: opposite the entrance to Heathcroft, at footpath 96, and along the service track (now partially blocked off with a fallen log) nearly opposite the entrance to High Covert.

bridleways, and from the adjoining replacement common land which was registered on previous exchanges;

- without management, the land will naturally regenerate (though part, at Round and Watson's Wood, is old woodland), and in time, become scrubby and as unsuitable for access on horseback (or any other access) as are now the neighbouring areas of replacement land to the east.

3.2 In our view, these defects could have been addressed, if the golf club agreed:

- to remove internal fences and those along the boundary contiguous with other areas of common land or public rights of way (particularly along BW477), so as to ensure the land has something of the character of common land;
- to ensure that there was practical access on horseback to the replacement land except Round Wood and Watson's Wood;
- to leave gaps suitable for the passage of horse riders opposite the right-angled turns in BW477 (where the bridleway in both instances turns from east-west to south-north), so as to create a new cross field route (marked as a 'Track' on the large scale OS map) avoiding the need to drop down to the bottom of the field, and giving excellent views to the south (if the first bullet were adopted, this would happen anyway);
- to provide access along or adjacent to Banstead FP96 to permit passage by horse riders from BW477 north to the bridle bridge over the M25.

3.3 None of these outcomes has been assured. I will turn to deal with the section 106 agreement, submitted recently by the golf club.

## 4 Section 106 agreement

4.1 The golf club has purported to enter into a section 106 undertaking as regards the future maintenance. We do not believe that this agreement provides any assurance as to the deficiencies inherent in the replacement land. This is because:

- The undertaking relates only to the management of the replacement land, and does not contemplate better access for horse riders.
- The undertaking has not yet been acknowledged by the local planning authority, let alone endorsed.
- The planning authority has not solicited the undertaking, did not require it as a condition of planning permission, and is under no obligation to enforce the undertaking — indeed, given the disposition of the council towards the development, as other objectors will note in their objections, it is hardly a matter for confidence that the undertaking will be enforced.
- There are very limited resources in local planning authorities to enforce against planning breaches.
- No third party can enforce the undertaking: a third party can only lobby the local planning authority to do so.

- The golf club may apply to the local planning authority to modify or discharge the undertaking at any time.
- Even if such application were refused, the golf club may appeal to the Secretary of State for that purpose.

4.2 We asked the golf club to enter into a legally enforceable agreement to secure our objectives. The golf club could have entered into an unlimited (in duration) agreement with Reigate & Banstead Borough Council under section 39 of the Wildlife and Countryside Act 1981, for the management of the land, including for the purposes above. Alternatively, it may be possible to secure the same outcome through a unilateral deed. In either case, the public would have obtained an interest in the agreement which would be independently enforceable through the courts. But there is no such agreement, and the section 106 undertaking is insufficient and dependent on the will of the local planning authority to enforce it.

## 5 The offer to horse riders

5.1 The application proposes access at three points from the adjacent public rights of way, and we have been told by the golf club that at least one access point would be suitable for horse riders. However, the application document is silent on this aspect: yet accessibility for riders is fundamental to the value of the exchange.

5.2 While the golf club may or may not give assurances as to what may or may not be done on the replacement land as regards access, there is no guarantee that any assurances will be delivered and indeed honoured in the long term. The Secretary of State can clearly give some weight to the assurances provided by the golf club, but we say that, whatever the Secretary of State's views as to those assurances, those which are not covered by the section 106 undertaking are incapable of being enforced by any party, and those which are covered by the undertaking can only be enforced at the discretion of the local planning authority.

5.3 Moreover, whatever position is taken in relation to the golf club's assurances, there can be no guarantee that such assurances will be honoured in the long term, and that is a flaw which is of great concern to the BHS. We can have no knowledge of the future disposition of the golf club towards equestrian access on its common land, or of the golf club's viability.

5.4 Indeed, the replacement land in the ownership of the golf club, shown in the register map at flag 2 of the applicant's bundle as registered in consequence of applications 1842, has never been maintained by the golf club, and practical access to it is restricted to the public bridleway and one or two other well-established paths — and these paths are themselves threatened by overgrowth.

5.5 It will be noted that insofar as the replacement land registered in consequence of previous exchanges, shown in the register map at flag 2 of the applicant's bundle as registered in consequence of applications 1842 and 1854, remain fenced against equestrian access, and riders have no access to the latter site, while the fence along

the boundary of BW478 to the south of the application 1842 site remains largely in place.

5.6 If the replacement common land were registered as common land, and the golf club did install sufficient gaps to give access from the adjacent bridleways, there would be no protection against those gaps being closed subsequently. The area of the replacement land does not include the adjacent bridleways (but it could have done), and therefore the protection against works on common land conferred by section 38 of the Commons Act 2006, which would prevent the erection of fencing or closure of the gaps without the consent of the Secretary of State, would not apply to perimetral fencing, since it is clearly open to owners of adjacent land to fence against the common.

5.7 Indeed, there would be nothing to prevent the golf club from fencing off the entire replacement land site and physically preventing all access to it, since no part of the site is crossed by a public right of way along which access must be preserved. Section 193 does confer a right of access to Walton Heath, and the effect of section 17(6) of the Commons Act 2006 is that those rights would apply to the replacement land. However, nothing in section 193 requires an owner of common land to facilitate such access. On the overwhelming majority of commons, there is already access to the common along public highways, so it is impossible lawfully to physically restrict public access. But this replacement land has no public highways across it. Moreover, there is no intention to remove existing perimetral fencing. So public access to the land will depend on the goodwill of the landowner. (The BHS does not deny that the land will be permanently subject to section 193 rights: it is questioned only whether it would necessarily be possible to exercise those rights in certain circumstances.)

5.8 The Secretary of State has no power under section 16 of the Commons Act 2006 to impose conditions on an exchange, and therefore the Secretary of State can only reach a conclusion on the basis of the exchange of land proposed by the applicant. He cannot modify the exchange. He must consider the exchange on the basis of what is there. The applicants have given assurances as to the future management of the replacement land, but the Secretary of State cannot be confident that the management proposals will be delivered, given the weaknesses inherent in the section 106 undertaking, and he can have no confidence whatsoever that there will be sufficient and continuing access for horse riders or indeed anyone else, given the particular context of the replacement land. In effect, any such access which is provided will be at the pleasure of the golf club, and may be withdrawn, without sanction, at any time. The BHS considers that the exchange is therefore entirely unsatisfactory from the perspective of horse riders' access to the land.

## 6 The location and character of the replacement land

6.1 The release land is accessible on all sides from the adjacent parts of the common, and from Dorking Road, although a rough bank alongside the road, and traffic on the road, makes access on this side only really practicable at several places (see footnote 2 above)..

6.2 The replacement land is unusually remote from the release land. There is no direct route for horse riders to reach the replacement land from north of the M25. Horse riders are unlikely to ride very far along Dorking Road, so they would reach the replacement land either via Frith Park Farm and Little Heath and along BW477, or over the M25 bridle bridge, and then round the M25 exchange land south of the M25, to reach by an indirect use of BW100 and BW477. This assumes that there would be access for riders to the replacement land at both right-angled bends in BW477, which as we have seen is not assured. In either case, the replacement land is some considerable distance from the release land. For those who wish to approach from the riding stables to the north of Walton on the Hill, it will be considerably less practicable to reach on a short hack. For those approaching from riding stables south of the M25, such as in Headley, it will be equally accessible.

6.3 The release land is classic common land. As one would expect of a common, it is open and unenclosed on all sides. There is free access to it. Deregistration will create an island of unencumbered land within the larger area of Walton Heath. The future use of this land would be entirely at the discretion of the golf club, subject to planning permission where necessary. The golf club might, if it wishes, immediately erect a surrounding fence of up to two metres in height, without planning permission, to enclose the release land. That would be an intrusion into the openness of Walton Heath, which has been unenclosed since time immemorial. The Secretary of State is entitled to take into account the effect of deregistration of the release land on the landscape, the enjoyment of the rest of the common and the local heritage (policy guidance, paragraph 3.9.3).

6.4 The replacement land is enclosed farmland and woodland. It has none of the character of common land, and there is no intention that it should be managed to acquire such character. None of the perimetral fences will be dismantled, as against the adjacent bridleways or against the adjacent previously registered replacement land. Some internal fences will be retained. There will be none of the sense of openness and unenclosed character associated with common land, and indeed, those who visit that land will need to enter into it through designated access points. Neither walkers nor riders will be able to follow their inclination to wander off BW477, FP96, FP517, or BW100, except through the designated access points. Indeed, users may well conclude that the land is private, and not available for public access. Given the pattern of equestrian use of Beecham's Field, it is all too likely that riders will reach that conclusion.

6.5 In the Secretary of State's guidance (section 2), he cites the benefit of: "building the value of open, unenclosed common land and greens as a *de facto* 'communal' resource and providing a sense of belonging." Section 3 explains that the legislation: "Ensure[s] that the special qualities of common land, including its open and unenclosed nature, are properly protected". This exchange would eliminate that benefit in relation to the release land, and confer no such benefit arising from the replacement land.

6.6 Accordingly, the BHS considers that the exchange is therefore unsatisfactory from the perspective of the character of the land, and consequently horse riders' likely use of it.

## 7 Other matters

7.1 Neither the applicant nor the Secretary of State has circulated a draft of the order of exchange for consideration by objectors. The BHS regrets that the public have not been able to assure themselves that the terms of the order will secure the effect of the application as sought. In particular, section 17 of the Commons Act 2006 provides that the replacement land is to be subject to the same rights of common, and the same rights and incidents, as the release land, but that provision to the contrary may be made under subsection (7). We wish to be satisfied that neither the applicant nor the Secretary of State seeks to employ the provision in subsection (7).

7.2 It has been suggested that the improvement of facilities for the golf club, and the wider benefits which that might confer in terms of promoting a thriving recreational business, is a public benefit which ought to be taken into account by virtue of section 16(6)(d), which allows the Secretary of State to take into account "any other matter considered to be relevant". However, the Secretary of State has published on the gov.uk website<sup>3</sup> a letter<sup>4</sup> dated 25 February 2011 from the then Parliamentary Under Secretary to Craig Whittaker MP about applications for section 16 consent in relation to wind farms. The letter states:

"Reference is made to the Secretary of State's desire to 'promote sustainable energy generation in an appropriate setting'. This wording is not intended to impose an additional test or factor to be considered in the context of section 16 applications, but is merely an acknowledgment of the role of sustainable energy generation, ... In short, paragraph 4.13 is not intended to discriminate in favour of wind farms or any other type of application on common land: it is intended merely to direct those who wish to undertake such works towards an application under section 16... . Such an application (under section 16) would then fall to be

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3 *Protection of common land*: <http://www.gov.uk/common-land-management-protection-and-registering-to-use>

4 [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218769/sustainable-policy-letter.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218769/sustainable-policy-letter.pdf)



considered in the usual way, against the statutory criteria and the Secretary of State's policy objectives in section 3 of the policy guidance, having regard to the provision of replacement land in exchange for that required for the development. Each application must be considered on its individual merits, and there is no intention in the policy guidance to treat applications relating to wind farm projects in any way differently from other applications under section 16 of the Commons Act."

7.3 That letter suggests that, even in the context of wind farms where, at least at the time of the letter, the Government was strongly committed to their merits, the Government does not see the policy advantages of wind farms as operating to tilt the playing field in favour of such applications under section 16. In other words, whatever the wider advantages of the use to which the land is to be put, the Secretary of State expects to focus on the statutory criteria and his stated policy objectives as regards the merits of the exchange itself.

7.4 At the opening of the inquiry, Mr King said that: "a legal test of equal benefit in the guidance is not in the legislation. It would be an error to maintain such a test." But it may be instructive to compare this application with a proposal for the compulsory acquisition of common land for the purposes of a new road scheme or other public works, for which purpose a certificate must be given by the Secretary of State<sup>5</sup> that the replacement land is 'equally advantageous' to the release land. In such a case, the Secretary of State has already concluded that the new road is necessary and in the public interest. But in giving his certificate, the Secretary of State does not say: "this is such an important road that any old exchange will do." He says, as the law requires, "Never mind the road. Is the exchange sufficiently fair that the replacement land is equally advantageous to the release land?" If it is not, the planners must find some other, better, land for the exchange. It is a powerful incentive for the planners to get it right first time.

7.5 The analogy here is that almost everyone accepts that the new practice area will be good for the golf club. Of course it is. An application will be made by an owner under section 16 only if it is in the owner's interests, just as the new road is in the public interest. The question for the Secretary of State is not how beneficial is the exchange for the golf club, or whether it secures some wider public purpose in promoting the golf club as a thriving business in a growing economy, but simply whether the exchange itself is a good one. That is clearly the Secretary of State's policy, as evinced by the policy guidance and the supplementary letter, and it is a policy which is open to the Secretary of State within the discretion afforded by section 16.

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5 Under section 19 of the Acquisition of Land Act 1981.

## 8 Conclusion

8.1 The BHS opposes the exchange because it denies riders' access to an area of open common land suitable for horse riding, and substitutes replacement land to which there is no assured access for horse riders, or indeed anyone else, and which is entirely lacking in the character and utility of Beecham's Field. We therefore ask the Secretary of State to refuse the application.

Hugh Craddock  
For the British Horse Society  
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