



Overground Easements Guidelines

Adopted January 2020

1. Introduction

The Malvern Hills Trust (MHT) has the power under the Malvern Hills Act 1930 as amended by the 1995 Act, to authorise overground and underground easements. An overground easement is a legal right to cross over MHT land with or without vehicles or animals to get to and from the highway. Easements are granted for the benefit of a property rather than an individual.

Underground easements are dealt with in separate guidelines.

“Malvern Hills” in this document means any land under the jurisdiction of Malvern Hills Trust including the Hills, commons, verges and woodland.

“The Acts” means the Malvern Hills Acts 1884 – 1995.

“The dominant land” means the applicant’s land for which the easement is requested.

2. The power to grant an easement

All decisions made by the Board are subject to the overriding requirement to act in the best interests of fulfilling the Trust’s charitable objectives.

The criteria for granting easements are set out in s7 1930 Act (as amended):

7A (1) Subject to subsection (2) below, the Conservators may on such terms and conditions as they think fit (including terms and conditions as to the provision and maintenance of cattle grids and other works) authorise in writing any person to construct, maintain, alter or improve roads or ways over the Malvern Hills affording vehicular or other access from any highway to land being land lying within or adjacent to any part of the Malvern Hills and appearing to the Conservators to lack satisfactory access.

(2) In granting authorisation under subsection (1) above the Conservators shall have regard to the effect of the works being so authorised on the natural aspect of the Malvern Hills and shall impose such terms and conditions as are necessary to ensure that any adverse effect is minimised.

(3) The Conservators may, on such terms and conditions as they think fit, for the purpose of or in connection with the provision of roads or ways, grant licence to use and grant easements and rights in, under or over lands forming part of the Malvern Hills and on which roads or ways are authorised to be constructed pursuant to subsection (1) above.

3. Training for trustees

Because of the legal requirements, the likely public interest in cases where any significant development may result from the grant of the easement and the sums of money which can be at stake, applications for easements can be some of the most significant and high profile decisions which the Trust makes. For these reasons, potential conflicts of interest may also be very significant.

The Trust will provide training for trustees on this complex subject. Board members are expected to attend.

4. Delegated decisions

The Board has agreed that certain decisions should be delegated to the CEO.

Applications for confirmation by deed of pre-existing rights of access

To be determined by the CEO.

Applications for amendments to the route of existing overground easements

These are determined by the CEO unless there are significant complicating factors. The application should be reviewed by the management team to ensure it complies with the Malvern Hills Acts and to give consideration to operational, ecological, archaeological and landscape impacts. A Deed of Variation will be required for amendments to pre-existing legal easements, and in the case of variation of prescriptive rights, the easement must be confirmed by deed. This will be drawn up by MHT's solicitors at the cost of the applicant. Decisions of the CEO to grant such application should be reported to the next Board meeting.

Change of use of an existing overground easement

Changes of use includes, for example: agricultural to residential; agricultural to business; residential to business; business to residential. These applications are to be determined by CEO unless there are significant complicating factors or if they are likely to have a value of over £20,000. Whether an application should be referred to the Board should be decided by the CEO in consultation with the Chair of the Board and the Chair of Land Management Committee.

The application should be reviewed by the management team to assess any legal, operational, ecological, archaeological and landscape impacts. Applications will be referred to land agents for valuation and to solicitors to draw up the Deed of Grant/Variation, at the cost of the applicant. Decisions of the CEO to grant such application should be reported to the next Board meeting.

Temporary licences

These are determined by the CEO – for example temporary access for utility companies to carry out work or where access is required for a short period for a specific project on an adjoining property. The arrangements may be referred to a land agent for advice if complex or long term.

5. Determination of applications for new overground easements

These may be considered by Land Management Committee and then referred to the full Board or may be referred directly to the Board, depending on the complexity of the application. Which route is taken will be determined by the Chair, Chair of Land Management Committee, CEO and Secretary to the Board.

Considerations

The detail set out below is intended as guidance only. Applications must be determined in accordance with the Malvern Hills Acts, charity law and in accordance with any guidance issued by the Charity Commission.

No two easement applications will be identical; therefore each application should be considered on its own facts. In deciding whether to grant or refuse a request for an easement the following are always relevant but other factors may need to be taken into consideration:

- i. The overriding duty of the Board is to act in the best interests of fulfilling the Trust's charitable objectives.
- ii. The Board must be satisfied that the conditions in s7A(1) of 1930 Act are fulfilled:
the dominant land lies within or adjacent to the Malvern Hills
the access would connect the dominant land to the highway and
the dominant land appears to lack satisfactory access
(for the purpose for which the application is made)
- iii. The Board must consider its obligations under s7A(2) of 1930 Act to have regard to the effect of the works so authorised on the natural aspect of the Malvern Hills and to impose such terms and conditions as are necessary to ensure any adverse effect is minimised .
- iv. Board members should consider the guidance set out in CC27 "It's your decision" which sets out general considerations for all decisions.

Note:

"Satisfactory access" has no definition, so common sense must be applied.

The "works so authorised" has been defined in case law as not only the physical easement itself but also any development that will flow from it.

The effect on the "natural aspect" is not defined in the Acts. It has been considered in case law. In summary, the impact has to be "significant" (and so a trivial effect is not

material) and the Trust is not obliged to defend “every blade of grass”¹ when deciding what is in the best interests of the charity.

The “effect” to be considered is on the land under the Trust’s jurisdiction and not the effects on anyone else’s land or on Malvern in general. Any proposed development will require planning approval, which is separate from the Trust’s decision making process.

The overriding consideration of acting in the best interests of fulfilling the objectives of the charity is not an exact calculation. The trustees will need to take into account all the circumstances. For example, this will include weighing the public benefit which could be achieved by the Trust for purposes and initiatives that preserve the natural aspect and enhancing the public’s recreational use and enjoyment of the Malvern Hills as a result of receipt of a capital sum, against the effect of granting the easement after appropriate mitigation. A further factor to be considered is any possible reputational impact of a decision, how it might impact on the charitable objectives of the Trust and how that might be mitigated.

Process guidelines

This is for guidance only and applies both to initial applications and the second stage of applications dealt with under 6 below.

On receipt of the application, officers will ensure that sufficient information has been provided by the applicant, and if not request further details.

The Chairs of the Board and LMC Committee will be invited to consider with officers whether the application should be considered by the Land Management Committee or referred direct to the Board.

Officers will gather all the necessary information to enable the application to be properly considered including obtaining appropriate professional advice (in a complex case, in consultation with the Chairs of the Board and LMC Committee).

Once all the relevant information is available notice of the application will be posted:

- i. on the Trust’s land, by the proposed route of the easement.
- ii. on the Trust’s web site, with the relevant documentation.

The Trust will also notify in writing occupiers of property immediately adjoining the site for which the easement is requested.

Members of the public will have 28 days to submit any comments which they wish the Trust to take into consideration when deciding the application. These comments will be made publicly available on the Trust’s web site with the name and address of the person submitting them. The Trust reserves the right to edit or to refuse to display any comments which may be defamatory, unlawful or abusive.

In cases where, in the opinion of the Chair in consultation with the officers, a substantial development might result from the grant of the easement, notice of the application will be published in the public notices section of the Malvern Gazette.

Officers will prepare papers detailing for example:

¹ Mr Justice Wyn Williams *Evans v Wimbledon and Putney Common Conservators* [2013] EWHC 3411

Any relevant landscape designations
Landscape considerations including possible mitigation options of any adverse effect
Relevant conservation or archaeological issues
Relevant site history
Whether the easement can be shared with another existing user
Details of the anticipated capital receipt if the easement is granted (supported by professional advice) and of any benefits to the Trust that could result
Officer recommendations including appropriate mitigation

For applications where all relevant information on the impact on the natural aspect is available, if an application is approved by the Board, solicitors will be instructed to draw up a deed of grant.

6. Applications where easement will be associated with a planning application for development of the dominant land.

The Trust has taken legal advice on how to deal with applications where the impact of any development flowing from the grant of an easement on the natural aspect of the Malvern Hills cannot be ascertained at the time when the application comes before the Board.

In these circumstances the Board should consider adopting a 2 stage process:

1. To consider the effect of the construction of the easement itself. Examples of potential impacts include destruction of important habitat or species; a significant change to the appearance or character of the Malvern Hills.
2. Once full details are available, to consider the impact of any development which will flow from the grant of the easement. This might include a significant change to the appearance or character of the Malvern Hills, noise, lighting and drainage.

The process to be followed is outlined below:

- a) Consider the effect of the direct impacts arising from the construction of the easement itself on the Malvern Hills in accordance with the factors set out in 5 above and any other relevant considerations. This will include things like habitat destruction, visual impact, impact of any signage or lighting which will be required, whether these impacts are significant and if so what terms and conditions could be imposed to minimise the impact. Consider the best interests of the charity and any advantages that might be secured were the easement to be granted.
- b) If the application is granted in principle, agree Heads of Terms setting out the conditions on which the easement would be granted, including any mitigation required in relation to the physical easement, and that the landowner supply to the Trust full details of the proposed development in

order that the Trust can consider the effect of that development on the natural aspect of the Malvern Hills. The Heads of Terms would also set out the conditions required in order to ensure that the Trust could enforce any conditions placed on the applicant.

- c) An option agreement would then be prepared in accordance with the Heads of Terms, incorporating the conditions which the landowner would have to fulfil before the easement could be granted, and annexing a draft deed of easement. The Option agreement would be signed by both parties.
- d) The Board would consider the second stage (the impact of the development resulting from the grant of the easement on the natural aspect) once full details were available and could either reject the application or decide what terms and conditions needed to be applied to mitigate any effect.
- e) If the Board was satisfied the conditions set out in the Option Agreement were met, the applicant could call for the grant of the easement

7. Following a decision on an easement application

- The applicant should be notified in writing of the Committee's recommendation and/or the Board's decision. If the easement has been refused, the reasons for refusal should be clearly explained.
- MHT Wardens should be made aware of the outcome of the decision so that they are able to monitor any subsequent activity.
- Deeds of Grant are to be signed by the CEO and sealed with MHT's seal.
- Responsibility for maintaining records of Deeds of Grant lies with the Secretary to the Board/Admin Officer. Deeds of Grant are to be securely stored and should be kept indefinitely.
- Where the Trust has been given, or believe it has been given, incorrect or misleading information in relation to an easement application, the Trust reserves the right to:
 - a) Where the easement has already been granted in principle, void the decision and decline any request to reconsider.
 - b) Where the easement has not yet been granted in principle, decline the request to consider the application.

8. Requests to review decisions of the Land Management Committee in relation to easements.

Recommendations of the Land Management Committee are referred to the Board for adoption at its next meeting (subject to any request for a review as provided in this clause).

If an applicant is dissatisfied with a recommendation of the Land Management Committee in relation to an easement on one or more of the grounds set out below, he/she shall notify the Trust in writing within five working days of receipt of the

notification of the Land Management Committee's decision. He/she should specify the ground(s) for the review and the relevant facts.

The grounds for requesting a review are that the decision of the Committee:

- i. was unlawful and/or,
- ii. was irrational or unreasonable and/or,
- iii. has been reached without following due process and/or
- iv. has been reached without taking into consideration material facts

The review will be carried out by a panel comprising not less than three nor more than five Board members including:

- a) the Chair and/or Vice Chair of FAR (whether or not they were present at the meeting at which the decision under review was made)
- b) Chair and/or Vice Chair of the Governance Committee (provided they are not also members of the Land Management Committee and present at the meeting at which the decision was made)
- c) other Board members who are not members of the Land Management Committee who shall be nominated by the CEO taking into account any relevant skills and experience

The panel will consider:

- i. the original application
- ii. the paper prepared for the meeting
- iii. any other documentation produced for the meeting at which the decision was made
- iv. the minutes of the meeting (and the audio recording if necessary)
- v. the contents of applicant's request for the review
- vi. any other relevant material

The panel can either:

- Confirm that the decision of the Land Management Committee was properly reached
- Refer the matter back to the Land Management Committee for re-consideration

The Panel must submit a report either to the next Board meeting (where they have confirmed the decision of the Land Management Committee) or to the Land Management Committee (where the Panel has referred the matter back) setting out the reasons for their decision.

Part 2

The application process

Applicants should contact MHT to discuss their plans prior to submitting an application. This will enable Officers to identify relevant factors – in particular where legal and other professional advice (and therefore additional cost) will be necessary.

Where easements are associated with a development which is likely to require planning permission, applicants are strongly encouraged to submit their easement application before seeking planning permission.

Applications should be submitted to the Secretary to the Board using the easement application form and should be accompanied by the appropriate non-refundable application fee. Minimum application fees (which are subject to VAT) are listed below. They cover the costs incurred by MHT in processing the application. They may be increased for complex applications at the discretion of the CEO. Where MHT needs to obtain legal or other professional advice (for example valuing the rights requested, or on the impact on the natural aspect) the cost of this advice will be payable by the applicant in advance and will be non-refundable once the advice has been sought. If an easement is granted, applicants will also be required to pay any further professional fees incurred including drawing up the Deed of Grant, and the financial consideration required for the grant of the easement.

All applications must include a map showing the route and extent of the proposed easement together with details of any development associated with the easement.

Type of overground easement requested	Minimum application fee + VAT
Amendment to route of existing easement	£100 (plus legal/other costs)
Confirmation by deed of a pre-existing prescriptive right of access	£75 (plus legal/other costs)
New agricultural easement	£100 (plus legal/other costs)
New easement for single dwelling	£200 (plus legal/other costs)
Change of use of existing easement	£200 (plus legal/other costs)
New easement for small commercial development	£200 (plus legal/other costs)
New easement for >1 and ≤10 dwellings	£400 (plus legal/other costs)
New easement for >10 dwellings	£750 (plus legal/other costs)
New easement for ≥50 dwellings	£1,000 (plus legal/other costs)
New easement for large commercial development	£1,000 (plus legal/other costs)

Straightforward applications will take at least eight weeks to process. Additional time will be required for applications associated with large scale developments. All fees and costs must be paid before the application is considered.

Standard conditions for easements.

The Trust is empowered to grant easements 'on such terms and conditions as [it sees] fit'. Specific conditions may sometimes be required, but normally the conditions set out in the schedule will apply to all overground easements granted by MHT.

Surface materials

Construction methods and surfacing materials must be appropriate to the location. In most situations, the appropriate surfacing will be a loose stone of an appropriate grade, colour and depth. Materials to be used will normally be specified in any deed of easement.

MHT should be notified if the user of an easement wishes to re-surface or maintain the easement. Work on the easement must be carried out using the same type of material as agreed for the existing surface unless the Trust consents to alternative materials being used. The user is responsible for obtaining any other consents which may be required.

Requests for non-standard surface treatments.

Other surface treatments may be considered where special considerations apply, for example in urban locations or on steep slopes. If an easement is shared, the views of the other users should be sought and considered before agreeing to alternative surfaces. These requests will be considered by the Land Management Committee and referred to the Board for adoption. Where a request is made to re-surface a prescriptive easement which has a non-standard surface treatment which has not been approved by the Trust, the Trust will take into account the history relevant to the easement and factors relating to its location. It will normally be a condition of granting the request that the dominant owner(s) enters into a formal deed of easement with the Trust which includes a covenant in relation to the ongoing maintenance of the easement.

Dealing with breaches of easement agreements.

Use of easements and compliance with Deeds of Grant will be monitored by Wardens. Where breaches of agreements are noted, these will be dealt with as follows:

- a) Warden to speak to the resident, making them aware that they have breached the conditions of their easement/do not have permission to carry out the work concerned and asking them to rectify the situation. Where unauthorised work is taking place on an easement, every effort should be made to contact the owner of the dominant land immediately. In many instances this will be sufficient to resolve the problem.
- b) A letter will be written by the CEO confirming the breaches which have occurred and requesting that the land owner takes the necessary action. This request should include a timescale for rectifying the problem(s).
- c) Solicitors will be contacted for advice on appropriate action. Where legal action is advised the agreement of the Board will be sought.

Schedule

Overground easement – standard conditions

- The applicant will pay Malvern Hills Trust's (MHT) application fee, together with legal and other professional costs and disbursements associated with granting the easement together with any VAT thereon.
- The applicant is responsible for obtaining all other relevant consents, including *inter alia* planning permission and under s38 Commons Act 2006.
- The easement will be for the benefit of a specified number of properties only and for the specified use.
- The width of any track should not normally be more than 2.75 metres. Wider entrance splays or passing bays will be permitted where they are necessary at the discretion of the CEO/Board. The width of the easement to be specified in the deed.
- Where appropriate, if there is an existing easement nearby, there will be a presumption that its use should be shared, with a spur to serve the new user.
- Construction methods and surfacing materials must be appropriate to the location and must be agreed in writing by MHT. In most situations the appropriate surfacing will be a loose stone of an appropriate grade, colour and depth. Other surface treatments may be considered, depending on the circumstances, for example in urban situations or on steep slopes. Re-surfacing must be carried out using the same type of material as agreed for the existing surface.
- Future maintenance will be the responsibility of, and at the expense of, the easement holder. No work to be carried out on the easement without the prior written consent of MHT. Where a new easement will in part use an existing easement, responsibility for maintenance of the shared section will become the joint responsibility of all users.
- Liability for installation and maintenance of any culverts required to accommodate the easement will be the responsibility of the easement holder.
- The easement holder will indemnify MHT against any injury, damage or loss arising from the grant of the easement.
- Contractors working on land under MHT's jurisdiction to construct or re-surface easements must provide MHT with a method statement for approval and evidence of their public liability insurance prior to work commencing. Any damage caused to MHT land must be repaired to the satisfaction of MHT and MHT reserve the right to require a bond to enable reinstatement work to be carried out by MHT in the event of the easement holder failing to do so.
- The use of house signs, kerbs, posts or stones to delineate the easement will not be permitted.
- Parking or storage of materials on, or adjacent to, easements will not be permitted.
- Easement holders must not do anything on their easement which interferes with the public's right of access across the land over which the easement passes.

- Unless MHT agrees otherwise, where an agreement has been made in principle to grant an easement, the agreement will expire after 3 years unless a deed has been executed and all consideration paid.
- Where services are also to be laid, these must, where possible, be placed under the route of the easement.