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| **Application Decision** |
| **Site visit on 28 March 2023** |
| **by Nigel Farthing LLB.** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date 19 April 2023** |

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| **Application Ref: COM/3301435**  **Waterford Marsh Common, Hertfordshire**  Register Unit No. CL090  Registration Authority: Hertfordshire County Council |
| * The application, dated 16 June 2022, is made under Section 38 of the Commons Act 2006 for consent to carry out restricted works on common land. |
| * The application is made by Sarah Roberts on behalf of Hertfordshire County Council, County Hall, Pegs Lane, Hertford. |
| * The works comprise the erection of stock proof fencing and gates   Decision: Consent is granted for the works in accordance with the application dated 16 June 2022 and the amended plan, as attached to this decision, subject to the following conditions:   * the works shall commence no later than 3 years from the date of this decision; and * the kissing gates to be installed shall be Mobility Kissing Gates compliant with BS 5790.2018 and shall have wire netting to the lower section to prevent access by dogs; and * the kissing gate at the northern end of the proposed fencing shall be located a minimum of 5 metres from the field gate; and * the redundant fencing indicated on the amended plan shall be removed no later than the date of completion of the proposed works; and * all works shall be removed, and the land restored to its former condition on or before 31 December 2033 unless a further consent application is made and approved. |

**Preliminary matters**

1. Following advertisement of the proposal, 23 objections were made and one letter of support received. Representations were received from the Open Spaces Society and Natural England and eight other individuals. In response to the objections and representations an amendment to the proposal was made in relation to the location of the proposed fence. The amended proposal was circulated and commented on by the parties.
2. I undertook a site visit on 28 March 2023 when I was accompanied by the Applicant and two supporters of the application. I walked extensively around the application site and immediately surrounding area to familiarise myself with the locations mentioned in the correspondence.
3. This application has been determined on the basis of the written evidence, the comments submitted by all parties and my own observation of the site. In reaching my decision I take into account all of the submissions made.

**Description of the site**

1. The application site comprises the main part of Waterford Marsh Common (‘the common’) excluding the two disconnected parcels at the north-west and south-east of the main area of common. The entire registered common extends to 10.76 hectares.
2. The Commons Register does not identify any owner of the common, but Stapleford Parish Council are stated to be the owner and undertake responsibility for its management. There are four registered rights of common, each to graze three animals.
3. The application site is bare rough grassland lying immediately to the east of the River Beane. There are some mature trees to the west of the site. A railway line runs along the eastern edge of the common, with one small parcel of common lying to the east of the railway and connected to the main area by means of a tunnel through the embankment. The eastern boundary of the common is fenced at the foot of the railway embankment. I was told the fence is on railway land. There are two public footpaths within the common, one running along the riverbank and the second passing through the tunnel and running west across the application site to join the riverside path.
4. I am told that until recent years the common was grazed by cattle during the summer months.
5. On the day of my visit it was raining and the common was wet, and muddy in parts where works had been undertaken recently to improve the river bank. The riverside footpath showed signs of extensive use although there were very few users during the course of my visit. The path from the tunnel showed some evidence of use, as did a route around the eastern perimeter of the common. The main area of the common consisted of tussocky rough grass showing no sign of passage or use.
6. For the purposes of identification only, the location of the proposed works is shown on the attached amended plan (the plan). The plan is amended from that which accompanied the application to show the proposed fence being set back from the riverbank in order to address issues raised by objectors.

**The Application**

1. The amended application seeks consent to erect a stockproof post and wire nettingfence for a length of 997.7 metres approximately parallel to, but a minimum of 10 metres from the bank of the River Beane. The indicative position of the proposed fence is shown on the plan. In addition the application seeks consent for the erection of combination gates spanning the opening to the tunnel under the railway line. The proposed fencing and gates, together with existing perimeter fencing, would create an enclosed stockproof grazing area of 7.58 hectares.
2. The purpose of the application is to facilitate the management of the common through grazing with cattle. Historically the common has been grazed by cattle which have been contained to the west by the depth of the river. Changes to the river have resulted in the water level being lower such that it no longer provides an effective barrier to cattle. The proposed fence would contain cattle on the western side of the common. By siting the fence a minimum of 10 metres from the river bank cattle would be prevented from accessing the river and damaging the riverbank. The fence would also segregate cattle from people using the riverside footpath or enjoying recreational activities by the river.

Main Issues

1. Section 38 of the 2006 Act provides that a person may apply for consent to carry out restricted works on land registered as common land. Restricted works include any that prevent or impede access over the land, including the erection of fencing.
2. I am required by Section 39 of the 2006 Act to have regard to the following in determining this application:
3. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it),
4. the interests of the neighbourhood,
5. the public interest, which includes the interest in nature conservation, conservation of the landscape, protection of public rights of access and the protection of archaeological remains and features of historic interest,
6. any other matters considered to be relevant.
7. In determining this application I have had regard to Defra’s Common Land Consents Policy Guidance (November 2015) which has been published for the guidance of both the Planning Inspectorate and applicants. However, every application will be considered on its merits and a determination will depart from the guidance if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the guidance.

Reasons

***The interests of those occupying or having rights over the land***

1. There are registered rights of common to graze animals. Stapleford Parish Council, as owner of the common, wishes to graze cattle on the common. This regime is a significant element of the Parish Council’s management strategy which has as an objective the increase of biodiversity. The proposed works will facilitate grazing by rights holders and the landowner.
2. There are private rights of way recorded over the common which will be unaffected by the proposed works.

***The interests of the neighbourhood***

1. The common is located on the outskirts of Hertford in a semi-residential area. The walk along the riverside footpath is clearly popular and the wider common (especially the outer margin) is used by local people for general recreation, especially dog walking.
2. The original proposal was for a fence to be erected along the riverbank. The proposed location of the fence was at the heart of many of the objections, with concern expressed that this would prevent those recreational activities that take advantage of the river and would create an unnecessary sense of enclosure. I fully understand these concerns. The Applicant has addressed these matters by the amended proposal which provides for the fence to be located a minimum of 10 metres from the riverbank. This will provide a riverside strip of land for recreational activities to which grazing animals will not have access.
3. The fencing will create an enclosed area within the common, but the purpose of the fencing is to keep cattle in rather than to keep people out. People will continue to have access to the whole of the common at all times. Provision is made for kissing gates at four points within the fence and as part of the combination gate at the tunnel. The Applicant has agreed, in the event that consent is granted, the kissing gates shall have wire netting on the bottom section to prevent dogs getting through, thus reducing the opportunity for conflict between cattle and dogs. The kissing gate at the northern end of the fence would be located a minimum of five metres from the field gate to avoid issues with cattle congregating at the field gate.
4. A significant number of objections have been made to the proposed works and a common theme is the perceived conflict between grazing cattle and recreational use of the common, such that the objections are as much to the use of the common for grazing as to the erection of a fence. Whether or not this application is granted, it remains the case that grazing of the common is an established and legitimate use of the land and registered grazing rights exist and can be exercised by the rights holders at any time. Similarly, the owner of the common, Stapleford Parish Council, has a right to use the land for grazing purposes.
5. In considering the interests of the neighbourhood it is necessary to take into account all legitimate uses of the common and conclude whether the proposed works will interfere with the co-existence of those uses. It is clear from a number of the objections that co-existence has in the past been uneasy and grazing cattle have caused concern for some users. Hitherto, when cattle have grazed the common there has been no means of segregating the cattle from people and their dogs. The proposed fence will provide an area at the northern end of the common to which the cattle will not have access and this, together with the ten-metre riverside strip will be available for recreational purposes without any risk of conflict with cattle.
6. I accept the proposed works will present a level of enclosure whereas none exists at present, and for some people this will be unwelcome. However, this must be balanced against the legitimate entitlement to graze the common, and the benefits that accrue from achieving segregation of people and cattle. On balance I conclude that the benefit of providing areas from which cattle are excluded will positively benefit the neighbourhood, and local people will be able to use the common as they have previously. Accordingly, there is, in my judgement, no significant detriment to the interests of the neighbourhood.

***The public interest***

*Nature conservation*

1. The common is not designated for any conservation or environmental purposes. One objective of the management scheme, of which the proposed works form part, is to increase the biodiversity of the common. The Applicant has explained how grazing with cattle at an appropriate density will be beneficial to the ecology of the site by creating a mosaic of patches of grass at different lengths which will attract a wider range of flora and fauna than the existing uniform sward which results from mechanical mowing.
2. In terms of managing the common the alternative to grazing is mechanical mowing with the cuttings being removed, known as ‘cut and lift’. I accept the evidence from the Applicant that cut and lift will do nothing to enhance the biodiversity of the site and thus from a nature conservation perspective grazing is the preferrable option.
3. The River Beane does not form part of the registered common, but does adjoin it and is a feature mentioned by many people in their responses to this application. The river is a natural chalk stream, an rare and ecologically significant habitat, which has hitherto been of poor ecological status. There are various reasons for this, including the poor rate of flow caused by the weir close to the southern end of the common. The weir has been breached in recent years resulting in improved flow and this, together with improvements to the banks and river course, has seen an improvement in the state of the river. Cattle entering the river from the common will damage the riverbank and jeopardise the improvements to river quality that have been achieved. The proposed fence will prevent cattle from accessing the river and causing such damage.
4. Having regard to the foregoing, I conclude that the proposed works will have a positive benefit for nature conservation

*Conservation of the landscape*

1. The erection of fencing on the common will have an impact on the open landscape of the common. The Applicant states that post and wire style fencing has been proposed because it has a lower visual impact than alternatives. Alternative management schemes have been considered in the form of ‘virtual fencing’, portable electric fencing, ‘cut and lift’ mechanical grass cutting and ‘rewilding’. I shall consider these in turn.
2. Virtual fencing does not require any visible infrastructure but relies on either a buried electrical wire or a GPS system to deliver an electric shock to cattle that seek to stray beyond the designated area. The principal benefit of such a system is that there is no detrimental visual impact. However, the Applicant rejects this option on the grounds of prohibitive cost and uncertain reliability. The Applicant also points out that this system does not allow anyone using the common to know where the ‘fence’ line is and thus whether conflict with cattle is likely. It does not exclude dogs from the grazing area and thus preserves the possibility of conflict. It is suggested that this technology is in its infancy and improvements to reliability and cost are anticipated in the future.
3. Electrical fencing does require physical infrastructure which is portable allowing for more flexible grazing of the common. However, in contrast to the proposed post and wire fencing system, the area enclosed by an electric fence would not allow any means of access for people and would thus result in their complete exclusion from any area being grazed. The Applicant has rejected this option on the grounds that, although less substantial than fixed post and wire fencing, it is unsightly and is capable of being knocked down thus providing a less secure barrier. It also poses some level of harm to children, dogs and wildlife.
4. ‘Cut and lift’ has been rejected by the Applicant primarily on the grounds of cost, but it is also a less beneficial to nature conservation. If this scheme of management were adopted, it would involve an annual cut in the autumn by which time the grass will have grown to a length and density such that it would be unsuitable for recreational activity. In contrast grazing through the summer months will keep the sward to a manageable length throughout the growing season.
5. ‘Rewilding’ has been suggested by some objectors. My understanding is that this would involve no, or very limited intervention with the intention of allowing the common to revert to a ‘natural’ state. The Applicant advises that, left unmanaged, the common would revert initially to rank grassland, of low ecological value, and then to woodland. The impact would be to render the common incapable of being grazed and to limit the range of recreational opportunities available.
6. In relation to landscape considerations, I conclude that, whilst accepting the proposed post and wire fencing will have a visual impact, there is currently no better alternative available and that, on balance, it is beneficial that grazing of the common should continue. It is foreseeable that in the relatively near future a reliable and affordable virtual fencing system will be available and I recognise this would merit serious consideration at that time.

*The protection of public rights of access*

1. The common enjoys an established use as a public open space and supports the two public footpaths described earlier. If consent is granted there will be no loss of common land and all of the common will remain available for recreation. The fence will obstruct access from the unenclosed to the enclosed areas, but the provision of kissing gates will limit the impact of this. The riverside public footpath will not be impacted by the proposed works. The footpath from under the tunnel to the riverbank will be obstructed by gates at the tunnel and by the fence, although a kissing gate is proposed at this location. The consent of the Highway Authority will be required to the erection of these structures on the public right of way.

*Archaeological remains and features of historic interest*

1. The proposal does not affect any archaeological remains or features of historic interest associated with the common.

*Conclusions on the public interest*

1. Overall, I am satisfied that there are no sufficient adverse impacts on the public interest that would cause me to conclude the applications should not be granted.

*Other relevant matters*

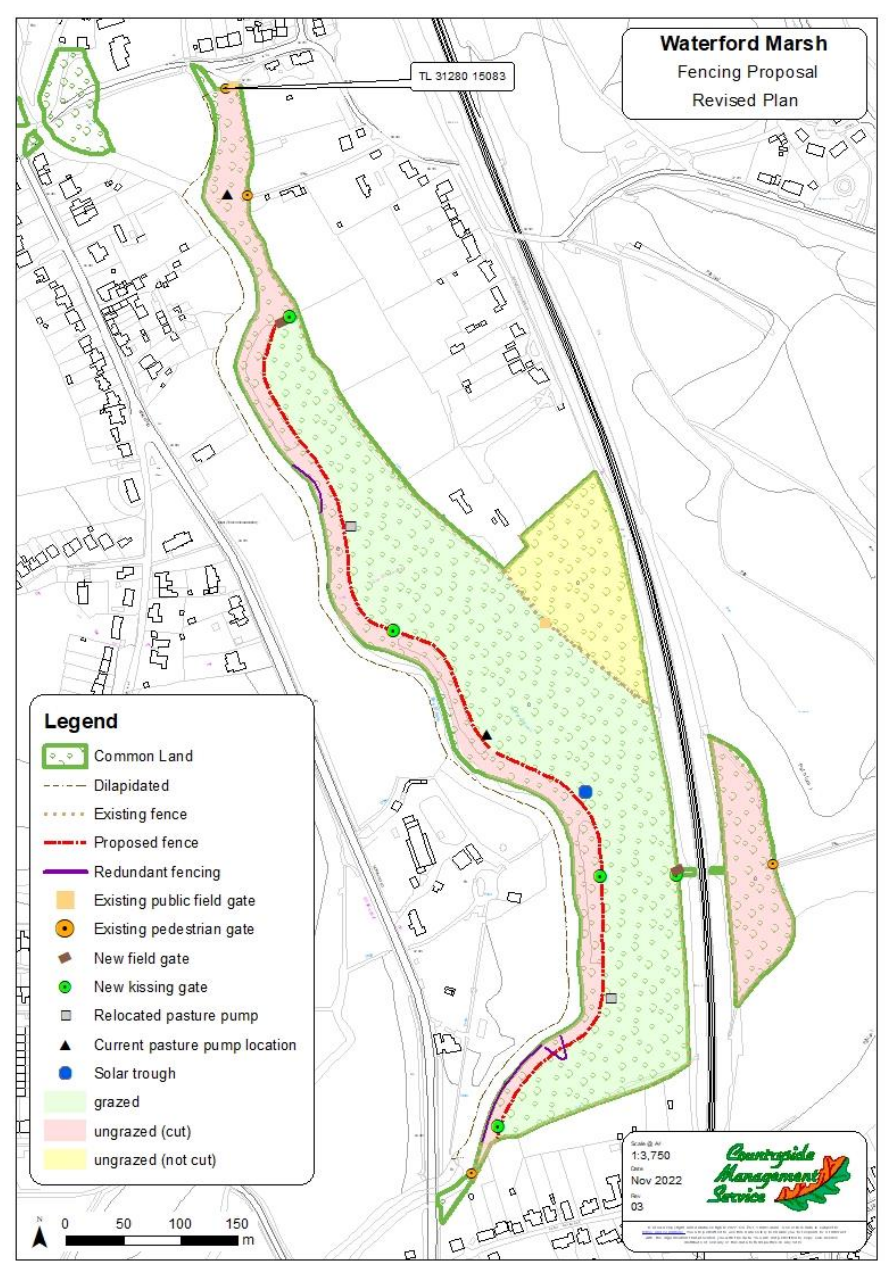
1. Paragraph 4.6 of DEFRA’s policy guidance advises that commons should be maintained or improved as a result of the works being proposed. Furthermore, paragraph 4.7 advises that in deciding whether to grant consent to carry out works on common land, the Secretary of State will wish to establish whether the proposed works are consistent with the use of the land as common land.
2. In assessing these applications, I am required to consider whether they propose the best outcome. If I consider there is a better approach it is open to me to impose conditions to improve the outcome. Alternatively, I may refuse the application if, having applied the statutory criteria, there are good grounds for doing so.

**Conclusions**

1. Having regard to the interests and matters discussed above and taking account of all relevant matters raised in the written representations, I conclude the proposed works will not significantly harm the interests set out in paragraph 13 above for the reasons given. Indeed, public rights of access will be preserved and there will be some positive benefits to the interests of the neighbourhood and there will be no significant adverse effect on the conservation of the landscape. I have considered the various alternative management schemes that have been suggested and, for the reasons given, conclude that the proposed works represent the best option available at this time. Having regard to the possibility that a viable technology based alternative scheme for management may be available in the future, I propose to grant consent for a period of ten years only.
2. Consent is therefore granted for the works subject to the conditions set out above.

Nigel Farthing

**Inspector**

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