



## Application Decision

Site visit made on 07 June 2016

by **Susan Doran** BA Hons MIPROW

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

Decision date: 14/07/16

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### Application Ref: COM746

### Westerdale Common, North Yorkshire

Register Unit No. CL008

Registration Authority: North Yorkshire County Council

- The application, dated 19 October 2015, 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 Jonathan Wood on behalf of Andrew Fawbert of The Graziers of High Blakey Moor, Chris Clubley & Co. Ltd., 62-64 Market Place, Market Weighton, York.
  - The works comprise:  
The erection of 995 metres of permanent fencing on Westerdale Common.
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### Decision

1. Consent is refused.

### Preliminary matters

2. Following advertisement of the proposal, objections and/or representations were received from Robert Drury on behalf of the landowner, David Ross; the British Horse Society; Cleveland Mountaineering Club; the Open Spaces Society; North York Moors National Park Authority (NYMNP); the Ramblers' Association; Danby Group Parish Council; the British Mountaineering Council; Natural England; Historic England; and Nigel and Carol Wilson, the latter in support of the proposal. I have taken all of these into account.
3. I made an unaccompanied visit to the site.
4. The application has been determined on the basis of the written submissions and my own observations of the site.

### The Site

5. Westerdale Common comprises a moorland common of wet and dry heaths grazed by sheep and managed for grouse. There is one registered owner. It lies within the North York Moors National Park and within the North York Moors Site of Special Scientific Interest (SSSI), designated for its wet and dry heaths, blanket bog, and birdlife. It is also within the North York Moors Special Area of Conservation (SAC) for its extent of dry and wet heath and blanket bog, and North York Moors Special Protection Area (SPA), for its breeding populations of merlin and golden plover.
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6. There are public rights of way crossing the common, including the Lyke Wake Walk and Esk Valley Way. Several minor roads cross the common and these include Blakey Road.
7. The application site lies between Blakey Road and High Hill Top to the west.

### ***The Application***

8. The stated purpose of the application is to erect a permanent fence (just under a kilometre in length) to contain sheep and prevent them from straying and becoming a hazard on the highway. It would comprise wooden posts 1.1 to 1.2 metres high, supporting 7 strands of high tensile plain wire.
9. The proposal forms part of a larger scheme, which seeks to fence off land to the south at Farndale (which lies outside the registered common). This comprises a fence of the same construction running for 2.83km along the western side of Blakey Road, and meeting the proposed fence at the boundary of the common, beside the road. The scheme as a whole, the Applicant states, will enable grazing of a large area of the moorland to continue whilst safeguarding the sheep.

### **Main Issues**

10. 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 are any that prevent or impede access over the land, including the erection of fencing; the construction of buildings and other structures; the digging of ditches, trenches and the building of embankments; and, the resurfacing of land if this consists of laying concrete, tarmacadam, coated roadstone or similar material.
11. I am required by Section 39 of the 2006 Act to have regard to the following in determining this application:
  - (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
  - (b) the interests of the neighbourhood;
  - (c) 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;
  - (d) any other matters considered to be relevant.
12. I have had regard to Defra's Common Land consents policy<sup>1</sup> in determining this application, 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.

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<sup>1</sup> Common Land consents policy (Defra, November 2015)

## **Reasons**

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

13. Issues to consider in this context are the effect the proposal would have on the ability of commoners or other rights holders to exercise their rights, the effects on rights of access and whether there would be any loss or benefit to rights holders.
14. Registered rights of common include sheep grazing rights shared between 17 commoners, rights of turbarry (to dig turf), to take bracken and stone, and one right of estovers (to take wood). Sheep grazing rights are exercised on a frequent basis by 4 commoners in respect of their own rights and also using rights attached to other properties. Two other properties are cited as having sheep rights on the Common.
15. The Parish of Westerdale is represented by Danby Group Parish Council which is concerned the proposal would be detrimental to the Westerdale Graziers. The proposed fence is sited at the southern extremity of the common, and would run from the fence intended to be installed alongside Blakey Road to an existing fence on the boundary of the common at High Hill Top. Access to the common would still be afforded from the west, but for some this would require a lengthy detour. The Parish Council believes this would be impractical for those on foot needing to reach their grazing land. The Applicant believes that some Westerdale Graziers may benefit in terms of grazing and gathering their flock, although in what way has not been elaborated on. Nevertheless, it is apparent that others would be unable to fully exercise their rights as they do now to graze sheep on the whole of Westerdale Common, in the event permission to erect the fence is granted. Two pedestrian gates are proposed by the Applicant to address access issues, and it is possible these may afford access for the Westerdale Graziers. Whether this would be practical in terms of the movement of sheep flocks from one side of the proposed fence to other is unclear.
16. The land is managed by the owner for driven grouse shooting. They consider permanent fencing would be detrimental to this activity. To mitigate concerns raised about the potential for bird strikes, the Applicant is willing to attach shiny metal tags to the wire fencing. No evidence has been provided as to the effectiveness of such a measure over time, although I accept it might go some way to reducing such incidences.
17. Although the Applicant acted in the belief that the landowner knew of and consented to the proposal, there is no indication to suggest that the landowner does support the proposal, rather the opposite. Overall, I consider there may be a limited benefit to some Westerdale Graziers but the proposal would have a negative effect on the ability of the commoners to exercise their rights as they do now. Further, there is no indication as to whether or not the Westerdale Graziers support the proposal.

### ***The interests of the neighbourhood***

18. The issues to consider here include whether or not the proposal would positively benefit the neighbourhood, whether or not local people would be prevented from using the common in the way they are used to, and whether or not the proposed works would interfere with future use and enjoyment of the

common, whether by the commoners, the public or others. For example, whether the fencing would render part of the land inaccessible.

19. As regards a positive benefit to the neighbourhood, those most likely to gain are the Graziers of High Blakey Moor who would benefit from an agricultural and economic perspective. An agricultural benefit arises in ensuring upland farms can rely on the grazing of common land; and an economic benefit in that the common can maintain a living for commoners who use it to graze livestock. Notwithstanding the initial outlay in erecting the fencing as a whole, the Applicant says the farmers are committed to ensuring the safety of their animals.
20. A decrease in the number of sheep lost to road traffic collisions by virtue of the presence of the proposed fence would be a positive outcome, subject to the proposed fencing on Farndale which does not form part of this application. In isolation though, I see no benefit arising. The Applicant says it is becoming increasingly difficult to persuade farmers to graze sheep on the common due to the high number of sheep fatalities on the road. However, no statistics are provided by either the Graziers of High Blakey Moor or the Westerdale Graziers as to the number of sheep killed or injured on the road, from which the scale or extent of the problem can be measured. Neither is there any evidence that other actions have been taken or considered to calm and manage the traffic using the road.
21. Whether the proposed fencing would have a negative impact on tourism as the NYMNP suggests is difficult to assess. However, part of the attraction of the area for visitors is its openness, and the introduction of the proposed fencing at this location would be incongruous. Furthermore, as already noted above, the proposed fence would affect the ease with which the Westerdale Graziers' were able to access part of the common land. The proposed stiles and hunting gates would though facilitate some access through the proposed fence.

### ***The public interest***

#### *Nature conservation*

22. There are no potential benefits to nature conservation identified to result from the proposal. Concerns about losses of habitat associated with installing the proposed fence are likely to be small. The compaction of soils resulting from this and from vehicular access during construction can be mitigated by taking particular care to ensure there is minimum impact on the area. However, appropriate assessments of the likely effects of the proposal have yet to be carried out.
23. Both the landowner and NYMNP raise concerns about the potential for birds to collide with the proposed fence. However, the Applicants comment it will follow the contours of the land, which they say will reduce the risk to low flying birds, and metal tags could reduce the possibility of bird strikes. The design and height of the fence they say will not form a barrier to deer, foxes and small mammals, or birds. Timing of the construction of the proposed fence could also help reduce the impact on the driven grouse. As stated above, the area is designated as an SSSI for its birdlife and also as an SPA for its breeding birds. Indeed, a variety of breeding birds were evident at the time of my site visit. I recognise the sensitive nature of the area, and note the measures the Applicant

proposes. Nevertheless, an appropriate impact assessment of the proposal on the SSSI/SPA/SAC would be required.

24. Natural England has doubts as to the need for fencing to maintain the traditional flocks associated with the open moorland landscape and nature conservation interest. The usual method of managing flocks in such situations is through the process of 'hefting' whereby flocks are familiar with their place on the moor and keep other flocks away, often with the support of shepherding. Such traditional methods are exercised here. However, the Applicants maintain that this does not prevent sheep from straying onto the road which is what the proposed fence aims to do. I understand that shepherding has been employed to reduce the potential hazard posed by sheep on the road, but this has not been successful. I agree with Natural England that the introduction of fencing is inconsistent with traditional flock management methods and the resulting nature conservation interest.

*Conservation of the landscape*

25. As stated above, the reason that permanent fencing is considered appropriate is to prevent sheep from straying onto the road and becoming a hazard, and to enable the continued grazing of a large area of moorland. A time limited consent is not something that the Applicant feels would address the problem, as once reached, they say, the Graziers would be in the same situation as at present. However, a time limited consent, if considered to be appropriate, would allow the scheme to be reviewed from time to time and/or for a future application for a further time limited period. On the other hand, some of those opposed to the proposed fence have suggested alternative methods of control such as those provided by emerging technologies. The NYMNPAs mention a scheme (the Better Outcomes for Upland Commons Project) which may provide an alternative means of dealing with stock management instead of fencing – although they do not elaborate on this.
26. I appreciate that new technology such as virtual fencing is still in its infancy and it is not yet proven to be suitable to replace conventional fencing such as here alongside roads. In addition, the Applicant believes it would be more expensive than the conventional fencing proposed and is not currently developed to a point where it would be reliable and economically viable for sheep. Sheep on the common they say are generally of a low value and the costs of a virtual fence system together with increased management time would be prohibitive. However, there is no information about the cost of the alternatives by way of comparison. Furthermore, new technologies are evolving quickly and other viable methods may soon become available.
27. However, the Applicant argues that the proposed fence may help to reduce the cost of vet bills, insurance and carcass disposals as a result of the decreased number of injuries and fatalities. Yet, as stated above, no statistics have been provided about casualties and losses of livestock as a result of collisions with vehicles on the road, and no evidence provided that other measures, such as traffic calming, have been considered.
28. Nigel and Carol Wilson say they are aware a significant number of sheep are killed each year by speeding motorists with resulting costs to local farmers; but there has been some reduction in animal losses in recent times through the efforts of the local authorities to improve warning signs. However, they do not

- consider this is enough. Enforcing a much lower speed limit through use of fixed cameras and hefty fines, in their view, would be an effective alternative, but they doubt whether this will happen or whether it could be resourced.
29. I have already mentioned above that the usual way of managing sheep on open commons such as this is that stock will 'heft' to particular areas. This together with other traffic management methods is successfully employed on many commons as a means of minimising the risk of accidents. The road passing through Westerdale Common is subject to the national speed limit. I did notice occasional 'informal' signs alongside the road carrying the NYMNP symbol (one to the north of the location of the proposed fence) illustrating a sheep and the words "Slow Down". However there is no indication that other measures have been considered or explored by the Applicants, such as traffic calming or speed limits, or other appropriate signage to alert road users that sheep are present.
30. Temporary electric fencing has been considered but is felt by the Applicant to be inappropriate in the location, and no explanation has been given as to why this is so or why traditional shepherding has not been fully successful.
31. I accept that the alignment of the proposed fence would be less visible from the road, but do not believe this would be the case from other parts of the common, or from land to the south, nor indeed from the informal path that runs parallel with it. From all these locations the fence in whole or in part, even as it follows the undulations in the land, and allowing for its construction type and natural weathering, would be visible in an otherwise open landscape, and would therefore impact on the enjoyment of those using the common, in particular for recreation. The Applicant says there are other fences in the area; indeed one runs along High Hill Top. However, it follows a contour line along the hillside rather than being on top of the moorland where it would be more visible from the surrounding land and nearby paths. It follows that I share the concerns of The Ramblers, Danby Group Parish Council, the British Horse Society, the Open Spaces Society and the NYMNP that the proposal would have a negative impact on the local landscape, the openness and natural beauty of which attracts large numbers of visitors each year. Furthermore, the location is within the National Park's Nature Conservation Area which is characterised by its expansiveness and openness, and panoramic views giving a sense of wilderness, remoteness and open country.
32. The Applicant is amenable to the NYMNP suggestion of siting the proposed fence 3 metres to the south of the informal path so as to reduce the impact of the proposed fence on walkers. Whilst this would be sensible, in my view it would not overcome the visual impact of the fence from the walker's perspective, or the impact of furniture along the fence necessary to maintain public access, notwithstanding the materials proposed.
33. I note the Applicant's argument that the feasibility of the whole fencing scheme (including that at Farndale) depends on this application receiving permission. I also appreciate that the grazing of sheep on the common plays a key role in conserving the landscape, and a key factor in its enjoyment by its users. I understand that the graziers are concerned about the welfare of their stock. However, I consider overall, that the proposed fence would have a significantly adverse effect on the conservation of the landscape.

*The protection of public rights of access*

34. No public right of way is affected. The path running parallel to the proposed fence line has no legal designation, but is clearly used by the public and others, and continues west beyond High Hill Top. It also links with an existing public right of way on the east side of Blakey Road. However, in addition to east-west travel, there is also the issue of north-south travel to consider for those choosing routes between Westerdale and Esklets Crag to the north and The Lion Inn and land to the south. The NYMNPA draw attention to the popularity of the area for walkers and in particular the nearby Coast to Coast and Lyke Wake Walks, and the Lion Inn, favoured as an overnight destination for long distance walkers in the National Park.
35. The land affected by the proposal is designated as open access land under the Countryside and Rights of Way Act 2000, which affords public access on foot. To address concerns raised by those opposing the proposal in that the public's ability to walk here freely would be adversely affected, in particular travelling in a north-south direction, the Applicant is willing to provide three stiles and two hunting gates (to British Standard 5709:2006) within the proposed fence.
36. I consider the proposal would ensure that access points are provided for the public, thus retaining public access. However, having regard to the requirements of the Equality Act 2010, if I were to permit the fencing I would specify that access be provided by means of pedestrian gates rather than a combination of stiles and gates.

*Archaeological remains and features of historic interest*

37. No designated heritage features appear to be directly affected by the proposed fence. However, it passes close to two scheduled ancient monuments: Flat Howe round barrow (dating from the Late Neolithic to Early Bronze Age) and wayside cross base, and The Margery Bradley standing stone. The standing stone, also of Late Neolithic/Early Bronze Age date, serves as an historic parish boundary and estate marker. The Applicant has indicated this feature will remain accessible to the public, lying outside the fence line and the proposed fencing will not interfere with either monument. Nevertheless, it will separate the two monuments, and there is a likelihood of other undesignated features in the vicinity of the proposed fencing which would need to be taken into account were consent to be granted. Scheduled Monument Consent would be required for any works within the scheduled ancient monument areas.
38. The NYMNPA draws attention to an area of old coal pits on Blakey Gill Head dating to around the second half of the 19<sup>th</sup> century. Again were these to be affected by the proposed fence then measures would need to be taken to avoid disturbance to these features. A careful assessment would be required as to the impact of the proposal in this regard in view of the Applicant's willingness to place the fence 3 metres south from the informal path.
39. I consider that any potential negative effect of the proposed fence in this regard could be addressed by careful planning and, where necessary, gaining appropriate consents.

## **Conclusion**

40. Having regard to the criteria set out in paragraphs 10-12 above, I conclude that although the proposed works may confer some benefit to the Graziers of High Blakey Moor, the fencing would have a detrimental effect on others with an interest in the common, and in particular would have a significantly detrimental effect on the character and openness of Westerdale Common. Furthermore, the Application lacks factual evidence to support the reasons given for it.
41. I find there is no significant effect either way in terms of nature conservation; and public rights of access would be provided for, albeit restricted by the location of access points for north-south travel. The separation of scheduled monuments by the proposed fencing would be regrettable, but with careful assessment as regards the position of the proposed fence, and appropriate consents, there is unlikely to be any significantly detrimental effect on archaeological remains and features of historic interest.
42. I find that the disadvantageous effects of the proposal outweigh the claimed advantages. It follows that I conclude the application should not be granted.

*S Doran*

**Inspector**

