
Application Decision

Site visit made on 1 March 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 25 April 2017

Application Ref: COM 3158741

Mallerstang West Common, Mallerstang, Cumbria

Register Unit: CL 94

Commons Registration Authority: Cumbria County Council

- The application, dated 15 September 2016, is made under section 38 of the Commons Act 2006 ('the 2006 Act') for consent to carry out restricted works on common land.
 - The application is made by Mr J R C Faithfull on behalf of the Mallerstang West Graziers Association.
 - The works comprise 14,650 metres of post and wire fence for 15 years over 5 sites covering 2,707,000m² to include access gates.
-

Decision

1. Consent is granted for the works above in accordance with the application dated 15 September 2016 and the plans submitted with it subject to the following conditions
 - (i) the works shall be removed no later than 15 years from the date they are carried out;
 - (ii) the works shall begin no later than 3 years from the date of this decision;
 - (iii) the access gates shall comply with BS 5709:2006.

Procedural Matters

2. I carried out an unaccompanied site inspection on 1 March 2016. My decision has been made on the basis of my observations on this visit, taking account of the application and representations received in response to the advertisement of the application.
3. I have had regard to the Department for the Environment, Food and Rural Affairs Common Land Consents Policy Guidance, published in November 2015, which sets out the benefits which common land should deliver, and the outcomes that it considers must be ensured by the consents process. This document has been published for the guidance of both the Planning Inspectorate and applicants. However, the application will be considered on its merits and a determination will depart from the published policy if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the policy.

The Main Issues

4. 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. In considering such an application I am required by section 39 of the 2006 Act to have regard to the following:
 - (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, the conservation of the landscape, the 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.

Assessment

The interests of those occupying or having rights over the land

5. Mallerstang West Common is owned by Mr Hugh Brown who supports the application and the proposed works. The application is made on behalf of the Mallerstang West Graziers Association ('the Graziers' Association') which represents the interests of those with rights over the common. There are five commoners who currently exercise their grazing rights and the Graziers Association has entered into a stewardship agreement with Natural England in relation to the management of the common.
6. Given that the active graziers have entered into a scheme which aims to maintain the historic management of the common for the benefit of nature conservation and that the freehold owner of the common has given his consent to the scheme, I consider that the proposed works would not have any adverse effect upon their interests.

Interest of the neighbourhood

7. The 2015 guidance indicates that the issues to be considered in this context include whether or not the proposal will offer a positive benefit to the neighbourhood, whether or not the works would prevent local people from using the common in the way they are used to, and whether or not there would be an interference with the future use and enjoyment of the common, whether by commoners, the public or others. For example, would the fencing sterilise part of the land rendering it inaccessible.

Positive benefit

8. The proposed works seek to facilitate the establishment of scrub woodland in five areas of the common to increase biodiversity by creating a mosaic of habitats and by providing food and shelter for birds, particularly Black Grouse. The scrub woodland is also intended to mitigate flood risk in the Eden catchment area by slowing the rate of flow from those streams on the common

- feed the River Eden. The stewardship scheme between the Graziers' Association and Natural England is also designed to maintain a viable agricultural income for those graziers participating in it. The fencing is required to protect the new woodland from stock damage; once the trees and scrub are established the fencing will be removed.
9. Consideration has been given to whether the desired outcomes could be achieved without fencing parts of the common; the removal of grazing stock or a severe reduction in livestock numbers was not considered a viable option as a balance has to be struck between environmental improvements and sustaining agricultural businesses which rely upon raising livestock on the fells. Consideration had also been given to whether the newly planted trees could be protected solely by tree tubes, but this would leave them vulnerable to damage from livestock through rubbing and trampling. Given that grazing stock are likely to browse and feed on any new growth which may appear from the tube if not otherwise protected, I am satisfied that there is a need to prevent grazing by excluding livestock from those areas to be planted and that the alternative methods considered would not provide the level of protection provided by the fencing.
 10. Concerns were expressed by one objector that the commencement of this particular scheme on Mallerstang West common would result in the loss of an opportunity to introduce a comprehensive scheme of flood protection for the whole of the Eden Valley. The objector acknowledged that similar planting schemes on Mallerstang East and Birkett Commons had been completed.
 11. The Graziers' Association submits that the proposed scheme has been included in the Cumbria Flood Action Plan produced by the Environment Agency and the Cumbria Floods Partnership which seeks to manage the landscape upstream of major habitations to slow the flow of water and reduce peak water levels. The Graziers' Association also points to the results of research being undertaken by Lancaster University on water attenuation from tree planting and fencing at Tebay Common. It is submitted that the research demonstrates that water flow through fenced and planted areas is reduced.
 12. I acknowledge that a comprehensive flood protection scheme for the whole of the valley is likely to be of benefit to those living in the valley and downstream in places such as Appleby and Carlisle. However, there is no evidence before me that such a comprehensive scheme is being formulated and in its absence, small schemes centred upon individual commons will provide a degree of mitigation and contribute to the prevention of future flooding. I consider the proposed planting scheme will, in the fullness of time, help to reduce water run-off from the common into the Eden and contribute towards flood protection in the Eden valley. Although the magnitude of that contribution is not yet known and is likely to require further research and study, I consider the scheme is likely to have a positive benefit for both for the neighbourhood and the public.
 13. The objectors also questioned whether the proposed scheme would have any impact upon flood risk downstream of the common when livestock rates on adjacent commons remained unchanged. The agreement which the Graziers' Association has entered into is specific to their common and the stocking rates on adjacent commons are outside the terms of the agreement relevant to

Mallerstang West common. The proposed scheme will however, result in a reduction in livestock rates of approximately 20% which reflects the reduction in the area of the common that will be available for grazing.

14. Concerns were raised about the possible spread of bracken on the common where grazing was to be removed for the duration of the scheme. The Graziers' Association submits that the maintenance and aftercare of the trees forms part of the agreement with Natural England and that control of competing vegetation would be part of the maintenance and aftercare of the scheme. With regard to encroachment by bracken, it was not considered that this was a particular problem on the common due to the extent of wet soil present but that its presence would be monitored and controlled if necessary.
15. In formulating the scheme, the Graziers' Association has consulted with those persons resident in the immediate vicinity of the common and has made adjustments to the design of the scheme, the location of fences and the planting programme to take into account the concerns raised by neighbouring owners and occupiers. Mitigation measures include not planting in specific areas to prevent sunlight being blocked from residential property and for fence lines to be adjusted so that they do not appear to be located on the skyline when viewed from a particular property. The evidence before me suggests that the concerns of those persons resident in the immediate vicinity of the common have been addressed and that any likely adverse effect upon neighbouring properties will be minimised.
16. I consider that the proposed works are unlikely to have any adverse impact upon how the common is used by those persons resident in the neighbourhood. The common is predominantly moorland with areas of blanket bog and is primarily accessed by pedestrians or equestrians using the existing public bridleway which crosses the common to the west of Hazelgill. None of the proposed fencing impinges upon the bridleway which will remain free from any additional structures.
17. The Graziers' Association has consulted with both the Local Access Forum and the Yorkshire Dales National Park Authority's Ranger with regard to the most appropriate locations for access points into the enclosures which will be created by the fencing scheme. The least restrictive infrastructure in terms of gates as opposed to stiles will be erected at a number of points (29 gates in all) to enable access into and through the common.
18. I consider it unlikely that the proposed works would have a significant adverse effect upon the ability of residents in the neighbourhood to enjoy the area for informal outdoor recreation or that the interests of the neighbourhood would be unduly harmed by the proposals.

The public interest

The protection of public rights of access

19. In relation to public rights of way, the preferred means of access through any boundary is a gap. In the absence of the possibility of a gap (because of the need for stock control) a gate is preferable to a stile in the light of the requirements of the Equality Act 2010. There is no reason why the same principles cannot apply to access to common land.

20. The common is also registered as Open Access Land under the Countryside and Rights of Way Act 2000. As noted above, the proposed works do not adversely affect the public bridleway which crosses the common. The gates to be provided will comply with the current British Standard and are the least restrictive option given the requirement to exclude sheep from those parts of the common proposed to be planted. I consider that the proposed works would not unduly restrict access to the common on foot.
21. The Open Spaces Society submitted that there was a considerable quantity of unauthorised fencing already present on the common which had not been included in this application and should be removed. The Graziers' Association responded that the roadside fence on the southernmost plot of Aisgill Moor was to be replaced as part of the scheme and that it would be removed at the same time as the remainder of the scheme fencing was removed. The remaining unauthorised fences comprised a 200 metre section at Lordburn Close which would be removed as part of the scheme, and the fences around a number of the shakeholes found on the common.
22. The Graziers' Association estimates that the fences around the shakeholes totalled approximately 700 metres in length. Although the shakehole fences did not form part of this application the Graziers' Association was extremely concerned that the removal of these fences would impact upon the safety of any user of the common particularly in snow or dense fog. There are 11 shakeholes which are fenced as a result of them being particularly deep or sheer in character. The proportion of the common within the shakehole fences is less than 0.33% of the total area of the common.
23. The Graziers' Association notes that before they were fenced, the graziers would have to descend into the shakeholes on a weekly basis to rescue livestock which had fallen in. I consider that the fencing of the shakeholes is necessary for both good animal husbandry and to make the common safe to walk over. Although these fences are not the subject of the current application, it would be open to the Graziers' Association to seek consent for the retention of the shakehole fences under a separate section 38 application if they so chose.

Nature conservation

24. The proposed planting scheme is located within a Red Squirrel Buffer Zone within the Yorkshire Dales National Park and the planting scheme is comprised of small seeded species which will not encourage the spread of grey squirrels. The species mix will also produce a suitable habitat for Black Grouse which have been noted to be present on the common.
25. The areas of the common proposed to be fenced include areas of blanket bog; it is not proposed to plant these areas as 40% of the land to be enclosed will remain open. Reducing grazing pressure on blanket bog by the exclusion of sheep for the duration of the scheme is likely to lead to an increase in the volume of the blanket bog and its ability to retain water which in turn may contribute to the attenuation of water flowing from the common into the Eden.
26. I consider that there will be an increase in the nature conservation value of the common as an indirect result of the proposed works. The fencing, together with

the exclusion of grazing will allow for the establishment of the trees, which will lead to the wider environmental and conservation benefits sought by the Graziers' Association.

Conservation of the landscape

27. The proposed works are intended to facilitate the establishment and growth of scrub woodland as habitat for Black Grouse but also as part of flood risk alleviation in this part of the Eden valley. The Graziers' Association has consulted with the Yorkshire Dales National Park Authority ('YDNPA') and the Yorkshire Dales Access Forum and has taken advice from those two bodies regarding the conservation of the landscape. The visual impact on the landscape of the proposed fencing will be minimised by using post and wire and the fencing will be positioned where it is least visually intrusive. Clearly there will be a greater visual impact when close to the fences although the height should generally mean that people will have a view over the top of them.
28. With the exception of the smaller enclosures at Turner Hay Hill and Deep Gill, the proposed enclosures at Shoregill Fell, Ais Gill and Aisgill Moor would be fairly substantial at 139.4Ha, 62.0Ha and 65.8Ha respectively. Consequently the generally 'open' character of these parts of the common would be retained for anyone accessing these enclosures through any of the proposed access points. The erection of gates within the new fences will have some adverse impact upon the landscape; however I do not consider that the impact would be unacceptable.
29. The Graziers' Association acknowledges that the responsibility for maintenance and repair of the fence and its eventual removal resides with the graziers; it is submitted that provision has been made within the scheme for such works to be fully funded. I am satisfied that the proposed works would be properly maintained for the lifetime of the fence.
30. Taking account of the overall purpose of the works and the intended outcomes I consider that whilst there will be a visual impact arising from the fences and gates, this will be for a limited period in landscape terms. I am satisfied that the short-term visual impact is outweighed by the long-term conservation and flood risk management objectives of the scheme, which will deliver landscape improvements over a much longer period.

Loss of existing use or interference with future use

31. The proposed works are unlikely to interfere with the current or future use of the common by residents, commoners or visitors. There are no internal fences proposed which would sterilise any part of the common or prevent access by the public or the commoners.
32. I consider that the proposed works will enable the traditional management of the common to continue and that the proposed works will deliver environmental and amenity benefits which are enjoyed by both residents and visitors to the common.

Protection of archaeological remains and features of historic interest

33. Historic England commented that there were no designated heritage assets within or near any of the proposed fencing. However it was noted that some of the fences were in close proximity to the Settle-Carlisle Railway Conservation Area and suggested that the appropriate officer at YDNPA be consulted. Having made a visit to the site, the YDNPA archaeologist was of the view that the proposed works were unlikely to have any detrimental impact upon archaeological remains. It was noted that there were some mining related features near Cotegill Bridge which could be marked on the ground to prevent any potential disturbance or unnecessary damage.
34. I am satisfied that with the mitigation works proposed for the Cotegill Bridge area, the proposed works would not harm any archaeological remains or features of historic interest.

Conclusions

35. Having regard to the interests set out in paragraph 4 above, I find that the works would not adversely affect those interests and that it is expedient that consent for the works should be given.
36. For the purposes of identification only, the locations of the works are shown edged red on the attached plans.

Alan Beckett

Inspector

APPENDIX

