



Application Decision

Site visit held on 12 and 13 March 2019

By Martin Elliott BSc FIPROW

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

Decision date: 23 April 2019

Application Ref: COM/3205971
Fylingdales Moor, North Yorkshire

Register Unit: CL76

Registration Authority: North Yorkshire County Council

- The application, dated 22 June 2018, 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 Laurence Edward Hodgson for the Manor of Fyling Court Leet.
- The works comprise: the erection of approximately 5,000 metres of fencing to enclose approximately 325 hectares of moorland and the erection of eight field gates, two kissing gates, two other gates and two stiles.

Decision

1. Consent is refused.

Preliminary Matters

2. The application seeks approval for 2 field gates and 2 kissing gates from the A171 road, 2 gates, 2 kissing gates and 2 stiles from the U2413 road and 2 field gates from the track from Howdale Farm. However, the application plan only identifies 8 field gates and 3 kissing gates. The applicant was asked to clarify the number of structures and confirmed that they were happy with the proposed numbers of gates and field gates as shown on the application plan. I have considered the application on this basis.
3. Representations are made on the basis that consultations were not carried out in accordance with the guidance set out in 'A Common Purpose, A Guide to Community Engagement'¹. Whilst it would have been advantageous to have carried out consultations in accordance with the guidance² there is nothing to indicate that the statutory requirements in respect of the application have not been complied with; the applicant has confirmed that the advertising requirements have been met. Nevertheless the applicant was asked to contact all consultees again giving 28 days to respond to the consultation as previous consultations did not provide sufficient time to respond.

¹ A Common Purpose, A Guide to Community Engagement for those contemplating management on Common Land (A Common Purpose)

² Common Land Guidance Sheet 1a published by the Planning Inspectorate advises that pre-application consultation should be carried out as set out in A Common Purpose

Main Issues

4. In considering the 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.
5. I have had regard to Defra's Common Land Consents Policy³ in determining this application under section 38, 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 policy if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the policy.

Assessment

Interests of those occupying or having rights over the land

6. The common is subject to rights of common (sheep gaits). Rights of common are exercised by four commoners and are exercised for 12 months of the year. Representations of support for the proposed works have been received from two individuals with rights of common and the landowner has also confirmed their support. It is stated that the works will allow the land to be grazed; it is not currently possible to graze the land safely due to the land being open to the A171 road. Grazing will assist in the management of the moor to encourage the regeneration of heather and prevent the growth of scrub. One of the commoners indicates that enabling grazing will provide a financial boost and reduce the risk of fire the proposed fencing would also improve security. Bearing in mind the above the proposed works will be of benefit to those with rights of common. There is nothing to indicate that the works would have any adverse effect on those occupying or having rights over the land.

Interests 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.
8. I consider below (Paragraphs 9 to 18) the effect on public access to the common. However, no evidence has been put before me as to any benefits or disbenefits to the neighbourhood. The Parish Council support the application

³ Common Land consents policy (Defra November 2015)

on the basis that grazing will help with the management of the moor and the positive factors identified by the applicant.

The public interest

The protection of public rights of access

9. The common is subject to rights of access on foot in accordance with the Countryside and Rights of Way Act 2000 (the 2000 Act). The fencing will restrict public access to the common and given that the fencing will create pockets/strips of common land outside the fenced area these areas will become inaccessible from within the common other than via the gates which are proposed. Given the location of the gates I consider that the proposed fencing will have a significant detrimental effect on public access to the common as a whole.
10. The proposed fencing will cross two public bridleways leading from the U2413 road, one leading to Cook House and the other following Green Dike and then continuing into the adjacent forestry plantation. The application plan indicates that a field gate will be provided on the bridleway to Cook House where it crosses the proposed fence at the U2413 end and also at the Cook House end. However, there is no provision to access the bridleway running along Green Dike where the proposed fence crosses the route at its northern end and the bridleway will therefore be obstructed. A field gate is to be provided in the fence at the southern end of Green Dike before this bridleway turns southwest and enters the adjacent plantation.
11. The fencing will also cross the two public footpaths which commence from the public bridleway leading to Cook House and lead to the A171. A field gate and a kissing gate will be provided in the fencing at the A171 end. A further public footpath leads onto the common from Howdale Farm and although not entirely clear from the application plan the route of this footpath would, from the information before me, be obstructed by the fencing. It is nevertheless noted that there is a proposed field gate in the vicinity which appears to accommodate a route leading to a ford over the stream flowing northwards from the moor. I consider this route below at paragraph 15 below.
12. The British Horse Society (BHS) say that no consideration has been given to gates on the route of the bridleway from the A171 to Cook House. However, this section is unaffected by the proposed works. As noted above a field gate is proposed at Cook House where the route continues over the common.
13. Whilst gates are provided to access the various public rights of way, as pointed out by the Open Spaces Society (OSS) it will be necessary to obtain consent from the highway authority under section 147 of the Highways Act 1980. Consent for the works does not grant the necessary authority for erecting structures on public rights of way.
14. Notwithstanding the above, although the applicant suggests that the gates on the bridleways will be fitted with 'modern equestrian catches' the application provides no specification as to the proposed gates, not only those on public rights of way but also other gates providing access to the common. In the absence of any specification it is unclear as to how obligations under the Equality Act 2010 will be complied with. Both Natural England (NE) and the OSS state that structures should comply with the British Standard BS5709. In the absence of any specification which shows compliance with the Equality Act

2010 I agree with NE and the OSS that structures should comply with the current version of BS5709 (BS5709(2018)). Should consent for the works be granted then I intend to impose a condition that all structures are compliant with BS5709(2018).

15. The BHS also state that no consideration has been given to the unrecorded bridleway from Stoupe Brow to Brow Moor and links to Howdale Moor via a sunken holloway and ford to link with the footpath from Howdale Farm. On my site visit I located the sunken holloway and the continuation track onto Brow Moor and also the ford on a narrow track leading to the footpath from Howdale Farm. The route from the sunken holloway onto Brow Moor falls outside the area of land to be fenced but nevertheless the route gains access to Brow Moor via an existing field gate/bridle gate. I also noted another bridle gate to the south west of these gates which also gives access to Brow Moor. There is nothing to indicate that these access points will be affected by the proposed fencing. In respect of the route leading from the ford to the footpath leading from Howdale Farm this route falls within the fenced area and access to this route will be maintained by a field gate. I revert to my previous comments in respect of BS5709(2018) which are equally applicable to this field gate.
16. The BHS also contend that no consideration to gates has been given at grid reference 962995 where an unrecorded bridleway enters into the forestry plantation. On my site visit I noted a track along the outside edge of the forestry plantation, leading from the bridleway following Green Dike to the location identified by the BHS, where a further track leads into the forestry plantation. The access into the plantation will not be restricted at this point as the fencing is to the north of the track alongside the plantation. Nevertheless, given that this track will be enclosed between the fencing and the plantation it will not be accessible to, or from, the common. Access will only be available from the gate on the bridleway adjacent to Green Dike or the kissing gate in the fencing adjacent to the A171 just to the north of Helwath Beck. I consider this to be a significant adverse impact on public access to the common.
17. One objector states that dog walkers would be banned if cattle were grazed on the common. Whilst the 2000 Act includes certain provisions in respect of access restrictions on dogs there is no general provision providing for the banning of the dogs from open access land where cattle are being grazed.
18. The East Yorkshire Ramblers seek clarification as to whether a kissing gate or stile is to be provided at grid reference 957993 at Harwood Dale Forest. This location falls outside the application land and is not a matter for my consideration.

Nature conservation

19. NE has been consulted on the application and advise that the relevant units are in an unfavourable recovering condition with no recorded threats. NE has a Higher Level Stewardship agreement with the landowner which covers the application land. They suggest that the introduction of intensive grazing will facilitate more intensive management of this area of the moor but that this may result in a reduction of the biodiversity of the North York Moors SSSI moorlands as a whole. However, they do not object to the proposal. Nevertheless NE advise that in the event of consent being granted they will require formal notice before commencement of the works. This is due to the application land being a Site of Special Scientific Interest (SSSI), a Special

Protection Area (SPA) and a Special Area of Conservation (SAC). NE would, under SSSI legislation, need to approve any stocking plans, mindful of existing common rights, to ensure any introduced stock do not damage the existing conservation interest of the site. If consent for the works is granted the applicant is reminded to have regard to Natural England's Standing Advice on European Protected Species.

20. NE also point out that the proposals exceed the threshold of 2km and may require Environmental Impact Assessment screening⁴. Whilst an Environmental Impact Assessment screening may be required the application must be considered on its merits.
21. Notwithstanding the above the North York Moors National Park Authority (NYMNP) make the point that the application provides no evidence to support an overriding conservation/biodiversity need for the fence and grazing which might offset other concerns. The NYMNP accept that grazing will reduce vegetation height and that together with heather burning or cutting would reduce the fire risk on the moor.
22. Although I note the assertions of the applicant as to the benefits to nature conservation, and NE acknowledge that without the grazing of the land scrub may increase potentially resulting in a loss of biodiversity, there is little evidence before me as to the extent of the benefits of the works in respect of nature conservation. As such it is difficult to give the potential benefits any great weight in considering the application as a whole. It is nevertheless likely that there are some benefits and grazing, along with controlled heather burning and cutting, would reduce fire risk.

Conservation of landscape

23. The application indicates that the proposed works include some 5000 metres of post and green wire and green barbed wire to a height of 1.3 metres. Any fence will be kept away from the skyline and in the lee of any hills and woodland where possible. Concerns are raised as to the impact of the fencing on the landscape. The NYMNP say that the unfenced nature of the moorland in the North York Moors is one of the National Parks special qualities and part of the areas distinctive character. It is their policy (National Park Management Plan Policies E1 and E32) to resist this type of landscape impact other than where there are over-riding reasons. The North York Moors National Park Landscape Character Assessment (2003) also lists fencing as having an impact and being a threat to the moorland landscape.
24. The area of the common subject to the application currently offers wide open views of the common itself and the surrounding areas. There are wide open vistas on all sides although to the south this is somewhat impeded by well established forestry. Some of the proposed fencing runs parallel but not immediately adjacent to the established forestry; the proposed alignment of the fence appears to accommodate an existing track which is adjacent to the plantation. Given that the fencing does not follow the boundary of the common I consider that the fence will impact on the landscape of this part of the common. This section of fence will introduce an artificial boundary and create a 'corridor' which will disrupt the open vista northwards and introduce a sense

⁴ The Environmental Impact assessment (Agriculture)(England)(No.2) Regulations applies to common land by Regulations 3 to 18 of the Environmental Impact Assessment (Agriculture)(England)(No. 2) (Amendment) Regulations 2017

of enclosure. This will detract significantly from the openness of the common and therefore adversely affect the landscape. In respect of the fencing along the A171 road, given the proximity of the adjacent road, and in some parts vegetation which will obscure the fencing, I consider that the impact will not be significant although there will be some impact. Along the north-western edge of the common the fencing will separate relatively small areas of common from the main part of the common. This fencing will again intrude on the openness of the common thereby having an adverse and not insignificant effect on the landscape.

25. Along the eastern side of the common the fencing will follow the seaward side of an existing track. Although the positioning of the fence may mean that it is not visible from certain parts of the common the works will establish a linear feature in excess of 1 kilometre. Such a feature will clearly visible from this part of the common and, have a severe impact on the landscape. The fencing will also have a significant impact on the spectacular views from the track towards the coast and Robin Hood's Bay which will detract from the openness of this part of the common. Consequently the fence will have a significant detrimental effect on the landscape at this location.
26. It is also noted that the fencing does not follow the boundary of the common. As such the areas outside the fencing will be subject to a different management regime or even left unmanaged. This may in due course have an effect on the open character of the common and as such needs to be put into the overall balance.

Archaeological remains and features of historic interest

27. Historic England (HE) have been consulted and advise that Stony Marl Moor is an exceptionally important archaeological site. However, whilst the proposed fence encloses most of the designated scheduled sites the fence is considered to cross the medieval dike known as Green Dike (1020116) and Round Barrow Cemetery 440 metres west of Brickyard Cottage (1019712). The fence will also pass close to the Round Barrow 500m south of Howdale Farm (1019681). Although the impact on these monuments is considered relatively minor the enclosure of the moor is considered to have an impact on the setting of the monuments and HE suggest that this has a negative impact on the significance of these monuments.
28. HE understand that the fencing is necessary for the management of the moor and are of the view that managed grazing of the moor will be beneficial for the management of the important archaeological sites within the fenced area. HE take the view that the identified harm is acceptable given the requirement to re-establish grazing. However, HE ask that the fence crossing Round Barrow Cemetery (1019712) is moved to the south-east to avoid burials. Further that the fence should run to the south of Round Barrow (1019681) but that in the event that this makes the fence more visually intrusive HE should be contacted for further advice. It is not clear from the information before me as to the location of the fencing in relation to this scheduled site and therefore it is difficult for me to determine the effect of the proposed works or any change to the alignment of the fence in the context of the effect on the landscape. In respect of the fence crossing Green Dike (1020116) HE advise that this will require Scheduled Monument Consent which must be applied for before any works are carried out.

29. NE suggest that the grazing of the common other than by sheep may be of concern in respect of potential damage to the archaeology of the area. NE do not expand on their view but as noted above before any stocking of the land they will require formal notice such that any stocking levels could be agreed; this will assist in removing or minimising any potential damage to the archaeology.
30. Bearing in mind the above whilst the proposed works will have some detrimental effect on archaeological remains and features of historic interest there is nothing to indicate that any adverse effect is significant. Nevertheless, if consent is granted any fencing should be moved to the south-east of Round Barrow Cemetery (1019712) so as to avoid any burials. Further, any fencing should be to the south of Round Barrow (1019681). It should be noted that consent for works under the Commons Act 2006 does not negate the need to seek other consents under other provisions. HE require Scheduled Monument Consent in respect of Green Dike.

Other relevant matters

31. One objection raises concerns in respect of the water supply for Ravenscar as a consequence of contamination or any treatment of the land. As pointed out by the applicant the water from the common flows south via Helwath Beck to the River Derwent or northwards via Howdale Beck to the North Sea. No evidence has been put before me in respect of the source of the water supply for Ravenscar and the likelihood of any contamination from either the works or subsequent grazing of the land. I am therefore unable to give these concerns any weight.
32. Further concerns are raised in respect of problems to walkers which may be posed by cattle. As pointed out by the applicant any stocking rates are likely to be low and, given the size of the area to be enclosed, it is likely that walkers or riders on the common will not come in close contact with livestock. Whilst the grazing of livestock might pose an issue with walkers I consider any risks to be very low such that it does not have any bearing on my decision.
33. The East Yorkshire Ramblers make the point that at one time it was possible to get across the west end of the forest onto the common opposite Harwood Dale Lane. They ask if it is appropriate to seek access from the Estate and the Forestry Commission so as to avoid walking along the A171 to the car park. This is not a matter for my consideration as it falls outside the application land.

Conclusions

34. The Commons Act 2006, and earlier legislation relating to common land, enables government to safeguard commons, ensure the special qualities of common land are protected and improve the contribution of common land to enhancing biodiversity and conserving wildlife. Commons should be maintained or improved as a result of any proposed works with section 38 of the 2006 Act conferring additional protection on common land.
35. Bearing in mind all of the above, there will be some benefits to those with rights over the land in that the fencing will enable the land to be grazed thereby improving the management of the common. There may also be some benefits in respect of nature conservation. However, the benefits are largely unknown and as noted above it is difficult to place any great weight on these benefits. Notwithstanding the above, the fencing will have a significant

adverse effect on public rights of access and the landscape. The proposed works may also be detrimental to archaeological remains and other historic features although there is nothing to suggest that any impact will be significant.

36. It is appreciated that other forms of enclosure which would allow grazing have been considered but are in the circumstances impractical. However, although finely balanced, I do not consider that the benefits arising from the fencing outweigh the disbenefits in respect of the effect on rights of public access and landscape.
37. Having regard to these and all other matters raised in the application and in the written representations I conclude that, on balance, the application should be refused.

Martin Elliott

INSPECTOR