
Application Decision

by Richard Holland

Appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 12 November 2019

Application Ref: COM/3223578

Bowes Moor, Durham

Register Unit No: CL1

Commons Registration Authority: Durham County Council

- The application, dated 25 February 2019, 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 Robyn Peat of George F White LLP.
 - The works comprise the erection of approximately 5700 metres of stock management fence, consisting of Sheep Net HT8 with 1 x line wire on top in total. Bird markers at 2.5 metre intervals. Fence to be at least 1.05 metres high. Pressure treated timber – intermediate posts 65mm top diameter space no more than 3.5 metres apart. Straining posts 100mm diameter, maximum spacing of 150 metres or at every change of direction point. Provision of 2 x wooden field gates and 1 x water gate.
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Decision

1. Consent is refused.

Preliminary Matters

2. I have had regard to Defra's Common Land consents policy¹ (Defra's policy) 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.
3. The application form (dated 25 February 2019) was originally submitted on 26 February 2019. However, the applicant re-submitted the form on 8 July 2019 to include more details of the proposed works; no changes were made to the proposed works. I am satisfied that the interests of anyone wishing to make a representation about the application have not been prejudiced.
4. This application has been determined solely on the basis of written evidence.
5. I have taken account of the representations made by NE, Historic England (HE) and the Open Spaces Society (OSS).
6. 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;

¹ Common Land Consents policy (Defra November 2015)

- c. the public interest;² and
- d. any other matter considered to be relevant.

Reasons

The interests of those occupying or having rights over the land

7. The land is owned by the Field Reeves of Bowes Regulated Pasture c/o Mr Andrew Bracewell, who was consulted by the applicant but has not commented. Having been in direct contact with the applicant before making its representation, NE refers to the applicant as the landowner's agent. Whilst the applicant has not made clear in the application form that he is acting on behalf of the land owner, I am satisfied that this is likely to be the case and there is no evidence to suggest that the interests of those occupying the land would be harmed by the proposals.
8. The common land register records numerous grazing rights over the land. The applicant has advised that there are six active graziers, all of whom were consulted about the proposals. None have commented but all are party to a sheep-grazing regime associated with the Bowes Moor Countryside Stewardship Agreement (the Stewardship Agreement) between the applicant and NE. As the fencing is proposed to facilitate the grazing regime, I am satisfied that the works would be in the interests of persons exercising rights of common over the land.

The interests of the neighbourhood and the protection of public rights of access

9. The fence line is proposed to run roughly west/east for approximately 5700 metres along a section of the common land boundary formed by Deep Dale Beck. The land south of the beck is common land (Bowe Moor) and is included in the Stewardship Agreement grazing regime. The land north of the beck (Lartington Moor) is neither but is also used for grazing. The fence is proposed to run along the south side of the beck to stop grazing animals crossing between the two moors.
10. The interests of the neighbourhood relates to whether the works would affect the way the common land is used by local people and is closely linked with the interests of public rights of access. The land is open moorland and likely to be used for general recreational access by local people and the public alike. The application proposes two public access points in the fence line. Gate A would be at the far western end where the common shares a boundary with the adjacent East Stainmore Regulated Pasture (common land unit CL17). Gate B (and a water gate) would be at the far eastern end of the fence line, where existing fencing on the Lartington Moor side of the beck extends for a further 3000 metres or so eastwards to provide a continuous stock-proof barrier.
11. The applicant says no public rights of way cross the proposed fence line and it seems that on this basis no additional public access points along its length are deemed to be necessary. Both NE and OSS have raised concerns that this would have an adverse effect on public access. In response the applicant says that additional gates could be left open (presumably by walkers) and that the isolated location of the fence would make regular inspection of additional access gates difficult. Whilst the applicant has also suggested that self-closing kissing gates could be a solution to the problem, he has said only that "*in principle additional access points would be considered and a possible consultation on their location should be undertaken*".
12. The proposed fence line would extend for approximately 5,700 metres with no public access points through it other than at each end. The applicant's concerns that additional gates along the fence line could be left open indicates that, although there are no formal public footpaths, this area of the common is still used by the public. Whilst the applicant has suggested that kissing gates could be installed to address public access concerns, the application has not been amended to include such gates or other additional means of access. I conclude that in the absence of any additional gates or stiles the proposed fence line would seriously and unacceptably harm rights of public access.

²Section 39(2) of the 2006 Act provides that the public interest includes the public interest in; nature conservation; the conservation of the landscape; the protection of public rights of access to any area of land; and the protection of archaeological remains and features of historic interest.

Nature conservation

13. The land lies within the Bowes Moor Site of Special Scientific Interest (SSSI), the North Pennine Moors Special Area of Conservation (SAC) and the North Pennines Moors Specially Protected Area (SPA) for Golden Plover, Hen Harrier, Merlin & Peregrine Falcon. NE has advised that the SSSI is a mixture of 'unfavourable recovering' and 'unfavourable' condition.
14. The Stewardship Agreement runs from 1 January 2018 to 31 December 2027 and includes an objective to improve areas of degraded blanket bog by reducing summer and winter grazing levels; the Agreement includes the provision of fencing of a type similar to that proposed in this application to meet this objective. The proposed fencing would assist in managing grazing stock numbers accordingly by ensuring that animals grazing Lartington Moor could not stray into the managed area. NE acknowledges that areas of the SSSI are experiencing over-grazing and that this needs to be addressed. NE raised no concerns about any potential impact of the fence on other biodiversity/habitat interests.
15. I consider that the proposed fence would assist in meeting the objectives of the Stewardship Agreement and would benefit the interests of nature conservation.

Conservation of the landscape

16. The land lies within the North Pennines Area of Outstanding Natural Beauty (AONB) and the AONB Conservation Board was consulted by the applicant. Whilst the Board subsequently requested and received additional information from the applicant about the application, it has not commented on the proposals. OSS contends that the fencing would be an eyesore. The applicant has said the fencing would not be visible from any public highway and that wherever possible it would be below the edge of Deep Dale Beck and so would naturally be shielded by the river bank. He notes that the nearest public right of way is the Pennine Way footpath, some 1100 metres away. The Stewardship Agreement aims to use a controlled grazing regime to improve areas of degraded blanket bog. It follows that over time such improvement would be beneficial to the AONB landscape and that stock control fencing is integral to realising such benefits. However, whilst the Stewardship Agreement will come to an end in 2027 the application is for permanent fencing as the applicant considers that there would always be a need to prevent stock encroachment from Lartington Moor. Given its location, I consider that the fencing, so long as it is no more than 1.05 metres high, will not have an unacceptable visual impact and will conserve the natural beauty of the AONB. Nevertheless, I consider it appropriate, were I to conclude that the fencing is acceptable in all other relevant respects, to require that it is removed when the Stewardship Agreement ends. Should there still be a need for the fencing after this time a fresh application to retain it may be made.

Archaeological remains and features of historic interest

17. HE has advised that it has no objections to the proposals. There is no evidence before me to suggest that any archaeological remains and features of historic interest might be harmed by the proposals.

Other matters

18. Both NE and OSS have advised that in order to properly comment on this application they should first have sight of the necessary NE Environmental Impact Assessment (EIA) screening decision. Such a decision is necessary where over 2km of fencing is proposed for an AONB. The section 38 application form completion notes advise that an EIA screening decision and consent (where needed) should be sought from NE before, or at the same time as, applying for section 38 consent. However, the two processes are separate and it is not mandatory to proceed in that order. The completion notes go on to say that a section 38 application will be determined regardless of whether an EIA screening decision and EIA consent (where needed) has been sought or granted. I am satisfied that there has been no procedural anomaly that may have prejudiced any interested party's ability to comment on the application before me.

Conclusion

19. I consider it unlikely that the works will harm the interests of those occupying the common or harm any archaeological remains and features of historic interest or be visually intrusive. I conclude that the works will benefit nature conservation as they will facilitate a grazing regime to improve degraded blanket bog as part of a Countryside Stewardship Agreement.
20. However, I conclude that this benefit is outweighed by the serious and unacceptable harm that over 5km of fencing with only two gates would cause to public rights of access. Consent is therefore refused for the works.

Richard Holland