
Application Decision

by Richard Holland

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

Decision date: 24 March 2020

Application Ref: COM/3237989

The Severn Ham, Tewkesbury, Gloucestershire

Register Unit No: CL 21

Commons Registration Authority: Gloucestershire County Council

- The application, dated 23 September 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 The Environment Agency.
 - The works comprise three sides (3m x 3m x 3m) of treated permanent three-rail timber fencing of no more than 1.5m in height.
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Decision

1. Consent is refused.

Preliminary Matters

2. I have had regard to Defra's Common Land Consents Policy¹ 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. At the time the application was made the proposed works (the fence) had not been carried out. The applicant subsequently advised that the fence has since been erected.
4. This application has been determined solely on the basis of written evidence. I have taken account of the representations made by the Clerk to Tewkesbury Commons, Tewkesbury Town Council, Natural England (NE) and the Open Spaces Society (OSS). It is not clear but I have assumed that the Clerk to Tewkesbury Commons represents, or is the successor to, the Trustees of Tewkesbury Commons.
5. 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;² and
 - d. any other matter considered to be relevant.

¹ Common Land Consents Policy (Defra November 2015)

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.

Reasons

The interests of those occupying or having rights over the land

6. Ownership of the land is disputed and unclear, although this does not prevent the application from being determined. The Environment Agency (EA), as applicant, says in the application form that the Trustees of Tewkesbury Commons (the Trustees) are the owners of the common but also claims that EA owns, and has Land Registry title to, the application land. Tewkesbury Town Council (The Council), manages the land and claims to be the owner and custodian of the whole of the Severn Ham.
7. The commons register records the Trustees as the only holders of rights of common. The right relates to grazing over the whole of the common at certain times of the year. The applicant confirms that sheep and cattle are known to be grazed around the fence area during the permitted months each year. The Clerk to Tewkesbury Commons considers that the fence hinders grazing.
8. Ownership of the affected land is disputed between the applicant and the Council, which objects to the fence. The Clerk to Tewkesbury Commons, as rights holders, also object to the fence. This being the case, I am not satisfied that the applicant has shown that the fence serves the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it).

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

9. When the common is in flood, drains channel water into the River Avon via a network of ditches. The fence sits around two land drains on three sides and its purpose is to discourage the public from walking over them. The fence serves two functions. Firstly, to highlight to the public the risk of slips, trips and falls and to reduce that risk. Secondly, to protect the drains from footfall that could result in loose soil blocking the drains and increasing the time taken for water to drain away from the Ham.
10. The interests of the neighbourhood test relates to whether the fence unacceptably interferes with the way the common land is used by local people and is closely linked with the interests of public access. The fence is a visual and physical deterrent to access but does not fully enclose any land as one side remains open. This allows local people and the public alike, as well as grazing animals, to walk over the drains if they wish to do so at their own risk. I am satisfied that the fence will not unacceptably restrict public access given that it will only partially enclose 9m² of the common.

Nature conservation

11. The application land lies within the Severn Ham Tewkesbury Site of Special Scientific Interest (SSSI). NE assent for the fence was given in August 2019. The assent notes that the fence is required to safeguard members of the public from injuring themselves on a collapsed drain. NE has not commented on this application other than to assume that the drains will be repaired at some stage and that the necessary assent to carry out such works on the SSSI will be sought. There is no evidence before me to suggest that the fence will harm nature conservation interests.

Landscape

12. The fence is a small feature in the landscape and the applicant says the materials were chosen to complement the SSSI environment. Nettles grow adjacent to the fence and will soften its visual impact during the growing season. Nevertheless, I consider that the fence is bound to have some detrimental visual impact. However, in commenting on the application no party has raised concerns about the visual impact of the fence. I give this considerable weight and I am satisfied that the fence is unlikely to cause serious harm to the landscape.

Archaeological remains and features of historic interest

13. There is no evidence to suggest that these interests will be harmed by the fence.

Other matters

14. The application makes no reference to 'collapsed' drains or to any intention to repair drains. Indeed, in subsequent correspondence the applicant says it does not own the drains and has no power to repair them, although it also says the open-ended fence design will allow its operatives continued access to the drains to remove loose soil if and when required. The Council says that it would prefer to deal with the issue of the dip itself and to infill the area with soil from the Severn Ham. Neither the applicant nor the Council has said who owns the drains or who is responsible for their repair.
15. Defra's common land consents policy says works should take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact. Whether or not the infilling envisaged by the Council amounts to 'repair', I consider it likely that infilling would make the site safer for the public to walk over. The applicant has not commented on whether this would impact on the drains functionality or be a suitable alternative to protect public safety. In the absence of such comments, and having regard to the Defra policy, I am not satisfied that the works are in the wider public interest.

Conclusion

16. The fence is unlikely to cause any harm to nature conservation or archaeological/historical interests and is likely to have only a minor impact on landscape and public access interests. However, those responsible for the management of the land and those who exercise rights of common over it consider the fence to be contrary to their interests and I conclude that this objection is decisive. Consent for the fence is therefore refused.

Richard Holland