



Application Decision

by **Richard Holland**

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

Decision date: 30 July 2020

Application Ref: COM/3244595

Birkbeck Fell Common, Cumbria

Register Unit No: CL9

Commons Registration Authority: Cumbria County Council

- The application, dated 8 January 2020, 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 South Lakes Ecology for Birkbeck Fells Commoners Group.
 - The works to enclose a total of 55.92 hectares of common land for 20 years comprise:
 - i) creation of seven fenced enclosures with a total of 6120m of 1.9m high wooden post and steel mesh deer fencing;
 - ii) creation of one fenced enclosure with 1556m of 1m high wooden post and netting (with barbed wire strand) sheep fencing; and
 - iii) installation of wooden gates of at least 1.2m in width (two gates in Enclosure No. 8, four gates in Enclosure No. 4 and three gates in the remaining enclosures).
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Decision

1. Consent is granted for the works in accordance with the application dated 8 January 2020 and the plan submitted with it subject to the following conditions:
 - i. the works shall begin no later than 3 years from the date of this decision;
 - ii. all gates shall comply with British Standard BS5709; and
 - iii. all works shall be removed on or before 29 July 2040.
2. For the purposes of identification only the location of the proposed works is shown in red on the attached plan.

Preliminary Matters

3. 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.
4. This application has been determined solely on the basis of written evidence. I have taken account of the representations made by Natural England (NE), Historic England (HE), Lake District National Park Authority (LDNPA), Friends of the Lake District (FLD) and Cumbria & Lakes Local Access Forum (LAF).

¹ Common Land consents policy (Defra November 2015)

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.

Reasons

The interests of those occupying or having rights over the land

6. The land is owned by Lowther Estate Trust, which was consulted by the applicant but has not commented on the application. However, the proposals are integral to a Higher Level Countryside Stewardship agreement (CS agreement) sought jointly by the applicant and the landowner, which the applicant advises cannot be signed unless Section 38 consent for the proposals is given.
7. The common land register records various rights of grazing (mostly sheep but also ponies), estovers, turbury and rights to take bracken. The applicant advises that 14 commoners exercise grazing rights yearly from April to October inclusive. The applicant represents the commoners' interests but nevertheless consulted all 14 active commoners individually about the application; none have commented.
8. I am satisfied that the application is made in the interests of the landowner and the active commoners and there is no evidence before me to suggest that they do not support it.

The interests of the neighbourhood and public rights of access

9. Eight separate enclosures (fenced areas) are proposed, in which approximately 60,000 new trees and scrub will be planted. It is proposed to retain the fencing for a period of 20 years. All but two fenced areas will be at the edge of the common, with the largest (21.89 hectares), area 6 as shown on the application map, enclosing the common's northernmost portion. The second largest (16.63 hectares), area 3, will be in the centre of the common. The purpose of the fenced areas is to exclude grazing livestock and deer until the planting is sufficiently established to withstand grazing pressure.
10. The interests of the neighbourhood test relates to whether the works will unacceptably interfere with the way the land is used by local people and is closely linked with public rights of access. The applicant advises that the common is mostly isolated from public roads and I consider that this may limit the number of people who are practically able to visit. Nevertheless, people are entitled to access the common which is well served by public rights of way, including two bridleways.
11. The applicant concedes that the fenced areas have the potential to hinder access to certain areas and I consider that this will indeed be the case. In particular, areas 5, 6 and 7 will enclose sections of public footpath and areas 3 and 4 will enclose sections of identified desire lines.
12. To limit the detrimental effects on access, scrub planting will be at least 5 metres from footpaths to ensure they are clear of vegetation. Gates will be installed at suitable points to allow access into and through the fenced areas and will be fitted with 'Access land' markers to show that the land is open to the public. Planting will be low-density and substantial patches will remain unplanted to avoid restrictions to access, views and wildlife. I conclude that the fencing will affect free movement over the common but that it will not unduly do so or cause serious harm to the interests

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.

of the neighbourhood and public rights of access. I agree with the interested parties that, to facilitate access, all gates should meet British Standards.

13. It is clear that the opinions of parties with an interest in public access matters, including the Open Spaces Society, which has not commented on the application, were taken into consideration when the fencing plans were developed. I give significant weight to there being no objections in principle to temporary fencing on public access grounds from those parties which have commented. Whilst the parties do not object to the fencing in principle, there are concerns from some that retaining it for a period of 20 years is excessive and that it may not be removed once that time has passed. I consider this under 'other relevant matters', below.

The public interest

Nature conservation

14. Most of Birkbeck Common, including proposed fenced areas 1 - 6, lies within the Shap Fells Site of Special Scientific Interest (SSSI) and the Lake District High Fells Special Area of Conservation (SAC). Only the eastern spurs of the common north and south of Gill Farm, where proposed fenced areas 7 and 8 lie, and land at Brackenhill, are excluded from these designations. The purpose of the planting within all eight fenced areas is to restore native tree and scrub habitat to facilitate greater diversity of bird and invertebrate life, protect the soils and aid flood alleviation in the River Lune catchment. The planting will form part of the CS agreement sought by the applicant and the landowner, which is due to start on 1 January 2021.
15. The applicant says the planting will help meet SAC targets of restoring juniper scrub and sessile oak woodland cover and will benefit designated SSSI features. NE advises that the proposed areas of native scrub will be beneficial for the designated features of the SSSI and SAC, and for biodiversity in general, and believes that the addition of these areas will result in the outcomes envisaged by the applicant. NE further advises that it is impossible where there is both grazing stock and red deer present to successfully establish scrub and trees without exclusion fencing. LDNPA supports the intention to add ecological diversity to the common in the form of scrub cover, in particular the benefits it will bring to the Curlew, which is one of the species listed as part of the bird assemblage for which the SSSI is designated. FLD and LAF also agree that the scheme will enhance biodiversity.
16. I conclude that by preventing access to grazing animals, the proposed fencing will assist in establishing newly planted scrub and trees for the benefit of nature conservation interests inside and outside of the SSSI and SAC.

Conservation of the landscape

17. The application land lies within the Lake District National Park and the fencing will have a detrimental impact on its landscape to a certain extent. The applicant advises that a number of measures are proposed to reduce its visual impact. Sheep netting is visually less intrusive than deer fencing and will be used where additional deer deterrents will be in place, such as at area 6 close to a public right of way. Careful routing of fencing and a minimum distance of 15 metres from public rights of way will minimise the visual impact, as will the planting of individual trees (with guards) outside of fenced areas to break up the fence lines as viewed from distant vantage points. Further to this, I consider it likely that the fencing will become less visible as the scrub and trees establish and begin to hide it.
18. The applicant advises that centuries of grazing have created an almost tree-less landscape, giving the impression of a relatively bare and exposed area of moorland. I conclude that the proposed fencing will assist in establishing newly planted trees and scrub, and it follows that these will affect the landscape in the long term as they grow. Whilst it is not a primary aim of the application to change or enhance the landscape, the applicant points to the Lake District National Park Landscape Character Assessment (LDNPA 2018), which promotes the creation of woodland on valley sides and lower fells at sites where it would enhance local landscape character. NE considers that the planting will restore the natural landscape and that the disadvantages of introducing the fencing into the upland landscape will be outweighed by the benefits gained.

19. I am satisfied that the proposals will help to ensure the natural beauty of the Lake District National Park is conserved in the long term and that this outweighs any temporary visual harm.

Archaeological remains and features of historic interest

20. HE advised that it does not object to the fencing as no designated assets will be affected by it and there is no reason to suspect that any non-designated nationally important archaeological sites will be impacted. The applicant advises that there are four features within the common that have Historic Environment Record (HER) numbers and seven other historic environment features that have no individual record in the HER database. I am satisfied from a plan submitted by the applicant that none of these features will be within the fenced areas and that the fencing will not harm any designated archaeological remains or features of historic interest.

Other relevant matters

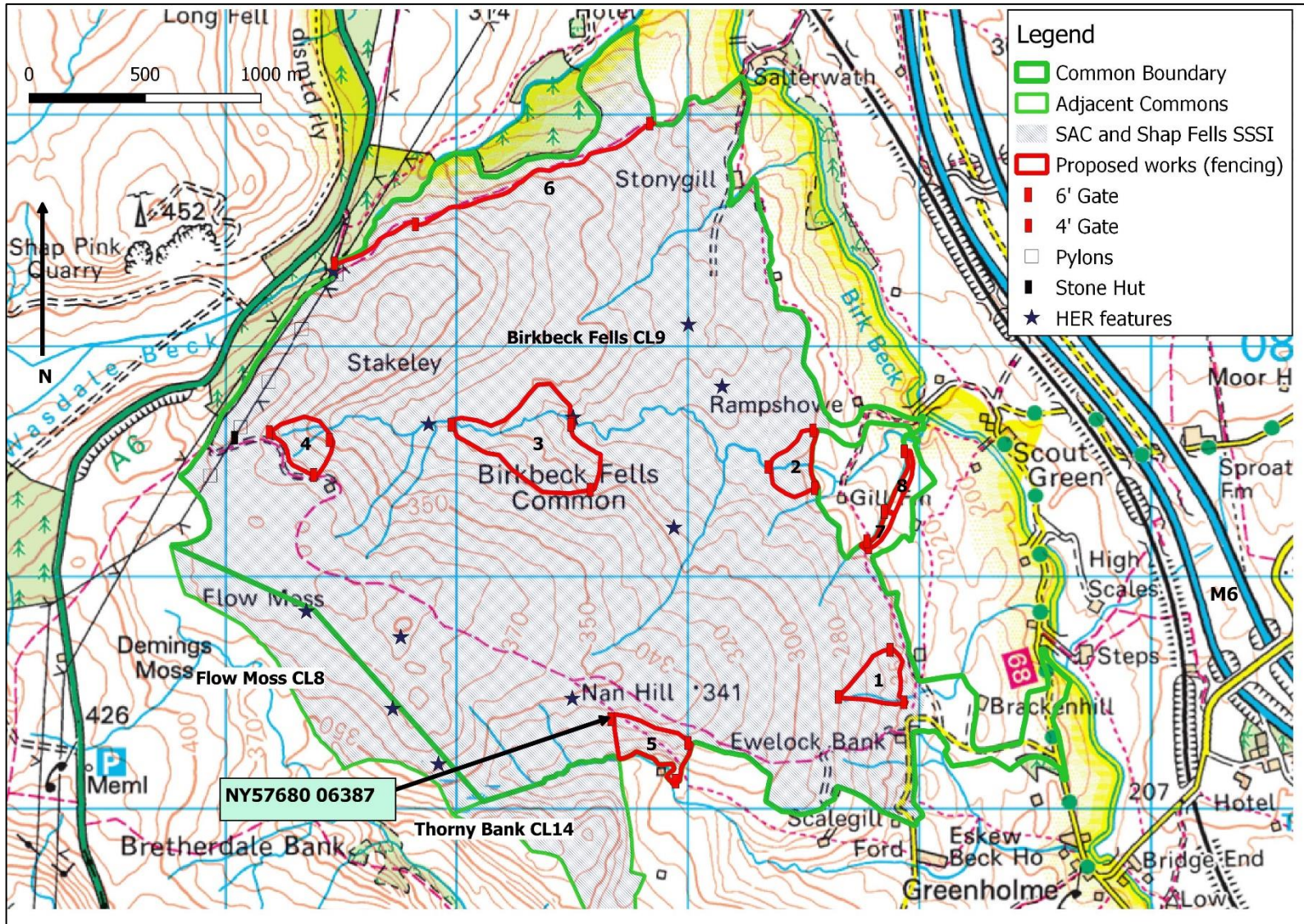
21. Numerous streams flow through, or originate on, Birkbeck Common. They run firstly into the Birkbeck watercourse and then into the River Lune, which has seen severe flooding in recent years after exceptionally heavy rainfall. Planting trees and scrub at targeted locations on the common is intended to help slow down the flow of water run-off into the River Lune catchment and is a stated aim of the planting. This will contribute to flood alleviation in the area, which I consider to be of wider public benefit.
22. FLD considers 20 years to be an excessive period for the fencing to remain in place and that it is, in any case, unlikely to survive much beyond 13 years or so. It wishes to see the period aligned with the terms of the expected CS agreement, which is likely to be for 10 years, although it does concede that 10 years is not a long enough period for the planting to properly establish. LDNPA and LAF share the view that the fencing and CS agreement periods should align. NE considers consent for 20 years to be appropriate in this instance to allow sufficient time for the scrub to reach a density where it is able to 'self-protect' against grazing pressures; no party has suggested that 10 year's growth would be sufficient for such self-protection to be reached.
23. Defra's common land consents policy says, "*The Secretary of State will wish to know whether the objectives motivating an application can be achieved within a predictable time frame, or should be reviewed from time to time, and if so, whether any consent to works should be time limited*". I consider that a review after 10 years is unnecessary as I am satisfied that the proposed fencing will need to be in place for 20 years if it is to achieve its purpose.
24. LDNPA, FLD and LAF are concerned that the applicant's stated commitment to maintain the fencing and to remove it at the end of the consented period, whatever that period may be, is not sufficiently binding. Requiring the removal of fencing by a given date can be secured by attaching a suitable condition to any consent given, and such a condition is attached to this decision. The onus is on the applicant to remove the fencing in a timely manner. I consider it unnecessary to attach a condition requiring the fencing to be maintained during the consented period as it is in the applicant's interest to ensure that the fencing remains fit for its purpose.

Conclusion

25. I conclude that the proposed works will not significantly harm the interests set out in paragraph 5 above; indeed, they will be in the long-term interests of nature conservation and the landscape. Slowing the flow of run-off into the River Lune catchment is in the wider public interest and this adds weight to my decision. Consent is therefore granted for the works subject to the conditions set out in paragraph 1.

Richard Holland

Birkbeck Common Map showing proposed works, Common boundary, adjacent commons and Shap Fells SSSI and Lake District High Fells SAC boundary



For more information on each fenced enclosure, see attached report No 1119/5: Birkbeck Common Scrub Planting Proposals, 10th Dec 2019