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# Application Decision

Site Visit held on 8 October 2015

**by Helen Slade MA FIPROW**

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

**Decision date: 15 February 2016**

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## **Application Ref: COM 664**

### **Thwaite Common, Alby-with-Thwaite**

Register Unit No: CL50

Commons Registration Authority: Norfolk County Council

- The application, dated 5 August 2015, 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 Paul Ingham on behalf of Thwaite Common Management Committee, c/o North Norfolk District Council, Holt Road, Cromer, Norfolk, NR27 9EN.
  - The works comprise:
    - installation of up to 3520 metres of temporary electrified fencing comprising of 1.2m high wooden posts with 2 or 3 strands of wire to enclose 146,000 square metres of land;
    - the installation of an unspecified number of permanent corner posts and intermediate posts to carry the temporary fencing,
    - the installation of 11 means of access comprising permanent gates and stiles;
    - the division of the common land, with the use of the fencing, into three sections.
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## **Decision**

1. Consent is not granted.

## **Preliminary Matters**

2. Following advertisement of the proposal, objections and representations were received from The Open Spaces Society, Yvonne Moore, Bob Grimble, Auriel and John Mims, Barry Fitzpatrick and Natural England all of which I have taken account.
3. I carried out an accompanied site visit on 8 October 2015 in the company of Mr Paul Ingham (North Norfolk District Council) and Ms Helen Baczowska (Norfolk Wildlife Trust) who supported the application; by Mr Bob Grimble who has offered the application qualified support; and by Mrs Yvonne Moore who was concerned about various aspects of the application and the proposals.
4. Following the site visit I requested further details on a number of matters highlighted as a consequence of the site visit. All this material has been circulated or otherwise made available to the interested parties and comments invited. This application has been determined on the basis of the written evidence, the comments submitted, and my own observations of the site.

## Description of the site

5. The site lies in the village of Erpingham about 25kms to the north west of Norwich, and in the parish of Alby-with-Thwaite. There is no registered owner of the common, and it has been subject to the protection of North Norfolk District Council since 1965. The Council's powers of management were delegated to Alby-with-Thwaite Parish Council in 1992, acting through a Management Committee.
6. The common as a whole is described in the 2013 Management Plan<sup>1</sup> as being formed of two main blocks separated by an area of agricultural land. The Western Area as a whole is stated as being 16.2ha in size and, for management purposes, is itself divided into two parts: the West Area ('WA') and the Central Area ('CA'). The Eastern Area ('EA') is given as being approximately 2.9ha in size. A reduced copy of the original application plan is attached to this decision and has been annotated to identify the three areas. I note that the Commons Register itself gives the total area of the common at the time of registration as being 30.855 hectares or thereabouts. Some small areas were subsequently deregistered and would account for a small discrepancy, but the figures do seem to me to be rather at odds with each other.<sup>2</sup>
7. The common is all designated as a County Wildlife Site ('CWS'). The WA and CA were designated in 1983 and the remaining area added in 2010/11.
8. The site slopes downhill gently from north to south, and is made up of a variety of habitats including dry and marshy grassland, small areas of woodland, scrub in scattered blocks, hedgerows and ponds. To the north and to the extreme west and east the site is bounded by minor roads. To the south the site abuts a small stream in a ditch which separates the common from domestic curtilages and other open farm land. A public footpath abuts the western edge of the CA, dividing it from the WA, and the agricultural field separates the CA and the EA.
9. The common is regulated by a Scheme of Regulation ('SoR') under the Commons (Schemes) Regulations 1982 and has previously been grazed. Although fencing has been in place within living memory, it was largely removed following a public inquiry in 1997. Part of the WA is currently fenced, allegedly in accordance with the terms of the SoR, and has been grazed with cattle between May and November since 2009. The fencing is breached by a number of gates and stiles allowing the public access to the grazed area.
10. The whole site was entered into the Countryside Stewardship Scheme in October 1992 which required grazing by cattle, sheep and, or, horses for at least 10 weeks of every year covered by the agreement. The removal of the fences in 1997 has meant that the site as a whole could no longer be grazed, apart from the resumption of grazing in 2009 as described in the previous paragraph.

## The Application

11. The application states that the area of the common as registered is 19.1ha (in line with the area described in the Management plan but not in accordance with

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<sup>1</sup> Thwaite Common Management Plan 2013 – Norfolk Wildlife Trust. This appears to replace an earlier plan produced circa 2003 by Norfolk Wildlife Services.

<sup>2</sup> See also the application details below

the Commons Register; see comments in paragraph 6 above) but proposes to fence only 146,000 square metres, or 14.6ha. The original application plan suggests that the maximum extent of the fencing would encompass the perimeter of the WA and the EA, and most of the CA, leaving a strip along the northern area to exclude a pond. A second plan, submitted in May 2015, identifies the existing temporary fencing of the WA (which is subject to the application retrospectively) but also appears to amend the fencing line of the EA by omitting a second pond. I have received no amended application and I therefore intend to determine the application by reference to the original plan.

12. The application plan is annotated to suggest that the ponds in the EA are to be excluded, but the key suggests that the fence line would include them. The notes also suggest that the CA and the EA would be divided into paddocks but no details of the internal fencing have been given. This is not acceptable. An application should identify all structures or works for which permission is being sought. Any permission granted as a result of this application will apply ONLY to the fencing shown along the lines indicated on the application plan.

### **Main Issues**

13. 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;<sup>3</sup> and
  - d. any other matter considered to be relevant.
14. I have had regard to the latest edition of Defra's Common Land Consents Policy<sup>4</sup> ('the 2015 Guidance') in determining this application which has been published for the guidance of both the Planning Inspectorate and applicants.<sup>5</sup> 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.

### **Reasons**

#### ***The interests of those occupying or having rights over the land***

15. Only two properties have rights attached to them with respect to Thwaite Common, and these rights are currently claimed by Mr and Mrs Mims and Mr R Grimble. Neither of these parties exercise their grazing rights. Any grazing which has taken place in recent years appears to have been let out by the Management Committee.
16. Mr and Mrs Mims wholeheartedly support the proposal to fence the common on the basis that it will improve the quality and the diversity of the sward,

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<sup>3</sup>Section 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.

<sup>4</sup> Common Land Consents Policy (Defra November 2015)

<sup>5</sup> This edition of the guidance was issued after the date of my site visit and so it was circulated to the parties for comment, should they so wish.

returning the common to its previous beauty. They are of the view that the re-introduction of temporary grazing in the WA is gradually improving the quality of the common after having declined when the fencing was removed entirely and grazing ceased. In the absence of grazing they say parts of the common have become difficult to walk due to the encroachment of scrub and coarse species.

17. Mr Grimble has offered qualified support for the scheme, provided that the fencing and grazing is properly managed.
18. Whilst I acknowledge the views of both these parties, their comments do not strictly relate to their own rights as neither has expressed an interest in actually grazing the land in exercise of their rights. The views they express are more in the way of general comments as residents of the locality who use or value the common as members of the public.
19. Nevertheless, I accept that from the Management Committee's point of view it is likely to be easier for them to find graziers willing to put their animals on the common if it is fenced. This is demonstrated by the fact that whilst the fencing was removed entirely, the common was not grazed because no-one was prepared to put stock onto it. Once the temporary fencing was erected, a grazier was found, although not without a financial incentive.
20. The SoR gives the inhabitants of the neighbourhood a right of free access to every part of the common and the privilege of playing games and other kinds of recreation thereon subject to any bylaws. I have not been made aware of any bylaws restricting this right. Furthermore, the SoR also provides that the District Council shall maintain the common free from all encroachments and shall not permit any trespass on or partial enclosure of the common.
21. It is inevitable that I must conclude that the proposed fencing, whilst not preventing access entirely, would nevertheless on a regular basis comprise partial enclosure of the common, and would restrict the right of free access provided for by the regulations. In reaching this view I ignore the fact that part of the area is already fenced. The existing fencing has been included in the application (on a retrospective basis) and it is not my role to examine whether or not the current 'temporary' fencing has been erected in accordance with the SoR, although I do have my doubts about that interpretation.

### ***The interests of the neighbourhood***

22. The 2015 guidance indicates that 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 result in the loss of existing use, 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***

23. The applicants argue that the grazing of the land, which the fencing will facilitate, will increase its value for nature conservation, improve access to the common and benefit its general appearance. The 2013 Management Plan indicates that since the temporary grazing was re-established in 2009 the scrub, rank vegetation and emerging reed bed have been controlled by the grazing, with little need to resort to cutting or spraying. It is also claimed that

there has been greater public access to the WA and that the grazing has been broadly supported by the local residents. The site has been monitored every year and the officer responsible, Helen Baczowska has reported that the aims have been largely achieved.

24. However, despite seeking further information from the applicants, including copies of the 2013 Management Plan and other survey information, I have not been supplied with any objective reports to support these contentions. The species lists which I have been sent cover the site in general, and I have not been provided with any detailed information from the annual monitoring. The claimed improvements are therefore anecdotal.
25. The objectors have suggested that since the cattle do not graze the scrub it has increased as a result and that the regime of cutting the vegetation (practised in the absence of grazing) was a more effective way of controlling the growth. Access is easier on those areas which are not being grazed, and the proposed fencing would not be a benefit to the neighbourhood as it would change the character of the common.
26. In the absence of specific evidence regarding the benefits (or dis-benefits) to nature conservation I am unable to identify or evaluate any actual positive benefit from the existing regime of temporary grazing which might be extrapolated to apply to the common as a whole. I also consider that the character of the common would be altered by the erection of fencing and that its local distinctiveness would be lost. This would not be a positive benefit.

*Loss of existing use or interference with future use*

27. The applicants claim that the inability to fence the common on a temporary basis would result in the loss of grazing again. This would appear to be supported by their previous experience and would, in their view, be a loss of existing use.
28. The objectors to the proposal argue that the fencing will interfere with access to the common which for the most part is open and unrestricted. Although access will still be possible it will be confined to particular entry points. Provision has been made in the application for 11 entry points in the form of stiles and kissing gates. At the site visit it became apparent that in fact the gates would be more correctly described as pedestrian or wicket gates as there is no intention to erect the 'box' type enclosure with two clashing posts which is normally associated with the description 'kissing gate'.
29. 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. I would expect the same principles to apply to access to common land and therefore if I grant this application I intend to attach a condition to specify that access points should be gates rather than stiles. Furthermore, they should conform to the British Standard 5709 in accordance with paragraph 5.12 of the 2015 Guidance.
30. Nevertheless I acknowledge that fencing of any sort would result in interference to the access to the common which is currently enjoyed over the CA and the EA. (Access to the WA is already restricted to a number of access points by the existing temporary fencing, but as that fencing is subject to this application I consider that I must assess the application as if it were not there.)

- Given that the grazing period is largely over the summer months, this would result in more restricted access during a period when demand may be higher.
31. Furthermore, the objectors refer to a ditch constructed by the local Highway Authority across the CA running from north to south. I was able to observe this feature during the site visit. The drainage works were apparently carried out without reference to the Management Committee. It is far from clear to me under what powers the Highway Authority believed it had the consent to undertake such work on common land, but whether or not this excavation was lawful is not a matter for me to determine.
  32. Notwithstanding the circumstances of its construction, the effect of its presence is such that the ditch has interfered with the internal access across the CA and the erection of the fencing proposed in the Section 38 application will exacerbate this interference, effectively cutting the CA into two separate parts with access points confined to gates at the perimeter through the fencing. This is not a desirable state of affairs.
  33. Further concerns have been expressed by the objectors about the proximity of the proposed fencing to the road along the north side of the common. The plans suggest that the fencing would run adjacent to the carriageway in places but the road is single track with no passing places. Pedestrians and horse riders frequently have to step aside onto the common to let vehicles past.
  34. The plans show that the fencing alongside the WA would run, as now, along the roadside. For the CA it is shown well back from the road, giving plenty of room. Along the north side of the EA the plans show the fencing would again run adjacent to the road and would also encompass the ponds. The applicant has stated that the fence would not, in fact, encompass the ponds, and that it would be possible to set the fence back from the road for safety purposes.
  35. It is not helpful for an application to be prepared in a way in which confusion exists about the intentions of the proposal. The application should be accurately completed and indicate exactly the works for which consent is being sought. As I have explained in paragraph 11 above, no revised application has been submitted, although a revised map was sent to the Planning Inspectorate on 21 May 2015.
  36. It is open to me to amend the plan if I consider it necessary or appropriate and if I consider that I have sufficiently detailed information to allow me to do that. However I have not been provided with detailed measurements which would give me the confidence to modify the plan accurately, and I am therefore unwilling to do so.
  37. I therefore conclude that the application as made will significantly interfere with the free access to the common currently enjoyed and in the foreseeable future. Although the application is for temporary fencing, this appears only to apply to its temporary presence each year between April and November. There is no indication that permission is time-limited in years. I note that the Countryside Stewardship Agreement runs until September 2022 and thus if I were minded to grant the application I would place a similar limit on the permission. This would allow for proper evaluation to take place to assess the benefits and the need or otherwise for a further permission.

## **The public interest**

### *Nature conservation*

38. I have already indicated that the Management Committee considers that in order to improve the nature conservation value of the site it is necessary to graze the common. They claim that the regular cutting of vegetation is both expensive and disadvantageous since it does not include the removal of the vegetation, and is not suitable on the wetter parts of the common.
39. The WA and the CA were designated as a County Wildlife Site ('CWS') in 1983 and the site was extended to include the EA in 2011. In 2012 the whole common was entered into the Stewardship scheme with Natural England at both Entry Level and Higher Level. The Stewardship Agreement sets out a number of objectives and acceptable methodologies to achieve its aims. This includes species-specific targets for the grassland management.
40. The Section 38 application states that the primary aim of the proposed fencing is to enable the re-establishment of Thwaite Common's diverse native flora. Historically it is claimed that grazing resulted in the maintenance of grassland containing a diversity of wildflowers and created an excellent habitat for native flora and fauna, because grazing reduces the vigour of invasive plants in favour of diverse indigenous plants requiring lower nutrient levels. The attempts to maintain the grassland by cutting have been thwarted by the difficulties of cutting the wetter area mechanically, and the inability to remove the cut material which results in a dense thatch which rots down to enrich the soil. This is undesirable in terms of nature conservation aims.
41. In terms of the specifics of species diversity, the Section 38 application is of no assistance so I requested more details from the Council. I have received CWS survey data from 1984, 2008, and 2011, and an undated survey which only covers the WA and the CA and which I therefore presume pre-dates the extension of the CWS in 2011. I note that of the species set out in the Stewardship agreement as indicators of success, several are recorded in the 2008 survey, and some are also recorded in the very detailed but undated survey. Some of the examples that I could find are Southern March Orchid (*Dactylorhiza praetermissa*), Greater Birdsfoot Trefoil (*Lotus uliginosus*), Water mint (*Mentha aquatica*), Knapweed (*Centaurea scabiosa*), and Ragged Robin (*Lychnis flo-cuculi*).
42. No details have been provided of the relative ground cover percentages set out in the Stewardship agreement as indicators of success so I have no information to assist me in determining how well or badly the current management is performing. The only information is anecdotal, including the comments by Mrs Moore in her objection claiming that the number of orchids has increased on the area currently grazed. However she also considers that areas of scrub which the cattle do not eat have also increased.
43. Whilst I acknowledge that grazing is an accepted method of conservation management, it is clear from the Stewardship agreement that other mechanical methods are also acceptable to Natural England.
44. Nevertheless I also acknowledge that, from the point of view of the applicant, grazing could be a much less costly and labour-intensive way to proceed. Grazing is not without its problems, of course, and can lead to poaching and

ground damage, particularly in the wetter areas. Careful monitoring of the site would be required to ensure that the grazing was producing the desired effect and not resulting in damage. The Grazing Agreement allows the District Council to secure the removal of stock if necessary.

45. The applicant disputes the claims by the objectors that the grazing would result in less favourable habitat for many fauna, such as the barn owls and kestrels that are regularly seen. The objectors also consider that the fencing may also be a barrier to roe deer and muntjac. I have insufficient information or evidence available to me to know how much use is made of the common by fauna, but I accept that if the habitat were to be altered to any degree, there may also be an alteration in the balance of local fauna. However I agree with the applicant that any grazing would be unlikely to reduce the vegetation and ground coverage to the extent that the local fauna would be adversely affected.
46. I find the application to be severely lacking in detail and rather lax in its completion. The supporting information is also lacking in detail and, that which exists, I had to ask for. The claims regarding the improvements to nature conservation are all anecdotal, despite the opportunity which has existed since the grazing was reintroduced in the WA to provide more detailed survey information. Although I acknowledge the fact that grazing is an accepted methodology of managing a sward, other methods are available which may produce similar results. I do not dismiss the difficulties expounded by the applicant of manual clearance methods, but I must weigh all factors in the balance in coming to my decision. On the whole I am not persuaded that the benefits to nature conservation have been shown only to be achievable by fencing the common in the manner applied for.

#### *Conservation of the landscape*

47. As I have already said, the applicants consider that fencing is the only way in which the future grazing of the common can be achieved. However other solutions may exist to prevent stock from straying and the 2015 Guidance does expect evidence to be presented of other options that have been explored. Paragraph 4.3 cites potential options to fencing such as temporary speed limits on an appropriate stretch of road to prevent accidents and to preserve the open nature of land, or for warning signs or other traffic calming measures to be introduced.
48. The objectors (particularly the Open Spaces Society ('OSS')) have raised the option of cattle grids, but this has been dismissed by the applicant as too expensive. No detailed costs have been provided to support this contention, and no information on how the Stewardship Agreement might have helped (or not, as the case may be) in this regard has been offered. Cattle grids are apparently employed at other nearby commons (Hanworth and Litcham are two examples cited by the OSS).
49. Animals are frequently grazed successfully on open commons, some with quite major roads passing through them. The situation is managed because animals naturally 'heft' to particular areas, and because traffic management options such as cattle grids and traffic calming can minimise the risk of accidents. The roads surrounding the site in this case are minor roads, single track in many cases, and will not carry the volume of traffic that is experienced in some other places where open commons are found.



50. I place no weight on the contention by the applicants that cattle grids would not be popular because householders would then have to fence their gardens. I agree with the OSS that the onus is on those householders to fence against the common in any case, and the focus should be on the preservation of the common in accordance with government policy.
51. The applicants seem to think that the fencing will not be very visible. I agree with the objectors that the topography will not 'hide' the fencing and, furthermore, even when the fencing is removed at the end of the grazing season the site will then be littered with posts and gates standing in isolation. I suggest that this will present an unsightly appearance and certainly not one that is in keeping with its open character.
52. I consider that the proposed fencing will interrupt the open nature of the common land and will be detrimental to the conservation of the landscape to a significant degree. I am not satisfied that sufficient effort has been put into exploring other options for stock control which do not involve the negative impact on the distinctive character of the common. Such consideration may have been given, but little in the way of evidenced reasoning of it has been submitted to me.

#### *Public Access*

53. There is a public right of way across the site running roughly north to south and separating the WA and the CA. There are no plans to erect any fencing across this route and it appears largely unaffected by the proposals. However, if the fencing is erected on both areas at the same time, there will be a channelling effect which is unlikely to be attractive to walkers. The applicants imply that the fencing would be no less than 15 metres apart which would reduce the feeling of containment, but not remove it.
54. The site is also designated an open access area under the Countryside and Rights of Way Act 2000 ('CROW Act'). Mrs Moore points out in her objection that the existence of the cattle on the currently fenced off portion of the common is a disincentive to walk there for many people, especially those with dogs. Both she and Mr Fitzpatrick refer to incidents of cattle stampeding towards people, and Mrs Moore states that others are simply intimidated by the presence of the cattle and so do not walk in that area. Fencing of more areas will restrict access even further.
55. The applicants point out that not all of the proposed fencing will be in place at any one time, the intention being to rotate the grazing areas to some extent; but the details and the methods for doing this are not spelt out in the application as I have already mentioned. Nevertheless, it remains the case that the fenced areas are likely to deter access by some people, if not all.
56. I have already commented on the fact that the temporary nature of the fencing applied for does not appear to be time limited in years. This militates against the application as it stands and if I were to permit the fencing I would limit it to the life of the current Stewardship agreement.

#### *Archaeological remains and features of historic interest*

57. No archaeological features have been brought to my attention, apart from the antiquity of the common itself.

## **Conclusion**

58. Having regard to the criteria set out in paragraphs 13 and 14 above I conclude that, although the works may have some benefit to conservation interests, the fencing would have a detrimental effect on the distinctive open character of Thwaite Common and would also interfere with the rights of public access, both in actuality and in perception. The decision not to use other methods which could be employed to facilitate grazing without such detrimental effects has not been adequately justified by the applicants. Furthermore the application is not supported by sufficiently detailed survey information to allow me to judge whether the improvements envisaged in terms of nature conservation would actually be achieved as a result of the proposed fencing.
59. I find that the disadvantageous effects of the proposal, and the lack of detail in the application, outweigh the claimed advantages. I conclude that the application should not be granted.

*Helen Slade*

**Inspector**