
Application Decision

by **Richard Holland**

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

Decision date: 6 June 2017

Application Ref: COM/3167505
THE HOLLOW WATERING PLACE, CUMBRIA

Register Unit No: CL 296

Commons Registration Authority: Cumbria County Council

- The application, dated 17 January 2017, 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 and Mrs G. Swainbank.
 - The works comprise a larch lap fence being approximately 1.8 m high and 10.4 m in length. A bamboo fence approximately 4 metres long and 1.5 metres high. The application has been made retrospectively.
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Decision

1. Consent is refused.

Preliminary Matters

2. I have had regard to Defra's Common Land Consents Policy Guidance¹ 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 guidance if it appears appropriate to do so. In such cases, the decision would explain why it has departed from the guidance.
3. This application has been determined solely on the basis of written evidence.
4. I have taken account of the representations made by Roderick and Jill Donington Smith, Stephen Yare, Natural England (NE), The Open Spaces Society (OSS), Friends of the Lake District (FLD), Ian Brodie for the Lake District Area Ramblers and Historic England (HE).
5. I am required by section 39 of the 2006 Act to have regard to the following in determining this application:-
 - 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;
 - the public interest;² and
 - any other matter considered to be relevant.

¹ Common Land Consents Policy Guidance (Defra November 2015)

² 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.

Reasons

The interests of those occupying or having rights over the land

6. Some objectors to the application are concerned that the works make it difficult for the local authority to maintain the site. Allerdale Borough Council confirms that it is content to allow the fencing to remain as a flood resilience measure on the common land and no objections have been received from any other local authority with an interest in the land.
7. The common has no known owner, and there are no registered rights holders. I conclude that the impact of the works on those occupying or having rights over the land is not at issue.

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

8. The interests of the neighbourhood test relates to the way in which the works have impacted on local people's use of the common. The applicants explain that during Storm Desmond on 5 December 2015, the River Greta, which flows past the applicants' property, flooded their garden and the common. The works are needed to control the free flow of water in this area and mitigate any future flooding of the applicants' property. The larch lap fence panels enclose a small area of common and are designed to be easily removed during a flood event to enable water to pass through without hindrance. The applicants advise that the bamboo fence is also removable.
9. Those objecting to the application comment that there is insufficient justification for the works on the common. The works are in the applicants' private interest only and have effectively incorporated the application area into their garden. The common is a valuable recreational space allowing access to the river; the works reduce the area of common available to the public for access and recreation. The objectors also question why the works have not been erected on the applicants' land and ask whether alternatives to the works have been considered such as replanting hedging.
10. The applicants in response comment that public access to the river bank was only possible from the proximity of Calvert Bridge and was neither desired nor possible to the application land because of thick vegetation. The application land and a culvert, which lies outside the application land, have been maintained by the applicants. The culvert also creates a small but obvious barrier to public access.
11. I acknowledge the applicants' concerns about future flooding of their land and sympathise with their wish to protect their property. However, it is not clear to me how the fencing will prevent the flooding of their property and no evidence from an independent expert on flood alleviation has been provided to back up the applicants' contention that the fencing reduces the risk of flooding. Neither have the applicants explained what alternative flood prevention measures have been considered that do not involve enclosing the common. By enclosing the land users of the common will regard it as part of a private residential garden and therefore out of bounds to the public. While the applicants have said that the fence panels can be removed, the works present an impenetrable and permanent barrier and prevent local residents and the general public from accessing and enjoying this part of the common. I find that the works unacceptably harm the interests of the neighbourhood and impede the public's right to access and use the land.

The public interest

Nature Conservation

12. NE advises that the location of the works is immediately adjacent to, or partly within, the River Derwent and Tributaries Site of Special Scientific Interest (SSSI), which is also part of the River Derwent and Bassenthwaite Lake Special Area of Conservation (SAC). NE adds that should the works obtain section 38 consent it may wish to give consent to the works in accordance with the Habitat Regulations. This is due to the potential risks to the SAC from invasive species and sedimentation from the proximity of the works to the SAC.
13. I note that NE confirms that there is no benefit to nature conservation from the proposed works but neither will there be a detrimental impact on the SAC interest features. Based on the evidence

before me, I conclude that the proposed works do not impact adversely on nature conservation interests.

Conservation of the landscape

14. The common is located within the Lake District National Park. Those objecting to the application argue that the works are physically and visually intrusive and damage the visual amenity of this public space. The applicants do not agree that the works are visually intrusive as the fencing can be used anywhere and is within planning regulations. The applicants advise that they plan to mitigate the visual impact of the works by painting the fence.
15. I consider that the works are an alien and visually intrusive feature on the common which screen the application land and part of the river from public view. I do not agree that painting the fence will sufficiently mitigate their visual impact. I find that the works unacceptably harm the appearance of the landscape and natural beauty of the national park.

Archaeological remains and features of historic interest

16. The Ramblers feel that the works damage the 'historic feature of this former watering place'. However, no evidence of the common having any historical significance has been provided. HE has confirmed that it has no objection to the granting of consent for the proposed works. I am satisfied that the proposed works do not harm any archaeological remains or features of historic interest.

Other matters

17. I note that some concerns have been raised about the location of the notice advertising the application on the common. I am satisfied that the applicants have met the advertising requirements.
18. I also note that there is some dispute between the objectors and the applicants about the wider history, impact and nature of the flooding in and around Keswick. I consider these arguments outside the scope of this application and not relevant to the determination.

Conclusion

19. Having regard to the interests set out in paragraph 5 above I conclude that the works unacceptably impede public rights of access and harm the appearance of the landscape. The fencing gives those wishing to use the land the impression that it is part of a private residential garden and thus not publicly accessible; this is not in keeping with the status of the application land as common land. Furthermore, while I appreciate that the fencing has been erected to alleviate flooding of the applicant's property, no independent expert evidence supporting the applicants' assertions that the fencing prevents flooding has been presented. The applicants' case is not sufficiently compelling to outweigh the harm the works cause to the common and those wishing to use it. I conclude that consent should therefore be refused.

Richard Holland