

|  |
| --- |
| **Application Decision** |
| Site visit made on 5 July 2023 |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 22 September 2023** |
| **Application Ref: COM/3314450****New Road Common**Register Unit No.: CL68Registration Authority: Cumbria County Council* The application dated 10 January 2023, is made under Section 38 of the Commons Act 2006 for consent to carry out restricted works on common land.
* The application is made by the Environment Agency.
* The permanent works comprise a linear flood defence wall replacing existing metal fencing, three floodgates and one pedestrian gate, surface water drainage and reprofiling of the slipway to the river. The temporary works comprise safety hoarding along the full length of the common and welfare facilities
 |
| **Decision: Consent is granted in accordance with the application and is subject to the following condition:*** All temporary fencing and compounds shall be removed, and the land fully reinstated within three months of completion of the works.
 |

Preliminary Matters

1. Objections were made by the Friends of the Lake District (FOLD), the Open Spaces Society (OSS) and Kendal Civic Society (KCS).
2. An accompanied site visit was held on 5 July 2023 with representatives of the Environment Agency (EA), FOLD and KCS.
3. Planning permission was granted in June 2019 for all reaches of the Kendal Flood Risk Management Scheme (KFRMS). Since then, the flood defence works on New Road Common have been amended and a revised non-material amendment planning application was submitted in July 2023. The works before me are those covered by the revised planning application and planning permission would need to be granted before they could be undertaken.
4. South Lakeland District Council (SLDC) and Cumbria County Council (CCC) merged on 1April 2023 to form Westmorland and Furness Council (WFC). CCC were the Commons Registration Authority and SLDC were the Planning Authority. As a Unitary Authority, WFC now undertakes both functions.

Description of the site

1. New Road Common is made up of several separate parcels on either side of New Road. The total common size is 6,933 m2 (0.69 hectares). Two parcels on the south-east side of New Road are affected by the proposed works. One is 5,977 m2 (0.06 hectares) and the other is 137 m2 (0.01 hectares).
2. The common affected by the proposed works is largely grass with tarmac paths running through it. Part of the common is within the River Kent and a slipway crosses between the land and river. For most of its length, metal railings run along the New Road edge of the common and a wall with railings runs along the top of the riverbank. The abutments and access ramps to a footbridge over the river are within the common and consent for these has previously been granted. The common between the footbridge and Melrose Place is rough land but is required to be reinstated to grass as part of the footbridge consent works. At the time of my visit, there were fourteen planters on the common as well as lamp posts, benches, a road sign, and bins. There were wooden bollards at the top of the slipway and boulders on it to prevent vehicular access and safety walls and railings on either side of it.

The Application

1. The application is for permanent flood works consisting of linear flood defence works, surface water drainage, new hardstanding, landscaping, and reprofiling of the existing slipway to the River Kent. Temporary works during the construction phase are also proposed.
2. The proposed linear defence flood wall would run along the edge of the common alongside New Road replacing the existing metal railings. It would be 155 metres long and 0.7 metres wide with a maximum height of 1.65 metres at the northern end, reducing to 0.4 metres at the southern end near Miller Bridge. The lower sections of wall would have railings along the top to a maximum height of 2 metres to ensure pedestrian safety around the carriageway. Steel sheet piling would be used below ground to support the wall. The wall will be reinforced concrete with an outer surface of masonry stone cladding. There would be 0.5 metre clearance between the carriageway and wall which would be surfaced with deterrent paving to discourage pedestrians from walking alongside the road.
3. Four gates are proposed in the wall. Alongside the Gooseholme footbridge, there would be a 4.4 metre wide double-leaf floodgate. At the pedestrian crossing opposite Blackhall Road, there would be a 2 metre wide single leaf floodgate. These two gates would remain open except during flood conditions. Opposite the top of the slip road, there would be a 10 metre wide double-leaf floodgate which would be closed at all times. The fourth gate would be a 3 metre wide pedestrian gate at the southern end of the common with a 1.1 metre high railing between the gate and Miller Bridge. This gate would remain open except in flood conditions.
4. The existing wall alongside the river between Melrose Place and Gooseholme footbridge would be raised to a height of 1.45 metres.
5. New surface water drainage channels would be constructed in the common to allow the discharge of water to the River Kent.
6. The existing slipway to the River Kent would be reprofiled to retain public access and enable periodic river maintenance. The existing stone setts, which are believed to remain underneath the existing loose stone, would be reinstated to match those visible at the bottom of the slipway. The gradient would be less than the steepest part of the existing footway.
7. The existing grassland and tarmac paths would be retained for the most part. However, the path between Miller Bridge and the slipway would be widened to 3 metres to facilitate cycle access. The existing tarmac hardstanding for the planters would be reinstated to grass and fourteen new ones, each 1.3 metres by 1.3 metres, would be provided. Small areas of additional tarmac would be required around the floodgates.
8. The temporary works would comprise temporary solid fencing along the full length of the common for health and safety reasons during the construction and reinstatement works. Most of this fencing would be within the carriageway but it would prevent access to the common. A welfare cabin is also proposed on the common which would be approximately 3.5 metres by 2 metres. The construction works are expected to last for six months.

The Main Issues

1. Section 38 of the Commons Act 2006 (the 2006 Act) provides that a person may apply for consent to carry out restricted works on land registered as common land. Restricted works are any that prevent or impede access over the land, including the erection of fencing; the construction of buildings and other structures; the digging of ditches, trenches, and the building of embankments; and the resurfacing of land if this consists of laying concrete, tarmacadam, coated roadstone or similar material.
2. I am required by section 39 of the 2006 Act to have regard to the following in determining the application:
3. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
4. the interests of the neighbourhood;
5. the public interest, which includes the interest in nature conservation, conservation of the landscape, protection of public rights of access and the protection of archaeological remains and features of historic interest;
6. any other matters considered to be relevant.
7. I have had regard to Defra’s Common Land Consents Policy Guidance in determining this application, which has been published for the guidance of both the Planning Inspectorate and applicants. However, every application will be considered on its own merits and a determination will depart from the guidance if it appears appropriate to do so. In such cases, the decision will explain why it has departed from this guidance.

Reasons

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

1. There are no registered commons rights. Taylor’s Fair use the common for a fair twice a year under a Royal Charter believed to date back to 1309. The proposed works are designed to ensure it does not impact the fair’s activities or their access to the common. They have been consulted and actively involved in access arrangements to minimise potential damage to the grass.
2. The fair currently gains access at the top of the slipway. The proposed 10 metre wide gates and the removal of two trees would improve their access. Access to the common would not be available during the construction stage. However, the works are expected to last for 6 months so would only affect one fair.
3. I am satisfied that the proposals would not have a negative impact on anyone having rights in relation to or occupying New Road Common.

***The interests of the neighbourhood***

1. Under the Scheme of Regulation and Management under the Commons Act 1899 approved by Order on 8 March 1910 (Scheme of Management), the inhabitants of the district have a right of free access to every part of the common and a privilege of playing games and enjoying other recreation thereon.
2. Concerns are raised about the loss of access to the common for recreational use. The OSS and FOLD queried the figure of 137 m2 (later reduced to 128 m2) provided by the EA for the area of grassland that would become hardstanding, including the walls. They estimate the figure to be between 213 m2 and 225 m2. By my calculations, the wall and buffer strip to the road would take up 186 m2 of common. However, some of this area is currently occupied by the existing railings and tarmac strip which the OSS state is 0.3 metres wide. Therefore, this reduces the additional area taken up by the walls and buffer strip to 139.5 m2 which equates to 2% of the whole common or 2.3% of this parcel of common.
3. This land would no longer be accessible for recreational use by the inhabitants. I note the gates would take up a small additional area, but this would be minimal. The planters would take space on the common, but these already exist in different positions so would not result in the loss of additional space. Some small areas of hardstanding for the gates to open and to widen one section of path are proposed. However, these areas would still be accessible to the public. Therefore, most of the common affected would still be available for use by the inhabitants for recreational purposes. On completion of the works, Natural England (NE) considers the public would be able to walk around the common in the same way as they did before.
4. The widening of one section of path and reprofiling of the gradient to accommodate cyclists is likely to benefit the neighbourhood by providing a traffic-free cycle route as an alternative to the busy New Road.
5. The reprofiling of the slipway and replacement of the loose stone with stone sets would make access to the common within the river easier for everyone. The large boulders, bollards, and vegetation, on and around the slipway would be removed improving access. The gates at the top of the slipway would prevent access directly from the roadside. However, there is no road crossing point for pedestrians here. It is not clear if the inhabitants have a right to launch watercraft from the slipway, but this is not currently possible.
6. The proposed flood defence works would reduce the flood risk in the New Road Common area to 5% in any given year. Currently, there is a 20% risk. The scheme would improve flood resilience for approximately 227 residential properties, 85 unclassified properties and 71 businesses. New Road is part of the Kendal one-way system. When it floods, traffic flow and accessibility are severely disrupted with roads becoming gridlocked.
7. The proposed works at New Road Common are an integral part of the wider KFRMS. Without them, there would be a gap in the flood defences causing a localised spill point and a significant area of Kendal around New Road would be more vulnerable to flooding.
8. FOLD questions the public benefit and raises concerns that some properties would have an increased risk of flooding unless other phases of the scheme proceed. The EA advise in the short term, there would be a decrease in flood resilience to properties upstream. However, they are working to deliver flood resilience works for this area which are programmed to be completed before the proposed works at New Road. Without the proposed works on New Road Common, the area would be inundated in a flood event.
9. The proposed scheme in its entirety would improve flood resilience for the whole of Kendal, having a significant benefit to the neighbourhood. The majority of the common would still be available for recreational use, with improved cycle access. Access to the river would also be improved due to the slipway works.
10. During the construction works access to the common would be completely prevented with solid fencing erected. Works are expected to last for six months. Although these would result in a temporary loss of access to some of the common, I consider this to be a relatively short period, particularly considering the longer-term benefits of the flood defences for the neighbourhood.

***The public interest***

*Nature conservation*

1. The proposed works are alongside the River Kent and Tributaries Site of Special Scientific Interest (SSSI) and Kendal Special Conservation Area (SCA).
2. NE has been working alongside the EA at all stages of the scheme's development, including advising on the Habitat Regulations Assessment (HRA). Most of the works are outside of the main channel of the SCA. However, they are aware of some design changes which may require in-river working for the outfalls and surface water drainage. This work may need addressing with an addendum to the HRA. They do not anticipate any significant concerns for identifying necessary mitigation to protect the SCA. However, they request that, if permission is granted, a condition to ensure the HRA is satisfactorily completed and finalised be added to the consent for works. The HRA is required as part of the planning permission, therefore, I do not consider it is necessary to condition this if I grant consent for the works.
3. The revised HRA submitted with the 2023 planning application indicates the works are in line with the original HRA with no additional impacts identified. Any work within the river would be done on foot using hand tools. Works could potentially cause minor disturbances to the channel bed substrate. Concrete from the slipway works could potentially enter the river channel and affect turbidity. Mitigation measures include adhering to pollution prevention good practice, monitoring the site conditions, biosecurity measures and installation of silt fences or booms.
4. NE do not envisage any benefits to nature conservation arising directly from the works on New Road Common. Overall, Phase 1 of the KFRMS is designed to deliver biodiversity benefits in various locations.
5. In the Environmental Statement (ES) for the original scheme, Miller Bridge was identified as having a moderate bat roost potential. Three trees alongside it were identified as having low bat roost potential, one of which was to be removed in the original scheme. With appropriate mitigation, the impact on bats was considered to be significant. However, the amended scheme retains this tree and the overall impact on bats would be neutral. With appropriate mitigation in place, no other significant impacts were identified in the ES.
6. FOLD has concerns about the loss of two trees by the slipway and considers the formal ornamental planting to be inappropriate in terms of biodiversity. They believe biodiversity gains could be made with meadow plants and different mowing regimes which would also contribute to the character of the common.
7. The removal of the trees by the slipway and the proposed planting were taken into consideration when SLDC granted planning permission for the wider scheme. The planting would be a mix of ornamental perennials, grasses, and shrubs in moveable planters like those already on the common. Most of the existing grassland would be reinstated to the current standard.
8. Mitigation works required by the HRA would prevent any long-term negative effects on nature conservation. Although there are unlikely to be any benefits to biodiversity or nature conservation as a result of the works undertaken, there are no significant adverse effects that would impact the wider public interest.
9. Any areas of common affected during the construction works are proposed to be reinstated. If I authorise the works, I can apply conditions to ensure that the reinstatement works are undertaken.

*Conservation of the landscape*

1. The OSS, FOLD and KCS consider the proposed works would seriously harm the open landscape and informal character of New Road Common and would be visually intrusive. It would become enclosed and have the appearance of an urban park or private garden rather than a common due to the walls and landscaping. Views of the common, river and historic town centres would be lost. NE considers there would be an inevitable reduction in the current level of visual connection between the common and the town with a more enclosed feel to the common.
2. SLDC considered the impact of the wall during the planning process for the original scheme. They considered the wall would impact the landscape of the area but found that the impact would be less than in other areas of Kendal. The relationship between the river and the surrounding properties was found to be of relatively little significance and considered to have a neutral impact. As the proposed wall is along the back of the footway, they found it would not sever the relationship between the properties and the river.
3. I consider the proposed wall would have an adverse effect on the open character of the common. The stone cladding aims to mitigate the visual impact by blending in with the surrounding historic architecture, but it would be a physical barrier and impact on views of the wider landscape. The impact would be greater at the northern end where the wall would be too high for most people to see over. The existing railings have a limited impact as they are lower and open allowing views through and over them.
4. The existing riverside wall prevents views of the river from outside of the common except for the short section opposite the slipway. Therefore, the proposed works would only affect short sections of river views at the northern end between the footbridge and Melrose Place and at the top of the slipway.
5. There would be a limited increase to the amount of permanent hardstanding within the common; 52 m2 from the path widening and floodgate arcs and 139.5 m2 from the wall and buffer. Some of the wall is on existing hardstanding which would reduce this figure. I note the EA consider the wall will only require an additional 52 m2 of hardstanding. Whichever figure is used, it equates to between 2% and 3% of the common. There are already fourteen planters on the common and the only other landscaping proposed is the reinstatement of the existing grass. Therefore, I consider the additional hardstanding and planters would have a limited impact on the landscape of the common and wider townscape.
6. I consider the reinstatement of the slipway to its original stone sets and the removal of the existing boulders and bollards would benefit the appearance and landscape.
7. During the construction works temporary solid fencing of up to 2 metres high would be erected in the road alongside the common. This would have a significant visual impact on the common and surrounding area including Miller Bridge and Gooseholme Common on the other side of the river, but this would only be for six months.
8. Although I consider the proposed works would have an adverse effect on the landscape, I do not consider the impact to be substantial over the longer term.

*The protection of public rights of access*

1. Railings are present along most of the New Road edge of the common which prevents direct access to it. The proposed wall would replace these railings with open gates alongside the footbridge, Miller Bridge, and opposite Blackhall Road where access to the common is currently available. Therefore, except in flood conditions, public access at these points would remain unchanged.
2. The proposed gates alongside New Road opposite the slipway would be closed at all times. Currently, there are no railings here so these gates would reduce access for pedestrians and cyclists. However, there is no pedestrian crossing point across New Road at this point and no footway along the roadside. Therefore, public access at this point is likely to be limited.
3. The gates would prevent the public from launching watercraft into the river using a vehicle. However, this is currently not possible. The bollards and boulders would be removed to allow operational access for the EA. Any watercraft that could be carried onto the common would be able to launch from the slipway.
4. I have already concluded above that the slipway works and widening of a path for cyclists would improve access.
5. FOLD, the OSS and KCS consider the proposed works would reduce the enjoyment of the common by altering the feel and experience of the common. The walls would make the common feel enclosed and the experience of walking in an open area would be lost.
6. The walls are likely to make the common feel less open than the existing railings and restrict views into and out of the common. However, once on the common, I consider the main appeal is the view of the river which would largely remain unchanged by the proposed works. Due to the amount of traffic on New Road and the vehicular access and parking for businesses on the north-western side of it, I consider most walkers and cyclists would prefer to use the path on the common rather than the footway or carriageway, and this appeared to be the case during my site visit. This would minimise the impact the wall would have on the views.
7. Works are predominantly along the New Road edge of the common, with limited works within it. I have already concluded above that the planters and additional hardstanding would have minimal impact on the recreational use of the common.
8. During the construction of the proposed works, New Road Common and part of New Road would be closed which would have a significant negative impact. However, the works are scheduled to last for six months and the common would then be reopened and any damaged grass reinstated.
9. Although there would be some impact on public access due to closed gates at the top of the slipway, I consider the overall effect on public rights of access and the enjoyment of them would not be significant.
10. The OSS considers the works are not allowed by and are against the spirit of the Scheme of Management which they claim states ‘the Council shall do nothing that may otherwise vary or alter the natural features or aspect of the common or interfere with free access to every part thereof.’ A copy of the Scheme of Management has not been provided by any of the parties. Without it I can only give limited consideration or weight to this view.

*Archaeological remains and features of historic interest*

1. Historic England (HE) is not aware of any non-designated nationally important archaeological sites that would be affected by the scheme and none of the parties refer to any archaeological remains.
2. New Road Common is within the Kendal Conservation Area (KCA) and Miller Bridge, which abuts the south-western end of the common, is a Scheduled Ancient Monument (SAM). There are sixty two listed buildings close to the proposed works, eighteen of which are shown on the works plan.
3. During the works there would be a significant impact on Miller Bridge. However, once the works are completed and the land reinstated there would be no significant impact. Vibration from the installation of the sheet piling could affect Miller Bridge. However, mitigation measures and monitoring would be in place to reduce the vibration to acceptable levels. The effects on Miller Bridge are not predicted to be significant.
4. There would be a slight adverse impact on listed buildings during the works. This would rise to a moderate adverse impact at year one of the operational phase and fall to a slight adverse impact during year fifteen of the operational phase. Overall, the impact would not be significant.
5. HE considers there would be an impact on the KCA and the setting of Miller Bridge from the flood defence walls. SLDC also considered there would be a residual impact on the setting of one listed building and Miller Bridge. However, both consider the protection from flooding conferred by the flood defences would more than outweigh the impact and harm caused by them. SLDC considered this protection to be a significant public benefit.
6. The flood defences originally proposed abutted Miller Bridge, but in the revised scheme this is no longer the case. Metal railings and an open pedestrian gate would now sit alongside the bridge. The kerb would tie into the bridge with sealant which would not affect the bridge.
7. The OSS is concerned the proposed works would destroy the cultural heritage of the site. They refer to the hiring, horse, cattle, and entertainment fairs dating back to the Middle Ages which have evolved into the present-day fair. They state that the common byelaws only allow fairs which do not prevent normal recreational use. I have concluded above the proposed works would not adversely affect Taylor’s fair. The OSS acknowledge the old retail and wholesale fairs have gone. However, I consider the proposed works would not prevent the use of the common for similar fairs if they were to be resurrected.
8. The proposed works would have some impact on the KCA, and the setting of a SAM and listed buildings. However, these are not considered to be significant in the longer term. Furthermore, the works would protect the area from flooding which would significantly outweigh the impact on the historic features.

***Benefits of the KFRMS and other options***

1. The proposed works would increase flood protection benefiting the neighbourhood by reducing flooding to residential and commercial properties. Where works would lead to less than substantial harm, they should be weighed against the public benefits of them. These include the social and economic benefits resulting from a reduced risk of flooding and the protection of listed buildings and heritage features.
2. I accept the proposed works would create a visual barrier between the public and the common and would have an impact on the landscape. They do not impact nature conservation or archaeological features. There would be some impact on the KCA and historic features, but these would not be significant and would be outweighed by the protection from flooding. I consider the public benefits of the proposed works, both socially and economically, would outweigh any impact on public access, the neighbourhood, nature conservation, the landscape, and archaeological or historic features.
3. The OSS and FOLD both state their preference for upstream natural flood management measures. Natural flood management measures and slowing the flow form part of the KFRMS, complementing the engineered measures. However, such measures alone cannot provide sufficient flood resilience for the communities within the Kent catchment.
4. The EA considered numerous options for the KFRMS, with initial assessments being undertaken on each to establish the environmental, technical, economic, and social impacts. The measures which passed these tests were shortlisted, reviewed, and considered in more detail. Two alternatives were considered on New Road Common. A linear defence wall alongside the River Kent was discounted because it would have resulted in a severe impact on the openness of the common and would have severed the land and river areas of the common. The existing river wall would also have required costly and extensive repair work.
5. The second option, approved in 2019, used two smaller floodgates on either side of the slipway and a larger gate onto the River Kent. This has been revised to remove the walls within the common and align them with other sections of wall. This avoids segregation of the common and requires fewer floodgates and less permanent land take. For these reasons, the proposed revised scheme is preferable to the other options.
6. I consider that the flood defence scheme proposed appears to be the most acceptable and feasible option.

Other Matters

1. Some parties believe an application to deregister and exchange the common land under Section 16 of the 2006 Act should have been made as they consider the land affected by the works to be more than 200 m2. They also believe this application should have been considered with the application for Gooseholme Common as they are contiguous greenspace. Considering them separately leads to a piecemeal approach and they believe this is an attempt to circumvent a Section 16 application.
2. Concerns were also raised over the legality of the road width and the occupation of the common by businesses on the north-western side of New Road. It was questioned if the common affected by the Blackhall Road junction improvements had been deregistered. Reference was also made to the previous, unlawful use of the common on the south-eastern side of New Road as a car park which has since been restored.
3. The EA are not the freeholder of the land so cannot make a Section 16 application. SLDC considered making an application under Section 16 to resolve the issues on the north-western side of the common and potentially on behalf of the EA. This was deferred until after the merger of SLDC and CCC. WFC could still decide to make one.
4. Whilst I note these comments, the application before me was made under section 38. Therefore, I am only able to consider the merits of this application. The application for Gooseholme Common has already been considered and consent granted. I am not able to revisit that decision and those works have already commenced.
5. The issue affecting the land on the north-west side of the common and any encroachment of roads onto it are not before me. I do not have enforcement powers relating to commons, unlawful works, or the incorrect removal of common land from the Register.

Conclusion

1. Having regard to these and all other matters raised in the written representations, I conclude that consent for the works, as shown on the plan appended below, should be granted subject to the condition set out above.

Claire Tregembo

INSPECTOR

**Plan of Proposed Works**

****