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| **Application Decision** |
| **Site visit on 25 July 2023** |
| **by Grahame Kean Solicitor, MRTPI, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 16th January 2023** |

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| **Application Ref: COM/3312481** **Matterdale Common, Cumbria**Register Unit No. CL0067Registration Authority: Cumbria County Council |
| * The application, dated 1 December 2022, is made under section 23 of National Trust Act 1971 (the 1971 Act)
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| * The application is made by Mr Phillip Hutton on behalf of Matterdale Common Group.
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| * For the purposes of identification only, the location of the proposed works is shown on the attached map.
* The works, proposed for fifteen years’ comprise:
1. Renewed consent for a 1400m fence which currently excludes an area of approximately 5.5 hectares at Sandbeds Moss (grid reference NY367229).
2. Renewed consent for a 1600m fence which currently excludes an area of approximately 4 hectares at Barbaryrigg Moss (grid reference NY362228).

Formal Decision: Consent is granted for the works in accordance with the application dated 1 December 2022 and the submitted plans as amended, subject to the following condition: * the fencing and all associated works indicated on the submitted plans shall be removed and the land restored to its former condition by 31 December 2028.

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**Preliminary matters**

1. The application has been determined on the basis of written representations received and my site visit which was accompanied by the agent for the applicant and partly by a representative of Friends of the Lake District. The visit started and ended at Fell Gate at the eastern end of the Old Coach Road.
2. The applicant seeks to renew consent for 1400m and 1600m of temporary fencing and associated works for 15 years, with the aim of preventing further peat erosion on Matterdale Common (the Common) by excluding livestock from the damaged areas and improving the condition of the habitat. The fencing would exclude grazing for conservation purposes from two enclosures and is part of a scheme under the Higher Tier Countryside Stewardship scheme (HTCS).
3. Following advertisement of the proposal, 23 objections were made and one letter of support received. Representations were received from the Open Spaces Society (OSS) and Natural England (NE) and eight other individuals. In response to the objections and representations an amendment to the proposal was made in relation to the location of the proposed fence. The amended proposal was circulated and commented on by the parties.
4. The Cumbria and Lakes Joint Local Access Forum, Friends of the Lake District, NE and the OSS submitted substantial comments/objections, raising concerns such as lack of monitoring/evidence and the impact of the fencing. The applicant has, in response to representations, agreed that any consent should tie in with the current HTCS which lasts until 2028 and to future surveys.

**Legal Framework**

1. By s38(1) Commons Act 2006 (CA2006), consent is required from the Secretary of State (SoS) for any “restricted works” on registered common land. Restricted works are those which prevent or impede access to or over the land, which might include erecting fencing, constructing buildings, digging ditches or resurfacing of land with tarmac and similar materials. However, s38(1) does not apply to works on any land where the works are carried out under a power conferred by or under any enactment applying to common land (s38(6)(b)).
2. The land is owned by the National Trust (NT) who raises no objection. By s23 of the National Trust Act 1971 (NTA1971) the NT may carry out works on common land that it considers “*desirable for the purpose of providing, or improving, opportunities for the enjoyment of the property by the public, and in the interests of persons resorting thereto*”, but SoS consent is required by virtue of s23(2) in the case of work “*whereby access by the public to any Trust property to which the said section 29 applies is prevented or impeded*”.
3. The reference to s29 is to s29 National Trust Act 1907 (NTA1907) whereby NT may exercise certain powers over common land, as amended by CA2006. The effect of the section as amended is that s29 applies to any land registered as common land. Since the land comprised in the present application falls within this category, and since the works proposed would in my judgement and as described below, impede access to its property, albeit in a limited way, any acts of NT in relation to the land that fall within the scope of s23(2) NTA1971 would be subject to the requirement to obtain consent from the SoS.
4. Several commoners actively exercise grazing rights on the common, but also appear to have duties under NE’s stewardship arrangements, to restore areas of degraded blanket bog on the common. To the extent that their activities include the fencing works the subject of this application, they or indeed anyone engaged in the works must have at least an implied licence from NT to carry out the same. The permitting of such works by NT is an act that in my opinion is subject to the requirement to obtain SoS consent.
5. Therefore, the application is correctly made under s23 NTA 1971.
6. Defra’s Common Land consents policy of November 2015 is relevant to the application. In general the policy seeks to ensure that our stock of common land and greens is not diminished, works take place on common land only when they maintain or improve the condition of the common or, exceptionally, where they confer some wider public benefit and are temporary or have no lasting impact, and use of common land is consistent with its status as such.
7. In determining the application, regard must be had, by s39 CA2006 Act to:
* 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; and
* any other matter considered to be relevant.
1. The public interest is defined (s39(2)) to include nature conservation; landscape conservation; protection of public rights of access to any area of land; and protection of archaeological remains and features of historic interest.

**The site, description of works and justification**

1. The public has rights of access on the Common and several Commoners exercise grazing rights year round. These graziers (Matterdale Common Group) were in a Higher Level Stewardship (HLS) agreement with NE, now in the HTCS scheme. Its aim is to restore areas of degraded blanket bog on the Common and enhance biodiversity and landscape, while restoring the land as a carbon store to contribute in the battle against climate change.
2. There are two areas of fencing, CL1 and CL2, already constructed and which benefit from SoS consent given in 2009. The fencing excludes two areas of damaged blanket bog where the underlying peat has become exposed, respectively some 1400m and 1600m in length and 1.2m in height. CL1 encloses c5.5 hectares and CL2 encloses c4 hectares. Exposure had led to erosion of the peat and sedimentation of watercourses in the Bassenthwaite Lake catchment. Sedimentation adversely affects water quality and biodiversity in this area.
3. To prevent further peat erosion, it is necessary to exclude livestock from the damaged areas. This would enable blanket bog vegetation to re-colonise the bare peat and improve the habitat. On consultation with NE, it was originally proposed that these areas be fenced off for a period of 5-10 years to facilitate recovery. There is no other practical way of preventing livestock access while maintaining the Common as a viable grazing resource.
4. The fencing selected is sheep stock fencing and the livestock that requires exclusion is sheep. No other types of fencing have been considered as they would either not be sufficient for livestock exclusion or they would cause a significant visual impact on the common. The fencing would accord with BS 1722, wooden post, sheep netting with nine or twelve inch net spacing and a single top wire (not barbed) erected in straight lines between strainer posts at each end of the fence, corner and turning points. Timber would be peeled and tanalised or treated with an approved preservative. Wire would be galvanised and comply with BS 4102.
5. Complete livestock exclusion from the Common was not considered a practical alternative, as it would render the Common unusable as a grazing resource and prevent Commoners and the public from exercising their rights of access.
6. In terms of adjacent works and existing common land several fences and walls form the boundary of the Common and there are several stone sheepfolds in varying states of repair. The Old Coach Road is a historic drovers' track running across the northern part of the Common, occasionally used for vehicular access.

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

1. There are registered rights of common to graze animals. As noted above, the public has rights of access on the Common and the Commoners exercise grazing rights year round.
2. NT as owner of the Common, considers the renewal of consent is desirable for the purpose of improving opportunities for the enjoyment of the property by the public and is in the interests of visitors to the common. The Open Spaces Society (OSS) objected that, the application was invalid because the relevant person in NT had not certified compliance with s23(1) NTA1971 providing for exercise of powers relating to common land. No evidence was supplied that suggests such action is necessary here. The correspondence suffices to demonstrate the capacity in which NT acts and position taken in relation to the application.
3. I am satisfied that the proposed works would facilitate grazing by rights holders and are in the interests of the landowner.

***The interests of the neighbourhood***

1. There are no definitive public rights of way across the areas proposed for enclosure, but it is all Access Land in accordance with the CROW Act 2000 and a bridleway passes between the two enclosures running in a north to south direction from Lobbs. This route then joins the Old Coach Road which runs to the south of the enclosures in an east west direction. The Old Coach Road is a locally well-known and well used unsealed country road which runs for some 8km through neighbouring parishes.
2. The fencing creates two enclosed areas within the Common but their purpose is to keep livestock out rather than to keep people out. People would continue to access the whole Common at all times. A 1.525m high wooden self-closing gate is included in each enclosure fence to maintain public access and enable graziers to gather stray stock that breach the fencing. The gates display discrete open access symbol signage.
3. The areas would normally be accessed only by the more determined and able walkers and those interested in wet-land / bog features. Hence, the level of demand for public access is likely to be small but the Local Access Forum (LAF) recommended that each exclosure should have two pedestrian access points: one at the north and south extremities of each. The applicant has now accepted advice that the consent sought should expire at the end of the current HLS agreement on 31 December 2028 and will be responsible for the maintenance and ultimate removal of the fencing. They are also content to install additional step-stiles at opposite ends of each exclosure to facilitate access.
4. In considering the interests of the neighbourhood it is necessary to take into account all legitimate uses of the common and conclude whether the proposed works will interfere with the co-existence of those uses. I accept the proposed works will present a level of enclosure whereas none exists at present, and for some people this will be unwelcome. This must be balanced against benefits that accrue from excluding livestock from the still degraded areas of the Common. On balance I find that the benefit of maintaining these enclosures will positively benefit the neighbourhood, and local people will be able to use the common substantially as they have previously. Accordingly, there is, in my judgement, no significant detriment to the interests of the neighbourhood.

***The public interest***

*Nature conservation*

1. Matterdale Common lies within the Lake District National Park and one of the two existing enclosures, CL2 lies partially within the boundary of Thornsgill Beck, Mosedale Beck and Wolf’s Cragg Site of Special Scientific Interest (SSSI). This site was notified in 1998 for its geological interest. Gaining effective of water movement across the area seems to me to be a key to long term revegetation of the peat. The features of the SSSI have not been adversely affected by the existing fencing works and no ongoing impact is anticipated should the fences be permitted to remain for a further period.
2. Having regard to the foregoing, I conclude that the proposed works will have a positive benefit for nature conservation

*Conservation of the landscape*

1. The fences around CL1 and CL2 will inevitably be visible in the immediate locality. Most visitors to the area will utilise the Old Coach Road and will, therefore, be looking down on the affected areas, so "skylining" effects would be limited. The fencing would be seen against a dark background of heather and peat.
2. NE states that whilst the fencing is visible from the Old Coach Road and the bridleway the landscape impact at this location is not considered to be significantly adverse. The materials still appear to be in good condition although they have weathered and the retention of the fence for a further period will allow ground cover to continue to develop, leading to a further reduction in bare areas and the potential for an overall improvement in the landscape quality of the area in the longer term. The fencing has resulted in the vegetation in the enclosures recovering more quickly without grazing pressure.
3. Retention of the fencing for 15 years is a longer period than the original consent and it seems doubtful whether such a long period of continued grazing exclusion is necessary to support the ongoing recovery of the vegetation in this area.
4. I agree with NE’s assessment that the visual impact from the continued restoration of the blanket bog would significantly outweigh the temporary visual impacts caused by the fencing. Therefore in relation to landscape considerations, I find that whilst the fencing has some visual impacts, on balance it is beneficial that the enclosures should continue for a limited period.

*The protection of public rights of access*

1. NE states that the size of the common, coupled with the topography, boggy nature of the terrain and lack of any established routes within the enclosures all contribute to the works having a minimal effect on recreational users of the Common overall.
2. If consent is granted there will be no loss of common land and all the Common will remain available for public access. Gates would limit the impact of the fencing as regards impeding access from unenclosed to enclosed areas.

*Archaeological remains and features of historic interest*

1. The proposal does not affect any archaeological remains or features of historic interest associated with the Common.

*Conclusions on the public interest*

1. Overall, I am satisfied that there are no sufficient adverse impacts on the public interest that would cause me to conclude the applications should not be granted, subject to a condition that consent is only given up to and including 31 December 2028 to bring the fencing into line with the period of the current HTCS agreement and allow for a detailed appraisal of the ecological benefits since the fences were originally erected in 2009.

**Other matter**

1. The Open Spaces Society (OSS) raised legally based objections. It doubted that the NTA1971 applied, but for the reasons given above I disagree. It also said that the application process was controlled by an order specifically related to the particular Common in question. I deal with this matter below.

*Whether local legislation applies in place of s38(1) - s38(6)(a)*

1. The Inclosure and Regulation (Matterdale) Provisional Orders Confirmation Act 1879 gave effect to two orders made by the Inclosure Commissioners (Commissioners), ie the Provisional Order of Inclosure and, - which is relied on by OSS the Provisional Order of Regulation (the Order). The Order included:

“*that for the improvement of the part of the said common to be regulated, the following provisions be put in force; that is to say, provisions for-:*

*2. The planting of trees, or the erection of such fencing as may be found necessary for shelter or for the protection of the planting, or of the due exercise of the rights of common, or in any other way improving or adding to the beauty of such part of the said common.”*

1. There is a postscript to the provisions itemised as follows “*the foregoing provisions for adjustment of rights and for improvement shall apply to all that part of the said common which is to be regulated*”.
2. The use of the phrase “provisions for” suggests that there would have to exist a more specific and subsequently articulated power of regulation to be spelled out in relation to the whole or a specific part of the Common, that would justify the provision of fencing as it has been applied for here. OSS did not provide evidence as to the existence of any such award or application that might have been made to permit persons to carry out specific works that would be excepted from the application of s38(1) (prohibition on works without consent), ie works mentioned in s38(6)(a) which are:

*“(a)works on any land where those works, or works of a description which includes those works, are carried out under a power conferred in relation to that particular land by or under any enactment”.*

1. It is a matter of public record that the Matterdale Inclosure Award was made on 14 July 1882, for example the Commons Commissioners’ decision Ref 262/D/822-830 dated 28 July 1982 confirms at the seventh paragraph that: *“the said 1882 award was made under 2 provisional orders both 27 February 1879 one for Regulation and one for Inclosure which orders were confirmed by the Inclosure and Regulation (Matterdale) Provisional Orders Confirmation Act 1879, 42 and 43 Vict. C. lxxxi.”*
2. However I have not been provided with that or any other award pertaining to the Common. Regulation of a common under the Commons Act 1876 was a highly bureaucratic exercise, and it is commonly understood that what was meant or intended by “regulation” of a common was a source of no little confusion at this time. The structure of regulation set out through local provisional orders, Acts, local awards, and conservators’ schemes of byelaws produced a confused set of legal parameters. The 1876 Act and Order are enabling powers and do not appear to give dispositive effect to item 2. which only foreshadows, for example the power to “*improve*” or “*add to the beauty*” of the Common.
3. Furthermore, tracing the succession of authorities concerned with these matters, I note that the Board of Inclosure Commissioners originated in the Inclosure Act 1845 which set out the purpose of facilitating the inclosure and improvement of common land. The Land Commissioners, as the Inclosure Commissioners were called under the Settled Land Act 1882, became part of the new Board of Agriculture under the Board of Agriculture Act 1899, inheriting the powers of the Inclosure Commissioners. After several transitions, the Ministry of Agriculture and Fisheries was formed, then the Ministry of Agriculture, Fisheries and Food, and latterly the Department for Environment, Food and Rural Affairs (Defra) in 2001 under whose auspices the CA2006 itself was enacted and now regulates consent.
4. Therefore, the generality of the provisions cited by OSS alone does not persuade me that the effect of s38(1) CA2006 is displaced by the Order. It is however, displaced by the operation of s38(6)(b) which I have dealt with in the legal framework section of this Decision.

**Conclusion**

1. Having regard to the interests and matters discussed above and taking account of all relevant matters raised in the written representations, I conclude the proposed works will not significantly harm the interests set out above for the reasons given. Public rights of access would be preserved and there would be longer term positive benefits to the interests of the neighbourhood and no significant adverse effects on nature conservation or conservation of the landscape.
2. Having regard to the representations made I will grant conditional consent that will expire on 31 December 2028 unless a further consent application is made before that date and approved.

Grahame Kean

Inspector

**Map referred to in Decision COM/3312481**

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