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| **Application Decision** |
| Site visit made on 5 March 2024 |
| **by Helen O'Connor LLB MA MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 8 March 2024** |

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| **Appeal Ref: COM/3325376**  **Name of Commons: Little Langdale Common and Baysbrown Common, Westmorland**  Register Unit Nos: CL76 and CL77  Commons Registration Authority: Westmorland and Furness Council |
| * The application, dated 29 June 2023, is made under Section 38 of the Commons Act 2006 for consent to carry out works on common land. |
| * The application is made by Andrew Birkett of the Little Langdale & Baysbrown Commoners Association. * The works comprise three fences of the following lengths – 1,078m and 505m (Little Langdale Common) and 562m (Baysbrown Common) for a temporary period of 15 years. |
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Decision

1. Consent is granted for the works in accordance with the application dated 29 June 2023 and the accompanying plans, subject to the following conditions:
2. The fences, gates and stiles hereby approved shall be removed on or before 15 years from the date of this decision.

Reason: In the interests of certainty and to restore unrestricted access for Commoners, the public and livestock across Little Langdale and Baysbrown Commons.

1. The fencing hereby permitted shall be provided with the gates and stiles shown on the drawing entitled ‘Little Langdale Common and Baysbrown Common Stiles Replaced by Gates’ dated 14.2.24. The gates and stiles and shall thereafter be retained for the duration of the fencing.

Reason: To ensure public access remains for the duration of the fencing across Little Langdale and Baysbrown Commons.

1. The fencing shall not include barbed wire.

Reason: In the interests of visual amenity and public access.

1. For the purposes of identification only, the location of the works is shown in red on the plan in Appendix 1.

**Preliminary Matters, background and application**

1. Section 38 of the Commons Act 2006 (the 2006 Act) prohibits restricted works on common land unless consent is obtained. Restricted works include the erection of fencing.
2. Common Land units CL76 and CL77, known as Little Langdale Common and Baysbrown Common respectively (the Commons), lie in the centre of the Lake District National Park (NP). In turn, they amount to approximately 364 hectares and 128 hectares. The Commons are also within the English Lake District World Heritage Site (WHS).
3. The works propose three sections of fencing of approximately 1.2m in height, constructed using wooden posts, sheep netting and topped with two strands of wire. To distinguish the respective fences, I have referred to them as Widdy Gill, Blea Beck and Kettle Crag. Widdy Gill and Blea Beck concern Little Langdale Common, and Kettle Crag concerns Baysbrown Common.
4. Widdy Gill is the longest fence proposed at 1,078m, and is also the most southerly. It would turn a corner at Wrynose Bridge. Four pedestrian gates and six stiles would be distributed along its length. If installed at 1.2m in height, it is proposed that barbed wire would be used to top this fence given the topography. Alternatively plain wire could be used, but the fence would need to be 1.4m high to stop sheep jumping over it from higher ground.
5. The Blea Beck fence of 505m would lie to the south of Blea Tarn on a north/south axis. It would run broadly parallel and to the west of a public right of way, converging with it at its southern terminus. Three pedestrian gates and one stile are proposed along its length. It is proposed that plain wire would be used to top this fence.
6. The Kettle Crag fence would measure 562m in length. Running in a broadly east/west axis it is the most northerly position. Two pedestrian gates and two stiles are proposed along its length. It is proposed that plain wire would be used to top this fence.
7. The proposed fencing works form part of a wider project of land management and stock control which involves creating exclosures to prevent grazing. This would support the reinforcement and creation of scrub woodland on the Commons. The works are related to a Countryside Stewardship (CS) application which has been submitted to the Rural Payments Agency.
8. Natural England have issued a screening decision dated 23 June 2023 under the Environmental Impact Assessment (Agriculture)(England)(No.2) Regulations 2006. This found that broadly similar fencing works (albeit that four fences were proposed for 10 years) would be unlikely to have significant effects on the environment because it would improve the condition of priority habitats, the water quality in Little Langdale Tarn SSSI and would contribute to flood resilience, carbon storage and soil stability.
9. I am also aware of a separate relevant application for works on common land (Greenburn Common CL29, reference COM/3325462) made under section 23 of the National Trust Act 1971. This concerns adjoining common land to the south of Widdy Gill. It too proposes fencing, and the intention would be to connect with the proposed Widdy Gill fence to form a large exclosure. I have borne this in mind when making my determination.
10. This application is for the proposed fencing works on common land. Although there may be a connection, it does not directly cover methods of land management, planting or habitat creation. As such, it is not within the scope of this decision to administer or determine the merits of any CS scheme. Therefore, reference to the CS scheme is made only insofar as is directly relevant to the fencing works proposed.
11. I carried out a site visit accompanied by representatives of the applicant. The application has been determined on the basis of the written evidence, the comments submitted and my observations of the site.

Main Issues

1. 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 (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);

(d) any other matter considered to be relevant.

1. I have had regard to the Common Land consents policy issued by the Department for Environment, Food and Rural Affairs dated November 2015 (the 2015 policy) as this sets out the Secretary of State’s policy in relation to the determination of section 38 applications.

Representations and Objections

1. Substantive representations were made in response to the advertisement of the proposal from Natural England (NE), Historic England, the Open Spaces Society (OSS), Friends of the Lake District (FLD) and Cumbria & Lakes Joint Local Access Forum (C&LJLAF).
2. In summary, Natural England are generally supportive of the proposal and consider that long term benefits to the Commons would outweigh temporary adverse impacts from the fencing on landscape character. The works form part of a CS scheme likely to provide financial support for the continuation of a common land agro-pastoral system. Nevertheless, NE contend that stiles should only be used in exceptional circumstances and consider suitable provision should be made for equestrian access if necessary. Furthermore, they consider public information boards near the public right of way closest to the Blea Beck fence would be beneficial.
3. Historic England confirm there are no listed buildings or registered parks and gardens that would be affected by the works. Neither are they aware of any non-designated nationally important archaeological sites. They do not consider that the proposal would have a harmful impact on the Outstanding Universal Value (OUV) of the WHS.
4. The OSS and FLD have similar concerns regarding the use of barbed wire and stiles and raise some doubts that the fencing would be removed at the end of the 15 year period. They consider the visual impact of the fencing would be harmful to landscape quality, particularly the Blea Beck fence given its proximity to a popular public right of way. They assert tree and shrub planting in this vicinity could adversely affect expansive views for users of the footpath. Both organisations refer to the presence and status of existing fencing on the Commons which they consider ought to be clarified. The OSS request that a condition be used to remove such fencing if consent is granted. Alternatives to the fencing should also be assessed.
5. The OSS raise specific concerns of the likely effect on named species of flora and fauna at Blea Moss, and do not consider that sufficient evidence has been provided in relation to the impact on nature conservation.
6. FLD further advise that heritage features should be made obvious to ensure that fencing works avoid them and that thought needs to be given to the cultural heritage associated with traditional farming and the unique agro-pastoral farming system.
7. The C&LJLAF wish the wider project success, stating that they are generally reassured by the applicant’s submissions relating to the removal of the fencing at the end of the period sought. They suggest periodic monitoring over the 15 year timescale is undertaken to ensure the wider project is meeting its nature conservation objectives.
8. I shall consider the substantive matters raised in the following parts of my determination that consider the statutory criteria.

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

1. The extracts from the register of common land provided show that there are 3 rightsholders with rights to graze specified stints of sheep, cattle and/or horses at Little Langdale Common, and 2 at Baysbrown Common. In addition, the rightsholder at Birk Howe Farm also has a right to take bracken over Little Langdale Common. The information before me indicates that most of the grazing rights are exercised across the Commons, predominantly in relation to sheep between April and November.
2. Ostensibly the fencing to create large exclosures to prevent grazing would interfere with the majority of those rights. However, it is clearly relevant that the application is made by a rightsholder on behalf of the Little Langdale and Baysbrown Commoners Association (CA). They seek to restrict grazing areas voluntarily and temporarily as part of a CS scheme to protect native trees and shrubs from grazing by sheep. The longer-term aim of the CS scheme is to create greater ecological habitat diversity and structure on the Commons to benefit wildlife and improve water quality in Little Langdale Tarn SSSI. There are financial grants associated with the CS scheme.
3. Overall, subject to the removal of the fencing, there would be no long-term harm to those occupying or having rights over the land. In the medium term, rights to graze would be impaired, but I am satisfied that the CA are best placed to judge the course of action that suits their interests as commoners.

***The interests of the neighbourhood***

1. The 2015 policy indicates that the issues to be considered in this context include whether the works mean that local people will be prevented from using the common in the way they are used to and whether they would interfere with the future use and enjoyment of the land as a whole.
2. The NP is a very popular area amongst people wishing to gain access and derive enjoyment from outdoor activities, such as walking, running and climbing, as well as an appreciation of the natural beauty of the dramatic landscape. The Commons in this case positively contribute towards that recreational activity and scenic beauty. In these respects, it is difficult to differentiate the use and appreciation of the Commons by local people from that of the general public, albeit that they may be able to undertake such activity more frequently. Given the considerable crossover of interests, to avoid duplication I have taken account of these aspects when considering the public interest.

***The public interest***

*Nature conservation*

1. There are multiple designations across the NP to reflect its importance and value in terms of natural habitats and geological interest ranging from European, national to local designations. There are eight Sites of Special Scientific Interest (SSSI) within 1.7km of the fencing, the closest of which is the Blea Tarn SSSI, approximately 100m north of the Blea Beck fence.
2. However, none of the three fences would encroach into any of these designated sites and so would be unlikely to directly affect their special scientific interest. Nevertheless, the fencing comprises part of a CS scheme intended to extend two existing areas of native scrub on Kettle Crag and along Blea Beck, and to establish native scrub along Widdy Gill.
3. NE advises that Little Langdale Common has priority habitats including grass moorland, upland flushes, fens, swamps, upland heathland, alkaline fens, transition mires and quaking bogs, many of which are in poor condition due to overgrazing. If native tree and shrub planting is established across the Commons, it would reinforce existing moorland fringe habitats and establish native scrub on land that presently reflects the effects of high grazing levels.
4. The CS scheme planting would also provide a seed source to promote the natural regeneration of native trees and shrubs on the open fell thereby resulting in a more diverse habitat structure that would generally be beneficial to wildlife. NE refers to the expansion of tall herb plant communities, the diversification of invertebrates as well as benefit to Juniper, a listed species under section 41 of the Wildlife and Countryside Act 1981. In turn, ongoing natural regeneration would lead to longer term improvements in carbon storage, soil stability, water quality and water retention.
5. By protecting newly planted trees and shrubs from grazing, the exclosure fencing proposed would contribute toward these nature conservation objectives. The 15 year period coincides with that sought by the National Trust on common land to the south, and tallies with the CS scheme. This coordination would maximise the nature conservation benefits over a wider area. Moreover, it reflects a reasonable period for tree and shrub planting to become established in relatively exposed growing conditions to an extent that it would be better able to withstand grazing stock.
6. Furthermore, owing to likely reduced siltation from livestock generated erosion, there would be a positive effect on the water quality of Little Langdale Tarn SSSI. The SSSI is designated for its aquatic habitat, wetland vegetation and grassland and lies downstream of Widdy Gill. Improvements to the mire vegetation would assist populations of the Caddis Fly.
7. The OSS mention Marsh Clubmoss, Bog Orchid, Intermediate-leaved Sundew and the Keeled Skimmer Dragonfly at Blea Moss. It is suggested that there is insufficient information in relation to the likely effect of the proposed planting on them. Nevertheless, NE states that Blea Moss will be improved by reduced grazing on the western part of Little Langdale Common. Given their area of expertise, and the absence of substantive evidence to show otherwise, I attribute greater weight to the comments of NE in this respect.
8. Therefore, overall, I am satisfied that the proposals would contribute towards a long term beneficial impact on nature conservation at the Commons.

*Conservation of the landscape*

1. The OUV of the WHS is derived in large part from the extraordinary beauty and harmony of the mountainous valleys of the Lake District. Formed by Ice Age glaciers, the landscape has subsequently been shaped by the distinctive agro-pastoral system. OUV is further derived from the association of the area with the Picturesque and Romantic movements which recognised the relationship between humans and the landscape as a resource for enjoyment and inspiration. The status of the area as a national park further reflects the special qualities of the landscape.
2. The Commons form part of the Langdale Valley which possesses dramatic topography, a range of habitats, opportunities for panoramic views and a sense of naturalness and remoteness.
3. The three fences proposed are of a considerable length and represent an obviously manmade intervention that would harmfully dilute that sense of naturalness and remoteness. Nevertheless, the wooden posts, open nature of the fencing and restricted height would give the structures a low-key presence. Their presence would also be ameliorated by the fencing responding to the topography of the landform.
4. I have taken account of the concerns raised relating to the proposed use of barbed wire at the Widdy Gill fence. My observations were that the use of plain wire would be preferable in visual and practical terms as it would present a less assertive barrier than barbed wire. It would also be safer for those accessing the common and walking alongside the fence to reach a gate or stile. In landscape terms the increased height of 1.4m would have a marginal visual impact.
5. In the context of Kettle Crag and Widdy Gill, the degree of visual harm from the fencing would be localised, and therefore likely to affect a relatively limited number of people. However, given the proximity of the Blea Beck fence to a popular right of way, the visual harm, albeit modest in nature would be more conspicuous. Some concerns are raised in the representations that planting associated with the CS scheme in this vicinity could impact on the open aspect and eastern views from the public right of way. However, my primary consideration in this application relates to the impact of the fencing works proposed which, in the case of Blea Beck would be to the west of the footpath.
6. In the long term, the balance of evidence relating to the CS scheme objectives indicate it would be likely to support a continuation of the common land agro-pastoral system and restore priority habitats at the Commons. These are likely to assist in the conservation of landscape quality and reinforce the OUV of the WHS. However, in the medium term I find that the proposals would result in localised albeit temporary harm to the landscape character of the Commons owing to the presence of the fencing.

*Public Access*

43. The fencing proposed would present a barrier to the unrestricted public access across the Commons. As described earlier in my decision, a mixture of gates and stiles are proposed to provide public access. The applicant confirms these will be compliant with BS5709 and has increased the number of gates in response to representations received.

44. Based on the information supplied I am satisfied that sufficient pedestrian gates would be provided to cater for people with a range of mobility requirements, and that they are in the locations that reflect the most prevalent and even minor usage based on the Strava heatmap of the area. As such and having regard to the Public Sector Equality Duty under section 149 of the Equality Act 2010, I am satisfied that suitable public access would be retained with pedestrian gates within a reasonable distance. The stiles proposed would augment that provision.

45. One effect of the fencing would be to exclude horse riders from the exclosures created. However, the information provided combined with my general observations of the terrain suggests that horse riders would mostly access the Commons from the roads which cross it. The steep and rocky ground at Kettle Crag renders it unsuitable for such activity and the absence of other obvious riding routes across the territory makes it highly unlikely that the proposed fencing would pose a barrier to horse riders. Access to the relatively level ground at Blea Tarn Moss would remain. In these circumstances, requiring the provision of equestrian gates would be disproportionate. Even so, the proposal represents a diminution in access.

46. Consequently, I find that the proposed fencing would constrict access for a considerable period, albeit temporarily. The pedestrian gates and stiles proposed would facilitate a reasonable degree of continued access, but this does not equate to unrestricted access currently available to local people in the neighbourhood, the public or equestrian users. Hence, this harm weighs against the proposals.

*Protection of archaeological remains and features of historic interest*

47. No listed buildings or registered parks and gardens are near to the proposed fencing. Installing wooden posts would involve some ground disturbance but would not affect any known notable areas of archaeology nor any areas considered to have significant archaeological potential.

48. Roman road up Wrynose Pass, Roman road in Wrynose Bottom and Rifle Range target and Marker’s Hut are Scheduled Monuments within Little Langdale Common. The mapping provided shows that the proposed fencing for the most part would lie a considerable distance away from these features of historic interest and so they would not be directly affected. The closest feature is Roman road up Wrynose pass to part of the Widdy Gill fence. The modest height and low key appearance of the fence would not harm the remains of this long linear feature.

49. Accordingly, there is little basis to consider that the proposals would result in any material harm to archaeological remains or features of historic interest.

***Other matters considered to be relevant***

50. Paragraph 4.3 of the 2015 guidance states that the Secretary of State will wish to know what alternatives have been considered to the application proposal. In this case it was considered whether some ‘no fencing’ options would achieve similar nature conservation objectives. Using electronic collars to control sheep was discounted owing to a combination of the likely high number and associated cost of such collars, and uncertainty that they would operate effectively given the thickness of the fleece of hill breeds of sheep. The option of an increased use in tree guards and tubing would be likely to lead to the widespread proliferation of such fixtures. By comparison with the proposals, I consider that such an approach would be likely to have a greater adverse impact on the visual landscape character of the Commons.

51. The removal of all sheep was considered in conjunction with the National Trust as part of the CS scheme. However, as reflected in the representations received, the retention of a hefted Herdwick flock is an important part of the cultural heritage of the WHS and NP.

52. The evidence further shows some exploration of the extent of fencing and period required was undertaken prior to the application. The former was decreased, whilst the latter increased from 10 to 15 years. Therefore, in broad terms I am assured that alternatives to the fencing have been considered and discounted for sound reasons.

53. Reference has been made to the status of other existing fencing present on the Commons being somewhat uncertain and potentially unlawful. My determination relates to the three fences before me in this application. Hence, it does not extend to regularising other potentially unlawful works that do not form part of the application. It follows that any conditions or restrictions imposed should relate to the works proposed. Moreover, specific enforcement procedures exist in the 2006 Act to address unlawful works.

54. Similarly, although under investigation by the applicant, information boards do not form part of the works proposed. Nevertheless, their absence would not detract from the longer-term nature conservation benefits identified.

55. Details of the monitoring of the planting proposals associated with the CS scheme would be more appropriately addressed through that process. The applicant has confirmed that 15 years would be sufficient time for the native planting to become established and that funding will be available to remove the fencing. An enforceable condition to remove the fencing on or before 15 years of the date of this decision would provide certainty in that respect.

**Overall balance and conclusion**

56. Paragraph 3.2 of the 2015 policy seeks the outcome that works take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.

57. The fencing works would cause localised harm to the special qualities of the landscape of the Commons as well as hindrance to unrestricted public access. However, in the longer term, subject to the removal of the fencing, their temporary presence is likely to yield wider public benefits including notable nature conservation and landscape benefits. Therefore, I find that the proposals would align with the policy objectives set out in the 2015 policy. Moreover, these benefits are sufficient to tip the balance in favour of allowing the works.

58. Therefore, having regard to the statutory criteria, 2015 policy and the written representations, I conclude on balance that consent should be granted for the works subject to the conditions set out in paragraph 1.

Helen O’Connor

Inspector

**Appendix 1**

Not to scale

Plan referred to in paragraph 2
