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| **Application Decision** |
| Site visit made on 10 May 2024 |
| **by Wendy McKay LLB, Solicitor (Non-practising)** |
| **Appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 10 July 2024** |

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| **Application Ref: COM/3334565**  **Land at Therfield Heath, Baldock Road, Royston, Hertfordshire**  Register Unit No: CL 92  Commons Registration Authority: Hertfordshire County Council |
| * The application, dated 4 December 2023, is made under section 38 of the Commons Act 2006. * The application is made by Mr Martin Berry on behalf of the Rotary Club of Royston to construct works on common land. * The works comprise: * fencing; and, * other works comprising two marquees; up to 75 gazebos; up to 20 portable toilets; one skip; a temporary car park (Area B) and the cutting of the grass within the area to be used for the Kite Festival (Area A) and within Area B as necessary in the months before the event. |
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Decision

1. Consent is refused.

**Preliminary Matters**

1. The application has been considered on the basis of written evidence and an accompanied site visit to see the application land and surrounding area which took place on 10 May 2024.
2. There have been 26 parties who made representations about the application. I have taken all these representations into account including those made in support of the application and those made on behalf of Natural England (NE) and one other objector opposing the application. The Open Spaces Society has no objection to consent being granted.

The Application

1. The application was made on behalf of the Rotary Club of Royston (the Rotary Club). The owners of the affected land are the Trustees of the Therfield Regulation Trust. The application confirms that the common is regulated by a statutory body of Conservators known as The Conservators of Therfield Heath and Greens.
2. The application refers to works in two locations:

## The part of the Therfield Heath which is some 15,000sqm (Area A on Maps 1 and 2) on which it is proposed to hold the Kite Festival.

## The adjacent field (Area B on Maps 1 and 2) which has an area of about 16,000 sqm that is proposed to be used as a temporary car park.

1. The application indicates that the proposed works would relate to a specific event, namely, the Kite Festival and would be temporary in nature. The set-up may start on Friday 2 August 2024. The event itself would take place on Sunday 4 August 2024 and the site would be fully cleared and restored by Monday 5 August 2024. The grass in Areas A and B would be cut as necessary during the months before the event to provide a suitable surface and to discourage ground nesting birds.
2. The applicant has subsequently advised that the Kite Festival has been cancelled for 2024 but wishes to continue with the application as the decision will inform arrangements to be made for events in future years.

Description of the Common Land

1. The common land registered under CL92 comprises a part of the Therfield Heath. The total area of the Therfield Heath Common is about 155ha.
2. The Area A that is intended to be used as the kite flying area is part of Therfield Heath which is a Site of Special Scientific Interest (SSSI). NE advise that it is designated for the calcareous grassland. The designation includes certain specialist plant species such as a nationally important population of pasque flower (Pulsatilla vulgaris). The grassland also supports large populations of chalkhill blue butterflies (Lysandra coridon) and a diverse invertebrate fauna. The Area B that is intended to be used as a car park falls outside the SSSI.
3. The rights of common recorded over Therfield Heath include the right to pasture (graze sheep) between 15 April and 1 November which is held by stint-holders who own land in the Parish of Therfield. There is also a right of free access at all times, and the privilege to play games and enjoy reasonable recreation which is held by the inhabitants of Royston, Therfield and the neighbourhood and is extended to the wider public by virtue of section 193 of the Law of Property Act 1925.

Main Issues

1. I am required by section 39 of the Commons Act 2006 (the 2006 Act) to have regard to the following in determining this application:
2. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
3. the interests of the neighbourhood;
4. the public interest which includes the 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; and
5. any other matter considered to be relevant.
6. Section 39(3) provides that consent may be given in relation to all or parts of the proposed works and subject to such modifications and conditions relating to the proposed works as are thought fit.
7. In determining this application, I will have regard to the Department for Environment, Food and Rural Affair’s (Defra’s) Common Land Consents Policy November 2015 (the Consents Policy), which has been published for the benefit of the Planning Inspectorate, applicants for consent, and others with an interest in applications (such as objectors). The Consents Policy explains that every application must be considered on its merits, and a determination may depart from the policy if it appears appropriate to do so. In such cases, it will be explained why it has been decided not to follow the policy.

Reasons

*Alternatives*

1. The Consents Policy provides that the Secretary of State will wish to know what alternatives to the application proposal have been considered.
2. The applicant states that working with Conservators, they have tried to move the event away from the SSSI to another part of Therfield Heath and/or to move it to a later date when it might have less impact on the SSSI, but this has not proved possible for a variety of reasons.
3. The option to move the Kite Flying Arena away from the SSSI and onto another part of Therfield Heath close to the café, tennis courts and other amenities has been considered. However, the kite flyers have taken readings at this location and concluded that it is not suitable for a kite flying event as it lies in a ‘bowl’ that is sheltered from the wind.
4. Another option considered was to move the Kite Flying Arena away from the SSSI onto the area traditionally used for car parking. This would mean finding another site on Therfield Heath for a car park, but no other suitable site could be found. To hold the event without a car park would cause unacceptable disruption and disturbance to residents.
5. A third option was to keep the Kite Flying Arena on the SSSI but move the event to a date later in the year to accommodate the mowing regime favoured by NE. However, the Applicant explains that to be viable, the event needs to take place at a weekend, ideally during the school holidays and certainly before the middle of September. There are very few possible dates that meet these criteria later in the year and the kite flyers are not available on any of those dates.
6. NE acknowledges that several alternative options have been explored including for grass cuts to take place from, at the earliest, the end of July to allow grassland plant species the time to reproduce. NE proposes that this could be as a single cut employed immediately prior to the event taking place, followed by collection which would be more in line with management on other parts of the SSSI.
7. As set out above, this has been considered and rejected by the applicant who submits that if the grass has grown well, it would be impossible to assess the condition of the site before it is cut. This would leave the Rotary Club with only three days to prepare the area for the event which would be entirely inadequate and represent a potential health risk to the kite flyers when running up and down the field looking at their kites. There would also be a risk to the public walking over ill-prepared ground. The Rotary Club could not risk the financial cost that would result from a last-minute cancellation of the event due to unsafe ground.
8. Whilst NE, the applicant, and the Conservators have met to discuss a number of alternative/mitigating options, none of these options could be agreed by the parties. I am satisfied that alternatives to the application proposal have been fully considered by the parties and that no further explanation for their rejection is required. I shall now assess the application against the relevant section 39 criteria set out above.

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

1. The landowners have been consulted and have not raised any objection to the application.
2. In relation to the common rights registered over the land, the applicant indicates that one stint-holder exercises their rights to graze and the public use the common heavily. However, no objection has been raised by those with rights of common, or any other rights, over the land in question.
3. Given the temporary duration of the proposed works, I consider that the effect on the ability of commoners or other rights holders to exercise their rights including rights of access would be very limited. I conclude that the proposal would not harm the interests of those occupying or having rights over the land.

*The interests of the neighbourhood*

1. The Consents Policy requires consideration of any positive benefits, loss of existing use and the future use and enjoyment of the land.
2. The application explains that the Kite Festival is an annual charitable event that was established in 1991 and has been running for over 30 years. The applicant states that it is very popular with residents – especially families. Local businesses also sponsor this not-for-profit event which has raised over £100,000 for mostly local charities including the Conservators and other organisations involved in protecting Therfield Heath.
3. The Applicant states that the Royston Kite Festival delivers significant benefits to the local community. These include:

* (i) bringing together a diverse range of local people on a scale that no other local event does and enabling local clubs, associations and charities an opportunity to promote their cause, raise money and recruit new members;
* (ii) providing public servants with an opportunity to engage with the local community and vice versa;
* (iii) raising tens of thousands of pounds for local charities;
* (iv) encouraging thousands of local families onto Therfield Heath to enjoy a safe, low-cost day out in the fresh air; and
* (v) supporting the recreational enjoyment of the landscape and organised activities and the cultural life of the town.

1. Those making written representations in support of the application provide further details of the community benefits that it provides. In opposing the application, a local objector submits that there are other activities taking place in Royston that also bring the community together.
2. Whilst objecting to the application, NE recognises that community events are a feature of the use of the common and have a positive impact to people’s lives and wellbeing. It acknowledges the social, cultural, and financial benefits that can be accrued from events of this nature on common land.
3. Although there may be other Royston events that afford community benefits, I have no doubt that the Kite Festival offers positive benefits for the local community on a number of different levels. Given the temporary nature of the event any loss of the existing use for the neighbourhood would be short lived and would not impinge upon the future use and enjoyment of the land by local people. I conclude that the proposal would encourage and support the use of the common land by the local community and would be in the interests of the neighbourhood.

*The public interest*

1. The public interest is defined by the 2006 Act as including the public interests 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. I shall now consider these various elements in turn.

*Nature conservation*

1. NE’s position is that in the absence of agreement in relation to an alternative cutting regime, it is unable to support the application due to the likely adverse impact that the associated preparatory cutting regime referred to in the application would have on the notified chalk grassland feature of Therfield Heath SSSI.
2. NE’s concern is that frequent cutting would interrupt and prevent the flowering and seed setting of chalk grassland plants. In contrast, late summer grazing or cutting (and collecting) allows their reproductive cycle to be completed which provides the seed source of the next generation of grassland plants in this area. NE submits that over time an unsuitable mowing regime, where plants cannot reproduce, would result in a continued lowering of characteristic species abundance and diversity. The cutting proposal, as it currently stands, is therefore likely to have an adverse effect on the notified chalk grassland feature of Therfield Heath SSSI.
3. Nevertheless, NE believes that with the right mitigations to avoid damage from grass cutting the Kite Festival could still proceed and it seeks modification of the mowing schedule in accordance with its advice given to the Rotary Club on 27 September 2023. However, as set out above the applicant has rejected those alternative proposals as being impractical and unsafe for its purposes.
4. The applicant draws support from the fact that NE has not objected to this event for the past 30 years. The Rotary Club asserts that the area they use, including the SSSI, does not change the condition of Therfield Heath which would remain the same after the event as it has for the past 30 years. Nevertheless, they accept that if the Kite Festival did not take place the flora and fauna in these areas would change and with the right management, almost certainly improve. However, they submit that inhibiting improvement in this way is not the same as causing damage.
5. In response, NE reasserts its position that to continue with the cutting regime in the manner proposed for the Kite Festival would result in damage to the designated features of the SSSI. NE’s view is that repeated cutting is likely to cause damage to the SSSI features, through the potential loss in this area of plant species characteristic of the chalk grassland and such operations are not consistent with the conservation of the SSSI. NE’s evidence is that to continue to use the land in this way with the proposed mowing regime would not simply preserve the status quo but would lead to harm in the long-term. I find no reason to disagree with that view which I consider to be robust. The proposal cannot therefore be said to support the public interest in nature conservation.
6. In relation to the extent of the SSSI proposed to be used, the applicant points out that they are only applying to use 2% of the Heath for the event and 1% of the Heath’s SSSI. In response, NE estimates that there is about 142ha of calcareous grassland on the site. It explains that the East Anglian type of chalk grassland suffered severe loss during the post-war period so remaining examples are of high conservation value. NE’s view is therefore that damage to 1% of the SSSI constitutes damage to the SSSI feature as a whole. It seems to me that given the high conservation value of remaining examples of this type of chalk grassland, the extent of the area proposed to be utilised does not correlate with the significance of the effect on the integrity of the SSSI.
7. The applicant also explains that it is the Conservators that are responsible for cutting the grass and the existing management regime has historically involved frequent cuts from March through to August keeping the grass short and the surface suitable for various activities. The applicant states that under the Higher Level Stewardship (HLS) scheme, the management of the common is stipulated by NE to be grassland with no restriction on when it can be cut. The historic rationale for this management has been to accommodate the golf practice ground, the Kite Festival and other recreational activities which were all established uses well before the HLS scheme started. In 2018, the golf club moved their practice ground to another part of the Heath, but the Kite Festival continued on the same area which was maintained in the same way.
8. NE advises that the agreement relating to Therfield Heath has now expired. The Conservators should therefore apply to NE to seek assent for any operations that are likely to damage the SSSI special interest features and any management should be consistent with furthering the conservation and enhancement of the flora and fauna on the site. Given that background, I concur with NE that consideration of the HLS agreement is not directly relevant to the issues in this case.
9. An objector has also raised the matter of the impact of holding the Kite Festival on ground nesting birds. Whilst the applicant accepts that cutting the grass for the Kite Festival would discourage birds from nesting on the area, they point out that the area used for the Kite Flying Arena is close to local housing and regularly used by dog walkers with other parts of the SSSI offering better nesting sites. Furthermore, Therfield Heath has been designated as a SSSI because of its plant species, butterflies and invertebrate rather than the birdlife it supports. It is the mowing regime rather than any effect on ground nesting birds that forms the basis of NE’s concerns and I consider that to be the main consideration under this topic heading.
10. I conclude that the mowing regime associated with the proposed works would not be consistent with furthering the conservation of the SSSI’s notified vegetation communities. The proposal would therefore result in a significant negative effect upon nature conservation and would not be in the overall public interest. The extent of the land within the SSSI that would be utilised for the event, and the temporary duration of the event, itself, does not dissuade me from that view.

*Conservation of the landscape*

1. The Consents Policy draws attention to the prospect of impacts including an adverse impact on the remaining part of the common, for example, by spoiling the view.
2. The landscape aspect has been considered by NE. Its position is that given the temporary nature of the event (one day) it does not anticipate any long-term adverse impacts to the landscape. I concur with that view, and I do not consider that the temporary works envisaged would have a significant or long-term adverse impact on the landscape of the common which would be conserved.

*Protection of public rights of access*

1. The Consents Policy requires consideration of the effect that the proposal would have on those wishing to use the common for recreation and access.
2. The applicant states that stakes some one metre tall and linked by tape would be used to mark an area of about 10,000 sqm which is used for kite flying displays. Tape strung between one metre stakes would also be used to separate cars from pedestrians within the temporary car park.
3. Therefore, for the duration of the event including the set-up and clearing away, there would be some interference with those wishing to use this part of the common for other recreational activities and access. However, I am satisfied that any restriction of public access would be localised and temporary and that public rights of access would be protected in the long-term.

*Protection of archaeological remains and features of historic interest*

1. There is no evidence before me to indicate that the proposed works would harm any archaeological remains or features of historic interest.
2. In the absence of any such concerns being raised, I am satisfied that the proposed works would have no adverse effect in this respect.

Other matters

1. The Consents Policy provides that in considering any application for consent, the Secretary of State will have regard to certain matters. These include the duty under section 28G of the Wildlife and Countryside Act to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features of which the site is of special scientific interest.
2. As previously mentioned, NE’s view is that repeated cutting is likely to cause damage to the SSSI features, through the potential loss in this area of plant species characteristic of chalk grassland. The Applicant accepts that if the Kite Festival did not take place there may be a positive impact on the flora and fauna in this small area. I consider that the mowing regime associated with and forming an essential part of the proposed works would not only inhibit the restoration of SSSI features but would be harmful to this part of the SSSI and its overall integrity. The proposal would not therefore be consistent with the duty to further the conservation and enhancement of the SSSI.
3. In reaching a decision, I must balance this consideration with my duties under section 39 of the 2006 Act.

Conclusions

1. I conclude that the mowing regime which is a necessary and acknowledged aspect of the proposed temporary works would have a significant adverse effect on this part of the Therfield Heath SSSI. The proposal would therefore be harmful to the public interest in nature conservation. To balance against this harm, I have found that the holding of the Kite Festival would offer positive benefits for the local community and would therefore be in the interests of the neighbourhood. No other harm in relation to the factors that I am required by section 39 of the 2006 Act to consider has been identified except in relation to my duties under section 28G of the Wildlife and Countryside Act.
2. I consider that, on balance, the harm to nature conservation and the integrity of the SSSI and the consequent conflict with the duty under section 28G of the Wildlife and Countryside Act to further the conservation and enhancement of SSSIs would together strongly outweigh the positive benefits to the neighbourhood that would arise from the holding of the Kite Festival.
3. Having regard to the interests and matters discussed above and taking account of all the relevant matters raised in the written representations, I conclude that consent should not be granted for the works applied for.

*Wendy McKay*

**Inspector**