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| **Application Decision** |
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| **by Rory Cridland LLB (Hons) PG Dip, Solicitor** |
|  **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 9 April 2025** |

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| **Application Ref: COM/3350325****Therfield Heath, Therfield, Royton, SG8 9NU**Register Unit No: CL92Commons Registration Authority: Hertfordshire County Council  |
| * The application, dated 13 August 2024, is made under Section 38 of the Commons Act 2006 for consent to construct works on common land.
* The application is made by Mr Daniel Palmer, Affinity Water Limited.
* The works comprise the excavation and replacement of existing infrastructure, the erection of temporary fencing, reinstatement of the land and other minor works.
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Decision

1. Consent for the excavation and replacement of existing infrastructure, the erection of temporary fencing, reinstatement of the land and other minor works on parts of Therfield Heath (Register Unit CL92) is granted in accordance with the application dated 13 August 2024 and accompanying plan subject to the following condition:
	* + 1. The works shall commence no later than 3 years from the date of this decision.
2. For the purposes of identification only, the location of the relevant works are shown on the attached plan.

**Preliminary matters**

1. This application has been determined on the basis of the papers submitted. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
2. Therfield Heath is regulated under the Commons Regulation (Therfield) Provisional Order Confirmation Act 1888 (as amended) (“the 1888 Act”). This includes powers to allow the conservators of the common to carry out (or authorise the carrying out on their behalf) various works which would otherwise be restricted under section 38(1) of the Commons Act 2006 (“the CA2006”).
3. The Conservators of Therfield Heath and Greens (“the Conservators”) have objected to the application on the basis that it has already provided authority for some of the proposed works under a licence dated 3 February 1967. While it accepts that some of the proposed works fall outside the terms of this licence, it argues it has the power to grant them under the terms of the 1888 Act and that, as a result, an application under section 38(1) of the CA2006 is not necessary nor the correct mechanism for seeking consent.
4. Section 38(1) of the CA2006 restricts the carrying out of certain works on common land other than with the consent of the secretary of state. It is, however, subject to a number of exemptions including where (i) works are carried out under a power conferred in relation to that land by, or under, any enactment or (ii) where they are carried out under a power conferred by, or under, any enactment applicable to common land.
5. While I accept that the Conservators may have the power to provide authority for the carrying out of the proposed works, and that in doing so, enable the applicant to benefit from the exemptions in section 38(6), I am not aware of any provision which would prevent the applicant from also making an application for consent under section 38 of the CA2006, or the secretary of state from assessing it against the relevant criteria.
6. Indeed, I see no reason that an applicant could not seek consent under section 38 on a precautionary basis, albeit that, on the face of it, it may not need to do so. As section 38(9) makes clear, consent given under section 38(1) constitutes consent for the purposes of that subsection only and the applicant will still need to satisfy itself that it has obtained any other consents necessary to carry out the proposed works - including those that may be required from the Conservators or the landowner.
7. As such, while I note the views of the Conservators and acknowledge that there may be other mechanisms under which the applicant could seek consent to carry out some of the works, this does not, in itself, prevent them from also seeking consent under section 38 of the CA2006.

**Main issues**

1. Section 38 of the CA2006 provides that a person may apply for consent to carry out restricted works on land registered as common land.
2. In determining such an application, s.39 of the CA2006 requires me to have regard to the following:
3. the interests of those occupying or having rights over the land (and in particular, persons exercising rights of common over it);
4. the interests of the neighbourhood;
5. the public interest; and
6. any other matter considered to be relevant.
7. Section 39(2) provides that the ‘public interest’ includes the public interest in:
8. nature conservation;
9. the conservation of the landscape;
10. the protection of public rights of access to any area of land; and
11. the protection of archaeological remains and features of historic interest.
12. I have also had regard to Defra’s Common Land Consents Policy (November 2015).

**Reasons**

**The proposed works**

1. The applicant explains that the proposed works are essential to ensure that it is able to comply with its duties as a statutory undertaker. It explains that one of the existing bore hole pumps has failed, needs replacing and that other parts of the infrastructure have deteriorated and must be upgraded to secure the supply of water to the area.
2. The proposed works would involve the excavation and exposure of the existing borehole chambers, their removal and replacement together with the erection of temporary fencing and other associated works. Once completed, the land would be reinstated to its previous condition with all fencing removed. The applicant expects this would take no longer than 12 weeks.

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

1. The application land is owned by the Therfield Regulation Trust, who have confirmed that while they are not refusing permission to carry out the works, they should either be carried out in accordance with the terms of the existing licence or under a separate arrangement. As these arrangements are private matters between the landowner and the applicant, they fall outside the scope of this application and I have not considered them further.
2. The proposed works would result in some temporary disruption to the management of the common. However, in view of the fact that only a small part of the common would be affected, coupled with the limited duration, I am satisfied that they would not have a materially detrimental impact on the management of the common or the regulation of the common more widely.
3. Others with interests over the land include the Royston Golf Club, the Church Commissioners for England (in respect of mines and minerals) as well as a number of rights holders identified in the register for CL92. Even though it is unclear whether, and to what extent, these rights are exercised, in view of the temporary nature of the proposed works and being limited to a small part of the common, it is unlikely that the ability of the rights holders to exercise their rights would be materially affected. The remainder of the common would be available for those individuals who wished to exercise their rights over the register unit and following the completion of the works, the land would be restored to its previous condition.
4. Accordingly, taking all of the above into account, I do not consider the proposed works would have a significantly adverse or permanent effect on the interests of those occupying or having rights over the land.

***The Interests of the Neighbourhood***

1. The application seeks consent to carry out essential works as part of the applicant’s statutory undertaking. The applicant explains that the proposed works are intended to ensure that Royston and its surrounding communities continue to have a clean and plentiful supply of water.
2. Maintaining existing infrastructure is likely to be less disruptive to the neighbourhood than more extensive repair. While I acknowledge that during the period that the proposed works were carried out (around three months) there would be some disruption to those living and working nearby who might wish to use this part of the common, taking into account the temporary nature of this disruption, and the proposed mitigation (including the provision of an alternative route while works were carried out), I consider that the adverse effect on the neighbourhood would be limited.
3. Overall, I am satisfied that when weighed against the clear benefit in having a clean and plentiful supply of water, it would be in the interests of the neighbourhood for the proposed works to be carried out.

**The public interest**

*Nature conservation*

1. In addition to being common land, Therfield Heath is designated as a Site of Special Scientific Interest (SSSI).
2. The proposed works would involve some temporary disturbance and short-term damage to the common. However, while I note the various comments made in relation to the applicant’s surveys and the impact on the SSSI, NE has advised that the proposed works are not expected to have any significant or long-lasting negative impact on the site’s notified features or on the common’s level of biodiversity more generally. Furthermore, I note that it has assented to the proposed works under Section 28H of the Wildlife and Countryside Act 1981.
3. Overall, provided the terms of the assent are adhered to, I am satisfied that the proposed works would not have any lasting impact on the SSSI or adversely affect the public interest in nature conservation.

*Conservation of the landscape*

1. NE advise that the proposed works would be highly visible from Steak Piece Road and nearby public rights of way while the proposed works were carried out. However, it notes both the proposed use of green netting for the fencing and the temporary nature of the works are important factors in helping to mitigate the impact. It advises that provided that all above ground infrastructure is removed on completion of the works and the site is appropriately restored to grassland, it does not envisage any long-term adverse impacts on the character of the landscape in this location. I have no reason to conclude otherwise.
2. Accordingly, I am satisfied that the proposed works will not have an adverse effect on the public interest in conservation of the landscape.

*Public access*

1. The proposed works would involve the erection of temporary fencing for around 12 weeks and would enclose an area of common over which the public currently enjoys legal rights of access. However, provision would be made for an alternative route and the existing route would be reinstated following completion of the works.
2. While I acknowledge there would be some temporary disruption, this would be short lived and there would be no permanent impact on public access rights. During the time the works were being carried out, the remainder of the common would remain available and alternative access routes would ensure that impacts were kept to a minimum. Overall, I am satisfied that there would be no significant adverse effect on public rights of access over the common.

**Overall conclusion**

1. I have found above that the proposed works would not have a significantly adverse or permanent effect on the interests of those occupying or having rights over the land. Likewise, I have found that it would be in the interests of the neighbourhood for the works to be carried out.
2. Furthermore, I am satisfied that the proposed works would not have any lasting impact on the SSSI or adversely affect the public interest in nature conservation. While I acknowledge there would be some minor disruption to public access and some adverse visual impact on users of that part of the common while the works were carried out, this would be both limited in extent and temporary in duration.
3. Accordingly, for the reasons set out above, and having had regard to all other matters raised, I conclude that consent should be granted. However, in view of the essential nature of the works and in order to provide certainty, I have imposed a condition requiring the proposed works to commence within a period of 3 years from the date of this decision.

Rory Cridland

 Inspector

**Plan**

