



Application Decision

Inquiry held 30 and 31 July 2009

By **Martin Elliott** BSc FIPROW

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

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Decision date:
17 September 2009

Application Ref: COM54

Hartlebury Common, Worcestershire

Register Unit: CL68

Registration Authority: Worcestershire County Council

The application, dated 14 November 2008, is made under section 38 of the Commons Act 2006 ("the 2006 Act") for consent to construct works on common land.

The works comprise:

- the provision of fencing around the main common land blocks;
- the provision of gated access points, both kissing and bridle gates, compliant with British Standard BS5709:2006, at frequent intervals in the perimeter fencing including on all public rights of way;
- the provision of vehicular access gates; and
- the provision of a cattle grid on the existing entry road into the main car park at Wilden Top.

Summary of Decision: The application is granted, subject to modifications¹, set out below in the Formal Decision.

Preliminary Matters

1. Section 38 of the 2006 Act provides that a person may apply for consent to carry out restricted works on land registered as common land under the Commons Registration Act 1965. Restricted works are any that prevent or impede access to or over the land. They include fencing, buildings, structures, ditches, trenches, embankments and other works, where the effect of those works is to prevent or impede access. They also include, in every case, new solid surfaces.
2. The application is made by Mrs L Nether, Senior Countryside Sites Officer, Worcestershire County Council, Countryside Centre, Wildwood Drive, Worcester, WR5 2LG. The application is on behalf of Worcestershire County Council.

¹ Section 39(3) of the 2006 Act provides that consent may be given – (a) in relation to all or part of the proposed works; (b) subject to modifications and conditions relating to the proposed works as the national authority sees fit.

3. I held a public local inquiry on 30 and 31 July 2009. I carried out an unaccompanied site inspection on the afternoon of 29 July 2009. At the end of the inquiry the Council requested that an accompanied inspection should take place and this was arranged for 7 August 2009. The Council subsequently withdrew its request for an accompanied site visit due to the unavailability of the applicant and the event was cancelled. I am satisfied that I am able to consider the application on the basis of my unaccompanied site visit.
4. Hartlebury Common is 87.3 hectares in area and is registered as common land (CL 68). The land is owned by Worcestershire County Council. There are registered common rights for the extraction of sand and gravel. No common rights for grazing were registered under the Commons Registration Act 1965.

Modifications to the application

5. The applicant acknowledges that section 193 of the Law of Property Act 1925 applies to the common and notes, since submitting the original application, that this gives a right of access on horseback as well as on foot. At the inquiry the applicant asked for the application to be modified to include the provision of bridle gates compliant with British Standard BS5709:2006 in substitution for the intended kissing gates.
6. The applicant noted that a vehicular access gate for commoners had been inadvertently missed from the application at a point to the southern corner of the plot identified as plot N on the location plan appended, at page 99, to the proof of Mrs L Nether. The applicant requested that the application be modified to include such a gate.
7. The applicant also noted the objections of Mr and Mrs Tarrant in relation to an existing five barred gate on the boundary between their land and the common at a location shown on the plan (inquiry document 8). The applicant requested that the application be modified to allow for the retention of this feature with a gap in the fence. This was with the provision to allow for the replacement of the gate at a later date by either the Council or the adjacent landowner.
8. No objections were raised to the requested modifications outlined in paragraphs 5 to 7 above.

1815 Inclosure Act

9. Mr Powell submitted, on the basis of evidence provided in a book on Hartlebury Common that, by reason of the 1815 Inclosure Act, there was no lawful authority to fence or otherwise enclose Hartlebury Common. Mr Powell provided an extract of the book which includes a clause from the Act which states '*Provided always, and be it further enacted, That nothing herein contained shall authorize or empower the said Commissioners to divide or enclose that part of Hartlebury Common lying to the south side of the said Turnpike Road, leading from the said village of Hartlebury to the said hamlet of Lower Mitton.*' Mr Powell contended that it was contrary to the wider public interest to contemplate fencing on the common before it had been shown that the Act did not apply.
10. The applicant contended that the 1815 Inclosure Act did not give the Commissioners the power to divide or inclose Hartlebury Common.

Consequently there were no powers to extinguish, through inclosure, the common land forming Hartlebury Common; the Act did not stop the fencing or any other 'enclosure' of the land. It was clear from the wording of the Act that it related to powers granted under the Act and did not fetter other legislation such as the Commons Act 2006. The wording of the 1815 Act simply made it clear that the powers of 'inclosure' did not extend to Hartlebury Common. In any event it was not the inquiry's role to consider whether there was some lawful impediment to carrying out works on the common. In this respect Mr Powell accepted that there was nothing to prevent the inquiry from proceeding.

11. In my view the clause in the 1815 Act simply states that the provisions of the Inclosure Act of 1815 do not apply to Hartlebury Common and that the Common could not be inclosed in the future. The Act does not prevent the fencing of the common in accordance with an application under the Commons Act 2006. The proposed fencing does not equate to the 'inclosure' of land which would have been in accordance with the 1815 Act and would have provided for the allotment of lands. There is nothing from the 1815 Act which suggests that the application should not be considered.

Other preliminary matters

12. A Mr Tucker submitted a proof of evidence in support of the application. However, Mr Tucker did not subsequently attend for the full duration of the inquiry and did not give evidence. I have taken into account his proof and all other written representations in reaching my decision on the application.

Reasons

13. Hartlebury Common is an 87 hectare site located on the eastern fringes of Stourport on Severn and lies to the west of Hartlebury village. The common is one of six main sites containing important areas of lowland heath in Worcestershire. As a national priority habitat the Worcestershire Biodiversity Partnership has drawn up a specific Habitat Action Plan (HAP) for lowland heath sites. Lowland heaths are seen as nationally and internationally important and this type of habitat is listed under the United Kingdom Biodiversity Action Plan and the European Union habitat's directive in recognition of its importance.
14. The site is designated as a Site of Special Scientific Interest (SSSI) due to its countywide importance for dry dwarf shrub heathland.
15. Historically the common has been open and unenclosed and preserved through grazing and the removal of bracken, heather and wood for use as domestic, building and agricultural materials. The long association of the common with man is evident in the high density of archaeological and historic features recorded on the Site and Monuments record.
16. Decline of traditional practices has led to a change in the open nature of the common, the quality of wildlife, the nature of the landscape and the preservation of archaeological and historic features.
17. Section 28G of the Wildlife and Countryside Act 1981 as inserted by the Countryside and Rights of Way Act 2000 places a duty on local authorities to *'take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora and fauna*

or physiographical features by reason of which the site is of special scientific interest'. This duty applies to Worcestershire County Council. Natural England have assessed Hartlebury Common as being 'Unfavourable no change, or declining'. This definition is given to sites where the special features are not being adequately conserved or are being lost. Site assessments from 1991 indicate that the SSSI is continuing to deteriorate. The application will allow the County Council to fulfil its statutory duty under section 28 and thereby avoid the risk of prosecution.

18. Management took place on the common between 1993 and 2003 under a Countryside Stewardship Agreement. Work under this scheme included tree and scrub removal, experimental turf stripping, heather management by cutting, heather reseeding and bracken control. In 1999 the County Council commissioned a study to review management at Hartlebury Common. The report 'Investigation of Management Options for Hartlebury Common' (Eco Tech 2000) recommended a short term programme of works and stated that '*grazing would be likely to be the most beneficial management at the site*'. October 2000 saw the publication of the 'Hartlebury Common Management Plan 2001 – 2010' which included the aim to investigate alternative methods of management including grazing. Subsequent works were carried out under the Tomorrow's Heathland Heritage Project partly in preparation for the introduction of grazing. A report was published in March 2004 investigating the implications and practicalities of grazing (Further Investigation into the Future Management of Hartlebury Common, N Button (*Button*)).
19. In April 2007 an application to Natural England under the Higher Level Stewardship Scheme (HLS) was unsuccessful. Natural England's view was that the high volume of mechanical methods of heathland restoration and management, in the absence of grazing, would not achieve the desired objective of bringing the SSSI into a favourable condition. Natural England had stated that they would not support a project which did not include grazing and that cattle contained by fencing was the only grazing scheme they would support.
20. In 2008 Natural England agreed to fund the 10 year management plan as outlined in *Button* with a work programme including grazing to achieve favourable condition for the SSSI within the period of the plan. This led to an application under section 38 of the 2006 Act to fence the common.
21. As regards livestock containment the applicant had investigated various options. It is considered that, without any restriction, the livestock would be free to wander into adjacent residential and industrial premises and onto local roads. Stock could disappear from the site and the style of grazing would not meet the management objectives. The option of shepherding had been considered but since the common was now divided into several plots separated by roads and development it was not considered suitable on grounds of public and animal safety, practicality and cost. Virtual and electronic fencing had not been shown to be effective or a viable option for livestock.
22. Whilst penning might appear attractive there were a number of practicalities which needed to be considered. The grazing of animals within permanent stock fencing would constitute a significant impediment to access and also have a negative impact on the landscape of the common. There would be higher

installation costs than a perimeter fence. Penning using electric fencing was not considered to be sufficiently reliable by itself; there was a strong likelihood of theft. It was anticipated that the use of electric fencing would wholly restrict access to the area whilst being grazed.

23. The applicant concluded that the best method of containment was by fencing around the various blocks of common land already determined by existing features. The type of grazing needed to attain a favourable condition of the common, and enable the Council to meet its statutory duty, was extensive low density grazing and this was best achieved by the proposals outlined in the application. It was considered that permanent stock proof fencing would have a positive effect on managing fly tipping and unauthorised vehicular use.

Main Issues

24. 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;²
 - (d) any other matter considered to be relevant.

Assessment

Background issues

25. Mr Powell for the Open Spaces Society (OSS) submitted that incorrect conclusions had been reached in respect of the best fencing solutions to deliver the objectives in relation to Hartlebury Common. This was supported by the detailed analysis of three issues, public concern over and fear of cattle where dogs are traditionally exercised, the delivery of the conservation objective and minimising visual intrusiveness to that commensurate with methods employed on the Malvern Hills. Mr Powell also raised concerns over the dismissal of the use of cattle grids on the A4502 road. Messrs Selway and Tarrant also made representations in relation to the method of livestock containment and concerns relating to the threat from cattle in respect of public safety were also raised. I take account of this latter aspect when considering other relevant matters.
26. Whilst I note the representations as outlined above, I am required to consider the application before me measured against the criteria which I have set out above at paragraph 24. My role is not to consider alternative proposals to those set out in the application although I have an option to modify the application or impose conditions. I heard a considerable amount of evidence and submissions in relation to the alternative methods of containment including penning and also in relation to the experiences at alternative sites and the provision of cattle grids on the A4025.

² 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.

27. In summary the evidence before me clearly demonstrates that penning would not provide the extensive low level grazing that is required to restore the value of the site. Internal penning would present a significant risk to the archaeological value of the site as a consequence of ground disturbance caused by any fencing. Any internal penning would have a visual impact on the landscape and may to some extent reduce access to the common as a whole. Installation, maintenance and management costs would be greater. The experience of Mr Jones who grazed land with pens bounded by electric fencing gave a clear indication as to the practical difficulties of using such a regime. The evidence from the Conservators on the Malvern Hills was that they preferred extensive grazing and that penning was labour intensive. Mr Bingham for Natural England made the point that whilst penning was seen as a solution for the Malvern Hills the site was grassland and the outcomes required for Hartlebury Common as lowland heath were different.
28. As regards the provision of cattle grids on the A4025 the evidence was that one cattle grid could cost in the region of £75,000 and that if services were affected then the cost would be significantly more. Ongoing maintenance costs on a road carrying 13,000 vehicles a day would be considerable and the level of vehicle use would constitute a noise nuisance up to a ¼ mile distant. There was no guarantee that authority would in any event be given for a cattle grid on an 'A' class road. Government advice was that cattle grids should be avoided on 'A' class roads unless all other options had been explored. The provision of cattle grids would allow cattle to wander across the road which raised a number of safety issues. A reduction of speed limits to counteract this would likely meet resistance from the Chief Constable and would raise issues of enforcement and create additional safety hazards in the existing 30 mph zone.
29. There is nothing from the evidence which leads me to conclude that the applicant has not considered these matters fully. Furthermore, if I were to conclude that any proposed alternatives provided for a more effective and less intrusive form of management for the common this would constitute a significant departure from the application as made. My powers do not extend to modifications to the extent that might be required to accommodate penning and additional cattle grids, noting that other consents may indeed be required. In view of the above I have not considered further the issue of penning and the provision of cattle grids on the A4025.

Interests of those occupying or having rights over the land

30. Hartlebury Common is owned by Worcestershire County Council. Approval of the application would enable the Council to manage the site in accordance with their policies and allow the Council to comply with its duties in respect of the SSSI status. Natural England outlined that if consent was not granted then the required work to bring the SSSI into a favourable condition would need to be carried out by hand. Mechanical management could also be used but this was expensive and would be difficult. In any event the evidence suggests that this would not achieve the required results without the site being grazed. Evidence from Mr Mindykowski indicated that work carried out by mechanical means had been known to damage archaeological features.
31. Section 28J and 28K of the Wildlife and Countryside Act 1981 Act makes provision for Natural England to formulate a management scheme to address

- the restoration or neglect of an SSSI. Failure to comply with any statutory duties in respect of an SSSI could result in the serving of a management notice where Natural England could carry out the necessary works and recover all costs. Natural England also have the power of prosecution which could result in fines of £5,000 in a magistrate's court with unlimited fines in a County Court. Overall there are clear benefits to Worcestershire County Council as landowner.
32. The applicant notes that the three commoners, Mr Selway, Mr Troman and the Highways Agency have a right to take sand and gravel. Mr Selway pointed out that the rights of the Highways Agency had been transferred to a Mr Howes on 30 June 2008 and that steps were now being taken to register those rights.
33. Mr Selway contended that approval of the application would have a serious adverse effect on the commoner's right to remove any sand and gravel from the common. It should be noted that, whilst Mr Selway indicated that he was acting on behalf of the other commoners, he was unable to provide evidence in support of this contention. The applicant noted that Mr Troman had given verbal support to the application. Mr Selway added that to diminish such rights would be against individual's rights under protocols in EEC regulations relating to property rights.
34. Mr Selway outlined that when collecting any sand he would pull up at the side of Hartlebury Road and collect the sand from the banking. The proposal to fence would prevent access to this area of the common. Mr Selway had also collected sand from the common adjacent to Poollands Farm. The last time he collected sand was about five years ago but any amounts were small and were for his personal use.
35. The applicant contended that commoner's rights were in reality restricted but that the proposal provided for increased vehicular access to the site by the provision of eight vehicular gates. With the exception of access from the Hartlebury Road it was difficult to understand how rights could be restricted. The rights of the commoners should also be seen in the context of the need to obtain permission from Natural England who would only allow extraction of sand and gravel in limited quantities so that it did not interfere with the conservation of the SSSI. The point was made that the extraction of sand and gravel was listed as an operation likely to damage the SSSI and as such required the consent of Natural England. Planning permission would also be necessary as permitted development rights did not apply to SSSIs. The Council was not aware of any rights being exercised in the last 15 years and in view of the fact that no notifications had been made, or any consents given, it was unlikely that any rights had been exercised for decades. The applicant was unaware of any EEC protocols but if the reference was to the European Convention on Human Rights then it should be noted that the Commons Act 2006 would need to have been compliant with the Human Rights Act 1998.
36. In my view whilst there is evidence that the right to extract sand and gravel has not been exercised to any great extent in recent years those rights remain. Notwithstanding the fact that further consents may be required I do not think that the proposed fencing will prevent the exercise of those rights. The scheme provides for increased vehicular access for commoners thereby providing greater access to the whole of the common. It is accepted that it

may no longer be possible to extract sand and gravel from the northern boundary of the site, along Hartlebury Road, but the remainder of the site will become more available. It is also noted that extraction will not be possible within the close proximity of the proposed fencing. As regards the EEC protocols Mr Selway was unable to identify these and in the absence I am unable to attach any weight. If Mr Selway is referring to protocols provided for by the Human Rights Act 1998 then there is nothing to suggest that his rights will be breached by the application. Whilst there may be some loss of convenience those rights may still be exercised subject to the need for other consents. The loss of convenience is not so great as to constitute a breach of Mr Selway's human rights. Further, the loss of convenience will not outweigh the benefits of the application which will allow the Council to comply with its statutory duties.

37. Having regard to all of the above there are clear benefits to Worcestershire County Council, as landowner. The application will enable the Council to carry out the necessary improvements to the common and avoid any sanctions which may be imposed by Natural England or the Courts. In terms of the right to extract sand and gravel, whilst there may be a loss of convenience in exercising those rights on the northern boundary of the site, the improved vehicular access will allow exercise of those rights with greater ease over the rest of the common. On balance there is nothing to suggest that the application will have any significant effect on the right to extract sand and gravel.
38. The applicant has considered the rights of the public to walk and ride upon the common in relation to the interests of persons having rights over the common. I consider this aspect in the context of the interest of the neighbourhood and the public.

Interests of the Neighbourhood

39. The applicant contended that the interests of the neighbourhood would be better served by:
- i) The enhancement of the landscape and nature conservation.
 - ii) The improvement in the openness of the common.
 - iii) The ability of neighbours who abut or who are close to the common to obtain access to the common.
 - iv) The positioning of the fencing being designed to be unobtrusive as possible so as not to detract from the openness of the common.
 - v) The provision of fencing having ancillary benefits in providing a deterrent for unlawful and antisocial uses of the common.
40. The applicant did not think that there was anything to suggest that fencing to the rear of the properties adjacent to the common, where the owners of the properties had no provision for equestrian access, would deprive them of their rights over the common. It was doubtful if anyone would be able, or permitted, to keep a horse in the gardens of such properties and any concerns were purely theoretical. Equestrian gates could be provided if any resident wished to exercise a right on horseback but no requests had been made. Other

areas of common which abut private grazing land are not proposed to be fenced and the landowners would be able to provide access if they so wished.

Landscape, conservation and openness of common

41. In my view the evidence indicates that approval of the application will allow for the management of the Common with the provision for grazing. The applicant outlined that the only viable prospect for restoring the viability of the site as a lowland heath was through the long term grazing of the site. This grazing in turn will improve the landscape and nature conservation value of the site. Evidence from Natural England was that grazing of the heath would enhance the invertebrate and bryophyte communities and would also help control any regeneration of species such as birch or oak which were likely to establish after cutting. Previous cutting had regenerated the heathland but also initiated the development of invasive scrub and tree vegetation. These species consequently became dominant and reduced the historic open landscape. No evidence has been submitted to suggest that grazing would not achieve the desired results. With the removal of the scrub and the continued control by grazing the Common will become more open.

Access

42. In terms of access to the common, this will be improved for those neighbouring the common by the provision of bridle gates which will provide access for wheelchair users. Access will also be maintained to cater for cyclists from the Hartlebury Park Estate to a safe cycle route into Stourport on Severn. Access by adjacent residents from their private property will not be restricted due to the provision of a 'squeeze' in the proposed fencing. Since the acknowledgement by the Council of access for equestrians those in the neighbourhood with horses will enjoy improved access by the provision of bridle gates at each access point; previously access for equestrians has been restricted.
43. As regards any desire for direct equestrian access from the neighbouring properties there is no evidence to suggest that any such access is required. I nevertheless note Mr Tarrant's observations that he and his neighbours have previously had direct access to the common. In respect of Mr Tarrant the gate onto the common from his property is proposed to be retained if the application is granted. Overall there is no evidence to suggest that access for those in the neighbourhood will be restricted and, bearing in mind the provision of bridle gates at all access points, access will be enhanced. Mrs Nether confirmed that there would be no restrictions on dogs whilst on the common.
44. Mr Powell contended that access points should be provided at 250 metre intervals along any perimeter fence, subject to practical considerations. However, in my view, there is no evidence that any existing access will be impaired or that other access points are required. Mr Powell referred to the continuity of public access across the A4025. In response to this the applicant pointed out that on the opposite side of the road to the public right of way close to the Old Rose and Crown there was ditch and access was not possible. In respect of the public right of way to the southeast and on the opposite side of the A4025 to the most southerly car park, the applicant said that they would have no difficulty in providing an additional bridle gate on the opposite side of

the road; this would provide access to the northern side of the common. Whilst I note this option there is no evidence before me to indicate any demand for such access at this location and, in any event, access can be gained by using the footway alongside the A4025 for a short distance, to the car park, from which access to the common will be possible. In the event of the application being approved I do not propose to modify the application to include a gate at the location suggested by the applicant.

Fencing

45. Mr Powell made specific reference to the 'dreadfully unsightly fencing proposal' of the area of common to the southwest of the A4025 (plot 3 as identified in Mr Powell's proof). He thought that this would discourage legitimate use by horse riders and pedestrians. In respect of this plot the applicant pointed out that the A4025 followed a causeway so that views from the road would be above the fence line. Furthermore there was no intention to remove the existing vegetation between the road and the fence which was to be positioned 3 to 5 metres from the carriageway. The fence, viewed from the common would be backed by vegetation. For these reasons the applicant did not think that the fence would be visually intrusive. In relation to the southern boundary any fencing would be adjacent to existing fencing and would have a negligible visual impact. There would be no impact to views onto the common as these were currently obscured by buildings and equipment. In relation to the remainder of this plot any fence would be adjacent to an existing bund or erected adjacent to existing fencing. Again the applicant did not think that the fence would be visually intrusive.
46. I note the issue raised by Mr Powell, and the concerns raised in the written representations about the visual impact of the fencing. However, the fencing is to be positioned at locations which will follow, to a large extent, the perimeter of the various land blocks. Where possible the fence is to follow existing boundaries or other features. It is noted that 38% of the common is already fenced and some of the proposed fencing will be along existing lengths so as to secure the boundary. Any roadside fencing along the A4025 and Hartlebury Road will be obscured by scrub which will be retained to reduce any visual impact. Although the fencing may in parts be visible I do not think that it will be significantly detrimental to the character of the Common. In relation to access to the land to the south of the A4025, the evidence is that this area is considered to be a 'no go' area as a consequence of its misuse and, noting comments at paragraph 47 below about the effectiveness of any gates in preventing vehicular misuse, I take the view that the fencing will encourage lawful use of the land. There is nothing to indicate that access to this land will be impaired by the provision of a fence.

Ancillary benefits

47. In respect of the ancillary benefits provided by the fencing, the common is subject to misuse by motor vehicles and fly tipping. Whilst Mrs Nether accepted that the proposed bridle gates would not exclude motorcycles or small quad bikes the fencing would prevent cars and other vehicles from gaining access; fly tipping would also be made more difficult. I accept that any fence will be prone to vandalism and require maintenance by the Council. However, the fencing will nevertheless provide some assistance in the reduction of

misuse. Mrs Nether thought that the act of fencing itself would give an indication that the land had not been abandoned. In my view the fencing will demonstrate to some extent that the land is being managed and again this will to some extent help to reduce misuse.

Compartmentalisation

48. Mr Powell contended that the proposed fencing would recognise or result in 12 isolated parcels of common land, several of which appear to be intentionally abandoned. There had been a gradual degradation of the common accompanied by a tendency to withdraw from certain areas such that the most appropriate management would be their abandonment. In part this attitude had evolved due to development pressures, industrial and housing, leading to the dumping of rubbish and frequent use by motor vehicles. This disrespect and inappropriate treatment had led to a culture of local disrespect and an expectation that abuses would not be challenged. The OSS was against any circumstances which would lead, either directly or indirectly, to the damaging of the common contrary to the benefit of the neighbourhood or to the interests of those with an interest in the common and/or the use of it. Mr Powell provided a detailed analysis of the abandoned plots.
49. In response the applicant took the view that the areas identified by Mr Powell had not been abandoned and the management plan for the common dealt with each area of land. Whether or not certain abuses had been allowed to occur was not relevant to the inquiry. Some of the areas indicated by Mr Powell had been excluded to provide for a right of access to property. Other areas were used as car parks or were not suitable for grazing and therefore did not require fencing. It was accepted that certain areas were isolated from the rest of the common or were already divided from the common by existing roads. There was no intention to withdraw from any parts of the common and steps had been taken to deal with any anti social issues in particular those arising to the southwest of the A4025. The proposed management plan would provide the positive enhancement of the areas concerned.
50. In my view the common is already compartmentalised with areas of land separated from the main common by clearly defined features such as roads or existing boundary features. Other areas identified exist as car parks, form access to properties which need to be retained to maintain that access, or form part of the highway network; these areas are unsuitable for grazing and as the applicant has indicated there would be no merit in including such areas within the proposal. In practical terms the inclusion of these latter areas would require additional works such as the provision of gates or cattle grids. Such structures would inconvenience those living in the neighbourhood and if cattle grids were provided this would add a significant cost to the scheme and present a noise nuisance to those living in the vicinity of any grid. There is nothing before me to suggest that the areas identified by Mr Powell will be abandoned as a consequence of the proposal; the management plan for the common identifies management proposals for all the areas. As such I do not think that the application in this respect will be contrary to the interests of the neighbourhood. The evidence is that apparently neglected areas of land will benefit from some form of management. I do not think that those with an interest in the land, or the use of it, will be affected since there is no reduction in the access to the common as a consequence of the application. As

previously noted the various plots are already separated from the common as a consequence of their individual characteristics. It should be noted that the unlawful use of, and encroachment onto, the common is not a matter for my consideration.

Overall conclusions on the interests of the neighbourhood

51. Having regard to all of the above the application will result in an improvement in the nature conservation value of the site and also provide a more open landscape. Access for those in the neighbourhood will be improved with the provision of bridle gates for use by wheelchair users and equestrians. There is nothing to suggest that existing access will be adversely affected. The application will allow for the overall management of the common and will have a positive effect on any misuse. The proposed fencing will not have a significant detrimental impact on the character of the common. On balance there is nothing to suggest that, taking into account all considerations, the interests of the neighbourhood will be adversely affected.

The public interest

Nature Conservation

52. The proposed works are intended to allow for the grazing of Hartlebury Common such as to enable the County Council to fulfil its statutory obligations in accordance with section 28G of the 1981 Act. The grazing will also help fulfil Defra's³ policy targets to increase the number of SSSIs in a favourable condition. The importance of the site is clearly recognised and the evidence is that without extensive low level grazing the nature conservation value of the site will diminish. I am aware of the observations that the Common should not be maintained in an 'artificial' state but the Council are required to manage the site so as to preserve its heathland status. Whilst to some the stocking levels may appear low, the applicant indicated that this was at the upper level required for providing the intended benefits. None of the parties appearing at the inquiry disputed that grazing was not necessary for the required nature conservation of the site and a number of written representations gave support to the need for grazing.

53. Evidence from Natural England was that grazing is recognised as being highly beneficial to the heathland ecosystem and is considered to be an appropriate management for lowland heath. It was recognised that trials were no longer needed as sufficient relevant experience of heathland grazing was available. The applicant pointed out that English Nature had summarised their position and there was no expert evidence opposing that view. *'Grazing is both fundamental and integral to the restoration of the structural and species diversity on Hartlebury Common, and the only way of securing recovery of the SSSI. We feel that low impact, all year grazing will achieve the required result...'* In addition *'It is Natural England's opinion that the SSSI has reached a critical point, which can now only be addressed by introduction of a grazing regime. ...the management regime as described would, therefore secure the long term sustainable future of the public interest value of the common as outlined in section 39 of the Commons Act 2006'*.

³ Department for Environment and Rural Affairs

54. The statement from Mr Tucker outlines that there was a priority to maintain the heathland as a requirement of its SSSI designation. In his efforts at scrub and woodland limitation on the common he realised that grazing provided the only long term sustainable solution.
55. I note the comments that the application will result in the congregation of animals in areas where the grazing is more attractive and that this would result in greater or excessive damage to those areas. However, the applicant outlined that cattle would be encouraged to graze across the common as a whole by the movement of mineral licks and water troughs. There is no evidence to demonstrate that this form of management would not prevent localised erosion or damage by the grazing of cattle so as to be detrimental to the nature conservation of the site. The point was also made that the breed of cattle will be selected for its diverse palate such that a variety of vegetation would be grazed. Further, any breed will need to demonstrate the type of browsing required to meet the needs of widespread extensive grazing.
56. Having regard to the above it is clear to me that the application will have a positive benefit on nature conservation.

Conservation of the landscape

57. I have already considered the effect of fencing in the context of the interest of the neighbourhood. I reached the conclusion that whilst the fencing may in parts be visible I do not think that it will be significantly detrimental to the character of the Common. Similarly in the context of the landscape I take the view that, whilst there may be some detriment, the effect will not be significant.
58. I have previously noted that the application will facilitate the grazing of the land and subsequently lead to the restoration of a heathland landscape. Bearing in mind the importance of lowland heath and the designation as an SSSI the restoration of the heathland landscape must be seen as an advantage.
59. Overall whilst there are disadvantages insofar as the effect on fencing on the visual landscape there are benefits in terms of the restoration of the heathland landscape.

The protection of public rights of access

60. The applicant accepted that any fence provided a physical barrier but noted that 38% of the common was already fenced by adjacent landowners. However, access inside the common would be unaffected and the improvement of the common would increase public access to all areas. The point was made that the fencing may further encourage public access that might have been put off by antisocial behaviour. It was noted that all access points are to be maintained.
61. I have already formed the view that the application will improve the access for those in the neighbourhood and for those same reasons access will be improved for the public. In particular there will be improved access for wheelchair users and equestrians. Any fencing which is erected will be at or close to the perimeter of the various blocks of common land subject to the

application, whilst this may exclude small sections of the Common there is nothing to suggest that access which is already being enjoyed will be restricted. As regards those areas of common which fall outside the application site, access will be unaffected.

The protection of archaeological remains and features of historic interest

62. Evidence from Mr Mindykowski outlined that surveys had confirmed Hartlebury Common is a rich landscape of diverse historic interest representing an archaeological record spanning 10,000 years. Scrub encroachment had clearly weakened the historic landscape character of the common. The effects of deep root action tended to break up the historic earthwork features; this was particularly damaging given the sandy nature of the soil which was prone to erosion. Scrub also restricted the visibility and access to historic features reducing their value which the features can give to interpretation and public enjoyment. Whilst it was inevitable that scrub would be cleared by hand or mechanical means, such methods could increase the risk of damage through erosion. It was reported that mechanical methods had resulted in damage to earthwork features. The most appropriate method to control regrowth was therefore by the long term grazing of the site. It was nevertheless accepted that cattle could contribute to erosion as a result of poaching but with small numbers of cattle, of a breed that does not congregate, this could be minimised. In this respect I revert to comments made above in relation to the congregation of cattle and the provision of mineral licks and water troughs.
63. Bearing in mind the above the proposed works will permit the low intensity extensive grazing which will protect and enhance the archaeological value of the common.

Overall conclusions on the public interest

64. Having regard to the above I take the view that the application will have positive benefits in terms of nature conservation and the protection of archaeological remains and historic features. In terms of public access there is nothing to suggest that there will be any losses. There are positive benefits in terms of improved access for wheelchair users and equestrians. Whilst there may be a detriment to the landscape in relation to the boundary fencing, the scheme will result in the enhancement of the landscape value of the common as a whole. Taking all factors into account I take the view that on balance the application will be in the interest of the public.

Other relevant matters

65. The applicant considered that there were other relevant factors in favour of the application, these included:
- i) The statutory duties upon the County Council which could expose the Council to criminal prosecution and considerable expense of any remedial works which would be required.
 - ii) The need to provide for the long term financially viable and sustainable managed future for the common.

- iii) The fact that without extensive grazing the County Council would be unable to secure the funding which is available for the wide ranging management of the common.
 - iv) The ancillary benefits in respect of antisocial issues.
 - v) The genuine success of schemes elsewhere.
66. I have already considered the statutory duties of the Council as landowner and have concluded that in the light of the potential penalties the application would clearly be in the Council's benefit. Furthermore there is a clear need to provide long term management of the common to ensure that the Common returns to and remains in a viable condition. Evidence is that low level extensive grazing of the common was the most suitable, reliable and cost effective process to achieve long term management of the common and to allow the recovery of the SSSI. Without such grazing the condition of the site will continue to deteriorate. In order to secure funding through the Higher Level Stewardship scheme Natural England has made it clear that funding would only be provided if the nature conservation objectives and the recovery of the SSSI can be delivered. In their view this can only be achieved by extensive low level grazing. If funding were not obtained through the scheme then the Council themselves would be required to fund any necessary management to comply with its statutory duties. As such the scheme application will be to the benefit of the Council since it would be able to secure external funding for the necessary management of the common.
67. I have previously concluded that there will be some ancillary benefit to the neighbourhood arising from the fencing of the common in terms of reducing misuse; those benefits are not limited to the neighbourhood.
68. As regards the success of schemes elsewhere the evidence from Natural England was that the benefits of extensive low level grazing is recognised and has been shown to be successful elsewhere; there was no longer any need to carry out experimental trials. The success of other schemes in my view adds weight in support of the application which will secure the management of the common.

Capital costs and maintenance

69. A number of representations have been made in respect of capital costs and ongoing maintenance liabilities. The Council as landowner has a statutory duty in respect of the SSSI status of the common, the cost of complying with those statutory duties is not an issue. The evidence before me is that the application will permit the Council to secure external funding to comply with those duties. Failure to comply would result in additional expenditure and potential prosecution of the Council. There is nothing before me to suggest that the proposed scheme does not offer the most cost effective approach. It is nevertheless accepted that there will be ongoing maintenance costs for the Council and the applicant noted that a monitoring and maintenance regime would need to be adopted.

Demand for car parking and access points

70. Mr Selway made the point that the provision of gates for public access will increase the demand for car parking adjacent to those locations. In relation to this, as the applicant pointed out, there is no evidence of access being gained from anywhere else other than existing access points. As such the fencing will not cause a diversion of people gaining access via different points with a consequent increase in demands for car parking. There is nothing to suggest that the provision of gates will be to the detriment of the neighbourhood as a consequence of demands on car parking. Mr Selway also contended that the provision of five bridle gates would concentrate use in these areas and result in horse riders having to use busy highways to reach the common. In view of the fact that the Council has sought modification of the application to include bridle gates at all access points I do not think that this situation will occur; equestrians will have greater choice so that local busy roads can be avoided.

Risks from grazing cattle

71. I note concerns raised by Messrs Powell and Selway and others in relation to the potential conflicts between dogs and cattle and the safety implications towards dog walkers. Both Mr Powell and Mr Selway made reference to recent cases where there had been serious injuries and in one instance a fatality caused by cattle. I am also aware of the concerns that some walkers including those with dogs may be deterred from using area as a consequence of any grazing with cattle. In terms of the interactions between dogs, cattle and horses the experience of the applicant was that the risks posed when proper measures are in place were minimal. There was no evidence to indicate that grazing would result in any increase in out of control dogs. Although reference had been made to a number of instances where injury or death had been caused by the interaction of cattle and humans these involved cattle in an agricultural setting with either a bull or cattle with young. Those people involved were in close proximity to a large number of cattle or the incidents involved breeds not suited to human/dog/horse interaction. In the current scheme no such situations would occur.
72. I accept that some individuals may be concerned about the risks posed by cattle. However, there is nothing to suggest that the proposed scheme of grazing will present any significant risk or that the public will be deterred from gaining access to the land. The applicant outlined that any cattle would need to be an easily handled, non aggressive breed. Cattle meeting this profile namely Shetland and Dexter were available locally and expressions of interest had already been made to graze the land with such cattle. Any cattle would be required to be acclimatised to humans and dogs but would not be inclined to approach. Given that there would be no more than 30 cattle on the common at any one time there would be ample opportunity to avoid the animals. Signs would be erected at access points and visitors will be advised against feeding so as to prevent the cattle approaching humans. Mr Bingham of Natural England took the view that, given the stocking levels, the chances of seeing cattle would be remote. The experience from a number of sites including well used urban sites was that there was no conflict and any risks were minimal. In the first instance some may be intimidated by the presence of cattle and some may choose not to use the site. However, in the long term there was no evidence that use was reduced and in reality there was an increase due to the attraction of cattle.

Insurance obligations

73. The issue of insurance obligations of allowing grazing over the common was raised by Mr Selway who referred to the case of McKaskie v Cameron. Whilst I accept that there are insurance obligations there is a requirement for the common to be grazed in order for the Council to fulfil its statutory duties. There is nothing to indicate that any insurance obligations would outweigh the benefits which would be accrued by the approval of the application. The applicant outlined that careful consideration has been given to the type of cattle which would be used for grazing on the common and that risks would be minimal. The circumstances in the case cited are very different to those which would occur on the common bearing in mind the stocking levels, the breed of cattle and the absence of calves.

Type of fencing

74. Mr Selway questioned the adequacy of a 1.2 metre high post and wire fence in relation to the prevention of animals straying onto highways. The applicant contended that the fencing proposed was normal and adequate. The proposal was not to use barbed wire due to concerns raised about its suitability. In my view there is nothing to indicate that the proposed fencing is inadequate.

Disease control and promotion of access

75. Mr Tarrant thought that the widespread grazing of the common could result in the closure of the common for the first time in the event of an outbreak of foot and mouth disease. Whilst I note this point there is nothing to suggest that the potential threat of temporary closure outweighs the benefits which will be facilitated by the application. I was advised at the inquiry that part of the common was closed previously as a consequence of foot and mouth disease control measures. Mr Tarrant also referred to comments made by Natural England in relation to promoting access to the common which in his view would lead to further erosion. Although I note this point Natural England have a responsibility to 'increase *opportunities for everyone to enjoy the wonders of the natural world.*'

Consultation

76. A number of the written representations raised concerns over the nature and the amount of public consultation regarding the application. Whilst there may be concerns over any initial consultation, there is no evidence that the statutory requirements have not been complied with. The applicant confirmed at the inquiry that all statutory requirements had been fulfilled. It was also outlined that the Council had provided information in the local press and notices at each entrance to the common. Correspondence had been delivered directly to all properties sharing a boundary with the common and direct consultation had taken place with key stakeholders and groups, a public meeting had also been held.

Conditions relating to timescale

77. The applicant noted that the application had been made on the basis of a permanent fencing proposal. The County Council submitted that there was sufficient evidence locally and nationally that grazing is an appropriate method

requiring containment. Further, that in terms of economic viability, any temporary permission requiring a further inquiry would be costly and it should be noted that considerable lead in time was required for the project to work. It was possible to impose conditions and if there was concern that any fencing could remain, if at some point the grazing were to end permanently, the permission to continue to graze the common could cease. If the view was taken that consent should be temporary then this should be for at least 10 years or in fact 25 years. However, the applicant requested that the consent should be for permanent works. The applicant noted that, although the current funding was available for 10 years, the statutory obligations of the Council would remain and any funding after that time would be for ongoing maintenance costs.

78. Evidence from Mrs Nether was that any consent should be for a minimum of 10 years as this was the timescale to achieve the aims. Ideally any limit should be 15 to 25 years after which an assessment could be made as to whether or not grazing should continue. She contended that there was clear evidence that management should involve grazing and this was how the common was traditionally managed. Evidence from Mr Bingham was that grazing would be required indefinitely to maintain the heathland and therefore any fencing should be permanent.
79. A number of the written representations suggest that grazing should be on a temporary experimental basis. In evidence Mr Bingham outlined that the value of grazing lowland heath had gained increasing recognition in recent years; the principle was now well established. He referred to a review of the feasibility of introducing grazing to Cannock Chase which states that '*Trials are not needed, as sufficient relevant experience of heathland grazing is now available....*'
80. Having regard to the above there is nothing in my view to suggest that any fencing around the common should be time limited. The principles of grazing as a means to manage lowland heath have been established and it is not necessary for the works to be carried out on an experimental basis. The evidence from Natural England is that any fencing should be permanent and this will facilitate the ongoing grazing of the common, which although fallen out of practice, is a traditional activity on the common. No representations have been made, other than those relating to an experimental period, that the works proposed should be time limited. Taking all factors into account I conclude that no conditions should be imposed in relation to the timescale of any consent.

Other Matters

81. Mr Tarrant raised concerns over the management of ragwort. This is not a matter for my consideration.

Conclusion

82. Having regard to the interests and matters set out in paragraph 24 above, I have reached the conclusion that on balance the works will not adversely affect those interests, and that it is expedient that consent should be given.

Formal Decision

83. Accordingly, in exercise of the powers conferred by section 38 of the 2006 Act,

and of all other enabling powers, I hereby give consent to the works described and indicated on the plan accompanying the application subject to the following modifications.

- The provision of bridle gates compliant with British Standard BS5709:2006 in substitution for the intended kissing gates.
- The addition of a vehicular access gate at a point A on the plan attached to this decision.
- The retention of a gate, without boundary fencing, at point B on the attached plan, with the provision to allow for the replacement of the gate at a later date by either the Council or the adjacent landowner.

Martin Elliott

Inspector

APPEARANCES

For the applicant:

Mr J Salmon	Of Counsel, instructed by Sarita Arthur-Crow, Legal and Democratic Services, Worcestershire County Council
Who called	
Mrs L Nether	Senior Countryside Sites Officer, Worcestershire County Council
Mr A Mindykowski	Historic Environment Countryside Adviser, Historic Environment and Archaeology Service,
Mr D Clee	Safer Roads Team Leader, Worcestershire County Council Hall
Mr J Bingham	Land Conservation Adviser for Natural England

In support of the application:

Mr G Jones	Local grazier
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In opposition to the application:

Mr E Powell	Open Spaces Society
Mr J Selway	Commoner
Mr T Tarrant	Local resident

Interested person:

Mrs H Pimble	Local resident
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DOCUMENTS

- 1 Health and Safety Executive Guidance – Cattle and Public access in England and Wales
- 2 3 no. web page extracts from the Telegraph relating to incidents with cattle
- 3 Department of Transport advice on roadside features (appendix 15 of applicant's document library)
- 4 Department of Transport Circular 01/2006 (appendix 16 of applicant's document library)
- 5 Correspondence with the Planning Inspectorate relating to the 1815 Inclosure Act
- 6 Law report and newspaper articles relating to incidents with cattle appended to the proof of evidence of Mr Selway
- 7 Hartlebury Inclosure map 1821 and location plan
- 8 Location plan of five barred gate