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# Application Decision

Inquiry opened on 19 April 2011

by **Heidi Cruickshank BSc (Hons), MSc (Hons), MIPROW**

an Inspector appointed by the Secretary of State

Decision date: 27 May 2011

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**Application Ref: COM165**

**Kingwood Common, Oxfordshire**

Register Unit No. CL 38

Registration Authority Oxfordshire County Council

The application, dated 6 April 2010, is made under section 38 of the Commons Act 2006 for consent to construct works on common land.

The works comprise:

- The erection of 2,228m of post and wire fencing and 13 access points and gates on Kingwood Common.

**Summary of Decision: The application is refused.**

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## Preliminary matters

### *The Nettlebed and District Commons (Preservation) Act, 1906*

1. The application was made by Mr Jeremy Simon on behalf of the Nettlebed and District Commons Conservators ("the Conservators") under section 38 of the Commons Act 2006 ("the 2006 Act") for fencing to enclose an area of Kingwood Common ("the common") to allow seasonal grazing of cattle. Objectors raised the issue that the common was subject to The Nettlebed and District Commons (Preservation) Act, 1906 ("the 1906 Act") and believed that this would not allow the Conservators to fence the common as proposed.
2. When this issue was raised The Planning Inspectorate sought advice from the legal team at the Department for Environment, Food and Rural Affairs ("defra"). Unfortunately, this was not copied out to the parties until I had received the file. I considered that I would be unable to take the defra advice into account unless the parties had sight of it and, having read it when first viewing the file, I could not ignore that advice. This did mean that the parties only received it shortly before the Inquiry, however, no-one requested an adjournment in relation to this matter. As the relevant points had been raised by several objectors I was satisfied that the parties should have a reasonable understanding of the issues and that there was no prejudice in this respect.
3. The 1906 Act was "*...to incorporate a body of Conservators for the preservation and management as public open spaces of certain commons in the rural district of Henley in the county of Oxford and for other purposes.*" The common covers an area of 60 hectares and is registered as common land (CL38) under the Commons Registration Act 1965. It is part of the Nettlebed and District Commons which total eight separate commons covering 227 hectares and this proposal is part of a larger project regarding the management of all the commons. There was no argument that the common was not subject to the 1906 Act.

4. The part of the 1906 Act to which I was particularly referred was section 11 which states:

*"By virtue of this Act there shall be imposed upon the Conservators the following duties and they shall (subject to the provisions of this Act) have the following powers namely: -*

*(A) "Except as in this Act otherwise provided they shall at all times keep the commons uninclosed and unbuilt on as open spaces for recreation and enjoyment of the public and they shall as from the passing of this Act be entitled to require the commons to remain unenclosed and may and shall do all such acts and things and institute all such proceedings as may be necessary for that purpose;*

*(G) "Any part of the commons set apart by the Conservators for any purpose may be closed and exclusively appropriated by the Conservators for any period or periods not exceeding twenty-one days in any one year and for not more than four consecutive days on any one occasion..."*

5. It was argued for the objectors that the 1906 Act prevents the Conservators erecting the proposed fence, which was to be in place for 15 years, as this would 'inclose' the common for longer than the period allowed by section 11(G). It was argued for the Conservators that the term 'inclose' related to the legal Inclosure of commons, taking it into private ownership, rather than physical enclosure of an area. However, I agree with the objectors that 'inclose' and 'enclose' appear to be used in the same way and seem to mean 'fencing in'. I was referred to the case of *National Trust v Ashbrook (1997) 4 All ER 76* on this point and I consider it significant that the 1906 Act uses the term 'inclose' in section 21, in a way that clearly refers to the fencing of an area. I am satisfied that it is physical enclosure which is referred to in section 11(A).
6. It was also argued that section 11(G) refers only to actions taken in relation to section 11(F), which allows the setting apart of parts of the commons to play games, hold shows or exhibitions, among other things. However, the section refers to *"Any part of the commons set apart...for any purpose..."* (my emphasis). Even if it was the case that the time limit refers only to purposes under section 11(F), section 11(A) would still prevent inclosure of the common. It seems to me that the 1906 Act prevents the Conservators from being able to implement the fencing proposal as this would 'inclose' part of the common.
7. It was argued for the Conservators that the grazing was part of a management scheme, the expected results of which – more open space and heathland areas - would be in line with section 11(D) of the 1906 Act to *"...improve any part...so far as may be necessary or desirable for the purposes of health recreation enjoyment and convenience."* I recognise that there is some tension in the expectation on the Conservators to manage access, when this in itself requires management of the landscape within which such access is to occur.
8. I accept that those drafting the 1906 Act might not have envisaged fencing as necessary, as grazing was apparently occurring as part of the rights of common without it and the surrounding roads would have been much quieter. However, it is not possible in my view, to simply put aside the clear wording set out in

section 11(A) on the basis that the authors didn't think to the future; the 1906 Act must stand as it is written unless and until alterations are made.

9. I do not consider that the proposed works could be implemented under the 1906 Act, even if I were to consider it appropriate to grant consent under the 2006 Act. Although there may be opportunity to make alterations to the 1906 Act, in order to allow implementation of the works at a later date, the Conservators did not appear to think this necessary and did not give any indication that they had investigated this possibility.
10. The Conservators said that similar applications had been granted by the Secretary of State, however, it is not clear whether the matter of the ability to implement an application by reference to a similar Act had been brought to the attention of the Secretary of State in such cases. Whilst looking for consistency in the decision-making process each decision must stand-alone by reference to the evidence put forward, which will vary from case to case.
11. Taking all matters raised on this point into account I consider that the application must fail on this ground alone, however, I will consider the other evidence.

### ***The affected land***

12. The common lies to the west-north-west of Rotherfield Peppard, with Colemore Lane mainly running on the eastern boundary, apart from small areas to the east of the lane, and Stoke Row Road running within the western boundary. Residential roads and properties are situated within the common to the south and the surrounding roads form what is referred to as the southern triangle to the south-west of these properties. The surrounding land is a mixture of woodland, fields and a few houses, with the village of Sonning Common lying to the south-east.
13. The common is a mix of wooded areas with glades, within which heathland species are identified. Lowland heathland is a UK Biodiversity Action Plan ("BAP") Priority Habitat for Conservation and the common is one of the few sites in Oxfordshire containing this habitat. As a result, the common is designated as a Local Wildlife Site.
14. The common is crossed by formal and informal tracks and roads. There are two public bridleways, one of which would be affected by the proposed fencing. The total area of the common is about 148 acres or 60 hectares, but the area proposed for fencing is a smaller part lying within the main area between the roads and properties, with the fence generally set in from the boundaries.
15. During the Second World War the common was used as a camp and the remains of this use affect much of the area, in particular on the western side.

### ***The map***

16. There was some confusion as to the appropriate map to be used, however, as I said at the Inquiry, I have used the map submitted with the application, which is Headed 'Kingwood Common' and has the fenceline indicated by a red line.

## **Procedural Matters**

17. An Inquiry into this application was scheduled to be held in November 2010. However, due to a procedural compliance issue regarding the advertisement of that Inquiry it was postponed.
18. I made an unaccompanied site visit on 18 April, opening my Inquiry on 19 April and closing it on 20 April 2011. Following a request by some of the parties I made an accompanied site visit on 4 May 2011, it not being possible to make the visit immediately following the close of the Inquiry.

## **Reasons**

19. The stated purpose of the application is to introduce cattle grazing to help to keep informal paths open that have been lost to scrub and trees. The application referred to the Nettlebed Commons Management Plan 2006 – 2015, which covered all the commons and set out that the key to sustaining the landscape and wildlife of the commons was grazing and management of the scrub. It was clear in looking at the application as a whole, and hearing the evidence at the Inquiry, that the main driver was heathland conservation.

## **The Main Issues**

20. 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. Restricted works are any that prevent or impede access over the land, including the erection of fencing; the construction of buildings and other structures; the digging of ditches, trenches and the building of embankments; and, the resurfacing of land if this consists of laying concrete, tarmacadam, coated roadstone or similar material.
21. 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, which includes the interest in nature conservation, conservation of the landscape, protection of public rights of access and the protection of archaeological remains and features of historic interest;
  - d. any other matters considered to be relevant.
22. I will also have regard to defra's Common Land Consents Policy Guidance<sup>1</sup> in relation to the determination of applications under section 38, which has been published for the guidance of both the Planning Inspectorate and applicants.
23. In response to the notice 76 objections, 41 representations in support of the application and a letter from Rotherfield Peppard Parish Council ("the Parish Council") were received. As already noted several people raised issues regarding the 1906 Act. The main issues between the parties related predominantly to the matter of public interest, particularly in relation to nature conservation and landscape and the protection of public rights of access.

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<sup>1</sup> Defra, Common Land Consents Policy Guidance July 2009  
<http://www.defra.gov.uk/rural/documents/protected/common-land/consent-policy-guide.pdf>.

## **Assessment**

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

#### *The landowners*

24. The Register of Common Land ("the Register") showed the owner as Colonel Robert Peter Fleming. Although one party had queried the validity of this it was undisputed within the relevant period and so I accept the Register entry. A letter from the great-granddaughters of Robert Fleming indicated that they were the present owners in the capacity of Trustees of the Will of Nicholas Fleming, their brother, the land having remained in family ownership.
25. The Trustees indicated support for the reintroduction of grazing to return the common to a more open area, which they felt would not be possible without fencing. There was nothing before me to suggest that their interests would be compromised.

#### *Registered rights*

26. There are several rights of common recorded within the Register. Some relate to property access rights and no-one indicated that these would be compromised by the proposal. As the proposed fencing is situated away from tracks giving access to the properties in this area it does not seem that any such access rights would be affected.
27. Several properties registered a right of estovers, that is taking wood, and in some instances scrub, for fuel, which the Conservators said was exercised infrequently. I note that there were some rights registered for the taking of wood, as well as bracken, for other purposes. Some also registered a right of turbary, that is a right to dig turf, although the Conservators indicated that these rights were not exercised. No-one indicated that their rights in these respects would be affected by the proposal and it does not seem to me that it would be likely to prevent the collection of the amount of fuel or turf that might be expected. However, I do consider that there may be a little more difficulty in the physical movement of wood, scrub or turf depending upon the position of the property holding the right in relation to the proposed access points.
28. In addition two properties have grazing rights, one with the right of pasture for one pony and the other for a right of grazing over both Kingwood and Peppard Common not exceeding 50 head of cattle, sheep and donkeys. Rights of grazing were apparently last exercised in the 1940s or 1950s. It was indicated that if the fencing proposal went ahead this may enable those with grazing rights to exercise them, which would be welcomed by the Conservators. Whilst this was not seen as a positive outcome by some of those speaking in objection, I consider that the ability to exercise those rights, although without any indication that they might be taken up at this time, would be in the interests of those who hold them.

#### *Public Access*

29. The public have access rights to the common by virtue of section 17 of the 1906 Act. Access rights on foot also apply under the Countryside and Rights of Way Act 2000.

30. The Conservators were very clear that it was not their intention for the public access to be prevented as a result of the fencing. They had provided thirteen access points, which they felt were on all the used routes in and out of the common, and said that the four-strand wire fence proposed would be of such width that it would allow able-bodied people to pass between the wires, accessing at other points if required.
31. However, I must agree with the objectors that the proposed number of access points is much reduced from that suggested by the 1999 Feasibility plan, which recommended one per 30 -50 metres. Although the Conservators indicated during the Inquiry that they would be open to making more access points no formal request was made to me to alter the application by the insertion of specific additional access points. Similarly it was said within the application that consideration was being given to whether the eastern boundary fence, along Colemore Lane, could be removed when the cattle were not grazing. Again this was discussed at the Inquiry but would require formal alteration of the application.
32. Some people said that they would feel unsafe using the common when the cattle were present. Although the British Horse Society ("the BHS") had not raised an objection to the proposal, local riders indicated that they would not feel safe, as their horses might be scared by the cattle and this could cause accidents. The proposal would also lead to two new gates needing to be negotiated, where current access is not subject to barriers, although if the eastern fence was removed when grazing was not occurring then a gate would not be required on this side for much of the time and I note an intention to tie gates open when cattle were not present.
33. Whilst I accept that some people might curtail their activities during the periods of grazing, I weigh against this the fact that the cattle would only be present for a maximum of four months in the year, spread across two periods, with signs indicating whether they were present or not. However, I do keep in the back of my mind the possibility of use of the area by those with grazing rights, once such use would be physically possible, which might extend the grazing period unless the Conservators implemented appropriate bye-laws. I also take account of the information, in relation to other commons where such grazing is used, that the cattle can themselves be an attraction to visitors.
34. In weighing the issue of public access I also take into account that the grazing regime may in itself improve access by ensuring that the glades and paths remain open for use. However, weighing all points, I consider that the proposed fencing would have a negative impact on public access, making it more difficult for some users at all times and potentially putting off others from accessing the area during the grazing periods.

### *Conclusions*

35. Taking all matters into account, whilst I have noted some potential benefits, I consider that there would be an overall negative effect on the interests of those occupying or having rights over the common.

### ***The interests of the neighbourhood***

36. As the main points raised in support of the application relate to nature conservation matters I shall consider the interests of the neighbourhood in this context under general public interest matters.

### ***The public interest***

37. I have dealt with matters of public access to the common above.

### ***Nature Conservation***

38. The application indicated that the sole purpose of the fence was to keep livestock in the areas where they were needed to promote and maintain the lowland heathland. Evidence was presented of the plants on the common which were indicator plants of this habitat and whilst strong arguments were made that some of these plants might have been introduced more recently I accept that there are areas of the common which can be classified with this habitat type.
39. Objectors suggested that there were other ways to manage the glades, which were of the desired habitat, without affecting the larger area of the common. I do note that the Conservators, and other interested bodies, had already attempted other management regimes, such as strimming, particularly making use of volunteers, but felt that there were insufficient volunteers to keep up-to-date with the workload. The southern triangle was removed from the grazing scheme at an early stage and it was suggested that if grazing took place in the proposed area, then the volunteers could keep the southern triangle from becoming overgrown.
40. It was also argued that this was not heathland but woodland and so it was inappropriate to manage the area as heath. Whilst it may be that this was originally woodland, mapping from 1797 on shows the common differentiated from the surrounding woodland areas. It appears that the common was a more open area from at least the late eighteenth century.
41. I understand that most heathland will develop to woodland unless it is managed to prevent woodland succession. Whilst I note some discussion as to the 'value' to be placed on heathland versus woodland it does seem that there will be greater species diversity where there are different habitats within an area. I accept that the maintenance and promotion of the heathland is an important matter and note the inclusion of this habitat in the Chiltern Dipslope and Plateau Conservation Target Area, which identifies the most important areas for wildlife conservation in Oxfordshire. I note that the Chilterns Conservation Board support the proposal.
42. Concerns were raised regarding the effect of the fencing on existing wildlife in the area, such as fallow and muntjac deer. Additionally, some people were concerned that the grazing would itself affect some plant species. There was insufficient evidence to show me that this would cause significant issues for either flora or fauna.
43. I note that there is a Site of Special Scientific Interest ("SSSI") nearby but that Natural England have raised no objection to the proposal, as they do not believe it will have a significant adverse effect.

44. Reference was made to the duties set out in the Natural Environment and Rural Communities Act 2006 ("NERCA") for the conservation of biodiversity. Whilst I agree with the objectors that the Conservators probably cannot be taken to be a public authority bound by NERCA, the Parish, District and County Councils do have a role to play. I note here that such duties also apply to the Secretary of State in determining applications such as this.
45. I am satisfied that the proposed works are intended to make a positive contribution to nature conservation with respect to the identified habitat and consider that this would probably be the case.

#### *Landscape*

46. Due to the generally wooded nature of the common there would, in my view, be little effect on landscape, other than the potential conservation of the paths and glades, as already discussed. The proposed siting of the fence 5 – 10 metres from the roads and access tracks would make it unlikely that it would be visually intrusive from a distance, although clearly it would be seen along Colemore Lane, where it is closest to the boundary. However, taking account that this is not a well-used road, and that there are other boundary treatments associated with the properties in this area, I do not consider that this would be particularly intrusive.
47. The Conservators chose not to follow the advice in the 1999 Feasibility report of fencing on the existing boundaries, which would generally mean less visible change, although cattle grids would then be needed onto the access tracks.

#### *Protection of archaeological remains and features of historic interest*

48. Comments were raised that the Conservators had omitted to declare that there were structures on the common, however, to be fair, the question in section F of the application form refers to the effect on Scheduled Ancient Monuments ("SAM") and section G to existing buildings and roads. Neither of these points seems to be relevant to the historic remains on this site, which date from the Second World War and cannot be said to be existing in the sense that they are currently in use and are not on the SAM register. However, these are features of historic interest and the Oxfordshire County Council Planning Archaeologist has indicated that they should be preserved.
49. I understand that the site was initially used as a barracks for British and then American troops, then as an American Field Hospital and finally as a Prisoner of War Hospital. The above-ground features have been destroyed, I understand after an Inquiry in 1955, so there are no standing buildings. Some of the resulting debris remains on site and there is concrete, from former paths and roads, over much of the site.
50. There may be an issue regarding the location of the proposed fencing and whether it would cause damage to the features, although there seems no reason why the grazing itself should cause any problem in this respect. It was said that the existing tree roots were more likely to cause damage, however, the management of such existing features is a separate matter. The Conservators said that they would ensure that the fencing itself did not cause damage, although a detailed fencing plan taking account of the features was not provided.



51. Some objectors raised concerns that the features would cause a hazard to the cattle and I was referred to the Animal Welfare Act. I do not consider it my role to intervene on this point, however, I do take account that no indication was made as to works that might be undertaken to deal with the identified risks in order to ensure animal welfare in this respect, other than indicating 'appropriate steps' would be taken. It was suggested by objectors that the affected areas could be left out of the proposed fencing area, however, the Conservators did not indicate support for this.
52. I consider that the issues potentially arising from the historic features in this area have not been appropriately and sufficiently assessed and addressed. This weighs in the balance against granting the application.

### *Conclusions*

53. Taking all matters into account, whilst I have noted the potential benefit in relation to nature conservation, I consider that there would be an overall negative effect on the interests of the neighbourhood and the public interest.

### *Other matters*

54. Although there were a number of comments regarding the quality of the consultation process, and there may have been some matters that could have been dealt with differently, overall that process appears to have been open and transparent to those who might have wished to take an interest at the time. It is not always possible to reach consensus on such projects and that is not always a reasonable expectation. Nevertheless, whilst it seems to me that the Conservators have made this application guided by the appropriate principles, I consider that the full implications and options have not yet been considered and resolved.
55. Whilst I do have the power to grant applications subject to certain modifications I do not consider it my role to finalise an application with regard to such important matters as the location and number of access points, whether or not part of the fence could be temporary rather than permanent or whether further alteration to the fence-line would be required in relation to historical features. Any modifications I made would not be open to further objection and so, without agreement between the parties to them at the Inquiry stage, I consider it would be inappropriate for me to attempt to resolve the outstanding issues in this way.

### **Other matters**

56. Comments were made regarding the constitution of the Conservators, the requirements for which were set out under section 6 of the 1906 Act. However, I consider that to be a separate matter from the issue before me. I do not believe that there is anything to prevent anyone making an application such as this and so I do not consider that the matter of whether or not the Conservators are correctly constituted affects my decision and have not considered it further.
57. Some comments made that the reason behind the application was to access particular grant funding, however, I have not considered this matter or, similarly, whether or not the outcomes of previous grant-funded work were legally compliant.

58. Concerns were raised regarding the way in which the Parish Council had arrived at their response to the application, however, this is not a matter for me. I have taken account of the Parish Council letter as appropriate.
59. Issues surrounding the management and use of the area marked as a depot, which lies to the north of the proposed fence-line, are not matters for me.

### **Conclusions**

60. Having regard to the interests and matters set out in paragraph 21 above, I have reached the conclusion that the works proposed by this application would adversely affect those interests. I also consider that the Conservators would be unable to implement such works within the current framework of the 1906 Act. Therefore I consider that consent should not be given in relation to this application.

### **Formal Decision**

61. Accordingly, in exercise of the powers conferred by section 38 of the 2006 Act, and of all other enabling powers, I hereby refuse the application.

*Heidi Cruickshank*

**Inspector**

## **APPEARANCES**

### **For the Applicants:**

Mr P Allport	Nettlebed and District Commons Conservator
Mr J Simon <i>who called:</i>	Chair, Nettlebed and District Commons Conservators
Mr J Blackwell	Local resident
Mr A Greenwood	Solicitor
Miss J Hignett	Project Officer, 2008 - 2010
Mr M Jackson	Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust
Mrs C Napper	Community Officer, Oxfordshire Nature Conservation Forum
Mrs S Rankin	Former leader of the Friends of the Commons
Dr J Thompson	Former Parish Councillor, Rotherfield Peppard Parish

### **In Objection:**

Mr R Halson-Best	Assistant Access Officer British Horse Society, speaking as a local horse-rider
Mr W Upton <i>who called:</i>	Of Counsel, <i>on behalf of</i> Kingwood Common Preservation Group
Mr T Dadley	Chairman, Kingwood Common Preservation Group
Mr A Cotton	Local resident
Mr T Johansen	Local resident
Mr J Nelson	Local resident
Mrs A Pearce	Local resident
Mr M Saunders	<i>on behalf of</i> himself and The Open Spaces Society
Dr T Southern	Local resident

### **Interested Parties:**

Mr Hammond	Parish Councillor, Rotherfield Peppard Parish
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## **DOCUMENTS**

- 1 The application
- 2 Opening Statement by Jeremy Simon, with witness list
- 3 Witness Statements submitted in advance of the Inquiry for the Conservators and additional statement of Cynthia Napper
- 4 Statement of Sally Rankin
- 5 Nettlebed and District Commons Management Plan 1995 - 2005
- 6 Statement of Nigel Wooding, with letter from Oxfordshire County Council Archaeological Services
- 7 Oxfordshire Wildlife Sites Project entry
- 8 The Conservators' Closing Statement
- 9 Opinion of Mr Upton, with attached caselaw
- 10 Statement of Ted Dadley
- 11 Statement of Tony Cotton, with photographs
- 12 Statement of Terje Johansen
- 13 Submissions on behalf of The Kingwood Commons Preservation Group, with attachments
- 14 Statement of Richard Halson-Best
- 15 Letter from Mrs Rachel Masters
- 16 Statement of Mark Saunders, with attachments and photographs
- 17 Statement of the Open Spaces Society
- 18 Documents submitted by Dr Southern