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1.0.0 Introduction

1.1.0 Qualifications and experience:

1.1.1 My name is Bob Milton and I am instructed to act on behalf of the British Horse Society. I am a director of Abbeylands which is a company founded in 2005 to act as consultants in public access and rights of way. I have a postgraduate qualification in public rights of way and public access management. I am a member of the Institute of Public Rights of Way and Access Management [IPROW] and listed as a specialist consultant in common land and village greens.

1.1.2 I have been active in public rights of way and common land since 1995. I have acted both for private clients and public authorities. As well as commercial work I have acted on a voluntary basis for charities active in this area, including the Open Spaces Society [OSS], the British Horse Society [BHS] and the Sports and Recreation Alliance [formally the CCPR]

1.1.3 At the present time I act for the BHS as an access officer for the Guildford and North Hampshire areas and local correspondent for the OSS for Surrey Heath and Guildford, as well as being involved as Common land adviser to the BHS southern and south eastern regions. I am at present a Trustee of the BHS and was a Trustee equivalent for the OSS for ten years up until 2007

1.1.4 I am, and have been for six years, a statutory commons commissioner for The Greenham and Crookham Commons in Newbury, Berkshire on behalf of the Sports and Recreation Alliance. This experience and knowledge of the effects of grazing on heath land on that common, as well as the many others on which I ride in the Thames Basin and Wealden Heaths areas, and the associated access issues, is I believe, highly relevant.

1.1.5 I have acted for these charities and private clients at a number of public inquiries over the last ten years. On this occasion I act for the British Horse Society in a voluntary capacity for the production of this statement of case, and to act an ‘Expert Witness’ as required. As a consequence this statement contains my true

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and professional opinion of all relevant matters in this application and relating to the future management and the well running of this common.

1.1.6 I also have a Diploma in Horticulture [Landscape] and have run my own landscape construction and design company for over 35years. I have worked extensively on Bagshot silt soils specialising in lakes and ponds so have a general understanding of horticulture on these soils.

1.2.0 Scope of evidence:

1.2.1 It may be of assistance to briefly clarify the scope and structure of my proof of evidence on behalf of the British Horse Society. This objection does not repeat those arguments that found favour in the previous [1998] inquiry in which the Secretary of State found overwhelming in favour of the neighbourhood [as against the enclosure of the common for extensive grazing]. It concentrates on the changes in legislation and the declared aims of the appellant in respect to this application, including the future management of the common alluded to in the application and in the funding agreement with Natural England.

2.0.0 Site Context and Consent history:

2.1.0 The common, like most lowland heaths in the south of England as against those in Europe, were the product of our Manorial system and the changing management of this country. These remnants of that system [the lowland heath commons]were primarily used by the rural communities, that relied on them, to supplement the adjacent farmed and improved lands [and from the end of the 18th century and especially from the end of the Napoleonic War in 1815 (Waterloo) to accommodate the changes to military training].

2.1.1 This area, known as the Thames Basin Heaths, saw at that time the founding of the Aldershot garrison and the Royal Military Academy Sandhurst. Large areas of heathland in adjacent Hampshire were Inclosed under Acts of Parliament and sold to the military. In Surrey much of the open and unenclosed lands were already in private hands and remained unenclosed but were acquired for military purposes over the next hundred years. In many instances this was welcome by the

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landowners, as the heaths had little agricultural value due to the intrinsic poor quality of the eroded soils. Some Victorian industrialists and others bought into the idyll of health benefits from freely available public recreation, prevalent during the 1860's. This period saw the founding of the Commons Preservation Society in 1865 and the passing of the first public recreational access Act of Parliament [The Metropolitan Commons Act 1866].

2.1.2 Modern agricultural techniques and the growing needs of the urban industrial classes put pressure on Parliament to grant more privatisation of the commoning lands and manorial wastes [Inclosure]. These developments resulted in an ever increasing dispossession of the rural poor from the land into the industrial urban interiors of the cities. It is estimated that over 80% of the lowland heaths in the south of England disappeared during the 1800s. Public health and the resulting push for more public recreation land resulted in the stemming of the Inclosures [1875].

2.1.3 The tide turned against private gain with a plethora of Acts which sought to help the urban poor have a better quality of life by granting rights for healthy recreation over these commons, as well as providing inner city recreation. At first this altruism was aimed at the metropolitan cities but later, with the enactment of the Commons Act 1899 and the National Trust Act 1907, at more rural areas. With the Law of Property Act 1925 we saw a wholesale change in the manorial landowning system and the enfranchisement of the rights of copyhold into freehold. Such a major change was balanced by the inclusion of s193 and s194 into the Act which protected public rights to 'air and exercise'.

2.1.4 Recent history of Chobham common, and other local commons, shows a quite divergent use by commoners and the parish over the last two hundred years. The major use from the late 1800's to the end of WWII was military training and before that was supplementary sheep grazing and hunting. The final nail in the coffin as far as minor agricultural use is concerned was the restriction placed on the milk supply in 1958 by the new Milk Marketing Board regulations, which

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banned the collection of milk from herds grazed on common land and manorial waste, where the public had access.

2.1.5 Unlike many of the commons in the area, Chobham Common did not suffer from Military Development, except where some was taken in 1955 by the Air Ministry [Burma Road] for part of the new military vehicles testing facility at Longcross. This was acquired under compulsory powers with exchange land but was never quite completed. Chobham Common remained in the possession of the Lord of the Manor [Lord Onslow] as manorial waste until Surrey County Council acquired the common, along with the Lordship for £1, under the powers of the Open Spaces Act 1906 for public recreation [along with many highways and verges which were deemed to be public but maintainable by the Lord of the Manor].

2.1.6 During the period from the Commons Act 1876 [including the Commons Act 1899 and the Public Health Act 1845-75 up until the Law of Property Act 1925] there was a move to not only protect but to enhance public access to the countryside for health and welfare especially for the urban poor. This move by Government was further embedded in the British psyche with the passing of the National Trust Acts 1907 and 1926, The Open Spaces Act 1906, the Corporation of London Act and many private Acts to protect these areas from development

2.1.7 The effect of the vast industrial wealth flowing into the rural landscape enabled wealthy modern industrialists to acquire many of these large open and unenclosed commons into large landholdings. Some of these were given to the nation through the National Trust, others were bought by the Military to fulfil the ever increasing need for military training or by utilities to protect and supply water to the urban areas.

2.1.8 Chobham common, unlike many of the Surrey military commons, was not purchased from Lord Onslow during the two world wars but was part of an agreement to remit inheritance tax in 1968 in favour of Surrey County Council [with the public benefit being the deed of dedication under s193 of the Law of Property Act 1925 made on the 7th April 1936].

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2.2.0 The Application

2.2.1 It is our contention that this application is primarily a means to gain funding, unfortunately, at the expense of public access. There is, we believe, inadequate scientific evidence and a lack of *overwhelming* evidence that the application is "reasonable' [S28G] in respect to the function for which the land is held – public recreation and open space. The application makes a substantial number of assumptions and guesses to support its approach whilst at the same time seeking to use the application as a PR exercise to 'acclimatise' users to the presence of grazing cattle [SWT 12.9]. In the terms of s28G this is not reasonable. At this point it is relevant to mention the inclusion in the application for retrospective consent for the bollards at Burrow Hill Green to which the BHS has no objection.

The guidance that all unlawful or un-consented works be included in any new application for s38 works has not been met as there are many, including those admitted to in the management plan[1] - '*The application would include other works raised by the community during the consultation like banks for a holding pond near the junctions of Stable Hill and Windsor Road to reduce water flow towards Chobham village and reinstatement of ditch and banks along Stable Hill and Chertsey Roads to prevent vehicular incursions onto the Common'*

2.2.2 The monitoring as outlined is solely to prove the efficacy of the regime advocated and insisted upon by Natural England in pursuit of its own self imposed targets. The monitoring is not a scientific trial since there are no control or comparative methodology areas. Neither is there any cost benefit analysis proposed.

2.2.3 There is no intention to consider the effects on public access, which are by right both on the highway and under s193 Law of Property Act 1925. The issue of displacement of user is not covered in any of the application supporting documents.

[1] http://www.surreywildlifetrust.org/files/chobhammngtproposals.pdf

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2.2.4 The application attempts to imply that the threat of compulsory acquisition is real when there is no evidence of NE ever relying on its s28G powers[2] in the case of local authority or other government land held for other purposes. This has and is being used by local authority land owners to threaten users and to over ride public opinion and access rights [eg Hartlebury and Esher commons] and to enable enclosure of public open space with attendant displacement of lawful user.

2.2.5 The Conclusions in 12.9 of the application assumes that grazing will happen over the whole of the SSSI. It can be even inferred, from the way it is written, by the use of 'could be' [12.9 para1 line 6] as a *fait accompli* and that consent in this present form could lead to a request for extension over the whole SSSI. This would then to be dealt with by the Planning Inspectorate in house, on the recommendation of SWT Ltd without going to public inquiry, thus bypassing public objection.

2.2.6 We intend to show, through dealing with all the arguments set out in the application that, as made, it is seriously flawed and should be refused. At the same time we will offer a number of alternative approaches based on reasonableness for all users and the objectives of Natural England in respect of the agency's equal remit for public access and conservation.

3.0.0 The Commons Act 2006

3.1.0 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.

3.1.1 PINs guidance sheet 1a asks the question:

• Are the fencing or works necessary? Are they desirable?

[2] Abbeylands comments on s28G appendix2

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• If yes to either of these questions, what kind of fencing/works are needed/ desirable? Are there better alternatives available?

And goes on to ask – '*If you conclude that the proposed works are:*

(a) for the management, improvement or protection (or to the negligible detriment) of the common or otherwise consistent with its traditional uses (eg. grazing, public recreation),….. apply under s38'.

It is therefore incumbent on all to deal equally with all aspects of use which in the case of Chobham is the major modern and dominant tenement of those traditional uses **public recreation** i.e. that of public access granted in 1934 for 'air and exercise'.

So the questions in this case should be rephrased as 'are the fences really necessary or can the requirements for favourable condition be met using other means' and 'are they desirable in terms of the dominant tenement of the reason for which the land is held being public recreation'?

Put another way the question should not be 'are there better alternatives' but 'are the alternatives as good or at least sufficient and cost effective in meeting not just the conservation but also the public access objectives'. Compromises may have to be made on both sides.

3.1.2 S39 Commons Act 2006 requires that in deciding this application regard must be had to the following:

(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; This being the public interest in:

(1) nature conservation;

(2) the conservation of the landscape;

(3) the protection of public rights of access to any area of land;

(4) the protection of archaeological remains and features of historic interest.

(d) any other matter considered to be relevant.

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3.1.3 Nothing in this legislation grants any part or parts priority weighting over any other. It therefore incumbent on the applicant to show that no particular interest is discriminated against.

4.0.0 ***Interests of those occupying or having rights over the land***

Chobham common is owned by Surrey County Council and managed under contract by Surrey Wildlife Trust Ltd. There are very limited registered commoners rights which are not exercised. The dominant tenement of the acquisition of the common was as public open space being that the land was acquired with a Deed of Dedication under s193 in place, which grants the public the rights to 'air and exercise' over the whole common.

4.0.1 There are many private easements over the common, as well as the potential for rights voided under the 1965 Commons Registration Act. These were not capable of registration due to Government misinterpretation of manorial waste [HoL 1990 Hampshire CC v Milburn re Hazeley Heath]. This may result in further registrations on the roll out of the Commons Act 2006 Part 1 in Surrey.

4.0.2 No weight under this heading should be attached to the application and pre agreement for Higher Level Stewardship funding to further the nature conservation of the site as it is not payable to Surrey County Council, their contractors or agents nor any other '28G' authority in pursuance of their statutory duty.

5.0.0 Interests of the Neighbourhood

5.0.1 The applicant sets out a series of survey results in 12.3 as to user. These figures are, it is believed, those produced for the SE Plan Thames Basin Heaths SPA Examination in Public in 2008 as part of Natural England's supporting evidence for the restrictions to development under the Habitat Directive. At the time, I pointed out that these percentages were based on flawed surveys and a complete lack of understanding of what public access by right to the countryside is, and the way different legislation, that governs it, has to be treated. In this case the surveyors confused common land [s193] and highway use. No attempt to differentiate between the two was made.

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5.0.2 At the Chobham site the surveyors erroneously amalgamated highway use of the bridleway and footpath rights of way network with that of the s193 common over which they run. This has resulted in a skewing of the results such that walking and horse riding were shown as a lower percentage of lawful user [a cycle is considered as a vehicle in terms of the public right to 'air and exercise' (being equestrian and pedestrian only) and cycling on the common is considered a criminal offence under s193(4) LPA1925 as well as s34 Road Traffic Act 1988].

5.0.3 By not differentiating those who only use the rights of way network from those exercising their rights to 'air and exercise' an incomplete understanding of the use of the common has been promulgated

5.0.4 Removing the incorrect statistical base would increase the percentage usage by dog walkers and equestrians of the common. This is important in that a greater effect is shown on the two major user groups of the common as well as an increased liability in terms of quantity of user of the grazier and landowner under the Animals Act 1971 on the common.

5.0.5 There is a question as to the relevance of what are called 'agreed horse rides' as these are by right and not permissive. They may be preferred but there can be no voluntary reduction in the public rights by the public at large. There is no Order of Limitations under s193 Law of Property Act 1925.

5.0.6 It will also be noticed that the maintained fire breaks are mentioned here but without any reason attached. They are used by all users across the common and to the ordinary person's eye could be assessed as evidence of favourable condition without grazing. A good example of this treatment can be seen on Odiham Common, Hampshire where the only heath habitat is the area which is mown on a regular cycle under the pylons.

5.0.7 It is our contention that 'interests of the neighbourhood' under the Commons Act 2006 is the same in all interpretations as 'benefit of the neighbourhood' under s194 LPA1925. The change only acts to clarify the previous legislation in terms of modern language use. To that end we can see no difference or change in the deliberations of this inquiry under this heading to that of the 1998 fencing for grazing decision [CYD/l077/ll04]

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The deliberations were *the "benefit of the neighbourhood" is defined as including the health, comfort and convenience of the inhabitants of any populated places in or near the parish in which the land is situated, in the context of the enjoyment of the common as an open space, and the "private interests" are defined as including the advantage of the persons interested in the common, ie, the soil owner and persons entitled to common rights.*

5.0.8 When the previous application was refused [and not appealed] the Secretary of State found for the Inspector's conclusions, which take into account the access, appearance, animal welfare, nature conservation, commoners' rights and activities on the Common. He notes and accepts the Inspector's view that while the proposed fences and gates would not materially reduce the general accessibility of the Common, as most people used the customary access points which would be provided with a gate or stile, nevertheless **it was the unfenced and ungated nature of the Common which distinguished it from most of the countryside.** He further notes and agrees with the Inspector's conclusion that the extensive grazing which would be made possible by the proposed fencing would be an additional benefit, which should be taken into account, **but which did not outweigh the harmful effect of the proposal on the existing benefit of the neighbourhood in relation to the appearance and accessibility of the Common.**

5.0.9 It is my belief that nothing has changed to reverse this consideration.

6.0.0 The public interest

This is set out in s39 and refers to the wider and more general public interest as

(1) nature conservation;

(2) the conservation of the landscape;

(3) the protection of public rights of access to any area of land;

(4) the protection of archaeological remains and features of historic interest.

6.1.0 Nature conservation

Nature conservation is put at the heart of this application and refers to the duties and regulations of legislation including;

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Section 28G of the Wildlife and Countryside Act 1981 applies to SSSIs. It imposes a duty on Surrey County Council as landowner: *to take **reasonable** steps, consistent with the **proper exercise of the authority's functions**, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.* [[3] for full description and embedded comment]

The *European Habitats Directive* defines lowland heath as being of particular importance and interest. The common contains this habitat and the *Directive* requires its protection.

The *European Union Birds Directive* requires member states to take 'requisite measures' to maintain the populations of certain birds, including nightjars, woodlarks and Dartford warblers, of which there are or have been small populations on the Common.

Section 40 of the Natural Environment and Rural Communities Act 2006 states that *every public body must, **in exercising its functions**, have regard, so far as is consistent with **the proper exercise of those functions**, to the purpose of conserving biodiversity*. This is a reference to the *United Nations Environmental Programme Convention on Biological Diversity*, to which the United Kingdom Government is a signatory.

Section 11 of the Countryside Act 1968 states: *In the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside.*

The question is whether the proposed regime being insisted upon is the correct and only one available. Also whether it is **reasonable** in the light of any effect the proposals have on the authority's function to hold and maintain the land for public recreation, [being specifically that right under s193 Law of Property Act for equestrians and pedestrians with or with out dogs] and that it meets the requirements under any other legislation [eg the Equality Act 2010[4] and the Human Rights Act[5]].

[3] See footnote 2 above
[4] Equality Act 2010 Equestrian briefing note Abbeylands October 2010 appendix 3
[5] Part1 Article 14 discrimination, Article 17 abuse of rights and Article 8 family life and Part II Article 1 personal possessions

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6.1.1 A majority of the applicants supporting evidence is set out in the SWT application [12.4 – 12.11]. It is solely based on the insistence that grazing is mandatory to achieve favourable condition, but it does not differentiate between extensive, for which there is no quantum, and focused intensive. In fact, despite the use of unlawful enclosures 1993 – 2000, no specific scientific evidence has been provided that the grazing carried out did, or is likely to have, the desired effect on this common. Neither does this application seek to provide that scientific evidence as it assumes that the instructions of Natural England are unarguable. To that end the applicant provides a long reference list of papers, most of which refer to main land European sites, with no scientific work being specifically carried out on English lowland heaths despite that being the main recommendation of English Nature Research report 422 2002.

6.1.2 The need for more research before making extensive grazing mandatory [as Natural England has] is supported by a major scientific analysis entitled 'Impacts of grazing on lowland heathland' published by Professor A Newton, Bournemouth University, and in November 2008[6]. It concludes **there is no hard evidence that extensive grazing works** or is better or equal than any other controlled grazing or non grazing regime[7].

6.1.3 The proposal put to the Secretary of State in February 2003, in line with ENRR422, by Macaulay Research Consultancy Services[8] to rectify this gap in the UK science knowledge base was turned down by the Secretary of State on cost grounds.

6.1.4 Other anomalies exist in the material that SWT and Natural England rely on such as the 2002 paper by Sophie Lake which relies purely on the anecdotal subjective assessments of just eleven land managers. It is unclear as to whether this 'subjective' assessment and some of the supporting statements could have been influenced by funding streams such as HLS. If this method of assessment is to be acceptable, then all other anecdotal evidence of the effect on public access needs to be equally considered.

6.1.5 The support of the landowner is also required. The statement in the application to the affirmative is solely reliant on a letter written by John Edwards[9] the Ecologist and

[6] Biological Conservation 142 (2009) 935–947 2008 Elsevier Ltd. All rights reserved appendix4
[7] E.g. the Woodland Education Centre heathland restoration project 1996-2001 appendix 5
[8] appendix6
[9] John Edwards letter to David Boddy 25th January 2011 appendix7

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Biodiversity Manager in SCC's Countryside department. The relevant part in relation to SCC's approval is "….. *there is no formal mechanism for obtaining the formal agreement of the County Council but I hope it will be possible to consider this letter as having the full support of Surrey officers who have been involved with Chobham common for many years."*. This statement brings into question whether all the ramifications of the proposals have been considered by the Council and its legal department especially those connected with public access rights.

6.1.6 No scientific trial is envisaged in this application for Chobham Common in terms of; environmental impact or cost benefit analysis, between alternative regimes on different habitats such as wet and dry heath. Neither is a non grazing control being considered with and without the same expenditure, as is envisaged over the 4year scheme. This application clearly states that the whole purpose is to 'acclimatize' the public to walking [with or without dogs] and riding through cattle. Why would members of the public actually put themselves in danger by walking or riding through these enclosures? The safe option is to go around. This human trait will defeat the whole stated object of the project. The proposed monitoring will not be sufficient on it's own to come to any scientific conclusion with regard to any benefit to the habitat through extensive grazing, or be able to monitor displacement from the areas enclosed. Is this **reasonable**?

6.1.7 This proposal on the whole only replicates the previous unlawful grazing project [1992-2000] for which there is no scientific data. It is even admitted that it is wholly in the same areas, which begs the question of whether extensive grazing as has been already practiced has shown any benefit. All this pilot project will do will be to show that cattle eat grass and if that is not available will start on young leaves, or starve.

7.0.0 Statutory duty and responsibilities

7.1.0 The thinly veiled threats set out in SWT 12.4 are misleading to the general law abiding public. This common is owned and held for public recreation under the Open Spaces Act 1906 such that it is held in trust for the public. SWT Ltd is acting as agent as a result of a management contract [which is not a lease in the accepted legal definition of such]. SWT Ltd has no legal beneficial interest in the land and so cannot be considered as being in

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control of the land in terms of the Habitats Directive ie landowner, tenant or lessee[10]. This is alluded to in SWT12.5 para 5 of the application which states that the so called lease is in fact a '50 year agreement for management'. The relevance of this point is that HLS cannot be paid for 'Statutory Duty' and that a management contract cannot negative that Duty. This point has been raised with the Rural Payments Agency and Natural England [Dr Helen Phillips] on the 31st October 2011 but no response has been received to date[11].

7.1.1 Surrey CC is therefore still bound by the duty set out in s28G but is **exempt from the provisions of S28E(1).** For NE to impose a scheme of management [S28J] it would have to prove that the Council was acting unreasonably with regard to its function if it did not agree to the proposed scheme. This does not apply here. The Council's dominant tenement of its duties is to hold and maintain the common for public recreation; but any work or project to that end must have regard to the nature conservation value and SSSI citation of the site. The effect of this application and the stated aim to extend grazing across the SSSI in four years time is to restrict the public's rights across the common by putting both physical and psychological obstructions [fencing and self closing gates, free roaming cattle] in place, as well as imposing by default other legislative restrictions [dogs on leads] which prevent or impede those rights. Given the research results in respect to the health benefits of horse riding[12], and the Secretary of State's published statement to increase riding access[13], is the diminishing and restricting effect on equestrian and other public access to the countryside of this proposal, and the future expectation of complete enclosure for extensive grazing 'reasonable'?

7.1.2 Where there is conflict, as in this case, and a barely concealed agenda to extend the extensive grazing over the whole common SSSI [500ha] in four years time with the attendant fencing, gates and cattle roaming, it remains for Natural England as the agency concerned to prove that it is *reasonable* to place the public in a physically or psychologically diminishing area in which to exercise their rights over the land without having assessed any potential discrimination or dangers. No Access or Equality Impact

[10] [Fisher v English Nature Neutral Citation Number: [2004] EWCA Civ 663

[11] Abbeyland s email 31st 0ctober appendices8
[12] BHS research document 'The Health Benefits of Horse Riding in the UK 2011' appendix9
[13] Letter from Caroline Spellman appendix10

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Assessment has been made in this case, nor has any attempt been made across the country where NE has been insistent in respect to Higher Level Stewardship funding [as is proposed here] to assess or quantify the **detriment** to the public rights caused by either the gating or the introduction of livestock.

7.1.3 No evidence of any sort is offered to support the use of extensive grazing as against any other potentially effective regime on lowland heath in the Thames Basin Heaths or adjacent SPA areas. To that end there is visual evidence[14] that such schemes have not worked.

7.2.0 **The Planning Inspectorate**

The PINS guidance sheet 8 states *'as a 'section 28G authority,' we must take "reasonable steps" when considering section 38 applications in or near SSSIs "to further the conservation and enhancement of the flora, fauna or geological or physiographical features" that have led to the designation of the site. In reaching a decision, we must balance this with our normal duties under section 39 of the Commons Act 2006.'* This is believed to be a misinterpretation of the regulations. The Inspectorate is supposed to be an independent arbiter of the application in respect of all the regulations pertaining to the site, in a quasi judicial role, as put by the applicant and objectors. It is therefore not bound itself by the regulation but to see that the **reasonable** test has been met in the light of the application and any objections. Therefore there is no duty to actively or positively weigh any decision under this regulation, which has been the case in a number of decisions [e.g. Hartlebury]. It is our belief that there has been no change in the governing legislation that resulted in Mr Asher's statement in his 1998 decision that the benefits of extensive grazing '*should not have priority over other considerations.*'

7.3.0 Habitat and Bird Directives

7.3.0 Nothing in these or any of the other relevant legislation gives any power to diminish or discriminate against any existing public access rights at the time of the enablement of these directives into UK law. Yet that is the effect that this application and many others like it, have or will have. There is discrimination against equestrians and those with

[14] Photos of grazing schemes appendix11

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'protected characteristics'[15] whose access to the common is diminished as a result of the introduction of fencing and the attendant self closing gates insisted on as part of the funding mechanism that is Higher Level Stewardship and extensive grazing.

7.3.1 Not withstanding the legal argument as to whether HLS can be paid lawfully to SWT Ltd acting as contractors for SCC [who as landowner is ineligible for this funding] the claim by SWT Ltd that the criteria have been so altered since 1998 is not accepted as the legislation relating to statutory duty was already in place in 1995 and has not changed. There is also the question of whether the present HLS agreement is lawful as there is no legal *internal agreement* [16]with all the commoners as required by NE. The continuing management of the common has not seen the benefits of work already consented to by Natural England [SWT 12.5 para5]. There has not been any reason put forward why a full implementation and rigorous scientific assessment should not be awaited before concluding that the common must be grazed as all else has failed i.e. 'the option of last resort'[17].

7.3.2 The whole future of these plans from NE is brought into question, particularly in the M3 corridor which bisects the common, by the failure to meet EU maximum nitrogen deposition for both humans and flora. The effect of such high deposition levels on the flora of the common has not been considered especially the rate of succession growth and European gorse in particular, which has a high fuel loading and is, from experience on Greenham common, not affected by grazing of any sort. A loss of 50% of the grazing areas in five years and advanced scrubbing up of the heather areas has been noted on Greenham common despite HLS, active commoning, conservation management and strong rabbit grazing.

7.4.0 **Higher Level Stewardship**

7.4.1 This funding stream is the driving force behind this application for fencing and grazing of this open and unenclosed manorial waste common land, as it has been across the country over the last few years. Inspectors and the Secretary of State have not allowed any questioning of the basic premise that the only land management regime allowed by

[15] Abbeylands Equality Act 2010 Equestrian briefing note October2010 appendix 12
[16] Natural England supplement to the Environmental Stewardship Handbook October 2011 appendix 13
[17] Finding Common Ground – Open Spaces Society appendix14

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Natural England [where the land is citied as lowland heath and designated an SSSI] is extensive grazing with cattle. This has been applied even where the only commoners' rights have been for sheep, as on Telscombe Tye. The consequences of such a narrow and blinkered approach have been felt across the user spectrum. The question has to be asked 'is that reasonable'?

7.4.2 The answer is complex but lies at the heart of the HLS scheme funding and the interpretation of it by NE management and officers. This can be categorized into a number of areas:

a. No recognition by NE officers who sign up HLS agreements that there is any other alternative to extensive grazing. Following pressure from the Open Spaces Society and MPs, the next (2013) version of the HLS handbook will make it clear *'that heathland can be cut or grazed'*[18]

b. That any benefit extensive grazing actually brings does not outweigh its disadvantages both environmentally and in *'relation to the appearance and accessibility of the common'*[19]. Nor has its effect on the public's, by right access, through displacement and as a psychological obstruction been quantified. Anecdotal evidence[20] shows that at Headley Heath Surrey there has been a reduction in the use by horses of the enclosed common of 50% with the majority of users moving from the area's facilities or finding other routes without cattle or self closing gates.

c. There is no requirement for officers making HLS agreements to take into account the public access rights over the land, other than gating and cattle grids on vehicular highways [s82-90 HA1980],as there is no reference to Commons or the Highways Act 1980[21] in the HLS Handbook. This, we can only assume is based on the expectation that consent will be forth coming from the highway authority as a result of the duty under s28G rather than the strict interpretation of highway law [s147 HA1980][22]

[18] NE Naomi Oakley 27january 2012 email appendix 15
[19] Inspector D Asher 1998 s194 decision CYD/l077/ll04
[20] Headley Heath riders report www.horseytalk.net
[21] NE Andrew Mackintosh email 17th august 2011 appendix 16
[22] Rights of Way Law Review S4.1: Obstructions p31-38 re s147 Agricultural and P17-21,41-46 + Herrick v Kidner 2010

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d. There is an assumption by NE that in all cases grazing was the traditional and the most significant use of the land which created the habitat as we know it. This is clearly not the case with the majority of the southern lowland heaths. Chobham Common, as we know it, was substantially created as a result of military activity over the last almost 200 years. Historically the use was across the whole spectrum of commoning. In the Middle Ages the dominant use was sheep grazing and up until 1958 there was some daily grazing of small dairy herds with attendant dairy maids, until the Milk Marketing Board regulations banned the collection of milk from animals grazing on land where the public had access.

e. The proposed change in use to cattle grazing and the effect on dog walking [over 50% of visits[23]] is not addressed in terms of other legislation[24] ie dogs on leads. In this particular case there is the additional effect on the designated SANGS [suitable area of natural green space][25]area a pillar of the mitigation agreed by Natural England to meet the UK Government's legal duty in respect to the Habitat Directive, which is part of the s193 common but adjacent to the SSSI area of the common, in terms of the possible reduction in development allowed in Surrey Heath caused by displacement from the SSSI[26]. This scheme is also a 'plan or project' in terms of the Habitat Directive and requires an Appropriate Assessment in conjunction with all other plans or projects to assess the impact of such a scheme on the balance of the SSSI and the existing mitigation required for the approved development of residential housing both in Surrey Heath and Runnymede. This has not been considered.

f. Neither Natural England, the applicant nor freehold owner appear to have sufficient knowledge or awareness of the imposed liabilities under the Animals Act 1971 caused by the introduction of grazing onto land that has public right of access, or that the introduction of grazing onto the common may not come within the exemption [for commoners] of s8 of the Act for accidents on a highway.

g. Natural England admits that the current HLS and Farm Environmental Plan handbooks *'do not currently make sufficient reference to access interests for land management*

[23] SWT 12.3 NE survey for the TBH SPA EiP SE Plan
[24] Abbeylands update of NE r649 s8 vers2 October 2011 dog legislation appendix 17
[25] Thames Basin Heaths SPA protocol Habitat Directive mitigation
[26] Waddensee judgement EU court re Habitat Directive 'any plan or project'

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option,..'[27]. The current HLS handbook states that participation in the lowland heath restoration option necessitates an undertaking to graze the land [as previously mentioned there is a commitment that the 2013 version will not mandate grazing]. The Open Spaces Society states *'although grazing may be preferred, it is possible to restore heathland without grazing it, and this requirement forces applicants to seek to fence land in order to obtain funding. Where it is common land, it is obviously undesirable to have to fence it'*[28].

h. The HLS handbook does not require the consideration of why the land is held nor whether the insistence on cattle grazing is **'reasonable'** in terms of the dominant tenement of the land holding by the local authority landowner, which in this case is public recreation or the public's rights to 'air and exercise'.

i. The HLS agreements prescribe the use of self closing gates for all gates[29]. This enforced interaction of horses whose innate natural characteristic is to flee is at the heart of equestrian objections to the introduction of grazing on equestrian access land. A self closing gate, to a horse, is a trap, closing. Whilst two way self closing gates are allowed under HLS invariably they are constructed as one way at the behest of the landowner, grazier or highway authority; unless a double box configuration is used [New Forest Box] with two way self closing gates, but this is rare due mainly to the extra cost and does not always result in better equestrian access as the experience on BW408 Pirbright shows [appendix 11 photo]. The specification only quotes BS5709 and therefore is not only not up to date but does not take into account that there is no British Standard for self closing gates. The BSI is therefore open to interpretation as to whether the construction it is suitable for its use. The standard of 1.5m clear gap for gates on highways is only a minimum with the positioning, construction and land form needing to be taken into account to meet the overriding requirement of such a construction in that it is 'suitable for its use'. It is our opinion that it may be that the gap needs to be much larger when the self closing speed is taken into account and for that speed and rate of closure to be sufficient not to be considered unsafe. The effects of self closing gates can be horrific as shown in

[27] NE andrew Mackintosh email 7th November 2011 appendix18
[28] OSS Kate Ashbrook email 3rd November 2011 appendix19
[29] HLS specification for capital works appendix 20

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the photos of Lotti 2011 and Verity's 2010 horses, [30] and by the poor girl who was knocked unconscious when her young horse was trapped in a self closing gate on Headley Heath in 2010. This incident was only two weeks after a meeting with Natural England, the local riders group, the BHS and the landowners [the National Trust] to look at the problems associated with self closing gates. The issues still remain unresolved. The gates specified are claimed to be 2.1m wide but this is, we believe, a manufacturers overall measurement including of the whole structure and not the free gap which is significantly smaller. It is time that Natural England ends its mandate of self closing gates. If they cannot provide a safe solution it should not give them a licence to implement a dangerous one.

j. HLS and Natural England do not differentiate between alternative grazing regimes. There is no acknowledgement as being suitable or relevant by Natural England of such schemes as focused intensive grazing. Parliament has already considered that it accepts mobile schemes in that it has sanctioned the 10%/10ha rule as being sufficient not to significantly reduce public access and has included it as 'exempt grazing' under s38 CA2006. This has been dismissed as being inadequate by the applicants and their paymaster. Surely the time to have contested this was during the Parliamentary process. If there is evidence that the exempt grazing rule should be adjusted for large commons then that should be put forward for consideration. This application restricts the fencing and gates to the plan supplied and cannot be moved.

k. There is no requirement to provide a quantifiable base line survey to measure the benefits of any HLS funding or the SSSI condition against the citation.

l. This HLS agreement does not have any legal internal agreement with the commoners and seeks to make payment to a third party [SWT Ltd] for statutory duty [SCC] both of which are, we believe, ultra vires.

m. HLS requires adequate and sufficient consultation and it is suggested the way the consultations were phrased, in particular the third, gave no real alternative to grazing. The resulting responses, especially from the hundreds of riders, were objections not support. No consultation, of what is now classified by the applicants as a pilot project to

[30] Photos of horses etc appendix 21

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acclimatise the public and its ramifications for its future extension over the whole common, was carried out.

8.0.0 The protection of public rights of access to any area of land;

8.1.0 It is important that this requirement refers to the area of land to be enclosed in its own right not as a percentage of the whole. It is significant in its own right [50ha and 10% of the whole SSSI]. Parliament has chosen to use the 10ha/10% maximum for exempt works under s38 as being insignificant in terms of the effect on public access. This proposal is ten times larger. It is therefore this area that needs to meet the **reasonable** test in respect to public access across the whole spectrum of user without favour or discrimination against any one group as a result of the introduction of grazing for six months of the year with the attendant gates.

8.1.1 It is insufficient to state that by just having a couple of gates that the public's rights of access have been protected, when in reality the imposition of gates, especially self closing for equestrians and the introduction of cattle in respect to dog walkers and equestrians into the area previously open and unenclosed, constitute obstruction[31] both physically and psychologically.

8.1.2 No Access or Equality Impact Assessment has been put forward as evidence.

8.1.3 Experience and anecdotal evidence from many grazing schemes from the Punch Bowl Hindhead to Headley Heath Surrey indicates that a reduction in equestrian access of 50% can be expected.

8.1.4 The British Horse Society's policy with respect to fencing and gates on equestrian common land was set in January 2011 being "that the Board at its meeting last week adopted the policy in respect of proposals re the fencing of commons as recommended by AROWAC".

"*The Society will object to proposals for the fencing of those commons to which equestrians have access where such proposals do not adequately protect and provide for access for equestrians. Any permission given for fencing should be time-limited.*"

[31] Conservation or obstruction a paper from Abbeylands October 2011 appendix 22

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8.1.5 My own experience in respect of the introduction of conservation fencing and the attendant self closing gates on the Punch Bowl Hindhead, Witley Common, Horsell Common Woking, Pirbright and Headley Heath Surrey indicates a major displacement can be expected of not only equestrians but also pedestrians, in particular dog walkers and parents with small children. The use of the Hindhead commons within the grazing enclosures when cattle and ponies are grazing drops to insignificant levels for these users and a significant increase in the use of the car parks around the national nature reserve on the adjacent Thursley common is noticeable. Whilst no in depth survey has been carried out, [and the change in weather would surely have an effect on the numbers of cars which have been counted over the last few years], use of the Thursley car parks show increases of up to 2000% over the period when cattle are present. Equestrian use of the Punch Bowl grazing areas has diminished so as to be statistically insignificant.

8.1.6 For horse riders the effect of the introduction of conservation grazing is a complex one and includes not only the psychological effect of the cattle on the rider but more importantly the horse. All horses react differently to cattle both in the open and when in close proximity, such as when cattle are moving out from rest behind bushes. The horse's natural characteristic is to flee. This is what happened to a BHS member on the Punch Bowl a few years ago resulting in the horse bolting home after dumping its rider and running through a cattle grid causing irreparable damage to the horse. This is not an isolated incident.

8.1.7 A recent report has been received on Royal Common, where SWT Ltd has been exercising exempt grazing, of a horse bolting after dumping its rider as a result of cattle cavorting along on the other side of the electric fence. Other examples can be given on conservation commons and of accidents to pedestrians where rights of way cross grazing pastures[32].

8.1.8 There is also a tendency for cattle to congregate near gateways[33] which will tend to dissuade riders and dog walkers from accessing the common or being able to get out.

[32] Horse and Hound 2008 appendix 25
[33] Photos appendix 23

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8.1.9 The enclosure scheme on Pirbright Common adjacent to Brookwood Cemetery is a very good example of displacement. Here New Forest Boxes were constructed on Bridleway 408 but not to British Horse Society standards, with two way self closing gates and a closing time of 2-3 seconds from 90 degrees. It is considered that the construction is not suitable for its intended use, acting as obstructions to lawful user and is therefore not to British Standard 5709. The effect of this is that, in general, riders no longer use the bridleway and choose to use a longer route on the vehicular highway. Riding in speeding traffic is felt to be less dangerous than using self closing gates.

8.1.10 A similar effect has been seen and reported on Ashdown Forest where because of the difficulties associated with a horse gate as part of the consented enclosure and fencing [s194], riders chose to use a non equestrian gate with a resulting fatal accident on the vehicular highway.

8.1.11 Similar reports were made with regard to the fencing and gates erected for conservation grazing during the 2010 stakeholder meeting on Headley Heath, Surrey with the local riders group, Natural England, the BHS and the National Trust.

8.1.12 There are no statutory methods of assessing or recording accidents caused by gates on rights of way or public access land. The nearest system available is RIDDOR under Health and Safety legislation, but this only records those accidents which result in hospitalisation or death of the rider or walker, not to the horse or dog. The HSE does make recommendations to land owners[34]It also relies on the landowner or manager making the report when they may be unaware of the incident or the legal responsibility to report it. There has been much publicity regarding accidents[35] on vehicular highways and public rights of way with a number of court cases[36] indicating that strict liability applies not only to the grazier but also to the landowner. It is our claim that the introduction of grazing onto open and unenclosed commons such as this, with the attendant fencing and gates, makes the landowner and Natural England wholly and severally responsible for strict liability. Without this project the likelihood of an accident to either the horse of rider as a result of fencing, gates or cattle would have been nil.

[34] HSE AIS 17EW
[35] Advice to countryside land managers Clive Williams Neath Port Talbot BC 2009 appendix 26
[36] eg Mirvahedy v Henley [2003 HoL 16], Hole v Ross Skinner [2003 civ774], Wilson v Donaldson [2004 civ972]

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8.1.13 Accident statistics can now also be found in the BHS gate accident statistics since the launch of the horse accident website[37] in November 2010. The latest figures [January 2012] report 41incidents with gates [to which such incidents as the fatality on the vehicular highway in the Ashdown Forest caused by displacement need to be added].

8.1.14 Injuries to horses are invariably caused by the gate furniture and the speed of closure of self closing gates[38]. Is it **reasonable** for riders to put themselves into such danger and for Natural England to insist that land managers cause it knowingly? Natural England and the landowners have a duty of care such that in respect to the gates and fencing "*the responsible carer must ensure, and take reasonable care to ensure, that* the project *does not put people in a position where they might reasonably foreseeably suffer some sort of injury*" and in respect to the Animals Act 1971 ***section 2(2)(a)*** is that "*the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe*"[39].

8.1.15 Is it **reasonable** for equestrians, dog walkers, the old and disabled[40]and parents with young children to put themselves in this danger or is it expected that they should give up their rights and go elsewhere?

8.1.16 Equestrians in particular have constantly objected to the present proposals since the first consultation with attendances of nearly 300 at three public open meetings called by The Cobham Riders Association in 2008,2009 and 2012; there was an overwhelming majority against the proposals.

8.1.17 The first occasion that anyone had the idea that this was only a first step – 'a pilot scheme' in the fencing of the whole common was in the application itself [12.9 Conclusions]. This was not disclosed or consulted on during the consultation process.

9.0.0 The protection of archaeological remains and features of historic interest.

9.1.0 This is not directly related to equestrian access but a recent application for fencing on Frensham Common [com 238 s23 NT Act] to protect a Bronze Age barrow sought to limit public access, including equestrian, due to access erosion. That common is part of the Thursley to Chobham SAC as well as being a SPA and a lowland heath SSSI. I can see no difference in the claimed erosion by the public [which has not been noted on Chobham

[37] www.horseaccidents.org.uk
[38] accident photos appendix 24
[39] Whippey v jones 2009
[40] Equality Act 2010

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common] and that which could be caused by the action of cattle on the Bee Garden, even though English Heritage seems to be unconcerned. Experience on Telscombe Tye with the introduction of cattle which was carried out with the blessing of English Heritage resulted in the complete trashing of the land form of the ancient and listed feature – the funeral road. It should be a serious consideration if cattle grazing is introduced.

10.0.0 Other relevant matters

10.1.0 The issue of displacement and the possible knock on effect on the discounted capacity attributed to the adjacent SANG should be of major consideration in respect to this application as should the avowed intention that this is a pilot project which will be rolled out in four years time over the whole of the 500ha of the SSSI.

11.0.0 Summary and Conclusions

11.1.0 Bearing in mind all the above we believe that SCC as landowners, and Natural England as the government agency for conservation and access, should reconsider the proposed scheme taking into account all the available alternatives to meet their duties and liabilities equally to both public access and to conservation.

11.2.0 We believe the outcome of granting consent to this application would not meet those duties, obligations and liabilities to equestrians or pedestrians especially dog walkers, children and the disabled.

11.3.0 We believe that there is a holistic alternative approach available to answer Natural England's dilemma. They need to get away from the 'one size fits all' doctrine of extensive grazing with the associated need for fencing and self closing gates. It could instead base the conservation management on proper scientific knowledge relevant to each area on this common and the UK in general. They could use revenue funding rather than capital funding to engage in a more mobile and focused management regime. Natural England must surely aim to reduce the possibility of displacement of user. Serious thought should also be given to carrying out a rigorous cost benefit analysis of the various alternative options and an assessment of ways to reduce the potential dangers and liabilities associated with strict liability whilst meeting the duties and obligations to the public across all appropriate legislative considerations.

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11.4.0 We ask you respectfully to dismiss this application.

Bob Milton MIPROW
On behalf of the
British Horse Society

16th March 2012