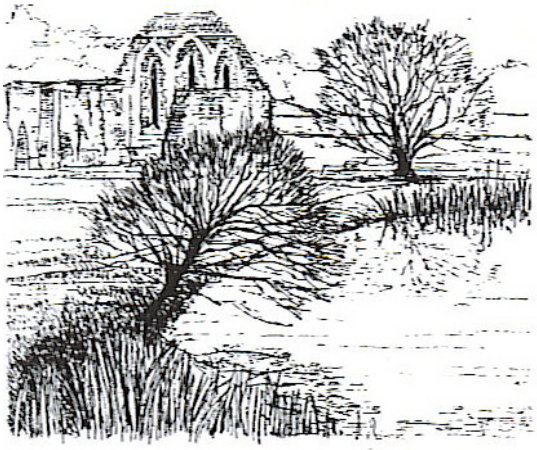

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Statement of Case

On behalf of Bob Milton with regard

to the s38 application for fencing and works on Chailey Common

1.0 Introduction

1.1 My name is Bob Milton, I am representing myself as an interested party having spent the last four years acting and negotiating on behalf of the Open Spaces Society until the final written objections to this application[1].

1.2 I am acting in a individual and voluntary capacity not withstanding I am a director of Abbeylands, a company specialising in public access matters. I am a full member of IPROW[2] and have a post graduate qualification in public rights of way and public access management. I have a diploma in landscape construction and have been a specialist designer and contractor for lakes and ponds[3] for thirty years. I am also a farmer with a flock of sheep and I breed horses. I have also acted on behalf of the CCPR as a statutory commissioner for Greenham Common for the last six years

1.3 This statement of case is by way of making sure all the criteria for s38 are addressed and that certain relevant matters are brought to the notice of this inquiry and the Secretary of State.

1.4 This application is made under s38 of the Commons Act 2006 as a result of the changes made by that Act to incorporate Schemes of Regulation under the Commons Act 1899 into the lawful consent regime not previously available under s194[4].

1.5 This application has been made by ESCC. The involvement of ESCC in this land is as a result of its notification as a Local Nature Reserve[5]. This application has been

[1] Objections 11th January 2008, 14th July 2009, 7th December, 15th January
[2] Institute of Public Rights of Way and Access Management ltd
[3] Royal Horticultural Society approved
[4] Law of Property Act 1925
[5] National Parks and Access to the Countryside Act 1949 PT111

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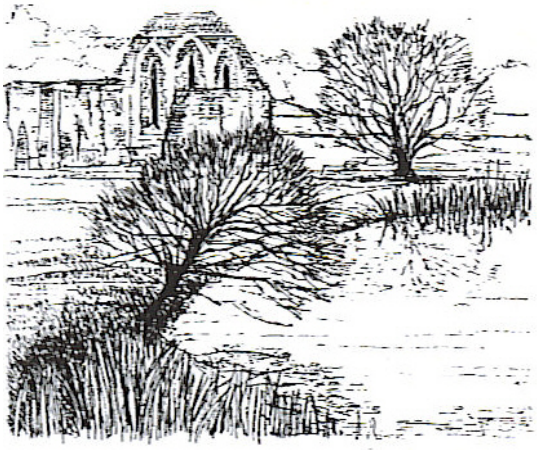

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validated by the Planning Inspectorate and the Inspector on the grounds that ESCC has the consent of Lewis District Council and this is sufficient in terms of the CA2006 for this application to be lawful.

1.6 I believe the inspector in incorrect in that whilst the consent of the landowner is required Lewis DC is only the occupier of the land under the Scheme of Regulation and has no power to agree any disposal or to delegate the Councils legal duties and liabilities to manage the common as set out in the Scheme where the dominant tenement is public recreation.

1.7 The Commons Act 1899 only gives choices as to involvement in the Scheme for interested Authorities[6] to contribute to the expenses. The Act does not allow the delegation of its duties. Therefore I believe, the consent relied on to validate this application is unlawful

1.8 The same applies to the delegation of enforcement powers under the bylaws[7] to the Local Nature Reserve management committee and the Parish Council. The Scheme only allows for the appointment or employing officers not for the wholesale delegation of powers, duties or liabilities to other bodies.

1.9 It has also been stated by Mr John Crawford[8]that the payment of monies to the LNR Management Committee is not as a result of delegation of duties but separate funding under the 1966 LNR agreement through other powers available to the Council and not in respect to the Scheme of Regulation and Management.

1.10 This leads me to deduce that the position of the LNR and ESCC's agreement is at odds with the CA1899 and the Scheme and is not lawful in that LDC had no power to enter into such agreement ie a disposal as a result of being in possession of the land for the purposes of the Scheme. Nor do I believe that the agreement is in force requiring as the Act does[9] for the agreement of all the landowners, lessees and occupiers. LDC as an occupier could not by Act of Parliament give its consent nor

[6] s5 Parish Councils, s12 other District Councils
[7] Bylaws 1973
[8] email 24 February 2006
[9] National Parks and Access to the Countryside Act 1949 s16

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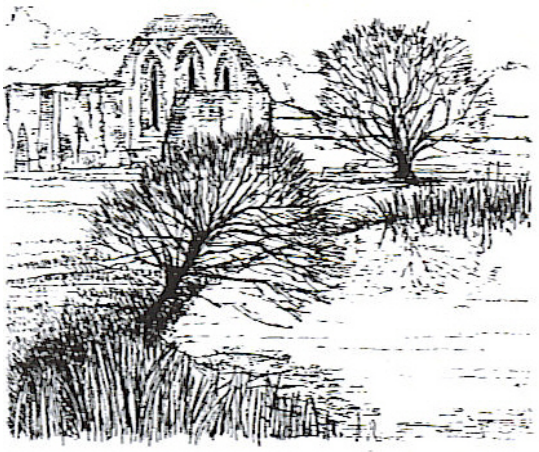

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did the other occupiers – the commoners, who have a legal interest in the land by way of all the herbage. The original agreement signed to by the then owner was in effect terminated by the sale of the unencumbered land. Again the new landowners have I believe not signed a new agreement.

1.11 I have found no evidence to support the suggestion that the declaration as a local nature reserve under the 1949 Act imparts any registerable legal interest in the land. In my opinion the declaration is by agreement and as such could only be considered a management contract. This is I believe supported by the powers set out in s17(1) and (2)[10] for the compulsory acquisition ie the legal 'interest in the land' only if they cannot conclude a reasonable agreement. The implication is that there is no legal interest unless compulsorily acquired.

1.12 Likewise I can find no precedent for the restriction of any rights granted under the Scheme of Regulation as I have been reliably informed has been muted by ESCC officers to equestrians. There is no reason to believe that those rights granted to the neighbourhood do not include equestrian access as set out in s5 of the Scheme subject to bylaws. The earliest bylaws[11] restrict equestrians who ride dangerously, which by implication shows that those rights exist.

1.13 The bylaws also refer to offences under s193 which implies that s193 applies. In the case of ex parte Billson 1998 'air and exercise'[12] was deemed to include riding as the powers to exclude where there and so the rights where inherent in the Act. The same logic applies here for Scheme.

1.14 The 1949 Act and the subsequent extension of the definition of 'nature reserve' in the NERC 2006 Act explicitly exclude people who cannot be bound by the agreement. This would apply to all easements and those with a legal interest in the land eg the commoners, as well as rights of access granted under the CA1899 which is now defined as the public at large. The reference to the management of the land

[10] 1949 National Parks and Access to the Countryside Act
[11] 22nd October 1953 repeated in the 1973 version
[12] S193 Law of Property Act 1925

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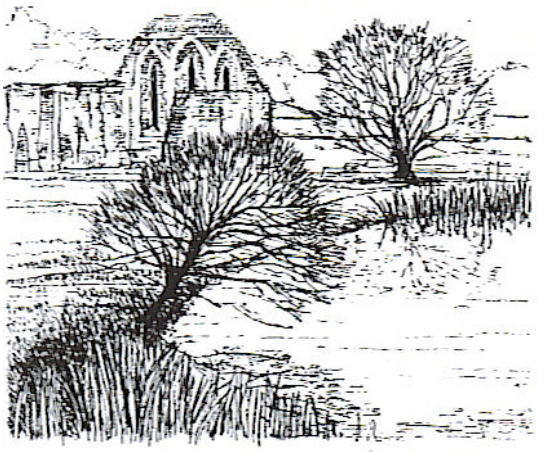

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for recreational purposes [13] applies only to land which has been so notified and is subject to a management agreement under the 1949 Act.

1.15 It is therefore my contention that no lawful consent under the CA1899 has been made and as such the application by ESCC is invalid.

1.16 It is perfectly possible for LDC to have made this application as part of a management plan that meets all the statutory ecological legislation within the terms of the Scheme of regulation and management. This would though require a management plan to meet all of the requirements of the Scheme for all the land covered by the Scheme. This does not exist nor does the LNR cover the whole of the area. The present nature conservation plan and the LNR management committee who implement such a plan have no remit under the LNR declaration for maintaining or enhancing public recreation which is the dominant tenement of the 1915 Scheme.

1.17 It is also the case I believe that no moneys can be paid under HLS which is the only funding which seems available to ESCC as they have no legal interest in the land. Such payments and those under existing Countryside Stewardship to ESCC would be ultra vires as ESCC is no more than a contractor and LDC has a duty of care to see that the contract for works on the common are completed correctly and give good value and meet all the councils legal obligations and liabilities.

1.18 This is especially important in the proposed regime given the recent case law surrounding the Animals Act 1971[14] [see section ? below]. Given the fact that this application could have been made by Lewis District Council as the vested occupier in possession of the land I have addressed the detail of the application as if such an application had been made with the proviso that I believe that the present application is invalid and the application does not form part of a relevant management plan for the whole of the land incorporated in the Scheme of Regulation.

2.0 Statutory criteria

[13] schedule 11 NERC 2006 K Hewitt s15.3
[14] McKaskie v Cameron 2010, Mirvehedy, Hole v Ross Skinner and Wilson v Donaldson

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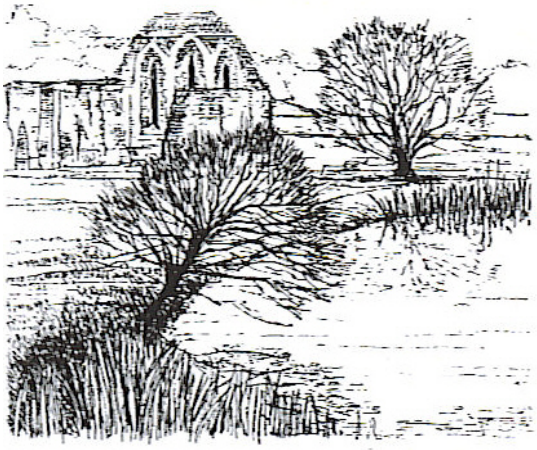

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2.1 The relevant criteria for this application are set out in s39 CA2006

a) the interests of the persons having rights to or occupying the land [in particular persons exercising rights of common over it]
b) the interest of the neighbourhood
c) public interest which includes:
    1. nature conservation
    2. conservation of the landscape
    3. protection of public rights of access to any area of the land
    4. protectin of archaeological remains and features of historic interest

2.2 In applying these statutory criteria we are informed that the Secretary of State will consider [15] whether the proposal is the best possible outcome [s2] across all the areas of consideration and the subservient consideration set out in s3. This application and the objections shows there are unresolved conflicts which will have a lasting effect on the stated considerations of the Secretary of State.

3.0 Assessment

i) in the interests of persons having rights in relation to, or occupying the land…

3.1 The effect of providing what is internal fencing to form paddocks across the common and unnecessary access restrictions to easement holders and will be a barrier in places for the management of drainage and utilities.

3.2 The proposals whilst perhaps provide safe access for commoners on the majority of the common will in effect exclude some areas from the common completely by no longer being accessible or being outside of this very restrictive management regime.

3.3 These proposals will have a significant effect on a number those with private rights of access as has been shown by the number of objections to this effect.

3.4 The proposed fencing and gates coupled with the exclusion of parts of the common from this habitat restoration scheme has the effect of limiting the public's rights as set out in the Scheme of Regulation 'of free access to every part of the common'.

[15] Common land consents guidance july 2009 ESCC tab3

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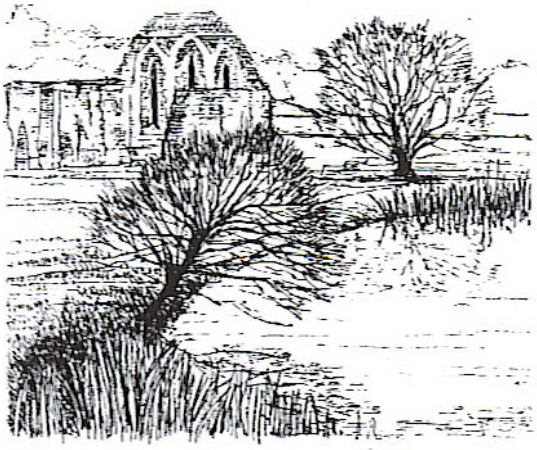

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This is being done by the provision of non boundary fencing and the use of access restricted gates and grids so as to cater for only a part of those members of the public who have rights. Such restrictions affect both the disabled and the equestrians.

ii) the interests of the neighbourhood

3.5 The question asked by the guidance is will the works add something that will positively benefit the neighbourhood. It has been argued by the applicant that the grazing will be a positive benefit but grazing could have been and could still be carried out by right of both the commoners and the landowners without the fencing. It is also true that past management in the 50's, 60's and early 70's managed to maintain the open and unenclosed heathland in what could only be considered an ideal landscape without grazing. There are many commons with all the considerations of Chailey that manage to incorporate all the conflicting considerations without internal fencing. Probably the best example is Minchinhampton common in the South Cotswolds.

3.6 This example has no internal fencing main road, cattle grids into the town, a golf course which is unfenced, and all private access are either gated or cattle gridded where the access enters private land. It has minimal accidents with cars as the roads are not bounded by scrub or trees where cattle can not be seen those that it does have are I am informed late at night with other factors having a major effect.

3.7 It is also important to consider whether 'the existing benefit is being protected rather than any additional benefit'[16]. In the decision of the Secretary of State on the 1998 application to fence Chobham Common he felt that the internal fencing which was similar to this did not meet these criteria.

3.8 It was also shown in the Secretary of States decision that a ten year grazing scheme on Odiham common [2005] did not show sufficient conservation benefit to override the detriment to the landscape of the internal fencing and refused to renew the consent.

[16] Counsels opinion DoE May 1984

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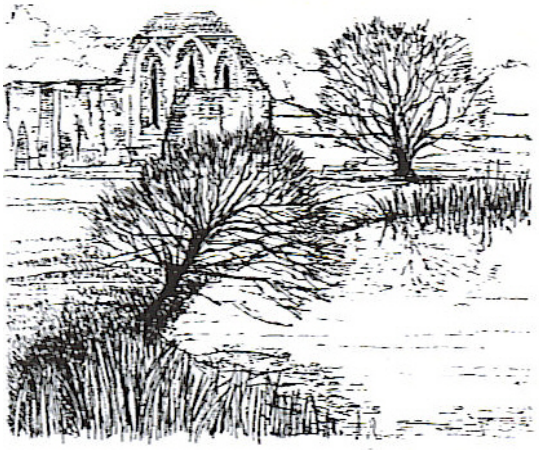

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iii) the public interest

3.9 This application majors on part of the considerations of the Secretary of State being the introduction of grazing to fulfil Natural England's unbending insistence that they feel that they can not meet their objectives without that is despite there being no quantitive science that those objectives can not be achieved without. In this case there are rights of common so grazing could have been introduced at any time since ESCC commenced management. It was not. Nor has there really been a concerted effort to manage the conservation requirements of the common without grazing by ESCC through sufficient resource allocation.

3.10 There is no management plan to deal with all the scrub and secondary woodland on the common. The plan only applies to the LNR declared land and not the whole common and even within the LNR the managers have been selective and do not seek to recover the lost heathland habitat. Which it seems should be considered in terms of the landscape as a whole.

3.11 The public's rights are set out in 3.4 above. It is the exclusion caused by the fencing, gating and cattle grids to some members of the public in the exercise of those rights [equestrians and pedestrians] that is the major objection in this section of the considerations of the Secretary of State. I do not believe that Natural England officers and advisers have viewed this project sufficiently from the public access point of view. They have I believe been blinkered by their own internal funding agreement with government and have over ridden their own remit for public access in the rush to meet the SSSI target and to spend EU CAP modulation monies.

3.12 This project has nothing to do with the re introduction of a sustainable grazing system for the commoners in fact I have seen no evidence of any legal agreement with the commoners with regard their legal interest in the land or how this project with affect their rights to the single farm payment.

3.13 The inclusion pedestrian only gates, when there are equestrian rights, is unacceptable. It is also unacceptable that there is no specific provision for disabled access through all routes in line with the provisions of the Disability Discrimination Act 1995 [as amended]. I find no evidence of the dedicated disabled consultation as required by the legislation.

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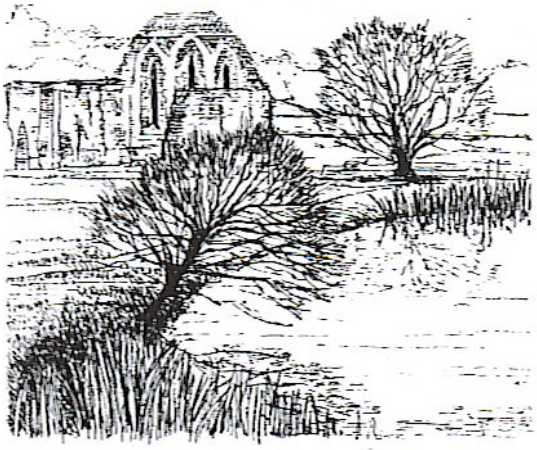

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3.14 The dangers and the obstruction associated with self closing gates and cattle grids are such that they are a major problem with this scheme especially to equestrians. I is not acceptable to grant consents where the outcome is detrimental to any particular user.

3.15 It is also in the public interest to see that all unlawful works on the common are included in this application in line with that set out in sheet 5 of the PINS guidance for works.

Where works have been constructed without consent under section 38, where such consent was required, you should seek consent for the existing works and for any new works proposed.

We see from the application that ESCC has included the height barriers erected not so long ago by the NCFH ltd to protect against certain vehicles using the common as an illegal camping site. What we do not have included is the construction and surfacing of the car parks or the works for the playing fields and the construction of the sports pavilion.

3.16 The impact on the landscape of the internal fencing will be considerable changing it for ever as not only will the fencing be obtrusive to the eye and divide the view but it is stated that the land outside and around the edges will be left to grow and revert to woodland. This in effect will create a fence some 10/15m wide and as high removing to views across the common.

3.17 It was also stated that the verge will be kept clear. One presumes this is as result the highway authority input to this project. Yet there is no highway verge nor is it highway waste it is manorial waste common land. The liability is with the occupier Lewis DC or their manager to keep the vegetation clear of the highway. This has not been considered by ESCC in their management plan and LDC has no management plan

iv) any other matter considered relevant

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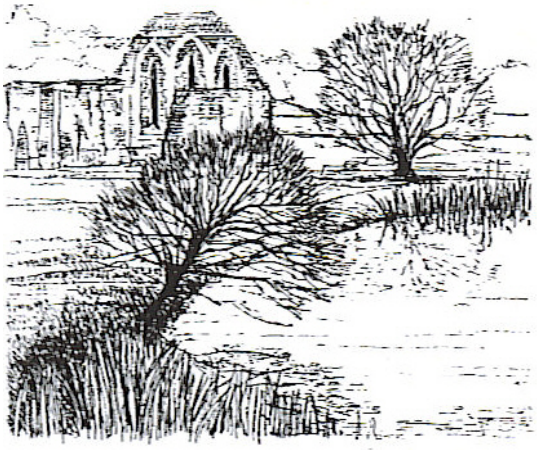

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3.14 I believe that the issue of the management of the common at large and the enforcement of regulations and bylaws is a serious consideration and has been missed. At present there are no bylaws for the Local Nature Reserve agreement even if it was a lawful agreement. As far as those powers and duties to enforce the bylaws under the Scheme are concerned I believe the delegation to the LNR management committee and the parish council to be unlawful.

3.15 I also believe that there is insufficient awareness and consideration of the impacts of the Animals Act 1971 as to the effect on status of internal fencing and the liabilities expounded in recent case law and the advice of the Health and Safety Executive[17]. These liabilities lie with Lewis District Council and ultimately with the landowner. Even though there is a derogation under s8 for commoners and landlords grazing open and unenclosed commons for accidents especially on the highway this will be removed for those areas outside of the internal fencing by voluntary restriction of that derogation caused by the construction of the internal fencing and there will be a perception by the public that there will be no grazing outside of those areas.

In consideration of all the arguments put forward by myself I ask you to dismiss this application. If the Secretary of State is minded to grant the s38 application then I would ask that the legal issues as to liability, gates and private access be dealt with as a condition and that the consent is time limited to coincide with the funding regime of ten years so that a proper scientific assessment as to the benefit of the extensive grazing can be made. It should also be a condition that any management plan for the common should include all the areas of the common excluded from the fencing regime in line with the dominant tenement set out in the Scheme of Regulation for public access

Bob Milton

[17] Agricultural information Sheet 17 EW

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