IN THE MATTER OF AN APPLICATION FOR RESTRICTED WORKS ON LAND AT CHOBHAM COMMON, SURREY

APPLICATION REFERENCE: COM 231

OUTLINE CLOSING SUBMISSIONS FOR THE CHOBHAM COMMON DEFENCE GROUP

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n.b. "XX" refers to cross-examination

1. In these outline closing submissions, we will address first the central issues this application, second the statutory tests and finally, other issues which have arisen during the course of the public inquiry.

Issues

2. The principle issues were helpfully identified by the Inspector in opening the inquiry as being:
    a. Whether grazing in the manner proposed is the best possible solution;
    b. The effect on access.

3. The subsidiary issues between us and the Applicant are:
    a. The purpose of the application;
    b. The necessity of grazing through enclosure to the management of lowland heath;
    c. If grazing cannot be achieved without enclosure, appropriateness of the number, spread and location of enclosure;
    d. Compliance with the statutory tests;
    e. The relevance of the Secretary of State's decision over the site in 1998;
    f. Compliance with Regulation 61(1) Habitats Regulations 2010.

4. My client does not adopt an absolutist position and accepts the necessity of measures to be undertaken to restore the heathland over the Common to a favourable condition. They have engaged as fully as possible with all consultation forums and exercised their rights to make full representations to the Secretary of State on the occasions where her permission has been sought and have been professionally represented on both those occasions. Finally, they have carefully considered this Application and the evidence base upon which it rests and have resolved to object to the granting of the Application after careful thought and seeking both legal and scientific advice.

Issue 1 – The purpose of the application

5. The purpose of the application is of critical important to determine whether the proposed high level of enclosure is justified on objective evidence. As the Defra Guidance[1] makes clear that to achieve the Government's policy aims, prohibited works should take place on common land *"… where they maintain or improve the condition of the common …"* (para.3.4)

6. The Applicant presents the works as "necessary" to the management of Chobham Common (Applicant's Statement of Case – para 3.21), but a closer interrogation of the evidence reveals a subtly different position.

7. Dr Alonso's evidence is revealing where she states that:
    a. *"For the duration of this proposal, the enclosures will make a small contribution to improving the condition of the site. However, the relevant units (nos. 3, 18, 19, 21, 23) will not change into favourable condition as a result, since the area covered is very small in relation with the site total extent (sic)"* (IA Proof para. 1.35).
    b. That appraisal was confirmed by Dr Alonso in XX and, Dr Day in XX agreed with Dr Alonso's assessment.

[1] Defra Guidance: *Common Land Consents Policy Guidance* (July, 2009)

8. However, under re-examination Dr Day accepted the formulation put to him by Mr Boyer that “some conservation is better than none” and under cross-examination Dr Alonso suggested the application was not “necessary” to the management of the common rather would merely “help” management. This is an extraordinary assertion and when coupled with Dr Alonso’s written evidence that the relevant units of common will not change into favourable condition as a result of the prohibited works, concedes that the proposal is a poor proposal for conservation and consequentially this application must be refused if this is the purpose (Defra Guidance para. 3.6). At the least, it demonstrates that a considerably better options exists for conservation and the application must therefore be refused for this reason also.

9. However, cross-examination has revealed the purpose is truly two fold:

    a. First, the familiarisation/acclimatisation of the public to grazing cattle;
    b. Second, a trial to demonstrate the benefits of grazing.

10. That purpose is re-enforced in evidence:
    a. *“The objective of these enclosures is not to demonstrate the effectiveness of grazing … rather to allow the Common users to familiarise themselves with the animals and show them what a difference they make in the vegetation appearance”* (IA Proof at para. 1.34)
    b. The proposal is intended to *“habituate the users of the Common to the presence of animals …”* (JD Proof at para. 2.67).
    c. *“… contribute to raising awareness of the benefits of grazing among the users and other interested parties”* (IA Summary Proof at para.W)
    d. *“…whilst acclimatising users of the Common to the presence of cattle”* (DB Proof, para.5.17);

11. The purpose of the Application is a material consideration in resolving whether to grant consent under Section 38(1). Acclimatising the users of the Common to the presence of unwelcome enclosure is a purpose quite contrary to statutory considerations. Furthermore, it does nothing to promote the policy objectives established by the Secretary of State in the Defra Guidance as:
    a. *Safeguard commons for current and future generations to use and enjoy;*
    b. *Ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected.*

12. Whilst the third stated policy aim of the 2006 Act is to *"increase the number of SSSIs in favourable condition"* that can only be based on a robust and credible scientific evidence base. It is incumbent upon an applicant who relies upon this policy aim to restrict public access to provide such an evidence-base before a public inquiry, together with a fully drawn-up methodology and baseline survey data of both habitat, fauna and user groups. It is no answer to suggest this material might be available to the Inspector if wished to see it (note suggestion of Mr Boyer in re-examination of Mr Boddy), as it has not been made available to properly interested parties to cross-examine the witness who supplies that material as to appropriateness for the task.

13. The acclimatisation of users of the common to cattle is therefore not a lawful reason to grant prohibited works which propose to enclose ten large areas of common land in addition to the enclosures already enjoyed by the Applicant under the tolerances of the exemption order.

14. The Application therefore hinges on it being a scientific trial to conduct research to be published or put to some other purpose (IA XX). We say this suggestion is incredulous for the following reasons:

    a. First, there is no methodology with objectively assessable targets, even in draft form, before the inquiry as a basis to

undertake this research. Consequentially, the Secretary of State cannot be satisfied a sufficiently scientific approach will be taken and that in four years time a credible evidence base will be available for public examination. For that reason it would not be possible to grant the application subject to a condition that it be carried out in accordance with an unseen methodology as all conditions must be "necessary, relevant, enforceable, precise and reasonable".[2] It goes without saying the minutes of the 18th October 2011 Chobham Common Liaison Group supplied by the Applicant as a methodology, is a wholly insufficient inadequate document upon which to determine this Application. In particular, it is not provided by Jonathan Cox Associates it is merely a minute taken by an unknown person as to what was summarised to a liaison group in a presentation group. There is no indication, for example, whether this is what is to be done over the Common or whether the options are even financially viable. We are uncertain of these important matters, as a consequence of the Applicant's failure to provide the document to the inquiry and a representative from Jonathan Cox to be cross-examined. No weight should be attached to these minutes as a methodology.

b. Second, there is no baseline survey of the vegetation in either the proposed grazing or control enclosures;
c. Third, there is no survey of the reptile, invertebrate or wildlife in the sites by which the bold claim that biodiversity will be improved in four years can be assessed;
d. Fourth, the Applicant has remarkably failed to supply any evidence (beyond the very anecdotal and oral) as to the effectiveness or otherwise of the grazing undertaken between 1993-2000 and throughout the exempt enclosures;
e. Fifth, no explanation is given as to how four years is an appropriate time frame to observe reliable results.

[2] PINS Guidance Sheet 6: *Possible Modifications and Conditions (attaching to a section 38 consent)* Paragraph "A – General Principle.

Issue 2 - The necessity of grazing in enclosure

15. It is the Applicant's case that the Common is in an unfavourable condition due to the spread of *Molinia* grass and that the best way to control its growth and restore lowland heathland to a favourable condition is via grazing. (IA confirmed in XX)

16. The Applicant conceded in evidence that its Application is predicated on the necessity to graze via enclosures to achieve a lowland heathland in a favourable condition. If grazing is not necessary to achieve a favourable condition of the heathland at Chobham Common (or a more appropriate management tool(s) exist) the purpose for the Application falls away and it must surely be refused. (IA confirmed in XX).

17. We submit on any sensible reading of the evidence, it has not been demonstrated that the grazing regime is necessary to the restoration of the land to a favourable condition.

18. There is a porosity of research as to the success of grazing in achieving that aim (IA Scientific References, Tab. 7., para.8.2.2.). Dr Alonso conceded that there is a lack of research published in scientific journals but choses rather to rely the anecdotal evidence of heathland managers. It is notable no objective evidence is before the inquiry as to its success from the managers at other sites or, indeed, at this site during the previous periods of extensive grazing. It is wholly implausible therefore to conclude that the effectiveness of grazing is *"clearly established"* (IA Proof, para.1.34). It is consequentially utterly unsatisfactory to enclose ten areas of common land on the basis of such weak evidence.

19. Dr Day in re-examination accepted the formulation of Mr Boyer that whilst little is known about the impacts of grazing in lowland heath as little is known about the effects of prescribed burning. This forgets that

prescribed burning does not require enclosure and that there is a strong policy presumption against the Applicant in granting an application for prohibited works of this kind (Defra Guidance para.3.3 *"ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected"*). Therefore, if there is equally little known about two management techniques, policy dictates the managers of common land should trial all those methods which do not require enclosure first which, of course, they have not done or supplied any evidence of such a trial at Chobham Common or elsewhere.

20. The Applicant has repeatedly conceded in evidence that grazing alone is unlikely to produce the condition required (IA Summary Proof, para. R; IA Proof para.1.29) and is, at best, a "complimentary method of management" (IA Summary Proof para. V; IA Proof para.1.36). Mr Adler, an experienced heathland manager, accepted in XX that the outcome of these proposed works will not result in the removal of *Molinia* grass altogether and that the tussocks will remain. Mr Adler helpfully confirmed that there was no intention to graze to the point of removal and that in his opinion there access to these sites only "might" result from these works but that access remained a matter of "personal judgement".

21. Grazing does have the potential to have *"very pronounced effects on the populations of heathland invertebrates, many of which are vulnerable or endangered"* (IA Scientific References, Tab. 7., para.8.3.2) and that *"reptiles are vulnerable to damage"* (IA Proof para.1.19). In XX Dr Alonso accepted there is an equal impact on invertebrates and Dr Day accepted in XX that he has seen no survey data of the reptiles, invertebrates or other wildlife at the control enclosures.

22. Furthermore, the author's of English Nature's thorough study *Impacts of Livestock Grazing on Lowland Heathland* (IA Scientific References, Tab 7, para.8.1.7.) identify four negative impacts of grazing:

    a. **Increased human activity** – leading to trampling of vegetation, disturbance of animals etc;
    b. **Fencing** – which may restrict the movement of larger vertebrates;
    c. ~~**Supplementary feedings** – forms an input of nutrients into the surrounding soil;~~
    d. **Water troughs** – concentrate livestock activity and increase wetness of the surrounding area.

23. Dr Alonso conceded in XX there is potential for three of those impacts to occur. Mr Adler confirmed in XX that it was his presumption that anything up to 10 cattle would be grazed in each of the proposed five grazing enclosures. This would require, in his experienced view, up to four after troughs to be filled twice weekly. The effects of water troughs on the surrounding areas as identified by English Nature (Applicant Bundle 6 Tab 7, para. 8.1.7) should therefore be afforded some considerable weight.

24. The Applicant concedes the potential for *"negative interactions between livestock and the public"* (JA Proof, para.6.13 and 6.16). The Applicant's answer is to (1) remove unsuitable cattle; (2) erect prominent signage; (3) rely on the fact the public can chose to use other parts of the common. We say this is a unsatisfactory for several reasons:

    a. Whilst the Applicant purports to have undertaken a risk assessment it is not before the inquiry in evidence and should therefore be afforded no weight. In particular, there is no evidence that the Applicant has considered the impact on disabled users, those with young children, those with dogs and riders.

b. Even if everything is done to minimise the potential for "negative interactions" the public perception of risk is still very real and will effect their use of the common in the way in which they are accustomed (JD confirmed in XX);

c. The Applicant concedes this point but suggests that the public have alternative routes. This is wholly inconsistent with Defra policy to only permit works which benefit the neighbourhood and refuse those which interfere with the use and enjoyment of the land as a whole (Defra Guidance para.3.9.2);

d. The Applicant buttresses this argument by pointing to the fact the enclosures are not crossed by any bridleways or "agreed horse rides". This forgets that the whole common benefits from the protection at Section 193 LPA 1925 which, following the decision of Sullivan J. in *ex parte Billson*[3] protects rights of air, exercise and horse-riding.

e. In any event, the Applicant has not conducted any survey of the use of the land with properly categorised sections to separate out walkers from horserisers from other recreational users (e.g. model aircraft). In XX the Mr Boddy suggests the Applicant has had recourse to the data collected by English Nature as to the impact on the TBHA SPA, yet this, again is not before the inquiry;

f. Finally, the Applicant purports to have conducted an assessment as to the impact on the disabled, elderly or those with young children of this proposal. Both Mr Boddy and Mr Adler helpfully confirmed to the Inquiry that such an assessment (in the form of an Equality Impact Assessment) has been undertaken but also confirmed it was not before the inquiry. No weight should therefore be afforded to this matter as it has not been demonstrated in evidence that (1) the impacts on protected groups has been properly assessed and quantified,[4]

[3] *R v SSETR ex parte Billson* [1999] QB 374.

[4] In a properly sound manner using, for example, the form supplied by the Equalities and Human Rights Commission.

(2) how they could be mitigated and (3) what measures have been taken to minimise/avoid the impact prior to the making of this application.

25. Dr Alonso praised in aid a number of benefits of grazing (IA Proof, para.1.30). We say those outcomes can equally be achieved by a combination of burning and cutting which do not require enclosure:
    a. … controls invasive species such as weeds, scrub, bracken and purple moor grass (IA and JD confirmed in XX that burning is more effective in the short-term and the removal of *Molinia* growth);
    b. … removes nutrients from the system, thus contributing to restricting the opportunity for invasive species to establish (JD confirmed in XX burning is more effective and that grazing without cattle moving off the heath to produce dung does little to remove nutrients – JD also confirmed in XX that there was no plan as part of this Application to remove the cattle off the heath or allow them to move to woodland).
    c. Whilst Dr Day was quick to point out that a one-off burn is not the answer to tackling *Molinia* grass, he conceded a one-off graze is not the answer either (JD in XX). Coupling this with Dr Alonso's concession in XX that burning is cheaper than grazing which relies on the HLS (and that if this is removed the SWT would have to go cap-in-hand to members) reveals this Application to be a wholly unsustainable option.

26. The Applicant also suggests only grazing can achieve a *"mosaic of micro habitats".* This is wholly unsupported by evidence as confirmed by the extensive research commissioned by (the then) English Nature (IA Scientific references, Tab 7 para.8.2.2.)

27. The Applicant dismisses the well-established management tool of prescribed burning and mowing, which of course, do not require enclosure of common. We find this analysis flawed:

a. The Applicant already concedes burning is a legitimate management option (IA Summary Proof, para. M);
b. The Applicant also concedes prescribed burning is suited to many situations, is cheap removes nitrates and above ground biomass and control trees and scrub (IA Proof, para. 1.19);
c. The Applicant however, notes that burning is not acceptable in *"urban or suburban sites"* (IA Proof, para.1.19) but Chobham Common is neither as IA confirmed in XX;
d. The Applicant also suggests burning is high risk if not controlled (ref above), yet also over-grazing has serious implications for biodiversity. A prescribed burn would be carried out by SWT who are professional land-managers (IA and JD confirmed in XX);
e. The Applicant has suggested burning is inappropriate due to the proximity of the M3 motorway. This does not however, rule out burning on other parts of the Common and cutting the sensitive sites, as indeed the Applicant concedes is a proper mixed method of management (IA Proof para.1.19). Further it ignores the fact that a carefully controlled burn can send smoke vertically thus avoiding sensitive sites (GE re-examination);
f. The Applicant accepts that to produce the required condition a *"combination of techniques"* is required (IA Proof para.1.29). Yet at no point has the Applicant considered conducting these alternative management techniques at the site first before making an application for prohibited works on a sound evidence base (DB confirmed in XX). There is certainly no evidence before the inquiry demonstrating other techniques (which did not require enclosure) failing before moving to consider this extensive enclosure of common land. It is an unsatisfactory answer to rule out such an approach on the grounds that it is "not consistent" and thus unscientific (DB re-examination by Mr Boyer). This is because conducting scientific trials is not among the stated policy objectives of the Secretary of State (Defra

Guidance, 2009, para 3.1 *et seq*.) whereas ensuring that *"the special qualities of common land, including its open and unenclosed nature, are properly protected"* is a prime objective.

28. The Inquiry heard evidence from Mr Geoff Eyre an experienced heathland manager as to the methods he has successfully used to restore heathland shrub. He has had extensive experience for restoring heath using the "Eyre Method" and provided unchallenged evidence that this could be achieved by machine and the use of herbicides (GE Proof, para.3.1.2). Mr Eyre further provided some approximate costing of this method which were not challenged (GE Proof, para. 5.1.2.)

29. Mr Eyre helpfully advised the negative effects of grazing (GE Proof, para. 4.1.3.) and the pertinent animal welfare issues of requiring cattle to graze *Molinia* grass for an extended period (GE, evidence-in-chief).

30. It was put to Mr Eyre that he did not have the appropriate expertise of lowland habitats compared with the uplands. Mr Eyre explained that he had worked on lowland sites which contained protected species (in Bedfordshire, Devon and Exmore) and explained that he had used the "Eyre Method" on these sites with success (GE in XX and then in re-examination).

31. It was further put to Mr Eyre that his research has not been published in scientific papers and, that further he had not adopted an appropriate sampling methodology to determine the habitats and wildlife present on Chobham Common (GE in XX). It should be noted that the Applicant has not been able to point to any objective (let along scientific) evidence base as to the effectiveness of grazing in lowland heath. Furthermore, the Applicant has failed to supply the inquiry with any baseline vegetation data or survey data of the proposed grazing sites. It should be borne in mind that the Applicant's method requires extensive common land to be enclosed whereas Mr Eyre's method does not. Furthermore, Mr Eyre produced evidence of the success of

his method which has not been challenged in evidence by the Applicant.

32. It was finally put to Mr Eyre that he was ignorant of the law relating to burning and that little weight should be attached to his evidence as a consequence (GE in XX). It should be noted that the Applicant relied, to further this point, on the definition of the "burning season" contained at Regulation 2 Heath and Grass &c. Burning (England) Regulations 2007 which defines the season outside the uplands as "1st November in one year to 31st March in the following year" in apparent conflict with Mr Eyre's proof at para.2.1.8. Mr Boyer neglected however to take Mr Eyre to Regulation 7(1) which permits any person to apply to Natural England for a burning licence outside the burning season if the conditions in Regulation 7(3)(b) are met. These are that the burning is "necessary or expedient" for:

> *"The conservation, enhancement or management of the natural environment for the benefit of future generations …"*

33. In re-examination Mr Eyre helped the Inquiry by confirming that burning would achieve these aims and, that furthermore, he was well aware of the Regulation 7(1) process of burning licences and had applied for many hundreds during his long career in heathland management.

34. For the foregoing reasons it is submitted the Applicant has failed to demonstrate that the same outcomes cannot be achieved by other methods of legitimate lowland heath management, which do not require enclosure. The Application must therefore be refused for this reason alone.

Issue 3 – The quantity and length of enclosure

35. The Applicant has accepted grazing is only part of a series of techniques (IA confirmed in XX) and, references the English Nature report which indicates the porosity of research as to its effects. In

particular the Applicant concedes grazing is merely a complimentary management tool to burning and mowing (IA confirmed in XX).

36. There is therefore no rational explanation as to why a combination of management techniques could not be employed to restore the common. It is utterly un-scientific to propose one method (grazing with enclosure) without having first trailed the formed. It is no answer to suggest this will take too long (as IA explained in XX) because common land should not be enclosed unless there is a very sound evidence base as to why and there simply is not such an evidence base in to support this Application.

37. In particular, the Applicant has advanced no evidence to demonstrate it has mitigated the extent of enclosure with other methods.

38. The Applicant has alighted on five large areas of common to be enclosed during the peak periods of public use for a seemingly random period. David Boddy submits four years was “chosen to be sufficient” (DB Proof, para.5.17) yet offers no more evidence, beyond relying on a consultation exercise (DB in XX) which, in any event, has been heavily criticised by the inhabitants of the neighbourhood (Proof of Evidence of Mr Peter Higgs p.3). If large areas of common are to be enclosed the public have a right to know the reason for the length.

39. Coupling this with the total lack of scientific method and objective targets, there is no way interested inhabitants of the neighbourhood can tell in four years’ time whether this proposal has been a success. As Dr Day put it in his re-examination by Mr Boyer only “some” results will be available in four years, he makes of course no undertaking as to what these will be and when considering there has been an lack of any baseline vegetation evidence before the inquiry is likely no results will be visible or, even if visible results are available, there is no way they will be comparable to what is there now as no baseline data is before the inquiry to be tested.

40. Extreme caution should be placed on the undertakings of the Applicant that an appropriate method and monitoring will be employed. It will be recalled the common had been grazed from 1993-2000 together with the exempt enclosures and yet the Applicant has not submitted any objective evidence (beyond the most anecdotal recollection of managers in oral evidence) as to the effectiveness or otherwise of those periods of grazing.

Issue 4 – Statutory Tests

41. Section 39(1) sets out the criteria the Secretary of State is to have regard when resolving to grant consent. We focus on three:

The Interests of the Neighbourhood

42. The Defra Guidance at para.3.9.2. sets-out three questions:
    a. Does the work add something that will positively benefit the neighbourhood?
        i. The Application provides no additional benefit. The purported conservation benefits are, even on the Applicant's assessment, "small" (IA Proof, 1.35) and the common will not change into favourable condition as a result;
        ii. Furthermore, the Applicant has not defined the neighbourhood before the Applicant was submitted (conceded by SF and DB XX) and so it cannot be said the Applicant has considered this important matter prior to submitted its Application;
        iii. In any event, the considerable public opposition to the scheme should be afforded some weight under this heading.
    b. Does the work prevent people using the common in the way they are used to?

i. Yes. The Applicant concedes the public will be put off using the enclosures and accepts this will impeded public access (JA, Proof, paras. 6.13- 6.17);

c. Do the works interfere with the enjoyment of the land as a whole?

i. Yes. The Applicant points out that visitors will have the option not to enter the enclosures (JA, Proof, para.6.16) and we can readily infer it foresees this will be the case.

The Public Interest (Nature Conservation)

43. The Defra Guidance sets out the following advice with respect to nature conservation, which we take in parts:

a. Are there potential benefits to nature conservation from carrying out the proposals?

i. Conceivably yes, but limited weight should be attached to these in light of the porosity of research;

ii. There is no reason why the existing exempt works enclosures cannot be used to demonstrate these benefits;

iii. Finally, the availability of other, less intrusive, methods outweighs what limited benefits might be realised by grazing by enclosure.

b. Does Natural England or any other competent person agree with that assessment?

i. The predecessor to Natural England makes clear there is a lack of scientific research in its 2001 Report;

ii. It also sets-out negative impacts of grazing;

c. Does the work facilitate the continuation of sustainable systems which will deliver environmental benefits:

i. The project is expensive, it is sustained only by a grant by Natural England;

ii. Some weight should be given to the over-reliance on a Government grant at this time of public spending contraction. There is no evidence that the HLS funding is

ring-fenced and underwritten into the future. It cannot therefore be said to be sustainable.

The Public Interest (Public Rights of Access)

44. Defra Guidance expressly requires a consideration of the effects of the work on those wishing to sue the common for recreation and access.

45. We say the impact will be significant as a consequence of the following factors:
    a. The ten areas of proposed enclosure are large;
    b. The presence of fencing will impeded the open nature of the common;
    c. The prominence of important signage will increase the visual intrusiveness of the fencing;
    d. The presence of cattle will have dissuade some users from using the land, this will be heightened with the presence of warning signs;
    e. The fencing, whilst seasonal, will be placed at the times of peak use;
    f. The pedestrian squeezes are unsuitable for many users;
    g. The gates are limited in number.

46. Significant weight should be attached to these factors.

General Policy Considerations

47. At para.3.5. the Secretary of State advises that she will *"consider whether the application proposed the best possible outcome: it may be that a more acceptable outcome could be achieved by adopting a different approach".* In which regard we would draw attention to the following matters:
    a. The benefits of grazing are uncertain and, if as the Applicant contends, grazing cannot be delivered on the site without enclosure, it is incumbent to them to attempt other management techniques before enclosing common land;

b. The Applicant's objection of individual alternatives can be overcome by a mix of methods (such as burning and mowing in areas near the M3 Motorway or other sensitivity);
c. In any event, if grazing with enclosure is necessary there is no explanation of evidence why five large enclosures are necessary and not fewer or smaller ones.

48. The burden of proof rests squarely on the Applicant to demonstrate the matters at Section 39(1) are discharged. Having so failed, the Application should be refused.

Issue 5 – 1998 Inquiry and other Reports

49. By Regulation 17(1)(b) Works on Common Land (Procedure) (England) Regulations 2007 the Secretary of State is required to consider *"any report by an inspector following a site inspection…".*

50. In 1998 an inquiry was held to determine an application by Surrey County Council into a proposal for fencing and grazing at Chobham Common. The Inspector heard evidence undertook a site visit and produced a report (Applicant's Statement of Case: Annex D). Whilst that proposal was different from this, two factors are of keen relevance:

a. First, the Inspector concluded that a proposal which only proposed to restore some protected land at the expense of the rest was not lawful or expedient at [IR, para.55-56]. This scheme of course proposes a very similar, if not more stark, approach whereby the Applicant concedes the whole site will be broadly unaffected by the proposal. It causes further concern when one considers the TBH SPA had yet to be designated in 1998 and yet the Applicant has today brought forward a less appropriate scheme on a more protected site.
b. Second, the Inspector concluded that appropriate landscape advice should have been sought as to the fencing [IR para.62]. There is no evidence before this inquiry the Applicant has done

as such before prosing ten areas of enclosure at peak usage, made more prominent by the presence of warning signs.

51. Very significant weight should be attached to the Applicant's failure to address the Secretary of State's concerns in 1998 with this proposal.

52. The Applicant has sought to rely on the decision of the Secretary of State concerning *Land at North Chailey* (COM100). In particular paragraphs 57-58 of the Inspector's Report (Applicant's Annex to Statement of Case, Appendix E) where he deals with a sentence in EN Report 422 (Applicant's Annex to Statement of Case Appendix D, para.12.2 p.93) which reads as follows:

> *"There is an urgent need for more information to guide the use of grazing as a management tool for lowland heath"*

53. In interpreting the meaning of this sentence, upon which it is apparent Mr Milton placed some weight, the Inspector held at paragraph 58 that:

> *"In my view the implication of this sentence is not, as Mr Milton appeared to suggest, that there is no clear evidence that grazing can be effective in assisting the re-creation of heathland habitats and landscapes, but that more evidence is needed about how this can be done most effectively in particular circumstances …".*

54. This paragraph however, needs to be seen in its proper context. Primarily, the Inspector will note the Report was only tendered at the Inquiry (IR, page.22 document 32). Secondly, it is notable that the Inspector was not referred to paragraph 12.1.1. on p.91 and paragraph 8.2.2. on p.50 of the Report which I put to Dr Alonso on Day 1, and which makes clear the lack of research on the impacts of grazing on lowland heath in the opinion of English Nature. It will be recalled that Dr Alonso accepted in XX EN Report 442 reflects current scientific thinking. Furthermore, the Inspector will recall in XX Dr Alonso was not

able to point to scientific peer reviewed papers where the impact has been proven (or even clearly demonstrated). Finally, the Inspector will note the Applicant has not supplied any such evidence before the Inquiry. The decision of the Secretary of State concerning *Land at North Chailey* is easily explained by the evidence before his Inspector at the time and, consequentially, is not of great assistance to this Inquiry, which has heard evidence tested first hand.

Issue 6 – Appropriate Assessment

55. By Regulation 61(1) Conservation of Habitats and Species Regulations 2010 a competent authority must, before deciding to grant consent for a plan or project, which is likely to have significant effects on a European Site must make an appropriate assessment of the implications for that site, if the plan or projected is not directly connected to or necessary for the management of the site.

56. The Secretary of State for the Environment is plainly the "competent authority" for the purposes of an application under Section 38 Commons Act 2006. As the Secretary of State has appointed an Inspector to exercise her function under Section 39 of the 2006 Act to determine this Application,[5] the Inspector is the competent authority and is required to resolve this matter before determining the Application.

57. The enclosure of lowland heath to facilitate extensive grazing is clearly a "plan or project".

58. The introduction of a grazing regime has the *potential* to adversely affect the habitat (IA Scientific References, Tab 7, para. 8.3.2. and IA in XX) (See also: Proof of Geoff Eyre).

[5] By Regulation 3(1) Works on Common Land &c. (Procedure) (England) Regulations 2007.

59. We say the Application cannot be seen as "directly connected or necessary" to the management of the land at Chobham Common for the following reasons:

    a. The principle stated purpose for the application is to acclimatise the public to the presence of cattle (IA, Summary Proof, para.w; DB Proof, para. 5.17; IA Proof, para.1.34; JD Proof, para.2.67);
    b. The application if granted will only make a "small contribution to improving the condition of the site" and in any event the land will not change into favourable condition as a result (IA Proof, para.1.35).
    c. Dr Alonso conceded in XX that the application is not "necessary" to the management of the site rather that it will merely "help";
    d. However, significant weight should be attached to the persistent failure of the Applicant to support these key assertions with evidence. Further, significant weight should be attached to the failure of the Applicant to supply baseline monitoring of the site in order to determine necessity.

60. It will be recalled that the term "management" means "conservation management of the site"[6]

61. In resolving whether the Application requires an Appropriate Assessment the Secretary of State should recall her duty to employ the precautionary principle where there is scientific doubt about a matter which, when it comes to the effects of grazing on habitats, we say there is.

62. It is therefore submitted that this Application requires an assessment to be carried under Regulation 61(1) Conservation of Habitats and Species Regulations 2010. Due to the lack of scientific evidence before

[6] *Managing Natura 2000 Sites: The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC.* Paragraph 4.3.3.

the Inspector, that is not possible to be conducted and the Application should be refused as a matter of law.

Conclusion

63. The proposal conflicts with a number of the statutory objectives and policy aims for common land. Furthermore, the Applicant has persistently failed to support its case with evidence and consequentially the inhabitants of the neighbourhood and the Secretary of State cannot satisfy themselves that the impressive claims in the Applicant's case are substantiated. The Application should therefore be refused.

ASHLEY BOWES
GRAY'S INN.

20 April 2012