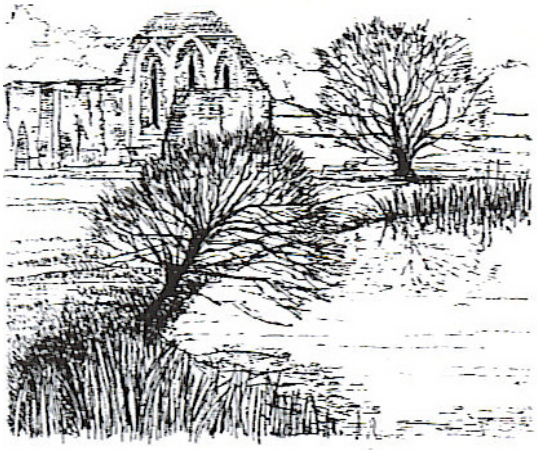

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Final submission

in the matter of

An application by East Sussex County Council [Com100]

For
Works and fencing on common land under s38 Commons Act 2006

By Bob Milton

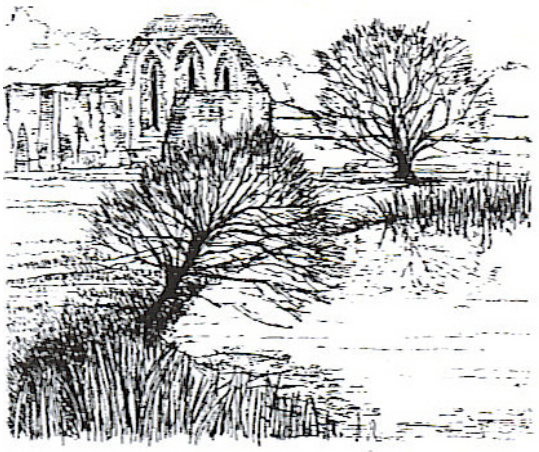
I have heard no evidence to counter my objections in respect to the legal framework supporting this application and on that ground I ask for this application to be refused

If though as it seems in this case the Secretary of State wishes to ignore the legal matters relating to the powers of ESCC to make this application and of Lewes DC and ESCC in the form of the Local Nature Reserve Management Committee in the matter of the lawful management of the common then I am required to address the specific matters for which the Secretary of State has the power in certain circumstances to deal with.

We have heard much evidence from Natural England and those other bodies and individuals which support the over riding use of extensive grazing on lowland heaths. The evidence of Natural England was not supported by any quantitive scientific evidence on this site or others. The others likewise gave emotional rhetoric without any quantum or reference to like examples.

The example of the grazing the 50's to the 70's with a herded group of animals was lacking in detail including times of year or even day the grazing took place and the use of byland. What was not admitted was that what NE wishes to achieve was originally achieved by the wholesale clearance and use of the common for military purposes during two world wars and its effect afterwards. This will never be achievable in the manner proposed with the resources available.

The lack of effectiveness of the LNRM committee over the last 40 years was pointed out by a number of objectors. This is a valid point. The wholesale change in the common landscape has come about during their stewardship. They changed the regime on conservation grounds by stopping rotational burning and cutting almost to neglect.



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We heard that both ESCC and the management committee have ignored the ir duty on the grounds of lack of resources. How can this be when they have reserves enough to fence the common and when the lack of resources is no excuse in the exercise of duty [ex parte Tandy] which was surely imparted on the declaration of a nature reserve? The operating agency [Nature Conservation Council / Natural England] has always had the power [s16(3)(b) 1949 NP Act] over the last 40 years to finance its requirements to any level it feels is required but has not.

It can therefore be no excuse that there have not been sufficient resources to defray the works needed or capable of being carried out in those 40years.

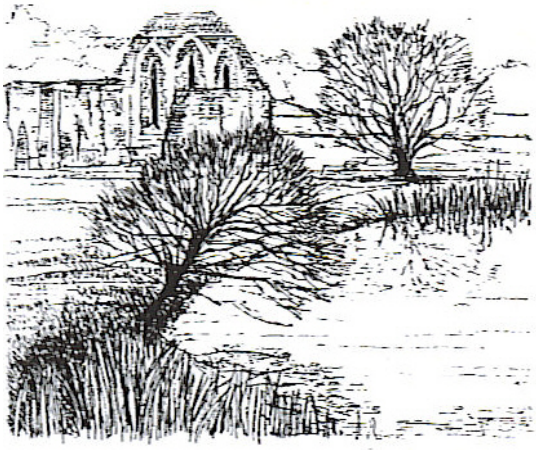
It was stated by Dr Day and others that grazing is just one of the tools available and those other tools such as burning, scraping and spraying will be needed. We do not have any published detailed management plan which sets out how and where these other tools are to be used. All we have is a provisional off the record agreement for Higher Level Stewardship which is guaranteed for the next 10 years only. The restriction on the use of stewardship monies ha, I believe, added to the lack of alternative tools being used over the last ten years at least.

The commitment to HLS brings with it further considerations as to the payment of monies as it requires there to be a legal interest in the land. This is not the case here and I am of the opinion that any payment of HLS would be ultra vires.

Evidence was given that bracken constitutes 35% of the flora and gorse a further 25%. Science tells us that the ingestion of bracken is poisonous n grazing animals. No attempt to treat this expanding threat has been taken by ESCC in readiness for any grazing reintroduction.

Likewise the proliferation of ragwort which is also poisonous to grazing animals and is a notifiable weed on or adjacent to grazing has been ignored. The incidence of TB in cattle has also been ignored and has been brought very much to the for with the increase in TB in the area and the recent case only reported last week of a cull deer on Ashdown Forest being reported with acute TB. This will have serious ramifications as to the ability of the grazier to meet and maintain the objectives of the project in the time frame of the HLS scheme.

These issues and those of ‘strict liability’ as a result of the recent cases under the Animals Act 1971 likewise raises the question of the capabilities of ESCC and the management committee to manage the scheme.



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It was pointed out by ESCC counsel that grazing is a lawful activity on the common. Quite right but the erection of fencing is not. Those grazing rights are a legal interest in the land and no different to those of the landowner. Yet they have been ignored in the rush to meet NE's public service agreement with the Treasury.

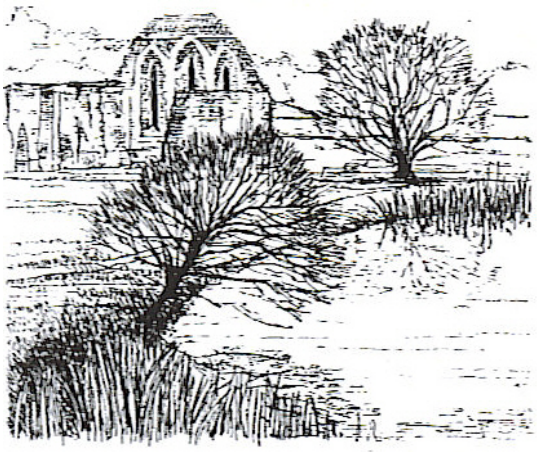
No legal agreement has been made now or in the past when the declaration was made as is required by the 1949 Act with all the occupiers ie including the commoners. Also no compensation agreement in support of the declaration was made.

The same disregard of commoners rights is seen again here in that it has not been made clear to them that any single farm payment for the rights of common or any statutory excess in favour of he landowner [approximately £6,000 in total] will be compromised. It is even unclear whether ESCC has the legal right to lease out the grazing on the common since they have no lease agreement for those rights.

The situation, we heard [PIG], is equally confused over the private rights across the common. Design specifications set out in the application do not it seem meet the legal rights of easement holders and the application therefore fails on the first test under s39 CA2006.

This failure is further compounded by the recommendations of the ESCC Highway authority safety audit officer who seems to have been unaware of what existing public and private rights impinge on the highway. His changes were made after the agreement of the landowners so calling into question that support from the NCFltd. He seems to be treating this project a new road scheme when it is in fact only a restriction on existing rights of access to and over the highway which his recommendations can have no bearing. Quite the opposite the scheme as proposed will increase the use of the A272 by NMUs especially equestrians and those disabled persons with large mobility vehicles. This is a disaster waiting to happen.

The officer did not understand the difference between private and public rights over the land or what was highway waste, highway verge or manorial waste in terms of lawful use. Such lack of knowledge makes his recommendations unsustainable. This ignorance by the Highway authority and ESCC LNR management is shown in the constant changes and suggestions to vary the design during this inquiry in particular the variations put forward for the design of the A272 access for the Holford lane which leads to Broomies and other properties across the common.



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The design of bypass gates as well as the provision of the demand activated crossing [Pegasus] of the A272 are pivotal in meeting the open heathland ecological and landscape objectives and the maintenance of the public rights of access across the common. It must be conditional on any consent as at the moment the application does not meet the private and public access rights. It was stated that the lights would not be implemented within any reasonable time scale and so this application immediately fails to meet its stated needs. These rights can not be bound by the LNR declaration.

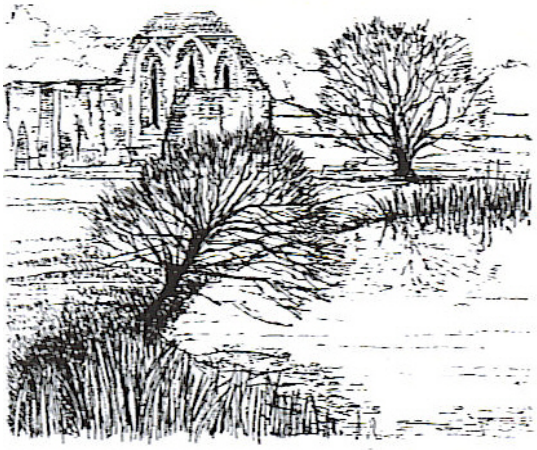
The issue of gates have been a major worry of the equestrians and it was accepted by the council that those rights exist. Yet we heard that those rights have been threatened in the past. All existing private and public rights must be protected within the constraints of this application and any consent which at the moment the application does not do. I believe that the consultation with equestrians leaves much to be desired and depended on the one person who is to benefit from the scheme. This and the lack of consultation or provisions with disabled users and their representatives act to obstruct lawful users eg medium kissing gates and do not meet the requirements of the DDA and is not in the public interest. This application should fail on this point alone in its discrimination of a vulnerable group.

Much work is still to be done on the actual provision of gates and cattle grids such as self closing mechanisms, timing, and access to excluded areas. This in itself requires such a substantial variation to the application as to require the application to fail.

The lack of management detail and commitment for those areas outside of the fenced areas which are still part of the Scheme of Regulation will mean that they will either be lost to public access or become de facto private drives to adjacent properties. This is not in the public interest.

We heard from ESCC highways have agreed to grant s147 HA1980 consent to licence the gates on public rights of way on the grounds that they can lawfully grant such licence. I tried to draw the attention of the inspector to two learned papers from the ROWLR [4(1) p31-38 and 41-46] which cast doubt on the that commitment and hope the inspector will avail himself of the documents from the PINs library. The SoS should not grant consent if there an legal barriers that is both public and private to the implementation of the project.

It was accepted by Counsel that equestrian rights did exist over all the common subject to the 1915 Scheme this means that those gates which are not useable by equestrians nor where the



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disabled can gain reasonable access act as obstruction to lawful use and can not be bound by any LNR restrictions. This application should fail on this account in the public interest.

The evidence as to the duty for conservation of the local authorities involved and the Secretary of State is based on the requirements of s28G CROW 2000. The mitigating and saving section in relation to this common is conditional on the reason for which the land is held and the duty is only to have regard. So that where anything is done then the duty is to take account of the nature conservation requirements not the other way around

In this case the dominant tenement is LDC's occupation is public access and recreation and those private rights and easements. These would be those rights which can not be bound by the legislation used to declare the LNR .

This project has not addressed any of them to a degree that would facilitate the implementation of any consent under s38 that the Secretary of State can give.

There is management plan which can be considered the basis of this application. Given the utter failure on so many issues of this application I can see no reasonable support can be given to the application and it should be refused.

If the SoS is minded to grant consent then I believe that all the legal issues need to be addressed and the consent should be time limited to coincide with the 10years of the funding under HLS with a full scientific review and cost benefit analysis to support any future consent.

Bob Milton