

The Conservators of Therfield Heath and Greens

The Therfield Regulation Trust
c/o Royston Golf Club, Baldock Rd, Royston, SG8 5BG
Registered Charity No. 277881
Chair: Clare Swarbrick

Clerk to Conservators
c/o Royston Golf Club
Baldock Rd
Royston
SG8 5BG

Sent by email only

6th October 2021

Dear Sirs,

The Conservators of Therfield Heath and Greens (statutory managers) and the Trustees of the Therfield Regulation Trust (landowners) object to the section 38 application by Affinity Water Limited under the Commons Act 2006 for works to construct two permanent borehole kiosks on Therfield Heath (Hertfordshire CL92).

1. The Common

- 1.1. Hertfordshire CL92 is known as Therfield Heath (the Heath). While located mainly in the parish of Therfield one part of the common fell within the urban boundary of Royston on the appropriate date. As a result the wider public have rights of access to the common under section 193 of the law of Property Act 1925.
- 1.2. The register for Therfield Heath (CL92) records that: *"The land comprised in this Register Unit is regulated by the Commons Regulation (Therfield) Provisional Order Confirmation Act, 1888, "* (the 1888 Act¹).

No. and date of note	Notes
6. 26.4.71.	The land comprised in this Register Unit is regulated by the Commons Regulation (Therfield) Provisional Order Confirmation Act, 1888, dated 7th August, 1888 (51 and 52 Vict. - Ch.clix) in pursuance of the Inclosure Acts 1845-1878.

¹ [The Commons Regulation \(Therfield\) Provisional Order Confirmation Act, 1888](#)

- 1.3. The 1888 Act was made in pursuance of the Inclosure Acts 1845-1878 and specifically using the process from the Commons Act 1876. Therfield Heath and Greens is one of some 36 commons in England created under the 1876 Act. Because of its name the 1888 Act is often miscategorised as a local act, however it is in law a Public General Act by virtue of both section 32 of the Inclosure Act 1845 and section 12(10) of the Commons Act 1876.
- 1.4. The Land Commissioners papers from 1888 record the importance of the Heath to Therfield, Royston and the neighbourhood. This importance remains today with huge numbers of visitors every day of the year including those who come to play formal or informal games (golf, tennis, rugby, football, cricket, archery) as well as running, walking and fitness training. Special interest groups watch, study and record the flora and fauna (some of which is of national importance). Others use the common to picnic, sunbathe, simply collect their thoughts and regrettably (following a poor local planning decision) eat their fast food burger.

2. The body of eight Conservators created under the 1888 Act

- 2.1. The 1888 Act and the subsequent 1893 Award created a body of eight Conservators to regulate the common and that body has been continuously in existence since.
- 2.2. The Conservators' role is that of statutory managers. To keep the common free from nuisance while allowing the public and the commoners to enjoy their rights. It includes powers to make bylaws and importantly control the erection of any structures as stated in the schedule to the 1888 Act.

That no turf be cut on the said Common, and that no booths or other erections of any kind be set up thereon, except with the permission and under the superintendence of the Conservators, who shall have power to take payments in consideration of their giving such permission as aforesaid: Provided that no turf shall be cut on the said Common for use elsewhere than in Therfield and Royston.

- 2.3. While section 42 of the Commons Act 2006 allows a permission under section 38 to be viewed as permission under various schemes for the creation of commons, this is strictly limited to schemes under the Metropolitan Commons Act 1866 or schemes under the Commons Act 1899. Section 42 does not apply to commons created under the Commons Act 1876.
- 2.4. As such even should section 38 permission be granted for some booth or other erections of any kind, permission MUST also be sought from the Conservators who have the power to take payments in consideration of their giving such permission.
- 2.5. Such payments are a vital income source for the Conservators who are mainly funded from this kind of income stream and public donations. Unlike other more famous commons the Conservators get no direct funding from the public purse.

- 2.6. By virtue of the 1888 Act being a Public General Act the body of eight Conservators are in respect of the Wildlife and Countryside Act 1981 a section 28G authority.
- 2.7. The Conservators also have a regulatory role in relation to the Therfield Heath Local Nature Reserve which was declared by Hertfordshire County Council pursuant to the National Parks and Countryside Act 1949 in 1973. Unlike the SSSI which is only part of the common and some additional units that are contiguous but not common land, the nature reserve encompasses the entire common as it was in 1973.
- 2.8. The Conservators' regulatory role in respect of the nature reserve is for the issuing of permits to allow operations under the Therfield Heath Nature Reserve Bylaws 1974, created by Hertfordshire County Council and confirmed by the Secretary of State (Home Office) 27th July 1974.
- 2.9. The nature reserve bylaws allow the Conservators to regulate and intervene at a local level across the entire common including the SSSI giving valuable local context and local permission alongside Natural England's consents and assents processes. Alignment between Natural England's and the Conservators' objectives is maintained at monthly meetings.
- 2.10. By virtue of being a 28G authority and when permitting:
- a) Operations in the local nature reserve that impact the SSSI, or
 - b) The erection of structures within the SSSI.

The Conservators are appropriately bound by the duties required of 28G authorities including where appropriate the requirement to consult Natural England etc.

The Conservators also have a duty in respect of biodiversity within section 40(1) of the Natural Environment and Rural Communities Act 2006.

3. A Brief History of Water Abstraction on Therfield Heath

- 3.1. Article 3 of the Lee Valley Water Order 1965² allows the Lee Valley Water Company,

"when they have acquired the necessary land or sufficient rights therein to:

- (a) continue and maintain the borehole created by them on or under the land described in Part 1 of Schedule 1 to this order.*
- (b) construct and maintain thereon or thereunder a pumping station for the purpose of abstracting water from the said borehole together with such other boreholes and pumping stations, and such adits, headings, shafts and other works, as may be necessary or expedient for augmenting, improving or maintaining the supply of water obtainable by means of the Therfield Pumping Station."*

² The Lee Valley Water Order 1965 is not published online but available on request

- 3.2. Part 1 of Schedule 1 describes “1,400 square feet or thereabouts” of land on Therfield Heath. 1,400 square feet is 130 m².
- 3.3. The successor to the Lee Valley Water Company is Affinity Water Limited.
- 3.4. A 99 year licence³ was granted in 1967 between three parties, the landowner (the Church Commissioners), the Conservators (as statutory managers) and the Lee Valley Water Company. This licence provides the “*sufficient rights in the land*” as required in article 3 of the Lee Valley Water Order for the 130m² “operational area”.
- 3.5. The licence makes no mention of Secretary of State permission under section 194 of the law of property act 1925⁴ (repealed by the Commons Act 2006 but current in 1967) for these works, and no evidence of the legality of these works is offered by the applicant. We presume (and assume the applicant will agree) that this is because it was agreed between the parties to the licence that section 194(4) applied to these works by virtue of the 1888 Act. The recital of the 1967 license confirms this and states that permission is sought and granted by the Conservators.
- 3.6. It is important to note that the Lee Valley Water Company respected and indeed engaged the Conservators to achieve the required permissions for the 1967 works. In the current application they intend to ignore the need to seek a similar permission from the Conservators despite that permission being integral to the existing pumping station. If the applicant argues that Conservator permission is not required then that would undermine the licence and would lead to the pumping station being an illegal structure on the common, the removal of which could be enforced under section 41.
- 3.7. The 1967 licence provides for some above ground works, specifically 130 m² which is the pumping station building (including the electrical sub-station) and the hardstanding. Part 1 of the schedule is specific that the boreholes will be underground and does not include rights to above ground works at the boreholes. The applicant is assuming a right to extend these above ground where no legal right exist.

THE SCHEDULE

(1) The construction of two boreholes in and under the land coloured pink and marked 'A' on the plan No. 1 annexed hereto together with concrete bearing-pads the bores to be capped and the whole to be overturfed and left completely flush to conform with the existing surface

- 3.8. In relation to this application there is nothing within the existing licence that permits the boreholes to be above ground level. The Trust would expect to have the same

³ The Pumping Station Licence is not published online but available on request

⁴ [Law of Property Act 1925 section 194](#)

rights as any other private land owner where new works are proposed on their land. The applicant has yet to explain to the landowner how such works are permitted on their land without landowner permission.

- 3.9. In relation to this application, Conservator consents within the current licence are limited to the pumping station, the related electrical sub-station and the hard standing. No consents are given in the existing licence for above ground structures in the land area marked pink on the map (the area above the boreholes).

4. Consideration if the section 38 application is premature

- 4.1. Consideration is now given to if this section 38 application is premature. Generally a section 38 application is the last permission that is sought. This is for good reason.
- 4.2. Typically section 38 decisions carry a timeframe in which works must commence and there is a very real possibility in this case that such a timeframe would simply lapse as the applicant would be unable to secure the necessary additional permissions.
- 4.3. With that in mind it seems unreasonable that the general public and volunteer organisations should be put through a public inquiry process when the resulting Planning Inspectorate decision will not determine if the works will go ahead or not.
- 4.4. To a large extent section E of the application form is intended to deal with this in respect of planning permissions. Such permissions could take a significant time and as a result it is usual to achieve planning permission before making a section 38 application.
- 4.5. For these reasons we believe the Planning Inspectorate should use their powers within article 6(4) of The Works on Common Land, etc. (Procedure) (England) Regulations 2007⁵ to work with the applicant to ensure they produce documents as part of the application that evidence that the section 38 decision will enable the works to go ahead.
- 4.6. In this application we are told that planning permission is not required, and that may be the case, although to date it has not been possible for us to verify with the Local Planning Authority that this constitutes a permitted development. Our working assumption is that the applicant is relying upon permitted development from Part 13 A of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015. It is unclear which of the permitted developments A(a) through A(g) is being relied upon and if two kiosks with a total volume of 32.8 m³ exceed the limits of permitted development A(e). The kiosks are each described as 16.4 m³ capacity in the application to Natural England for SSSI assent.
- 4.7. Section D1 Question 12 also deals with planning and is inconsistent with Section E suggesting that "*A Certificate of Lawfulness Proposed Use or Development will also be*

⁵ [The Works on Common Land, etc. \(Procedure\) \(England\) Regulations 2007 article 6](#)

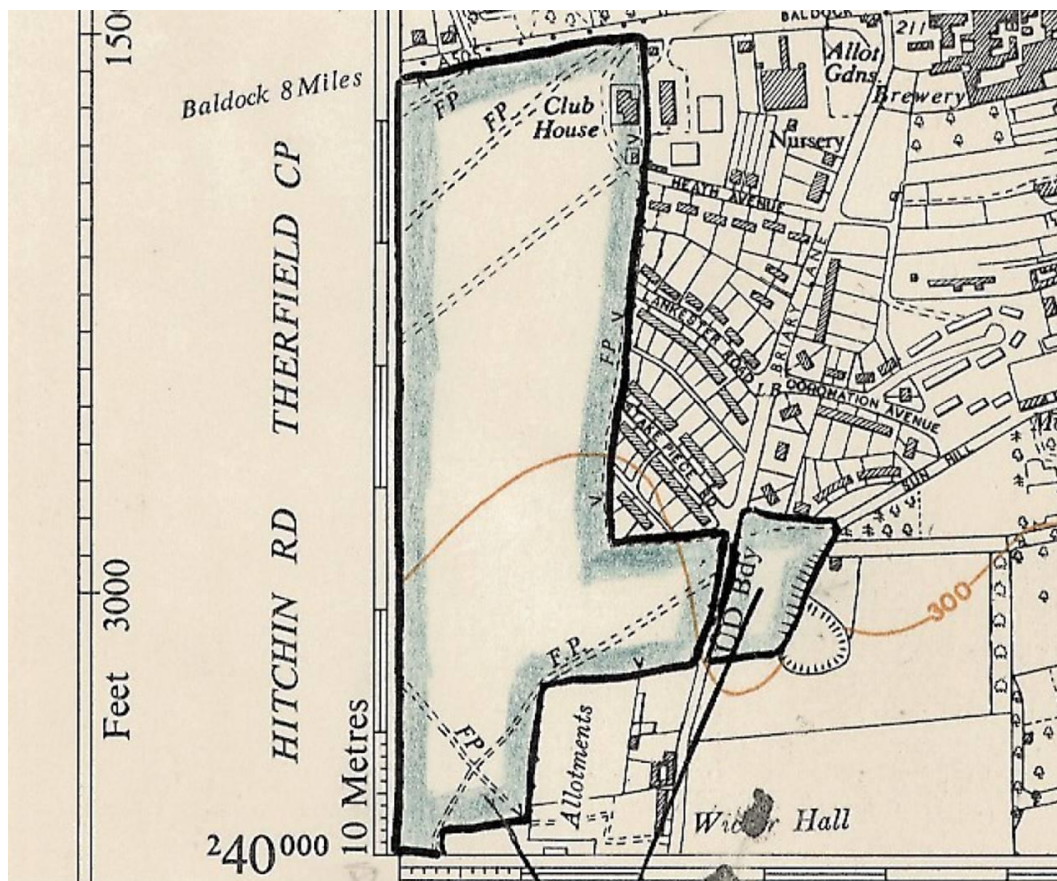
sought for the works” suggesting that while planning permission may not be necessary there are other planning hurdles yet to be overcome.

- 4.8. Two separate permissions are required from the Conservators and these have yet to be sought. They are:
- a) The Conservators must grant permission for the structures under the 1888 Act. It may be the case that the applicant will argue that the Lee Valley Water Order 1967 allows these structures but that case has not been presented and does not resonate with the Conservators.
 - b) The Conservators may also be required to issue a permit under the local nature reserve bylaws for the removal of plants and soil to allow these permanent kiosks. In considering such an application the Conservators will be mindful of their 28G duties to further and enhance the conservation of the SSSI.
- 4.9. In addition, and should the landowner not have already granted a licence for above ground works at the borehole locations, the applicant will need to secure a new licence or alternatively gain rights over the land through some other mechanism.

5. Issues with the application

- 5.1. The Conservators and the Trust note some issues with the application which in our opinion need to be cleared up to assist with clarity.
- 5.2. The application (or at least the copy we received from the applicant) is not dated or signed, we would like a copy of the application as actually provided to the Planning Inspectorate.
- 5.3. The application claims the notice was in the Royston Crow on 2/9/2021 it was not. A notice did appear on 9/9/2021.
- 5.4. The applicant uses the term “operational site” and “operational area” without showing these areas on the maps. In section G the applicant states “*These works are within an existing operational Affinity Water site*”. In our opinion the applicant is suggesting they have rights over land that they do not have rights over. The applicant should mark these areas on the maps and include the evidence that they have rights over the land. The Trust and Conservators’ view is the applicant has rights above ground limited to land amounting to some 1400 square feet (approx. 130 m²) which is the pumping station and associated hard standing. They do not have above ground rights to any other part of the common. We understand the rights of water undertakers under the Water Industry Act 1991 to subterranean works but there is no automatic right to extend such works above ground on private land or common land.

- 5.5. The Conservators do not recognise the rights information in the application. These do not seem to be consistent with the current rights as recorded at the Commons Registration Authority (CRA).
- 5.6. The map of the common is wrong and seems to be based on out of date or inaccurate information. The CRA should have been contacted to provide accurate and up to date maps of CL 92. Below is one of the 4 maps from when CL 92 was registered in response to the 1965 Commons Act indicating what was common when the registration became final in 1971. The common extends to the boundary with adjacent properties and there is no part of the pumping station that is not on the common.



- 5.7. The applicant refers to various security and water standards and regulations but does not offer any clarity on what these standards and regulations are or if they apply on privately owned common land. We need to have clarity on which standards and regulations are not currently being complied with and that these apply on privately owned common land, which is designated a SSSI and a local nature reserve.
- 5.8. The applicant says these works are “essential” yet has been talking about them with the Conservators since 2013 and has for eight years not progressed them under a section 16 application which the Conservators would see as essential given they offer nothing for the common.

- 5.9. We are told there is no alternative than doing these works in the current location. This is simply not a credible statement. Affinity Water's Water Resources Management Plan⁶ (WRMP) involves moving water vast distances from reservoirs and abstraction points. In such a context some new boreholes could be sunk on other land off the common and the boreholes on the common retired. The application must not make statements that are not credible and remain factual.
- 5.10. We are told that the "environmental team" have reviewed all environmental matters and yet the Preliminary Ecological Appraisal ⁷(PEA) provided to Natural England (but not to the wider public as part of the application), fails to notice the designation of the site as a local nature reserve. There is no credible environmental plan as part of the application. Two concrete slabs measuring 3.5m x 3m each are to be raised above ground removing plants and soil, this is environmental destruction not enhancement and would appear contrary to the Wildlife and Countryside Act 1981.
- 5.11. The PEA is in places notably different to the section 38 application before us. The PEA explains that potentially there will be a permanent fence around the site. The application does not make reference to the PEA nor guarantee any of the PEA mitigations will actually take place.

6. Assessing the application

- 6.1. In this section considerable reference is made to the Common Land consents policy (Nov 2015)⁸ (the consents policy).
- 6.2. The applicant makes no claim that the kiosks are consistent with the use and enjoyment of the land as common land. The consents policy states:

"5.8 In deciding whether to grant consent to carry out works on common land, the Secretary of State will wish to establish whether the proposed works are consistent with the use and enjoyment of the land as common land."

Aligned with the illustrative examples in 5.8 these kiosks should be refused as they are not consistent with the use and enjoyment of land as common land.

- 6.3. The Conservators are proactively seeking to shift perceptions about Therfield Heath so that the local communities learn about, and actively protect the common and the SSSI. Our Head of Conservation and the Conservators themselves work to inform the local community about the importance of the site, as both a SSSI and common land.
- 6.4. The existing pumping station is an eyesore visible from the eastern Heath and the Baldock Road. We believe that the installation of these kiosks will continue to

⁶ [Affinity Water - Water Resources Management Plan](#)

⁷ The Preliminary Ecological Appraisal was sourced from Natural England under EIR

⁸ [The Common Land consents policy \(Nov 2015\)](#)

demonstrate to the users of the Heath, and even those just viewing from the road, that the site is no more important than any other piece of land in the area.

- 6.5. Given the graffiti, damage and anti-social behaviour we have already seen around the pumping station, these additional kiosks will add further cover for those wishing to misuse the Heath as well as providing additional large structures for graffiti, smashing bottles etc. Rather than a valued area, this will leave a scenario where the Conservators are managing conflict in plain sight of the local community devaluing the importance of the common and the SSSI.



- 6.6. Considering 5.7 from the consents policy,

“5.7 Commons should be maintained or improved as a result of the works being proposed on them. The Secretary of State sees section 38 as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character. In other words, consent under section 38 should be seen as a gateway, which enables the construction of works

which are sympathetic to the continuing use and enjoyment of common land, but which reinforces controls on development which are inappropriate or harmful.”

The Conservators are of one mind that these kiosks will be harmful to the common because the kiosks do not align with the Conservator strategy that seeks to engender public support and a special sense of community value.

Any works that are harmful should be refused or an alternative scheme designed perhaps using section 16.

6.7. Answering Question 12 the applicant makes the claim:

“These works have a clear overriding public benefit, not just to Royston, but the surrounding areas supplied by this network.”

In terms of the consents policy it is helpful to note that the applicant does not suggest the kiosks are of benefit to the common, commoners or in the public interest (as defined in section 39(2) of the Commons Act 2006). The only benefits are for the “wider public benefit”. Paragraphs 5.14, 5.15, 5.16 of the consents policy deal with such applications. 5.14 suggests that statutory undertaker’s apparatus are not of benefit to the common but might be considered as “wider public benefit”. 5.15 and 5.16 explain that in many cases the Secretary of State would expect a section 16 application to be more likely to succeed than a section 38 application. 5.15 explains:

“An application for consent to such works under section 38(1) will rarely be granted unless there are convincing reasons why an application under section 16(1) cannot or ought not to be pursued.”

In the case of these kiosks, the Conservators have worked with the applicant on a section 16 proposal to create a 515m² compound. Discussions began in 2013 and some very credible plans have been drawn up. The Conservators believe this is the correct way forward and there can be no doubt that a section 16(1) application can and ought to be pursued.

Paragraph 5.16 finally concludes that section 38 applications in the “wider public benefit” should only be temporary or insignificant. The example of a control booth is given, two of which we already have on the Heath adjacent to the tennis courts. The proposed kiosks are not control booths being far larger.

6.8. Meeting the Secretary of State’s objectives is possible but not with the current section 38 application. The applicant should share the detailed proposals from 2014 and later, specifically the proposal created by / with Maydencroft. (Maydencroft Limited, Maydencroft Manor, Maydencroft Ln, St Ippolyts, Hitchin, Hertfordshire SG4 7QA). Such a proposal, using a section 16 application, could deliver the applicant’s objectives, the Conservators objectives and more importantly the Secretary of State’s objectives. The applicant may not want the additional expense to meet other’s

objectives but needs to recognise that these objectives cannot be ignored. Other than expense there seem to be few barriers to such a plan.

7. Conclusions

- 7.1. The Trust and the Conservators are opposed to the section 38 application.
- 7.2. Barriers to implementation exist even if section 38 approval were granted, for example Conservator permission. The applicant should be asked to address these barriers before determination.
- 7.3. The Conservators believe this case is complex because of the interaction between various legislation including the 1888 Act and the Commons Act 2006, bylaws, conservation legislation like the Wildlife and Countryside Act 1981, and water Industry legislation and regulations. This case is not simply about a decision but the priorities of the Secretary of State and any conflict that exists between such priorities and existing law. Legal argument will need to be submitted and this indicates the matter needs to be determined at a hearing or (because of the likely duration) a public inquiry.
- 7.4. We are also aware of the variety of opinions on this application and the diversity of people who have made representations. This is an additional reason to require it to be determined at public inquiry where proper consideration can be given to all voices.
- 7.5. Credible alternatives exist that will not harm the common and can also deliver the wider public benefits sought by the applicant. Such alternatives also meet the Secretary of State's objectives. These should be explored at public inquiry.

8. Site visit

- 8.1. The Conservators and Trustees would like to accompany the inspector on any site visit.

Yours faithfully,

Clive Hall - Conservator
Clare Swarbrick - Chair
Carol Fossick - Clerk