UNCORRECTED MINUTES OF ORAL EVIDENCE

taken before the

MALVERN HILLS BILL COMMITTEE

PETITIONS AGAINST THE BILL

Thursday, 5 March 2026 (Morning)

In Committee Room 2

PRESENT:

Lord Hope of Craighead (Chair)
Baroness Bakewell of Hardington Mandeville
Lord Evans of Guisborough
Lord Inglewood
Lord Ponsonby of Shulbrede

FOR THE PROMOTER:

Jacqueline Lean, Counsel, Malvern Hills Conservators
Alastair Lewis, Roll A Parliamentary Agent
Susan Satchell, Governance Change Officer, Malvern Hills Trust
Jonathan Bills, Conservation Manager, Malvern Hills Trust

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(At 10.30 a.m.)

1. THE CHAIR: Welcome to this, the 13th public meeting of the Select Committee on the Malvern Hills Bill. Those who are present in the room are reminded that their mobile phones should be on silent and please do not have conversations behind the witnesses. As far as fire precautions are concerned, we have a system of a two-tone siren followed by taped messages that are broadcast. If evacuation is necessary, please follow the instructions of the clerk and, if anybody happens to be outside in the corridor, find the nearest security officer. These proceedings are being broadcast and a full transcript will be taken. If we need to deliberate, which I think is unlikely this morning, then the room will be cleared to allow us to conduct our deliberations in private.

2. Before I call on you, Ms Lean, to present your case, I think I should deliver the reasons for the decision we took on Tuesday to allow the Malvern Environment Protection Group to present its case. This is a local voluntary association that was founded in 2019. It has a constitution adopted on 4 September 2019, which states that its aims are to have concern for and protect the natural aspect of the Malvern Hills and surrounding commons.

3. It operates through a committee and has a wider public membership of about 320 subscribers to its mailing list. It convenes public meetings as the need arises, at which there are between 100 and 200 attendees. It has received donations amounting to about £20,000, most within the past two years and mostly composed of small donations from local people. That indicates that it is supported more widely across the local area than the number of those who attend its meetings might suggest.

4. The group made a formal decision to oppose the Bill at a committee meeting on 11 December 2024, following months of engagement with what was then a proposed Bill. This included two public meetings held on 11 May 2024, which were attended by about 200 local residents. We were told that it was made clear that those attending them supported the MEPG in petitioning against the Bill and that they relied on it to do so.

5. We were referred to the King's Cross Railways Bill, where the Camden Cycling Campaign, which had just over 200 members, was not granted locus standi, but that was a body that, unlike the MEPG, did not have a formal constitution or rules. Also, as the promoter in that case pointed out, there were many other people in Camden than the 200 members of that body who rode bicycles.

6. We decided that the MEPG is a body that sufficiently represents amenity and recreational interests affected by the Bill within the meaning of Standing Order 117(2) and that, having regard to the importance of the issues it raises and to the instructions that we were given at the Bill's Second Reading, we should exercise our discretion to enable it to develop its case against the Bill.

7. I should mention the Worcestershire branch of the Campaign to Protect Rural England, Richard Percy and Richard Sarginson, who were co-petitioners with the MEPG. We were told by counsel for the MEPG that the co-petitioners were not appearing before the committee and that they were happy for MEPG to advance the petition on their behalf, and not because of a continuing lack of support for the petition.

8. Ms Lean, I think that it is over to you to present your material this morning.

Statement by Ms Lean

9. MS LEAN: Thank you, my Lord. Before moving on to our substantive case on Parts 4 and 5 of the Bill, I wonder whether I could pick up some points of housekeeping. Firstly, I apologise, but I hope a further bundle of documents has reached you this morning. The apology is because I am conscious there is a lot of paperwork being generated by this, but what we have tried to do in this file is put together the materials we think we will be needing to refer to on these parts of the Bill, so Parts 4 and 5. There will be a couple of documents that you may have in the very large bundle we gave you at the beginning, but, where we think we will definitely be going to those, we have tried to put those in this bundle as well to reduce the need to go back to the very large bundle at the beginning.

10. THE CHAIR: That is very kind of you. Thank you very much.

11. MS LEAN: The second point of housekeeping, if I may, is that there were some actions about the Bill, or the drafting of the Bill, that were raised or outstanding from the hearings in February. Firstly, in the bundle that we have handed in today, at page 111—if it is tabbed, it is behind tab 18, but otherwise it is page 111. This is the table that was prepared in respect of the powers in Schedule 4. Ms Satchell referred to those in her evidence about where some of them might have come from, that some would have been from Charity Commission model clauses and some were from elsewhere. This is the table that shows where there is a precedent or where that might have come from and identifies

those that have been essentially newly drafted for this specific Bill.

12. THE CHAIR: I think you are reorganising some of them in the order of appearance, are you not? It is easier to read and follow the trend of thought.

13. MS LEAN: Indeed, my Lord. That was the second action I was going to pick up. There was a sheet of paper that I hope was handed to the committee on Tuesday, which had some additional proposed amendments arising out of matters raised by the committee during the last set of hearings. Firstly, there was a suggested proposed amendment to Clause 8(6), which is about the trustees being appointed in respect of parishes, picking up on the queries that were raised there about reporting back to the board of matters that were raised to them. We have put forward some potential wording that we hope captures what was discussed at the last hearing.

14. THE CHAIR: Sorry, can you give me just a moment? My file has collapsed already.

15. MS LEAN: It is not in the bundle that we have given you today, my Lord. I think it was handed to you as a separate sheet of paper on Tuesday.

16. THE CHAIR: Yes, it is just that the bundle you have given me today has come apart. I just have to get them back into their files. Otherwise it is going to be very difficult.

17. MS LEAN: I understand we have one that is clean and is spare, if it is helpful for us to hand that up instead.

18. THE CHAIR: No, it is all right. One has to be very careful with lever arches, I am afraid, to get them absolutely just in line; otherwise they do cause real problems. Just give me a few minutes.

19. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Was it a single sheet of paper?

20. MS LEAN: It was a single sheet of paper that has some red text on it.

21. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: I remember it.

22. LORD EVANS OF GUISBOROUGH: Did it look like this?

23. MS LEAN: Yes, my Lord. That looks about right. Yes.

24. THE CHAIR: I will try to be more careful. The thing has completely collapsed and is completely out of order. It is one of the problems of this particular presentation, is it not? Right, I am ready. Thank you.

25. MS LEAN: The second document that I mentioned is dated 2 March 2026. These are, as I said, amendments that have been proposed in response to matters that were specifically raised by the committee. They are not included in the revised filled Bill that I believe you had on Monday or Tuesday, because they are not ones that were being swept up as part of discussions with counsel. These are our suggestions or our proposals in response to matters that you had asked about for your review, rather than us just putting them in, as it were.

26. The first one is on Clause 8(6). This was picking up on the point around the role or the responsibilities of the trustees who were to be the liaison between the board and individual parishes. Firstly, it picks up on the idea of there being a trustee who is appointed to act as a point of contact between the inhabitants of each of the parishes listed in Clause 23, picking up, I think, on an earlier point from my Lord, Lord Hope, about the word "any" perhaps being a bit ambiguous. Then it goes on to say at a new proposed 6(a) that a trustee who is appointed under that subsection must report to the board any representation that is made to the trustee by an inhabitant of the parish in respect of which the trustee is appointed under subsection (6), and which, in the trustee's view, is a representation that merits consideration by the board.

27. That is trying to bring in the point about making sure that information is taken back to the board. It is not simply the board being able to communicate with inhabitants of the parish through that trustee.

28. Then proposed subclause (6)(b) makes clear that that is not exclusive; i.e. the fact that there is a trustee with a responsibility to report back representations that he considers merit consideration does not preclude the inhabitants of that area bringing matters separately to the attention of the board or the Trust.

29. THE CHAIR: Yes. I think these are very helpful. Do you require a decision from us, or are you simply offering them as matters that you will put forward and will be included in the list of amendments that are being made from you?

30. MS LEAN: My Lord, we are offering them in response to a request to see if you were content with them. If you are content with them we would be happy to put them forward, but we did not like to presume. It may be that what we have done is we have given you something and, if, in your report, you feel that these are amendments that should be made, that could be reflected in your report in that way.

31. THE CHAIR: I think when we are discussing the clause it will be helpful, so we will just leave it on the table, as it were, for us to bear in mind, and we can let you know later whether it is enough for us.

32. MS LEAN: Indeed, my Lord. The second proposed amendment is Clause 15—the nominations committee—and this was a matter again raised by my Lord, Lord Hope, which was that it seemed a bit odd that the definition of independent members had disappeared from subclause (3) and it had gone down to a separate subclause, subclause (18). The proposal is to put it back into subclause (3) and then delete the separate definition in subclause (18).

33. The final proposed amendment is in Schedule 4, firstly paragraph 6, and this was in response to a point that was raised by my Lord, Lord Evans. Paragraph 6 of Schedule 4 was the one that referred to the Trust—the powers including acquiring, merging or affiliating with or entering into any partnership or joint venture with any other charity. It suggested deleting the word "merging", so it would just read "acquiring or affiliating with or entering into any partnership with". Apart from that, my Lord, it is a suggested reordering of a couple of the paragraphs, as my Lord identified might be helpful.

34. THE CHAIR: That is very helpful. The ones in black are on the table now, but it is the ones in red for us to discuss and let you know about.

35. MS LEAN: My Lord, I think the reason why you have some in red and some in black is because the ones in black are relatively straightforward in terms of telling you what it is going to do, i.e. "insert this here". The red is so that you can see the change from subclause (6) as it is at the moment. I think that that is the magic in the colouring, more than that. Again, all these would be subject to your view or your approval that these were amendments that you wanted to see made to the Bill.

36. LORD INGLEWOOD: Might I just briefly ask a question to clarify my mind about

this? Having looked at this, I then looked a little bit further into the whole question of the point about charity trustees. Am I right in thinking that the words "charity trustees" are not found anywhere in statute, but they are found in Charity Commission guidance and that, therefore, the role of the trustees as charity trustees is measured against the Charity Commission's guidance and that is where the definition of that word is to be found?

37. MS LEAN: My Lord, my recollection is that the definition of charity trustees appears in the Charities Act 2011, but I would have to double check that because I am afraid I have slightly taken my head out of the Charities Acts.

38. LORD INGLEWOOD: Right. The reason I say that was that there was a definition in the guidance and I was not quite sure whether that was the definition that we are using here, but you are probably right.

39. MS LEAN: My Lord, I think the sense is that they probably are. Could I take that as an action point, just to check the guidance and how it squares with the Act and to put my hand on the specific provision I have in mind? Thank you.

40. THE CHAIR: The Charities Act does define the expression "charity trustees" and the various duties are specifically for the charity trustees to address—Clause 74, for example.

41. MS LEAN: Clause 74 in the Bill or—

42. THE CHAIR: Of the 2011 Act. I think it says the charity trustees are not permitted to expenditure voting a Bill in Parliament without the consent of the commissioners.

43. MS LEAN: Oh, indeed, my Lord, yes. Section 74 of the Charities Act I think does not refer to the charity trustees but does say that no expenditure may be incurred for those purposes without the consent of the court. Forgive me; I do have in mind that there is a provision that defines charity trustees for general charities legislation in the Charities Act. I am just loath for the number because I know it is in different section numbers depending on whether in the 2011 Act or one of the earlier Acts. Forgive me; it is Section 177 of the Charities Act 2011. "In this Act, except in so far as the context otherwise requires, 'charity trustees' means the persons having the general control and management of the administration of a charity". It is my understanding that the Bill would be using the term

as it applies in the Charities Act, but I will double check with the guidance that that also correlates with the—

44. LORD INGLEWOOD: My point is that, if you looked to the guidance, which I did, it laid down some rules as to what they might or might not do. I was just wanting to make sure whether the thread ran directly.

45. MS LEAN: I think it probably does, my Lord, because it is all part and parcel that the Charities Commission's guidance would have been done against the backdrop of the expectations of the Charities Act.

46. LORD INGLEWOOD: I am just anxious to be clear exactly what we were just talking about. That is all.

47. MS LEAN: On housekeeping, those were some outstanding points on the Bill drafting. The third point I have on the list is on another charities point: my Lady, Baroness Bakewell's, question from Tuesday about texts that appeared on the Charity Commission website. My understanding is that the information from—there is a series of tabs down the side of the page for the Malvern Hills Bill and, if you click on the one that says "what, who, how and where", you get to a page where it says what a charity does and how a charity helps. What is said there is "provides buildings/facilities/open space". I believe that that was the query.

48. My Lord, I am instructed, and I have gone and had a look at the Charity Commission website itself, that the Charity Commission has broad categories that it uses to classify what different charities do and one of those broad categories is "provides buildings/facilities/open space". It is not saying that it is doing that, that it is providing buildings and facilities and open space. It is that the charity falls within that category or that type of charity in terms of how it carries out its functions.

49. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: It would be able to do any of those three, or all of those three.

50. MS LEAN: No, my Lady, because that is purely the broad group that the Charity Commission would put the Malvern Hills Trust in. It can only do what is in its acts or what is in its objects, so the Charity Commission categorisation does not expand what is

in the governing documents of the Trust. If it assists, the same categorisation appears on the Charity Commission's page for the Wimbledon and Putney Commons Conservators, for the Epping Forest, which I think I mentioned back in February, and also bodies like the Great Torrington Commons Conservators. You can see that it is quite a standard description of what a charity does. It applies to these sorts of bodies.

51. My Lord, the fourth point I had on housekeeping, also arising out of Tuesday, is about the levy and Section 303 of the Public Health Act 1875, which I mentioned as a power in general legislation by which Ministers can, by provisional order, wholly or partly repeal, alter or amend any local Act, other than an Act for the conservancy of rivers, that is in force and subject to other conditions that relate to the same subject matter as the 1875 Act. My Lord, that Act is applied to the Malvern Hills Conservators. To make clear, it applies in Section 19 of the Malvern Hills Act 1909. In fact, there has been an order made through that power in the past, which changed the composition of the board of conservators in 1958.

52. Without going to bundle 1, in bundle 1, you do have all the legislation relating to the Malvern Hills Act. There were a couple of statutory instruments, one of which was an order, from 1958. That came from or through the matrix of Section 303 of the Public Health Act 1875.

53. I also mentioned on Tuesday that that power had potentially been looked at or talked about around the time of the 1995 Bill. We have gone back and had a trawl back through boxes. In very broad terms, around the time of the 1995 Act, when it was a Bill, it looks like the Malvern Hills District Council was raising looking at changing the constitution of the Trust and looking at the levy and the levy-paying area. Rather than going down a formal route of seeking an amendment to the Bill or suchlike, from the Malvern Hills District Council, as I understand it, there was essentially an agreement that a working group would be set up with the Trust, Malvern Hills District Council and other stakeholders to look into this point after the Act, as to whether or not there should be a change to the composition or the levy-paying area.

54. It seems, in very, very high-level terms, that it did not get very far, in part it seems because there was some pausing due to local government reorganisation that was going on at the time. Then it did not seem, from a couple of documents, that that was maybe a

core priority for other new bodies or stakeholders at the time, so that did not seem to go anywhere in practice in 1995, although it looked like it was something people were looking at.

55. It looks like it was then looked at again around the 2000s. As part of that, an approach was made to Defra for its view on whether it would look at using a Section 303 order to change the constitution of the Trust. What I have seen is the communication that came back that, even if the power could still be used, given we are looking at an Act from 1875, large parts of which have been repealed over many years, it was unlikely that the Ministers would look to take anything forward under that basis, given it was quite an antiquated procedure and suchlike.

56. I think that that was a very long-winded way of saying it is on the statute books, but there are issues, I think, around whether it could actually, in practice, still be used today. Even if it could potentially be used, once you have dug down through all the, "Does it apply because of this, that and the other?", there has been a clear indication in the past from the relevant department that it would not be looking to go down that route of making that sort of order at this point, so much further on from when the Act was enacted.

57. My Lord, I am conscious that we may have to come back to some of those issues if past matters or what happened in the 1990s or why things have not happened before is raised by petitioners, but I hope that gives an answer to what I understood to be my Lord, Lord Hope's, particular concern, which is that, if you were going to put any reliance on the existence of the 303 power, you would need to be clear about what its status was and whether it could be used. I think what is probably fair for me to say is that, even though it is on the statute books, it might be safest to work on the basis that that is not likely to be an option or an avenue that would be taken forward to change the levy-paying area going forward.

58. My Lord, the only other point is probably a more note for me. I have one point to pick up on the power of disposing of land in Clause 73, but it might be sensible that I deal with that when we touch on ancillary land a little bit later today.

59. My Lord, at that juncture, if I could move to the powers in Parts 4 or 5 of the Bill, again, what we are proposing to do is focus in these sessions on the clauses that we understand to be opposed in those parts and pick up the unopposed clauses primarily when

we deal with all the unopposed clauses at a later session. There are a couple that I will pick up on as we go through, just because they sit quite naturally. For example, in by-laws it seems sensible to deal with all of the by-laws powers together, rather than the two that are raised and deal with the two that are not later. Again, what we would be proposing is probably a bit of an approach by which I might outline what provisions say or what they do, their connection with existing provisions, and then look to Ms Satchell or Mr Bills, who returns today, to explain why the Trust is looking for this power, why it needs this power, what it is thought it would need to do and any questions you might have about how this power may have been exercised in the past if it is one that is already on the statute books.

60. I am very conscious that the parts of the Bill we are about to go into bring us into the world of commons, estovers and fencing, and interactions with the Commons Act 2006 and the Highways Act 1980. I wondered whether it would be acceptable to the committee if I briefly brought out four points of context that may just assist in setting a bit of the scene for the powers that we will be going through in a little more detail this morning, if that would be acceptable. On this, there is in bundle 7 a note—I am afraid another note—that has been prepared, which is behind tab 19, starting at page 114, where we have sought to outline some headline points around the commoners' rights, how that interacts with the Bill, the fencing powers and then, at the end, liability for damage caused by trespassing livestock.

61. THE CHAIR: Just move quite slowly, because to find 19, which is at the very back, requires a lot of skill to avoid getting into a tangle with the thing falling to bits again. The trouble is it is quite a tight bundle, this, in this file. Am I being unusually stupid if I find it difficult to get to tab 19?

62. MS LEAN: I do not think so at all, my Lord. I am just now concerned about the pages I might be missing, because mine seems to be a little bit less tight.

63. THE CHAIR: I have got it now.

64. MS LEAN: I was going to probably use this as a bit of a jumping off point. Again, I think we have mentioned with other notes that you will have seen that these were documents that were in part prepared when responding to petitioners, so there will be text from here that has been included in responses to petitioners who have raised matters to

do with this, but it has been expanded upon for the purposes of these hearings.

65. My Lord, so the first point, by way of introductory context, is about commoners' rights and the nature of commoners' rights. My Lord, you may have seen reference in the earlier Acts or in some of the petitions to rights of common being enjoyed by reference to ancient customs of the forest of Malvern or other customs under which such rights were enjoyed. That is sort of the language that you see in Section 10 of the 1884 Act. The position has moved on somewhat in that, under the Commons Registration Act 1965, there was an essentially "register or lose it" regime that was set up.

66. After the 1965 Act came into force, it set up a provision that said there will be registers of common land and there will be registers of town and village greens. On that, you have to put all land that is common land or town or village green, and you have to put who the owner of that is, and, if somebody has rights of common, they have to put on that register, "I have these rights of common. This is what they are". If it is grazing, it has to identify the number of animals that are entitled to graze. That then becomes the basis for which common rights are looked at, essentially, because the Commons Registration Act 1965 says that, if it is not on the register by a prescribed date, those rights of common will no longer be exercisable. We have sort of moved away from this idea of looking to, "Do you have it as a matter of custom or practice?", to, "Do you have rights that are registered on the commons register?"

67. Commons registers do vary in their entries. In headline terms, while they are conclusive as to somebody saying, "I have a right of grazing or a right of estover or a right of piscary" and, if you are grazing, "It is this many animals", they are not always very clear about exactly what the nature of the right is on some of the others. Estovers is something I believe one of the petitioners may be raising in front of you. There are different types of estovers. I believe they are called botes, from the French. There are things like general house bote and fire bote, but, broadly, it is the purpose that you can take or use wood, bracken or gorse or things for, whether you can take it for fuel or whether you can take it for repairing your house, but that is not the sort of level of detail that necessarily tends to appear on the register. It is still sometimes necessary to go back and look at, if somebody says, "I have a right of estover", "Okay, what was the right that you enjoyed?" by reference perhaps to the custom that was prevailing at the time.

68. I highlight that because that may be a point we come on to with estovers about cutting down of trees. It is also important to note generally in this context that, for the Malvern Hills, a commoner who enjoys rights of common who has rights registered on the commons register will have that over a particular unit of common land. The mere fact that they may have rights of common on part of the Malvern Hills, because they might have rights of common over registered unit CL9, which includes Castlemorton Common, which is one I know you will be hearing about over the next week or so, does not mean that they have a right of common over any of the common land that is currently within the Trust's jurisdiction. Again, that was just to highlight that the register is quite important in terms of understanding, when somebody says, "I have rights of common", well, that does not mean that it is anywhere within the Trust landholding. It is on the bit of the common that you have the rights registered on on the register.

69. THE CHAIR: Just before you go further, so the register is the key, is it, to the extent of the commoners' rights?

70. MS LEAN: Indeed, my Lord, who has them and where they are, and in terms of, if it is grazing, how many animals, in very broad terms. My Lord, to continue that thought, the Bill does not extinguish any rights of common. Clause 94 makes clear—and I have referred to this in paragraph 2 of the note—that, except where specifically provided, nothing in the Bill is to be deemed or construed to take away, prejudice or affect any right of common exercisable by any person or persons overall, in respect of the Malvern Hills. One point—I know we will come on to this—is that there is a point of clarification in Clause 56 about estovers, and specifically what can be done in respect of particular trees.

71. My Lord, in terms of obligations and duties in respect of the commons, again, as we say at paragraph 3, the Bill does not remove or alter existing obligations in terms of things like keeping the hills unenclosed and unbuilt upon, or resisting and abating encroachments. Also, it carries forward the ability to regulate the exercise of any rights of common exercisable upon the hills or to make by-laws regulating the use or enjoyment of rights of common. Those are things that find their foundations in the earlier Acts. Those things are carried forward into the new Bill. In terms of the fundamentals of what can be done, in essence, they remain unchanged in the Bill. That is, essentially, the position in respect of commoners, as in, "What are the rights? How do we look at the rights? What does the Bill do in terms of impact on commoners' rights?"

72. I should probably also say something about the Trust as a landowner, because this will be relevant when we are looking at the grazing compartments in particular. This is picked up at paragraph 7 of the note, which says, firstly, obviously, commoners are only entitled to graze the number of animals that are recorded in the register of common land. Importantly, the owner of common land, so the Trust, is also entitled to graze that land. The commoners' rights are not exclusive, but what the owner cannot do is—he can graze any surplus. The owner cannot graze if that unnecessarily abridges or interferes with the rights of commoners. An owner would not be able to say, "I am going to put 200 cows on here" if it was only capable of supporting 210 cows and the commoners had 190, for example. The owner could not, essentially, oust the commoners in that way. If it could support 200 and the commoners only have 10 animals grazing, the owner is perfectly entitled, as a matter of law, to put animals on to graze the surplus that is left over from the commoners.

73. That is relevant in the context of understanding the licensing of the grazing compartments. I believe that my Lord, Lord Inglewood, asked about this on day 1. That is the Trust, as landowner, granting licences to graze the commons, but in circumstances where there are not commoners there or, if commoners are using their rights, they are not using the full extent of the grazing that is available, and so there is that surplus for graziers to be brought in to graze.

74. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Are you saying that commoners might have, as you say, 200 cattle or sheep that they are grazing on the common and the landowner could then say, "This will actually sustain 250 animals and therefore I am going to put my 50 on as well" and they mix together, or is this where the fencing comes in?

75. MS LEAN: My understanding is that they could mix together. I am sure that I will be told if I am wrong on that. The point is that it would not be enclosing it, because it would be free common for anybody to graze on. It would just be saying, "There is this surplus left over on that common land, so the landowner is therefore entitled to add his cattle into the grouping". I am sure that Mr Bills can explain in due course about how the by-laws and the operations of this work, so animals belonging to different people are identifiable, so that the Trust is able to identify if there are animals on there that should not be, for example.

76. THE CHAIR: Can you explain about the numbers in the register? It seems a very strange idea. You can only have, on your grazing, the number of animals in the register. What happens at lambing time? Are you able to have lambs on these grazing areas? You do not know until the lambs pop out how many there are going to be.

77. MS LEAN: My Lord, that is not a question I had thought about. I will be honest with you. I do not know whether Mr Bills can answer it, but it may be that I have to go and double check that.

78. THE CHAIR: It seems a very odd provision, this register, if it has to have the numbers of animals. Is it a maximum number that you put in?

79. MS LEAN: I think it is a maximum number, my Lord.

80. THE CHAIR: Right, that makes more sense.

81. MS LEAN: It comes out of—I am thinking about words about stinted pastures and number of stints and things, which used to be in common—like how many you could have. I think that was attempted to be translated when the register came in as going, "This is the amount that my property would need or could be reasonably supported for my property and that comes to about 50, so I can graze up to 50", not, "I can graze exactly 50", so forgive me.

82. THE CHAIR: Yes, perhaps that is better expressed.

83. MS LEAN: Yes, forgive me.

84. LORD INGLEWOOD: If I might, ordinarily you would bring your ewes back to the steading, to lamb them close to home to keep an eye on it, and it is really only later in the year, when they are bigger, that you then push them out on to the common. It does not necessarily affect the niceties of the point.

85. THE CHAIR: You do not know how many you are going to push out until lambing.

86. LORD INGLEWOOD: You would not push the ewes about to lamb, in general terms, out on to the common because you want them close to home to make sure that the lambing goes—in Cumbrian terms, that is the inbye lamb, but anyway I do not want to—

87. THE CHAIR: We can go into the details about that. I go to an area where blackface lambs lamb on the hill. Anyway, I think we should not go too deeply into this.

88. LORD EVANS OF GUISBOROUGH: Might I just ask a question about the numbers, Chair? I am a city person, so my knowledge of lambing is limited, but I am interested in how you reach those numbers. The numbers are in the register, but how do those numbers alter if the nature of the grazing land changes? If the register was created in 1965, there may well have been changes to the environment since then that enable you to support more or fewer animals. How is that reflected?

89. MS LEAN: Perhaps I can hand to Mr Bills for that.

90. MR BILLS: Thank you. When the Commons Act went through, it took the information from all those with commoners' rights as to what they had historically put out on the common. Mr Jones might say, "I have had 11 cows, three chickens and eight geese", and that is what will be written in the register. That is what he has the rights for, and whoever owns that house thereafter, and it does not change. It may be the case that enough people claimed certain numbers of animals and they were recorded in the register that the grand total could be far more animals than the common could actually sustain, and that is the tragedy of the commons. That is the case with ours as well. It would more be a case that it is not relating to the commons register to dictate how animal numbers may go up and down. It would be through good relations and management.

91. THE CHAIR: Ms Lean, I am rather concerned about time. I am afraid that it is partly my fault, but we have to get through quite a lot of material this morning. Can you just carry on through the note and pick out the points that really are important for us?

92. MS LEAN: Indeed, my Lord. As I said, that was to finish off the commoners' rights to give a bit of an understanding about how some of these powers may play out or interact with commoners' rights. Fencing powers was the second point to pick up on, and this is summarised in the note at paragraphs 9 onwards. The key point to pull out, I think, here is at paragraph 10, which is that powers to fence or to temporarily restrict access to parts of the Malvern Hills are not new. There are precedents, for example in Section 15 of the Malvern Hills Act 1995. There are precedents in Section 4 of the Malvern Hills Act 1930.

93. There are further powers or changes to powers that are sought through the Bill,

which are summarised in the note, but we will touch on those as we go through the particular provisions. What I want to do is just draw attention also to the matters discussed at 21 to 26 of the note, which I will summarise very briefly, which provide some context for fencing powers or the needs for fencing in the context of the Malvern Hills, which is specifically around liability for damage caused by straying livestock.

94. Ordinarily, a landowner would be responsible. If, as I put it the other day, my cows got out of my garden and went down the road to Mr Lewis's garden and ate his roses, then I am liable for the damage to his property. That is obviously a bit tricky when it comes to commons, the whole nature of it being—so that might carry with it a duty to fence or secure my land, so that my animals cannot get out and cause damage to my neighbour's property. That is obviously a bit difficult with commons, the historic nature of which has been that they are an unenclosed space that no one person controls or fences.

95. As referred to in the note at paragraph 24 in particular, there has grown up a widespread acceptance of a custom that, when you are dealing with common land, there is a duty on occupiers of land joining the common to fence against the common. Rather than putting the onus on me to make sure that my animals do not get into Mr Lewis's garden, if it is a common the obligation is on Mr Lewis to fence his garden to make sure the animals do not stray off the common land into his garden. That is reflected in terms of the provisions in the Animals Act, which brought things forward from the common law about liability for damage when animals stray. That provides a little bit of context for some of the powers that you will see around where the Trust asked for a power to fence non-common land for the control or management of its livestock. That is the Trust, as landowner, needing to take steps to prevent its livestock straying and causing damage where it would otherwise be liable for it. Where there are powers about securing the common, that is really a pragmatic power, as it were, but it does not—and the clause specifically says it does not—displace any underlying existing legal duty for other people to fence against the common. It seemed easy to touch on it now and mention it, and then we might come back to it when we get to the clauses, just in case you wondered why something about the Animals Act suddenly popped up in your note when the Act does not refer to it.

96. The third point of housekeeping, my Lord, is consents under the Commons Act 2006. It is only touched on very briefly in the note in the context of identifying some

powers where the consents do or do not apply. One thing I should highlight is that there is obviously a consenting regime for works on common land, which is provided for in Part 3 of the Commons Act 2006. You have copies of that in this bundle that we have given you today at tab 7, page 34.

97. In very broad terms, Section 38 is a prohibition on works without consent. If you want to do certain types of works, which are referred to as restrictive works, on certain types of land, which includes common land, you cannot do it unless you have got the consent of the appropriate national authority. In England, that is the Secretary of State for Environment, Food and Rural Affairs. In practice, it is done through the Planning Inspectorate. This is about works that have the effect of preventing or impeding access to or over any land, like common land, and it includes things like fencing or buildings or digging ditches and trenches. There is this regime that says that, if you want to do these sorts of things, it is prohibited unless you have gone and got the specific consent to do that specific work.

98. There is a disapplication of that in subsection (6), which says that the prohibition does not apply in certain circumstances. The important one, for present purposes, is that in subsection (6)(a), at the top of page 35. That requirement, that prohibition, does not apply to "works on any land where those works, or works of a description which includes those works, are carried out under a power conferred in relation to that particular land by or under any enactment". We have not given you the explanatory notes to the Act—forgive me—but the example that is drawn out in the explanatory notes, and I would make a point on submission anyway, is that that is something like where you have an Act like this Bill. Where you have a specific Act that says, "This is an Act about the Malvern Hills" or "This is an Act about Wimbledon and Putney Common", if there is a power in there that says, "You can fence for certain purposes", if you are fencing under the powers of that Act, you do not have to go and get consent under Section 38.

99. I have raised this because you will see when we go through the Bill that there are some provisions that say, notwithstanding anything in subsection 38(6)(a), the provisions of Part 3 apply. There are some powers in the Bill that say, "Even though, in theory, there is a statutory disapplication, no, you might still have to go and get consent if you want to do that particular work". Some of the powers say that; some of the powers do not.

100. In part, that is a product of where there are powers that existed in the 1930 Act or suchlike, because there was a similar disapplication to that in Section 38(6) in the predecessor provisions, which were in the Law of Property Act 1925. Some of the powers are ones that did not have that attached to it, so they have been carried forward. There were some in the 1995 Act—sorry, the then equivalent of Section 38(6)(a) was disapplied, so it said, "Regardless of that, you need to go and get consent if you are doing fencing or suchlike", and there are some new powers that have come in. I will touch on, when we go through each of the provisions, where the Section 38 consent regime would apply, where the Bill says it would not, or where it would not apply on the Bill as drafted.

101. What it is probably right for me to do at this point is to highlight that the Trust has been engaging with Natural England, as one of the stakeholders on this Bill, and has been engaging about the powers and the application of the Commons Act consent. Natural England has a couple of clauses where it maybe takes a different view from the Trust on whether or not it should be within the Section 38 consenting regime, or whether we could rely on the fact that there is the power in the Bill and the disregard. What we have provided you with is the most recent letter from Natural England on that point setting out its position, which you have in the bundle at tab 9, page 41. I wanted to tell you it was there, because I am hopeful we will get to this later today, but just in case we did not, so you know where the letter is.

102. What I was proposing to do was come back to more general points on the Commons Act and maybe why we say that the balance has been struck right in the Bill, in our submission, between those powers where we say, "Okay, yes, Section 38 consent. We agree it would be appropriate to go and get Section 38 consent", and those powers where we say, "No, this is a case where we should be able to rely on that general disapplication in Section 38(6)(a).

103. My Lord, the fourth related but very final point of context is to note that the Bill does not disapply requirements for any other consents. If planning permission is required for a particular type of work on the common, there is nothing in the Bill that says, "You do not have to go and get planning permission".

104. THE CHAIR: Can you give me just a moment? You referred to a letter from Natural England and my tab 9 actually has the statutory instrument.

105. LORD EVANS OF GUISBOROUGH: It is tab 8.

106. MS LEAN: I think it might be in tab 8. Yes, I think I noticed this in my bundle. I think tabs 8 and 9 have got mixed up. What is currently behind tab 8 should be tab 9. It should be page 41 and it should be a letter dated 23 January 2026.

107. My Lord, that is by way of a flavour or a bit of context for some of the particular points that may be coming up or you may need to hear more about from us as we go through Parts 4 and 5 of the Bill. Is that a convenient juncture to turn to the opposed provisions?

108. THE CHAIR: Yes.

109. MS LEAN: The first provision that I have noted down as being opposed in Part 4 of the Bill is that in Clause 42, which is at page 36 of the Bill.

110. THE CHAIR: What about 38? You are coming back to 38.

111. MS LEAN: My Lord, I did not have 38 on my list of opposed clauses.

112. THE CHAIR: It is a minor point, but David Cameron is objecting to it because he says the effect of it is to really change what is to be found in the Countryside and Rights of Way Act 2000. He wants the clause to be broadened out. Perhaps you can come back to that when we meet next week and just bear that in mind. Just look at David Cameron's comment on 38.

113. MS LEAN: Indeed, my Lord. Forgive me; that had obviously slipped off my list. I think the short point is that this is the same as the first part of—forgive me, in fact I did have Clause 38 down. I have just called it a different number. That is the problem in my note. I have called it Clause 44, whereas in fact it is Clause 38, which does explain why it was before Clause 42 in my notes. No, you are right, my Lord. It is opposed by petitioner Mr Cameron. It is not a new clause. It was previously contained in Section 15(1) of the Malvern Hills Act 1995.

114. The wording in Section 15(1) of the Malvern Hills Act 1995 is slightly longer, because it goes on to say a person who enters is not to be treated as a trespasser. Those words have been essentially considered superfluous. They have been taken out because it

is considered that the drafting in Clause 38 really captures the essence of the right in question. It is the right subject to the provisions of the Act in compliance with rules, regulations or by-laws related to the Malvern Hills at the time being in force. The public have a right of access to the Malvern Hills on foot or on horseback for the purpose of open air recreation. It is pretty much word for word what is in the beginning of Section 15(1) of the 1995 Act.

115. THE CHAIR: I think his point may be this, if I can just press this a little further. The opening words of Clause 38 are "Subject to the provisions of this Act". He says, "Have a look at Clause 63", which is about licensing. Among other things in licensing, you have to provide insurance for various things you are doing. I think he is concerned that there are other provisions elsewhere in the Bill that tend to restrict the apparently broad right of access.

116. MS LEAN: My Lord, my submission would be then that probably the focus is on the clauses that are said to be of particular concern in restricting that right, because the wording of Clause 38 is identical, with the identical restrictions and caveats, to that in the existing Act. It would seem the problem there might be more people saying, "We are worried about this power because it might do this", rather than the provision in Clause 38 itself.

117. THE CHAIR: The answer to Mr Cameron may be, "That is all very well, but what really matters are these other clauses that we come to later on, but this clause in itself has got a precedent and it is broadly expressed and should be left as it is".

118. MS LEAN: Indeed, my Lord. Indeed, that would be my submission on that clause.

119. THE CHAIR: Right. Thank you.

120. LORD EVANS OF GUISBOROUGH: Do you exclude cyclists? It says "on foot or horseback".

121. MS LEAN: My Lord, the right that was expressed in the 1995 Act was on foot or on horseback. There are permissive provisions around cyclists, but it is not an as-of-right access in the same way as the foot or the horseback. I am told that that is except on the bridlepaths, but then that is under a slightly separate regime, which would be under the

regime that governs public rights of way, as opposed to the other areas of the hills.

122. THE CHAIR: Sorry, I interrupted you. We are looking at Clause 44.

123. MS LEAN: Clause 42, my Lord. I believe that this is one that is also raised by Mr Cameron in his petition. This clause is really about the enforcement of the duty that you find in Clause 40, which is on page 35, to keep the Malvern Hills unenclosed. It essentially provides that the Trust is complying with its duty to, by all lawful means, prevent, resist and abate all enclosures and encroachments or attempts to do that or to use the Malvern Hills for purposes inconsistent with the Act that you find in Clause 40, and that it can take all necessary measures to do that. Again, that finds its footing in previous legislation.

124. This is a new provision in Clause 42(2), which is that any expenses reasonably incurred by the Trust in taking those measures under subsection (1) can be recovered from the person responsible. That is a new add-in, but, in my respectful submission, it is a fairly sensible add-in because it reflects what you would expect if you went to court to take action against somebody who was doing something they should not be doing. You would expect to recover your costs for it, so it is basically just reflecting that position.

125. THE CHAIR: Clause 42(1) is concerned with what other people do, basically.

126. MS LEAN: Yes. It is what the Trust can do to stop other people doing things they should not be doing if it is in the nature of enclosure, trying to enclose or encroach upon or take things from the hills that they should not be taking.

127. THE CHAIR: I mention this because, again, Mr Cameron's point is, "Look at 48", which gives a power to do exactly what 42(1) seems to be preventing. I think he is misunderstanding the position that 42(1) is dealing with other people, whereas, when you get to 48, it is looking at the powers of the Trust.

128. MS LEAN: Indeed, my Lord. Having said that, my Lord, of course Clause 42(3) brings in the Trust as well as other people, if I could put it in those terms. What Clause 42(3) says is that, without prejudice to any other jurisdiction or remedy, a county court can, on the making of an application, make an order requiring a person to do the various things in (a), (b) or (c).

129. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: In the past, have

there been many people who have fenced off the common for their own purposes?

130. MS LEAN: My Lady, that was part of what led to the 1884 Act. There was a real concern at that time that people were taking or enclosing or encroaching. Certainly looking at the—

131. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Was that large areas to keep stock on, or were they just extending their curtilage to increase their gardens, or make a vehicular access into their gardens, or property?

132. MS LEAN: Perhaps I could look to Mr Bills.

133. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: That would be helpful, I think.

134. MR BILLS: I think the further back in time you go, the larger the enclosure might be. Yes, there were huge tracts of land that were enclosed for various reasons. Through time, I would say that these have generally got smaller, but it does still happen today. If we have a neighbouring property and they are redoing their fence, if not much happens the other side of their fence, they might well think, "I will tell the contractor to put it another metre out and we will extend our garden a bit". We have had to tackle that. Although it is a slightly different type and scale, it is still happening today, yes.

135. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: It is low key. It is about extending your curtilage and having a bit of extra garden.

136. MR BILLS: These days it is much more like that, but historically it was whole farms and whole fields that were enclosed and taken from the common, yes.

137. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Thank you.

138. MS LEAN: My Lord, coming back to Clause 42(3), this widened things out a bit, if I could put it in those terms. There was the power in earlier Acts—essentially, you found it in Section 20 of the Malvern Hills Act 1884—for a court of summary jurisdiction to be able to make an order to stop people doing things. Those powers tend to be exercised by somebody who had an interest in the land or a right in the land that they could bring that action.

139. What subclause (3), read with subclause (5), says is that any person can make an application to the county court for an order to require a person to discontinue or refrain from enclosing or building upon any part of the Malvern Hills—that is the subclause (3)(a)—or requiring the removal of any unlawful enclosure from any part of the Malvern Hill. That is subclause (b). It would not just have to be the Trust that could go to court to say, "Somebody has fenced in that bit of land" or "Somebody has put a building up". Another person could do it.

140. The flip side of that is, of course, that, if somebody thought the Trust had done something it should not have done, under this provision that person could take the Trust to court and say, "We want an order saying the Trust has unlawfully done something", which might bring us into other issues around, "Has it done it under the powers? Is it charity proceedings that need separate procedure?" and all the rest of it. In theory, this does open up the potential not just for the Trust to bring an action against somebody, but also for somebody to bring an action against the Trust if they think that there has been an unlawful enclosure or building or suchlike.

141. Although I focused on the enclosures and the taking things from the hill, which is the duty in Clause 40 of the Bill, the power to go to court to get an action to say, "Stop doing that", in subclause 42(3), also relates to the certain provisions you find in Clause 41 of the Bill, which are about preventing unlawful felling, cutting or damaging of trees or things like that, or unlawful digging, taking away gravel or damage. The Trust can also go to court and say, "Somebody is unlawfully felling trees on part of our land" or "Somebody is digging out gravel". It sort of, in a sense, brings together in one place the jurisdiction the court would have if somebody turned up and said, "There is a problem on the hills because people are doing things they shouldn't be".

142. Subclause (4) of the Bill gives a limitation period of 12 years from the making of the enclosure or the erection of the building in question. The Malvern Hills Act 1884 has two provisions that deal with these powers. One refers to six; one refers to 12. The Bill says 12. I suppose it is helpful for me to bring out, as a parallel—I have touched on the Commons Act 2006 regime. There is a power for any person to go to court if they think somebody has done work on a common without having the requisite consent. The position seems to be, or the thinking seems to be, from, I think, information that has come out from Defra that probably 12 years is the limitation there. This would correlate with that 12-year

provision.

143. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: May I just ask: does the Trust have a programme of tree planting—saplings or slightly more mature trees—or does it not encourage tree planting?

144. MR BILLS: We plant trees every winter. It is just a case of getting the right tree in the right place, as the Forestry Commission says. There are some places where you absolutely would not want to plant trees. In fact, we are trying to remove trees in some parts for good reason, but in other parts we are encouraging them. There is a photo in the bundle of us planting trees with a local school that will come up later on.

145. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Are they successful or do the deer eat them?

146. MR BILLS: Where we are planting a tree avenue or something like that within Malvern, we will put protection around it for various reasons. If we are doing work where we know there are deer, we will protect the trees from them, but we do not always directly plant the trees. Sometimes we just allow natural processes and trees will pop up and grow on their own.

147. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: You would not put temporary fencing around it to try to protect a tree until it got a bit more robust.

148. MR BILLS: We could do, yes. There is a power to protect trees that are planted that is carried through from a previous Act. Yes, we do sometimes protect a tree or a group of trees.

149. MS LEAN: My Lords and my Lady, on Clause 42, just finishing up—it is a bit of a longish clause, I am afraid—I got to subclause (5) and said that any person can make an application to court. Subclause (6) is essentially the defence point for the Trust. If somebody brings an action and says, “The Trust has unlawfully enclosed”, an order will not be made if the Trust is actually doing it lawfully under a power in the Act or another enactment.

150. Subclauses (7) and (8) are new powers, but they essentially reflect what you would find in things like the Town and Country Planning Act or the Building Act 1984, where

somebody is required to do something. There is a notice or an order saying, “You must take down this thing that you have erected in breach of planning control” or, “You have a dangerous building; you must remedy it”. If the person does not comply with that notice or order, there is a power for the authority to step in and do it itself and recover the costs from the defaulter. Essentially, that provides the same thing for the Trust. If the Trust goes off and gets an order that says, “No, you have to remove this shed”, or, “You have to remove this fence”, and the person does not do it, the Trust can then say, “Right”, and it can then lawfully remove that fence and claim the cost of any works of doing that from the person who should not have done it in the first place.

151. That is a slightly longwinded way of saying that this is a modernisation of the enforcement powers that you find way back in the 1884 Act, but I hope, even where there are new bits in there, it comes across that there is a common-sense reason why that is in there and that it reflects general practice in other regimes.

152. THE CHAIR: It seems quite sensible. If an order is made against somebody and he does not comply with it or does not comply with it fully, it has not really achieved its object.

153. MS LEAN: It gets around any issues because, without having that in there, of course, if the Trust went down and pulled down the fence, even if there were an order saying that we should pull down the fence, technically it would be trespassing. This would give it the lawful authority to go and sort the situation out as opposed to having to go back to court and try to bring contempt proceedings or whatever to force the person to comply.

154. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: It is very litigious.

155. MS LEAN: My Lady, it is one of those powers that you hope you do not need to use, but it is quite important, if you do find yourself in that situation. This is really a modernising provision, the kernels of which you find in the earlier legislation.

156. LORD INGLEWOOD: A lot of these powers are parallel. The planning authority could do the same, could they not, in a slightly different way? Possibly simply as a landowner—forget about the powers. A landowner can exercise rights of land. It is part of a wider set of activities.

157. MS LEAN: It is part of a wider set of activities, yes.

158. LORD INGLEWOOD: It focuses your ability to do it and get on with it.

159. MS LEAN: Again, it is one of those things. Being a statutory body with certain powers, it makes absolutely clear that the Trust can go on and do these things and there is no issue about, "Have you got the proper authority to do that? What are you relying on?"

160. THE CHAIR: Instead of relying on the general power at the end, you have actually written in here specifically identifying what needs to be done in a particular situation.

161. MS LEAN: Indeed, my Lord. It is one of the examples of where we have taken the kernels from the earlier legislation, put it on a modern footing and updated it to say, "Yes, if this situation occurs, this is the power that you could look to use to sort that out".

162. LORD EVANS OF GUISBOROUGH: You are effectively using local authority-style powers. Does that not make it even more important that you have a robust number of elected members?

163. MS LEAN: My Lord, I would say it is not really using local authority-style powers. It is making clear that the Trust can essentially do what a private landowner could do. If somebody comes and does something on my land or they encroach on my land, I can go to court; I can sue; I can get an order to require them to take it down. That is making clear that this Trust, as a statutory corporation, as a legal person, has the same powers as a landowner to go on and do it, but it reflects more widely that they have broader duties and obligations under the Act.

164. They might do it not because they have a particular problem with somebody putting a fence up on land they own, because it is not a problem, but because it is interfering with the exercise of rights of common, so therefore they ought to require the fence to be taken down. It is allowing for the fact that they have that slightly broader role.

165. On the fact that there are the step-in default powers, I drew attention to the other regimes just to show that this is a not uncommon power that you find in statutes where there is a provision to go to court. If you get a court order and it is not complied with, the body is entitled to do that. I would have to trawl back in my memory bank to check where abatement or the rights of a private landowner come in if there is a court order that is not

complied with, but, in my submission, it is a sensible power. The fact it is a power that some local authorities might have does not strengthen or go to the debate about what the representation of the board ought to be. These are really powers that it would be exercising almost as a landowner rather than as a local authority body.

166. THE CHAIR: An individual could do these things—they do not need a statutory power to do it—but, because you are a body of statute, you need them written in. It is as simple as that.

167. MS LEAN: Indeed, my Lord. If I am being completely straight on this one, if an individual landowner went to court and got an order saying, "Mr X must pull down the fence that is encroaching on my land", I think the individual landowner would be well advised to check whether or not they could go on and take the fence down themselves, if it involved going onto Mr X's land. Here, of course, it probably would not be actually going onto somebody else's land; they would be doing it on their own land, so the point is probably moot.

168. THE CHAIR: It probably would be, but you are clarifying it, in your case.

169. MS LEAN: Yes, indeed.

170. LORD INGLEWOOD: In the context of the discussion about this, are there—there may not be on this land—things like rights for adjoining landowners to take a bit of sand, gravel or stone? Those might be part of their rights, but they may be registered as common rights.

171. MS LEAN: I think I might need to look to my right about whether there might be any of those particular types of rights.

172. LORD INGLEWOOD: If there are not, the whole thing is a bad point I am about to make.

173. THE CHAIR: Nobody has raised that point in petitioning against this right, so I think we can be fairly sure that, if there is, it is a very minor issue.

174. MS LEAN: My Lord, I think that would be captured by what said in Clause 41(2). which is, "Subject to the provisions of this Act, the Trust may make take all necessary

measures to prevent (a) any unlawful digging on or removal of stone, soil, gravel and turf". If somebody had a legal right to do that, whether that is because of a lease or a licence—

175. LORD INGLEWOOD: "Unlawful" does not cover without planning consent, for example. I am just probing. I think it is a bad point. I do not think it is really relevant, but I am just checking.

176. MS LEAN: I had taken "unlawful" to mean "without a legal right to do so", without a private right, but I am certainly happy to double-check that. That would be my natural reading of it because, if it was unlawful because it was in breach of planning control, you would expect that to be dealt with through the planning regime rather than by a landowner, if that makes sense.

177. LORD INGLEWOOD: Yes, fine.

178. MS LEAN: My Lord, I do have a note that Clause 44 is an opposed clause by Mr Cameron. I think this is the actual Clause 44, which is rights of common. "The Trust may by all lawful means regulate the exercise of any rights of common exercisable over the Malvern Hills", but, again, that ability to regulate the exercise of rights of common goes back to the 1884 Act.

179. In Section 10 of the 1884 Act, it is provided that the conservators may, amongst other things, "regulate the user and enjoyment of any rights of common or commonable rights in accordance so far as may be with the ancient customs of the forest of Malvern or other customs under which such rights are enjoyed". This ability to regulate the exercise is not a new power, and Mr Bills, I know, would be very happy to speak to some examples of how the exercise of rights of common are in practice regulated today, very quickly, to give an illustration of the sort of things being talked about.

180. THE CHAIR: David Cameron and the other commoners are saying that this is a shortened version of Section 10. They want it to be reworded to limit the Trust from regulating commoners' rights in a way other than the specific power for temporary fencing in Clause 49. That is a very specific point. They are saying, "It is shortened; it should be really reworded". That takes us back to the question of whether Section 10 of the 1884 Act did actually have that qualification in it. Do we need to look at Section 10

of the 1884 Act to see what is going on there?

181. MS LEAN: Indeed, my Lord. I am just going to look quickly. It is page 178 of the big R bundle, I am afraid.

182. THE CHAIR: Section 10 is a very long section, is it not?

183. MS LEAN: It is a very long section, my Lord, I am afraid. It does an awful lot of things. Where the relevant bit probably comes in is about nine lines down. It is a line that starts "thereof". It says "to regulate the user and enjoyment of any rights of common or commonable rights in accordance so far as may be with the ancient customs of the forest of Malvern or other customs under which such rights are enjoyed".

184. My Lord, this may come back to my earlier point, which is that, first, obviously, common rights are no longer essentially regulated or enjoyed under the ancient customs of the forest of Malvern or other customs. We have now moved on to the registration provision. That is what gives the basis for entitlement to exercise rights of common. I have mentioned that, obviously, sometimes it is necessary to go perhaps behind the register to understand—it is the same with estovers—exactly the nature of the right that was enjoyed.

185. That is perhaps where we come back to Clause 94 of the Bill, which is at page 69 of the filled Bill, which says, "Except where specifically provided, nothing in this Act is to be deemed or construed to take away, prejudice or affect any right of common … exercisable by any person or persons over or in respect of the Malvern Hills".

186. My Lord, if there was some particular aspect that a person could bring and say, "If you look back, this is the very particular nature of this particular right of common that I enjoy, this particular right of estover, piscary, pannage or whatever it may be", the power to regulate and exercise the rights would probably have to bring that into account. I do not think you could say that the ability to regulate the exercise of any rights could essentially extinguish the particular aspect or nature of a right.

187. I think it might be that the concern is more about, again, what Clause 48 or whatever is doing as opposed to Clause 44 itself. It is not clear exactly what it is that the petitioners say is lost by not having the words in from the 1884 Act, given that we are in this new

Commons Registration Act world.

188. THE CHAIR: Putting the two clauses together, what 44 is talking about regulation. It is not taking away things, which is what 94 would prevent.

189. MS LEAN: Yes.

190. LORD INGLEWOOD: If I were a farmer, the thing that might worry me in the context of this land is that, if it was felt there was overgrazing, although it is difficult in practice now to see why you might think that, the Trust might decide, as it were, pro rata to reduce everybody's grazing rights by 10%, which might be possible under these powers.

191. MS LEAN: Jonathan perhaps might be the right person to respond to that.

192. MR BILLS: No, my Lord. We would not be able to do that. We cannot alter what is in the commons register. We did not put the numbers in the commons register and we cannot change them. It is never a case—

193. LORD INGLEWOOD: It is an unfounded concern, which is what I suspect farmers would feel, faced with these provisions.

194. MR BILLS: Yes. I hope the wording is clear that we are not looking to change the rights that are recorded in the registers at all. It is not part of what this Bill is doing. If I perhaps can give you some examples of the regulation, it might help provide a bit of context as to what it is talking about in reality, if that is okay.

195. THE CHAIR: Yes, please do.

196. MR BILLS: In the past, including right up to today, examples of regulation have included that livestock are adequately marked. This means other commoners and Trust staff can readily identify the owner so that, when they are wandering from the common or if the public find an animal dead, we know who to phone. Dead stock are collected in a timely manner.

197. The third example actually came from the commoners themselves. What they were tired of is, at a certain time of year, some people would have their rams or bulls on the common. They would mate with their livestock, producing progeny that they did not want

of an unknown mixed breed. There is a by-law that captures that and details that no entire animals are allowed on the common between 1 September and 25 October. That has not come from us. That is people looking after the animals who wanted that regulation there for their own good.

198. The last example that I can think of that we have not had to do is, if someone were to have more animals than was in their commons register amounts, we would try to regulate that and bring the numbers down to what they should be in the commons register.

199. MS LEAN: Perhaps if I could, just finally on that concern, flag that Clause 44 does not just say that it could regulate the exercise of rights; it may "by all lawful means". If there was something that was going to interfere with the rights that they were entitled to or the number that were lawfully entitled to graze by the register, that would not seem to fall within something you could regulate because it would be an unlawful interference with the right of common.

200. My Lord, I think that brings us on to the fencing powers, which I know we have touched on. They are probably some of the ones that are raised more particularly by those commoners who have petitioned. If we can perhaps deal with Clauses 45 and 46 together, these start at page 37 of the filled Bill.

201. Clause 45, which is about regulation and prohibition of access to parts of the Malvern Hills for certain purposes, is not a new provision. This finds its statutory footing or its predecessor in Section 15 of the Malvern Hills Act 1995 and specifically in Section 15(3). It may be that this is where it is helpful to have the 1995 Act to hand because there are some similarities and some differences, so it may be easier to do by looking at the Bill alongside the existing provision. I will just find the reference for that. It is page 245 of the bundle 1.

202. Certainly, Section 15 of the 1995 Act says that nothing in the section, which was about public rights of access, would prevent the Trust from being able to do certain things. It is phrased slightly differently in Clause 45 because we have separated out the clauses about the right of the public of access and regulation and prohibition. It essentially provides that the Trust can "regulate or prohibit, for such period as may be reasonably necessary, access … to parts of the Malvern Hills" for one of six specified purposes. Those purposes are in 45(2)(a) to (f). They mirror the purposes in Section 15(3)(a) to (f).

203. In very broad terms, the first four could be categorised as conservation objectives: protection of ancient monument or archaeological interest; protection or restoration of the natural beauty of the Malvern Hills; preservation of trees; protection or preservation of flora and fauna or an SSSI. It is a slightly modernised or updated wording, but the thrust is the same as in the 1995 Act. The second two are safety: after consultation with the chief officer of police and the chief fire officer, for the prevention of the risk of fire; and for the prevention of accidents or injury or other damage. The purposes are in broad terms the same as in the existing legislation.

204. THE CHAIR: There is a particular point that the commoners make. They object to the words "so long as appears necessary", which is in subclause (3) of Clause 45. I see it is exactly the same words that you find in Section 15(3). You are just repeating the words that were there. They say, "Well, it could be used to allow for permanent fencing", but has that ever been done under the exercise of the previous power?

205. MS LEAN: I am going to look to Mr Bills. I think I know the answer, but I think it should probably come from him.

206. MR BILLS: The answer is no. It has never become permanent. It is always a temporary measure.

207. THE CHAIR: It is understood that it is only insofar as necessary. If it is no longer necessary, it is removed.

208. MR BILLS: Correct.

209. LORD EVANS OF GUISBOROUGH: In the 1995 Act, subclauses (a) and (d) require consultation or advice from external experts before steps are taken. Those appear to have been taken out in the Act that you are presenting to us now. Why is that?

210. MS LEAN: My Lord, it is because they appear now in Clause 46. Clause 45 is about what the Trust can do and Clause 46 is how it goes about exercising the power in Clause 45. There is a nuance I will pick up on in terms of the timing of consultation, but, in broad terms, the power in 45 to temporarily regulate or prohibit access to areas for specified purposes is carried forward from the 1995 Act.

211. There are specific provisions in there about having to put a notice up saying what

the reason for the prohibition of access is. In subclause (10), you cannot regulate or prohibit access in such a way to prevent a person for good reason going to or from land that is only accessible by Malvern Hills Trust land. It cannot essentially interfere with a private easement or something like that, if that is what needs to be done. Subclause (5) does contain an ability to provide a means of access, if it is thought appropriate to do so, or a gate. There are things that can be done. Even if you are prohibiting or regulating access, if there maybe is somebody who needs to be able to still get into that particular area, you can provide a means for them to do that.

212. What I should flag, my Lord, is what is now in new subclause (3) of Clause 45. It was previously just part of a very big Section 15(3). The thrust of the power is regulating or prohibiting access. It is not necessarily a fencing power, but subclause (3) says that you can fence in order to regulate or prohibit the access. For example, you do not have the power to fence if it is for fire prevention. I am told it is not generally thought a good idea to fence if you are dealing with a fire. That is the point. It is not, "You can fence to do these things". It is, "You can do things that might be necessary to regulate or prohibit access, and that would include fencing, if that is considered to be necessary to do so".

213. That probably brings us, then, on to Clause 46.

214. THE CHAIR: Before you leave 45, can it be used, as has been suggested by David Cameron and others, to close off internal roads? They are saying that it should not be used for that purpose and it should permit the free grazing of animals within the commoners' areas.

215. MS LEAN: My Lord, in my submission, no. Where there is a power to fence roads, that is expressed in another clause of the Bill. That is in Clause 48, which is page 40. Subclause 48(2)(a) makes specific provision for being able to fence within a common unit, where you will essentially fence off part of the common from a road.

216. If the concern is danger—I think the concern was, "A road could always be seen as dangerous, and you might use this power as a means of fencing the road for danger"—there is also another specific power for fencing where there is something that appears to be a source of permanent danger. No, in my submission, it is very difficult to see how this clause, if it was enacted, could be relied on to fence to stop animals crossing a road to access the other side of the common or going onto a road that is part of the common

because it would not also seem to fall into any of the particular purposes that are specified in Clause 45(2).

217. THE CHAIR: The road itself would not be part of common land, would it?

218. MS LEAN: My Lord, it can be. The issue is that you can have roads that run through commons and they tend to be regarded as being part of the common. It got a bit confusing with the Commons Registration Act because there were some provisions in there that said that you do not have to register a road that runs through it. Mr Bills will be coming to this shortly. There are examples on the Malvern Hills of where there is a road running through a common and so the road is technically part of the common itself.

219. THE CHAIR: I think I understand now. The commoners' point is they do not want any internal roads on their areas of common land fenced at all.

220. MS LEAN: Yes.

221. THE CHAIR: You are saying that Clause 48 cannot be used for that, other than for what you see in subsection (2)(a). Is that right?

222. MS LEAN: Indeed, my Lord. If this power was going to be used to enable somebody to temporarily fence part of a road off or something, you would have to find a very particular reason in (a) to (f) that that fell within. It would seem to be the exception rather than the norm, if I could put it in those terms. It would be a bit odd if it could just be, "Every road is dangerous, and therefore you can do it". It does seem to be directed more at, as (f) talks about, for example, "the prevention of accidents or injury or other damage to health, in the case where the part of the Malvern Hills in question is, in the opinion of the Trust, a temporary source of danger". It is difficult to see how you could say that about a road, if that makes sense, if the road has been there for a while and is still there.

223. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: If a commoner has their stock on a common that has a road running through it, that is not going to be temporary in terms of a short time that the fence is going to be needed.

224. MS LEAN: Indeed, my Lady.

225. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Quite a lot of

commons have signs for the motorists saying, “Beware. Stock on the road”.

226. MS LEAN: Indeed, my Lady. That is why I am saying—

227. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: There is no need for fencing in that case.

228. MS LEAN: That is what I am saying. It is difficult to see how that would fall into any of the purposes for which this power could be used. It is difficult to see how somebody could say, “There is a road running through the middle of the common. That is a danger. We should use this power in Clause 45”. It just does not seem to—

229. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: I am saying that you do not need to. There are other ways of dealing with this, which is alerting the public and the traffic to the fact that there are stock on the road.

230. MS LEAN: Yes.

231. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: If you go down to Dartmoor, it is all over the place. You just drive more carefully.

232. MS LEAN: My Lady, we are not seeking this power in order to be able to do that. This is not why the Trust is trying to carry forward this power from the existing Act. As Mr Bills confirmed, I do not think that this power has ever been used to fence a road running through common land.

233. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: If this power is already there, why are the residents so upset about what you are trying to do?

234. MS LEAN: My Lady, I think probably the petitioners will, when they come forward, be able to explain what their very particular concerns are. I am conscious that you will have heard reference to or seen allusions in the documents to there being at times perhaps misinformation or a misunderstanding about what is proposed or what the Bill is doing. The Trust has tried to put information out to say exactly what it is doing. It has myth-busters, FAQs and everything there. As I said, when you look at the provisions of the Bill, people have raised concerns saying, “It might do this”. When you actually look at the provisions, no, it does not do that. This is certainly not a power that the Trust is

seeking in order to be able to fence a road in a common.

235. THE CHAIR: It may be you need a specific provision in to make that clear. Perhaps you would like to think about that because that is the notice that you are being given by David Cameron and his co-petitioners.

236. MS LEAN: Indeed, my Lord. In my submission, where the Bill intends to confer a power to fence a road in a common, it does that expressly and in terms. It would be difficult to see, where there is a specific power, specific to a specific road, how you could then arguably construe a much more general power as giving the authority to do the same thing. We can certainly take away and think about, if any wording was necessary, what that form of wording might be.

237. THE CHAIR: It could be said, "Except as specially provided for in this Act, it should not be open to the Trust to fence any road within common land". I am just throwing that as a suggestion, and you could think about that because when we come back next week you will have to address the point.

238. MS LEAN: Indeed, my Lord.

239. LORD INGLEWOOD: Again, for clarification, is it the case that, where there is arguably tension between motorists and livestock on the common, priority is given to the livestock and the motorists have to temper their behaviour accordingly?

240. MS LEAN: I will look to my right.

241. MR BILLS: That is correct. The livestock are part of the common and you have to give way to the livestock, yes.

242. THE CHAIR: Are there notices up to that effect?

243. MR BILLS: Highways certainly have warning signs that there are livestock, yes.

244. MS LEAN: My Lord, we will be coming momentarily to some photographs that Mr Bills has provided, I think some of which do in fact have some signs in them.

245. My Lord, perhaps if I can move on to Clause 46 because 45 is the what and Clause 46 is how you do it. This is where there is a change from Section 15 of the Malvern Hills

Act 1995. As Lord Evans has indicated, in Section 15 of the 1995 Act subclause (3)(a) refers to the power being exercised "after consultation with the Historic Buildings and Monuments Commission" in (a); in (d) "if advised by the Nature Conservancy Council for England"; and in (e) "after consultation with the chief officer of police". There is also reference in subsection (7) to, "Except in case of emergency or where the regulation or prohibition of access for a period not exceeding 28 days, the conservators shall, before exercising any of the powers … consult the Central Council of Physical Recreation and at least one local association, authority or other body". Section 15, on a natural reading, does build in this idea of the exercise of powers after consultation with certain bodies, unless there is an emergency for some of those bodies.

246. In Clause 46, the main change that perhaps jumps out from the page is that, whereas you see the period of 28 days in Section 15 of the 1995 Act, what you have in Clause 46 is a period exceeding 42 days. Now, the rationale for that—I can ask Ms Satchell to speak to this in a moment—is that the period is extended to 42 days not because the Trust just wants to have longer to be able to fence temporarily but because it allows for the Trust having a situation where it needs to get that fence up. Something has happened; the fence needs to go up. The 42 days means you can put the fence up and then you start your consultation. You can have your consultation if you think it is going to last longer than 42 days. You can get the representations and you can consider them before you tip into day 43.

247. There has been a shift in focus. Whereas Section 15 previously, in terms, said, "Before you exercise the powers, do this and this, unless it is an emergency", Clause 46 is intended to shift that to, "There has to be consultation essentially before the end of a 42-day period, if it is going to last longer than 42 days".

248. LORD EVANS OF GUISBOROUGH: You are seeking to change the consultation requirements from before you do something to after you do something, but not before you finish doing something.

249. MS LEAN: It is the power to be able to do the consultation after you have started doing it, if I could put it in those terms. I am sure Ms Satchell can speak to this, but, if circumstances would allow, if this was something that was pre-planned, there is obviously scope for consultation, but this allows for the situation where you have to get that fence

up. You think it might well be more than 42 days. You just do not simply have the time or the luxury to say, “Let us run a 28-day consultation period or suchlike before we put a fence up”. You can do it before it tips over from 42 days—that is the acceptable period—into the 43. It might be helpful if I turn to Ms Satchell now to explain a little bit more about why the Trust is looking to do that.

250. LORD EVANS OF GUISBOROUGH: I think an example or two of where it might have been useful would aid the committee.

251. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: That would be very helpful.

252. MS SATCHELL: Yes, certainly, my Lords and my Lady. We have come across circumstances where we need to do something before we run a consultation. The couple of examples that we present to you immediately are, for example, damage to archaeology. I am not saying specifically that this happens all the time, but we do get people mountain biking on the archaeology. They are not supposed to be there, as you alluded to. There is not an automatic right to cycle all over the hills, but we do get—you see it every night—people with their strong lights on cycling along the ridge of the hills. If, for example, which I have seen them doing, they start cycling down the archaeology, down the ramparts of British Camp, in certain weather conditions, you could do a lot of damage. A dozen mountain bikers could do quite a lot of damage overnight.

253. What we want to be able to do is to see that damage and get a fence up in the morning. Inevitably, to repair the damage, it would take us more than 42 days in many circumstances to allow the vegetation to regenerate. The key thing is to be able to stop the damage getting worse straightaway.

254. THE CHAIR: I can understand that perfectly well, but why 42 days as opposed to 21?

255. MS SATCHELL: Because we are required, under the provisions of the Bill, to run a 28-day consultation. We get the fence up; we start the consultation immediately; we put up the advert and the notices. We then have to wait for 28 days, and it would give us seven, eight or possibly 10 days at the end of the period to consider the consultation responses before we decided whether it was appropriate to leave the fencing there or not.

We might get representations, for example, within that period that said, "I would like you to move this fence a bit because it is hampering my access. If you moved the fence, it would not affect the archaeology". We would take into account what people had got to say.

256. The archaeology does take quite a long time to repair. We have to consult, obviously, with Historic England as to how we do any repairs, and then you have to do the repair and get the vegetation to regenerate. It is just to give us that window of opportunity to get a fence up straightaway in circumstances where we need to. If we did not need to, if it was planned work, we would be quite happy to run the consultation in advance of putting the fencing up.

257. I hope I am not stealing my colleagues' examples, but, for example, a case where we could quite happily run the consultation beforehand was when we had an invasive non-native species in some of the ponds. We had a way of trying to tackle that, but it required us to stop the animals trampling through the ponds whilst that was taking place. What we actually did was cover them in opaque black plastic to kill the plants off. We obviously had to stop people, children, looking for newts and animals going into those areas in the meantime. That one was planned. We could do the consultation. We put the fence up after the consultation, but there are just those circumstances where we do need to just get the fence up straightaway. It would not be every single time.

258. The other example that we thought of was if there was, for example, a nesting bird that was particularly unusual and we did not want it disturbed. We have spotted the bird. We want to get the fence up to keep the people and the dogs out. We need to get the fence up straightaway. It is not a circumstance where you can say, "We are going to sit here for 35 days while we do a consultation". We need to get the fence up, and then we can consult.

259. Those are two of the examples that would merit putting a fence up before we asked people about it. We would obviously still consult Natural England and Historic England, as appropriate, as we used to, but sometimes you actually need to take the action before you ask the question.

260. MS LEAN: What is set up in Clause 46 is there is specific provision in subclause (1) for consulting Historic England, if it is subparagraph (a); and for seeking advice from Natural England, if you are in subparagraph (d), which is flora, fauna or SSSI. There is

the requirement, except in an emergency, to consult the Sport and Recreation Alliance and at least one other local authority or body for the areas to be affected; and, except in an emergency, before exercising the powers for a period exceeding 42 days, to give notice of what is proposed and the intended duration.

261. Those are the consultation and notification requirements that are carried through, but the change is that it has to be done before exercising the powers for a period of 42 days, i.e. before you have done it for more than 42 days, rather than before you start doing it for any period that might exceed 42 days.

262. My Lord, there is a provision that has been written in in subclause (7) about, yes, you obviously have to notify and tell people, just in case it needs to be said, but you should also actually consider what has come back with respect to that period as well, before the 42 days goes over. That is what it tries to tie in. This idea of the 42 days is there to allow, if a fence has to go up, for you to go out with your notice, your consultation and your 28 days, and there is still then that period. Before you tip over to day 43, you have done the whole process. It is not just that you have gone out to consultation. There is the expectation built in in subclause (7) that you will have considered what has come back from your consultees before you get to that day 43 point.

263. My Lord, of course, if there are any concerns about the wording of this clause or whether that sits naturally, obviously, we are very happy to look at the wording of it, because I am conscious that the "except in an emergency" language has come across from the earlier Acts. It may be that, given what we have discussed as how it is intended to operate—i.e. the whole point of this power is that you are meant to be able to get the fence up and then consult—the words "except in an emergency" that you currently have in subclauses (2) and (3) may potentially be superfluous or otiose because you have captured the idea of having to get the fence up by saying, "You only have to consult before the end of a 42-day period".

264. THE CHAIR: Yes, I think I have picked out the only bits of wording that the petitioners are concerned about. It was a very narrow point, really. Can we go on?

265. LORD INGLEWOOD: A last quick question: do you have any concrete instances of why things went wrong in the past that would have been remedied by the change?

266. MS LEAN: I am going to look to my right.

267. MS SATCHELL: It may be that my colleague will have a better example than I do, but in the 1995 Act there is that wording "except in case of emergency", which would theoretically allow us to get the fence up and then do the consultation in the same way, but the difficulty is the definition of what is an emergency. Is people trashing the archaeology an emergency? It might be as far as the archaeology is concerned, but it would not necessarily be an emergency in common parlance. It is trying to adjust the wording slightly so that we can take immediate action without having to worry too much whether it actually is an emergency.

268. MS LEAN: My Lord, in the bundles in front of you, at pages 1 to 6, Mr Bills has provided some photographs of the sorts of situations that the Trust might look to exercise the powers currently in Section 15 or proposed in Clause 45. I am sure he would be happy to go through them, if that would be of assistance. In broad terms, there are a couple of photographs of the archaeology point at pages 2 to 3; where damage has been caused to common land by what looks like vehicles that were off-roading at page 4; and the protection of flora and fauna at page 6. We have tried to provide some illustrations of the sorts of scenarios where it might be necessary to exercise these powers.

269. THE CHAIR: The temporary fencing we see at page 2 is not a barbed-wire fence. It is simply something to prevent access to the area that is being repaired. It is fairly simple stuff.

270. MS LEAN: I will look to my right.

271. MR BILLS: Yes, exactly.

272. THE CHAIR: You are not putting up barbed-wire fences for that sort of purpose at all.

273. MR BILLS: No, it is the minimum we can get away with. Part of that is to reduce the landscape impact of the fencing. It still has to be capable of doing its job because the work we have done could quite quickly be undone by certain activities. It does take a very long time, especially on the shallow acid soils of the Malvern Hills. On page 3 you can see the scar that we have repaired is just starting to revegetate. That is after 12 months. I

know that now, over two years later, it still has not completely grown over. It is not like a “keep off the grass” sign where you are repairing your lawn or something.

274. On page 4, just to come back to the discussion on fencing and commoners, we would be looking to address the areas of the worst damage. In the top-left photo you can clearly see where the ground is damaged. Any fence we might put up would be around the area of damage to add soil and seed and get it restored. As soon as it was restored, the fence would be down. These fences are very much linked to features on the ground, geographical areas. It is not the case that we would fence off a whole road because that would be completely unnecessary to fix the vehicle scars you can see in that photo.

275. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: In that picture in the top left-hand corner, is that where the car has attempted to drive on to the common? Is that because there is nowhere to park off the common?

276. MR BILLS: I am not sure of the reason why they decided to go beyond the tarmac and on to the common. It is a lot steeper than it actually looks in that photo. In that instance, they could not get back out. They obviously tried, which is what made the mess. In that actual scenario a recovery vehicle tried to pull them off and that actually got stuck too, so that needed a third vehicle.

277. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: It does not look like the kind of place where you would do a three-point turn.

278. MR BILLS: No, but especially delivery drivers do not know where they are going. They follow sat-nav, end up in some really awkward situations and make a horrendous mess before they pick up the phone.

279. MS LEAN: My Lord, if I can just finish up on Clause 46 and 45, there are also provisions for review. This is in subclause (8). If it is going to carry on for longer than a year, it has to be reviewed by the end of the year and at intervals of no more than one year. That period is shorter if it is for fire risk. There is an obligation in subclause (9), where we are doing a review, if there is interaction with a highway or a public right of way, to consult the highway authority.

280. The final point I should flag on Clause 46 is a difference from Section 15 of the

Malvern Hills Act 1995. The Commons Act consent regime would not apply to the exercise of the power in Clause 45 and 46. We would rely on the statutory disapplication in 38(6)(a). The power in Section 15 of the Malvern Hills Act 1995 was subject to the Commons Act regime because Section 21 of the Malvern Hills Act 1995 disapplied the equivalent of Section 38(6)(a) under the preceding legislation.

281. If any of the works or things that the Trust was authorised to do under the 1995 Act, which would have included the temporary fencing under Section 15, would have needed Commons Act consent under the then existing regime, but for the fact it has been under statute, that got disapplied so that it would still need the formal consent, whereas we would not, under the Bill, if it is enacted, be required to get Commons Act consent to exercise the powers in Clause 45 and 46.

282. I hope that may be explained also by the shift that we have explained about the situation of needing to do this quickly. You might need to do it now or put something up now and then consult on it. Although you can apply retrospectively for consent under the Commons Act for something you have already done, you are obviously at risk during that period of a claim or something being brought against you saying, "This is unlawful. You should take it down". There is a practicality element in there in part, which is that, given you are trying to move this on to a footing so you can fence and then consult because you might need to do it, it is odd then to build in a requirement that requires you technically to apply for consent before you do the work through a different regime.

283. There is also a degree of duplication, in a sense, with these powers because, under the Commons Act, what the requirement for the Commons Act triggers in part is a process by which you have to advertise and put notice out that you are planning to do something. There is an opportunity for people to make representations. That will be taken into account by PINS in deciding whether to grant the consent. There is a bespoke regime that is provided in Clause 46, which itself provides for you to notify, consult, an opportunity for people to say what they think about it and for that to be taken into account.

284. On one hand, there is a practicality issue here; on the other, there is already a process that reflects the sort of process that you would have in the Commons Act consent. That is a difference that it is right for me, I think, to draw to your attention between Section 15 and what is proposed in Clauses 45 and 46.

285. THE CHAIR: Where do we go from here?

286. MS LEAN: To Clause 47, my Lord, which is a very quick response from me. This is a power to "without notice, fence (or cause to be fenced) any part of the Malvern Hills that in its opinion gives rise to a permanent danger". This finds its footing in Section 4 of the Malvern Hills Act 1930. It is not a power that is subject to Commons Act consent today. It would not be a power that was subject to Commons Act consent if the Bill is enacted. It is Section 4(b) of the Malvern Hills Act 1930. "The conservators shall have the following powers … They may fence or cause to be fenced dangerous places".

287. In substance, it is just re-providing an existing power but making clear that they can do it without notice and making clear it is about a permanent danger, as distinct from the temporary danger situation that might be dealt with under Clause 46.

288. THE CHAIR: The objections, as far as I can work out from the petitions, are that it would allow the trustees to fence not only the edges of roads that run across the common land but also to close off the roads themselves. They wanted to be clear that the free movement of animals across common land should not be interfered with.

289. I think there is another point that needs to be clarified, which is that it is not used to fence roads and enclosed areas and it is not an additional power to fence. Those are the points that seem to be made about it, but you are saying this is a specific power dealing with permanent dangers and limited only to that.

290. MS LEAN: Indeed, my Lord. I think it is difficult to see what the justification would be for saying, "You need to fence this road as a permanent danger", if this road has been pootling through the common with animals going across it for a long period of time. In circumstances where, as I have mentioned, there might need to be a power in the Bill to fence against a road that runs through a common because of managing that interaction between the highway users and the ability to graze on the common land, where there is a power to do that, it is express, explicit and limited to one road. It is difficult to see, in my submission, how you could argue that Clause 47, which is a very general power, brought within it an ability to interfere with rights of common where it did not explicitly say it could do so for that purpose.

291. THE CHAIR: I think the point is probably met by the change of wording in the

filled Bill because originally the words were “it considers to be dangerous”, which opens up a whole lot of questions. To clarify that it is a permanent danger narrows it down very significantly.

292. MS LEAN: Maybe that has addressed it. I am sure the petitioners will say when they come in, but it may be that that is sufficient to address the concern.

293. LORD INGLEWOOD: One of the petitioners referred to a quarry that was flooded, which was fenced off.

294. MS SATCHELL: There is a picture of it.

295. MS LEAN: Yes, I think you may have a picture of it in Mr Bills’ documents.

296. LORD INGLEWOOD: That is the kind of thing this is intended to deal with.

297. MS LEAN: Indeed, my Lord.

298. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: It is page 8.

299. MS LEAN: At pages 7, 8 and 9, Mr Bills has given you some examples of where the permanent fencing for danger—or fencing for danger on a permanent basis because it is not going to change—power is used and so where it could be anticipated to be used in the future.

300. THE CHAIR: It is a very frightening picture, number 9—a sort of sinkhole, really.

301. MS LEAN: That is the sort of situation that Clause 47 could be useful for today in its current form and is there for in the future.

302. THE CHAIR: The change of wording is very important and very helpful.

303. MS LEAN: Indeed, my Lord. Hopefully, that will have assuaged the petitioners’ concerns.

304. Clause 48 is about fencing and other means of securing common land. This is a new power that has been brought into the Bill. I will say at the outset that this power, the Trust has said, in the Bill would be subject to Commons Act consent under Section 38. That is what is provided for in subclause (3) of 48. “Despite Section 38(6)(a) of the Commons

Act 2006, the exercise of the power under subsection (1) is subject to the provisions of Part 3 of the Bill except in the relation to the provision of a cattle grid in a highway". I will come onto cattle grids momentarily because they have their own little sort of mini-regime built into this clause.

305. Generally, what this means is, if the Trust wanted to secure common land by putting up a fence around it, it would also have to go and get consent under Section 38 from the Secretary of State via PINS, with what that brings into it: the notification, representations, consideration against the criteria in Section 39 of the Commons Act and, if needs be, a public inquiry, if that is the route that the inspectorate felt it had to go down.

306. My Lord, Clause 48(1) is a power to fence or install or use or and maintain any other means of enclosure to fence common land within the Malvern Hills, if the Trust considers that doing so is desirable for the prevention of animals straying from common land in question on to land that is not common land. I do stress that, because there is a concern that has been raised I think by at least one petitioner that this could be used to fence down the middle of a common.

307. There is one common, which I know Mr Bills will mention, where it is contiguous with common land that is not in the Trust's ownership. There was a concern, I think, raised there that, "You might put a fence up the boundary of your ownership, and it would stop the animals being able to exercise the right of common across the whole of the common". This makes it explicit that it is only about fencing to prevent straying from common land on to non-common land.

308. That would also catch the point that Lady Baroness Bakewell was concerned about: "What about the roads?" If the roads are part of the common, you could not use this power to fence along the side of the road in that situation.

309. THE CHAIR: There is a particular point raised by Barbara Wilkes and Susan Windle. They say that it should not be used to prevent the free movement of animals on Coombe Green Common.

310. MS LEAN: Indeed, my Lord.

311. THE CHAIR: They need to be able to go on to Hollybed Common. Now, what is

the answer to that?

312. MS LEAN: I am going to ask Mr Bills to take you to some documents in the bundle that he has prepared, if I may, because in that he has some photographs that explain where these powers might be needed and how they might be used, and he does specifically deal with this particular area of common that has been raised by those petitioners. If I can hand to Mr Bills, it is the photographs that start at page 10 of the bundle behind tab 3.

313. MR BILLS: Malvern Hills Trust owns many commons. None of them is entirely secure. There has been some misunderstanding about "enclosed", "secure" and so on. What we mean is that the livestock are contained within the common land unit. That is what we mean by "secure". Now, usually that is by fencing, but it could be by other means. I will come on to some of those later on. Typically, they are partly fenced by the neighbouring landowner in that duty to fence against the common that you heard about earlier. They are what is called leaky commons, as in the boundary is fine for most of it, but every now and again there is a hole, and that is where the livestock can exit the common.

314. This is talking about permanent fencing that would be subject to a Commons Act process. What the Trust is looking for is the power to be able to apply to that process, just like any other common landowner can in the country. It is that process that would involve lots of consultation and the detail of where exactly a fence might go, what kind of gates you would put in to allow horses to come through. The fine detail of these schemes is not what I am talking about here; it is the power to be able to apply to that commons process. I hope that makes sense.

315. From here on, I use Castlemorton Common—that is CL9—as an example, but almost everything I say could apply to other commons. Castlemorton is often the one that is spoken about, because it is the only common where there are still active commoners there. If you recall from my presentation to you a month or so ago, there were active commoners on the hills themselves, but for various regions, including wandering livestock, that stopped in 1990. We have had to plug the gap, if you like, as to how grazing happens on the hills. Castlemorton is often talked about because it still has its active commoners. The Trust is very keen and works with them to keep them exercising their commoners' rights, because they are best placed to do so.

316. In terms of the benefits that a secure common would bring, it would reduce the number of incidents where livestock get into private property. This is a regular occurrence, with sheep and cattle wandering off the common and into people's gardens, on to the village green, et cetera, and causing various problems.

317. B—it would reduce the number of incidences of livestock on roads, and therefore the number of road traffic incidents, especially on A and B roads. That is not to say this is a project with the purpose of making roads safe, or removing livestock from roads. It is simply saying a secure common would mean you would not find livestock on the roads outside of the common like you do currently, thus the metreage of livestock on road would go down. I will come onto that later on.

318. C—this is to do with the viability of the work that the commoners do. It would reduce the amount of time that they spend in fetching back strayed livestock. I should have also put there, "and reduced their time negotiating, discussing, sympathising with the local residents who have had livestock in their garden yet again that month". The less time they spend on that, the more time they can spend doing things that they would rather be doing and possibly would make them money. I have heard the story that, if you go far back enough, there were a pair of brothers who exercised their rights of common. They tended their herd of cattle all day long and were quite frequently found at the exit to Welland, and that is where they spent most of their day. It is just not the case these days that anyone can spend their time in that way. All of the active commoners have jobs elsewhere and need to be earning money in that way. They cannot survive by just tending these stock. Again, it comes back to that issue of viability.

319. E—on-road measures such as cattle grids can help to slow traffic within the common and make drivers aware that livestock are present. If any of you have visited the New Forest, you will be very familiar that you drive over a cattle grid and you know that there will be livestock there and ponies on the roads.

320. F—of course, if they are not in somebody's garden eating their rosebushes, they will be on the common doing the job they should be doing instead, eating the vegetation there.

321. MS LEAN: Mr Bills, you have a number of photographs, and then at page 14 there is a map of Castlemorton Common, which is what you say you are going to use as your

primary example. If I am right—and I am sure you will correct me—this is where we bring in Hollybed Common and Coombe Green Common, which the petitioners have particularly raised. Could you perhaps, for the photographs, just orientate us as to where each of these photographs is on the map at 14, and point out where these bits of common are—the Hollybed, the Coombe Green—and where the Trust's ownership of common land stops?

322. MR BILLS: Yes, I can do. The first picture shown is sheep entering a private business park. This is at Hollybush. On the map on page 14, this would be on the left side of the map. There is a green road going north-south. It is along that road. You can just make out the words "Hollybush Roughs" to the left of that road. That is where that photograph was taken.

323. The next photograph is more to show that significant road traffic accidents do take place. This one is within the common. Any scheme that secured the common would not have stopped this happening, although perhaps the driver would have been driving slower, having gone over a cattle grid. It is simply to illustrate that serious accidents do happen. You can see a police communication there in relation to where multiple sheep were killed. That particular one, they refer to as the road between Castlemorton and Coombe Green. That is off the common. That would be part of the B road, which snakes its way through the map. You can see it in yellow.

324. The next photo, you can see on page 12. At the bottom of your map, you can see the orange line, which is the A road. That intersects with the yellow road, which is a B road. At that junction is the junction of the A438 and the B4208 that you can see in that photograph. That is sheep some 500 metres strayed from the common. It is quite a way. It is a very regular occurrence. It is obviously very, very dangerous, with it being those class of roads.

325. The next image you can see is 250 metres from the common. They are within a village called Birts Street. I think it is to the right-hand side of the image. I do not think it actually has the name of it on there, but that is the name of the village. That is irrelevant; you can see that they are in a village, and it is a distance off the common.

326. THE CHAIR: Yes. We do not need to look at the map for that.

327. MR BILLS: Apologies that that map is not a bit clearer there. The last example is the cows on the B road within Welland village. If you look at your map again, in the top right you can see the dark cluster of houses that is the village of Welland. There is a yellow road going down towards the common, which is tinted blue. That is where that photograph was taken. Again, it is a very regular occurrence that cattle and sheep are within the village of Welland. Just to provide some wider context—

328. MS LEAN: Sorry, just while we are on that map, could you also orientate us by reference to Hollybush Common and Coombe Green Common that the petitioners were referring to?

329. BARONESS BAKEWELL OF HARDINGTON MANDEVILLE: Did you not? I have Hollybush circled.

330. MR BILLS: I can certainly go over it now. If you find the southernmost part of the common—the common being tinted blue—you can see there is a rather pointy bit of the common pointing south. Just above that point are the words "Coombe Green Common". Where that writing is, and following it right towards the telephone symbol on that OS map, that is Coombe Green Common, which is part of CL9. It is the same common land unit as all the rest, but it is not owned by Malvern Hills Trust.

331. There are three ways in which livestock or people can walk freely from Trust land on to the Coombe Green Common. It is a completely unfenced, almost invisible boundary between the land ownerships at present. Again, there is no suggestion to fence across that common. That is not what we are seeking to do. Hopefully that has made that clear.

332. Just to reiterate very briefly, commoning was a lot more prevalent in the past. I have noted down in the text here on page 13 that in the 1970s there were at least 18 local families putting livestock out there on Castlemorton Common. Remember, this is the easiest of our commons to look after, in that it is flat, there are water sources, and it is not as popular as the hills are with the public. That has declined. It is a tough job to do. That declined to a low of just three families in 2019.

333. There was a lot of worry about the state of SSSI down there and the state of the common—that there were not enough mouths eating the vegetation to keep the character, the history, the habitats, and all those other things that everybody values. The situation

now is slightly better, with six active families. With the Trust, we have a stewardship agreement together that brings in money to support what they do. We are very keen to keep that going. What we are trying to do is to remove as many factors as we can that stop people from exercising their rights in a sensible way to support what is on the common. I have outlined some of those factors, and how securing the common would remove some of those negative factors.

334. I have a few statistics for you as to how big or small a project that might be. Again, taking the whole of CL9 as an example, the perimeter of CL9 is just over 20,000 metres, so about 20 kilometres. Within that perimeter, there are 15 gaps. One of those—and by far the largest—is where CL9 meets the common land of Swinyard Hill, which is CL12. That is not a gap that we would be looking to plug, because there are no problems there. The livestock can wander up on to the hill of a different CL unit, but that is not a problem. The very largest gap of 1,927 metres we can ignore, and that brings the number of gaps right down to just 392 metres, which is 2% of the perimeter. Forgive me for all the numbers, but hopefully that portrays that it is not a huge project. It is actually a very small metreage. It is just quite a difficult one, because, for all but one of those gaps, it is where a road leaves the common, so you have to juggle the issues of traffic and highways regulations.

335. MS LEAN: Picking up, then, on Clause 48(2) of the Bill, having heard about the need to secure the common, 48(2) talks about the fact that the means of enclosure does not necessarily need to be on the location of the boundary of the common land in question. My Lord, this is something that petitioners have obviously raised a concern about, of, "If you are going to secure, it should only be on the perimeter". Mr Bills has provided some photographs showing the difficulties that could arise if you had to try to, or if you were required to, fence on the perimeter of a common. These start at page 16. They may be relatively self-explanatory.

336. The first photograph on page 16 is where you have underground infrastructure assets. Clearly an issue there might be about if you can actually physically put a fence there or if you are going to hit something, or if there are protection zones that might be put in place, or access to maintenance or suchlike.

337. Point 2 is public rights of way that Mr Bills has identified. If you have one of those

running in or straddling the commons, you can run up to some issues with where you can put fences, or whether you can put fences at all.

338. It might be that 3 and 4 are quite helpful for Mr Bills just to touch on very briefly, because in 3 he mentions highway infrastructure, visibility or safety. The photograph here, Mr Bills, if I am right, is Castlemorton Common, where you are going into Welland. This is a road that may be where there is particular concern—because it is the road that runs through the common as it goes into Welland village, and where the animals do graze on both sides of the road—about how you might deal with fencing there, or enclosing or securing there, given the constraints. Perhaps I could ask Mr Bills to touch on that.

339. THE CHAIR: Before we do that, I am looking for a convenient point at which to stop. We are getting fairly close to our time, and I also want to have a discussion about where we are going because we have moved very slowly. There is a lot more ground to cover, and I would like to just look at the programme with you. Can you find a convenient point, over the next few minutes, to stop? We can then move into just a discussion of what we are doing because time is limited, and we are not very far through the agenda.

340. MS LEAN: No, indeed, my Lord. Perhaps if I could just ask Mr Bills to explain the problems with fencing on the perimeter here, and so what solution you might use. That would be a natural point to draw stumps. Thank you.

341. THE CHAIR: Yes.

342. MR BILLS: The photo you are looking at, at the top of page 17, is the common in the foreground, with Welland village in the background. The boundary would be where the red car is that you can see. There is an entrance to the property you can see. There is a footpath on the left. There is no doubt that highways would have their own restrictions on visibility displays and distances from certain infrastructure. It is highly likely that highways would have something to say, which would move where you might put any infrastructure, such as a cattle grid. It is very unlikely that it would be perfectly on the boundary of the common.

343. Fitting in a bypass gate, for example, next to the cattle grid—that would not fit in the gap that is shown in this photo. They would be part of the process. Highways would have a lot to say about where infrastructure was placed on the highway. That may well

mean it is not on the exact perimeter of the common.

344. I can talk you through the second photo there. The purple line on the left is the boundary of the common land unit. The hills and the livestock are out of view to the right on that image. If one were to fence exactly on the boundary, on the purple line on the left, you would be including a private driveway that is down that bank, a steep bank that leads up to the B road. You would be including the B road itself, the parking area on the right, which is also a bus stop, and the precipitous rocky slope on the right there, which just would not be safe to include that or to try to put a fence there.

345. The sensible place to put the fence would be on the red line, to keep the animals that are to the right of this image safe. There are lots of reasons within that photo as to why fencing on the perimeter would be a bad idea. That fence is 33 metres from the actual common land boundary, to avoid all of those infrastructure items that I have listed.

346. MS LEAN: Thank you. My Lord, that comes back to the point, as Mr Bills said, that, when you would be looking to exercise a power under Clause 48, the Commons Act process would apply. The specifics around exactly where this is going to go would have to be worked through that process. It is an opportunity for people to input into the reason why and a weighing up by the inspector as to what exactly was proposed. Hopefully, that is just an illustration in response to concerns petitioners raised, saying it ought to only be on the boundary, to show some practical examples where we would say it should not be restricted to only being on the boundary, because that could actually be highly problematic and prevent you being able to actually secure the common in that way.

347. My Lord, that is what sits behind the power that is sought in Clause 48. There are some specific provisions around cattle grids. I wonder if I could suggest this, just so that we could finish off Clause 48. I do not think anybody is taking an issue with the bits of Clause 48 that are to do with how you might go about doing a cattle grid and exactly how it might interact with the consents under the Highways Act. I wonder if I could ask to park the bits of 48 that deal with how it amends the Highways Act or how that applies and what that means until we get to the unopposed clauses bit, because it is probably a bit of a lawyer running through rather than an evidence point, if that would be acceptable.

348. THE CHAIR: Shall we finish your presentation there just now and come back next week?

349. MS LEAN: The only point that is remaining on Clause 48, my Lord, that might need to be touched on is Old Hills. Perhaps if I could put it this way: you have some photographs for Old Hills at 19 through to 22 of your bundle. If I could just flag, essentially, Old Hills, I think I have mentioned, is one where the road does run through the middle of a registered common land unit, but in practice—I am sorry to pre-empt what Mr Bills, I am sure, will tell you more detail if you would like to hear more about it on Tuesday—one side is just woodland and it is a busy B road; it has been a busy road since the 1960s, and nobody is really grazing it. In order to make sure that you could actually have a grazeable element, which is on the western side, you would really need to secure there by fencing along the B road.

350. That would mean that animals would not be able to go from one part of the common to the other. You would be fencing a road in a common, but in practice that is one location where, if you want to sensibly exercise common rights at all, there has to be some fencing. It is not going to work if you fence the perimeter because this is just not going to work with the animals with that B road. That is the one exception that we are asking for in the Bill.

351. I am sorry. That was a very headline explanation from me. I am sure Mr Bills will speak about that in more detail on Tuesday if you would like to hear it, but you do have the photographs that sit behind it. I do not think any petitioner is specifically taking issue with the specific power we are seeking at Old Hills. It may be that if they come and they do take issue with it, then we can perhaps address it on that occasion, but I think otherwise that broadly covers Clause 48.

352. I know we need to deal with Clause 49 before we deal with the fencing powers. I am mindful of time. This is where we get into grazing compartments, so it might be sensible for us to deal with that on Tuesday.

353. THE CHAIR: Yes. I think we should finish the session there for today, and we will resume next Tuesday at 10.30 am.

354. MS LEAN: Indeed, my Lord.