

UNCORRECTED MINUTES OF ORAL EVIDENCE

taken before the

MALVERN HILLS BILL COMMITTEE

PETITIONS AGAINST THE BILL

Tuesday, 24 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

(At 11.50 a.m.)

1. THE CHAIR: Welcome to this, the 19th public session of the Malvern Hills Select Committee. I do not think I need to say very much about mobile phones and fire precautions, because I think you are all familiar with the drill. I do remind you that, because a Hansard record has been kept of the evidence and our discussion today, please check the Hansard record. If you find anything that is wrong with it, let us know and the record will be corrected.

2. We are going to discuss, to begin with, amendments. I hope I have not sprung a surprise on you by giving you a sheet of our reaction to the very helpful submissions that you have made to us. It is intended to simplify, because there is quite a lot that we can simply agree. The only point I would make is that, in my little table at the end, the numbers got right out of sequence towards the end and if I just tell you what the correct numbers are. To discuss, at the end, should be 23, because we would like to discuss that with you. To drop, 24 should be 23, 25 should be 26. Then, to amend and keep, 21 should be 22, 23 should be 24 and 26 should be 27. I think it will come clear as we go along that the important ones are the ones to discuss.

3. Before we get into the discussion of the amendments, there is one particular point that I can mention on our proposed amendments. We are not discussing these today because these are things that we are reserving to ourselves to discuss. I did say earlier on that of course that was prepared before we had heard your closing submissions and nothing is final until the report is produced, but there is one change that we are minded to make, and that is in regard to the quorum. The proposal was that the quorum should be six and we propose adding in the words “of which at least two must be appointed trustees”. In a way, it is to meet your point about chiselling away, Ms Lean, which we recognise is a significant point, and that is in some way a protection against that. That is a proposed amendment but of course we have not finalised our discussions completely, but I thought you should know about that.

4. There is one other point that I would like to be reassured about, as you have seen that we are taking a different view from the Charity Commission about the objects clause. Do they need to be told about that?

5. MR LEWIS: My Lord, they have been informed of the proposed change and they

have come back and said that they do not have any difficulties in terms of their regulatory position.

6. THE CHAIR: Thank you very much. That is helpful. I think we can get into the amendments themselves. The first one for discussion is in relation to 14(2)(b) and the issue of special resolution, but I would like to open our point about special resolutions, Ms Lean, because the definition that appears at page 5 is that it is passed by at least 75% of the trustees present and voting at the meeting. 75% is a rather odd figure to use for the size of board that we have. It is a standard formula, I am sure, that is taken out of what you find in many company things where you have many hundreds of people who are entitled to vote and you put that kind of thing in. When you have only, let us say, seven people there, what is 75% of seven? If it is nine, what is 75% of nine?

7. What we are wondering about is whether it would not be wise to put a table in, which gives a table that would set, for example, if it is eight trustees, of whom at least three must be appointed, where 12 are present. If it is a special resolution covered by eight, for example, eight trustees of whom two must be appointed, where there are 10 trustees present. That would just simply give rise to each of the possible situations that could arise. It could be important for people at the meeting, because going through their mind is, “If I take a vote, what is that going to do? Does it mean the special resolution is passed or is not?”

8. I just throw this out as a point, because 75% is not an easy thing to have in mind when you are trying to work out, with these small numbers of 12 people present, or eight people present, or whatever else it is. It is easy with 12, I suppose, because now it is a quarter, but it does not work in nines and sevens and so on.

9. MS LEAN: Yes, my Lord. From recollection, I think I may have tried to pull out a few examples of the number. Because you have to be at least to 75%, I have always assumed that that means you have to round up even if it is below the 0.5. You do tend to find a situation of it takes a while to get down to it having to be eight or suchlike. My Lord, that may well be sensible, if there is a thinking about how this might work in terms of, “If you are nine, then you should be at 75%—the special resolution may be passed if at least X are voting in favour of it”.

10. THE CHAIR: That is right, yes. What we have devised is a table that covers each

from when the 12, 11, 10, nine, eight and six or seven are present. Would you leave it to us to propose as an amendment, if the principle of the thing does not disturb you too much?

11. MS LEAN: My Lord, I certainly do not think there should be any issue on the principle. I think that clarity is obviously to be welcomed in case it avoids any arguments down the line about, “Do you round the 0.5 down or up?”, for example. Yes, I think we would be quite happy to leave that to your Lordships. Whether it is in the Bill or whether it is in perhaps a report that is sat behind it to explain it, again, we perhaps leave to your Lordship’s committee.

12. THE CHAIR: I think it would have to go into the Bill, but it could be done by a table. The definition, to keep it short, would be “See appendix 5”, or whatever it is, or something, and it would simply be set out there and everybody would know where to look.

13. MS LEAN: Yes, indeed, my Lord. We will leave that with your Lordships’ committee, if we may.

14. THE CHAIR: We will pursue that. Yes, right. As far as the clause itself is concerned, 12(b), the problem really is that we do not know what is going to go into the published recruitment policy and this is an area where we think clarity is needed. The special resolution was just to try to tighten it up a bit, but I can see that the better solution in this case is to tighten it up within what the policy is expected to be looking at. I am looking at subclauses (5) and (6) for some guidance as to the things that might be guiding the policy. What I wonder is whether you would like to come up at some point, not today, for discussing with our counsel what a refinement of that phrase could be like, giving greater clarity so that we are aware of what the policy is designed to do.

15. MS LEAN: My Lord, on that, if I can just clarify, what I have picked up from that and the note from earlier was it may be a way of linking the recruitment policy more expressly to (5) and (6), so making clear that the recruitment policy would make provision, amongst other things, for the matters specified in (5) and (6), so the criteria in there, but I am sensing there might be a wider question about, “What else should the recruitment policy perhaps include?”

16. I am conscious that I think we may have provided a copy of CC30, which was guidance from the Charity Commission on what a published recruitment policy should include, which includes things like reviewing skills and advertisement. It is just a question of whether you would like us to think of some language that might say, “The recruitment policy should consider the substantive points or deal with the substantive matters in (5) and (6)”, or also something that says, “and shall make provision, amongst other things, for advertising of vacancies”, just to be clear on the matters that you are wanting us to tie in.

17. THE CHAIR: The publication does not matter too much. It is what is in the policy.

18. MS LEAN: No, indeed.

19. THE CHAIR: You could cross-refer to this document, I suppose. That would give greater clarity.

20. MR LEWIS: Just thinking off the top of my head, my Lord, referring to that exact policy would probably be a mistake in primary legislation, but it could be more general, a reference to any guidance published by the Charity Commission on recruitment policies.

21. THE CHAIR: Yes. You are in touch with our counsel anyway on a whole lot of amendments. Could you add that to a package, that you can discuss it with him and come up with a formula that will expand what the policy is meant to do, what it is driving at and so on? As I said, the publication bit is not the bit that troubles us. It is the policy itself. Can we move to number 5, which is 14(5)(b)?

Private discussion.

22. THE CHAIR: No, I was saying that we could agree not to make it subject to special resolution. That was a means of getting better control over it, but, if the control can be in the Bill itself, that solves that problem, so we would not pursue the special resolution.

23. Now, as 5 is concerned, the question really is if we make a suggestion, that, at the end of 14(5)(b), we put the words “as charity trustees”. This is each trustee appointed must be a person of knowledge and so forth and has qualities that are “otherwise appropriate to the efficient, effective and economic discharge by the trustees of their functions”, and, just to clarify what those are, if we add the words “as charity trustees”.

24. MS LEAN: My Lord, I think we do not see any issue with that. As noted in your Lordship's note, that would then seem to tie it back more expressly to the requirement in Clause 8(3) for each of the trustees to exercise their powers and perform their functions in their capacity as trustees in the way they consider to be most likely to further the objects, so it does tie in both the objects and also that charity trustee point.

25. THE CHAIR: That is the idea of it, yes. Okay. That takes us to number 7, which is Clause 15(4)(e). What you are doing is putting a list of things there of things that the independent members of the nomination committee cannot be. I think we can follow (a), (b) and (c), and (d), I think we are content that current employees are there, but not past employees. It was suggested they should be there, but we are not pursuing that one. (e) is an odd one. I think we do not quite understand why that should be taken out—these people should be excluded. There are quite a lot of people there who are entitled to vote in an election for an elected trustee. What is the rationale behind it?

26. MS LEAN: My Lord, the rationale there again is about preserving some of that degree of independence. The independent members are appointed by the board. If the board, when appointing, comprises a majority elected trustees, you could have a situation then where you get through to the nominations committee and perhaps the board has decided that the trustee members should be elected trustees; the board has decided that the independent members should be some particular individuals who are also levy payers.

27. It does then just risk that situation of, perhaps in an extreme case, you could get back to that idea of the concerns about the self-selecting board that I think have been raised, particularly by petitioners, if there was a particular group of individuals who had a particular connection and it was felt that the board, if they had a majority, were able to then identify exactly who it was who would have control of identifying the appointed trustees. It was felt that, by removing people who could themselves elect members of the board, you maintain that greater degree of the outsider coming in, as it were, to ensure there are always some representatives on the nominations committee who are, in that sense, independent or removed from the—

28. THE CHAIR: Is it possible to narrow it down a bit? The people who are entitled to vote at an election for an elected trustee are all the people in the electoral area.

29. MS LEAN: Yes, indeed, my Lord.

30. THE CHAIR: Is that what you really mean?

31. MS LEAN: Indeed, my Lord, because obviously the route for those individuals to be involved in selecting the board is through the election of the elected members. If it is permissible for somebody who is in the electoral area to also be an independent member, that individual or individuals from the electoral area both have their direct vote for the number of elected trustees, but they also have a role in choosing who the other appointed trustee is going to be. I think Ms Satchell might be wishing to say something.

32. MS SACHELL: Yes. I do not like to interpose from what Ms Lean is saying, but I think what the promoters would ask the committee to remember is that actually the levy payers themselves provide less than 50% of the income of the Trust. I think we would view this as the last opportunity for those people who make up over 50% of the Trust's income to have some assurance that they will have some input into how the trustees are appointed.

33. THE CHAIR: You say, then, that all of them should be excluded from this particular process.

34. MS SACHELL: The levy payers should be excluded from this process because, with the majority elected trustees, the levy payers will have, effectively, control of the board. All of the trustees who are appointed will have an input into the appointment of the independent members. If you cannot ring-fence that somebody within the process is outside that group of levy payers, to give some opportunity for alternative opinion—and they are also the funders, the people who live outside the levy-paying area—I think the promoters would just feel that that would ensure some level of independence within the board.

35. LORD EVANS OF GUISBOROUGH: I just think this feels like a very blunt tool to do what you are attempting to do here. You are effectively saying that, if you have got someone who has the skills to serve on the board concerning nominations—and the reason you want that person, presumably, is because they have some HR or some selection experience to enable the board to do its job properly, but, if they live in this particular area, they are excluded by virtue of the address they live at, effectively.

36. I think the two roles that you are talking about are quite different. The role of

someone who is electing your elected members is just one vote in hundreds of votes. It is not in any way applying any sort of professional knowledge to the process. They might not even vote for the person who won. They might not have voted at all, whereas, for the member of the committee, you are actually looking for someone to spend some time and to apply some professional knowledge and use their judgment. I think the two roles are quite different.

37. I can understand concerns that maybe you will get someone from the levy-paying area who was a sort of malign power behind the election of your elected members and they in turn will appoint that person, but what if the malign power lives just outside the levy-paying area? Your proposal does not stop it happening then. I just think that this is fettering your options for selecting capable people for a fairly arbitrary reason, which is just that they live in the wrong place.

38. MS SATCHELL: My Lord, I do completely understand what you are saying. I would hope that, if they are a malign power, whichever side of the line they live, they might not get appointed to be an independent member by the board. It was just a thought from the promoter that it did at least ensure somebody with a hat in the ring to look at the appointments process. I agree it is arbitrary, but I think it was just viewed as a bit of a protection, so that it avoids the possibility of absolutely everybody being in the same camp.

39. LORD EVANS OF GUISBOROUGH: Also, I think the idea that the people outside the levy-paying area are funding it in different ways, if that is what you are saying, seems a bit strange. Are we saying they pay parking fees? Are we saying they contribute to grants that the organisation might receive? I think there is a very indirect link for people outside the levy-paying area.

40. MS LEAN: My Lord, if I may just come in on that point, I think perhaps it is fair to say that the financial may have been used as a bit of a proxy for the fact that obviously the levy-payers have a very particular interest. There are also people who have other very particular interests to do with the Malvern Hills who are, by dint of history, not in that group.

41. Of course, just bearing in mind something that Lord Inglewood mentioned on the last hearing date, what this proviso would do was it would allow to be brought in, for

example, as candidates, people who did live outside, for example those who were in and around Castlemorton, Old Hills, Powick, so people who do have a very particular and direct tangible connection and interest in the hills. It would enable them to be independent members of the nominations committee and, in that sense, give them a direct involvement in appointments processes to the board that they do not have because they happen to live outside the levy-paying area.

42. Although it might be looked at as being exclusory for people who are within the levy-paying area, what it does do is it acts as a conduit to actually bringing in, or being a means by which you can more readily bring in, that group of people who have a particular interest that is not currently reflected through being a levy-payer. I know that the two are not mutually exclusive.

43. LORD EVANS OF GUISBOROUGH: They are enabled to be a part of the committee even without this clause, are they not?

44. MS LEAN: They would be able to be a member of the committee without this clause, but what this perhaps does is carve out a clearer opportunity for those sort of interests to be clearly represented within the appointments process. As set up at the moment, it would mean that the nominations committee would necessarily have to have on it people who were not levy-payers, if I could put it in those terms. There would be people who may have particular interests because they live around Castlemorton or suchlike, or other people who, in accordance with the recruitment policy that is going to be put out, are thought to be suitable to be on it. It is a way of, on the one hand, safeguarding against an extreme situation you hope would not arise where there is an issue capture in that sense of the self-selecting board, but, on the other hand, about safeguarding a role that ensures that people who are not levy payers, but who may well have these very specific interests in the board and its work, have a particular slot that they can fill in the appointments process to the board.

45. LORD INGLEWOOD: Could I make a point, please? First of all, whoever they are, they have to have the objects of the Trust as the paramount consideration. Secondly, this seems to me to exclude the kind of person who may be a great expert in, shall we say, recruitment, who happens to come and live in Malvern. Once you have arrived, you are then excluded from coming in under this. That would be a mistake, would it not?

46. MS LEAN: In terms of the independent members, of course it would, in that situation, exclude the person who had a particular skill set, by dint of the fact that they lived in the area and therefore would be able to vote.

47. THE CHAIR: The skills are set out in 14(6), at the bottom of the former page: charity governance, and, at the top of page 14, management of land, protection and conservation and financial, human resources and so on. Those are the skills they have to have.

48. MS LEAN: Yes, my Lord. I am mindful that those are the requirements for the appointed trustees. It may be that that is where the opportunity would come for that individual to get involved with the board. Rather than saying, “I have particular experience in HR and recruitment and suchlike. Can I be an independent member?”, there would be an opportunity for them to put themselves forward to be an appointed trustee by dint of that expertise.

49. LORD INGLEWOOD: I understand that. It is just a bit clunky.

50. MS LEAN: It is clunky, but—

51. LORD INGLEWOOD: I would not make the point any more strongly.

52. MS LEAN: My Lord, I think it is fair to say we obviously recognise the points that have been made and why it might seem a bit odd to have a wholly exclusory—it is a slightly “sledgehammer to crack a nut” point, but what it does do is those two points we mentioned. One is it does essentially enshrine, if I could put it in those terms, a role in the appointments to the board, in selecting the board, for individuals who cannot do it because they are not levy payers. It means that there is a role for somebody such as the commoner at Castlemorton or the person who lives at Old Hills, who may not feel that they can stand as a trustee themselves, but they are very passionately interested in the board and its work. They would be somebody who could then obviously put themselves forward and see that there would be a slot that would be potentially available for them and that there is not going to be any sort of issue where, because they are not a levy payer, they might be seen less high on the list of potential independent members.

53. Again, it is coming back to looking at this Bill as something that would hopefully

put the Trust on a sensible footing for a very long time going forward. It does build in that safeguard if you happen to end up in a situation where there was a particularly hot topic issue of single selection capture, or the perception, if nothing else, that the board was a wholly self-selecting entity, because you had a majority of essentially elected members, who were then able to appoint the independent members and decide who sat on the nominations committee. That nominations committee would then decide who were going to be the appointed trustees and it would come back to the board, who would have the majority. It just makes sure and secure that there is always that additional bit of independence or that outsiders' input into the appointments process.

54. THE CHAIR: We will have to think about this in the light of what you said, so we will reserve our judgment on that point. Do we need to take a decision on this today?

Private discussion.

55. THE CHAIR: No, so we need not go into private session on this. We will just leave it on the table and discuss it later ourselves.

56. The next one to look at is number 11, which is another special resolution point. This is Clause 15. Yes, it is looking at Clause 15(16)(c), reasons for removal of members. It is a rather important provision, that, because one is considering the possibility of people being removed who, for some reason or another, are not compatible with the trustees or what they are trying to do.

57. The question really is whether the reasons you give for objecting to this stand up to examination. I am just looking back at your sheet. You are saying here that, apart from the earlier points, it could complicate matters, an ordinary resolution required for agreeing the terms of reference as a whole, while one element would require special resolution. I do not find that terribly difficult to grapple with, really. It is just you have a component in the whole package. The terms of reference as a whole, you say, are for ordinary resolution, but why not have a subcategory within it that requires special resolution? It is a problem of lack of definition, again.

Private discussion.

58. MS LEAN: Sorry, my Lord. Apologies for the fervent whispering going on at the

table.

59. THE CHAIR: It is all right. It is understood.

60. MS LEAN: My Lord, obviously in principle there is no reason, I suppose, why, if you are going to have overall terms of reference, why some part of that should not be subject to special resolution. It probably comes back to practicalities, timings and if it is needed. On practicalities and timings, this is obviously something that has to be done in order to establish the terms of reference for a committee so that you can actually have a nominations committee. You need to do that before you can even have the first lot of appointed trustees, which you need to have in place at the constitution date.

61. There is an issue about the more potential obstacles or barriers or procedural hurdles that you put, in terms of getting the committee in place, that there is a bit of a risk that you could find yourself in a situation of, “Are you able to have the committee constituted to do the things it needs to do in order to get the appointed trustees appointed so that they can go into office on the constitution date?” That has been one of the considerations there, which is that resolution is generally the approach on these documents. Special resolution should be for something that is exceptional. Does it inadvertently risk standing in the way of actually having done what you need to get done to actually go forward and make these appointments?

62. The second point is on whether it is necessary. Of course, the safeguard in terms of removal would properly seem to be that, in Clause 15(12)(b), the really critical point for protection of independent members would be that you have to have a special resolution to actually remove them. Obviously it makes sense that you can only remove them for a reason in the recruitment policy, but, even if there is a reason in the recruitment policy and it is met, you are still going to have to have a special resolution at the time that they should be removed. Do you need to incorporate an additional safeguard at the terms of reference stage to say that the reason why somebody could be removed under a special resolution at some point in the future has to itself be agreed by special resolution. Sorry, that was possibly a bit convoluted.

63. THE CHAIR: It still raises the question as to what acceptable reasons could there be?

64. MS LEAN: In terms of the removal of an independent—

65. THE CHAIR: Yes. What sort of reasons could there be for removing somebody from the nomination committee? When you are thinking of removing a trustee, criteria are set out, but in this case there are no criteria.

66. MS LEAN: Certainly, I see that point, my Lord. One thing I am mindful of is it might encompass, for example—for independent members, it says who they must not be, so it might encompass the situation of if any of those criteria to be an independent member were no longer satisfied. I am not quite sure that that works quite as well as I might think, but say, for example, in terms of the electoral area point, that might come into place.

67. There is also the point about conflict of interest. That might have been a better point for me to pick up on. If, for example, there was some conflict of interest that came up, that might be a reason why it was felt that somebody should no longer be able to be—sorry, this is referred to in 15(5)(b): “conflict of interest is likely to arise as respects the independent member carrying out their functions on the committee”. That might have been a better example for me to use of, if something changed for an independent member, say, that it would no longer be appropriate for them to be an independent member and they chose not to resign, that might be a reason for removing them.

68. There is reference, of course, to compliance with the code of conduct. If there had been material failures to comply with the code of conduct, that is referred to in 16(b). If, for example, there had been a consistent failure to attend or an inability to attend, potentially for some of the reasons why somebody could no longer be a trustee, if there was a particular state of—perhaps they no longer had the capacity to act as a member of a committee by reason of similar things that might come into, you could no longer be a trustee. There is a range of reasons, I suppose, slightly on the hoof, of the sort of things you might think or might say, “That is the reason for removal”.

69. THE CHAIR: What you have been saying draws my mind to Clause 12(3), which are grounds for removal of a trustee: breach of the code of conduct, seriously impeding or prejudicing the terms of the trust. Bringing into disrepute is unlikely in the case of a nomination committee. Failing to discharge adequately the functions of a committee and these sort of things—writing in points of that kind would clarify the issue.

70. MS LEAN: My Lord, could I perhaps ask maybe if we could take that point away?

71. THE CHAIR: Yes.

72. MS LEAN: I am picking up on the concern that, again, it may be that the special resolution is seen as a way of addressing the fact there is a lack of specificity in the Bill itself.

73. THE CHAIR: Yes. That is right. That is exactly the point.

74. MS LEAN: Possibly if we could ask if we could maybe take away and come up with some suggestion to provide to your counsel about what might be envisaged in terms of (16)(c) or the sorts of matters that might fall under (16)(c), if that would then address the special resolution point.

75. THE CHAIR: That would be a way of meeting the point, but do please have a look at Clause 12(3), because those are the kinds of things, although not all of them are apposite, one would expect to see here.

76. MS LEAN: Indeed, my Lord. I have to say that I think probably 12(1) and (3) were subconsciously what I had in mind when I was trying to pull on the reasons about things such as eligibility, so I am grateful that you reminded me where they actually were in the Bill. Thank you.

77. LORD INGLEWOOD: Can I just ask one quick question? Is this nomination committee going to be a standing committee, or is it going to be an ad hoc committee?

78. MS LEAN: I am hearing standing committee from both sides.

79. LORD INGLEWOOD: You do not need a nomination committee until you have somebody to nominate to something and that may not be all that often.

80. MS LEAN: My Lord, of course because there is the requirement to appoint every two years—sorry, because of the cyclical every two years and there are term limits, I think, on the independent members, it would, in that sense, be a standing committee, albeit one that was only expected to, I think, meet on the biannual basis.

81. LORD INGLEWOOD: On the shelf, waiting.

82. MS LEAN: On the biannual basis, unless the situation occurred, of course, where there was a vacancy, whereupon a meeting of that committee would then be called to deal with the casual vacancy. It is in that sense why it would be standing. It may not meet very often, or it may not be expected to meet very often, but it needs to be there, not least to deal with the situation of where there are the vacancies and you need to do the interim appointed trustee, and casual vacancies generally, I am told.

83. THE CHAIR: Can we leave that, then, as a matter of discussion with counsel?

84. MS LEAN: Thank you, my Lord. Yes.

85. THE CHAIR: The next one is 13 to discuss. In your response, you very helpfully set out reasons for modifying our suggestions and I think we do not have any problem with that. It is a question of really fine wording. Again, is this one for you to discuss with counsel? I think we are happy to go along with the idea of modification to avoid high cost of distributing too much material and ensuring fairness and the kind of information. I think these are very much the kinds of points that we would welcome, so can that be left for further discussion?

86. MR LEWIS: Yes. I am very happy to do that, my Lord.

87. THE CHAIR: Yes. I do not think that we need to discuss the details today, but I think that that can be left for later. The next one on my list is 16. This is a point about fencing between two commons. You have drawn our attention to the existing wording, which has a provision in it, if you look at 48(1) as it is at the moment.

88. MS LEAN: My Lord, if I have understood the position, the concern is that the Bill does not make absolutely explicit on its face that the promoter could not put a fence up between Coombe Green Common and the parts of CL9 that are in the Trust's ownership. Again, forgive me if I have misunderstood the amendment we had suggested and then the note about that—that rather than making an amendment to Clause 48(1) by adding words at the end about not fencing between two commons, it could be dealt with by inserting an express subsection or something express that said the power in 48(1) should not be used to fence between Coombe Green Common and Castlemorton Common. I think we would be comfortable with an express subsection.

89. THE CHAIR: The suggestion is to add it on to what is already there as (2)(a).

90. MS LEAN: My Lord, I think our suggestion would be that, perhaps rather than being added to (2)(a)—and this is just a drafting point, I think—it might be a freestanding (2)(b), because (2)(a) is dealing specifically with one situation where the Trust can fence within a common against a highway or against a road. There may be merit in having it as a separate (2)(b) to distinguish any idea or confusion about it being linked to roads or highways, and it is very specifically Coombe Green Common, Castlemorton Common.

91. THE CHAIR: I think that that is a very helpful suggestion. You understand that it is really to reassure people who, possibly for reasons that do not really have much substance, nevertheless are concerned about the risk that animals will be prevented from going from one to the other, and it is just a final protection from their point of view.

92. MS LEAN: Indeed, my Lord, and it puts on the face of the Bill what the Trust has said, that it has no intention to do that and does not consider it could do that under the provision, but it makes clear that it really could not.

93. THE CHAIR: Yes, that. It is simply the assurance to the people with animals in that area. Thank you.

94. LORD INGLEWOOD: That assurance will protect those who might be affected were the Trust to acquire more common land, I think, would it not? It is possible to envisage circumstances, is it not, where, if they acquired another bit of common, the mischief that we are talking about here would be stopped by the general power?

95. MS LEAN: My Lord, I think that reassurance would only apply to CL9 and the Coombe Green Common, Castlemorton.

96. LORD INGLEWOOD: What you are suggesting is site-specific.

97. MS LEAN: Yes.

98. LORD INGLEWOOD: You told us when you summed up that this would go on at least 20 years, preferably more.

99. MS LEAN: I hope so, yes.

100. LORD INGLEWOOD: In that period, more land might be acquired, but the eventuality of this sort of thing happening in those sorts of circumstances, you are telling us, is forbidden by the existing words, without the special exemption for Coombe Green Common.

101. MS LEAN: Yes. That is what I am being told. Yes, my Lord. Forgive me, what I was just thinking about was if there was common land that was not contiguous or if it—but no, the general point is there.

102. THE CHAIR: The next one is 18 and we are looking for this purpose at Clause 48(2). I think we can understand the point that to not be able to go into common land at any point is really too dangerous, because there could be a situations where you have no alternative, really, but, in the course of the evidence, somebody was suggesting, “What is to prevent this fence being put something like 45 metres away from the perimeter of the common land?” It is eating 45 metres into common land. You would not need to do that and I wonder whether there could be some qualification to this to prevent it being used excessively to go too far into the common land.

103. MS LEAN: My Lord, our response on this would be that the protection is there through the requirement for consent under Section 38 of the Commons Act 2006. This power is subject to that. Just if it assists as a reference, in bundle 7 we have given you not just Section 38 itself, but also Section 39, which are the matters the Secretary of State or his inspector would have to have regard to when deciding whether to grant Commons Act consent for the particular works that were being asked for. If it assists, my Lord, just for reference, Section 39 of the Commons Act is at page 35 of bundle 7.

104. If I may just read it, that “in determining an application for consent under subsection (1) of Section 38 in relation to works on land to which that section applies, the appropriate national authority shall have regard to: (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it); (b) the interests of the neighbourhood; (c) the public interest; (d) any other matter considered to be relevant”. Subsection (2) of Section 39 gives us a bit more about what is meant by public interest and that “includes the public interest in: (a) nature conservation; (b) the conservation of the landscape; (c) the protection of public rights of access to any area of land; and (d) the protection of archaeological remains and features of historic

interest”.

105. Just to be clear, when a Section 38 consent was going through, which might say, for example, “We want to put a cattle grid here and there need to be the bypasses here and the only practical places to put them are here and, yes, that comes into the common”, that would bring in all those considerations of almost having to balance up, “What is the benefit or what purpose is achieved by having them there? Could they go somewhere else that has less of an impact? What is the practical interference with the enjoyment or use of common?”, so those sorts of considerations about how much land and whether it really has to be there. Is this really justified to do that? That is the sort of thing that would be caught up in the Section 38 consenting process.

106. THE CHAIR: Is it possible to write something into subclause (2) to just make a reference to the Commons Act?

107. MS LEAN: My Lord, that is in subclause (3), so 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 that Act except in relation to the provision of a cattle-grid”, but I may have mentioned—

108. THE CHAIR: You do not refer to Section 39 there.

109. MS LEAN: No, my Lord, that is because what subclause (3) does is to disapply the disapplication for Section 38 consent. The fact that you have to have Section 38 consent means that the Section 38 power would have to be exercised by the Secretary of State, having regard to the matters in Section 39. Section 39 does not stand alone, as it were. It is something that would have to be brought into account as part of the Section 38 process.

110. THE CHAIR: Right. Can you give us just a moment to confer?

Private discussion.

111. THE CHAIR: Another way of dealing with this is just to put in a qualification, putting at the end of subclause (2) a requirement that the fence must be as close as reasonably practicable to the boundary. That is what you would be doing anyway, really, and it is just to put in that.

112. MS LEAN: My Lord, if I may, I am conscious that Ms Satchell was wanting to say something, but if I could just pick up on a couple of points that I think were in Mr Bills' material that he provided to the committee, which is that there may be circumstances where the best overall solution would not necessarily be to have it as close as you can possibly get it to the boundary. I think there is an illustration perhaps in his materials, if I can just see if I can find them, to examples, for example, where you might be able to put a fence directly on the boundary, but, if you moved it slightly in or slightly further away, there is a landscaping shielding effect due to trees or things like that.

113. It is that, although you could possibly put it as close to the boundary as you could, the better overall solution, bearing in mind things like protecting the natural appearance, the landscape, things like that, would be to have it set back slightly. The sorts of things that would have to be justified would be, "Why is the fence being suggested to be put there?", under the Section 38 consent looking at things like natural landscape, interference with public rights, interference with common or grazing rights.

114. THE CHAIR: That is just explaining what "reasonably practicable" means, giving weight to the word "reasonable"—"reasonably practicable". It is a question of judgment.

115. MS LEAN: Indeed, my Lord, but I suppose the risk would be "practicable" perhaps brings with it a connotation of "as close as you can practically do it", whereas the considerations here might not be, "Of course it is reasonably practicable to put the fence right on the boundary", because you could actually physically put a fence on the boundary, but there may be other reasons why, bringing in the wider factors, that is not the best place for it to go, even though it could go there.

116. I think, my Lord, that would be the concern about introducing "reasonably practicable": that it could be construed as limiting the matters that could be brought to bear and saying, "Because it is reasonably practicable to put it 20 centimetres from the edge of that road, you cannot therefore put it a metre away, even though that would mean the fence was nearly wholly hidden".

117. THE CHAIR: I think the concern is not these little measurements at all. There is concern it might be straying, as I have said, further in, really substantial distances. Moving, let us say, 50 metres into common land would be nothing like what you are discussing just now. It is that kind of problem.

118. MS LEAN: My Lord, I think that is why I was mindful of potentially the bypass issue. I mentioned the reference in subclause (3). The disapplication of the disapplication is not disappplied in respect of cattle grids. Essentially, subclause (3) says that you need Commons Act consent, but not for a cattle grid.

119. THE CHAIR: Yes, but one could add in at the end of that, “but Section 39 of the Commons Act shall apply”.

120. MS LEAN: I suppose, my Lord, there would be a risk with that, because obviously Section 39 would automatically apply where Section 38 consent is required. By writing that in, it might suggest that the Section 39 consent factors applied to the cattle grid.

121. What I was going to say on the bypasses is, although if this was being done purely under the Highways Act by the highway authority, the Section 38 consent would not apply to the cattle grid or to the bypass infrastructure, the Trust, in the Bill, has drawn a distinction between those, so you do not need Section 38 consent for the cattle grids, but you would need Section 38 consent for the bypasses, but that is the situation where you might be getting into the scenario of having to bring infrastructure further into the common land than you would be if you were just talking about the fence.

122. My Lord may remember the photographs at Welland at Castlemorton Common, and, for example, the fact that there were properties and driveways and suchlike either side of where the road punched through into the common from Welland. That is somewhere you would have to think very carefully about where the bypass infrastructure could properly go because of having to deal with the third-party properties. Forgive me; I am certainly not trying to give evidence on how bypass infrastructure might need to be, but that is a situation where you could see that the infrastructure might have to be brought rather more into common land than a fence. That is, I think, the concern about trying to prescribe distances or areas.

123. My Lord, the Trust view, I think, would certainly be that Section 38 consent is the safeguard there, because the Trust does not get to decide where the fence goes. The Trust does not get to decide where the bypass infrastructure might go. The Trust can go to the Secretary of State and say, “Please can we have permission to do this?”, but the decision will ultimately be one for the Secretary of State, through the planning inspectors, having been through a process where anybody can object to that, make representations and there

may have to be a whole public inquiry.

124. All this power really does, my Lord, if I could put it in this sense, is that it is not about the Bill authorising the Trust to go and put up a fence wherever it wants to. What it is doing is giving the vires to the Trust to make clear that it has the power to do what any other owner of common land would do, but subject to the same restraints as any other owner of common land, which is any owner of common land could put up a fence or do this if they get Section 38 consent. This is really a vires power, as opposed to a “Where should the fence go?” power.

125. THE CHAIR: This is largely about reassuring people because, as it stands, 48(2) is quite stark, because, unless you knew more about the background, which you have been explaining to us, it looks as though there is something there that eats into common land with no protection at all. What is wrong with putting in a reference there to the Commons Act and saying, “But any such measure will require the application of Section 39 of the Commons Act”? You may say that it is unnecessary because it is there already, but at least it is a reassurance to people.

126. MS LEAN: May I just quickly—

127. THE CHAIR: Yes.

Private discussion.

128. MS LEAN: My Lord, I think the response would probably be similar to some of the ones that we have mentioned elsewhere on the table, which would be, “Is the wording essentially superfluous because that is the law anyway?” Of course, if the committee were to consider that, even though it is in the Commons Act itself, it would be helpful to have that reflected in some way within the Bill, we could certainly think if we could come up with perhaps some wording to discuss with your counsel.

129. THE CHAIR: Yes. That is the point. It is simply that people look at that clause on its own. As I said, it is very stark. The question is, “How far can they go?” The Bill does not tell them that. Like so much in law, you have to look underneath. It is something that is not actually written out as such in the Bill, because you do not have to reproduce the Commons Act provision here, but some method of referring to it would be reassurance

that, whoever is applying their mind to the exercise of this provision, will be looking at the Commons Act. They will be doing it anyway, but it reassures the reader that that is what is going to happen.

130. MS LEAN: Indeed, my Lord, that point is taken away. I have to say that I do have to, of course, always remind myself that perhaps not everybody squirrels away Part 3 of the Commons Act 2006 to have as bedside reading and that therefore it may not be known. I can see why it would be helpful to maybe have a reference to it, so that people will know that there are those particular provisions that apply in that regard.

131. THE CHAIR: Can we leave this for discussion with our counsel on the exact way in which it is to be looked at?

132. LORD INGLEWOOD: Could I endorse that, having tried to understand it last night? I think I got there, but it is also important, I think, because most of the Commons Act does not apply to Malvern Hills. This is a relative exception to the general legal principle, is it not, that quite a lot of the Commons Act does not apply here?

133. MS LEAN: The provisions about commoners councils and suchlike, yes.

134. LORD INGLEWOOD: Yes, exactly, so people would not be thinking about this, and so to put it specifically there will help.

135. MS LEAN: Indeed, my Lord. If we can perhaps take that away and think if we can come up with some wording that draws attention to Section 39 of the Commons Act, so that it is clear that this is not just a freestanding, “The Trust can do anything”, and that there are constraints on it.

136. THE CHAIR: Can we conclude there? 18, that is a matter for further discussion. 23 is the last one, and this is all about the policy issue in relation to licensing. Our concern was that the policy is referred to in subclause (3). That is a policy published and made available but it does not tell us what the criteria are for that policy. It is one of these areas that greater definition is required and the idea of a special resolution was to try to put some sort of control over this, but there may be other ways of doing it. I am not sure that you have really dealt with that, if I can go and look at your sheet. There is a consultation process but we do not know what the policy is.

137. MS LEAN: Forgive me; I had not quite picked up on that nuance, because I had put a note that the consultation was acceptable and that—forgive me; I had not picked up from the note the nuance on looking for further criteria in Clause 63.

138. THE CHAIR: There might be a lacuna if there is a delay in the first policy being approved. Currently you have an arrangement that is in place.

139. MS LEAN: Yes, my Lord.

140. THE CHAIR: And you are concerned that it might be creating delay.

141. MS LEAN: Yes. The concern is whether there is something further that could be put in about what a policy under Clause 63 might look like or contain or the criteria in it. I am just looking quickly at 63. There is perhaps more in 63 that may provide some guidance on that than some of the other powers we have been looking at. Obviously, 63(1) is about licences, which may include uses that would otherwise be in breach of by-laws, which gives something of a steer of the sorts of things that might end up coming into the policy.

142. (2) is that the licences may have terms in them that include things about the location in the Malvern Hills, requirements for insurance, display of advertisements and charging of fees by the Trust to a licence holder, which would again seem to give some indication that, if those are the sorts of terms and conditions that might be imposed on the licence, that is the sort of thing you would expect to see picked up or mentioned in a policy.

143. (3) is about specified purposes, for business or organised activities. It is certainly including that. Again, that gives a bit of a steer and reflects what is in the Trust's current policies on this. You will expect to see things in there about people using the hills in the course of a business or any organised activity, and you would expect the policy perhaps then to drill down a bit more into what was meant by that.

144. LORD EVANS OF GUISBOROUGH: That is very broad, is it not?

145. MS LEAN: It is, my Lord.

146. LORD EVANS OF GUISBOROUGH: “Any organised activity” could cover anything, really.

147. MS LEAN: Indeed, my Lord.

148. LORD EVANS OF GUISBOROUGH: Apart from spontaneous activities, I suppose.

149. THE CHAIR: If we look at 63(3), the use is to be the subject of the policy. Is that right?

150. MS LEAN: Yes.

151. THE CHAIR: You say it can include the use in the course of a business and any organised activity, but that is itself pretty broad and exercises some concern about greater use no doubt getting benefit by licensing, people paying for licences and so forth. It is so open-ended as to what these extra uses could be.

152. MS LEAN: My Lord, that is why the requirement came in for there to be a policy because, when the Bill was deposited, if I recall correctly, it just had 63(3)(a) and (b). The requirement for there to be a policy was inserted in the filled Bill in response to the concern that subclause (3) was too broad. It made clear that the Trust is going to have to have a policy on it. That has obviously now been—subject to a further proposed safeguard, there is going to have to be consultation on the policy. There will have to be a draft policy that says, “The Trust is proposing that it would license for the following types of things: these types of activities; these types of uses; there might be requirements for insurance or where charges might be applied”. There would then have to be consultation on that policy before the Trust could adopt it and apply it.

153. What has been put into the Bill are essentially process points, which are there to avoid being too specific in 2026 about what some policy might, going forward into the future or at different points of the future, specifically include within it. It is trying to address it through putting in place procedures rather than prescribing the specifics, if I can put it in those terms.

154. THE CHAIR: It does not have any safeguards. When you talk about the policy relating to uses, one of the things that we have to be careful about, bearing in mind the objects, of course, is what safeguards would be there in the policy. The policy would have to say something about safeguards, would it not?

155. MS LEAN: Indeed, my Lord. Of course, the power in 63 would have to be read with the rights of access that are protected by 38. “Subject to the provisions of this Act and compliance with all rules, regulations and by-laws relating to the Malvern Hills for the time being in force, the public have a right of access to the Malvern Hills on foot or horseback for the purpose of open-air recreation”. Any policy or any exercise of powers under Clause 63 has to occur against that backdrop and against the similar protection for rights of common in Clause 94. There is obviously the proposed amendment about Clause 63 not capturing grazing now, for example.

156. In terms of safeguards per se, there are the safeguards about charging, which are built into (6) and (7), which were of particular concern for some petitioners. Other than that, it would be through, first, the requirement for public consultation on it—you would hope that, if there was something in there that looked truly egregious, you would get quite a lot of people telling you, “You should not really do that”—and the requirement on the trustees that, when they are exercising any of their powers, which would include formulating or adopting the policy, they have to do so in accordance with their general obligations and requirements under the Bill. In Clause 5(4), they have to exercise their functions in accordance with the provisions of the Act. In 8(3A), they have to exercise the powers and perform the functions in the way they decide, in good faith, would be most likely to further the objects.

157. I am sorry. That is a very long-winded way of trying to pull a few things together, but this is not a power that can just be looked at in isolation, saying that they can go and do anything they like. It always has to be viewed against that backdrop of anything that the Trust is doing or the trustees are doing has to be furthering the objects or, in good faith, what they think is best going to further the objects. It is not an explicit safeguard that is written in saying, “You cannot do this and you cannot do this”, or, “You can only do these things”. There are a myriad of matters that come into what could actually be done in this policy or what the Trust can require to be licensed or charged for in having any such policy under the Act.

158. THE CHAIR: In view of the time we have reached, I am going to suggest that we adjourn the proceedings now. We will have a discussion amongst ourselves. If you will be ready to come back at 2 pm, we may bring you in slightly after that so that we can have our discussion before you come in. We will stop now and see you this afternoon.