



## Planning & Regulation Committee

### Monday, 19 October 2015

## ADDENDA

### 1. Apologies for Absence and Temporary Appointments

<i>Apology</i>	<i>Temporary Appointment</i>
Councillor Anne Purse	Councillor Richard Webber

### 4. Petitions and Public Address

<i>Speaker</i>	<i>Item</i>
Stephen Anderson Myra Peters and Mark Yates	) 6. Barford Road farmhouse, South )Newington – Application MW.0080/15
?? Robert Stewart	) 8. Commons act 2006: Application to )register Humpty Hill, Faringdon as a )Town or Village Green

### 6. Change of Use of Agricultural Barns to Topsoil storage and screening for Topsoil business, a new lean-to 10 x 30m barn and new farm access for Barford Road Farmhouse, Barford Road, South Newington - Application No.MW.0080/15

#### *Additional Consultation Response*

County Minerals and Waste Policy Team

Policy W3 of the emerging plan confirms a shortfall for inert waste recycling facilities later in the plan period and the current Waste Needs Assessment

indicates a particular need for facilities such as this which can process soft excavation material.

Policy W4 seeks to confine waste operations in rural areas such as this to handling less than 20,000 tonnes of waste per annum.

The site appears well located for a small facility (being close to an 'A' road) although there may be local difficulty in terms of access. If these difficulties can be overcome, the site would provide a valuable waste facility. Any permission ought to contain a condition restricting the scale of the facility. Local Plan policy W4 provides the means to restrict this to no more than 20,000 tpa, but local access restrictions may require that this be even lower.

*Comment from the Deputy Director for Environment & Economy (Strategy & Infrastructure Planning)*

These comments were taken into consideration in the report but are not set out in the consultation responses. They are added here for completeness.

*Further Information on Bund Construction from the Deputy Director*

In paragraph 19 I said that the applicant had been asked for further details of the bund dimension and materials.

The bund would be 40m long by 4m wide by 4m tall. It would be constructed using subsoil from the site and imported topsoil from the business. The bund would be planted with a wildflower meadow mix and mown after the plants had seeded.

*Comment from the Deputy Director for Environment & Economy (Strategy & Infrastructure Planning)*

The bund would be of a satisfactory size and scale to reduce noise in the direction of South Newington. Noise issues are discussed in paragraphs 49 to 53 of the report. The bund as proposed along with the condition controlling noise from the site would be sufficient protect the local amenity from noise in accordance with policy PE18 of the OMWLP and policy C5 of the OMWCS.

The County Ecologist Planner advises that it would be preferable to not put topsoil on the bund prior to sowing with a wildflower mix. I am however concerned that waste not be imported to the site for landraising, so all the material for the bund should come from on the site or from the processed topsoil. A condition could be added to the permission stating that the bund shall be made of subsoil from the site and processed material only.

The wildflower mix would improve biodiversity in accordance with policy ESD10 of the CLP, if it is of the right mix and is maintained correctly. I therefore recommend the attachment of a further condition requiring the use of a mix that is at least 20% wildflower, and that the planting is maintained in accordance with the suppliers instructions.

*Revised Recommendation*

As report plus additional conditions:

- ix) The bund shall be constructed using only subsoil from the site and processed material from the topsoil screening operation.
- x) Within three months of the date of the permission details of the planting and ongoing maintenance of the bund shall be submitted and approved.

**8. Commons Act 2006: In the matter of an application to register Humpty Hill, Highworth Road, Faringdon as a Town or Village Green**

Additional Representations attached.

The Chief legal Officer and Head of Law & Governance feels that the opportunity should be taken to refer the points raised in the late submission to the Inspector for him to consider and is recommending that the item be deferred to the November 2015 meeting.

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Our ref ERK/CJD/GLA.276-3

Your ref NL Reg 33/Humpty

16 October 2015

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Dear Mr Clark

**In the matter of an application to register Humpty Hill, Faringdon as a town green**

We are instructed to act on behalf of Gladman Development Limited, Charles Frances Nigel Allaway and Rosemary Pollock (the "Objectors").

We ask that this letter be put for the attention of the members at the Planning & Regulation Committee meeting on Monday 19 October 2015.

This is another case where an application has been made to register farm land as a town or village green. Rather than reject the claim as misconceived Dr Mynors, the Inspector, has recommended registration. As demonstrated below he was wrong to do so.

Unfortunately, Dr Mynors has not engaged with the Objectors' submissions made to the inquiry and his Report is flawed. The decision of course is for the Planning and Regulation Committee and is not for the Inspector. However so far from it being open, in the light of the Inspector's Report, for the Committee to decide to **register** the land as a town or village green, what it should do is to decide to **reject** the application.

The first error that Dr Mynors made is as to legal basis of the application. As explained at paragraph 26g of the Report by the County Solicitor & Head of Law & Culture, the Inspector concluded that the application fell to be considered under section 15 (3) on the basis that the relevant 20 years use was down to 2011. In fact (in accordance with what Lewison LJ said in *R (Newhaven Port and Properties Limited) v East Sussex County Council* [2014] QB 282 at paragraph 29), the application fell to be considered under section 15 (2), on the basis that the permissive use between 2011 and 2013 fell to be disregarded. This was explained to the Inspector at the inquiry and set out in Appendix 2 to the Objectors' closing submissions. In this case what is a clear error can be argued not to make any difference, but it does go strongly to support the suggestion made above that in writing his Report the Inspector did not engage with what the Objectors were saying.

The second error is this. *R (Barkas) v North Yorkshire Council* [2015] AC 195 is a new case in which the Supreme Court had to consider what the requirements were for registration of a new town or village green.

Lord Carnwath said (see paragraph 65 of his speech)

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*... in cases of possible ambiguity, the conduct must bring home to the owner not merely that "a right" is being asserted, but that it is a village green right.*

What makes the assertion of a "village green right" (or a "town green right" in the case of a town) different from an ordinary right is that it is exercised in connection with a village (or, in the case of a town), a town.

Sometimes, as Dr Mynors will have appreciated, a smaller area can be taken but in the present case the relevant area put forward by the Applicant was Faringdon and Dr Mynors proceeded on this basis. Faringdon is quite a small town but it still has a population at the last census of 7,121. There was oral evidence on behalf of the Applicant from 15 people; and there were, additionally, 73 evidence questionnaires (some of the makers of which had also made written statements) and 38 written statements. 111 (i.e 73 +38) is 1.56%. Moreover the great majority of those who have produced questionnaires or statements live within 200 yards of the site.

The Objectors' point was clearly put to Dr Mynors as members will see if they look at the Objectors' closing submissions available in the Members' Resource Room (it is only necessary to look at paragraphs 28 and 29 of the closing submissions).

Accordingly in the required sense the use was not by the inhabitants of Faringdon; and use was not by a significant number of these inhabitants.

However Dr Mynors does not address the submission. What he does is to consider the question of where those who have used the land at paragraph 186 and says:

*... I consider that those using the application land are likely to have come largely from the civil parish of [Great] Faringdon. No doubt the [use] was predominantly from the parts of Faringdon nearest the land, but that will always be true in the case of any open space at the edge of a built up area.*

Thus we don't know the reason for why he disagrees with the Objectors. This would not matter if he is right and they (and apparently Lord Carnwath) were wrong: this is a matter the Committee will have to decide. In that context it would be helpful for members to have in mind the case of *Steed* (1995) 75 P & CR 487, an earlier case decided by Carnwath J (as he was then) decided that use by those who lived near to the claimed town green could not say that their use was referable to the town of Sudbury in which they lived. It is only necessary for members to look at the headnote to get the point:

*Held, dismissing the application ... Use of the land is not enough. It must be accompanied by an assertion of right and be linked to a right claimed by the inhabitants of a particular locality ... the evidence presented [did not] link the use to a right claimed by reference to any particular locality.*

Just to be clear, there was no doubt in *Steed* that the use was by the inhabitants lived in Sudbury in the *nearby streets* (p505) to the application site.

This is a sufficient for the Committee to reject Dr Mynors's Report. However there is a third error into which he fell.

If members go to the land they will see "on the ground" that it is used by local people to carry out a circular walk. This is because their feet have worn down the grass. This circular path is described by

Dr Mynors at paragraph 48 of his Report and it is also clearly visible in the aerial photographs. A sample of the aerial photographs are attached to this letter however better copies are available in the Objectors' bundle in the Members' Resource Room. This was referred to by one of the witnesses at the inquiry as "the dog track": it was heavily used by people walking their dogs.

Accordingly, as members will guess one of the points very strongly made at the inquiry, on behalf of the Objectors, was that use of the perimeter footpaths on this very large site (14 acres) did not count.

Once again, Dr Mynors did not deal with the argument and, more specifically, did not discount the footpath use even though he held ... *the principal activity, walking, took place primarily on the paths...* He failed to make an assessment of the only activity he could properly rely, namely that which took place off the paths. Dr Mynors fell into the same error as the Inspector in *R (Laing Homes) v Buckinghamshire County Council* [2004] 1 P & CR 36 at p573 where the Inspector failed to make any discount in respect of use of perimeter footpaths. In that case, as Sullivan J observed, use of perimeter paths would have suggested to the landowner not that land was being used as a village green but by people exercising public rights of way (see p600).

The final matter we want to draw your attention to is this. There was an issue at the inquiry as to whether in the land was used for grazing cattle in 1996 and 1997. The Objectors' evidence was clear that it had been; witnesses for the Applicant were equally clear that it had not. The barrister for the Objectors said this to Dr Mynors in closing his client's case:

*...you will appreciate why I am emphasising this part of the evidence. The landowner in a case such as this is very often not able to produce hard evidence which might demonstrate that land has been used less extensively than the evidence for the Applicant might suggest. Here is a piece of evidence which does indeed suggest that. It is necessary to engage with it and not just pass on as if it is a little puzzle which has no wider significance than whether there were or were not cattle on the land in 1996 and 1997.*

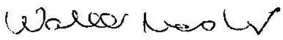
Dr Mynors devotes four paragraphs of his conclusion to the question of use of the land by cattle (paragraphs 169 to 172). As he says the *two accounts are impossible to reconcile*. He concludes that they *were* grazed on the land in 1996 and 1997 (paragraph 170). But he then fails to engage with the Objectors' point that this indicates that the land was used less extensively than the Applicant's witnesses claimed: how could they have failed to see them as the walked round the field – even if they were congregating at the edge of the field, as Dr Mynors suggests?

There are other points that we could make but we think that we have said enough to show that Dr Mynors's Report is both seriously inadequate and, moreover, that on the basis that use is not referable to the inhabitants of the town of Faringdon, it is clear that the land should not be registered as a town green.

The point arises as to what the registration authority should do in these circumstances. First of all, we suggest that the meeting on 19 October 2015 should be deferred. Second, we suggest that you obtain a QC's opinion on the points that we have made. We suggest that he or she will support what we have said. The costs of such a second opinion will be much less than the costs involved in a legal challenge.

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Yours sincerely

  
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