

DD1 and DD2 minerals planning permissions, prohibition order. Statement by Radley Parish Council.

Introduction

DD1 and DD2 are two overlapping sites in Thrupp, Radley for which there are old minerals permissions. The operators are JCSL and Tuckwells. In 2015 OCC set in hand a Review of Old Minerals Permissions for these sites, hereafter referred to as the ROMP sites. The first step of the ROMP process should be the submission by the operators of an application and an Environmental Statement. This did not happen within the statutory deadline of 12 months with the consequence that the permissions were automatically suspended in November 2016.

After nothing further had happened OCC's Planning and Regulation Committee (P&RC) decided on 9 September 2019 that mineral extraction was unlikely to resume and that the council was therefore under a legal duty to issue a prohibition order. This would rescind the existing permissions.

At their 1 June 2020 meeting, the P&RC were advised by officers that there was new evidence which might be relevant to their decision to proceed with the prohibition order:

- a counsel's opinion obtained by the operators;
- a planning application by Tuckwells to process gravel from the ROMP area.

The committee resolved to consider this new evidence at their July meeting. In the event they did not do so, but it appears that consideration might be given instead at their next meeting, which is on 7 September.

RPC plan to give oral evidence at that meeting. We are submitting this statement in advance, so that it can address the issues more fully and can be taken into account by officers in preparing their advice.

The statement is in three sections, dealing in turn with:

- the need for all papers relevant to the P&RC decision to be made publicly available unless there is good reason to the contrary
- the importance of OCC reaching and implementing their decision in a timely way so as to avoid continuing uncertainty and blight.
- the evidence, including historical evidence which has a bearing on current intentions, as to whether the statutory tests for prohibition have been met.

On the basis of the evidence currently available RPC believe that the statutory tests have been met, that OCC remain under a legal duty to make a prohibition order, and that they should do so as soon as possible for confirmation by the Secretary of State.

Availability of relevant evidence

The officers' report for the 1 June meeting referred to:

- representations from JCSL that new arrangements were being actively negotiated with Tuckwells for them to extract minerals at Nyatt;
- a planning application that had been received from Tuckwells for the processing of minerals to be extracted from Nyatt;
- a Counsel's opinion obtained by the operators arguing that there was no legal duty to proceed with a prohibition order.

The first of these has not been made available, nor have any related representations from the operators that the P&RC should review its decision to proceed with the prohibition order. The second has now been made available and the subsequent validated version of the application is on the OCC website. The third, Counsel's opinion, has not been made available on the argument that one of the exemptions under the Environmental Information Regulations (EIR) applies, but a summary has been provided.

The summary Counsel's opinion cites three 'powerful pieces of evidence' which are claimed to show that the operators do intend to proceed with extraction. These are:

- the application by Tuckwell's for the processing plant;
- 'the 2020 planning application for the ROMP';
- 'submissions to the minerals plan'

The first is already available, as noted above. It is not clear what the second might be, but it is certainly not available. The third has not been made available.

Overall, the publicly available evidence is very thin, lacking most of the material which we are told might be relevant to the P&RC's consideration of the issues. RPC asks that all is made available or – if for any reason that is not possible – for it to be fully summarised in the papers for the Committee's decision.

The need for a decision to provide clarity

The ROMP site lies wholly within the Radley Lakes area as defined in the 2018 Radley Neighbourhood Plan. This area is exceptional for the potential it provides for natural life, healthy exercise, scenic beauty, peace and tranquillity so close to a large urban population.

Consequent to the Neighbourhood Plan a masterplan is being prepared for the future of the Lakes area so its potential can be realised – whilst also respecting other remaining operational uses and permissions. A draft of the masterplan has been published for consultation with stakeholders and is at <http://www.radleyvillage.org.uk/radley-lakes-masterplan-report-12-june-2020/> . The proposals have been supported in the great majority of responses.

Implementation of the masterplan requires agreements with the various landowners, so that their own objectives and those of the masterplan can be reconciled. There

are eight landowners in the Lakes area. All except one have readily entered into dialogue, enabling good progress to be made. The exception is JCSL, whose land includes Nyatt – which contains the ROMP area’s unexploited gravel reserves.

RPC have invited JCSL six times¹ to discuss their Radley Lakes strategy, on a non-committal basis as they would like, so that common ground can be explored. On all occasions they have refused, citing their commercial interests (which we acknowledge) and a necessary polarity between those interests and the wider vision for the area (which we do not accept to be the case). That being so it has not been possible to reach any agreement with them about how the masterplan might make progress on their land. The result is blight for an area of huge community potential and also for the nearby residents.

The uncertainty about a prohibition order has undoubtedly contributed to that blight. It is particularly important therefore that the legal position in relation to the Order is resolved, so as to open up progress with the masterplan.

RPC fully recognise that the P&RC’s decision whether or not to proceed with the prohibition order must be based on specific legal grounds and that the potential benefits of the masterplan are irrelevant to those grounds. What we ask is that, if – as we believe to be so - the legal grounds are established, the P&RC should proceed in a timely way and not be put off by any obfuscations or threats as to costs which might divert them from their statutory duty.

The evidence as to whether the prohibition order should proceed

i) The legal tests and the issues arising

The County Council are under a statutory duty to make a prohibition order if

- a site has been suspended for two years for failure to provide an Environmental Statement or other relevant information, and;
- it appears to the council that minerals development has occurred but has permanently ceased.

The council may assume that minerals development has ‘permanently ceased’ only when:

- no minerals development has occurred to any substantial extent at the site for at least 2 years, and;
- it appears to the council, on the evidence available to them at the time when they make the order, that resumption to any substantial extent at the site is unlikely.

The wording of the last bullet point is important. The Council’s decision needs to be based on likelihood but not on certainty.

¹ in the context first of the Neighbourhood Plan and then of the masterplan

All of the above is statute. Additionally, Government guidance provides that:

- there are unlikely to be many cases in which, after 2 years' suspension, the mineral planning authority would not be acting rationally in assuming that working had permanently ceased.

In their decision of 9 September 2019 the P&RC decided that these tests had been met and that they were therefore under a duty to issue a prohibition order. On 1 June 2020 the P&RC resolved to consider whether this position might be changed by:

- The Counsel's opinion
- Tuckwells planning application for a processing plant.

These two new factors are addressed in turn below, following which there is a review of the relevant evidence and then RPC's conclusions reached from that evidence.

ii) **Counsel's opinion²**

The main arguments advanced by counsel are set out below in italics, followed by RPC's comment.

OCC's advice to the P&RC gave excessive weight to the guidance that a prohibition order should normally be made if an Environmental Statement has not been submitted within two years. This does not remove the need to look critically at the other evidence

It was quite correct for OCC's advice to the Committee to refer to this guidance, which creates a presumption towards a prohibition order being made in the absence of an Environmental Statement. There is also much other relevant evidence that the statutory tests for a prohibition order have been met - see (iv) below.

The other evidence is that minerals extraction has not ceased and that is the view that the Secretary of State would take

RPC disagrees. Again, see (iv) below.

OCC have been swayed by arguments from local residents about considerations that are irrelevant.

This is untrue. The officer advice to the P&RC stressed that their decisions must be based on the statutory tests. It did not refer to any irrelevant factors or to views from local residents. The representation made at the meeting by RPC were based solely on relevant factors, not on the desirable uses of the site. The RPC speaker at the

² RPC requested but was refused the full counsel's opinion. This section is based on the summary that has been provided

meeting stressed to the committee that wider issues cannot be taken into account.

OCC have failed to meet with the minerals operators to understand the evidence about their intentions

It is understood that a meeting is now planned. It should also be noted that OCC have not met with RPC and that JCSL has repeatedly refused to do so.

If OCC make an order and it is not confirmed by the Secretary of State, OCC might have to pay costs

That might be so, but it is hardly an argument for making the wrong decision. If OCC believe that the statutory tests are met they are under a legal duty to make a prohibition order. There is no discretion.

iii) The Tuckwells planning application

In 2014 the Secretary of State made a decision in relation to an earlier prohibition order that would have applied to part of the ROMP area (DD2). Shortly before (in 2012) Tuckwells had been granted planning permission for a plant to process gravel extracted from the ROMP area. Although the decision on the order was based on other factors the Inspector's report said that this planning permission was evidence of a genuine intention to extract minerals.

Tuckwells have now (April 2020) made an application for a similar processing plant. It has been suggested that if OCC proceed with a prohibition order an Inspector might similarly regard this as evidence of a genuine intent to extract and not confirm the order.

In RPC's view this is a curious suggestion. The 2012 planning permission was not in the event acted on and the permission lapsed without an ounce of gravel having been extracted. In retrospect the Inspector got it wrong. The lesson of 2014 is surely that a planning permission to process gravel cannot be regarded as credible evidence that minerals extraction will follow, especially in the absence of a ROMP application and Environmental Statement.

If the recent (2020) Tuckwell's application for processing was driven by a genuine concern to be in a position to process minerals from the ROMP area, it is difficult to understand why it has been made at this particular time, while permission to extract gravel from the area remains suspended, no detailed plans for its resumption are in place and no Environmental Statement has been prepared or submitted. It is also notable that the application is lacking in detail with several errors and inconsistencies and has not been preceded by any consultation with local interests. It appears to

RPC that the application is more a device to influence decisions on the prohibition order than a genuine attempt to prepare for resumed extraction.³

It is moreover JCSL not Tuckwells that own the land on which extraction would take place. Although the officer's paper to the 1 June meeting states that JCSL and Tuckwells are in 'active negotiation' for the latter to be 'contractors' for the extraction it does not say that an agreement has been reached and in particular does not say that Tuckwells would be able to activate extraction without the consent of JCSL, on whose commercial interests see (iv) below.

There is moreover a new factor. At the end of May 2020, in the context of the Vale Local Plan 2041, Arnold White Estates put forward a major development proposal in Radley for 600 new homes, an energy park and a country park. The energy park is fundamental to the carbon neutral credentials of the proposal. It would be on the Tuckwells site and would require the cessation of present and proposed minerals activities there. RPC do not support the AWE proposal and there is no evidence that Tuckwells have agreed to it, but if it begins to make progress through the Local Plan process there will inevitably be commercial pressure on Tuckwells to make their land available to AWE. If that happened, it is difficult to see how minerals processing and hence extraction could go ahead.

In summary there are several reasons why the Tuckwells application for processing does not show that minerals extraction is likely to resume.

iv) The evidence that extraction has ceased and is unlikely to resume

The current planning permissions for the ROMP area date to 1954 (sic). This was only one year after the Coronation; food rationing was only just coming to an end; Len Hutton was still captaining the England cricket team; Stanley Matthews had just won the Cup Final for Stoke City.

Nearly 65 years later the gravel in Nyatt remains unextracted. No gravel in the ROMP area has in fact been extracted since about 2000⁴. So there can be no doubt that extraction has 'ceased'.

The issue is whether 'resumption to any substantial extent is unlikely'. That requires the evidence about the owners and operator's intentions to be critically reviewed.

In their 2015 report which set in hand the current ROMP process, officers said

³ Despite these misgivings about the reasons for the application RPC recognise that it needs to be addressed on its merits and submitted comments on 13 August.

⁴ Extraction by JCSL ceased sooner, in about 1995

In her report, the Inspector considered that the fact the applicant said they were going to work the site was sufficient evidence that the site will be worked. However, OCC officers are not entirely in agreement with this assessment and believe that the applicant's actions are as relevant to assessing whether they intend to work the site as any statements they make in this regard. Insofar as time limits are missed or permissions are allowed to expire, then where these are contrary to the applicant's expressed intentions then they may provide evidence of a different intention.

RPC believe that this approach to the evidence is entirely right and that to understand current intentions on extraction it is necessary to look back at past actions and inactions. In particular it is necessary to look at the relationship between stated intentions to extract minerals and the continuation of non-mineral uses at the JCSL industrial yard.

This yard falls within the ROMP area. Buildings in the yard were originally constructed, it is said, to service mineral extraction, and are subject to a condition requiring their removal once no longer needed for that purpose (i.e. once mineral extraction has ceased).

From the 1970s onwards, buildings in the yard started to be used for a variety of light industrial purposes unconnected with minerals, sometimes with temporary permissions and sometimes unauthorised. The yard is in Green Belt and has very poor road access, so it is highly unlikely that these uses would have been permitted if it was not for the prospect that the yard might later be needed for minerals purposes.

In 1992, there was an appeal by JCSL against enforcement notices issued by VWHDC in respect of these non-mineral uses. The Inspector decided that the uses could continue while mineral extraction was still taking place. He also decided that a ten-year period (i.e. until **2002**) would probably be sufficient to complete the extraction.

And so it might have been, had JCSL not decided soon after 1992 (and certainly by 1995) to relocate their mineral extraction operation at Radley entirely, to another JCSL quarry at Sutton Wick. The reasons for ceasing extraction at Radley are not wholly clear but can perhaps be inferred from what followed.

In the ensuing years JCSL have continued to assert that they will extract the gravel at Radley but, bit by bit, have put back the stated timing of completion and used this to justify extension of the non-minerals uses in their yard.

In 2003, at which time extraction had not restarted, they said to the VWHDC that they needed until **2023** to complete it.

In 2011 a start had still not been made and they said they needed until **2026**.

It was also in 2011, that Tuckwells made their application to process gravel extracted from the area. The application said that JCSL would apply for modern planning

conditions for the extraction site by September 2012, that these would be agreed in two years and that extraction would follow. Again no extraction happened

The new 2020 planning application for processing does not explain this delay other than to say that applying for modern planning conditions took longer than expected. However, it does say that it will be up to 5 years before gravel at Nyatt starts to be extracted and that completion may take a further 16 years.

Potentially this means completion of extraction in **2042**. This is a full 40 years after the date the Inspector allowed for in 1992.

The key point is that JCSL have had a commercial incentive to keep the possibility of future extraction alive indefinitely, but not actually to undertake the extraction - since completion of the extraction would remove the case for any further temporary non-minerals permissions.

The link between minerals extraction (or rather the failure to extract minerals) and the industrial yard is still apparent today.

In December 2019 the Vale DC refused permission for continuation of the temporary uses at the JCSL yard. In June 2020 JCSL appealed against this decision, arguing inter alia

- Notwithstanding previous suggestions that mineral extraction related to the appeal site would not recommence, an application for plant in conjunction with mineral extraction has been submitted to allow mineral extraction to recommence, as has always been the intention;
- The basis of the committee decision in refusing this application was the serving of a Prohibition Order which is flawed, both in terms of whether such an order could be served, but also now with the decision to review the decision to serve an order;
- Given that mineral extraction will continue, the very special circumstances required for development in the Green Belt are met;

It does not take too much reading between the lines to detect a strategy by JCSL that links three planning processes currently in train. The application for a processing plant looks to be a device designed to derail OCC's prohibition order. The derailing of the prohibition order looks to be a device designed to overturn VWHDC's refusal of continued permissions for non-minerals uses on their industrial site.

Given all these factors, especially the long record of promises on extraction not being followed by action, there is compelling evidence – to quote the wording in the statutory test - that 'resumption [of extraction] to any substantial extent at the site is unlikely'.

The P&RC would need powerful evidence to the contrary if it was not to proceed with a prohibition order. As shown in (iii) above such evidence is not provided by the 2020 application for processing.

Counsel's opinion cites two further pieces of evidence.

The first is that a 'planning application for the ROMP' is on the way. Unless this was a quick application for form's sake – like the one rejected by OCC in 2012 - this would be a major exercise, requiring surveys and a well-researched Environmental Statement: an exercise which in the same opinion Counsel say that the applicant is not prepared to undertake. It must therefore be questioned whether this evidence exists.

The second is that representations have been made in the context of the Minerals and Waste Local Plan (MWLP). RPC have not seen these representations but would be surprised if they had a major bearing on intentions to extract. It is possible that the operators argue that the minerals in Nyatt would help OCC meet the extraction tonnages required by the MWLP. Any such representations would be irrelevant as a matter of law to the decision which the P&RC must now reach on the prohibition order.

v) Conclusions on the evidence

In summary RPC believes that the evidence shows the following.

- Minerals extraction has ceased. That has been so for about 20 years.
- The issue is whether it is 'likely' to 'resume to a substantial extent'.
- The operators have failed to make an application for renewed extraction together with an Environmental Statement, and there is no evidence of an acceptable one being 'on the way'.
- JCSL own the area of potential extraction. They have had and continue to have a commercial incentive to promise they will extract but not actually to do so.
- The credibility of evidence as to future extraction must be judged against their past record of not acting on their stated intentions.
- They have steadily put back the prospective date for completion of extraction. What was once 2002 has, bit by bit, slid to 2042.
- This record provides compelling grounds for concluding that 'resumption [of extraction] to any substantial extent at the site is unlikely'.
- Counter evidence is not provided by the Tuckwell's processing application nor by the other sources cited by the operators' counsel.
- On the basis of the available evidence OCC remain under a duty to issue a prohibition order.