

Annex 3

Proposed prohibition order in relation to the Radley ROMP area (MW.00023/21)

Submission by Radley Parish Council 6 July 2021

Summary

- Decisions on the prohibition order must be based solely on the legal tests in the Town and Country Planning Act 1990.
- If these tests are met the County Council is under a duty to make a prohibition order.
- Applying the criteria in these tests, there is:
 - weak evidence for the making of a prohibition order for most of the ROMP area, but.
 - incontrovertible evidence for making a prohibition order for the land in the north-west of the ROMP area (shaded yellow on the map).
- This is the case irrespective of future decisions on the processing of the minerals to be extracted.
- The legislation enables a prohibition order to be made for part only of a ROMP area.
- Oxfordshire County Council is therefore under a statutory duty to make a prohibition order for that part of the ROMP area marked yellow on the map.

Background

The map at the Annex shows the ROMP area and delineates in yellow the area to which a 'partial' prohibition order would apply. Sometimes it is referred to as 'the area north of the disused railway' but this can be confusing, so this submission refers to it as 'the north-western part of the ROMP area'. It refers to the remainder as 'the southern and eastern parts of the ROMP area'.

The P&R Committee has considered the case for a prohibition order on four occasions between September 2019 and March 2021. Radley Parish Council has supported the case for a prohibition order on all these occasions but latterly has argued for a 'partial'

order applying only to the north-western part of the ROMP area. RPC's most recent submission was in February 2021 and this still stands.

RPC welcomes the decision of the Committee on 8 March 2021 to review the case for a 'partial' prohibition order and look forward to reading officers' advice including legal advice. This submission is made without prior sight of that advice, but RPC has a good understanding of the legislation and of the duty it places on the County Council.

A partial prohibition order would have major benefits, unlocking a sterile impasse which has caused blight and benefited no one. It would enable:

- the minerals operators to plan ahead with more certainty for their proposed extraction at Nyatt (which would be outside the prohibition area);
- the Radley Lakes Trust to plan ahead with equivalent certainty for the implementation of the Radley Lakes masterplan (the whole of the ROMP area lies within the masterplan area, which provides a major opportunity for nature conservation and quiet recreation);
- the operators and the Trust to have a constructive dialogue about how their objectives can best be reconciled;
- the Vale of White Horse District Council to take planning decisions about the future of the north-western part of the ROMP area (currently prevented by the overhang of historic minerals permissions that have long been irrelevant).

However, these benefits will only be realised if the legal tests are met and that is what the rest of this submission addresses.

What are the legal tests?

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

- planning permission 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 winning or working has occurred but has permanently ceased

Note, this is a *duty* not a discretion. The legislation was amended in 2008 to turn the previous discretion into a duty so as to prevent blight arising from inaction¹.

¹ The Town and Country Planning Act was amended by the Town and Country Planning Environmental Impact Assessment) (Minerals Permissions and Amendment) (England) Regulations 2008. The Explanatory Memorandum to those Regulations explains the rationale for creating the duty, especially the avoidance of blight – a consideration very relevant to the current ROMP circumstances.

The County Council may assume that minerals winning or working has ‘permanently ceased’ only when

- it has not 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 Committee’s decision on resumption needs to be based on *likelihood* but not on certainty.

There are accordingly two questions to be answered;

- Has extraction ceased?
- Is extraction likely to resume?

Land in the south and east of the ROMP area

There is no dispute that extraction here has *ceased*. None has taken place since about 2000.

There is equally no dispute that there remain minerals reserves in this area – mainly below a field called ‘Nyatt’

The issue is whether extraction is *likely to resume*.

There has been a long history, which RPC has set out in earlier submissions, of extraction at Nyatt being promised but never actually happening. This has had the appearance of being a device to prolong the life of JCSL’s ‘temporary’ commercial activities within the ROMP area.

More recently, Tuckwells have secured a commercial agreement with JCSL to extract these minerals and have taken a number of preliminary steps (outlined in their submissions) to prepare an Environmental Statement which would be the precursor of an application to extract.

RPC accept that, in the light of these developments, it would be difficult for OCC to sustain a case for a prohibition order applying to this area.

Land in the north-west of the ROMP area

Again there is no dispute that extraction has *ceased*. None has taken place since 1979 (sic) and JCSL have made a statutory declaration on oath saying so.²

Nor is there any suggestion that mineral reserves remain. The same statutory declaration by JCSL said that the reserves are ‘exhausted’.

² JCSL statutory declaration April 2006

It follows that there can be no question of minerals extraction *resuming* and no claims have been made by anyone to that effect. The Tuckwells agreement with JCSL does not apply to this land and none of the preliminary studies by Tuckwells have taken place with respect to this land.

For this part of the ROMP area there can be no dispute that the legal tests for a prohibition order are met.

Might this position be altered by Tuckwells proposals for the processing on minerals to be extracted?

Tuckwells have applied for planning permission (MW.0075/20) for the processing of minerals to be extracted at Nyatt. This would be at their existing yard, which is within the ROMP area but well outside the area to which a partial prohibition order would apply (see map). On the face of it their processing plans do not impact on the case for a partial prohibition order.

Two suggested linkages have however been made, on which comment is needed.

Does the processing application need to be determined before a decision is taken on the prohibition order?

The short answer is 'no'.

OCC have said that the current processing application should be determined before any decision to withdraw the currently proposed prohibition order. Tuckwells have challenged this view. RPC agree with Tuckwells. The Parish Council have set out a number of concerns about the application as it currently stands and believe that there is a need for dialogue to deal with these points. It would be very unfortunate to reach a rushed or premature decision on the processing application simply to enable a decision to be taken on the prohibition order. There is quite enough other evidence already available for that and no need to wait.

Does uncertainty about the processing application affect the case proposal for a partial prohibition order applying to the north-west of the ROMP area?

Again the short answer is 'no'.

Tuckwells have suggested that if their processing application was refused they might instead need to use the land in the north-west of the ROMP area which would be subject to a 'partial' prohibition order.

This however seems irrelevant as a matter of law. For a prohibition order not to proceed in a given area the 'winning' or 'working' of minerals must be 'likely to resume'. These terms are defined as below

'Winning a mineral means making the mineral available or accessible to be removed from land.'

'Working a mineral means to remove it from its position in or under the land.'

The processing of minerals once extracted does not fall within these definitions, so processing would not amount to resumption of the winning or working of minerals.

Even if it was not for this definitional point the statutory test of *likelihood* would still apply and would not be met: it is highly unlikely that the land in the north-west of the ROMP area would in practice be required for processing.

In 2011 Tuckwells made an earlier planning application for processing of Nyatt minerals. This would have been at their own yard. This was a very well-developed application, was not opposed by RPC, and duly received planning permission. The permission is now time-expired but it is difficult to see why a similar application should not result in permission being granted. As has been noted above RPC have concerns about the current application, which - unlike the 2011 one – was not the subject of prior dialogue. But RPC entirely accept that if mineral activity at Nyatt is to resume then the Tuckwells yard is the most appropriate site for it to be processed. RPC are ready to work constructively with Tuckwells to that effect.

Can a prohibition order apply to part but not all of a ROMP area?

The short answer is ‘yes’.

The legislation in respect of prohibition orders (in the Town and Country Planning Act 1990) is quite independent of the legislation relating to ROMP reviews (in the Environment Act 1995). The prohibition order legislation applies simply to ‘land’ where minerals extraction has ceased and is unlikely to resume. That can be any land. There is no statutory link with the geographical areas of ROMP reviews or even with the areas covered by individual planning permissions.

In practice consideration of a prohibition order tends to arise as a result of a ROMP process. This is true in the present case where OCC initiated a ROMP review, the operators failed to provide a satisfactory Environmental Statement and the planning permissions were as a consequence placed in suspension.

But it does not follow that a prohibition order need apply to the whole ROMP area. Indeed in the context of the present case OCC officers have acknowledged (meeting with RPC on 10 May 2019 and advice to the P&R Committee meeting of September 2019) that it needs to be considered whether an order should apply to the whole ROMP area or only to part.

To remove any doubt on this point the Explanatory Memorandum to the 2008 Regulations states that the Regulations

*introduce a duty on a mineral planning authority to make a prohibition order in relation to the **whole or part** of a site subject to mineral permission review as they see fit where the required action has not been taken and automatic suspension has been in operation for two years.³*

³ Explanatory Memorandum to the Town and Country Planning Environmental Impact Assessment) (Minerals Permissions and Amendment) (England) Regulations 2008

The key words in the second line have been emboldened. Nothing could be clearer.

If therefore the land in the north-west of the ROMP area meets the statutory test for a prohibition order, which it does, the fact that it forms only part of the ROMP area is irrelevant.

The area is moreover very easy to delineate geographically (as shown by the map). It also has a distinct minerals history: extraction there started and finished much earlier than in the rest of the ROMP area. It is notable that the JCSL statutory declaration of 2006 treated it as a distinct and relatively historic area.

In an earlier meeting of the Planning and Regulation Committee, reference was made to an earlier proposal by OCC to make a prohibition order in relation to the land covered by permission DD2 but not DD1. This ran into difficulty because DD2 and DD1 contain an area of overlap (see map), making it inappropriate to deal with the DD2 area in isolation. That however is not the case here. The area to which the 'partial' prohibition order would apply falls wholly within DD2. There is no overlap.

RPC can therefore see no legal barrier to an order applying to the north-west of the ROMP area.

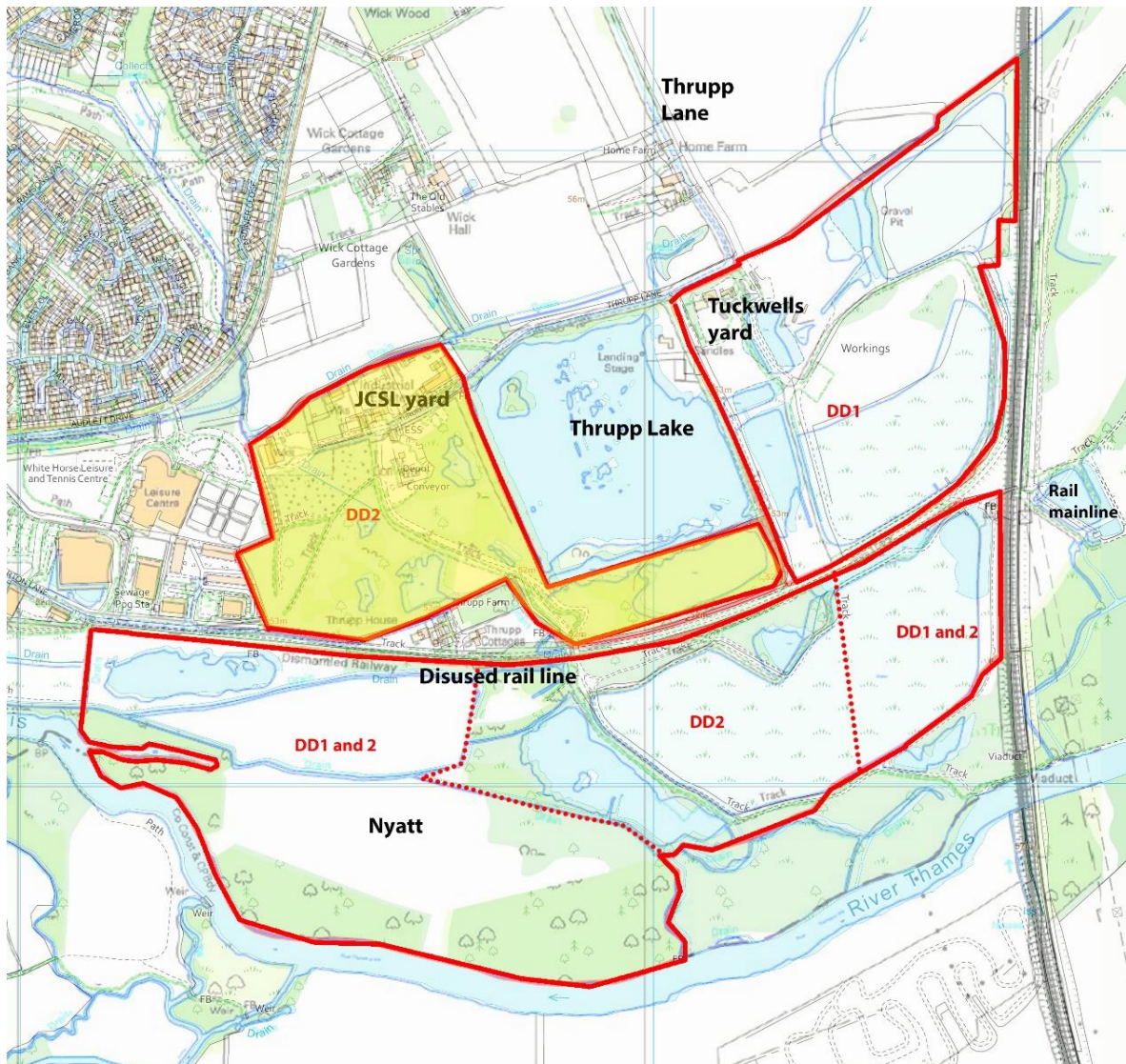
Conclusion

In conclusion RPC believe that:

- OCC are under a statutory duty to make a prohibition order applying to the north-west of the ROMP area;
- they should decide now to proceed on that basis;
- they should also decide now not to proceed with an order for the remainder of the ROMP area.

These decisions would bring a welcome end to the current uncertainty and blight.

Annex: Map



The ROMP area is delineated with a continuous red line.

The dotted red line show the boundaries of the current (suspended) planning permissions, DD1 and DD2, including the area of overlap

The area to which a partial prohibition order would apply is shaded in yellow.

