

Annex 4
IN THE MATTER OF

**REVIEW OF OLD MINERALS PERMISSIONS
(PARTIAL PROHIBITION) CONCERNING LAND AT
THRUPP LANE AND THRUPP FARM, RADLEY**

ADVICE

No5
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Introduction and Factual Background

1. I am instructed by Ms Jennifer Crouch for and on behalf of the Director of Law & Governance of Oxfordshire County Council (“the Council”) in relation to the review of mineral permissions concerning two former minerals working sites (Radley – Thrupp Lane (“DD1”), and Radley – Thrupp Farm (“DD2”), collectively “Radley ROMP”). A firm called J. Curtis and Sons Ltd is generally associated with Thrupp Farm (DD2), and another firm, H. Tuckwell & Sons Ltd, with Thrupp Lane (DD1). Both firms have coordinated their activities and worked the overall Radley ROMP site collectively from time to time.
2. What I will subsequently refer to as Areas 1, 2, 6, 7 and 8 fall within DD2. Areas 3 and 4 fall within DD1. Areas 5, 9 and 10 fall within both DD1 and DD2.
3. Both DD1 and DD2 were mined for sand and gravel. I understand that workable deposits remain in Areas 5, 6 and 7. It is estimated that approximately one million tonnes of sand and gravel remain to be extracted from these areas.
4. There is an extensive planning history relating to the Radley ROMP site which those instructing are familiar with and so will not be repeated here. It suffices to note the critical decision of Inspector Elizabeth Ord, a former solicitor, at the public inquiry concerning a previous prohibition order. Inspector Ord refused to confirm the order and the Council was required to pay substantial costs (following the normal rule in cases concerning the removal of previously held rights – similar to a CPO – that costs ought to follow the event). Inspector Ord’s decision concerned DD2 but pointed out (at paragraphs 8.6-8.10) that the extant permission for a processing plant on the adjacent site (DD1) was relevant to her assessment that the winning/ working/ depositing of minerals at the Thrupp Farm ROMP site (DD2) had not permanently ceased. Thus, she could not confirm the order because it could have precluded the operation of a valid planning permission.
5. I also note correspondence with the Council concerning permissions for areas DD1 and

DD2 extending back to 1955. This includes a decision on revocation by the MPA at the time, Berkshire County Council, concerning part of the Radley ROMP site (covered by consent reference M1/55). Unfortunately, the files contain no further details on whether the decision on revocation was taken any further. Moreover and in any event, subsequent decisions have superseded previous decisions concerning the Radley ROMP site.

6. Turning to the present matter before the Council, the Council drafted (but did not serve) a fresh prohibition order on 19 September 2019. A number of additional events have since occurred and significant further information is before the Council.
7. Firstly, an agent acting for J. Curtis & Sons Ltd submitted written evidence on 19 September 2020 asserting that they were carrying out ongoing work and thus the winning and working of minerals had not permanently ceased. Further information was submitted by the agent in January 2020.
8. Secondly, a planning application was received on 27 April 2020 from H. Tuckwell & Sons Ltd (“the applicant”) for “*the use of existing processing plant site to process sand and gravel from the nearby 94 acre Review of Old Mineral Permission (ROMP) site (Ref: P/369/71), the installation of a field conveyor system to the site boundary and ancillary facilities for the transportation, storage and processing of the sand and gravel and the use of an existing haul road*” (reference MW.0075/20, “the application”). The plant is to be situated on Area 3 and used in association with the extraction of mineral (sand and gravel) from Areas 5, 6 and 7. The machinery would cross the disused railway line from Area 3 into Area 9. It must be noted that in order to access the mineral in Areas 5, 6 and 7 then the mineral would also have to pass through Area 8 to reach the crossing point. However, those details will only come forward in the finalised ROMP conditions application (concerning the extraction of the minerals in Areas 5, 6 and 7).
9. Thirdly, an appeal against the refusal of planning permission for the further temporary B1 (office) use of the Radley ROMP area known as Curtis’s Yard (within DD2), has now been determined. The appeal was allowed by the Inspector and temporary planning permission was granted on 18 November 2020 for a period of five years. I have

helpfully been provided with that decision but note the Inspector queried but (rightly) did not determine the background issue concerning the use of the site for minerals development. That was not a question for the Inspector pursuant to that appeal.

10. A meeting of the Council's Planning and Regulation Committee ("Planning Committee") on 8 March 2021 made the following resolutions:

"A) The Planning & Regulation Committee's previous conclusion from its meeting on 9 September 2019 (Minute 39/19) that mineral working on the Radley ROMP site has permanently ceased and that there is a duty to serve a Prohibition Order is not rescinded but that the service of the Prohibition Order is held in abeyance pending:

i) the progression and determination of application no. MW.0075/20 for processing plant, a conveyor and a Bailey Bridge for the removal of mineral extracted from part of the ROMP permission areas DD1 and DD2; and

ii) H. Tuckwell and Sons Ltd providing an update, accompanied by documentary evidence, on progress with regard to the work on the application and Environmental Statement for the review of conditions for the ROMP permission areas DD1 and DD2 to the meeting of the Planning and Regulation Committee on 19 July 2021.

B) Officers are instructed to investigate whether it is possible to serve a partial Prohibition Order should it be concluded that mineral working has permanently ceased over part but not all of the ROMP permission areas DD1 and DD2".

11. The matter is to come before the Council's Planning Committee at its meeting on 19 July 2021.

12. Thus, to summarise: the Council must decide whether to revoke or serve the draft prohibition order presently held in abeyance (including whether to amend the prohibition order to apply to only part of the Radley ROMP site); progress determination of the application (MW.0075/20); and progress the ROMP conditions application and accompanying Environmental Statement ("ES").

13. On the partial prohibition order issue, officers are contemplating whether the

submission of the application which only affects Areas 3, 5, 6 and 7 (and a small amount of Area 9) invalidates members' previous conclusion that mineral working has ceased over the remainder of the Radley ROMP site. If not, the question is whether the Council remains under an obligation to proceed with the service of the prohibition order over the remaining area. This would secure the desired restoration of the remainder of the Radley ROMP, including Area 1, but allow the application to be granted and in due course for the development to take place. Even if such an approach is taken, however, officers are unclear how to address Areas which are only partially covered by the application or which appear likely to be necessary for minerals working in the future. Officers also query whether it is the case that once the Council have determined to treat minerals applications as pertaining to a single ROMP site, the same applies to any consequential prohibition order, (eg. whether a minerals site is severable in the manner contemplated).

14. This advice duly concerns the extant, but unserved, draft prohibition order. Essentially, I am asked to advise on resolution "B" above.

Advice

15. At the outset I must be clear that Council cannot both grant planning permission for development and prohibit that development. Nor can the Council serve a prohibition order when there is cogent evidence that the winning and working of minerals on that land has not permanently ceased. The submissions made by the agent for J. Curtis and Sons Ltd, the progression and award of planning permission for Curtis' Yard (there is no reason why B1 use could never be in connection with minerals operations elsewhere on the site), and the submission of an application for planning permission all clearly demonstrate an intention to continue to work the site.
16. In light of these facts, the Council is severely constrained in the options available to it by the terms of the legislation. It must base the decision on the likelihood of the resumption of the winning and working of material on all the evidence available at the time the Council makes the order (per paragraph 3(2)(b) of Schedule 9 of the Town and

Country Planning Act 1990 (“the 1990 Act”). Here, at the time any prohibition order would be finalized and served there will be further information on the landowners’ intentions, including extant consent(s) and/or an outstanding application. That is quite unlike the situation at the time the prohibition order was made in September 2019. The Council therefore acted within its powers to make the order then, but the factual context is now quite different.

17. In short, on the facts available now the Council can no longer say there is no likelihood of the resumption of the winning and working of material at the site on the evidence available to them. It does not matter whether or not the draft prohibition order instigated the application(s); indeed, that appears to be one of the ulterior motives of the legislation (to spur operators to promptly work out and then restore their sites).
18. On the utility of progressing with a prohibition order which was validly made at the time, and notwithstanding the additional consent/ information/ application, it must be pointed out that an appeal against that prohibition order (and one must be contemplated here) is a *de novo* review. The Secretary of State is therefore entitled to consider such evidence as they see fit, (not being under any obligation similar to paragraph 3(2)(b) of Schedule 9). They will undoubtedly consider the evidence of a planning application, at the very least, to constitute clear evidence of an intention to continue the winning and working of material on the site. Therefore, even if there was no costs risk if the Council progressed with the prohibition order (I should be clear: there is significant risk of a costs award given the present circumstances), it would be futile because the Secretary of State would almost certainly refuse to confirm the order.
19. As to the service of a “partial” prohibition order concerning land to the north of the disused railway line (Area 1, which includes the area known as Curtis’ Yard), as noted earlier that area now benefits from temporary planning permission. Whilst that is for office use there is no reason why that office use cannot be in connection with the winning and working of minerals elsewhere on the Radley ROMP site. Further and in any event even if a partial prohibition order was served in relation to the land north of the disused railway line it could not stop the activity presently taking place on the site, which benefits from planning permission and it could not, in any event, be the subject

of any prohibition order. That is because a prohibition order can only preclude the winning and working or depositing of minerals. As defined in English Clays Lovering Pochin & Co v Plymouth Corp (1974) 1 WLR 742) to “win” a mineral is to make it available or accessible to be removed from the land, and to “work” a mineral is (at least initially) to remove it from its position in the land. Finally, there is also the question (for the Council) as to whether it is practicable and reasonable to sever a minerals site given the complexity that would result from a partially prohibited/partially permitted minerals site.

20. Further to this issue, I have been usefully taken to paragraph: 206 reference ID: 27-206-20140306 of the PPG which provides:

“How much of the site area is covered by a review of minerals conditions?”

Where an Environmental Statement is required, environmental information is required for the whole minerals site covered by that permission before new operating conditions can be determined.”

21. The Council has established that the submission of conditions for the entire Radley ROMP site is EIA development, and so the submission must be accompanied by an ES. The entirety of the Radley ROMP site is duly in suspension pending receipt of suggested conditions and the accompanying ES. Both documents must of course be considered and approved. The PPG’s clear guidance that an ES must encompass “the whole minerals site” covered by that permission does imply that any prohibition order should equally cover the whole of the ROMP area. This is because the potential environmental impacts could not be fully assessed in an ES if there is a partial prohibition order in place (which effectively removes part of the permitted area the PPG advises should be covered in the ES accompanying the ROMP application).
22. To conclude on this issue, paragraph 3 of Schedule 9 grants the power to issue a prohibition order in relation to “a site”. That is not defined, therefore it is up to the judgment of the Council what constitutes “the site”. In my view it would follow that the Council could theoretically sever a minerals site by way of a prohibition order but

this must be based on the evidence before the Council at the time and take into account any discussion with the landowners. The Council must be able to reach a defensible conclusion that the resumption of winning and working or the depositing of mineral “to any substantial extent” is considered unlikely. Following Inspector Ord’s decision, this includes consideration of consent and activity on adjacent sites which may be relevant. Based on the evidence I do not consider there to be such a conclusion open to the Council at the present time.

23. Because no action has been taken in relation to the Council’s decision to make the existing draft prohibition order there is no reason why the Council cannot reconsider that decision, though I would advise that the entire procedure is transparently carried out by members given the interests that are affected and the significant public concern regarding the Radley ROMP site.
24. If the applicant does not take advantage of any consent that may be granted the Council can of course commence the procedure afresh.
25. I trust this has addressed the questions posed by those instructing. If anything arises further please do not hesitate to contact me in the usual way.

8 July 2021
Nina Pindham
No5 Chambers

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