APPENDIX B

LEGAL REPORT

WILTSHIRE COUNTY COUNCIL

REGULATORY COMMITTEE

Whiteparish: Section 73 Application: Extraction of sand with reinstatement to agriculture using selected filling materials without compliance with Condition 4 and Others of Planning Permission S.03.0592 Dated 16 May 2003 (Application WO.S.05.8012) ("the Application")

Summary:

The manner in which this Application was determined on 5 October 2005 has been reviewed and is considered unsound and to be legally flawed. The decision is therefore considered to be ultra vires. This being the case, the Council must now consider the Application afresh. The correct way in which the Application should be determined is set out in this report.

1. Applications made under Section 73 of the Town and Country Planning Act 1990 ("the Act")

This is an application made under Section 73 of the Act. This section provides an express power to apply for planning permission for the development of land without complying with conditions which were attached to a previous permission (in this case Planning Permission S.03.0592). The relevant considerations in such applications are not the same as those which govern applications for planning permission. The Council in this case is required only to consider the conditions in question and whether they are now relevant and necessary to achieve a planning purpose. The Act states that on any such application the Council shall only consider the conditions to which the planning permission should be granted and

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

An application under Section 73 of the Act does not enable the Council to revisit the merits of the planning permission itself. Planning permission was granted on 16 May 2003. This Application seeks to vary a number of the conditions attached to that planning permission when it was granted.

2. Reasons for refusing the Application

There were two reasons for refusal given following the meeting of the Regulatory Committee held at County Hall, Trowbridge, on Wednesday 5 October 2005. These were as follows:

- **Reason 1:**

  (i) there was insufficient evidence to provide confidence that infilling of the excavated sites would be completed;

(a) Comment:

The appropriate course of action if the Council is concerned about insufficient evidence having been put forward on a planning application would be for the Council to defer the matter for further consideration until such time as that information or evidence had been provided, to enable the Council to be satisfied that they are able to determine the application having had the benefit of all the evidence provided and submitted. The provision of insufficient evidence is not a good planning reason for refusal. There appears to have been a failure on the part of the Council to take into account the information as set out in the report to committee before reaching its decision.

- **Reason 2:**

  (ii) reinstatement would not be brought forward sufficiently quickly to avoid the loss of visual amenity to local residents and visitors.

(b) Comment:

This reason does not have a sound planning basis or justification and thus is not a good planning reason for refusing a planning application made under Section 73 of the Act. Again, there is no evidence provided by the Council to prove that that reinstatement would not be brought forward sufficiently quickly to avoid a loss of visual amenity; if there was concern about the lack of evidence provided in this area, the Council would be wise not to refuse the planning application but simply to defer application for further consideration at a later date.

3. Possible legal ramifications of refusing the Application for the reasons provided:

(a) Appeal

The most likely course of action which the applicant will take should planning permission be refused for the reasons as outlined in the Minutes following the Regulatory Committee Meeting held on Wednesday 5 October 2005 is that an appeal will be lodged; such an application is likely to have a strong chance of success.

An appeal by its very nature imposes considerable resource implications on any Council. Those resource implications are such that Officers' time is used in seeking to support the Councillors' reasons for refusal, (contrary to Officer recommendation) and provide and obtain witnesses who will be prepared to attend any inquiry, should it take place. There are, therefore, not only considerable manpower resource implications but also cost implications which will emanate as a result of any appeal lodged whether or not the appeal proceeds to inquiry or not.

In addition, there are further costs implications at any appeal itself. The applicant would be highly likely to seek an application for costs against the Local Planning Authority on the basis that its conduct had brought about the need for the inquiry in the first place.

(b) Cost Awards in Planning Appeals

Costs can be awarded for unreasonable behaviour by one or other party and their award does not follow the event or the decision on planning merits. The most common ground on which costs are awarded against Councils is the lack of properly substantiated reasons for refusal: each reason should be examined to see whether it is founded upon proper planning considerations and whether all material considerations in the form of judicial authority, planning policy guidance notes and circulars have been taken into account. A refusal (for example) because of an adverse planning opinion where the planning merits are in favour of the application may be regarded as unreasonable: these are to be considered but the application must be decided on its merits.

A successful appeal against refusal will not by itself justify an award of costs against the Council provided that their objections were supported by evidence of real substance. Successful awards against Councils have, in particular, been raised where there has been a failure to seek further information or clarification in connection with an application or to discuss it with the applicant.

Costs are most commonly awarded in planning appeals where the Council has failed to produce evidence to substantiate each reason for refusal. A decision based upon vague reasons and one which is without foundation in policy terms risks an award of costs being made against the Council.

For the avoidance of doubt, however, the Council is of course free to arrive at a different view from the recommendation of Officers provided that there are reasonable grounds based upon the site's specific considerations and planning justifications for doing so.

4. Judicial Review

A judicial review application could be mounted by the applicant but is more likely to be made by a third party who feels aggrieved about the grant of the planning permission. Judicial review applications should not normally be made where another remedy is available to an aggrieved party. The grounds upon which a judicial review can be granted are as follows:

(iii) the want or excess of jurisdiction;

(iv) error of law in the face of the record;

(v) failure to comply with the rules of natural Justice;

(vi) Wednesbury principle, namely that the decision could not have been taken by an authority properly directing itself on the relevant law and acting reasonably.

A Council is always, therefore, open to a judicial review for any matter determined and must at all times be alive to this possibility to ensure an application is dealt with procedurally correctly and fairly, and in accordance with the rules of natural justice.

A failure to comply with any of these matters or a failure to follow due process can expose a Council to a potential legal challenge.

VEALE WASBROUGH
17th October 2005