

REGULATORY COMMITTEE  
23<sup>rd</sup> OCTOBER 2002

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**WHITEPARISH: MOOR FARM**

**Purpose of Report**

1. To inform Members about the progress made towards implementing the development at Moor Farm, Whiteparish, and to advise on the potential for legal action being taken against the County Council should certain conditional obligations not be met by 31<sup>st</sup> October 2002. The legal position will be updated before the meeting of the Regulatory Committee.

**Background**

2. The Moor Farm site benefits from the grant of several planning permissions for sand extraction, waste disposal and ancillary development (ie new access, haul road, weighbridge, offices etc). However, the principal planning permissions can be rationalised as follows:-

- S.00.1519 Construction of new access and private road to serve sand extraction site and relocation of certain ancillary structures ...; and
- S.01.0939 Sand extraction and restoration

(Copies of these planning permissions are attached at **Appendix 1**).

3. More recently, Members will recall that the grant of planning permission to modify the terms of Conditions 9 and 15 of S.00.1519 (Application No. S.02.0509) was approved in principle, subject to the satisfactory completion of a supplemental Legal Agreement in respect of site traffic routeing and management. This Agreement remains to be finalised and hence planning permission S.02.0509 has not been issued.

**Works commenced to date**

4. Following lengthy negotiations with the Highways Agency, the required Section 278 Agreement (Highways Act, 1980) in respect of the highway works at Brickworth Corner was completed in August 2002. Works pursuant to this Agreement commenced on 9<sup>th</sup> September 2002.
5. The construction of the new access and junction arrangements is being controlled by a programme of works issued by the Highways Agency. (Copies of the programme and a letter from W.S. Atkins [acting for the Highways Agency] are attached at **Appendix 2**). "Completion" of these works is anticipated by 30<sup>th</sup> October 2002.

### **Matters for Consideration**

6. Planning permissions S.00.1519 and S.01.0939 stipulate through conditions that development, (in the context of either permission) must commence before 31<sup>st</sup> October 2002. In respect of S.00.1519, this requirement has been met by virtue of the fact that the works required to deliver the new Brickworth Junction arrangements commenced on 9<sup>th</sup> September 2002. However, implementation of S.01.0939 can only commence within the timescale set (by virtue of the restrictions of Conditions 3 and 6 of S.00.1519) provided the new junction improvements have been completed. It therefore follows that should the County Council conclude that these works have not been completed by the end of October 2002, any attempt to extract sand pursuant to S.01.0939 may be considered as being unauthorised development.
7. Therefore, the question of implementation in respect of the planning permissions at Moor Farm raises a number of serious concerns, regarding which officers have sought legal advice.
8. It should also be noted that Whiteparish Parish Council/Whiteparish Preservation Group have stated their intention to challenge the County Council over its interpretation of the conditions attached to the extant planning permissions should the new junction arrangements not be "completed" in the full sense of the word by 31<sup>st</sup> October 2002.

### **Matters Requiring a Definitive Response**

9. In the light of the above, the following scenarios for implementation and potential outcomes can be considered. However, it should be noted that the premise on which these scenarios are based relies on the notion that whether or not the requisite roadworks are completed within the timescales set is a question of fact as opposed to a question of law. In other words, the interpretation of the term "completed" is a matter of planning judgment rather than a matter of law. However, the judgment on the question of whether the junction is completed must be adopted by the County Council before the timescales set by conditions for implementation are reached.
10. The Council must, before it considers any scenario, form a judgment as to whether the roadworks are complete. It can be advised on this by the Highways Agency's opinion. However, the decision rests solely with the County Council.
11. Provided the Council takes into account all relevant matters and acts reasonably in reaching a view, the courts are unlikely to substitute their own opinion to replace that of the Council.

#### **Scenario 1**

12. The Highways Agency confirms, for the benefit of the County Council, that the new junction arrangements are complete on 30<sup>th</sup> October 2002. CSG (the developer) then commences the extraction of minerals in accordance with planning permission S.01.0939 on or before 31<sup>st</sup> October 2002. The County Council needs to decide whether it endorses the Highways Agency opinion.

## Scenario 2

13. The Highways Agency confirms, for the benefit of the County Council, that the new junction arrangements are "substantially complete" on 30<sup>th</sup> October 2002. CSG then commences the extraction of minerals on or before 31<sup>st</sup> October 2002. The County Council needs to decide whether the roadworks are complete.

## Scenario 3

14. Due to matters outside the control of the Highways Agency contractors, the new junction arrangements are not completed or substantially completed by 30<sup>th</sup> October 2002. Nonetheless, CSG commences the extraction of minerals on or before 31<sup>st</sup> October 2002 in order to secure, in their view, the development permitted under S.01.0939.
15. As stated above, the matters of fact underpinning the implementation of development at Moor Farm are:-
  - the need to complete the works within the public highway before any other element of the development is brought into use; and
  - the question of what can be considered as constituting completion of the said roadworks is itself a matter of fact and planning judgment.
16. It therefore follows that in order for sand extraction to be commenced (in accordance with the stipulations of S.01.0939) the County Council will first need to determine that the roadworks permitted under S.00.1519 are completed in accordance with the terms of the planning permission. As at 10<sup>th</sup> October the Highway Authority stated that "the works are substantially complete once all permanent works are in place and the road can be safely trafficked by the travelling public." However, what is unlikely to be achieved by the due date are the road markings and high friction surfacing, which are weather dependent.
17. If it were found the roadworks were not complete yet extraction commenced, the Council would have to consider the nature of its response. Any decision to take enforcement action must be well founded and considered to be expedient. The decision must also be grounded in "reasonableness" (in the "Wednesbury" judicial sense of the word). It must not be based on irrational factors and non-planning grounds or taken without proper consideration of the relevant facts. If these tests are applied to the scenarios for implementation at Moor Farm, the decisive issue for the County Council to consider before deciding on a particular course of action is whether any alleged breach of planning control or condition would unacceptably affect public amenity. The same principles apply when the County Council determines whether the roadworks are complete.
18. As an adjunct to these factors, the Parish Council/Preservation Groups have threatened to serve injunctive measures on the County Council and/or CSG should the roadworks not be completed by 30<sup>th</sup> October 2002.

19. The use of injunctive measures or the call for judicial review of the case will inevitably be grounded in the County Council's interpretation of whether the new junction arrangements have been completed in the terms of Conditions 3 and 6 of S.00.1519. If, following consultation with the Highway Authority, the County Council on the 30<sup>th</sup> October 2002 adopt the view that the new junction is complete (in the sense that it is safe and useable) and CSG then commence mineral extraction, it may face legal challenge from the Parish Council/Preservation Group on the grounds that in their view the junction is not complete as it may lack certain weather dependent features and is therefore not contractually or physically complete.
20. Conversely, if the County Council adopts the view that the new junction is incomplete, but nonetheless useable by the 30<sup>th</sup> October 2002, CSG may decide to mount a legal challenge against the Authority. However, it might not have a valid planning permission.
21. The threat of legal proceedings by either party should not be a consideration in determining whether the road is complete or whether enforcement action should be taken.

#### **Conclusions: Options Considered**

22. Works to construct the new junction arrangements at Brickworth Corner commenced on the 9<sup>th</sup> September, 2002. Despite the progress made to date in terms of delivering the package of works approved by S.00.1519 and the Section 278 agreement, the Highway Authority (Highways Agency) is of the opinion that by the 30<sup>th</sup> October 2002 the new junction will be useable but only "substantially complete". As stated above, the legal opinion will be updated immediately before the meeting.
23. The term "substantially complete" reflects the fact that certain works associated with the construction of the new access may not be achievable due to matters outside the control of contractors (e.g. the laying of 'anti-skid' surfacing can only be achieved when weather conditions dictate). However, the term does convey the fact that despite outstanding requirements the new junction will be operational thus allowing traffic to safely enter and leave the site under traffic light control.
24. It follows that if the new junction is delivered on the 30<sup>th</sup> October, as is envisaged, the County Council will need to consider how best to respond to the actions of CSG in respect of the extraction of mineral. If the County Council does not accept that the works, at that date, satisfy the requirements of conditions 3 and 6 of S.00.1519 it must go on to consider the use of appropriate enforcement action should CSG ever commence extracting mineral. This may lead to counter legal action being brought against the County Council by CSG. However, should the County Council accept that the works are "complete" and therefore an operational junction satisfies the terms of conditions 3 and 6, it may face legal challenge from the Parish Council/Preservation Group.

25. Notwithstanding the above, if again the County Council does not accept the opinion that an operational junction satisfies the terms of conditions 3 and 6 of S.00.1519, it should invite further Section 73 applications in respect of both extant permissions provided such applications are submitted before 31<sup>st</sup> October, 2002. Although this course of action may have certain merits, CSG may rely on their own legal interpretation of the situation and progress with the extraction of mineral in order to secure S.01.0939.

### **Recommendation**

26. In the light of the considerations set out above it is recommended that:-
- (i) Officers attempt to seek from the Highways Agency a definitive answer to the question of what constitutes “completion” of the roadworks in the context of conditions 3 and 6 of Planning Permission S.00.1519;
  - (ii) The County Council reaches its own view as to whether the roadworks are complete before 30<sup>th</sup> October 2002; and
  - (iii) If it is decided that the roadworks are complete, matters rest there. If the County Council determines the roadworks are not complete it must decide whether a new planning application should be requested or whether it is expedient to commence enforcement action if work commences in breach of the planning permissions.

**RICHARD J. LANDER**

Director of Environmental Services

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**The following unpublished documents have been relied on in the preparation of this Report:**

None

**Environmental impact of the Recommendation contained in this Report:**

As set out in the main body of the report.