

UPDATE REPORT - PLANNING COMMITTEE 13th October 2016

ITEM 2.2: 15/505213/FULL PART RETROSPECTIVE APPLICATION FOR THE IMPORTATION OF WASTE MATERIAL AND ENGINEERING OPERATIONS TO FORM LANDSCAPED BUNDS, CONSTRUCTION OF A 3 METRE HIGH GABION BASKET STONE WALL, CHANGE OF USE OF LAND AND CONSTRUCTION OF VAN AND HGV LORRY PARK, ACCESS AND CONSTRUCTION OF A ROADSIDE TRANSPORT CAFÉ FOR A3/A5 USES PLUS 24 HOUR WC AND DRIVER WASH AND SHOWER FACILITIES-LAND ADJACENT TO THANET WAY, HIGHSTREET ROAD, HERNEHILL, KENT ME13 9EN

A further response from **Kent County Council** dated 7th October 2016 has been received and the main points raised are as follows:

The enforcement position of the Environment Agency (EA) remains pivotal to the processing of this case. Notwithstanding the expiry of the EA's Waste Materials Removal Notice under section 59 of the Environmental Protection Act 1990 (as amended), the EA confirm that they are still pursuing the owner / occupier for the initial alleged unlawful deposit / operating without an appropriate authorisation. Subject to a successful prosecution, they would then have two further options:

(a) *to ask the court to impose a Regulation 44 Notice to require the waste to be removed, or*

(b) *to serve a further Section 59 Enforcement Notice to secure removal of the waste.*

Whilst the determination of the scheme is within the gift of the Borough Council, it would appear that in the current set of circumstances, any form of planning permission would be premature. The impending court case [JW comment: there is no evidence to suggest that such a court case is imminent; the file sits with the Environment Agency's lawyers as it has done for some considerable period time] has yet to be played out. At this stage, neither the applicants nor the Borough Council can rely upon the EA or indeed the courts to allow retention of any or all of the material on site.

The final planning envelope is still unknown, in terms of site levels, the physical characteristics of the materials and any quantity to be removed off-site. At this stage, the full merits / demerits of the scheme are therefore unable to be fully assessed. Any grant of planning permission would need to take account (in advance) of:

(a) *the environmental and amenity impacts of enforced removal by the EA;*

(b) *the impacts of any replacement material (acceptable to the EA) being returned to the site, under the apparent benefit of planning permission at the higher level.*

At this point, it is difficult to see how retention of the material on site can be held to be sustainable development; particularly given the possibility of a second round of importation of materials similar to the first. This potential hostage to fortune as described above is of particular concern to the County Council's Regulation Committee, which met on 13th September 2016. It was strongly held that alleged contraventions should not unfairly

advantage any land interests or prospective developers. In the opinion of this Authority, further unwarranted importation would be regarded as such.

These further dimensions do not appear to have been addressed within any revised set of proposals or the committee report.

Notwithstanding the reservations of the County Council with relation to the current scheme and unknown parameters, we recognise that the Borough Council may still on balance decide to grant planning permission. A planning condition reserving both existing and proposed site levels (and those of the bunds and Gabion stone wall) has been suggested, allied to a condition requiring prior submission of the details and quantities of any material to be removed from the site.

In the positive, these conditions identify some of the missing information already mentioned. However, in the opinion of the County Council, they are unable to substitute for highly material planning information being available at the point of determination. The 'Cornwall Principle' has to be observed, which by case law requires determining information to be available 'upfront'. Knowing that a court case is pending [JW comment: as noted above, there is no evidence to suggest that this is imminent], the conditions also have a 'Grampian' element, in the sense that they are being relied upon to time-delay the implementation of any grant of planning permission to the outcome of any legal action. The timescale is currently unknown and the Planning Committee would need to assess under the test of conditions whether this was reasonable or not.

Should planning permission still be entertained, the situation described under 06 (b) and 07 above, would need to be safeguarded against. A successful court action could lead to renewed waste removal powers being made available to the EA. This would require site clearance to a given level. The importation of any replacement material to the same quantity and height would need to be precluded by planning condition and / or legal agreement. This would allow for any unintended consequences to be avoided.

Environment Agency

The Environment Agency was contacted by Officers again on the 10th October 2016 and the following response has been received:

All I would add to my Email on the 27/9/16. Is that if a prosecution was successful we do have powers to remove the waste, either via a notice from the court or by re-issuing our own.

COMMENT

As set out in the main report the Environment Agency advised in writing on the 27th September 2016 that due to the lapse of time they are unable to prosecute the land owner against the failure to comply with the Waste Removal Notice which was issued on 11th June 2015.

The matter of the importation of the waste material without a suitable Environmental permit is unresolved and is still with the Environment Agencies legal team. There remains a possibility that action will be taken by the Environment Agency as set in their latest response of 10th October 2016. However, there is no clear indication that such action is imminent.

This is a balanced case and it remains for the Borough Council to reach a decision on the application as currently submitted. It is considered that sufficient information is available to enable the Council to consider and determine the application.

Balancing all of the issues it is considered that the conditions set out in the report in particular 2 (finished levels), 3 (material to be removed), 15 (landscaping details) and 16 (landscaping implementation) will ensure the satisfactory appearance of the development, such that no harm will be caused to the character of the area. Furthermore safeguards in terms of condition 4 (human health risk assessment) will ensure there is no harm to public health.

Recommendation is unchanged, namely that planning permission should be granted subject to conditions.

Updated by JW on 13/10/16