

6. OFFER OF SECTION 106 AGREEMENT IN RELATION TO ENFORCEMENT ACTION AGAINST THE CREATION OF A SURFACED TRACK ON LAND AT MICKLEDEN EDGE, MIDHOPE MOOR, BRADFIELD (ENF: 15/0057)

1. Introduction

- 1.1 This report seeks the Planning Committee's decision on an offer of a section 106 legal obligation in respect of an Enforcement Notice relating to an unauthorised track at Midhope Moor, near Langsett. This report is being brought to Committee for two reasons. Firstly, it is a matter which has raised significant concerns as it involved the construction of a new track in the Natural Zone and within an area that is also designated as a SSSI, SAC and SPA. Secondly, whilst officers have delegated powers to enter into section 106 legal agreements where they are related to planning applications, Standing Orders do not permit officers to make such decisions on behalf of the Authority where they are not related to applications, as is the case here. This matter is being brought to this Committee so that it can be dealt with urgently, given that any further delay would result in both parties incurring further costs in preparing for the public inquiry, due to start on 8 December 2020.
- 1.2 The unauthorised development which is subject of this report lies within the Peak District Moors Special Protection Area (SPA) and South Pennine Moors Special Area of Conservation (SAC), and has the potential to affect the interest features. A retrospective application for the development was refused on 15 June 2018 (application ref: NP/S/1217/1304). A copy of the report to that Committee is attached as appendix 1 as it sets out the matter in some detail. Following the refusal of the application the Authority served an Enforcement Notice in October 2018 to secure removal of the track and appropriate restoration; a copy of the Notice is attached as appendix 2.
- 1.3 Following service of the Enforcement Notice the applicant submitted an appeal, requesting that the appeal be dealt with through a public inquiry. There was then a very lengthy delay awaiting registration of the appeal by the Planning Inspectorate. However, a date has now been set for a public inquiry, beginning 8 December 2020. It is anticipated that this could last a number of days, with the appellant's agent requesting that 5 days be set aside. The Inspectorate is not holding in person Public Inquiries at the moment and are scoping the potential to hold this appeal remotely using video conferencing.
- 1.4 Following submission of the appeal the appellant's agent wrote to the Authority to suggest that the Enforcement Notice should be withdrawn, as they considered that their client had a strong case. Officers responded on behalf of the Authority, rejecting this suggestion. Officers then met the appellant's agent on site in August 2019.
- 1.5 In July 2020, a discussion took place between the agents and officers and the appellant's agent offered to withdraw the appeal if the Authority accepted that the track could stay in place for a longer period of time. In response to this offer, officers made a number of suggestions relating to the detail of that offer. The agent then came back with an amended offer in September 2020, which was discussed with Chair and Vice Chair of Planning and the Chair of the Authority. Following this consultation, the offer was rejected by officers, but it was made clear that the principle of an improved offer was open for discussion. Consequently, a revised offer was submitted on 1 October which forms the subject of this report.

2. Proposed Section 106 Legal Agreement

- 2.1 As noted above, officers do not have the authority to agree a section 106 obligation where it is not related to a planning application. Section 106 of the Town and Country Planning Act 1990 (TCPA 1990) allows planning authorities to enter into agreements or accept obligations with persons having a legal interest in land to restrict the development or use of the land in any specified way or to require specified operations or activities to be carried out in, on, under or over the land or to require the land to be used in any specified way. They are also used to confirm agreements between planning authorities and landowners in

respect of other obligations relating to development.

2.2 The section 106 obligation that is being proposed by the appellant would contain the following key elements:

- The appellant would withdraw the appeal against the Enforcement Notice; this would mean that the Notice would come into effect. The public inquiry would not proceed.
- Both parties would agree not to claim costs against the other party and not to pursue them in the event that the Planning Inspectorate awarded costs of its own volition.
- The appellant's agent says that this offer is beneficial to both parties as it would avoid the high costs incurred in a public inquiry and avoid the possibility of costs being awarded against either party. It also gives certainty to the Authority as withdrawal of the appeal means that the notice would come into effect (it has been in abeyance since the appeal was lodged in October 2018).
- The Authority would amend the enforcement notice to allow for a longer period for compliance. The revised offer, received on 1 October, sets out a revised period for compliance of 28 months from the date of the obligation. This is longer than the period set out in the enforcement notice, which requires a number of steps to be taken (see appendix 2). The section 106 agreement would give a longer period for compliance, but would give greater certainty to the Authority. An appeal always has a degree of uncertainty about outcomes. It should also be noted that if the notice is upheld at appeal, the period for compliance will only come into effect once the appeal has been determined, which is likely to be in the first quarter of 2021, whereas the 28 months would begin as on the date of the obligation.
- The section 106 also offers a restriction on the use of the track during the period that it remains in place (no more than 50 days per year) and a limit on the weight of vehicles using it (no more than 1500 kgs). This restriction is not within the existing notice.
- The section 106 obligation also provides the Authority an opportunity to agree a detailed scheme for reinstatement of the ground once the track has been removed; currently this would be achieved through the steps set out in the enforcement notice.
- The Authority would agree not to take any further enforcement action during the compliance period.
- Finally, the draft section 106 obligation includes a clause which would have the effect of preventing the Authority from exercising its discretion to "*decline to determine*" a future application to retain the track. This power, under section 70C of the TCPA 1990, which allows LPAs to decline to determine applications which relates to development on land "*to which a pre-existing enforcement notice relates*". This power is discretionary. In the revised section 106 obligation the appellant would be allowed to submit an application between January and March 2022 and the Authority would be obliged to determine it, but it would not be obliged to approve it.

3. Assessment:

3.1 Officers consider that the offer of a section 106 obligation in return for withdrawing the appeal is in the public interest for the following reasons, provided the terms of that obligation do not undermine the Authority's position:

Firstly, the withdrawal of the appeal would mean that the Notice would immediately come

into effect (it has been in abeyance since the appeal was submitted). In this circumstance, the Authority could consider a number of options including taking action to prosecute the landowner, through the courts, seeking an injunction or it could take direct action to remove the unauthorised track and recover associated costs.

Secondly, the withdrawal of the appeal would give greater certainty of outcome. Whilst officers are confident that an Inspector would support the Authority's case and dismiss the appeal, there is no guarantee of outcomes at appeal. The Inspector could, in theory, allow their appeal and quash the Notice.

Thirdly, even if the Authority were to win the appeal, we would incur significant costs in defending our position, particularly as this appeal is being dealt with by means of a public inquiry which is likely to last several days. The Authority has engaged a barrister to act as our advocate in making our case and several officers are likely to be engaged as expert witnesses. Whilst the Authority has a specific reserve to fight legal cases such as this, any decision to use this reserve needs to be carefully justified. It is also possible that both parties could claim costs against the other (the appellant's agent has made it clear that they intend to seek costs against the Authority). This could result in the Authority recovering some or all of its costs, or, in the alternative, being liable for some or all of the appellant's costs. The normal position is that there is no order for costs, however, this is also an area of uncertainty.

Fourth, accepting the section 106 obligation would provide an opportunity to engage collaboratively on a detailed scheme for restoration.

3.2 In considering these benefits, Members also need to consider the following points:

Accepting the section 106 obligation would extend the length of time the track is in place. Given the policy position in relation to development in the Natural Zone, the Authority's strong opposition to the planning application for the track and the public interest in this matter, any extended period is a negative factor.

Allowing the track to remain in place for a further period could weaken the Authority's position if the track becomes more established during this time. It has already been in place for 6 years – some parts have become less intrusive and have become covered by vegetation (albeit grasses rather than other plants), but some parts have not performed well and have broken up and become even more intrusive. Development in the Natural Zone is in principle contrary to our strategic policies, if a decision was later made (by the Authority or an Inspector) on the basis of improved appearance of the track over the passage of time, this risks undermining this key strategic policy principle.

As drafted by the appellant, the obligation requires the Authority to waive its power to "*decline to determine*" a future application to retain all or part of the track. This would have put the Authority in a position where it would have to determine an application (if submitted) but we would be under no obligation to approve it. However, the appellant would then have the right of appeal and this could lead to further delays.

Crucially, however, the Authority's legal team has advised that the Authority cannot 'fetter its discretion' to use a power granted to it under the TCPA 1990. We have advised the appellant's agent that we cannot accept this. The consequence is that if the appellant submits an application for development of the type prohibited by the enforcement notice at a future date (with the Notice in place), then the Authority has the discretion to decline to determine it. If the Authority declines to determine it, the appellant can seek a judicial review of that decision. If the Authority does not decline to determine, the application would then be dealt with in the normal way. Which option the Authority takes would be a matter for the Authority at that time, but the legal advice is that we cannot fetter that discretion by agreeing to that clause in the draft s106 agreement.

In conclusion, officers consider that, subject to the omission of the clause requiring the Authority to waive its discretion to decline to determine an application, the offer of a section 106 obligation in return for withdrawing the appeal should be accepted. The precise wording of the obligation and terms still needs to be discussed and agreed with the appellant's agent, but this can be delegated to the Director of Conservation and Planning in consultation with the Head of Development Management and the Head of Law.

4. RECOMMENDATION

4.1 That the offer of a section 106 obligation in respect of the Appeal relating to the creation of a track, Midhope Moor, Langsett (PINs ref no: APP/M9496/C/18/3215789) be accepted, subject to the omission of the clause requiring the Authority to waive its power to decline to determine a future application.

4.2 The detailed wording of the section 106 obligation to be delegated to the Director of Conservation and Planning in consultation with the Head of Development Management, and the Head of Law.

4.3 APPENDICES

Appendix 1 – Copy of Committee Report dated 15 June 2018

Appendix 2 – Copy of Enforcement Notice, October 2018

Report Author and Job Title:

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