**LAND AT MICKLEDEN EDGE, MIDHOPE MOOR, BRADFIELD, SOUTH YORKSHIRE**

**APP/M9496/C/18/3215789**

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# APPELLANT'S RESPONSE TO AUTHORITY'S STATEMENT OF CASE AND THIRD PARTY COMMENTS

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Response to Authority's Statement of Case

*Appeal format*

1. The Planning Inspectorate was correct to conclude that a public inquiry is the appropriate format for this appeal. The Authority agreed to a public inquiry in its Questionnaire. There are complex legal issues as to criminal offences, nullity, invalidity and the ground (f) appeal. There is a need for complex and highly technical data and expert evidence, including as to compaction, hydrology, botany, biodiversity, European sites, habitats regulations, the SSSI, landscape impact and visual impact. This evidence should be the subject of formal questioning by cross-examination. There is significant third party interest and involvement in the appeal, with many dozens of representations, including detailed and highly technical evidence or submissions from Natural England, RSPB, Friends of the Peak District/CPRE/Campaign for National Parks, the British Mountaineering Council and the Sheffield & Rotherham Wildlife Trust. The Authority's recent claim that there has been "some public interest" is a huge understatement. Factual evidence may have to be given under oath. The Appellant is proposing to call 5 witnesses, and 5 days is the appropriate length for a public inquiry. The Authority agreed to this time estimate in its Questionnaire. Given all the foregoing, an "in person" event is more appropriate than a "virtual" event.

*Introduction, Site and Surroundings, Planning History*

2. The Appellant will endeavour to agree these matters with PDNPA.

*Nullity*

3. PDNPA cannot derive any assistance from Natural England's failure to reply to its emails of 13 and 25 July 2018.

4. The Appellant will demonstrate that the "view" expressed by Natural England in its 8 July 2020 email is wrong. The Authority should disclose the 17 June letter and 1 July conversation summary referred to in that email.

5. The EN requires the Appellant to carry out (or cause or permit to be carried out) operations specified in the SSSI notification (removal of track, extraction of topsoil, use of vehicles, application of herbicides) but without giving Natural England notice of a proposal to carry out the operations and fulfilling one of the conditions in section 28E(3) of the 1981 Act. It thus requires the Appellant to contravene section 28E(1), giving rise to a section 28P offence. The EN also requires the Appellant to destroy, damage or disturb flora, fauna, geological or physiographical features, giving rise to a section 28P(6) and/or (6A) offence.

6. In McKay, the enforcement notice required the landowner, amongst other things, to grade a tipped area to a smooth profile and to cover the area with an even depth of not less than 10" of subsoil. Ancient monument consent was required, and a criminal offence would have been committed if the enforcement notice had been complied with without that consent. The Inspector purported to address the issue by varying the wording of the enforcement notice by inserting a new paragraph which began: "Subject to and within 6 months of the granting of scheduled monument consent". The High Court allowed the appeal against the Inspector's decision, concluding: "If he must do something unlawful or it is reasonable to anticipate that he must do something unlawful then he cannot reasonably be said to be able to carry out the requirements."

7. In the present case, the requirements of the EN require the Appellant to do something unlawful (or it is reasonable to anticipate that it must do something unlawful) such that the EN is likewise a nullity.

8. The difficulty or otherwise of the Appellant giving notice to Natural England is nothing to the point. Moreover, the giving of notice would not amount to the fulfilling one of the section 28E(3) conditions. Furthermore, it would not preclude a section 28P(6) or (6A) offence.

*Invalidity*

9. The Appellant has clearly set out its position on invalidity, and its position remains.

10. The accuracy or otherwise of "peat bog" in paragraph 5d of the EN is a matter for evidence. The Appellant notes the Authority's concession that part of this paragraph could be deleted.

11. There remains an issue as to whether the EN needs to be varied and whether it would cause injustice.

*Ground (a) appeal*

12. The ground (a) appeal remains in issue, and the Appellant has set out its position on landscape impact, visual impact, the Natural Zone, compaction, hydrology and biodiversity. That position is not here repeated.

13. The Appellant notes that the Authority now refers to and relies upon a range of development plan policies (GSP1, DS1 and DMC12) and other material considerations which are not referred to or relied upon as reasons for issuing the EN or in its Questionnaire. The Appellant also notes that the Authority neglects to take into account the Secretary of State's screening direction and assessment, and the consultation responses (including from Natural England) which informed it. It is the National Parks and Access to the Countryside Act 1949, as amended, not the Environment Act 1995, which establishes the statutory purposes of national park designation and imposes a

duty on National Park Authorities to seek to foster the economic and social well-being of their communities. It is surprising that the Authority has made such an elementary mistake in its Statement of Case.

14. The Appellant notes that the Authority refers to the Peak District Landscape Strategy and Action Plan 2009 in its Statement of Case, even though it is not mentioned in its Questionnaire.

15. The Appellant will endeavour to reach agreement with the Authority as to the timing of the appeal development and its methodology. The Appellant notes the Authority's position that there was formerly a rutted, unsurfaced, track, and that the appeal development has been laid on and alongside it.

16. The Appellant also notes the Authority's position that the geotextile matting was laid, "to reinforce the route for vehicular access to the moor west of the site where works to conserve and enhance the moor had been consented by Natural England." This is consistent with the Appellant's primary position that the appeal development is directly connected with or necessary to the management of the European site.

17. The appointed Inspector will determine the landscape and visual impact of the appeal development as at the date of determination of the appeal, not as at the date of that development.

18. The Authority is invited to provide the Appellant (and the appointed Inspector) with a copy of its section 3 designation.

19. The Appellant appreciates the Authority's express welcome of its moorland restoration works, its acknowledgement that the appeal development will have reduced vehicle erosion and its acknowledgement that this is a benefit in terms of landscape character and appearance. The latter acknowledgement contradicts the Authority's prior

assertion that the appeal development fails to respect or enhance the character of its surroundings and its assertion that it has significantly harmed the character and appearance of the landscape. It is apparent that the Authority has failed to compare and contrast the appeal development with the pre-existing rutted and unsurfaced track. The fact that moorland restoration works might have been carried out elsewhere without tracks does not render the appeal development harmful or detract from its benefits.

20. The Authority fails to weigh in the planning balance the benefits of the appeal development in terms of emergency services access in the event of a moorland fire.

21. The appeal development does not span Mickleden Beck. Historical records of Water Vole are immaterial. The Appellant will present evidence to the effect that the appeal development has had no or no material effect on the breeding populations of Merlin or Golden Plover, and that it has not resulted in a significant loss of habitat, compaction or hydrological damage. Use by vehicles and other users can be conditioned, and the Appellant will seek to agree conditions with the Authority. The Appellant rejects the proposition that these would be impossible to enforce. The Appellant has made it clear that it seeks permanent planning permission, or, in the alternative, temporary planning permission. Natural England did not object to the Appellant's application, subject to appropriate mitigation being secured.

*Ground (f)*

22. As the Authority put it in its 13 July 2018 email to Natural England: "In general terms, an enforcement notice can only seek the removal of the unauthorised development and reversion to the 'status quo', as existed immediately prior to the development being carried out. So we cannot, for example, require restoration of the land to a better condition than existed previously…we recently issued an enforcement notice with

regard to the Cartledge track on the Fitzwilliam-Wentworth Estate. As that case is similar to the Midhope Moor case I have attached a copy of that enforcement notice as an example."

23. However, despite this advice, the EN *does* require restoration of the land to a better condition than existed previously. On its own case (Statement of Case, paragraphs 4.54 and 4.62), the habitat covered by the route of the appeal development did not include Sphagnum Moss and part of the route of the appeal development was formerly a rutted, unsurfaced track. Moreover, the ground (f) appeal was *allowed* to some extent in the Cartledge case (a.k.a the Strines case).

Response to third party representations

*RSPB*

24. The Appellant takes issue with the proposition that there was no pre-existing track. On the contrary, there was a rutted, unsurfaced, track. The Authority agrees as much. The appeal development has been carried out on and alongside this pre-existing track. RSPB's position that a route resembling a track came into being between 2005 and 2009 contradicts its case that there was no pre-existing track.

25. The Appellant is not contending that the appeal development is permitted development. The Appellant's primary position, as already recorded, is that that the appeal development is directly connected with or necessary to the management of the European site. The geotextile matting is expressly included within the capital works programme for the Higher Level Stewardship Agreement. Although the Authority refused the planning application, it concluded in so doing that Appropriate Assessment was unnecessary. RSPB's "two keys reasons" for supporting the EN are thus misplaced.

26. The purpose of pages 3-11 of the RSPB representation is unclear. The appointed Inspector is unlikely to be assisted by generalities, references to drainage, a breeding bird survey the results of which were subsequently removed or RSPB's attitude towards rotational burning and grouse shooting. There are issues as to peat depth and the pre-existing vegetation, which will be explored in the evidence. The Appellant has set out its position on the HRA steps.

27. RSPB's representation is replete with references to Natural England and its material. However, it manifestly omits to give full consideration to the Entry Level and Higher Level Stewardship Agreement with Natural England, its endorsement of the Midhope Moors Moorland Management Plan, its section 28E consent and its lack of objection to the planning application (subject to conditions). RSPB does not weigh the benefits of the appeal development in the planning balance. The Appellant has set out its position on landscape impact, visual impact, the Natural Zone, compaction, hydrology and biodiversity. That position is not here repeated.

28. The Appellant is not pursuing a ground (c) appeal, nor is it seeking planning permission under ground (a) for any grouse butts.

29. RSPB's ground (f) case fails to grapple with the proposition that the requirements of the EN are excessive.

30. The Appellant observes that RSPB has no case on nullity or invalidity.

*Friends of the Peak District/CPRE/Campaign for National Parks*

31. This representation misses the point that the EN requires the Appellant to commit at least one criminal offence.

32. As recorded above, Natural England did not object to the planning application subject to mitigation and the Authority decided when determining the application that an Appropriate Assessment was not required.

33. The Appellant does not understand or accept the assertion that the appeal development harms openness and tranquillity.

34. The Appellant has set out its position on landscape impact, visual impact, the Natural Zone, compaction, hydrology and biodiversity. That position is not here repeated.

*Others*

35. Other third parties have made a wide range of points, many of them immaterial. The Appellant hereby endeavours to respond to discrete points.

36. As recorded above, there *was* a pre-existing track. The Appellant does not contend that the appeal development constitutes the *repair* of an existing feature.

37. The Appellant does not contend that an EIA is necessary, and has never done so. That was the Authority's position. The Secretary of State rejected the Authority's position.

38. The appeal development has no effect on cuckoos or on the area's quiet calm.

39. The Appellant has set out the reasons for the appeal development. It is not used to transport groups of shooters in vehicles to grouse butts. The appeal development is not used to facilitate the killing of endangered birds of prey. The Appellant is entitled to apply for retrospective planning permission as an ordinary aspect of the planning system. It has volunteered conditions restricting the type and usage of the appeal development.

40. The Appellant, not Wakefield Farm Estates, owns the appeal site. The Appellant is not "ignoring" the Authority; it liaises and corresponds with the Authority on a regular basis.

41. The 2005 Moorland Management Plan has been superseded.

42. The Strines and Langsett Reservoir cases are distinguishable. The appeal will be determined on its merits, not by reference to precedent.

43. There is no evidence that the appeal development has caused any or any material harm or risk in terms of wildlife, livestock or pollution. The Appellant has no intention of laying another layer of geotextile matting on top of the current geotextile matting.

44. The wooden log "rafts" are untreated, not treated, and it is not "impossible" for Sphagnum Moss to grow under them. Stored logs form no part of the appeal development.

45. Inappropriate or unlawful conduct in terms of horse riding, mountain bikes, off-road motorbikes, group running or letting dogs run loose is the responsibility of the people concerned. Any taking of photographs of a third party's car on a highway plainly occurred far from the appeal site.

46. The Appellant has set out its position on landscape impact, visual impact, the Natural Zone, compaction, hydrology and biodiversity. That position is not here repeated.

**DUNLIN LIMITED**

**30 JULY 2020**