

REPORT OF THE HEAD OF PLANNING AND REGENERATION

**17/01411/FULL: RETENTION OF SLURRY LAGOON, LAND AT NGR
276429 99746 (ADJACENT TO MARDLES GATE) COLEBROOKE**

BACKGROUND:

This report concerns a retrospective application for the retention of a Slurry Lagoon (5,250 cubic square metre capacity) with an earth bank around it up to approximately 1.5 metres to store dirty water arising from the dairy unit at Brocks Farm. There are two residential properties not connected to the farming enterprise in close proximity to the lagoon, the closest being Mardles Gate, the garden of which is less than 40.0 metres from the boundary of the site. The other property is Manor Croft. The garden areas to these properties have a clear relationship to the lagoon.

The planning committee have considered application proposals in relation to the development on two separate occasions.

17/01411/FULL: Consideration of this current application on 18th April 2018. Members were minded to refuse planning permission, but a final decision deferred pending consideration of this implications report.

17/00034/FULL: Consideration of LPA case ref: 17/00034/FULL on 23 August 2017. Refused planning permission.

Copies of both committee reports as presented are included in this report pack.

Although the landowner has been operating the facility without any controls, the current application has set out an odour management plans to seek to redress the harmful impacts that have arisen as a result of the unauthorised development. The key elements as proposed by the applicant and as set out in the Plan are summarised below:

DELIVERY OF MATERIAL. Material will be delivered into the lagoon via a 4" underground pipe which is to be installed if retrospective planning consent is granted. Material collected in a holding tank close to the dairy unit will be pumped via the pipe into the lagoon and discharged below the level of the floating cover. A plan showing the route of the pipe run has also been submitted

EXTRACTION OF MATERIAL. Extraction of the material will take place via a separate outlet pipe that will operate by gravity and be connected to an umbilical cord that will be towed behind a tractor when spreading takes place across the farmland.

FITTING OF THE COVER. A condition can be applied to the grant of planning consent requiring that the cover to the lagoon should be fitted within six calendar months of the grant of planning consent.

Since the meeting on the 18th April the applicant's agent has confirmed the landowner's intentions to apply for planning permission for an alternative siting on the farm some 300m to the south of the present siting and relatively close to some farm buildings that he owns at Mardles Farm. The agent has suggested the application is likely to be submitted in mid- May following the completion of a topographical survey of the site. Further updates will be provided in writing to members or verbally at the meeting on 16th May with regards to this matter. Consideration as to how this (the potential planning application) should affect members considerations of the issues covered in this report, are included in the main body of the report.

REASON FOR REPORT: To consider the reasons for refusal proposed by the Planning Committee at the meeting of 18th April 2018 in light of further advice from Officers, and to consider the scope of enforcement action required.

RECOMMENDATION(S)

The officer recommendation as presented is set out in the Committee Report which was considered by the Planning Committee members at their meeting on the 18th April.

Relationship to Corporate Plan:

Homes

- Protection of existing living environments

Environment

- Protect the natural environment

Financial Implications: Depending on the scope of any enforcement action taken to redress the existing unauthorised use/development (Enforcement Notice/ Stop Notice) following the refusal of the existing application. For instance if a Stop notice were served, the Local Planning Authority could be liable to pay compensation in certain circumstances.

In terms of refusal of the application, Members must be able to clearly justify each and every reason for refusal in line with the Development Plan, National Planning Policy Framework and other material considerations.

Legal Implications: The report identifies the risks in proceeding with a decision based on the reasons given by the Committee on 18 April 2018. In terms of defending any decision to refuse planning permission on a subsequent appeal and/or an appeal against an enforcement notice, there may be insufficient capacity to deal with this in-house. The Council may need therefore to appoint external legal representation if the appeal proceeds to a public inquiry.

Risk Assessment: as above.

Introduction

1.1 At the Planning Committee held on 18th April 2018, the Planning Committee resolved that Members were minded to refuse the application and therefore wished to defer the decision to allow for a report to be received setting out the implications for refusing the application considering the following issues as listed below:

- Proximity, odour impacts and effectiveness of mitigation
- Access / Highway safety
- Safety and Security

2.0 The implications of refusing the application

2.1 Proximity, odour impacts and effectiveness of mitigation

2.2 During the debate at the meeting, members were quite clear in their views that they did not consider that the planning balance should tip in favour of approval as officers had presented, because although the applicant has proposed potential solutions to seek to redress the odour and pollution issues, there was no redress to the issue of the close proximity to the neighbouring properties - and the resulting detriment to the amenities currently enjoyed by the occupiers.

2.3 Debate then ensued as to whether the scope of mitigation would be achievable in the time frame presented in the officer recommendation, which is much shorter than the applicant's own suggestion, and whether or not it was in fact deliverable. In particular, concern was expressed as to whether;

- it would be possible to deliver the dirty waters via a piping methodology given the distance and differences in topography between the unauthorised development and the dairy unit, and/or
- if it would be possible to export material from the unauthorised development whilst mitigating against the odour impacts and/or without requiring mechanical assistance which would be likely to result in noise concerns.

2.3 The reason as drafted below is considered to be robust and sets out a logical reasoning which would be capable of defending at appeal in the event that an appeal is lodged.

2.4 Reason for Refusal 1.

1. The slurry lagoon and earth bank surrounding it, by reason of its size, scale and siting in close proximity to the neighbouring properties at Mardles Gate and Manor Croft, is considered to adversely affect the residential amenity and the living conditions of these neighbouring occupants. Furthermore, and given the close proximity to the aforementioned residential properties, the members of the planning committee remain unconvinced that the scope of the mitigation measures as proposed as part of the planning application proposal are sufficient to address the odour nuisance and air quality impact in a robust and satisfactory manner and would therefore continue contribute to the scope of the un-neighbourly impacts that would arise from the scheme as it is proposed. On this the application scheme is considered to be contrary to Policies DM2, DM7 and DM22 of Mid Devon Local Plan Part 3 (Development Management Policies) and guidance in the National Planning Policy Framework

2.5 Access / Highway safety

2.6 Paragraph 32 of the NPPF states that decision takers should take account of whether 'safe and suitable access to the site can be achieved for all people' and therefore it is entirely correct that members consider highway safety in their decision making.

2.5 However, the same paragraph of the NPPF states that, 'Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

2.6 Therefore, the balance which members need to consider is whether the impact of permitting the development would have such a severe impact on highway safety in terms of additional trips on the highway that it justifies a refusal. In completing their deliberations on this matter members should be aware that whilst vehicular access is still likely to be required on an occasional basis, given the scope of the management and operation plan as proposed the predicted traffic arriving and departing from the site would much lower than the pattern arising from its current unauthorised use. Notwithstanding the comment above any traffic arriving and departing at the site could be argued to be considered unneighbourly as covered by reason 1 as set out above but this is considered to be in relation to the proximity of the site to the neighbouring dwellings as opposed as opposed to trip generation.

2.7 In addition it is noted that there have no objections raised by the Highway Authority. Therefore if members were to refuse the application, the Highway Authority would not be able to provide advice or support in relation to any appeal. In situations such as this, officers would strongly advise members not to proceed with such a reason for refusal unless and until they have evidence to back it up. This could require an independent highway consultant's report which would then be put before members before they make their decision.

2.8 However, if Members still feel that the development is unacceptable in terms of the means of access proposed and volumes of traffic that would be generated from a highway safety and capacity point of view officers have drafted a reason for refusal as follows:

2.9 Reason for refusal 2:

The application site is proposed to be accessed from a position on the public highway where visibility is relatively limited. The LPA are concerned that the additional traffic volumes generated from the unauthorised development would result in unacceptable conditions on the local highway network and therefore the application scheme is considered an unacceptable development resulting in severe impacts in terms of highway safety, contrary to the NPPF.

2.10 Safety and Security

2.11 At the meeting members raised the issue that there was not a fence around the perimeter of the top of the earth bank, and objections have been raised local stakeholders on the basis that the gate is often left open. Both the issues have lead members to question whether the application scheme would present a hazard in the locality given that the arrangements as existing could not guarantee safety for local stakeholders.

2.12 In completing their deliberations on this matter members should be aware that any persons who choose to access the site without permission would be doing so at their own risk, and therefore officers would not recommend any further consideration of refusing the application on this basis. Those accessing the site with the permission of the landowner would be subject to and potentially protected by the law relating to occupier's liability.

Summary in terms of LPA case 17/01411/FULL:

2.13 Members have indicated that they are minded to refuse the application. The report as set out above considers the options that members could pursue in determining to refuse the application. As stated reason for refusal no.1 presents a reasoning which is logical and capable of being defended in the event of an appeal. Officers remain concerned that reason for refusal no.2 cannot be evidenced and would not recommend proceeding on this basis. Concerns over safety and security should be set aside.

3.0 Enforcement Considerations

3.1 Given the existing development is unauthorised and members are minded to refuse the application that has been submitted to seek regularise the development, which is the second attempt made by the landowner, it is therefore recommended that an enforcement notice is served to redress the unauthorised development which is a clear breach of planning controls. The scope of the notice should require the slurry lagoon to be emptied and the land reinstated to its former condition and levels. In serving the notice a timeframe will need to be imposed establishing a timeframe for compliance. As members will be aware it is up to the local planning authority to determine what an appropriate time frame should be, and generally the timeframe should be proportionate to the scope of the impact that the unauthorised development is causing.

3.2 As stated above the applicant has indicated that he is currently investigating a revised location to site the lagoon. Whilst an update will be provided at or prior to the meeting regards this matter it is not possible to confirm if this revised location would be acceptable although it is noted that the separation distance to the nearest neighbour is approximately 230 metres, and/or how long it would take until this potential replacement storage lagoon would be available for use in the event that it was deemed acceptable.

3.3 If it is considered, given that the harm arising from the unauthorised development is sufficiently detrimental to the occupiers of the neighbouring properties, that the unauthorised activity should cease before the expiry of the period for compliance specified in an enforcement notice, the LPA may elect to serve a stop notice with the enforcement notice. There is no right of appeal against the stop notice and it is an offence to contravene a stop notice once it comes into effect. However, Members need to be aware that compensation can be payable in certain circumstances.

3.4 Where a decision is to be taken to serve a stop notice, the Local Planning Authority would need to ensure that an assessment of the foreseeable cost and benefits is first carried out and made available to the committee or approving officer who will authorise service of it.

3.5 In this instance, your officers' recommend that an enforcement notice is served. The notice should require the slurry lagoon is to be emptied and the land reinstated to its former condition and levels.

3.6 At this stage officers are minded to advise that further evaluation of the situation at the site should be undertaken to clarify the precise magnitude and scope of the harm arising from the unauthorised use and to reflect on the deliverability of the alternative location as discussed at 3.2 above before a decision is taken on whether to serve a Stop Notice. This is important as it will be necessary to ensure that the requirements of the stop notice only prohibit what is essential to safeguard amenity or prevent serious harm to the environment in the surrounding area. Notwithstanding this view with the recommendation as set out below would enable officers to authorise the serving of the Stop Notice to require the cessation of use of the Slurry Lagoon if after further investigation such a course of action is deemed necessary.

Human Rights and Equality Issues:

The expediency of Enforcement action has been assessed with reference to the National Planning Policy Framework (NPPF). Expediency has also been assessed with regard to the statutory

Development Plan, comprising the Core Strategy 2026 (July 2007), the Allocations and Infrastructure Development Plan Policies (January 2011) the Local Plan Part 3 Development Management Policies (October 2013) the Proposed Local Plan Review Policies 2013 - 2033.

When making their decision, Members must have regard to all relevant planning legislation, regulations, guidance, circulars and Council policies.

In addition, Members should note that the Human Rights Act 1998 (HRA 1998) makes it unlawful for the Council to act incompatibly with Convention rights. Decisions by the Committee must take account of the HRA 1998. Therefore, Members need to be aware of the fact that the HRA 1998 makes the European Convention on Human Rights (the Convention) directly applicable to the actions of public bodies in England and Wales. The specific parts of the Convention relevant to planning matters are Article 6 (right to a fair hearing); Article 8 (right to respect for private and family life); Article 1 of the First Protocol (protection of property) and Article 14 (prohibition of discrimination).

Article 6 deals with procedural fairness. If normal committee procedures are followed, it is unlikely that this article will be breached.

Article 1 of the First Protocol and Article 8 are not absolute rights and infringements of these rights protected under these are allowed in certain defined circumstances, for example where required by law. However any infringement must be proportionate, which means it must achieve a fair balance between the public interest and the private interest infringed and must not go beyond what is needed to achieve its objective.

Article 14 states that the rights under the Convention shall be secured without discrimination on grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

The power to issue any form of Notice to redress the issue is discretionary and should only be used where the Local Planning Authority (LPA) are satisfied that there is a reason to do so. The LPA must also be satisfied that it is expedient to issue the Notice. Consequently the Council must decide based on the particular circumstances of each individual case the question of expediency. The decision to take action must be reasonable and not based on irrational factors or taken without proper consideration of the relevant facts and planning issues or based on non-planning grounds.

Reason for issuing the Notice

It appears to the Council that this breach of planning control has occurred within the last four years. This breach is in relation to the formation of a slurry lagoon and earth bank surrounding it, without the benefit of planning consent. The retention of the slurry lagoon, by reason of its scale and close proximity to the neighbouring properties at Mardles Gate and Manor Croft, is considered to adversely affect the residential amenities and living conditions of these neighbouring occupants, particularly with regard to odour nuisance and air quality impact. The proposal is, therefore, considered contrary to policies DM2, DM7 and DM22 of the Mid Devon Local Plan part 3 (Development Management Policies) and the guidance contained within the National Planning Policy Framework.

Recommendations:

1. Members resolve to refuse the application submitted under LPA case ref: 17/01411/FULL for the following reason:

The slurry lagoon and earth bank surrounding it, by reason of its size, scale and siting in close proximity to the neighbouring properties at Mardles Gate and Manor Croft, is considered to adversely affect the residential amenity and the living conditions of these neighbouring occupants. Furthermore, and given the close proximity to the aforementioned residential properties, the members of the planning committee remain unconvinced that the scope of the mitigation measures as proposed as part of the planning application proposal are sufficient to address the odour nuisance and air quality impact in a robust and satisfactory manner and would therefore continue contribute to the scope of the un-neighbourly impacts that would arise from the scheme as it is proposed. On this the application scheme is considered to be contrary to Policies DM2, DM7 and DM22 of Mid Devon Local Plan Part 3 (Development Management Policies) and guidance in the National Planning Policy Framework

2. That Members, having regard to the provisions of the Mid Devon Development Plan and all other material planning considerations in accordance with Sections 172 and 183, Town and Country Planning Act 1990, ("the Act") should grant authority to the Group Manager for Legal Services to take all such steps and action necessary to secure the restoration of the land to its former condition which would at the same time redress the unauthorised use of it to store Slurry. This may include the issue of an enforcement notice and prosecution and/or direct action in the event of non-compliance with the notice. The reason as recommended for serving the notice is set out above.
3. That Members delegate to the Group Manager for Legal Services, in consultation with the Group Manager for Development Management, the decision on whether a stop notice should be issued to require the cessation of the use of the slurry lagoon in anticipation of full compliance with the requirements of the enforcement notice, subject to the Group Manager for Legal Services being satisfied that it is expedient to issue a stop notice, having regard to an assessment of the costs and benefits of such action and whether there is an essential need to safeguard amenity or prevent serious harm to the environment.

Contact for any more information

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File Reference

17/01411/FULL

Circulation of the Report

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Members of Planning Committee