

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

AC/

BETWEEN:

R (oao NORTH FERRIBY PARISH COUNCIL)

Claimant

-and-

EAST RIDING OF YORKSHIRE COUNCIL

Defendant

-and-

WYKELAND GROUP LIMITED

Interested Party

CLAIMANT'S STATEMENT OF FACTS AND GROUNDS

Introduction

1. The Claimant is the Parish Council for the village of North Ferriby in the East Riding of Yorkshire and is the democratic representative for over 3000 East Riding residents with a mandate to ensure their views are listened to and respected.
2. The Claimant made substantial objections to the Interested Party's application to discharge planning condition 7 relating to the provision and retention of a "Publicly Accessible Biodiversity Corridor" imposed on the planning permission granted by the Defendant to the Interested Party on 14 February 2022 for the "erection of a storage and distribution building (Use Class B8) with ancillary office space and associated parking, landscaping, access and ancillary works" on Land south east of Brickyard Lane Roundabout, Melton, East Riding Of Yorkshire, HU14 3HB (ref. 20/03555/STPLFE).
3. The Defendant is the local planning authority who granted the Interested Party's application to discharge condition 7 on 7 February 2024 (ref. 22/30356/CONDET).
4. The Claimant is aggrieved by the Defendant's decision and applies to quash their discharge of condition 7 on the grounds set out below.

Background

5. The Claimant objected to the grant of planning permission for the storage and distribution centre in 2022 and also raised the specific concern that the existing open space corridor on the eastern boundary of the site (now subject to condition 7) should be retained, enhanced and maintained to afford an accessible amenity open space for the local community.
6. The existing area of open space (together with a wooded area to the east of it known as the Plantation or Long Plantation – all referred to below as the “Open Space Land”) was transferred to the Defendant under the terms of a section 106 agreement entered into in 2004 and relating to a wider business park proposal on a larger area of land including the site of the storage and distribution centre permitted in 2022.
7. The Open Space Land abuts a residential estate on the western boundary of the Claimant’s administrative area. As part of a boundary review, the Parish area is to be extended to include the Open Space Land. It is held by the Defendant on trust under the Open Spaces Act 1906 but was leased to the Interested Party’s predecessor in title in 2008 for a term of 99 years and is now held by the Interested Party subject to the terms of the lease.
8. The Claimant made extensive representations on open space considerations in a letter from their solicitors, Ashtons Legal, dated 16 December 2020. The letter was accompanied by a report by the Landscape Partnership, Chartered Landscape Architects, also dated 16 December 2020 which assessed the open space proposals accompanying the development.
9. The Claimant’s letter criticised the proposals for the Open Space Land and the Interested Party’s Landscape and Visual Appraisal (LVA) by reference to the Landscape Partnership report and stated amongst other things that
 - (1) “there [will be] a quantitative but also a qualitative diminution in the area as a result of the [Open Space Land] proposals”;
 - (2) “The proposals will result in a situation where virtually 100% of the current available recreation area will be lost. All that will be left is the path which cannot be regarded as open space. ...without quantified justification in the public interest this loss cannot be justified in either recreational or landscape terms”;

- (3) The proposals will therefore be contrary to Policy C3 of the Defendant's Local Plan Strategy Document which requires that "Proposals should maintain and/or enhance the quantity, quality and accessibility of open space";
- (4) "The Landscape Partnership draw attention to the function and usability of the proposed bunds. They come to the very clear conclusion that the proposals cannot be regarded as open space since they would be wholly inaccessible to the general public through height, profile and vegetation cover, thus falling foul of Policy C3. There is no reasoned justification that would enable the Council to consider making an exception to policy. However, in light of the current use of the open space and the function it fulfils it is difficult to imagine that any justification could enable an exception to be made";
- (5) "the Landscape Partnership draw attention to a number of aspects relating to the tree planting proposals and the impact on existing trees and vegetation. As regards the existing situation the Council cannot seriously countenance a situation where, in addition to losing usable and valued open space, it will put the existing trees and vegetation in a position where they are likely to suffer degradation through the extension of the engineered bund into their root protection areas (as illustrated in the Arboricultural Assessment). Such a decision would be perverse";
- (6) "The Landscape Partnership make the point that "Woodland is proposed on the bunds, but bunds are not ideal growing conditions (drainage, exposure, etc.) and it is likely to be some years before planting becomes sufficiently established to begin to screen views";
- (7) "The Recommendations for Further Study are not optional but necessary to ensure that the council has relevant, pertinent and substantial information to enable it to make a proper decision that would not be susceptible to a judicial review challenge".

10. The "Recommendations for further study" set out in para. 4.1.1 of the Landscape Partnership's report were as follows:

"Landscape and visual aspects of the planning application that The Landscape Partnership considers require additional or further study and/or re-assessment before the effects of the proposed development on landscape and visual receptors can be fully understood – and thus the application determined – are considered below.

- Confirmation of how the engineered bunds would be constructed given their relationship to the root protection area of Long Plantation, and how the long-term health and viability of the woodland could be secured.

- Expansion of the methodology of the LVA to clarify how judgements have been made and better to understand the criteria thresholds.
- Review of the scheme’s stated design principles, to ensure they have been delivered.
- Review of whether the landscape measures as proposed would truly provide multifunctional green infrastructure, and whether they would deliver the envisaged design principles of introducing “a variety of connected new habitats and landscape features that can provide long term enhancements for biodiversity, landscape character, recreation and health and wellbeing.” In particular, whether the proposed scheme would provide accessible green space. Consequential review of the LVA and the weighting afforded to multi-functional green infrastructure in judgements when offsetting adverse effects.
- Review of opportunities to increase the width of the landscape corridor to that which was found acceptable to safeguard the visual amenity of residents of North Ferriby and users of the Yorkshire Wolds Way in the earlier approved schemes eg planning permissions 03/05511/STVAR, PA 08/30799/CONDET and PA 11/00613/STPLF.
- Clarification as to the assumed finished heights of the engineered bunds (e.g. illustrative sections prepared by the Landscape Architects vs the Site Finish Levels drawing), followed by consequential review and reappraisal of the likely landscape and visual effects to reflect the actual dimensions of the bunds and their ability to provide mitigation. Without such actions, it is not possible to rely on the findings of the LVA as part of the decision-making process.
- Expansion of the LVA to take account of the introduction of what are likely to be substantial engineered bunds into what is currently a largely level landscape, and the consequential adverse effects they themselves would have on landscape character and visual quality.
- Given the residual adverse effects on landscape and in particular visual receptors that remain, review of the mitigation measures proposed and exploration of how they might be expanded so as to more effectively mitigate the adverse effects arising from the proposed development”.

11. The “substantial” “engineered bunds [to] be constructed” on the Open Space Land are to be formed out of large quantities of soil which the Defendant permitted the Interested Party to deposit “temporarily” on the Open Space Land in August-September 2020.

12. The Defendant accepted in a letter of 18 February 2022 from the Defendant's Chief Executive, Caroline Lacey, to the Claimant's Chairman, Councillor Hookem, that it would be unlawful for the soil to remain but said that it was not "expedient" to require its removal "at this stage" since the Interested Party "have confirmed that this material will be removed as part of the construction process".
13. The Defendant said subsequently in a further letter from the Chief Executive dated 7 March 2022 that it would be "premature to remove the current soil stacks" until the process of discussion following a questionnaire which the Claimant had circulated to parishioners had been concluded. But that process resulted in 80% of respondents saying that they did not want landscaping of the Open Space Land to include the soil bunds.
14. On 26 April 2022, the Claimant attended a meeting with the Defendant's case officer on the Interested Party's application, the Interested Party and their landscaping consultants, Ward Councillors and Welton Parish Council. The purpose of the meeting was to present to the Interested Party and their consultants the outcome of the Claimant's questionnaire and to discuss the proposals for the Open Space Land. It follows that the Defendant (including its case officer) and the Interested Party were well aware of the Claimant's concerns and the community's wishes for the treatment of the Open Space Land.
15. On 25 July 2022, the Claimant's Chairman wrote again to the Defendant's Chief Executive making the same or similar points as set out above and below.
16. Despite the above, on 22 October 2022, the Interested Party submitted an application to discharge condition 7 including proposals for "re-profiling the land to create a more interesting environment", ie the creation of the substantial soil bunds.
17. On 18 November 2022 the Claimant attended a further meeting with the Council, Ward and Parish Councillors, David Davis (the local) MP, a local community group, Save Ferriby 2020, who also objected to the proposals for the Open Space Land and senior Council officers, Ms Caroline Lacey, the Chief Executive, Mr Alan Menzies, the Executive Director Planning and Economic Regeneration, Mr Stephen Hunt, Head of Planning and Mr Rob Mansell, property lawyer and the Council Leader, Councillor Owen, and the Chair of the Planning Committee, Councillor Hammond.

18. At this meeting, the Claimant further emphasised their concerns. The involvement of David Davis MP led to the consultation of the Humberside Police.

19. The Claimant, in common with many other members of the public, objected to the application. Their objection submitted in November 2022 stated amongst other things that

“• Attempts to influence this design by Ward Councillors and the Parish Council have largely been ignored by Wykeland [the Interested Party]...

The Consultations

- North Ferriby Parish Council surveyed every household in the village to ascertain how the Open Space should look and received a credible response.
- Wykeland produced a newsletter which had very poor distribution by their own admission. The proposed design was inside the newsletter and not referenced on the front page. And the final design has changed without further consultation.
- We are the only party that brings credible evidence to the table of what your ERYC council tax payers wish the public space to look like.

The bunds

- It is proposed to erect large bunds on the site up to two metres high, with planting on the top.
- This is a convenient way for the huge illegally stored mound of soil to be distributed.
- These will be “engineered structures” and it is our understanding that the NPPF prohibits the erection of such on defined Open Spaces.
- There are no sectional drawings through the bunds provided to demonstrate the profiles.
- 80% of survey respondents stated they wish to see no bunds.
- 70% of residents said that they will feel safer with unobstructed views and access to the Public Open Space will be easier without the bunds.
- The bunds will restrict views and provide hiding places for individuals or groups. The police need to be consulted on this because this is a public safety issue. Also, the proposed bunding opposite the underpass makes the footpath to the underpass more secluded for walkers and cyclists, a particular concern for the elderly and for those young people going to and from South Hunsley School.

- I would remind everyone of the responsibility of the council under the Crime and Disorder Act 1998 in respect of community safety and this is a typical example of when this needs to be done.
- Visit Ferriby on most weekends and you will hear the sound of off-road motorcycles ridden through Long Plantation to the annoyance of the residents. If these bunds are built then the riders will not believe their luck...”

20. On 24 November 2022, the Designing Out Crime Officer of the Humberside Police commented as follows:

After consultation with the Neighbourhood Policing Inspector, I can confirm that Humberside Police have concerns with regards to the current design and layout of the Publicly Accessible Biodiversity Corridor.

The neighbourhood policing team are aware through local knowledge and engagement with residents that there is an issue with nuisance motorbikes in the vicinity of the Publicly Accessible Biodiversity Corridor. Research of calls for service between August 2021 and October 2022 has identified 31 reported incidents concerning these issues. In addition to the complaints about anti-social behaviour caused by motorcycles, some reports also contained concerns about the safety of riders (including young people without safety equipment). Community feedback would indicate that the problem is under reported.

There is also evidence within other areas of the East Riding that bunds placed within open spaces have been problematic and have provided opportunities for motorbikes/quad bikes, and anti-social behaviour to occur. There have been numerous complaints from similar communities regarding this type of incident. In one location this has recently resulted in a Community Trigger, (under the Crime and Anti-Social Behaviour Act 2014) being raised by local people, following over 100 complaints in a 6-month period.

Noise from motorbikes can have a considerable effect on residents' wellbeing, and increasing calls for service to the police, therefore it is important to design this problem out from the offset.

Humberside Police are requesting that the bunds are removed. We appreciate that the bunds will only be to a maximum height of 1m, however it is important to consider reducing any opportunity for motorbikes/quad bikes to use them, and by removing them would devoid potential hiding places and provide a clear line of sight for the user along the route of the footpath. Pedestrian routes should be designed to ensure that they are visually open, direct, and well used and assist easy, intuitive wayfinding by increasing activity and therefore natural surveillance, a proven deterrent to crime and anti-social behaviour.

21. Similarly, on 1 December 2022, the Claimant further objected to the application, referring to the correspondence with the Defendant's Chief Executive set out above, that

“The outcome of the survey was clear, residents do not want any bunds and this has been clearly explained to the Wykeland Group on several occasions, so the Parish Council does not understand why the Council does not insist that the material is removed as per the original undertaking in the letter of 18 February”.

22. In another letter to the Defendant, also dated 1 December 2022, the Claimant stated:

“It is only fair to ask why Wykeland have repeatedly ignored the consistent approach by the Parish Council and Elected Members to change the proposals from those essentially submitted in October 2020?

Despite repeated correspondence with ERYC officers, the continued presence of illegally stored soil (also breaching covenants) is now proposed to continue which appears to be for financial reasons, and not in the interests of residents and free unrestrained access to the Open Space. Why?

Summary

We make no apology for repeating our last paragraph below [as set out in the letter of 25 July 2022]:

The most important thing for North Ferriby residents is to have the village protected as was the original purpose and intents of the Open Space. It is not to enable the developer or the end user to be able to enhance its green credentials through the provision of what it/they want, ignoring the basic needs and human rights of the local population. If ERYC is minded to permit the development of the Open Space as proposed, regrettably the perception will be that ERYC has once again championed the developer and the end user over the wishes of the community, your residents and tax payers”.

23. Following the submission by the Interested Party of additional plans to the Defendant on 31 August 2023, the Claimant submitted a further report to the Defendant by the Landscape Partnership dated 27 September 2023. Amongst other things, the report commented as follows:

“2.3 Bunds within the open space

2.3.1 Between the edge of the developed area and Long Plantation, a string of four bunds with a north-south orientation is proposed in the area allocated for Open Space in the approved scheme.

2.3.2 These bunds would be around 1.4m above existing ground levels and formed with steep side slopes and a level top that slopes with the prevailing existing site levels beneath.

2.3.3 The side slopes have a gradient of 1:2.857, meaning that the bunds are generally inaccessible to pedestrians and far from DDA (Disability Discrimination Act 1995, which is now incorporated into the Equality Act 2010 (Disability) Regulations) compliant were open space access an objective of the design.

2.3.4 Two further bunds are proposed at the north-western and south-western ends of the Eastern Open Space. Existing levels are not indicated on the plan drawings, only on the accompanying cross sections; however, these section lines do not cut through the highest part of the bunds.

2.3.5 The northern bund would have a top height of 19.406m AOD, which would appear to be c.2.2m above existing ground levels. The lower, steeper slopes of the bund vary between 1:7.19 and 1.576. As such, it could not be considered to be an accessible area.

2.3.6 The southern bund would have a top height of 14.6m AOD, which would be around 2.1m above existing ground levels. The side slopes would be around 1:7 and thus the bund could not be considered an accessible area.

2.3.7 The applicant's covering letter (31.08.2023) noted [TLP emphasis]:

*Earthworks across the north-south Corridor have been **reprofiled to either flat levels or to provide gentle slopes**, as requested by Council Officers and North Ferriby Parish Council (NFPC). Raised areas are no more than 1.4m in height. This amendment has also received the support of the Humberside Police Designing Out Crime Officer as a suitable measure to deter antisocial behaviour. Details of levels throughout the north-south corridor are provided on engineer's drawings 4300, 4301 as listed above.*

2.3.8 To date, North Ferriby has not had sight of any justification from Humberside Police as to why the revised bund might be considered a suitable measure to deter antisocial behaviour.

2.3.9 It is The Landscape Partnership's view that the proposed earthworks could not be considered to be profiled to provide gentle slopes. 1.4m is a meaningful height (approaching eye height for many). It is our view that they would continue to provide an attractive landform for those wishing to practice anti-social behaviour.

2.3.10 The bunds' height and their steep artificial or engineered profiles would appear as incongruous features within the landscape breaking up the sense of openness within the open space corridor. Once clothed with vegetation, they would likely result in shading within Long Plantation and further compromise views out through the plantation and the sense of openness beyond.

2.4 Path

2.4.1 A path would wind through the depressions between the bunds alternating between their eastern and western sides and providing access between an unresolved point within the northern end of Long Plantation and a point two-thirds of the way down the plantation. The southern third of the open space is devoid of formal routes. The path

would be 1.8m wide and would be surfaced with “hoggin compacted gravel with timber edges”.

2.4.2 No details are provided as to how the path would link with existing access routes within Long Plantation.

2.4.3 A Centrewire motorbike inhibitor gate would be located at each of the entrances on to the new path. The applicant’s covering letter (31.08.2023) notes that deterrent gates have recently been installed at the southern end of Brickyard Lane and at the northern entrance to Long Plantation.

2.4.4 3m wide maintenance gates would be located in the south-western corner of the Eastern Open Space, close to the railway line.

2.5 Fencing

2.5.1 No details are provided as to the form of any boundary treatment between the eastern edge of the open space and Long Plantation. As such, it is not possible to make a judgement on the effectiveness of the motorbike deterrent gates, since it would appear that that access could be gained through the remainder of this boundary; indeed they could be considered to only provide an obstacle for pedestrians using the path.

2.5.2 No details are provided regarding the form (style, height, materials, etc.) of the fence proposed on the open space’s northern boundary nor details of any access onto Monks Way East, nor again how motorbikes, etc. would be deterred.

2.5.3 The open space would be separated from the development area to the west by an acoustic fence; no details are provided as to the form (height, material, etc.) of the fence, and so it is not possible to make a judgement on the effect or influence it would have on the character of the open space.

2.6 Planting

2.6.1 The new bunds would be clothed with areas of native woodland, native shrub mixes, tall meadow grassland, flowering meadow grassland, shade tolerant meadow grass. None of these treatments are inducive to public access, even if the levels would allow.

2.6.2 Extensive areas of woodland are proposed along the length of the open space and thus, when in conjunction with Long Plantation, would narrow the perceived width of the corridor.

2.6.3 Much of the woodland would be planted on the proposed bunds. However, bunds are not ideal growing conditions as the growing material within is likely to be compacted and subject to fast drainage such that they quickly dry out in summer

months. Their elevation makes the planting more at risk to exposure and wind drying. It is likely to be some years before planting becomes sufficiently established to begin to filter or screen views as originally envisaged...

2.7 Provision of open space

2.7.1 The scheme proposed provides very little freely accessible open space.

2.7.2 The landscape corridor proposed comprises a string of planted mounds, and a snaking path. This could not be considered to be 'open space'. The gradients of the bunds are such that they would be inaccessible to most of the general public and, in any event, they would be planted or seeded to form rough grassland. In the northern two-thirds of the space, there would be little opportunity for pedestrians to stray from the surfaced path.

2.7.3 The applicant's covering letter (31.08.2023) notes [TLP emphasis]:

*The pedestrian route ... no longer passes through the southern half of the Corridor **which allows for an amenity area.***

2.7.4 The area in question comprises a narrow strip of grassland that would be liberally planted with individual heavy standard trees. As such, it would provide very little amenity value, being mean and narrow in terms of size/extent and containing obstacles such as individual trees and habitat piles that would comprise its openness...

4.2 Conclusion

4.2.1 In conclusion, the proposed scheme would not deliver an area of accessible open space for the use and enjoyment, and health and well-being of local communities. Rather, it would occupy the space of a tract of land that, until recent engineering works, already fulfilled the NPPF's function of open space.

4.2.2 The Landscape Partnership considers that before PA 22/30356/CONDET can be determined, a number of aspects of the scheme need to be reviewed in order to ensure the proposals deliver the open space specified within the Publicly Accessible Biodiversity Corridor - Design Parameters and to the standards prescribed by the NPPF, upon which planning permission 20/03555/STPLF was determined".

24. A subsequent letter from the Humberside Police dated 23 October 2023 and referring to a site visit on 3 October stated as follows

"I wish to add the following observations which will reduce Humberside Police initial concerns.

I am advised that the bunds are now going to be low nature (no more than 1.4metres in height) and a shallow incline, together with full coverage of plants/shrubs and trees and they will not be accessible, this is essential to prevent anti-social behaviour. Motorcycle

inhibitor gates will be installed at the north-east and south-east part of Long Plantation, (as per our initial request) and inhibitor gates have already been installed at the northern point of Plantation woods off Monks Way East (slip road adjacent to the roundabout) and at the south of the development site.

Humberside Police remain committed to preventing anti-social behaviour and working with the local community but your assurance that the following will be adhered to would be appreciated:

- North-west earthwork has been moved away from the acoustic fence - we would like this to be moved to run parallel to the acoustic fence to prevent areas of concealment between the earthwork and the acoustic fence as outlined in the original design, and the structural native species shrub mix to be either removed or placed to the front of the earthwork.

- To consider placing natural obstacles along the footpath which may include chicanes.
- It is important to consider the eastern perimeter of the biodiversity corridor adjacent to Plantation woods, to ensure that there are no gaps within the boundary line that could provide motorcycle access.

- To ensure a robust locking mechanism is attached to the maintenance access gate at the southern part of the site ('Sold Secure' Gold standard closed shackle padlock/combination padlock is recommended).

I would strongly encourage continued engagement with the local community, including the Parish Council to work with and respond to any concerns regarding this development”.

25. On 13 November 2023, the Claimant queried the change of stance by the Police and pointed out that

“It is unclear as to why Humberside Police now seems content to accept bunds of no more than 1.4m in height fully covered by plants/shrubs and trees, when in its response of 24th November 2022 it requested that the bunds, even at a maximum height of 1.0m, were removed from the scheme, stating that it was important to reduce ‘any opportunity for motorbikes/quad bikes to use them,’ and that by removing them ‘would devoid potential hiding places and provide a clear line of sight for the user along the route of the footpath’. Humberside Police also stated in November 2022 that ‘planting should not impede the opportunity for natural surveillance’. And yet in October 2023 it is supportive of higher bunds with plants, shrubs and trees thereon.

Humberside Police states in its response that by providing appropriate gates at the northern and southern end of Long Plantation, the motor and quad bikes can be prevented from accessing the bunds to prevent anti-social behaviour. However, there are numerous access points both north and south of the railway line off Brickyard Lane, not all of which will be closed when/if the current warehouse is built. Access is also possible from the foreshore.

But of greater concern to current users of the Public Open Space is the potential for persons, with or without bikes, to conceal themselves between the bunds. Although the bunds may be no more than 1.4m in height the height difference between the northern side of a bund and the southern side is increased by the sloping ground they would be built upon. In the view of The Landscape Partnership, independent consultants commissioned by the Parish Council, ‘the proposed earthworks could not be considered to be profiled to provide gentle slopes’, contradicting the ‘shallow incline’ stated by the

Police. Bunds 1.4m high with shrubs/trees will therefore have the impact of a much higher structure than a 1.4m on flat ground with no planting. In short, what is proposed with 1.4m high, planted bunds, is not safe.

A request is also made by the Police for that there be no gaps in the boundary line between Long Plantation and the Public Open Space to prevent motorcycle access. It is not clear how the Police intend this to happen – would they require fencing or more planting which will take many years to establish, if it does at all? North Ferriby Parish Council respectfully reminds the Police that this is legally defined Public Open Space, and by having ‘no gaps’ would also prevent access by pedestrians. There are gaps proposed where paths onto the POS emerge from Long Plantation. Additionally, a substantial ‘gap’ is required into the Long Plantation to allow maintenance of the woodland and The Yorkshire Wolds Way, using plant and equipment to reduce or fell trees as required for the health of trees and safety of the public. It is also important to ensure that the POS is accessible by persons with mobility issues and who may use wheelchairs/mobility scooters if the paths to be constructed are of an adequate standard and without the natural obstacles the Police wishes, though does not define, to see to prevent use of the paths by motorbikes. It is therefore the view of this Parish Council that preventing bikes from accessing the bunds from the east of the boundary line and providing natural obstacles along footpaths would be impossible.

It is also the view of this Parish Council that it would not be in the interests of public safety to only have access to the POS by way of the proposed footpath links, and that once the illegally placed waste spoil has been removed from the boundary line, the informal access points that existed prior to the spoil being dumped be allowed to reestablish in locations where users of the POS determine. This allows alternative means of leaving the POS, and also exiting the woodland, should there be an urgent need to do so.

Finally, in its first bullet point, Humberside Police requests an alternative location for the north-west earthwork/bund. This will of course require a new drawing to be submitted. North Ferriby PC wishes to be re-consulted on this revision and any others that will hopefully be made after taking this community’s views into account. It is in the best interests of Humberside Police to design out problems from the outset both for the safety and wellbeing of local residents and to prevent an increase in calls for service to the Force.

It is the view of North Ferriby Parish Council that the only effective way of doing this is to revert to the Police’s original position of 24th November 2022 and to remove all bunds from the design”.

26. On 1 December 2023, the Claimant again posted on the Defendant’s website the results of the consultation questionnaires filled in by 300 local households. The results of the survey indicated, as set out above, that not only did the respondents not want bunds but also, in addition to the figures quoted above, 86% of respondents agreed or strongly agreed with the statement that “the Open Space should be planted with trees to increase the width of Long Plantation”.

27. The Defendant issued its decision notice on the application to discharge condition 7 on 7 February 2024.

28. In addition to the grounds of challenge which follow, it is to be noted that it is not apparent from the Defendant's decision notice on the application to discharge condition 7 that any of the measures required by the Police have been in any way secured as part of the proposals. So even if the Interested Party's proposals for the Open Space Land including substantial soil bunds were implemented, there is no mechanism on the face of the decision for securing the "designing out crime" measures required by the Police.

29. Condition 7 on the planning permission dated 14 February 2022 provides as follows:

7. The development hereby approved shall not be occupied until a detailed scheme for the provision of the open space, identified as the 'Publicly Accessible Biodiversity Corridor' as shown on drawing no. 9619-L-01 Rev G, and following the parameters contained within the 'Publicly Accessible Biodiversity Corridor - Design Parameters' dated 26 March 2021, has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall include:

- i) Detailed landscape drawings including planting plans,
- ii) Public routes including any hard surface materials required to construct the routes,
- iii) Finished ground levels for the proposed open space only.

The development hereby approved shall not be occupied until the scheme has been approved by the Local Planning Authority.

Any public routes of hardstanding within the Publicly Accessible Biodiversity Corridor and forming part of the approved scheme shall be delivered prior to the occupation of the building.

The planting contained within the approved scheme shall be carried out in the first planting and seeding season following the first occupation of the building hereby permitted or the completion of the development, whichever is sooner.

The open space shall remain open to the public after the completion of the 'Publicly Accessible Biodiversity Corridor' and shall not be closed.

[Reason:] This condition is imposed to ensure a satisfactory provision of open space is to be provided in the interests of the amenity, health and wellbeing of future residents as required by Policies ENV1 and C3 of the East Riding Local Plan.

Grounds of challenge

30. In purporting to discharge condition 7 the Defendant erred in law in that it

(1) failed to give reasons for its decision, contrary to the requirements of reg. 7 of the Openness of Local Government Bodies Regulations 2014 (SI 2014/2095);

(2) in the premises and in any event, (a) failed to take into account the Claimant's representations and the reports of the Landscape Partnership demonstrating the

inadequacy of the Interested Party's "open space" proposals for the Open Space Land, despite the Defendant telling the Claimant in a letter dated 21 December 2023 that those matters would be taken into account (b) failed to take into account or and/apply relevant development plan policies and the provisions of the NPPF on open space;

- (3) failed to take into account the fact that the soil to be used for the creation of substantial earth bunds was deposited unlawfully and therefore liable to enforcement;
- (4) failed to take into account the Claimant's parishioners' (and others') public rights to use the Open Space Land as conferred by the trust created under the Open Spaces Act 1906 when the Open Space Land was transferred to the Defendant under the 2004 section 106 agreement; and
- (5) failed to take into account the risks of crime and anti-social behavior identified by the Police which will remain despite the Police's subsequent change of stance;
- (6) in any event, failed to secure the measures required by the Police in their letter of 13 October 2023 by any legally enforceable means (even accepting, which the Claimant does not, that those measures would be effective if implemented);
- (7) further or alternatively, and to the extent necessary to make this contention in the light of what follows, having regard both severally and in combination to the matters set out in the grounds above, the Defendant's decision was manifestly unreasonable.

31. The 2014 Regulations apply to decisions which "affect the rights of an individual", see R (Newey) v. South Hams DC per Garnham J at paras. 34-39 (discharge of a planning condition is not a "grant of permission or a licence" under reg. 7 but does "affect the rights of an individual").

32. As noted above, the Claimant's parishioners have public rights of recreation over the Open Space Land which were created by the trust arising under the Open Spaces Act 1906. Such rights are analogous with public rights in village and town greens and over public highways, see R (Day) v Shropshire Council [2023] UKSC 8 per Lady Rose JSC at para. 58.

33. The imposition of the requirement to give reasons means that those reasons cannot be supplied after the event, save for elucidation of reasons already given, see R (Shasha) v. Westminster CC [2016] EWHC 3283 (Admin) at para. 39, citing R v. Westminster CC ex p. Ermakov (1995) 28 HLR 819.

34. In Newey, Garnham J quashed the purported discharge of condition in that case because of the absence of reasons, see at para. 39:

“39. ... in my view, there was here an obligation pursuant to reg. 7 to provide a written record of the Decision. There was no written record here and accordingly the Council were in breach of its obligations under the regulations. It is common ground that if I so find the only appropriate remedy is to quash the decision and remit it to the Council for re-decision.”

Conclusion

35. The Claimant seeks an order quashing the discharge of condition 7 by the Defendant on 7 February 2024 (ref. 22/30356/CONDET). The Claimant also claims Aarhus Convention claim costs protection. It was confirmed in Cron dall Parish Council v. Secretary of State CO/3900/2018 that a body such as a Parish Council is a “member of the public” for the purposes of CPR 45.41(2)(a) on Aarhus Convention claims.

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