AGENDA ITEM 6a

DR/27/15

committee DEVELOPMENT & REGULATION

date 25 September 2015

ENFORCEMENT – MINERALS AND WASTE DEVELOPMENT
Proposal: **Construction of an abattoir wash water storage tank and de-odorising ring apparatus including associated equipment and container**.
Location: **Little Warley Hall Farm, Ranks Green, Fairstead, Chelmsford, Essex CM3 2BG**
Ref: **ESS/60/13/BTE**
Planning Inspectorate reference: **APP/Z1585/C/14/2220003**
Applicant: **C Humphreys and Sons**

Report by Director of Operations, Environment and Economy and Director for Essex Legal Services

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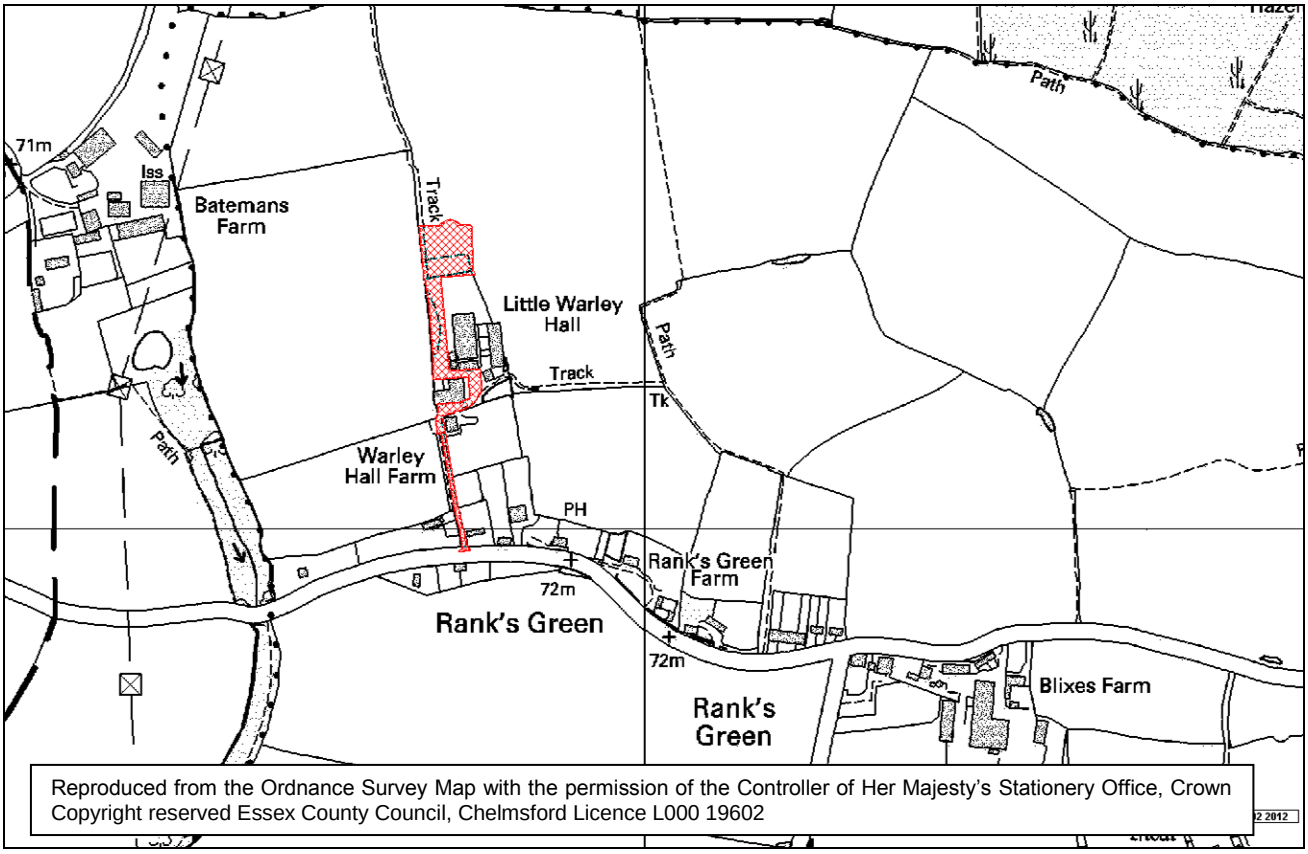

1. BACKGROUND AND SITE

At the March 2014 Development and Regulation committee meeting it was resolved that the application for the retention of the circular tank, de-odorising ring; equipment container; and associated hardstanding to facilitate the storage of abattoir wash water, together with the use of the existing agricultural access track to access the wash water tank be refused planning permission.

The committee also resolved to take enforcement action in relation to the tank which had already been erected on site and was in use and an enforcement notice was issued on 7 May 2014. This required the use of the tank to cease by 7 June and for the circular tank, the container and all the equipment to be removed by 5 September 2015.

The applicant appealed the enforcement notice on grounds (a) that planning permission should be granted and (f) that the steps exceed what is necessary to remedy a breach of planning control or remedy any injury to amenity.

The Secretary of State issued a decision on 19 May 2015 upholding the county council's enforcement notice and refused the application for deemed planning permission.

The site itself is located in Rank's Green, circa 2km north-west of Fairstead, in a largely rural area (in terms of development and majority land use). Accessed from a lane off Mill Lane, the site is situated at the northern end of the farmyard with arable fields to the north, east and west of the site.

Residential properties line the lane from which the farm is accessed. The closest residential property is approximately 150m south of the development (tank).

2. LEGAL CHALLENGE

A court application has been made to the High Court (reference: Mr Paul Humphreys v Secretary of State for Communities and Local Government (1) and Essex County Council (2), CO/2987/2015 and CO/3254/2015).

The court application is made against the Secretary of State. The County Council is joined in to the proceedings as 2nd defendant.

The claim has been made under the Town and Country Planning Act 1990 challenge provisions (in sections 288 and 289) under which a challenge can be made within 6 weeks of a decision. In this case the claimant is also seeking permission to make their challenge late as the 6 weeks had passed for the s289 claim by the time the claim was issued.

The procedure on the section 289 appeal is much the same as for judicial review with a permission stage before the matter can go forward to hearing. Due to a technicality the court office advised the claimant that they needed to make two separate applications which was subsequently done. The two matters are now going forward together.

The principal heads of challenge are as follows:

- The inspector failed to take into account correctly the nature and impact of the analysis of the application by ECC's officers, the Environment Agency and the air quality consultant;
- The inspector gave more weight to her site view from one location instead of the detailed report of the Environment Agency;
- Only one policy was recited in the reasons for the refusal – W3A. The inspector didn't provide reasoning to show how the actors in W3A were applied;
- Alternatively, before relying on policies other that W3A the inspector should have invited comments from the parties on the applicability/weight to be accorded to those policies;
- The inspector applied the criteria 'any harm' rather than 'any unacceptable harm' in relation to smell. This was not consistent with the NPPF and policy RLP36;
- The inspector had no information on which to conclude the deodorising unit 'could be exacerbating' the smell. The inspector also failed to consider whether it might be overcome by a condition;
- The inspector accepted that wash-water tanks condition could frequently be imposed in any application which was not retrospective but then differentiated, without explanation, the position on a retrospective application. It was possible to take account of 'all the merits' of the application in the same way. The inspector also ignored the Environment Agency and ECC air quality consultant views on the point;
- The inspector applied PPS10 in terms of national policy. This was the wrong policy as at 19 May 2015 this had been replaced by National Planning Policy Waste;
- In dealing with the ground (f) challenge the inspector appeared to accept the wash-water tank could be put to other productive uses on the site but concluded that the purpose of the notice is to restore the land to its condition before the breach of planning control AND remedy injury to amenity caused by the breach. On that basis the inspector rejected the ground (f) appeal, but there are 2 limbs to this which operate as alternatives on which the inspector had to decide on sufficient evidence.

The remedy claimed is that the matter should be remitted to the Secretary of State for further consideration. This would usually mean a new inspector and a new decision if the claim is successful. The Planning Inspector's decision used the written representations and site visit procedure.

The claimant has confirmed that the Government Legal Department, acting for the Secretary of State, has returned their acknowledgement of service indicating they will contest the claim.

ECC has acknowledged the claim but indicated that it will take a passive approach in the matter. ECC consented to the joining of the two parts of the claim and the vacation of the initial hearing listed for 29 July 2015.

No further information has been received since the initial claim form apart from a

second claim form for the s289 part of the application.

The court has now scheduled a hearing for 24 November 2015 which is expected to deal with both claims.

The Secretary of State's legal representative indicated on 25th August that it remains the Secretary of State's intention to defend the case. No further details of the grounds of defence have been provided but the legal representatives (the Government Legal Department) has indicated that it would not generally make any submissions until the skeleton arguments fall due, which in this case is 10 November 2015, in advance of the hearing of 24 November 2015.

ECC will be served with the skeleton argument once this is prepared. The Government Legal Department has also confirmed that it will keep ECC informed should its position change.

3. CURRENT POSITION

As stated, an enforcement notice was issued seeking the removal of the tank to prevent permanent harm to amenity and the locality. An appeal was lodged, by the applicant, against the refusal of planning permission and the enforcement notice issued by Essex County Council; the case was determined by way of written representations. The Inspector appointed by the Secretary of State for Communities and Local Government to determine the case issued her decision on 19th May 2015 which was to dismiss the appeal and uphold the enforcement notice. To date the enforcement notice has not been complied with and it is an offence not to comply with an enforcement notice, once the period for compliance has elapsed.

Whilst the Waste Planning Authority may now to choose to prosecute for this offence, any prosecution would not remedy the breach of planning control as, upon conviction, the court has no power to require that the requirements of the Enforcement Notice are upheld – i.e. the tank is removed. Furthermore, as the decision by the Secretary of State is currently under challenge by judicial review, it would be pragmatic and reasonable to delay any decision to prosecute for non-compliance with the enforcement notice until after the outcome of judicial review.

RECOMMENDATION

1. That any decision to prosecute for non-compliance with the Enforcement Notice issued on 7 May 2014 is deferred until the outcome of the judicial review (reference CO/2987/2015 and CO/3254/2015) is known and:

2. That a further update is provided to the Committee following the decision of the court.

LOCAL MEMBER NOTIFICATION:
Braintree - Witham Northern