SCHEDULE OF COMMITTEE UPDATES

204133 - PROPOSED VARIATION OF CONDITION 2 OF PLANNING PERMISSION 163327 (ERECTION OF A BARN EGG UNIT FOR FERTILE EGG PRODUCTION) TO REGULARISE AS BUILT DEVELOPMENT. AT WHITE HOUSE FARM, WATERY LANE, HAY-ON-WYE, HEREFORD, HR3 5TB

For: Mr Morgan per Mr Ian Pick, Station Farm Offices, Wansford Road, Nafferton, Driffield, East Yorkshire YO25 8NJ

ADDITIONAL REPRESENTATIONS

Three additional representations have been received from Helen Hamilton (Marches Planning) as below:

14th October 2021

On behalf of local residents

I have read your officer report on planning application ref. 204133 for next week's planning committee and I am concerned that it misleads the committee on a number of points, as follows:

1) Statutory Provisions

You state at paragraph 6.1 that this is an application under s.73 of the Town and Country Planning Act 1990 (TCPA) and at paragraph 6.2 you cite the provisions of s.73.

This is not a s.73 Application. As you acknowledge at the end of paragraph 6.4, the power to to authorise this development derives from s.73A of the TCPA. The application must, therefore, be determined under the provisions of s.73A.

For clarity, this is a retrospective application to regularise development already carried out. S.73 applies only to prospective development.

The provisions of s.73A are as follows:

*Planning permission for **development already carried out**.*
(1)On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.

(2)Subsection (1) applies to development carried out—
(a)without planning permission;

(b)in accordance with planning permission granted for a limited period; or
(c)without complying with some condition subject to which planning permission was granted.

(3)Planning permission for such development may be granted so as to have effect from—

(a)the date on which the development was carried out; or

(b)if it was carried out in accordance with planning permission granted for a limited period, the end of that period.]

An application under s.73 controls "Determination of **applications to develop land** without compliance with conditions previously attached." It thus relates to prospective development. If s.73 applied to retrospective applications, s.73A (c) would serve no purpose.

It is important to distinguish between the two sections of the Act, because, while under s.73 (2) (as you observe in your report) - "*the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted",* there is no such limitation on a s.73A application.

The Courts have held that when determining an application under s.73A, the LPA is "*is bound to consider the planning merits of permitting the development to continue*." (Sullivan J. in Wilkinson v. Rossendale Borough Council [2002] EWHC 1204 (Admin))

Sullivan J explained:

"Perhaps the best starting point is that an application for planning permission under section 73A is in all respects, save that the development will have been commenced, a conventional planning application. In dealing with such an application, the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material considerations."

Consequently, it should be made clear to the committee members that they are required to decide whether the unauthorised development as a whole is acceptable, contrary to your advice at paragraph 6.3 that *"the local planning authority can only consider the matter of the conditions and not the principle of the development granted."*

2) Scope of the Application

At paragraph 1.4 you say: *"This application seeks the variation of condition 2 of this planning permission."* In fact the description of the application (which would appear on the decision notice if permission is granted) is *"Proposed variation of condition 2 of planning permission 163327 (Erection of a barn egg unit for fertile egg production)* ***to regularise as built development."***

Consequently, if this permission is granted, the LPA would have accepted the current built form of the development. Condition 2 required conformity with the plans submitted with the 2016 application. Approval of this development would authorise the revised plans, which show the development as built, including the materials used.

At paragraph 1.5 you quote the application form as saying: *"there is minor changes between the approved plan and as built development in that the building has 13 roof fans instead of 7 as shown on the approved plan and the attenuation pond is large than shown on the approved plans. The application seeks to amend the location plan, site plan and elevation drawings to reflect the changes".* This statement is not the planning application description and so has no force. The drawings that would be approved illustrate much more significant changes than described here: the buildings are significantly larger than the approved drawings and have windows, the hardstanding is more extensive and the roof is of a highly reflective material, making the building unacceptably prominent in the landscape.

At paragraph 6.15 you assert that the glossy roof of the building *"is controlled, as per the committee resolution, by a condition*." And despite photographic evidence and several

objections, including from the Parish Council, objecting to the glossy finish of the roof, you state *" a breach has not been identified by the Councils enforcement team to date, if this came to light, then the breach of the condition could be investigated and appropriate enforcement action taken at the time."*

The Officer Report says the applicant's builder has confirmed to the planning enforcement team that the roof is matt, contrary to the evidence. You also say that the application does not seek to vary or alter condition 6. It does not need to if the Council approves the built form of the development as the materials are shown on the application drawings. Having approved the "as built" development, the LPA could not then take enforcement action against it. This could be addressed by a new condition requiring the roof to be painted or replaced with a matt finish within a specified period. However, the increased size of the buildings and other alterations could not be addressed by condition, short of requiring demolition and the removal of hardstanding.

As it is, you have proposed to reinstate Condition 6 as Condition 5. This says:

"Notwithstanding the approved plans and documentation, prior to the first use of the buildings for agricultural purposes all external elevations of the main building (including the doors any louvres and steel supports) shall be finished with an Olive Green (BS 12B27 / RAL 100 30 20) matt colour and the roof of the building ridge vents & feed bins with a Merlin Grey (BS 18B25 / RAL 180 40 05) matt colour."

Since the buildings have already been in use for a substantial period, this condition could not now be properly implemented.

3) Minor Material Amendment

At paragraph 6.40 you say *"having made the assessment of the proposals and their impacts, officers are content that the proposals, relating to the request for variation of the approved scheme are minor material amendments and as such it is appropriate to consider them having regard Section 73 of the Town and Country Planning Act 1990."*

As I explained above, s.73 of the TCPA does not apply to retrospective development so I cannot see how you can argue that the claimed limited scope of the departures from the planning permission enable the LPA to determine the application under legislation that does not apply to this development. You say *"this is also the appropriate course of action to regularise retrospective development having regard to Section 73A of the Town and Country Planning Act,".* Neither the planning practice guidance nor s.73A itself make any such provision.

In fact there is no statutory provision for a minor material amendment in any planning legislation.

Richard Harwood QC explains in "Planning Permission" (Bloomsbury Press 2016):

"There is sometimes reference to s.73 applications as 'minor material amendment applications' but that expression has no legal status or effect…The Planning Practice Guidance refers to 'Amending the conditions attached including seeking minor material amendments"…recognising that it is simply a s.73 application. There is no need for the change proposed in a s.73 application to be minor: it just needs to be within the parameters discussed above. The expression 'minor material amendments' is best avoided."

4) Prospective/Retrospective

You refer throughout the officer report to the “proposed development” - see paragraphs 1.9, 1.11, 4.3.2, 4.7, 6.14, 6.17, 6.23, 6.41, the Habitats Regulations Assessment and plan extracts on pages 3 and 4.

The report should make clear that the application relates to development that has already been carried out.

5) Habitats Regulations Assessment

S.63 of the Conservation of Habitats and Species Regulations 2017 requires:

(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a)is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
(b)is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
…
(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

The Officer Report has not explained to members that approval of this application would result in the granting of an entirely new planning permission. In granting that permission, the LPA must assess what the impact of the development will be on the River Wye SAC (and biodiversity in general) and whether those impacts can be avoided or mitigated.

Paragraph 6.28 refers to the manure management plan submitted with the 2016 planning applications and asserts that this satisfies s.63 of Habitats Regulations. But the manure management plan was not a condition of the planning permission and so did not ensure that the development would not cause water pollution. The application site discharges directly into the Hardwick Brook, which drains to the River Wye SAC some 5 km downstream. Citizen science monitoring has shown high phosphate levels in the brook and since the HRA was carried out for the 2016 application, there has been a serious deterioration in the condition of the River Wye, with the loss of up to 90% of one if its key habitats, Ranunculus fluitans.

In addition, local residents report the farmer has not been complying with the manure management plan and has been importing and spreading pig manure, contrary to the plan.

The HRA screening that has been carried out relies on the applicant’s use of DEFRA’s SCAIL modelling to assert that the development is not having an adverse air quality impact. The Institute of Air Quality Management (IAQM) makes clear that the SCAIL data cannot be relied on as “beyond reasonable scientific doubt” evidence. IAQM says in its Air Quality Impacts on Nature Sites guidance: *"Case law (see the Moorburg case) suggests that it may no longer be sufficient to rely solely on the background data provided by Defra and APIS in all assessments, as these provide ‘average’ data and are typically based on emissions data for a time period which does not encompass newly operating facilities."*

There was no ammonia assessment of the 2016 application, so it was not demonstrated that the development would not have an adverse air quality impact on the River Wye (or any other habitat).

APIS Data shows that the mean nitrogen deposition rate on the application site for the period 2017-2019 (the most recent data available) was 31.22 Kg N/ha/year, two to three times the critical load of 10-15 kg per annum for quercus (oak) dominated woodland. Natural England's Conservation Objectives for the River Wye SAC advise *"There are currently no critical levels for freshwater species and aquatic habitats and in this case we defer to the surrounding vegetation type such as transition mire or oak woodland. In both cases the critical load for nitrogen is exceeded within the Wye catchment and, therefore it can be presumed that there is a requirement to restore to site target."*

6) Amenity Impacts

I am surprised that the Environmental Health Officer has raised no objections on amenity grounds, given that there have been complaints about intense and unpleasant odour from this development, which I have experienced myself. The statement at paragraph 6.36 that "*no conflict with policy SD1 or RA6 is detected in respect noise, air quality and odour having regard to amenity of local residents"* is incorrect and misleading.

As several objectors have pointed out, the fact that the development already exists provides an opportunity to monitor its actual impact and for the LPA to impose planning conditions, for example requiring the use of air scrubbers to mitigate adverse air quality impacts.

7) Appearance

The report's conclusion that the development is compliant with the Core Strategy contradicts the expert view of the previous planning and landscape officers that "*harm the prevailing character of the landscape hereabouts and cause visual harm contrary to policies SS6, LD1, RA6 and SD1."*

Your report quotes the decision of the committee in 2017 as *"the impact of the development on the landscape character and appearance was not considered adverse; and the mitigation proposed, including the landscaping scheme and colour of materials would adequately limit any adverse impacts"*

In fact the reason for approval was: - *"The Planning Committee considered that the impact on landscape character and appearance would be not be "major adverse" in terms of degree of significance. Indeed Members considered that the landscape impact would be moderate or less, that any adverse impacts would be adequately mitigated by the proposed landscaping scheme and colour of materials and that in the planning balance, given the economic and social benefits, that the proposal represents sustainable development."*

This is significantly different. The committee accepted that the development would have an adverse impact on the landscape but decided that the benefits of the development outweighed that harm.

Since the conditions seeking to reduce the adverse landscape impacts of the development were not complied with and the Applicant is seeking to retain the development constructed in breach of those conditions, it is inconsistent to suggest that the development is compliant with the Core Strategy and in particular Policy LD1.

One of the concerns raised by the 2017 officer report was the extent to which the building and hard standing extended beyond the existing building (building 87m and hardstanding 95m). The building extends even further than this, nearly 90m from the old farm building and the hardstanding about 100m, but this is not mentioned in the Officer Report. (In fact, the measurements at paragraph 1.11 suggest that the building is the approved length. It is 2m longer - as well as 1.5m wider).

It appears that the current landscape officer has not actually visited the site and so has based his conclusions solely on the drawings submitted by the applicant.

You have stated in correspondence that the glossy roof is of a material that is designed to fade to matt in time. The applicant has not provided any evidence to the committee - which is tasked with making this decision - to demonstrate this and it is frankly implausible. I attach photographs of a poultry unit at Uphampton in the north of the County. The building was extended and re-roofed in 2010/11 following planning permission ref. N102126/F. The roof remains shiny after more than ten years.

8) Conditions

As noted above, condition 5 cannot be implemented because compliance was required before the development was brought into use.

There are similar errors in other conditions:

Condition 2 is required to be implemented *"prior to commencement of the development hereby permitted."*

Condition 3 is required to be implemented "*Prior to the first use of the building".*

The landscaping conditions contained in Condition 6 are required to *"be carried out in the first planting season following completion of the development or first use of the building for agricultural purposes (whichever is the sooner)."*

I would be grateful if you would revise the Officer Report to address the errors identified above and to correctly advise the committee.

Email dated 18th October

Further to my email of 14th October, I understand that the site visit will proceed tomorrow and the case will go to committee on Wednesday.

I do not understand how the committee can make a decision on this application without a much wider consideration of the planning merits of granting a new permission for the unauthorised development that is provided for by your officer report. Can I ask that you explain this in an update to the officer report with reference to the two attached legal cases: Wilkinson v Rossendale Borough Council [2002] and Lawson Builders v SSCLG [2015]

In Wilkinson, the LPA had granted retrospective planning permission for a tarpaulins business without a personal planning condition that had been attached to an earlier planning permission. In doing so, it had failed to consider the planning merits of allowing the continued use of the site.

Sullivan J. said: "The report simply lost sight of this fundamental issue and instead concentrated on the question whether condition 2 of the 1976 planning permission complied with the advice contained in circular 11/95…

As I understand the submissions made on behalf of the Council, it considered that because this application for planning permission was an application to remove condition 2, the Council in considering the application was in effect subject to the same constraints as those set out in section 73 subsection (2). Thus, whatever it did, it was not allowed to "wholly undermine" the 1976 permission."

He concluded:

"The underlying approach of the Council to this application for planning permission contains so many misconceptions that it is difficult to know where to begin. Perhaps the best starting point is that an application for planning permission under section 73A is in all respects, save that the development will have been commenced, a conventional planning application. In dealing with such an application, the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material considerations. (See section 70, subsection (2)). Section 54A of the Act is also applicable.

Absent any provision preventing the local planning authority from considering the planning merits of the development proposed in the application, it is bound to consider the planning merits of permitting the development to continue…

Thus, far from engaging with the relevant policies in the development plan and advising members as to whether or not the proposal was or was not in accordance with policy DC1 for the purposes of section 54A, the report simply side-stepped all of those highly material planning considerations. This was another fatal flaw in the decision-making prose."

In Lawson Builders, the Court of Appeal responded to the Secretary of State's argument that there was some fluidity between s.73 and s.73A of the Town and Country Planning Act 1990.

Pitchford LJ giving the lead judgement, said:

"Once it is understood that any grant of planning permission consequent upon this application had to be retrospective in its effect, it is clear that the power to make the grant was derived from section 73A TCPA. Section 73A(1) provides that on "an" application for planning permission, the permission granted may "include" permission in respect of development that has already been carried out."

He continued:

"I accept that, theoretically, section 73 enables an application to be made whether the development has not yet commenced, or is in progress, or has been completed. If the development has not yet commenced, a new grant of permission will take effect prospectively. If the development is partially completed the permission may take effect prospectively or, upon exercise of the section 73A power, both retrospectively and prospectively. However, if the development has been completed in breach of a pre-condition, (i) there remains no proposed development in respect of which any permission can be given and (ii) since there is no proposed development, any conditions, as varied, could only be imposed as a current obligation. The power to make a grant of permission in these circumstances is derived from section 73A and section 70 TCPA (see below, paragraph 27)...

This is a case within the recognised exception: the breach of the 2004 planning permission could not be undone." (my emphasis)

I attach the decisions with relevant paragraphs highlighted for ease of reference.

As with the development in the Lawson Builders case, the poultry unit at Archenfield has been built in breach of conditions that can no longer be complied with. The building is not in accordance with the approved plans and could not be made to comply without substantial, if not complete, reconstruction; Condition 5 controlling the matt finish of the buildings was required to be complied with prior to the first use of the buildings and the landscaping plan was not carried out in the first planting seasons following completion.

The landscaping condition was capable of retrospective compliance, the other conditions are not. The 2017 planning permission is consequently not, contrary to the claim in your officer report, a material consideration. The permission is no longer valid.

Email received 19th October 2021

I have rechecked the plans and see the approved building appears to be the correct width. However, the height is 5.5m, not 5m as stated in your report and the feed bins appear to be about 0.5m taller than the approved drawing.

I look forward to your clarification on the legal points.

OFFICER COMMENTS

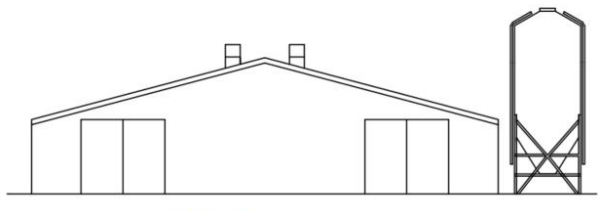
The application concerns minor changes between the approved plan and as built development. These are carefully set out in the report and were pointed out to members during the committee site visit on 19th October 2021

The application seeks to amend the location plan, site plan and elevation drawings to reflect the changes. For clarity and to amend the comment at paragraph 1.11 (correct error to ridge height)

The building dimensions have been checked (and scaled from the submitted plans and are as follows:

	163327	**204133**	**Change**
Width	18900mm	18900mm	No change
Length	105400mm	106960mm	+1560mm
Eaves Height	2950mm	3000mm	+50mm
Ridge Height	5520mm	5500mm	-20mm
Feed Bin Height	7600mm	7500mm	-100mm

Materials are detailed on the submitted plans as per extract below:



Materials.
Steel Portal Frame.
Walls - Profile Sheeting in Olive Green
Roof - Profile Sheeting in Merlin Grey
Fan Chimneys - Black Plastic
Feed Bins - Merlin Grey Plastic
Doors - Olive Green Steel Sheeting
Windows - Brown uPVC

I would also draw members attention to the suggested conditions (re-imposed from 163327) that seek to control the materials (section 6.15 – 6.16) but to assist with clarity officers would suggest the following condition is included in lieu of condition 5 of the recommendation:

Notwithstanding the approved plans and documentation, the external elevations of the main building shall be finished as follows:

Walls – Profile sheeting in Olive Green (BS 12B27 / RAL 100 30 20) matt colour
Roof – Profile Sheeting in Merlin Grey (BS 18B25 / RAL 180 40 05) matt colour.
Fan Chimneys – Black Plastic
Feed Bins - Merlin Grey (BS 18B25 / RAL 180 40 05) matt colour
Doors –Steel Sheeting - Olive Green (BS 12B27 / RAL 100 30 20) matt colour
Windows – Brown uPVC

Reason: To ensure a satisfactory appearance to the development in the landscape, in accordance with policies SS6, LD1, RA6 and SD1 of the Herefordshire Local Plan Core Strategy 2011-2031.

This application can be considered under s.73A TCPA 1990 as the works were carried out before the application was submitted and the application is therefore retrospective. It is considered that the amendments to the development are minor material amendments as a matter of planning judgement and therefore fall within the remit of section 73A TCPA 1990. –

This application made under s.73A does not require the planning merits of the whole development to be considered again. These have already been considered as part of the grant of the original planning permission reference number 163327.

Officers would refer members to the report that considers the impacts of the development including amenity, appearance, landscape and drainage have also been considered and consultations undertaken with the relevant Council departments on these issues.

Noting the representation above, officers also sought some further clarification on the matter of odour.

For reference – the committee report for 163327 stated:

Odour

6.43 The application is accompanied by an odour dispersion modelling study and refers to the 'Guidance on the assessment of odour for planning' published by the Institute of Air Quality Management as well as the Environment Agency guidance H4 Odour Management.

6.44 The Environment Agency H4 Odour Management guidance classifies odours from intensive livestock as moderately offensive and sets a benchmark odour criteria of 3.0 ouE/m3 (European Odour Units per metre cubed). The modelling, which takes into account meteorological modelling finds that the closest receptor ('Archenfield Cottage') would only experience a maximum 98th percentile hourly mean odour concentration of 1,.27 ou/Em3. Other receptors would experience a significantly lower level.

6.45 Therefore I am satisfied that the occupiers of Archenfield Cottage together with other occupiers of other dwellinghouses in the vicinity would not suffer an undue loss of amenity by way of odour. As a consequence I conclude that there would not be conflict with policies SS6 and SD1 as far as they relate to the impact of odour upon residential amenity.

Noise

The Environmental Health Officer reviewed the comments made in the above representation and has made the following comments:

I have reviewed the application with reference to odour as requested. The odour report supplied with the 1633327 remains relevant with regard to the number of birds and the egg laying function. As far as I can tell there has been no intensification of the use of the site nor change in other practices. The application to vary the condition relates to the use of 13 roof fans rather than 7. Essentially, with regard to ventilation

they will be performing the same function over the year ie to regulate the indoor temperature for the birds. Receptors closest to the unit – identified as 1- 4 in the odour dispersion modelling provided with 163327 have between 0.44 to 1.27 $ou_E/m^{3.}$ for the 98th percentile hourly mean odour concentration This is significantly below the Environment Agency's benchmark figure of 3.00$ou_{E/m}^3$ for moderately offensive odours and to a degree reflects the fact that the numbers of birds in the proposals sheds are relatively low (<15,000) and that egg laying sheds are emptied and thoroughly cleaned once a year unlike broiler units which are 7-8 times a year.

Given this set of circumstances I had no cause to consider that an increase in the number of fans would result in significant - indeed if any - increases in odour emissions to take the proposal over the 3.00 $ou_C/m^{3.}$

I have interrogated our database and find that we have had one complaint from one domestic property regarding odour in summer of 2020 but the complainant declined to want to pursue this using our standard Statutory Nuisance procedures so we have no information regarding frequency, duration, extent etc. Officers visited the complainant but did not witness any odours at the time of the visit.

Officers note the submission of and inclusion of caselaw in the representation and have reviewed this submission carefully; however, the report considers the proposed changes in the context of the approved plans against the policies of the Development Plan – taking into account any material considerations. The report and site visit have ensured that members are aware of the retrospective nature of proposals that are included in this request for a variation of the approved plans. Members have been made aware of the proposals that were approved under application 163327.

The Council considers that the application meets the requirements of s.73A(2)(c) TCPA 1990 as it seeks to vary the plans attached to condition 2 of the original planning permission as the development was carried out without complying with a condition subject to which planning permission was granted.

It is mentioned several times in the officer report that the development has been completed. It is therefore clear that the application is retrospective and should be determined under s.73A TCPA 1990. Section 73 TCPA 1990 allows for the variation of conditions before the development to which the condition relates has been completed. Section 73 is referred to in the officer report as the difference between these two sections of the act is that s.73A TCPA 1990 applies to retrospective applications only. All applications have to be considered in accordance with the development plan and all other material considerations and the officer report considers the application in accordance with these criteria.

<u>HRA</u>

An HRA screening report has been carried out by the Council's ecologist in respect of this application and is included in the Committee report. Any likely significant effect has been screened out.

CHANGE TO RECOMMENDATION

That the following condition is included in lieu of condition 5 of the recommendation:

Condition 5 - Notwithstanding the approved plans and documentation, the external elevations of the main building shall be finished as follows:

Walls – Profile sheeting in Olive Green (BS 12B27 / RAL 100 30 20) matt colour
Roof – Profile Sheeting in Merlin Grey (BS 18B25 / RAL 180 40 05) matt colour.
Fan Chimneys – Black Plastic

Feed Bins - Merlin Grey (BS 18B25 / RAL 180 40 05) matt colour
Doors –Steel Sheeting - Olive Green (BS 12B27 / RAL 100 30 20) matt colour
Windows – Brown uPVC

Reason: To ensure a satisfactory appearance to the development in the landscape, in accordance with policies SS6, LD1, RA6 and SD1 of the Herefordshire Local Plan Core Strategy 2011-2031.