



Notes of a Public Meeting regarding Marlbrook Tip

Monday 10th February 2014 at 7.00 p.m.

Held in the Trinity Centre, Lickey Parish Hall,
411 Old Birmingham Road, Lickey B45 8ES

PRESENT: Councillor J. A. Ruck (Chairman and Marlbrook Ward Member)

Mrs. R. Bamford (Head of Planning and Regeneration Services)
Mrs. S. Sellers (Principal Solicitor)
Mrs. T. Lovejoy (Planning Lawyer)
Ms. F Upchurch (Environment Agency)
Mr. R. Lewis (Environment Agency)
Mrs. A. Scarce & Mrs. P. Ross (Note takers)

Members of the Council in the audience:

Councillors H. Jones, C. McDonald, P McDonald, L. Mallett and K. Taylor

Councillor John Ruck (JR) opened the meeting, gave apologies from Councillor B. Cooper and introduced the officers present.

Presentation

Ruth Bamford (RB) explained that the purpose of the meeting was to discuss breach of planning control/over tipping and issues around the Reservoirs Act, which would be highlighted by Fiona Upchurch (FU) and Roger Lewis (RL) from the Environment Agency's office in Exeter. The presentation would include work the Council had been doing and the issues which have arisen. RB confirmed there would be an opportunity to ask questions at the end of the presentation, but should anyone prefer, officers would be available to discuss any points on a one-to-one basis at the end of the meeting. The presentation, together with the reports referred to throughout the evening would be made available on the Council's website after the meeting. The notes would also be made available in due course.

RB highlighted that a study had been commissioned and carried out by AD Horner which concluded that over tipping had taken place and was in excess of that permitted via planning permission.

FU introduced herself and explained that she worked for the Environment Agency specialising in Reservoir Safety for the whole of England. This evening she would explain the work of her team and how this applied to

Marlbrook Tip. The reservoir was registered in 1987 and reservoir safety was originally the responsibility of the County Council. However the responsibility of enforcing the legislation was passed to the Environment Agency (EA) in 2004. If the capacity of a reservoir is 37,000m³ of water above the natural ground level then it must be registered as a reservoir. The dam at Marlbrook Tip was actually formed by the landfill, which is unusual and therefore makes this a particularly complex site. FU provided information in respect of the legislation which applied to Reservoir Safety, dating back to 1930 and amended in 1975. It was originally put in place following the failure of 2 dams and the loss of life suffered. The civil engineers responsible for checking the registered reservoirs were called Panel Engineers (and registered by Defra) and each reservoir was inspected by them at least every 10 years. They ensure that the owner of the reservoir is responsible for making it safe. It was confirmed that the Panel Engineer was appointed by the owner of the land to carry out the inspection.

The last inspection took place in 2013 and a written report was provided by the Panel Engineer who had been appointed by the owner of the site. The Panel Engineer would be chosen from the Engineers listed by Defra and would have gone through a regular, rigorous appointment process. The report produced included a number of measures to be put in place in the interest of safety and which needed to be carried out. This included a covering of 300mm of restoration soil and seeded to provide a good grass sward. This work needed to be completed within 12 months of the report. FU's role was to ensure that this work was carried out. She had spoken to the owners in respect of carrying out the work in order to protect the land and those who lived in the area. Non compliance was a criminal offence and FU was able to warn and prosecute the owners if necessary. The presentation showed a map which highlighted the worse case scenario should flooding occur as a result of non compliance. The soil would be to protect what was on site, there was a clay cap to water proof it and the soil would stop any further erosion of the clay. This would protect what was inside and stop water getting in it and making it unstable.

FU provided contact details for herself together with other colleagues at the Environment Agency if residents had any other concerns.

RB advised that the Council had heard about the Panel Engineer's report following the last public meeting. The Council had prepared a draft Enforcement Notice to remedy the consequences of the over tipping which included soft landscaping to stabilise the site, contouring works and improvements to drainage, together with the tidying up of the site compound. The Council had used an engineering expert for technical advice and had also taken advice from a barrister. It was during this process that they became aware of the issues around the Reservoir Act.. Meetings had already taken place with the land owner, the Environment Agency and the Water Management Team; however there was a conflict between the Council's approach and that set out in the Panel Engineer's report, including the method and differences in how the contouring was to be carried out. The

Council sought legal advice on what could and could not be done in terms of issuing an Enforcement Notice.

Tracy Lovejoy (TL) explained the Council approach to the issues at the site. They had seen the Panel Engineer's report and it was clear the 2 methods were different and the Council therefore instructed a Barrister for advice on the conflict between the intentions of the Council and the Panel Engineer's requirements which must be implemented by the owner as instructed by the Panel Engineer and the Environment Agency as the regulatory authority.

The Council's barrister had considered the conflict between the Council's powers to serve an enforcement notice and the legislation under which the Panel Engineer made recommendations. It is not uncommon for two statutory regimes to conflict. The Panel Engineer's remit came from legislation which focussed on public safety. The Barrister advised that the Panel Engineer's report reflected the particular remit of the Panel Engineer to consider public safety and therefore covered a specific risk; the Council's approach was broader and based on balancing a wide range factors. There was no ability for the Council to change the recommendations in the Panel Engineers report to deal with these factors.

If the Council were to issue its Enforcement Notice, it would be seen as unreasonable as it would undermine that of the Environment Agency and give the owner two sets of conflicting requirements to comply with. The Court would err on the side of protecting public safety and therefore the Panel Engineer's report would be given priority over the Council's enforcement notice. It would also be unnecessary for both the Council and the Panel Engineer to impose the same requirements on the land owner because the land owner cannot be prosecuted twice for the same set of requirements.

It was therefore reasonable for the Council not to take enforcement action until completion of the Environment Agency work.

Sarah Sellers (SS) provided a comparison of the Council's approach and that of the Panel Engineer. Both approaches shared the same overall aim but with different ways of reaching the conclusion. The slides covered the volume of over tipped material, contours/gradients on the site, soft landscaping works and drainage. The approach of the Council, although broadly in line with that of the Panel Engineer, was more detailed in the works that were required. In respect of the landscaping and contouring, the aim was to smooth out the site and make it a better shape. In doing so it was intended that some existing materials could be re-used rather than bringing new material on to the in contrast to the Panel Engineer, who was requesting a large amount of restoration soil to be brought on to the whole area of the site which had not already been restored to grazing land. The Council was also suggesting work on the existing soil such as adding compost to make improvements rather than bring in more soil. In respect of drainage there were also some similar ideas which the Council had shared with the Panel Engineer, which may be taken into account by the land owner. RB confirmed that the Council had not

issued its enforcement notice but would work with the EA and their enforcement of the Panel Engineer's requirements.

RB then invited questions from the public:

Question - At previous public meetings some residents had wanted to see the material removed and WCC had said they would restore the road and it was understood that money had been put aside for this, would bringing more material on to the site again, which can only mean further disruption for the residents, delay this even further? Removing the soil may not be in the public interest but people may see it as a punishment for the land owner. How many lorry loads would have to be brought on site?

RB this would be dependent on the size of the lorry and the weight would differ dependent on whether it was clay or top soil. It was however estimated with a 7 cubic tonne load that it would need to be approximately 440 per week for a 6 month period.

RL said it was up to the site owner to meet the requirements of the Panel Engineer's report. It was up to him to comply and was not a planning issue at the moment.

Question – The owner breached planning requirements but has been allowed to pick his own Panel Engineer.

FU the list of Panel Engineers is available on the website, they are qualified to do the job and it is a prestigious role. The site owner is limited to choosing from that list, who has been appointed by Defra to do that job. There are also industry standards which they have to meet. 300mm is minimum standard to comply with.

Question – The site is already grassed over and stable, so why change it?

FU the EA will enforce what the expert has said if he says there is the need for 300mm to be there as a safety matter, and that is what will be enforced.

Question – What is meant by soil and who will monitor this? As last time when the Council said he could only bring so much on site he did not do it.

RB 300mm is over the whole site the EA will monitor that there is compliance.

FU it is not that simple, he has a permit and the Waste Team will get consignment notes to say what has gone on site, the Panel Engineer once satisfied that his recommendations had been met and done properly he will issue 1060 certificate to show the work has been carried out.

Question – Will it be monitored and checked?

FU it will be under the jurisdiction of the Panel Engineer. RB confirmed that it would be restoration soil – made up of sub and top soil that was put back on the site.

Question – (Resident Anne Doyle AD) previously the land owner did his own monitoring, who will do it this time? The Panel Engineer is independent, what confidence can the residents have that the site owner will comply with this and when he previously failed to comply with his planning permission and the Council failed to monitor.

Councillor Ruck (JR) confirmed that the EA had taken over the matter and its enforcement so there was nothing else at the moment the Council could do.

AD - Residents were simply concerned with the matter being concluded.

JR it was a matter of safety.

A resident from 39 Marlbrook Lane informed the Council that his garden had been washed away.

Question – (Resident Jeff Evans, chartered engineer) knew the area very well as he had lived locally for a number of years. It appeared that everyone was hiding behind the reservoir issue which had always simply been a pond until the over tipping had started (Mr Evans provided information as to which brooks lead into this) and it was the over tipping which needed to be addressed and the reservoir had been created by this and needed to be got rid of. A further resident provided background information about the site, when it was a quarry and about the various previous owners and what had been “tipped” on the site. He also confirmed that it had never previously been a reservoir and that it should be and originally was a “stream”.

RL it was defined by the law as an artificially created receptacle for water and its retention. Therefore it was difficult when the situation is created by the culvert collapsing, blocking the water channel and a new culvert created. As long as treated and designed to retain the water, it was within the remit of the owner to remove it. Currently they were trying to make the site as safe as possible and this was by sealing the material.

Question – Should consider removing the reservoir and then look at removing the excess soil on the tip. He should pay for the restoration and removal of reservoir.

RB if the owner decided to remove it he could, but he has not done this and we have the Panel Engineers report saying this is what must be done. The Council cannot serve its notice and the EA has to take precedent.

Question – AD we were told that the land owner was been told to put more top soil on there to make it safe, instead of making it bigger the land owner should be told to remove some and then put top soil on. It's a question of aesthetics not just a safety issue. The views have already been distorted and will be obliterated if further soil is put on there. It should then be opened up to the public.

RB the roots will provide stability and it will continue to be private land until further notice. What the Council's work did was to look at cut and fill rather than bring more soil on to the site. This cannot now be done because of the Panel Engineer's report, as it does not recommend removing soil.

JR the problem is the soil has compacted to give stability to the top of the site. SS we have met with the Panel Engineer QCE and held detailed discussions and challenged his approach, but he has responded by sticking to his proposals.

Question – The Panel Engineer's report was March 2013 what has been done in response to that?

FU the owner has done nothing as he did not want to compromise the situation, he has said he will apply for permission and now put things in place.

Question – (Roy Hughes) under the Reservoir Act, how has a pond now become a reservoir, what would the dimensions be if it held the amount of water quoted in your slide?

FU was unable to give exact dimensions. RL a potential 10m depth of water which would spread back over the road, dangerous body of water which would be trapped.

Resident's comments it shouldn't be there and should let nature take its course. The reservoir is being used as a stick to beat us with. Residents also questioned the calculation of the 440 lorry loads of soil over 6 months and how much would be used to cover the area as they wished to clarify what was potentially being brought on to site.

RB was asked to clarify how her calculation had been made, as to the calculation – number of lorries – as surely this would differ according to lorry capacity size. RB said that it was difficult to estimate as the calculation could be done in different ways. Residents said that the number of lorries brought on to site should be stipulated.

Cllr Peter McDonald If the owner had kept to what had been detailed in his application we would not be in this position now and the lorries suggested should be used to remove soil not bring more on to the site. This was a clear failure of the Planning Department and the Chief Executive should be at the

meeting. It should be remembered that residents have previously said they did not want the soil removed due to the lorries going backwards and forwards along the road and only a few have been affected by the landscape. Now we hear that the lorries will be back. The EA are saying that the land owner can be prosecuted, could this have been done before when brought up by residents, as at that time they were told it was not an option as it was likely the land owner would walk away. After all this how can the residents have confidence in what they hear and it appears that the involvement of the EA appears to be stopping the Council from taking any further action. What residents want is for the land owner to be prosecuted and the land put back as it was and for a public inquiry to be held in order to get to the bottom of what has really happened.

42 Marlbrook Lane resident has had experience of the tip and did not want any more soil to come on, it did not need top soil to grow grass on it, as roots would not grow more than 3cm anyway. The reservoir should be got rid of, it was the right time of year to grow on it, where the sheep currently are was best soil, like restoration soil.

FU the area referred to has already been signed off and it was the rest of the site which needed the work carrying out in order to sign it off.

Question – Have they had previous experience of the land owner?

RL a site in Durham has been discussed, but this does not involve a reservoir.

Resident The land was originally sold as Crown Estate, what conditions had the Crown Estate put on it, they should be brought in and a public enquiry held.

JR did not believe that there were any conditions under the sale.

Resident the first tipping rights were to David Tyas – a pumping station would need to be installed.

Resident clarified the position in respect of the Crown Estate, the Crown takes over land which has a problem and back ground information was provided as to how the land became the responsibility of the Crown Estate and how the land should be sold to someone who would put those problems right and should give an undertaking that he would correct the issues.

Question – AD why was the owner given permission to build a golf course, but nothing specific to make the site safe? And we now have the issue of a reservoir which we did not have before?

RL it has been a registered reservoir since 1993 with WCC and has been inspected repeatedly and now it needed to be made safe and the enforcement in place.

Question - What is the timescale for the work to be carried out? From what we have been told there appears to be an implication that it has to be done by March 2014 as a requirement under the Panel Engineer's report, this is obviously not going to happen, what are the issues from this delay?

FU legislation has changed from July 2013 in respect of reservoirs. When you get to the end of the timescale stipulated you would normally serve a notice to give further time and it would become a criminal offence. Therefore in this case it will be the end of March 2014 if no work has been carried out it will go to the Enforcement Panel at the EA and they will discuss it, the EA has no power until that date then they are able to act.

RL they will take into account public interest, proportionality and then agree what action will be taken. The land owner's behaviour will be considered together with what is proportionate. They could write a strong letter, prosecute or issue an enforcement notice. They also have the powers to carry out the work on the land owner's behalf and re-charge the costs and take action to recover them. Based on the information provided in respect of putting restoration soil on the site it could take 6 months.

Question – What measures are in place to stop the reservoir slipping further?

FU that is the whole point of the report.

Roy Hughes (RH) questioned the calculations provided and said that from this information it was already clear that they were not accurately calculated. RB said that a firm had been employed and that Sarah Trinder (ST) was here this evening and was asked to clarify the calculations which she had made following receipt of the Panel Engineer's report. ST had looked at the previous reports in respect of the Tip and used the quarterly information for February to June to calculate approximately how many lorry loads would be needed to meet the requirements of the Panel Engineer's report. RH raised the issue that those reports had been proven to be flawed and therefore the calculations and figures used would not be accurate.

Resident - Reiterated that the residents did not want further disruption from lorries travelling up and down to the site and that any soil should be moved from the site in order to fill it in. The reason that everyone was here at the meeting was because the tipping which was set up in the first place was not monitored and the situation was allowed to continue. The land owner should be made to install a weighbridge to ensure a correct record of what is taken on site.

Resident – Were the EA aware of a second reservoir approximately 200 yards across the road from this site.

FU a reservoir has to be over a specific size to meet the requirements, over 25,000^{cm} are registered, the one referred to may be properly maintained.

RL if it is and not on public registered then EA have a duty to make sure it is registered.

Question – In respect of the Panel Engineer, is he a qualified civil engineer and does he deal in absolute facts and not opinions?

RL Panel Engineers can have different views, 3 have looked at this site and come up with the same views. They are members of the Institute of Civil Engineers and can be challenged. Their appointment is reviewed every 5 years and reported to the Secretary of State to enable them to keep their membership going.

RB in respect of the amount of tipping and the Faber Maunsell's reports, the A D Horner report clarified what was on site, in order to understand what had happened.

Question – Why haven't Faber Maunsell been challenged? And why haven't the Council take action against them?

RB at previous meetings we have discussed the difficulty with enforcement and what the Council can do, as they do not have any contractual agreement with them. Residents can contact the Police if they feel this would help, but the Council can only act in respect of the planning issues arising from the site.

Question – AD what if things go wrong, who will hold the Panel Engineer to account?

RL technical matters are not monitored, the Panel Engineer is relied on and must issue a certificate to say the work has been done; he will work together with a supervising engineer. The Panel Engineer is based in Edinburgh; it is not his position to see that the work has been put in place. The onus is with the land owner to appoint the Panel Engineer and them to carry out the work. Peter Kellen did the inspection report and it is that which would be enforced. However, it could be his equivalent that would sign the work off as it was understood that Peter Kellen has not been engaged for this part of the work.

Question – How will he know the number of vehicles have the right weight and volume of soil in them and who will check it's the right soil and identify where it should go?

RL the work has to be signed off by a Panel Engineer and he has to have appointed a supervising engineer at all times to ensure it is being carried out. David Crook from Leeds is also the site manager.

JR what happens if he has not appointed a site engineer by the end of March 2014?

FU the enforcement process will begin – the history etc. from the site will go to the Enforcement Panel and they will discuss what action will be taken.

JR how long would this take?

RL this could take months as they would have to serve a notice of liability and then there would be another period of possibly 6 months to give the land owner the option to carry out the work.

RB can the public make representations to the Enforcement Panel?

RL you can make representations to his team and these would be passed through to the Enforcement Panel.

Question – Was the Panel Engineer asked to provide a solution to the problem and did it include removing the soil? The aim of the meeting had been to re-assure residents, but it has given them more cause for concern.

RB said the meeting had been called as she wanted residents to know what was happening and the issues which have made it impossible for the Council to take the enforcement notice any further and it was accepted that the situation had raised more questions than answers.

Question – The Panel Engineer's report states 300mm what would happen if 600 mm was put on, would that be ok?

FU it would be down to the Panel Engineer, if he accepted more, specific wording was 300mm to provide erosion restriction.

Residents questioned whether this was consolidated or tipped soil and asked why a weighbridge could not be insisted upon. As there was concern that further over tipping would happen. Residents again questioned why there had been no prosecution over fraudulent reports from Faber Maunsell.

SS reiterated that the Council did not have a contractual relationship with Faber Maunsell so was not able to prosecute and the only regress would be through the planning enforcement regime and as discussed at this meeting this was not currently possible.

RB said that residents could go to the Police if they wished to take this matter further as a civil matter and it was understood a number of them had done this.

Sue Hughes quoted the recommendations from the Planning Policy Task Group report, in respect of a designated officer to deal with any issues which arose.

RB confirmed that this was part of what would have been the Council's responsibility but unfortunately as they were unable to carry out the enforcement notice due to the Reservoir Act, this was not applicable.

Councillor Luke Mallett – Summarised the discussions by saying the understanding is that it is not the Council's responsibility, and from this evening it was apparent that the residents did not have confidence in the matter being resolved. The concern was what was going to happen in respect of the Panel Engineer's report and who was responsible for putting the residents in this situation. He urged for a public enquiry to be held in order to get to the bottom of the situation once and for all.

JR made reference to the previous monitoring group which had been set up following the original planning application and how there had been confusion over what had been reported back in respect of those meetings.

Residents repeated that they did not want further soil on site and the disturbance from the further work. It was also highlighted that many meetings had been held over the years with no positive results from them, people were already aware that the land owner had not co-operated so the main concern was who would monitor the new work? They also stressed that they wanted to get to the bottom of the situation and find a way of making their views heard. Although there appeared to be legislation in place to cover the situation they asked why someone was not carrying this forward with a proper plan and in a more aggressive manner.

Question – Was there any legal mechanism where the matter could be taken out of the land owners hands and resolved by either the EA or the Council?

JR he was the owner of the land and if he does not comply then this can happen.

Residents questioned how this situation had happened in the first instance. There was a failure to monitor and now they were being told there was none of the original staff left at the Council who were originally involved so nothing could be done. People had complained but when questioned, the Council said these had been recorded as enquiries not complaints. If a public inquiry was held then officers past and present would be interviewed and the truth would become clear.

JR reiterated that the process of law much be followed and that the land owner had until the end of March 2014, if the work was not carried out then the matter would be followed through, but it was out of the Council's hands and the responsibility of the EA.

JR thanked the officers and residents for attending the meeting and confirmed that the reports referred to and notes from the meeting would be available on the Council's website in due course.

The meeting closed at 9.05 p.m.

NOTE:

After the meeting closed a further question was put to SS by one of the residents as follows: - If the effect of the additional material going onto the site is to increase a risk of slippage, who takes statutory responsibility for future events, the Panel Engineer, or the site engineer (QCE)?