

Appendix 5



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AIS/AMM/3188_LCC Letter

3 April 2018

Lancaster City Council
Development Management
PO Box 4
Town Hall
Lancaster
LA1 1QR



Dear Sir/Madam

Tree Preservation Order 646 (2016)
Capernwray Diving Centre, Capernwray Road, Capernwray, Lancashire, LA6 1AD

I refer to the above Tree Preservation Order ("the TPO") served on my client, Mrs Carol Hack, of Hack Enterprises Ltd, on 8 March 2018.

I am instructed to make formal representations and to object to the TPO as currently made. These representations are based on the following:

- i) A thorough walk-over of all areas covered by the TPO (undertaken on 27 March 2018);
- ii) A review of the planning history of the Capernwray Diving Centre site utilising the Council's online planning search facility and documents and plans provided by my client;
- iii) Relevant legislation;
- iv) Relevant National Planning Policy and National Planning Practice Guidance relating to Tree Preservation Orders.

At the outset I would indicate that I have significant concerns with the apparent superficial and indiscriminate use of the TPO in this case. My clients have owned and operated the Capernwray Diving Centre site since 1997, during which time they have developed a range of leisure and tourism based facilities. My clients are conscious of the landscape and biodiversity attributes of the site and have taken appropriate professional/environmental advice in the past when engaging in the planning process.

Unfortunately it appears that the officers of the Council responsible for the preparation of the TPO have not thoroughly or objectively considered relevant planning matters that would be material when considering the expediency of making a TPO.

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The law and related policy guidance confirm that Local Planning Authorities can make TPO's if it appears to them to be "*expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area.*"

At this point it is worth considering the following aspects of National Planning Practice Guidance:

➤ ID: 36-005-20140306:

- When granting planning permission authorities have a duty to ensure, whenever appropriate, that planning conditions are used to provide for tree preservation and planting. Orders should be made in respect of trees where it appears necessary in connection with the grant of permission. (NB. This duty would extend to any decision maker including a Planning Inspector determining a planning appeal on behalf of the Secretary of State).

It is noted that in the relevant planning history relating to the erection of 15 holiday homes at the site (which has included the original outline planning permission granted in appeal and two separate approvals of reserved matters) that the Council did not consider it necessary or appropriate to make a TPO in respect of any trees at the site.

➤ ID: 36-007-20140306-36-08-20140306:

- These sections deal with "amenity" (a term which is not defined in law) and indicates that LPA's must exercise judgement when deciding "*whether it is in their powers to make an Order.*"
- The discretion is not unfettered. As with all such discretions, an LPA must meaningfully engage with the exercise of the discretion, otherwise a decision to act pursuant to the relevant legislation will be ultra-vires.

➤ In terms of what an LPA should or can take into account when considering amenity, the guidance is helpful and refers specifically to the following matters:

- Visibility -- the extent to which the trees or woodland can be seen by the public will inform any assessment of whether the impact on the local environment is significant. The trees, or at least part of them, should normally be visible from a public place, or accessible by the public.
- Individual, collective and wider impact. "*Public visibility alone will not be sufficient to warrant an Order.*" LPA's are to assess the particular importance of groups of trees or woodlands by reference to:- size and form; future potential as amenity; rarity, cultural or historic value; contribution to, and relationship with, the landscape.

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- The importance to nature conservation can also be a factor.
- ID: 36-010-20140306:
 - Dealing with expediency this section confirms that although some trees or woodlands may merit protection on amenity grounds, it may not be expedient to make them the subject of an Order. For example, in respect of trees which are under good arboriculture or silvicultural management.
- ID: 36-011-20140306:
 - This confirms that the purpose of a Woodland Order is to safeguard the woodland as a whole, which depends on regeneration or new planting. (NB: for reasons that will be explained later in these submissions we would question whether a Woodland Order is appropriate to the circumstances of this site).
- ID: 36-021-20140306 and 36-022-20140306:
 - These sections of the guidance emphasise the need for and value of a site visit by LPA officers to consider whether or not an Order is justified. It is stressed that officers need to *"fully assess the amenity value of the trees or woodlands concerned."* Officers should gather sufficient information to enable an accurate Order to be drawn up and for accurate boundaries to be mapped: this can also include information on people with a legal interest in the land affected; the present use of the land; the trees importance as a wildlife habitat; trees which are not to be included in the Order. (NB: as far as our client is aware, officers of the Council had not undertaken a thorough and appropriate site visit prior to service of the TPO on 8 March 2018, and did not do so on that day).
- ID: 36-028-20140306:
 - This confirms that the purpose of the woodland category is to safeguard a woodland as a whole.
- ID: 36-059-20140306 and 36-060-20140306:
 - These sections relate to works on trees protected by an Order. They confirm that where an exception applies the authority's consent to carry out works is not needed (notice of those works may need to be given to the authority).
 - One of the stated exceptions (Town and Country Planning (Tree Preservation) (England) Regulations 2012 14 (1) (vii) are works necessary to implement a planning permission. (NB: planning permission exists for development at the site and this will be detailed subsequently).

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> ID: 36-083 - 20150415:

- o This confirms that the consent of the LPA is not required for carrying out work on trees subject to an Order "so far as such work is necessary to implement a full planning permission." One example provided would be a tree required to be removed to make way for a new building for which planning permission has been granted.

Having reviewed the relevant Law and Guidance we have grave concerns of the actions of the LPA to make the TPO in its current form. The TPO does not reflect the situation on the ground (the site identified is not a woodland), does not reflect appropriate nature conservation/habitat management regimes previously approved for the site, and does not take any account of the planning history of the site (in particular the extant planning permission).

The planning history of the site is significant and covers development directly associated with the use of the former quarry as a diving centre, but also other associated tourism related development. It is this planning history that is of direct relevance. It must be clarified that our review of the planning history is based on documents and plans provided by our client, but also by documents and plans available on the Council's online planning register of planning applications.

The following elements of the planning history are relevant:

> 04/00877/OUT -- Erection of 15 holiday homes. Granted on appeal (ref: APP/A2335/A/04/1168372) 14 December 2005 and subject to the following conditions:

- i) Approval of the details of the siting, design and external appearance of the buildings, the means of access thereto and the landscaping of the site shall be obtained in writing from the Local Planning Authority (LPA) before any development begins.
- ii) Application for approval of the matters included in Condition 1, shall be made to the Local Planning Authority before the expiration of three years from the date of this permission.

(NB: no specific condition was imposed relating to when the development must be begun. In the absence of such a condition Section 91 of the Town and Country Planning Act 1990 every planning permission is subject to a general condition that the development must begin within a standard time period. In the case of Outline Planning Permission those time periods are within two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to the approved).

- iii) Two subsequent applications for approval of reserved matters pursuant to Outline Planning Permission 04/00877/OUT were subsequently dealt with.

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- 06/00877/REM – Reserved matters application for the erection of 8 holiday units. Granted 13 November 2006. This relates to plots 1-8 (along the south-west portion of the quarry site) and development has been commenced and fully implemented in respect of these properties. I am informed by my client that works on some of these plots commenced in 2007 and continued thereafter – please see attached letter from Mason Gillibrand Architects to my client confirming discussions with the LPA's Case Officer at the time, Peter Rivet, confirming that a 'material start on site' had taken place.
- 08/01308/REM – Reserved matters application for the erection of 7 holiday units (submitted 13 November 2008). Granted 26 January 2009. This element had not been commenced until February/March of this year when site clearance and ground levelling works commenced.

Our assessment of the status of these planning permissions and reserved matters approval is that the element relating to the 7 holiday units (08/01708/REM) remains extant and is capable of implementation.

That is the case because the two applications for approval of reserved matters (05/017077/CEM and 08/01308/CEM) were both submitted within three years of the grant of Outline Planning Permission 04/00877/OUT. Development then commenced some time in 2007 – again well within two years of the final approval of the reserved matters.

This planning history is highly relevant because the planning permission for the development of the 7 units (effectively the second phase) remains extant and capable of implementation. We would invite officers to carefully and thoroughly review the approval of reserved matters details for those 7 units as indicated on the following plans:

- i) Mason Gillibrand – 4555/P/01 – this indicates the approved layout of the 7 holiday homes and associated works including access roadway and car parking areas and indicates an earth mound and planting along the northern boundary;
- ii) Mason Gillibrand – 4555/P/02 – this provides elevations and sections and demonstrates the significant level changes and proposed earthworks necessary to facilitate the approved development;
- iii) Mason Gillibrand – 4555/P/03, 04 and 05 – more detailed elevations, plans and sections clearly illustrating the extent of existing ground materials to be removed and re-graded to create a new earth mound along the northern and north-eastern boundaries of the site.

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One other important factor pertaining to the details approved under 08/01305/REM was the associated Nature Conservation Management Plan (July 2006). Again we would invite Officers to review and understand this document. It will be noted that the bulk of the areas of the site covered by the TPO were identified as grassland along with limited areas of scrub and trees. Only limited parts of the surveyed area were identified as woodland but the management regime set out suggested a need for thinning and, in particular, the control of scrub and tree encroachment into the extensive grassland areas. The impact of the blanket woodland TPO is to preclude the thinning and scrub clearance required by the Nature Conservation Management Plan, contrary to the objectives of maintaining a biodiverse habitat across the site.

It is to be noted that the original Inspector dealing with the outline planning application stage noted the following factors associated with the site and proposed development:

- i) For its size, the site is highly diverse – several different grassland communities occur. The opportunity to improve the quality of the grassland was recognised (paragraphs 4 and 5);
- ii) The construction of the buildings and access track will necessitate some clearance of trees and scrub. None of the species likely to be affected are mature and all are common. (paragraph 10).

On the basis of the foregoing we make formal objections to the TPO on behalf our client. The main grounds of objection are:

- i) The making of the TPO is ultra-vires. The discretion to make a TPO is not unfettered – in this particular case there is no evidence that the LPA has meaningfully considered or engaged with the exercise of the discretion. (NB – should the TPO be confirmed as currently drafted we will seek full disclosure of any relevant documents, reports, notes, memos or emails circulating at the time of the making of the TPO).

As a result the TPO has been made in a superficial and indiscriminate way. As far as we are aware no Officer of the Council undertook a thorough or effective site visit of the whole site affected – it is clear, for example, that large areas of the “woodland” do not contain any trees whatsoever (a point that would have been apparent from a basic walk-over). Indeed, those areas are to be valued as a diverse mix of grassland that should be maintained as such for biodiversity reasons.

- ii) Furthermore, the exercise of the discretion in this case appears to have been made in ignorance of, nor having any regard to, the relevant planning history of the site – in particular the existence of a planning permission for 7 holiday homes across the northern part of the site where trees do exist. Felling/removal of those trees is an exception to TPO protections where necessary to implement that planning permission.

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- iii) The TPO is purportedly made "in the interest of public amenity and wildlife benefit". This takes no account of the fact that much of the area covered by the TPO is not visible from public viewpoints (either when considered from nearby or from longer distances). The TPO as made also completely ignores established nature conservation management regimes being followed by my client pursuant to the Management Plan submitted in support of the Outline Planning Permission and subsequent approvals of reserved matters.

That Management Plan identified Area/Zone 3 as land to the east and south-east of the quarry (all covered by the TPO as woodland) as "being largely unaffected by tree and shrub colonisation" and goes on to state "that no new tree or shrub planting will be considered practical or desirable within this part of the site in which the grassland is the main feature of conservation concern."

One of the key management aims for the site was, in part, to retain the (then) present extent of the more vulnerable habitats, including the semi-natural calcareous grassland. The condition of that habitat was to be maintained as follows:

"3. Maintain the condition of these habitats by controlling, as necessary, encroachment by scrub and other invasive vegetation. The most predictable problems are likely to arise from spread of shrubs and trees on the grassland areas with deeper soil."

Ironically and worryingly the use of a woodland TPO will protect all self-seeded tree growth in these grassland area, and will be counter-productive in terms of habitat management and biodiversity interests.

- iv) My clients have no issue with the retention and long term management of appropriate trees at the site – i.e. those that are clearly of significant amenity value and that are not affected by the development approved under various permissions and approvals. However, the TPO as made is fundamentally flawed for the reasons set out in this letter. The exercise of the legal discretion to make a TPO has not been undertaken in a way which reflects the relevant Government Guidance, and there is no evidence that the TPO was based on a thorough or objective assessment of the site circumstances, the planning history or relevant habitat management regimes already in place at the site.

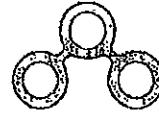
My client is disappointed that there has been no attempt by the Council to engage positively to discuss what may be appropriate. It is clear to us that the decision to make the TPO (in its current form) was ultra-vires. For those reasons our client formally objects to the TPO.

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Going forward we and our client would welcome the opportunity to meet to discuss all of the relevant planning matters so that a consensus can be reached. This may involve a more focussed and appropriate TPO if that is considered expedient.

Yours faithfully



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Encs.

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