

Special Meeting of the Board

Application for Easements, Chance Lane/Jackpit Lane

19 March 2019

This paper is supplemental to Paper A prepared for the meeting which was due to be held on 20 November 2018 (which is referred to as “the previous paper”).

Board members will be aware that MHT postponed the meeting to consider the application for easements to serve land off Chance Lane scheduled for 20 November 2018. This was in order to take advice on the points raised in a letter dated 14 November 2018 from Mr M Huskinson who stated that he was acting on the instructions of “an association of local residents”. A copy of MHT’s response to that letter has been circulated.

MHT’s solicitors advised seeking the advice of a QC with particular experience with judicial review. In summary, Counsel confirmed that in his opinion there was a sufficient public element in a decision by MHT whether or not to grant an easement to make that decision potentially amenable to judicial review. Both Mr Huskinson and Counsel referred to Scott –v- National Trust where it was decided that the National Trust’s decision not to renew red deer hunting licences on its land could be subject to judicial review.

Judicial review is not a review of the decision itself but of the process by which it was reached.

Counsel’s advice does not change the factors relevant to MHT’s decision making process – these are still governed by the MH Acts and by charity law.

Although Mr Huskinson refers in his letter to bringing a claim for judicial review, Board members should be aware that the applicants could equally bring proceedings for judicial review if they felt that the Trust had not followed the correct process or had considered the wrong factors. It is important therefore that Board members re-read CC27 “It’s your decision” which details what should be taken into account in making decisions and take very careful note of the factors which are relevant under s7 of the 1930 Act as amended (referred to as s7 in this paper). S7 is set out at the end of the previous paper.

The application must be determined in accordance with the criteria set out in the Malvern Hills Acts and the obligation of the Board as charity trustees to act solely and exclusively in the best interests of the charity. The introduction of irrelevant factors to the decision making process could lay the Trust open to legal proceedings.

Some supplemental points are outlined below.

Previous history of the site.

Whilst the Board should be aware of previous decisions in relation to the site and factors which were properly taken in to account, any application for an easement has to be judged on its merits and all will be different on their facts. It was noted in the previous paper that the request made in 2012 in relation to the site was not an application for an easement, in that it did not indicate the route for any proposed access, give any specification for the easement itself nor any detail about the way in which the site might

be developed. There was no information on which the Board could have properly based a decision.

There was a similar non-specific request to consider granting access in 2011. The minutes of the 2011 meeting refer to a “policy” of not granting access to facilitate the development of Rose Farm.

Any blanket “policy” would appear to be a failure by the trustees to properly exercise their judgement, as a general refusal to consider applications for access to a site would mean the trustees were not taking into account the facts of the application, the factors set out in s7, or weighing up whether it was in the best interests of the charity to grant the application.

One consistent consideration has been the potential effect of granting an easement on the wide, tree lined verges of the Guarlford Road and that will always be a material factor in relation to any application in this location.

Proposals for development

A point which was raised by Bruton Knowles (land agents instructed on behalf of MHT) was that the Board might seek to have some direct input into the planning process. Officers were reluctant to endorse this because of the risk that public perception would be that the Trust was in some way a party to the development of the site and for the reasons set out in paragraph 4 on the second and third pages of Bruton Knowles report.

However this is an issue which Counsel has also raised and which has been given further consideration by Officers with the Trust’s solicitors. Although a degree of mitigation is included in the Heads of Terms, it is possible that the development might include unforeseen elements. It is also possible that, by the time any development takes place, the planning regime could have changed – for example it is MHDC policy at present to include 40 % green space on greenfield sites. If the regime were to change in the future, this could affect the way any development was designed and laid out, which could in turn (for example) affect its visual impact when seen from the Hills and therefore the nature of any mitigation that might be necessary. Consequently VWV (MHT’s solicitors) have drafted a new clause for the Trust to consider including in the Heads of Terms, if they were minded to approve the application. (See Appendix).

This would enable MHT to reserve their position on the effect of the design and layout of any development on the natural aspect of the land under its jurisdiction and either require any mitigation which might be appropriate as a condition of granting the easements or decline to proceed with the grant of the easement

This would in practice mean that the developer, when preparing the planning application, would have to keep in mind the impact of the proposed development on the Trust’s land. (MHT could also comment on the planning application during the planning process in the usual way.)

Potential capital receipt

It is impossible to be specific about the use to which any capital receipt could be put as it is impossible to predict the priorities of MHT at some indeterminate time in the future. As

identified in the previous paper, it could only be used for purposes for which capital monies can be used to further MHT's charitable purposes.

The Malvern Hills AONB is a landscape of national importance. There are hundreds of acres of land on the spine of the Hills, and adjoining MHT's existing land on the flanks of the Hills which would benefit from protection in perpetuity under the Malvern Hills Acts and make a valuable addition to MHT's public access land. Without unduly fettering the discretion of future trustees, it would be an option to specify that any capital receipt from the grant of this easement would be used for the acquisition of "purpose land" or for capital improvements to MHT's land to improve public access.

Recommendation

The decision before the Board is whether to grant Rose Farm Partnership an Option for easements as set out on page 2 of the previous paper. This agreement would be subject to certain conditions which would be set out in Heads of Terms.

The draft Heads of Terms (document 3 with the previous paper) outline the proposals put forward by the applicant for agreement. If the application were approved in principle, the solicitors will be asked to check that all relevant points are properly covered in the Heads of Terms and a final draft would come back to the Board for approval and signature.

It cannot be in the best interests of MHT fulfilling its charitable objectives, as Mr Huskinson suggested in his letter dated 14 November, for Board members simply to refuse to grant the easement without having regard to the possibility of receiving a large capital sum which could be used to preserve, for the benefit of the public, additional parts of the landscape in accordance with the Malvern Hills Acts without very careful consideration and for good reason.

The correct approach for the Board is to have regard to both the potential capital receipt and the s7 factors and to decide whether the grant of the easements is in the best interests of MHT fulfilling its charitable objects

The physical impact of constructing the 2 easements in themselves on the natural aspect of the land under MHT's jurisdiction is outlined in the previous paper and is of limited extent. They will not be prominent in the landscape when seen from the Hills. The emergency access is to be a grasscrete surface 3m wide and the main access (together with a pavement and possible widening of Chance Lane) will involve surfacing under 1000 sq m of Trust land (and installation of signage and lighting), all of which land will still be available for public access. Because the main access is on Chance Lane, the impact on the vista along Guarlford Road will be minimal, except in the area immediately adjacent to the mouth of Chance Lane. The potential capital receipt from granting the easements would enable the Trust to acquire a significant additional area of the Malvern Hills landscape which would become protected and managed in perpetuity as a public open space, and/or to undertake capital works to improve public access to the Hills.

However, MHT also needs to take into account the development which would result from the grant of the easement. Because there is presently no detail about the way in which the site might be developed, the Board needs to defer judgement on the effect of the development itself on the natural aspect of MHT's land, whether it needs to be mitigated

and if so how. The inclusion of the clause in the Appendix in the Heads of Terms should enable the Trust to do this.

Proposed resolution:

In this resolution, the Malvern Hills means the lands from time to time under the jurisdiction of MHT for the purposes of the Malvern Hills Acts.

The Board, being satisfied that Rose Farm (being land lying adjacent to part of the Malvern Hills) appears to lack satisfactory access for the purpose of a residential housing development and having had regard to the effect of the work being authorised on the natural aspect of the Malvern Hills

Resolves as follows:

Subject to solicitors on behalf of the Trust approving Heads of Terms incorporating the principles set out in the draft marked version 7 20181012 and those Heads of Terms being agreed by the applicant

Subject to the applicant agreeing to the inclusion in the Heads of Terms of the clause set out in the appendix to Paper A for the meeting 19.3.2019

The Board agrees to enter into an Option agreement for the grant of easements as follows:

- i) Vehicular and pedestrian access to and egress from Rose Farm over part of the Trust's Land to the public highway together with the necessary visibility splays, lighting and signage as detailed on ADL Traffic Engineering drawings No. 2212 – 09 Rev A, 2212-10 Rev A and 2212-11
- ii) Access for emergency services vehicles from Hall Green Close to Rose Farm to cross Jackpit Lane in so far as the Trust are able to grant access as detailed on ADL Traffic Engineering Ltd drawing 2212 -09 Rev A.
- iii) Right to lay, and thereafter use, all service media required to serve the proposed development of Rose Farm under the easement routes set out in i) and ii) above.

Any capital sum received from the grant of the above easements will be earmarked within the Parliamentary Fund for the purchase of public access land in accordance with the Malvern Hills Acts and/or for improving public access to the Malvern Hills (as defined in the Malvern Hills Act 1995)

Susan Satchell
Secretary to the Board

Jonathan Bills
Conservation Manager

Cheryl Gentry
Finance and Administration Manager
4 March 2019

Duncan Bridges
CEO

Appendix

“Malvern Hills” means the land from time to time under the jurisdiction of MHT for the purposes of the Malvern Hills Acts

- a. As soon as reasonably practicable following the grant of any Planning Permission for the development of Rose Farm, the Landowner shall send to the Trust a copy of the Planning Permission (together with a copy of the planning application and all drawings and other documents that accompanied the application) and all such other information as the Trust shall reasonably request in connection with the proposed development (which shall include any information required to be submitted to the local planning authority in order to satisfy any conditions contained in the Planning Permission) and the Trust shall consider the effect of the grant of the easement contained in the Deed of Grant on the natural aspect of the Malvern Hills.
- b. As soon as reasonably practicable (and in any event within [six] months of receiving all of the information referred to above) the Trust will notify the Landowner whether or not it is satisfied that the entry into the Deed of Grant would be in accordance with the Malvern Hills Acts 1995, and detail any terms and conditions that should be imposed to ensure that the adverse effect of the works on the natural aspect of the Malvern Hills is minimised.
- c. Following receipt from the Trust of a notice confirming that it can grant the easement the Landowner may at any time within [] months of such notice serve notice on the Trust calling for the Deed of Grant.