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**COUNCIL'S NOTE ON IMPLICATIONS  
OF RESTOCKING NOTICE**

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**Introduction**

- 1 On 13 February 2023 the Forestry Commission notified the Council as Local Planning Authority that it had served a Restocking Notice in its area<sup>1</sup>.
- 2 The Restocking Notice was served pursuant to s.17A of the Forestry Act 1967 ('the Act'), and gave notice requiring (as relevant):
  - (1) Before 30 June 2024, even restocking of four areas identified on the map attached to the Restocking Notice with a total of 183 broadleaf trees, according to a specified mix of species.
  - (2) For a period of 10yrs from planting, the trees must be properly protected against damage and replanted if lost.
- 3 When overlaid with the Appellant's Development Masterplan (16.3839/P205, Rev.C)<sup>2</sup>, the four areas impinge upon:
  - (1) 2 of the Class E (Commercial, Business and Service) Units which are proposed to provide the acoustic barrier for the appeal site, nearest to the existing metal crusher on Benfleet Scrap.
  - (2) 3 of the residential frontages at the north east edge of the appeal site where lower density larger housing is indicated.
  - (3) 2 of the residential frontages at the southern end of the appeal site where medium density housing is indicated.

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<sup>1</sup> It is assumed that the Restocking Notice was served on a Director of G&K Groundworks Ltd. since they appealed against the original version of the Notice and were represented by Smart Planning at the appeal (see below).

<sup>2</sup> See overlay plan enclosed with this Note.

- 4 The email to the Council enclosing the Restocking Notice stated (Email dated 13 Feb 2023, as relevant, emphasis added):

*'Restocking Notices are served under the Forestry Act 1967 when the Forestry Commission believes that trees have been felled illegally (without the authority of a felling licence where one was required) by someone with an interest in the land – typically the freeholder or tenant. The Restocking Notice places a duty on that individual to restock the land with trees. Failure to comply with a Restocking Notice allows the Forestry Commission to serve an Enforcement Notice, which places a similar duty on the individual. Failure to comply with an Enforcement Notice is an offence carrying an unlimited value fine upon conviction in a magistrates court.*

*Planning permission granted by the local planning authority for the same area as that covered by a Restocking or Enforcement Notice does not override the conditions of either Notice. The Notice does not prevent the local authority from granting planning permission, but in most instances that permission will not be able to be enacted without the conditions of the Notice being breached. In instances where the local planning authority is minded to grant planning permission for land where a Notice is in force, they may wish to consider removing the land subject to the Notice from any planning permission granted for a wider area. The Forestry Commission may pursue enforcement proceedings against the person served with a Notice in the event of non-compliance its conditions.*

*...'*

- 5 By letter dated 14 February 2023, the Council wrote to the Appellants' planning agent (copying in PINS), stating that it considers the Restocking Notice is a material consideration for the forthcoming inquiry which is of very significant weight, and that the implications for the scheme are significant<sup>3</sup>. The Council invited the Appellants to advise as a matter of urgency how they intended to address the issues raised.
- 6 By email on 15 February 2023, the Appellants' planning agent made brief comments and stated that he would need to take advice before responding properly. No further response has been received.
- 7 In default of a full response by the Appellants, this Note sets out the Council's position in relation to the Restocking Notice and its implications for this appeal.

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<sup>3</sup> Letter from Hutchinsons to Smart Planning which enclosed (inter alia) the Restocking Notice, and a provisional overlay of the areas of the appeal site affected by the Notice.

### **Relevant provisions under Part II of the Forestry Act 1967: Power to Control Felling of Trees**

- 8 Under s.9 of the Forestry Act 1967, a felling licence is required for the felling of growing trees, subject to exceptions. Under s.9(4)(d), the requirement for a licence does not apply to any felling which is '*immediately required*' for the purpose of carrying out development authorised by planning permission granted under the TCPA 1990.
- 9 Under s.17 of the Act, it is an offence to fell a tree without the authority of a felling licence, which is a summary offence, carrying a penalty of an unlimited value fine.
- 10 Under s.17A of the Act, the Forestry Commission may serve a restocking notice on a person where it appears to the Commission that the person has committed an offence under s.17 of the Act and the person has an estate or interest in the land. The restocking notice requires the person to restock with trees the land or such other land as may be agreed between the Forestry Commission and the person, and to maintain those trees in accordance with the rules of practice and good forestry for a period of no more than 10yrs, as specified in the notice.
- 11 Under s.17B of the Act, the person served with the restocking notice can appeal it on the basis that they object to the notice or to any condition on it. On such an appeal, the Minister has the power to withdraw the notice or notify the objector that it shall have effect subject to such modification as the Minister shall direct.
- 12 Under s.24 of the Act (applying s.17C), where any works required to be carried out in accordance with conditions on a restocking notice are not carried out, the Forestry Commission may give the person responsible an enforcement notice requiring specified steps to be taken within such time as may be specified for remedying the default. If those steps are not then taken within the specified time, the Forestry Commission has the power to enter the land and take those steps. Further or alternatively, the Forestry Commission has the power to prosecute a person for failing to take those steps, which is a summary offence carrying a level 5 penalty.
- 13 Under s.24B of the Act, upon convicting a person for an offence under s.24, the court may itself make a restocking order.

- 14 Under s.25 of the Act, a person may appeal against a s.24 notice only on specified grounds: (a) that the works have been carried out in accordance with the conditions of the restocking notice; or (b) that the steps required to be taken are not required by the conditions on the restocking notice.

**Appeal against the original Restocking Notice and resulting position**

- 15 The Council has now received further documents from the Forestry Commission relating to the appeal against the Restocking Notice (see enclosed).
- 16 On 30 October 2018, the Forestry Commission issued a Restocking Notice under s.17A ('the original Restocking Notice') because it appeared to the Commission that growing trees had been felled on the appeal site.
- 17 The Appellant(s) appealed against the original Restocking Notice to the Minister.
- 18 The appeal was heard before a Reference Committee. This was attended by representatives of Smart Planning and a Director of G&K Groundworks Ltd. where a series of arguments against the notice were raised and discussed.
- 19 The Reference Committee's Report, following deliberations in May and June 2022, sets out the arguments raised and considered.
- 20 The Appellant(s) argued that the original Restocking Notice was not valid and / or that its terms were not proportionate (para. 8).
- 21 On the validity argument, the Committee found that an act of illegal felling had occurred, and that a Restocking Notice was an appropriate response to that act. The felling occurred in one calendar quarter on or before March 2018 (paras. 11 and 12).
- 22 On the proportionality argument:

- (1) The Committee noted that the original Restocking Notice required that an area of 2ha be restocked at a density of 1100 stems per hectare (para. 17). Essentially, this covered the majority of the appeal site.
- (2) Having reviewed aerial photography and historical aerial photographs, and having heard from the parties, the Committee found that the original Restocking Notice was disproportionate as to the extent of the illegal felling that had taken place, in that the area allocated for restocking exceeded the likely true area in which illegal felling had taken place (para. 18).
- (3) As a result, the Committee recommended a modified restocking area confining restocking to those sections of the site where more dense and mature woodland is evident from historic photographs (para. 19).
- (4) The Committee followed an approach based on individual tree replacement. Based on the trees explicitly identified as felled (61), a modified ratio of 3 to 1 was applied, resulting in at least 183 trees to be replanted (para. 22).
- (5) As to the areas to be replanted, the aerial photographs gave an indication of the areas where the trees were most advanced and where the most trees of licensable size were growing and the restocking should take place. These had been mapped and agreed by the Committee as the areas recommended to be restocked in the modified restocking notice (para. 23).
- (6) Since the vast majority of the licensable trees were likely to have been oak, an alternative species mix was recommended requiring 50% to be oak (para. 24).

23 The Recommendation of the Committee was (Email from Mark Kourie to DEFRA dated 6 October 2022):

*'Recommendation: The recommendation is for the Minister to accept the conclusions of the Reference Committee and to direct the Forestry Commission to issue a modified Restocking Notice and map, based on the trees explicitly identified as having been of licensable stem size.'*

- 24 On 21 October 2022, the recommendation of the Committee was placed before the Minister at DEFRA and approved (Email from DEFRA to Mark Kourie dated 21 October 2022).
- 25 By email dated 25 October 2022 – before the current planning appeal was issued on 9 November 2022 – the Minister’s decision of 25 October 2022 was emailed to Smart Planning. This included a draft Amended Restocking Notice and draft Amended Map. The letter noted that the Forestry Commission would issue the official (signed) versions in due course.
- 26 The signed versions of the revised Restocking Notice and map were then issued on 13 February 2023 as referred to in the Introduction above. They are not materially identical to versions enclosed with the letter of 25 October 2022.
- 27 Having exercised the right to appeal the original Restocking Notice, there is no further right of appeal available to the Appellant(s) against the revised Restocking Notice.
- 28 Once the compliance period has expired (from 1 July 2024), the Forestry Commission has the power to issue an enforcement notice requiring compliance with the restocking notice. Non-compliance with that enforcement notice will empower the Forestry Commission to carry out the restocking under direct action and / or to prosecute the recipient of such a notice for non-compliance (s.24). Upon conviction, the court has the power to issue its own restocking notice (s.24B).

### ***Arnold White case***

- 29 In *Arnold White Estates Ltd. v The Forestry Commission* [2022] EWCA Civ 1304, the Court of Appeal gave their views<sup>4</sup> on the interaction between the 1967 Act and the subsequent grant of planning permission.
- 30 In the *Arnold White* case, the Forestry Commission had issued a s.24 enforcement notice in July 2020 to enforce compliance with restocking conditions on a felling licence granted in October 2018 for woodland at Ilford Park, near Newton Abbot in Devon. Outline planning permission for mixed use development of the land had been granted in June 2016 with

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<sup>4</sup> The views are strictly of persuasive force only, but were given by the most senior planning Judge of the Court of Appeal, Sir Keith Lindblom (Senior President of Tribunals), and were the unanimous views of the Court.

conditions requiring reserved matters approval for layout and landscaping etc (para. 23). A further full planning permission for an access road and drainage works was granted in September 2020 (para 3). A number of points are of relevance.

31 First, the appellant argued that (paras. 61-62):

- Since the grounds for appeal against a s.24 notice are narrowly drawn, both the felling licence and the s.24 notice must yield to the principle behind s.9(4)(d) – that the statutory scheme for felling is not intended to prevent development authorised by planning permission, and that the grant of full planning permission overrides the requirements of the restocking conditions. The land use planning system embraces a wider view of the public interest than the regime for felling licences allows.

32 The Court rejected that argument, finding that a subsequent grant of planning permission did not automatically trump an extant felling licence, or the conditions imposed on it (para. 63).

33 Secondly, the Court explained what felling '*immediately required*' for the purpose of a planning permission meant under s.9(4)(d) of the Act. Felling would be immediately required where the planning permission definitely requires it to be done if the development were to proceed, and does not entail any further relevant approval having to be obtained from the LPA. That would exclude an outline planning permission without the necessary approval of reserved matters (para. 65).

34 The June 2016 outline planning permission in that case included reserved matters approvals, in particular for layout and landscaping, which would establish exactly which trees on the site would have to be felled. Since there was no reserved matters approval under the outline planning permission of June 2016, there was no statutory exemption for the requirement for the felling licence (para. 66).

35 Thirdly, the Court rejected the argument that reserved matters approvals or the grant of full planning permission would have the effect of removing the need for compliance with the restocking conditions on the felling licence (paras. 67-70).

- 36 Fourthly, the Court commented that the land use planning system and the legislation for forestry comprise separate but co-ordinated statutory schemes. The duties of the Forestry Commission go beyond the role of LPAs in discharging their development management functions and involve considerations which would not necessarily be taken into account by LPAs when determining planning applications (para. 71).
- 37 Fifthly, the Court rejected an argument that there was an implied general power to withdraw a s.24 notice. The refusal of the Forestry Commission to withdraw the s.24 notice was legally sound. A residual discretion to withdraw such a notice could only be exercised in limited circumstances (paras. 79-80).

### **Implications for outline appeal scheme**

- 38 Applying the above facts and law here, the following submissions are made:
- (1) Given the appeal scheme is for outline planning permission, where reserved matters approval will be required for the final layout / landscaping etc., the Appellants cannot rely on the statutory exemption under s.9(4)(d) of the Act.
  - (2) The original Restocking Notice required restocking over the majority of the appeal site. Through the appeals process, the Committee heard from the Appellant(s) on that issue and considered the evidence on the point at a hearing. As a result, the original Restocking Notice was revised by the Forestry Commission, identifying the requirement to restock the appeal site with 183 trees in the 4 locations identified on the plan. It is inconceivable that the Forestry Commission would now further amend those locations or agree to restocking elsewhere. In any event, there is no evidence that any different location for restocking has been agreed with the Forestry Commission, or that it will be.
  - (3) Given the appeal scheme is for outline planning permission which will be subject to a 3yr implementation period and reserved matters approval, it is likely that the Forestry Commission will seek to enforce the Restocking Notice before the scheme is built out.



- (4) Given the land use planning system and forestry legislation comprise separate but co-ordinated statutory schemes, the Restocking Notice is clearly a material consideration of very significant weight for the determination of this appeal.
- 39 This has serious implications for the appeal scheme both in terms of the noise attenuation proposed and more generally.
- 40 As to the noise issue, at this outline stage, the Appellants seek to demonstrate that the noise environment will be acceptable primarily by proposing acoustic attenuation in the form of a noise barrier created by the Class E Units positioned adjacent to Benfleet Scrap, together with a robust glazing specification. The effect of the revised Restocking Notice is that the part of the acoustic barrier adjacent to the existing metal crusher on Benfleet Scrap will not be able to be provided, and there is nothing to suggest that the Forestry Commission would not enforce its right to have trees replanted and protected in this location. There is no alternative acoustic attenuation put before the inquiry by the Appellants.
- 41 It is no answer to say that this issue could be left to reserved matters such that the grant of a reserved matters approval would render the felling of trees (restocked under the Restocking Notice) immediately required and subject to the exemption under s.9(4)(d) of the Act. Given the existence of the Restocking Notice, the Council is highly likely to seek to remove the land subject to the Restocking Notice from any reserved matters approval, as envisaged by the Forestry Commission (see para. 4 above), which would mean the noise attenuation could not be achieved. Alternatively, the Council would also have to consider any harm caused by the removal of replanted trees. The issue should be grappled with now.
- 42 Further, the noise mapping relied upon by the Appellants to show an acceptable noise environment indicatively places the lower density larger houses, for example, furthest from Benfleet Scrap on the northeast edge of the appeal site. The effect of the Restocking Notice is that housing in this location will not be able to be provided and may have to be nearer to the noise source, potentially affecting the noise impact.
- 43 More generally, the Appellants have put forward an indicative layout for the scheme which can be taken to illustrate the Appellants' best attempt to demonstrate how no.68 residential

units and the industrial units could be acceptably accommodated on the appeal site (development Masterplan (16.3839/P205, Rev. C).

- 44 The Restocking Notice materially impinges upon the indicative location of a significant proportion of that indicative layout (5 residential frontages and 2 Class E Units). The location of the replanting required by the Restocking Notice has been considered at appeal. It is inconceivable that it would be amended further or agreed to take place elsewhere, and there is no evidence that it will be.
- 45 As a result, it is not at all clear that the Appellants could now accommodate the no.68 residential units and the industrial units which form their scheme on the appeal site, avoiding the locations for replanting under the Restocking Notice.
- 46 Further, the biodiversity net gain “benefit” of the scheme relied upon by the Appellants rings completely hollow. The baseline against which to assess any claimed benefit is a site which was subject to illegal felling of trees prior to any ecological assessment being undertaken. The Appellants cannot sensibly rely on a “net gain” in those circumstances based on future landscaping and biodiversity schemes.
- 47 The Appellants cannot claim to be taken by surprise by the documents above or the issues raised by the Restocking Notice given that:
- (1) G&K Groundworks Ltd and Smart Planning took a full part in the appeal process against the original Restocking Notice, attending the appeal hearing in 2022.
  - (2) Smart Planning were informed of the Minister’s decision and draft amended Restocking Notice and map in October 2022, before the current planning appeal was lodged. The signed version of the revised Restocking Notice was issued on 13 February 2023 and was materially identical to the draft Notice and map sent to them in October 2022.
- 48 For the above reasons, the Council contends that the revised Restocking Notice is a material consideration of very significant weight for the determination of this appeal and has serious implications for the outline scheme as presented.

- 49 The Appellant was invited to respond to the issue of the revised Restocking Notice on 14 February 2023. The Council reserves the right to amend its position or raise further issues in response to any points now raised by the Appellants.

ASITHA RANATUNGA

23 February 2023

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