

## **PLANNING COMMITTEE - 30 MARCH 2005**

### **REPORT OF THE CHIEF SOLICITOR**

#### **MISCELLANEOUS ITEM - PROPOSED ENFORCEMENT ACTION IN RESPECT OF FOXMOOR NURSERIES, CHELSTON, WELLINGTON**

##### **PLANNING HISTORY**

In 1996 planning permission was granted to Foxmoor Nurseries to erect two glass houses at Haywards Lane Chelston to enable the re-location of the business from Rockwell Green (planning permission no. 46/1996/022). The permission was subject to a Section 106 (S106) Agreement that required some widening of Haywards Lane and the provision of a right hand turning land from the A38 to be constructed prior to the commencement of the use of the second glass house, or within a year of commencement of use of the first glass house.

Whilst the first glass house was under construction in 2000 an application was received to change the use of 50% of the glasshouse under construction to B1 use for the design, production, assembly and distribution of small garden products (application no. 46/2000/022). This application was refused on the grounds of industrial intrusion into the open countryside and the possibility of precedent.

Subsequently a further application was made (application no. 46/2000/034) for the same use with supporting information that the permission was needed to permit the production of "Flower Towers" by Foxmoor Nurseries. Flower Towers are a plastic form of hanging basket.

Members of the Planning Committee were anxious to ensure the unit did not acquire an unfettered B1 use and accordingly another S106 Agreement was sought restricting the use in the following ways:-

1. No more than 50% of the existing glass house to be used for the B1 use;
2. No retail sales to take place from the site;
3. The permitted use to be carried out only by Foxmoor Nurseries or an associated user; and
4. The area to revert to horticultural use if Foxmoor Nurseries or an associated user ceased to trade from the premises.

(The interpretation of this agreement has subsequently been a point of contention between the Council and the owners, some elements of which have been resolved through mediation, and others which remain as live issues.)

Following the granting of the permission, an application was made to vary the 1996 S106 Agreement, to the extent that the right hand turning lane need not

be provided. This application was supported by the County Highway Authority and the variation was completed in October 2001.

There were subsequently complaints that the terms of the S106 Agreement were not being complied with and that various unauthorised uses were taking place at Foxmoor Nurseries. It was alleged that this resulted in large vehicles using Haywards Lane with a frequency that would not have been expected from the authorised use of the site.

There have been various meetings with the owners of Foxmoor and their advisers as to what uses are, or are not, authorised at the site and some level of agreement has been reached. Arbitration has taken place, which has further narrowed the issues. There are still however concerns that unauthorised uses are taking place.

The glass house has in part been sub-divided into individual lock up units which are occupied by a variety of different users. Information as to the individual uses has been collected by visiting the site and by the service of Planning Contravention Notices. The situation is not however static and the exact mix of uses on the site varies.

### **THE PRESENT POSITION**

It is agreed between the parties that the permitted use, subject to any further restrictions that may be imposed by the S106 Agreement, is B1 (light industrial). There is no consent for B8 (storage and distribution) although it is accepted that under Permitted Development Rights a total of 235 sq metres of floor space could be used for B8 use.

The question of whether or not an occupier is an associated user has been resolved through mediation such that occupiers are required to have either a 10% shareholding in Foxmoor Nurseries or be a Director of Foxmoor Nurseries with 5% voting rights.

It is accepted that not more than 50% of the glasshouse area is being used for the non-horticultural use, and there is currently no evidence of retailing.

However, there are still two main areas of disagreement:-

1. It is not accepted that all the users on the site are B1; and
2. The Council believes that any B1 user is further restricted by the Section 106 Agreement to a use related to planning permission 46/2000/034, referred to in the Section 106 Agreement as the "permitted user".

### **INDIVIDUAL UNITS**

At the date of writing this report the situation in respect of each unit is as follows:-

Unit 1 - Occupied by Fleetwood Fox

The occupying business is involved in weaving. This is accepted as a B1 use.

Unit 2 - Occupied by RH Fibreboards

RH Fibreboards have a unit on the Chelston Business Park and produce fibreboard packaging. The unit at Foxmoor is used for palletising and labelling of packaging, storage and distribution. This is considered a B8 use.

Unit 3 - Occupied by Riverford Organics

This business involves the overnight storage of organic vegetables which are packed and distributed from the site to individual customers. This use is considered B8.

Unit 4

Currently unoccupied

Unit 5 - Occupied by Scholastic Books

The business involves the packaging of books for School Book Fairs. The main business is located on Chelston Business Park and the unit at Foxmoor is used essentially for storage of the books between fairs. The use is considered to be B8.

Unit 6 - Occupied by Cards and Stationery SW

This business has its main business in a unit at Chelston Business Park. This unit is used as a satellite where storage of cards and stationery takes place with some packaging. It is considered to be B8.

Unit 7 - Occupied by Patrick Simpson

The business involves the assembly, distribution and storage of flues. The use is considered mixed B1/B8. The B8 element of the use is unauthorised.

Unit 7a - Occupied by Beers Direct

This business is used for the storage and distribution of beer to clubs and pubs. It is considered to be B8.

Unit 7b

This unit has recently been used for the storage of tiles. The occupier is not yet known, although the deliveries are made by vehicles marked as Gregory Distribution. The use is considered to be B8.

### Unit 8 - Occupied by Cider Woods

Research and development of “novelty” beds. This is considered a B1 use.

### Unit 9 - Occupied by Essex Finishers

The business involves the re-finishing of printed articles. This is considered a B1 use.

### Unit 10 - Occupied by Aquaid

The business involves the storage and distribution of water coolers. The use is considered to be B8.

### Unit 11

Currently unoccupied.

The positions of the units is shown on the plan appended to this report.

### Foxmoor Nurseries

Activities carried out by the company itself involve:-

- Fitting out of ex-shipping containers. This would be considered a B1 use but it is carried out in the yard which is outside the permitted area for B1 use. The use is therefore unauthorised.
- Cleaning and assembly of various items. Considered to be a B1 use.
- Horticulture. This use does not require permission.

## **GROUNDS FOR ENFORCEMENT**

There are two issues to be considered in relation to the uses at Foxmoor Nurseries. Firstly, it is accepted that B8 uses are not permitted (other than the element permitted under Permitted Development Rights). Action could therefore be taken against all those occupiers carrying out a B8 use provided that there is sufficient evidence of that use.

Secondly, there is disagreement between the Council and the landowner as to the extent to which the S106 Agreement restricts the B1 use of the site. The landowner believes there is an unfettered B1 permission for the glasshouse.

The Council believes that the B1 use is restricted by the terms of the S106 Agreement to the B1 use specifically referred to in the agreement and that there is evidence that at the time the agreement was concluded that was the intention of both parties. If this difference cannot be resolved by negotiation between the

parties, an application will need to be made to the Courts for a declaration as to the status of the planning permission and the S106 Agreement.

### **THE ECONOMIC DEVELOPMENT POSITION**

It is accepted that there is a need for the type of units provided at Foxmoor Nurseries which provides flexible accommodation at a modest price which assists small businesses in the area. Detailed comments from the Economic Development Officer will be reported verbally.

### **THE EXPEDIENCY OF TAKING ENFORCEMENT ACTION**

The taking of enforcement action is discretionary and should only be taken where the taking of such action is considered expedient. In reaching any decision therefore Members must give consideration to the impact the taking of such action might have on the businesses involved. If enforcement action is authorised, consideration must be given to the needs of the businesses in deciding the period for compliance with any enforcement notice and sufficient time allowed to re-locate.

### **OTHER FACTORS TO CONSIDER**

Members should also consider complaints received from local people as to the amount of traffic generated by the uses and the nature of Haywards Lane which is a narrow country lane providing the only means of access.

The County Highway Authority is concerned at the damage being caused to the edges of the carriageway by the level of use and in a report prepared in 2003 the Traffic Examiner for the Vehicle and Operator Services Agency considered that Haywards Lane was unsuitable for the volume and type of traffic using the road at that time.

Traffic accessing Foxmoor Nurseries also has to cross Haywards Bridge which has a load carrying capacity of 40 tonnes. In early 2004 it was reported that although some defects at the bridge had been identified, these were not at that time causing a problem. Any additional information in this respect will be reported verbally to the Committee.

**THE VIEWS OF THE WEST BUCKLAND PARISH COUNCIL** are currently awaited and will be reported verbally to the Committee.

### **RECOMMENDATIONS**

It is therefore **RECOMMENDED** that:-

1. The Solicitor to the Council be authorised to serve individual enforcement notices in respect of unauthorised B8 uses at:-

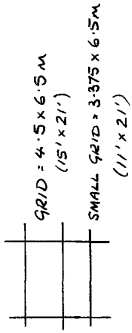
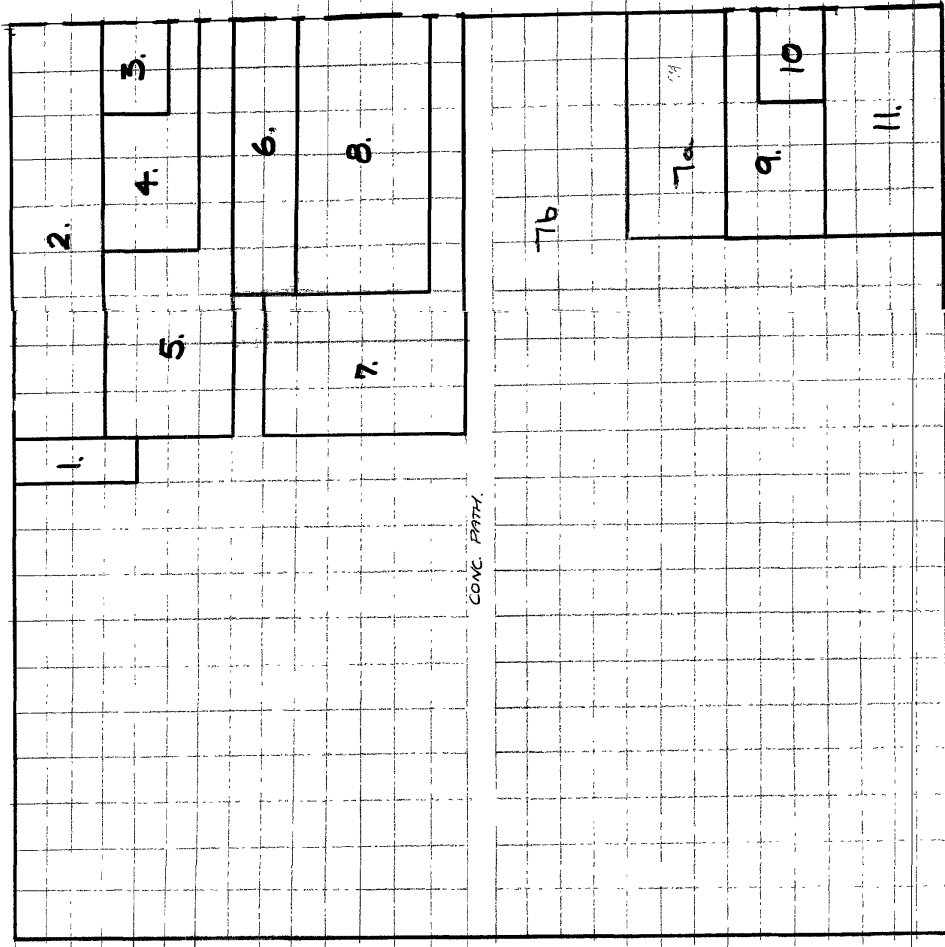
Unit 2 (RH Fibreboard);  
Unit 3 (Riverford Organics);  
Unit 5 (Scholastic Books);  
Unit 6 (Cards and Stationary SW);  
Unit 7 (Patrick Simpson);  
Unit 7a (Beer Direct);  
Unit 7b (Details of tenant being sought); and  
Unit 10 (Aquaid);

provided he is satisfied at the date of service that there is sufficient evidence of such unauthorised use. The period for compliance in each case to be six months from the date of service.

2. The Solicitor to the Council be authorised to negotiate amendments to the S106 Agreement to reflect to the satisfaction of both parties the agreement reached at the time of the granting of planning permission.
3. In the event that no such amendment can be agreed within four weeks the Solicitor to the Council be authorised to make an application to the Court seeking a determination as to the status of planning permission no. 46/2000/034 and the S106 Agreement.
4. On the receipt of satisfactory evidence of future letting of any units for other than authorised uses, the Solicitor to the Council be authorised to seek an injunction against Foxmoor Nurseries Limited restraining any such further lettings.

Chief Solicitor

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UNITS AT FOXMOOR NURSERIES  
 HAYWARDS LANE  
 WELLINGTON.