

PLANNING COMMITTEE

2 OCTOBER 2012

REPORT OF ACTING HEAD OF PLANNING

A.2 CONFIRMATION OF ARTICLE 4(1) DIRECTION IN RELATION TO LAND AT MISTLEY QUAY, ESSEX

(Report prepared by Gary Ashby and Mike Gibson-Davies)

PART 1 – KEY INFORMATION

1.1 PURPOSE OF THE REPORT

To consider whether or not to confirm the immediate Article 4(1) Direction made on 27 April 2012 and, if the Committee so decides, to confirm the Direction.

1.2 EXECUTIVE SUMMARY

The existing fence by the quayside at Mistley Quay was erected in September 2008. In basic terms, it is a steel wire mesh fence approaching 2 metres high in sections of about 2 metres each. The fence is approximately 150 metres long and runs along the edge of the quayside. There are photographs of the existing fence in Appendix A.

The current fence is 'permitted development'. Officers accept that some form of fence or barrier is required for health and safety reasons but in their judgment the current fence is excessive, unsightly, harms the visual amenity of the area and detracts from the character and appearance of the Manningtree and Mistley Conservation Area, within which the fence lies: see plan (2) in Appendix B which shows the location of the fence within the Conservation Area. Various investigations were carried out by the Council to explore how best to control further development in this area, including the use of 'Article 4 Directions'. These cannot be made or applied retrospectively and therefore cannot require the removal of the current fence. A non-immediate Article 4 Direction was authorised and served in March 2010 in respect of the land shown edged red on plan (1) in Appendix B. Around this time, the Regulations governing the making of Article 4 Directions changed, which culminated in the withdrawal of that particular Direction. In November 2010, a further authority for a non-immediate Direction was obtained, but the Council did not proceed with this because it was seeking to pursue an agreed settlement with the owners of Mistley Quay, TW Logistics Limited (TWL).

On 12th August 2011, TWL informed the Council that it was proposing to replace the existing fence. Thereafter, in the latter part of 2011 and the first months of 2012, information was received to the effect that TWL had sourced and bought a replacement steel fence nearly as high as the existing fence and that there was a real risk that it was going to be erected. The Council was provided with a description of the replacement fence and evidence of seeing it being brought onto the site and of where parts of it were being stored. Photographs were provided by a witness and copies of some of these are in Appendix A. Witnesses were interviewed and officers evaluated the evidence available. It was decided that there was a real risk that the replacement fence was about to be erected, which would be prejudicial to the proper planning of the area by reason of potential harm to the character and appearance of the Conservation Area and/or would constitute a threat to the visual amenities of the area. An authority was therefore obtained to serve an immediate Article 4(1) Direction on this basis.

On 27 April 2012 an Immediate Article 4(1) Direction ("the Direction") was made, served and came into effect under the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) ("the Order"). The Direction relates to the land at Mistley Quay, Mistley, Manningtree, Essex shown edged red on plan (1) in Appendix B. The Direction removes permitted development ("PD") rights for

development within Class A of Part 2 of Schedule 2 to the Order within this area. The PD rights removed by the order are the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

The publicity requirements of the Order were duly followed. Amongst other things, the Direction was advertised and there was a period of public consultation. The public consultation period began on 4 May 2012 and ended on 24 May 2012, during which 6 written representations were received, namely 4 letters of support, a formal response of “no comment” from the Secretary of State and a detailed written objection from TWL. An officer appraisal of TWL’s objections is set out in Section 3.2 of this report.

Having taken these fully into account, officers consider that there is a real and imminent threat of a replacement fence being erected and that, were this to happen, it is considered likely that there could be substantial harm to the visual amenity and character of both the Conservation Area and the wider landscape in this sensitive area if the Direction is not confirmed.

This matter was scheduled for consideration at the 4 September 2012 Planning Committee but was deferred as officers had received further comments from TWL. These comments and an initial officer response are attached to this report as Appendix E.

1.3 RECOMMENDATION

- a) That the Immediate Article 4(1) Direction which was made on 27 April 2012 removing the permitted development rights set out in Class A of Part 2 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (as amended) over land at Mistley Quay, Mistley, Manningtree, Essex, be confirmed, thereby making the Direction permanent.**
- b) That the Head (or Acting Head) of Planning Services and/or the Head of Resource Management is/are authorised to effect the confirmation of the Direction, give due notice and take whatever related and other steps as she/they consider appropriate.**

PART 2 – SUPPORTING INFORMATION

2.1 INTRODUCTION

In exercising its planning functions, the Council has a statutory duty to pay special attention to the desirability of preserving or enhancing the character or appearance of any Conservation Area within its District: see section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

By Article 3 of the Town and Country Planning (General Permitted Development) Order 1995 (“the Order”) the Secretary of State has granted planning permission for the classes of development described in Schedule 2. Class A of Part 2 (entitled “Minor Operations”) of Schedule 2 grants planning permission for “the erection, construction, maintenance, improvement or alteration of a ...fence....” These rights are commonly known as “permitted development” or “PD” rights.

Article 4 of the Order, (as amended) empowers a local planning authority, if satisfied that it is expedient to do so, to direct that permission granted by Article 3 shall not apply to any development of the Class in question in an area specified in the Direction. The word “expedient” is not defined but is found in other parts of the planning legislation. It carries its ordinary, everyday meaning of “appropriate” or “suitable”. Thus, Members must be satisfied, on the basis of cogent evidence, that it is appropriate that an Article 4 Direction be made.

An Article 4 direction is one of the tools available to local planning authorities (LPAs) in responding to the particular needs of their areas. An article 4 direction does not prevent the development to which it applies, but instead requires that planning permission is first obtained from the local planning authority for that development.

The consistent advice from Central Government, repeated in the DCLG circular first published in November 2010 (and revised in June 2012), is that permitted development rights should be withdrawn only in *exceptional circumstances* “where evidence suggests that the exercise of permitted development rights would harm local amenity or the proper planning of the area”: see paragraph 2.1.

Paragraph 2.3 of the circular gives some examples of circumstances where an Article 4 Direction might be appropriate. The one of relevance to the present case is the first, namely that the exercise of permitted development rights would “undermine the visual amenity of the area or damage the historic environment”.

In deciding whether an Article 4 Direction would be appropriate, LPAs should identify clearly the potential harm that the direction is intended to address. Would the exercise of PD rights in the present case undermine the visual amenity of the area or damage the historic environment? In the judgment of your officers, it would.

Under Section 108 of the Town and Country Planning Act 1990, a local planning authority may be liable to pay compensation to those whose PD rights have been withdrawn if they refuse planning permission for what would otherwise have been permitted development or grant planning permission with more onerous conditions than the Order would normally allow. Compensation may also be claimed for abortive expenditure or other loss or damage directly attributable to the withdrawal of the PD rights.

2.2 PERMITTED DEVELOPMENT RIGHTS AND ARTICLE 4 DIRECTIONS

There are two types of Article 4 Direction, a non-immediate Direction and an immediate Direction. When a non-immediate Direction is made, it does not come into force immediately it is made. The LPA has to advertise the Direction, notify the Secretary of State and there must be a period of public consultation. After that, the LPA must consider any representations received during the consultation period before deciding whether or not to confirm the Direction. It is only after a decision to confirm a non-immediate Direction has been made that it can be confirmed by the LPA. The PD rights are only withdrawn once the Direction has been confirmed.

With an immediate Direction, the PD rights are withdrawn immediately it is made. It still has to be advertised, the Secretary of State must be notified, there must be a period of public consultation and the LPA must consider any representations received during that period. The immediate Direction will lapse and cease to have effect 6 months after it is made unless it is duly confirmed by the LPA before then.

For Directions with immediate effect, the legal requirement, inter alia, is that the LPA considers that the development to which the Direction relates would be “prejudicial to the proper planning of their area or constitute a threat to the visual amenity of the area.” In your officers’ opinion “proper planning” necessarily includes the LPA’s duty to preserve or enhance the character or appearance of the Conservation Areas within its District.

2.3 HISTORY AND DESCRIPTION OF MISTLEY PORT

The settlement of Mistley was originally intended to be developed as a planned 18th Century community, but became dominated by the large maltings and workers’ housing along and off the main street (now known as Mistley High Street) associated with the processing and outward shipment of barley from the surrounding rural hinterland. Many of these buildings survive which contribute to the area’s unique character and sense of place and is part of the reason why, in 1969, the area including the quayside became a designated Conservation Area.

Today, Mistley Port handles the shipment and storage of loose, bulky materials such as granite, stone and

other coarse aggregates. Mistley Port is linear in shape and is bounded to the north by the River Stour. The eastern end contains the working berths and cargo-handling facilities and is used for open storage. The western end contains a large warehouse and is also used for open storage. The "middle section" of the port, which comprises the land that is the subject of this Direction, is open quayside and is the only traffic route through the port used by commercial traffic travelling between each end of the port. It is also used by the residents and businesses in the immediate vicinity including those occupying the former maltings buildings immediately to the south that have recently been converted in mainly residential use.

Whilst this middle section is within the operational area of the port and ownership of TWL, it has historically been open in nature with uninterrupted views out across the Stour Estuary for decades. However, in September 2008, a fence was erected along the quayside without any prior discussion or negotiation with the Council, obstructing views out across the open Estuary.

The landowning and development interests in Mistley are complex and longstanding. Over recent years the character of Mistley has changed and the area has become much more residential in nature and appearance. The Council's current position is one of trying to balance the existing business needs of the port and other businesses in the area whilst seeking to achieve a high quality environment for the new and existing residents.

2.4 MISTLEY AND MANNINGTREE CONSERVATION AREA

The area which is the subject of the Direction lies within the wider Manningtree and Mistley Conservation Area (see plan (2) in Appendix B which shows the location of the fence within the Conservation Area). The village of Mistley has an important relationship with its setting, particularly the Stour Estuary, which has been a significant element in its history and development. A Conservation Area Appraisal carried out by consultants on behalf of the Council in 2001 (and updated in 2006) specifically recognises the importance of open views out across the River Stour, to the Suffolk Shore opposite, from gaps in the High Street.

After careful consideration, it is the judgment of your officers that these important views have been damaged by the current fence and, perhaps of greater relevance, could be further harmed by the proposed replacement fence along the quayside, which is an important part of the Conservation Area.

2.5 DESCRIPTION OF THE EXISTING FENCE AND THE PROPOSED REPLACEMENT FENCE

The existing fence, which constituted permitted development under the Order, was lawfully erected without the need for planning permission in September 2008. It is a steel wire mesh fence, separated by vertical steel supports in sections of about 2 metres each. The fence is approaching 2 metres high and is approximately 150 metres long, running along the edge of the quayside. It is of the type that is typically erected temporarily around a construction site in order to prevent people from trespassing. The fence is unsightly, due to its size, construction and materials and in the judgment of your officers it detracts from the character and appearance of the Conservation Area due to its stark, utilitarian appearance. Moreover, the fence also mars views out across the Stour Estuary, views which had previously been open and unobstructed in this location for many decades. Photographs of the existing fence form part of Appendix A.

TWL wrote to the Council on 12 August 2011 about a number of ongoing issues. Near the end of that letter, they indicated that they had acquired a replacement fence. The letter states "*We have however pursued a conservation solution and after a long search acquired reclaimed railings with an architectural salvage specialist. We will invite Mr Hornby [TDC's then Heritage & Conservation Manager] to our workshop when the restoration process is underway*". However, no such invitation was ever received nor has TWL provided TDC with any further details about the proposed replacement fence. This is frustrating given the Conservation Area status of the quayside and its prominence and role in the wider appearance and character of the area.

The description of the proposed replacement railings as “*reclaimed wrought iron railings*” was repeated by Mrs Sargent, TWL’s company secretary, in her representations of 24th May 2012: see Appendix C.

Officers have received detailed descriptions from witness accounts of what is believed to be sections of the proposed replacement fence, which is reported to be stored on the quayside, presumably in order to be installed. Photographs of what is believed to be the proposed replacement fence form part of Appendix A. Witness accounts confirm that the fence is of a wrought iron construction. Officers in the Council’s Building Services Section believe that it is. The fence consists of sections of fencing, comprising of thick, solid, vertical members each about an inch wide, which are spaced approximately 6 inches apart and are tapered at the top. These vertical members are held together by a horizontal steel support near the top and another near the bottom. The fence is estimated to be somewhere between 1 and 1.5 metres in height and so would be shorter than the existing fence, but officers are concerned about the materials used and the construction of the fence which they consider would be overbearing, dominant and oppressive in an otherwise open and unrestricted area (in terms of views). It appears to be the type of fence typically built around Victorian Cemeteries, designed to restrict views and keep people out. The tight spacing of the vertical bars and their thickness would make the replacement fence even more obstructive and domineering than the existing fence and so would detract from the appearance and character of the Conservation Area.

2.6 SEPTEMBER 2008 TO DECEMBER 2011

In September 2008, the Council became aware that the existing fence had been erected. Since its erection, the existing fence has remained in exactly the same location. As set out in the Executive Summary above and in Appendix D, various investigations were carried out by the Council to explore how best to control further development in this location.

A non-immediate Article 4 Direction was authorised by the Council in 2010 but this did not proceed because the Council hoped it would be possible to resolve matters by agreement with TWL. Indeed, Counsel specifically advised that it was in the Council’s interests not to make an Article 4 Direction at that stage in order to seek to reach a negotiated solution. There was no evidence at that time that a replacement fence had been acquired or was likely to be erected.

Between January 2011 and June 2011 various unsuccessful attempts were made to discuss the ongoing fence issue and to reach a solution acceptable to both parties.

2.7 JANUARY 2012 TO DATE

In March and April 2012, TDC made attempts to arrange a meeting with TWL to discuss the ongoing fence issue, but these attempts also failed.

As stated in the executive summary, in April 2012, the Council received oral reports from a number of quarters that the erection of the replacement fence had been planned and was imminent.

The Council therefore made and served an immediate Article 4(1) Direction in respect of land at Mistley Quay, Essex, on 27 April 2012 in order to prevent the replacement fence being erected or other forms of Part 2 Class A permitted development taking place on the subject land. The land which is the subject of the immediate Direction is shown edged red on plan (1) in Appendix B.

In accordance with the Order, the Direction was advertised and there was a period of public consultation from Friday 4 May 2012 and to Friday 25 May 2012 (inclusive), during which time any person or organisation was entitled to make a written representation to the Council. There were 6 written representations as summarised in Section 3.1 below. A full copy of these representations comprises Appendix C and they are

reported and evaluated in Part 3 of this report.

This matter was scheduled for consideration at the 4 September 2012 Planning Committee but was deferred as officers had received some further comments from TWL on the afternoon of 4 September. These comments and an initial officer response are attached to this report as Appendix E.

2.8 LATEST INFORMATION ABOUT THE REPLACEMENT FENCE

The Council has written evidence that eye witnesses saw the replacement fence being brought onto the site in the form of a number of vehicle movements over what is believed to have been a period of weeks and no evidence has been received to suggest that any sections of the replacement fence have left the Quay. Officers consider that without the current Immediate Article 4 Direction the replacement fence would have been in place by now. Information has recently been received that TWL still intend to erect the replacement fence and that it would have been erected by now if the Direction had not been made in April 2012. It is understood that sections of the replacement fence itself shown in the photographs in Appendix A have been moved, but are presumably still being stored nearby.

PART 3 – REPRESENTATIONS RECEIVED

3.1 REPRESENTATIONS RECEIVED DURING THE CONSULTATION PERIOD

A copy of all the substantive written representations received during the consultation period comprises Appendix C to this report. A number of letters and e-mails received during the consultation period did not amount to substantive representations because they did not make any specific reference to the Direction and were either critical of the existing fence or sought clarification about the procedures.

The Secretary of State responded by e-mail dated 1 June 2012 and made clear that he had no comments to make in relation to the Direction.

Mistley Parish Council sent the Council an e-mail on 23 May 2012, which simply expresses their support for the Direction.

There were 3 letters of support from nearby residents, which simply express support for the Direction.

TWL submitted a 5-page formal objection to the Direction, which is considered in detail in the next section. In basic terms, TWL's representations are:

- object to the timing of the making and serving of the Article 4(1) Direction;
- the Council has known about TWL's intentions to replace the existing current fence with reclaimed wrought iron railings since August 2011; and
- TWL questions the Council's reasons for making the Direction and therefore whether it is lawful.

Before Members decide whether to confirm the Article 4(1) Direction or not, it is important that they carefully consider all the representations made.

3.2 OFFICER APPRAISAL OF TWL'S OBJECTIONS

Please note that the bold text is Officers' paraphrase of the salient points in TWL's formal objections. For the original wording, please see Appendix C.

In the view of your officers, many of TWL's comments are of limited relevance to the issue of whether the Article 4 Direction should be confirmed. Many relate to historic meetings and communications between the parties. Your officers have not sought to answer every allegation, but have set out a short chronology in Appendix D.

However, what is of significance is the fact that TWL confirm that they intended, and still apparently intend, to replace the current railings with reclaimed wrought iron railings and that no attempt is made to assess the impact of the proposed new railings on visual amenity or on the Conservation Area. There is simply a bald statement that "*there is no threat of harm*".

(a) The Council has known since August 2011 that TWL are replacing the existing fencing with reclaimed wrought iron railings and (b) that the timing of the Judicial Review court hearing prompted the Council to issue the Article 4 Direction

Whilst the Council accepts that it has known of TWL's intentions since August 2011, this objection is not directly relevant. Attempts to resolve issues relating to the fence by negotiation with TWL have been unsuccessful. The catalyst for making the immediate Direction was the receipt of evidence suggesting that the actual replacement of the fence was imminent. The timing of the evidence of imminent replacement being received by the Council and the end of the judicial review hearing is purely coincidental.

(c) TWL states that the Council made no contact about the fence between February 2010 and January 2011 following TWL's offer in February 2010 to discuss a replacement

That is substantially true, but has little relevance to the issues before Members. Considered globally, meaningful negotiations about the fence never materialised.

(d) The Council's refusal to specify conservation design criteria is a reason for lack of discussion about the replacement fence

Officers have always wanted, but have been unable, to engage with TWL and have meaningful discussions about potential designs and specifications. However, it is worth pointing out that, if Members decide to confirm the Article 4 Direction, then any proposal to replace the fence could be preceded by pre-application discussions with planning and conservation officers on appropriate designs and specifications of any replacement.

(e) The statement of reasons fails to justify the service of an Article 4 Direction and TWL question whether the Article 4 Direction is therefore lawful

TWL argue that the statement of reasons fails to justify the service of an Article 4 Direction. However, the Council firmly believed – based on the evidence obtained at the time – that there was a real and specific threat of permitted development taking place which could cause harm to the Conservation Area. As TWL had failed to discuss with the Council its intended course of action and did not fulfil its offer of allowing Council officers to come on site to see the materials it had acquired in advance of any works there was a real and legitimate concern about the potential replacement fence causing harm to the conservation area.

TWL states that the statement of reasons fails to recognise that the actual intention is to replace existing fencing with reclaimed wrought iron railings – as if it is assumed this level of information is enough to satisfy the Council's concerns. It is not clear at all from the limited description given by TWL in its letter dated 12th August 2011 what the replacement fence would look like and whether it would be appropriate for the conservation area.

The Council is aware the Article 4 Direction cannot be used to remove the existing fence and accepts this fence was erected lawfully under permitted development rights.

The Article 4 Direction was made and served to restrict permitted development rights where they have the potential to undermine protection for the historic environment and to bring certain types of development back under the control of the Council so that potentially harmful proposals can be considered on a case by case basis through planning applications.

(f) TWL states that the Article 4 Direction should not be directed to the existing fence

The Council is aware the Article 4 Direction cannot be used to remove the existing fence and accepts this fence was erected lawfully under permitted development rights. Whilst the Council also accepts that some appropriate form of fence or barrier was and is required to meet health and safety requirements, the existing fence and, of greater relevance, what appears to be the nature and scale of the proposed replacement fence are considered to be excessive.

The Council has been in discussion with the Health and Safety Executive (the HSE) about the specification and design of a suitable fence or barrier, which would be suitable for the Conservation Area, whilst also satisfying the HSE's health and safety concerns. TWL were sent suggested designs in March 2011 but no response whatsoever has been received from them. .

The Article 4 Direction is not seeking to prevent repair, as TWL suggests. It does mean, however, that planning permission must be sought before repairs that would normally not require the grant of planning permission can lawfully be undertaken.

(g) TWL suggests it is wrong to use the potential threat of a 'proliferation' of fencing within the Direction area as a reason for issuing the Direction

TWL claims that the Council knows that TWL does not intend to erect additional fencing in the area. This is incorrect. TWL has never properly clarified its intentions and has failed and/or refused to meet with Council officers to resolve the issues in dispute. .

(h) TWL suggests the Council has had regard to immaterial considerations in making the Article 4 Direction

This is not accepted. TWL claims that there are 'recurrent allegations of rights of public access to Mistley Port' in the statement of reasons report, which 'have no relevance to the service of an Article 4 Direction'. The proposed statement of reasons to accompany the Direction if and when it is confirmed has been amended to make the position clear.

Summary

TWL's objections level criticisms against the Council, a number of which are not entirely clear. TWL make allegations questioning the Council's motive for making the Direction and also allege that TDC has taken immaterial considerations into account. In officers' opinion, what TWL have notably failed to address is the fact that, without the Direction, there remains a real threat of potentially harmful development which would undermine protection for the historic environment.

A number of suggestions are given as to how the Council's statement of reasons could be improved which would help strengthen the case and justification for the Article 4 Direction. These have been taken into account by Officers and the appropriate draft changes have been made.

PART 4 - EVALUATION OF MATERIAL PLANNING CONSIDERATIONS

4. EVALUATION OF MATERIAL PLANNING CONSIDERATIONS

There is already development on the Quayside, namely the existing fence, which harms the character and

appearance of the Manningtree and Mistley Conservation Area. The existing fence is unsightly. It detracts from the appearance and character of the Conservation Area. It taints key views of the River Stour and the Suffolk shoreline beyond from the High Street, which is an important aspect of the Conservation Area.

The Council was concerned that the immediate replacement of the existing fence with a structure even more over-bearing and dominant would further harm the visual amenity of the area and the Conservation Area. In those circumstances, it decided to impose an 'Immediate Article 4 Direction' on the quayside in order to bring certain forms of development that otherwise could be carried out without the need to first obtain planning permission back under control of the Council. This is a legitimate planning tool available to Local Planning Authorities where there is felt to be a real threat of harmful development on the historic environment or local amenity of an area.

The direct effect of the Immediate Article 4 Direction served on land at Mistley Quay is that from 27 April 2012 (the date the Direction was made) planning permission must now be sought for the forms of minor development covered by the Direction, which will allow the Council to properly assess the impact of such development on the visual amenity of the area, the Conservation Area and the wider setting before deciding whether to grant planning permission or not. Any development carried out without the grant of planning permission is liable for enforcement action by the Council.

The effect of the Immediate Direction has obviously halted TWL's intention to erect the replacement fence but officers have received no evidence to suggest that the materials reportedly stored on the quayside have left the area. Nor have TWL suggested that their intention has altered. In the opinion of your officers, a real threat remains that if the Direction is not confirmed and/or the Direction lapses due to it not being confirmed within the 6 month period from the date the Direction was made, the replacement fence will be erected.

Having carefully considered all the representations received during the public consultation period, officers conclude that the Article 4 Direction has been lawfully made and is appropriate and expedient, in this instance, to help bring potentially harmful forms of development that could harm the visual amenity of the quayside area or damage the historic environment of the Conservation Area, back under the control of the Council.

PART 5 – IMPLICATIONS OF THE DECISION

5.1 DELIVERING PRIORITIES

The preservation and enhancement of the most attractive parts of the district (which includes conservation areas) is one of the Council's priorities. Moreover, the Council has a statutory duty to preserve or enhance the character or appearance of its conservation areas. An Article 4 Direction would bring certain forms of development back under control so that potentially harmful proposals which would otherwise be 'permitted development' (i.e. not require planning permission) would require planning permission and could be refused if thought to be harmful to the character and appearance of the Conservation Area.

5.2 RESOURCES AND RISK

Resources

If a decision is made to confirm the Direction, there will be a direct cost to the Council of the newspaper advertisement which is required and of complying with the other procedural formalities, such as issuing formal notices, noting records and making an entry in the local land charges register. The costs of this work and expenditure and of the associated officer time are within existing budgets.

It is not possible at this stage to quantify the cost of any compensation claim as no notice or indication of such a claim has been received. It remains to be seen what planning applications are made, if the Direction is confirmed, and it is not possible to predict at this stage whether they would be approved, approved subject

to conditions or refused. Suffice it to say that there is a possible cost implication to the Council arising out of a compensation claim.

There could be a substantial cost to the Council if a claim for Judicial Review is made challenging a decision to confirm the Direction (see legal section below). It is not possible to put a precise figure on the cost involved or to accurately predict the level of risk or the eventual outcome. Litigation of this kind is unpredictable. Depending on the outcome, the cost to the Council could range from several thousand pounds if the claim against the Council was unsuccessful to £40,000 or more if the Council lost the case. Even if the Council won the case, there would still be a net cost because in practice not all legal costs would be recoverable and there are also hidden officer and opportunity costs because of the implications of staff time. There is no provision in existing budgets to cover this expenditure.

Risk

There are three main areas of risk. First, failure to confirm the Article 4 Direction could result in similar or worse forms of walls, gates or fencing being erected on the land covered by the Direction which could be seriously harmful to the visual amenity of the area and in planning terms. This risk is considered to be reasonably high.

The second is the risk of claims (and potential liability) for compensation if the Direction is confirmed. This risk is also considered fairly likely, but cannot be quantified at this stage.

The third is the risk of a JR claim challenging any decision to confirm the Direction. The fact of the existing JR claim regarding the Council's adoption of the Mistleley and Manningtree Conservation Area Management Plan means that the risk of a JR claim challenging any decision to confirm the Direction cannot be ignored and is considered to be more than just a possibility.

5.3 LEGAL

The Direction which was made and came into effect on 27 April 2012 cannot require the removal of the existing fence. It removes PD rights in respect of "the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure" on the land shown edged red on plan (1) in Appendix B. The Direction will expire unless it is confirmed before 27 October 2012. If it is confirmed, before that date, planning permission would need to be obtained to erect a replacement fence on the subject land or to carry out any works of maintenance or alteration to the existing fence that would normally require the grant of planning permission.

There is no statutory right of appeal against the confirmation of the Direction. The only way of challenge would be for an aggrieved party with the necessary legal standing to seek Judicial Review (JR) in the Administrative Court. The only grounds for seeking JR would be if the decision confirming the Direction was Wednesbury unreasonable (i.e. one which no reasonable Council could possibly have taken) or if there was some serious procedural flaw. Before seeking JR, an applicant would first have to obtain permission to do so from the Court.

5.4 OTHER IMPLICATIONS

Consideration has been given to the implications of the proposed decision in respect of the following and any significant issues are set out below:

Crime and Disorder

No direct implications.

Equality and Diversity

No direct implications.

Health Inequalities

No direct implications.

Area or Ward Affected

Manningtree, Mistley, Little Bentley and Tendring Ward.

Consultation/Public Engagement

The Council complied with the procedures governing publicity and consultation as set out in the Order (which is further clarified in the guidance first issued by DCLG in November 2010 (which has since been updated in June 2012), namely the replacement Appendix D to DETR Circular 9/95). Should the Council decide to confirm the Direction, it must follow the publicity requirements set out in the Order to give notification that the Direction has been confirmed.

6. CONCLUSIONS

Members must ask themselves the following questions:

- (i) Is there cogent evidence that, in the present case, the exercise of permitted development rights under Part 2 Class A of the Order would undermine or threaten the visual amenity of this Conservation Area and/or or damage the historic environment?
- (ii) Are the circumstances sufficiently exceptional to justify the removal of PD rights?
- (iii) Is it expedient that, in all the circumstances, PD rights be removed?

Other Sections of this report describe the existing fence and what is understood to be the proposed replacement fence. Photographs of what is believed to be sections of the proposed replacement fence form part of Appendix A. Due consideration must be given to all comments received from members of the public as set out in Appendix C. It is for the Committee to decide how much weight to give these factors in terms of the potential harm which the Direction is intended to address, how much harm to the visual amenity of the area or the historic environment is likely if the Direction is not confirmed and thence whether or not it is expedient to confirm the Direction. If the Committee is satisfied in those terms that, on balance, there is a real risk of material harm if the Direction is not confirmed, then it should only decide to confirm the Direction if it considers it expedient to do so – in other words, if in the public interest it is appropriate to do so.

Officers have recommended confirmation because, in their view and following consideration of the comments received, they are concerned that the proposed replacement fence could harm the character and appearance of the Manningtree and Mistley Conservation Area.

BACKGROUND PAPERS FOR THE DECISION

- Understanding Place: Conservation Area Designation, Appraisal and Management, English Heritage (March 2011)
- Replacement Appendix D to Department of the Environment Circular 9/95: General Development Consolidation Order 1995, Department for Communities and Local Government (June 2012)
- Material relating to the making and serving of the Direction (April 2012)

APPENDICES

- Appendix A – Photographs of the existing fence and proposed replacement fence
- Appendix B – (1) Plan showing edged red the land which is the subject of the Direction
(2) Plan showing the extent of the Mistley and Manningtree Conservation area and location of the existing fence
- Appendix C – Copies of the written representations received during the public consultation period
- Appendix D – Short chronology
- Appendix E – Further comments received by TWL on 4 September 2012 and initial officer response

APPENDIX A

PHOTOGRAPHS OF EXISTING FENCE





**PHOTOGRAPHS OF PROPOSED
REPLACEMENT FENCE**

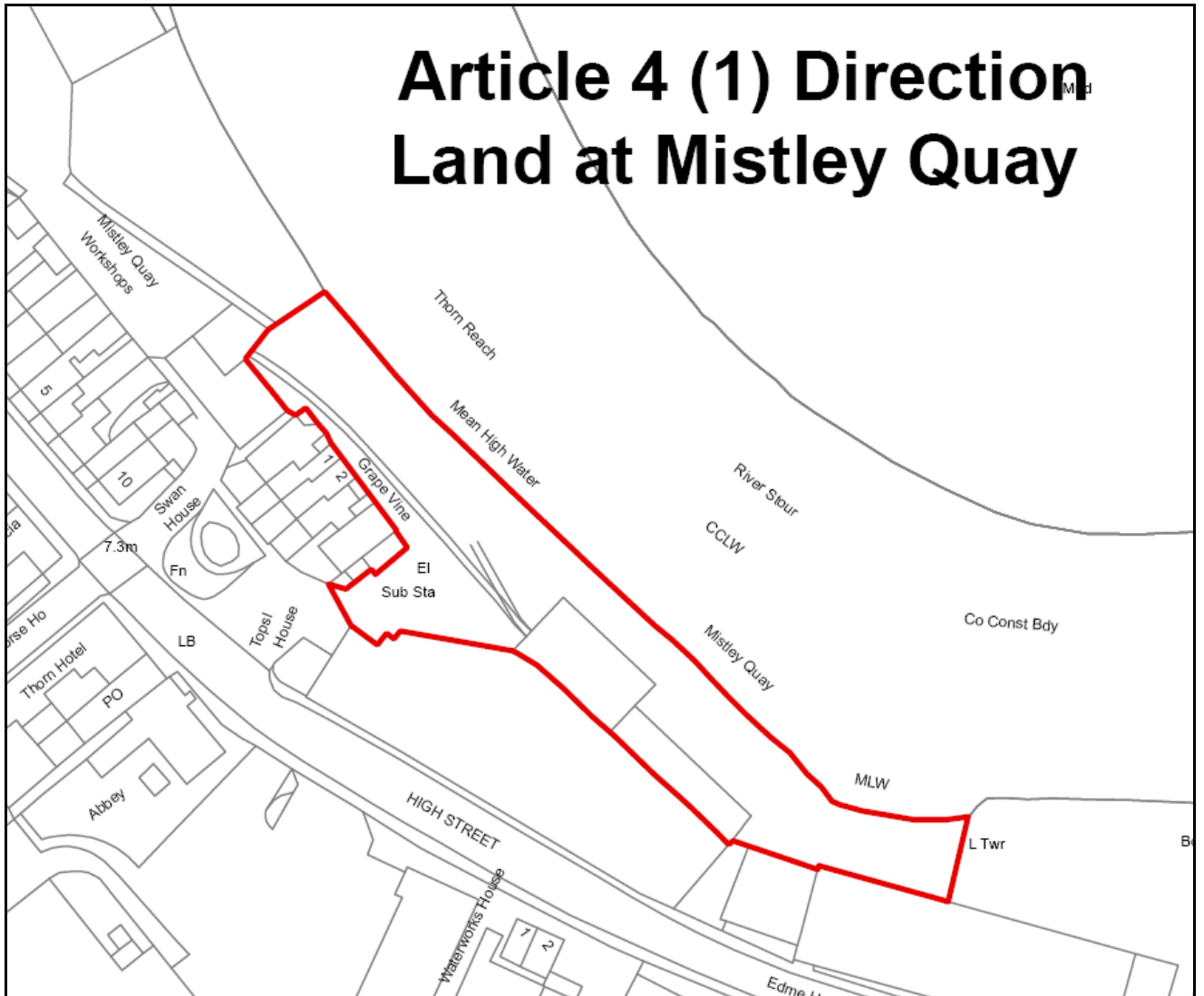




APPENDIX B

**(1) PLAN SHOWING EDGED RED THE
LAND WHICH IS THE SUBJECT OF THE
DIRECTION**

Article 4 (1) Direction Land at Mistley Quay



**(2) PLAN SHOWING THE EXTENT OF THE
MANNINGTREE AND MISTLEY
CONSERVATION AREA AND THE
LOCATION OF THE EXISTING FENCE**



APPENDIX C

COPIES OF THE REPRESENTATIONS RECEIVED DURING THE PUBLIC CONSULTATION PERIOD

Gary Ashby

From: Pat Sargent [REDACTED]
Sent: 25 May 2012 14:00
To: Gary Ashby
Subject: FW: Article 4(1) Direction in Relation to Land at Mistley Quay, Essex - Objection
Attachments: Article 4(1) Direction - Objection.doc
FYI...

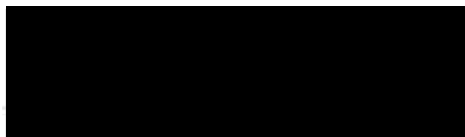
From: Pat Sargent
Sent: 25 May 2012 13:51
To: 'sstevens@tendringdc.gov.uk'
Subject: Article 4(1) Direction in Relation to Land at Mistley Quay, Essex - Objection
Dear Ms Stevens

Please find attached our objection to the Article 4(1) Direction in Relation to Land at Mistley Quay, Essex.

Please acknowledge receipt.

Yours sincerely

PG Sargent
Co. Secretary



This email
has been scanned by N-Defender, Nevis Computers' Email Security Solution

Article 4(1) Direction in Relation to Land at Mistley Quay, Essex

The permitted purpose of an Article 4(1) Direction is not “*a bid to gain stricter controls*” over a private property owner’s rights¹. The permitted purpose of an Article 4 (1) Direction in a Conservation Area is set out in English Heritage guidance:

*“It is only appropriate to remove permitted development rights where there is **a real and specific threat** ... of development which might **harm the significance of heritage assets**”²*

The Council has released a press statement to the general public setting out a series of easily disproved misrepresentations, repeated in the Statement of Reasons.

Timing

The Council has known since August 2011 TWL are replacing the existing fencing with reclaimed wrought iron railings.

TWL advised a principal planning officer, Gary Ashby, on 12 August 2011 that replacement railings had been acquired:

Fence

Over three months ago, we asked the Council to specify conservation criteria for a fence and the Council declined to comment. Mr Hornby did not contact us after the meeting on 1 June and this is over two months ago. This is consistent with the situation following our original proposal in February 2010 where the Council did not seek to engage for 12 months and followed a more aggressive course of action.

We have however pursued a conservation solution and after a long search acquired reclaimed railings with an architectural salvage specialist. We will invite Mr Hornby to our workshop when the restoration process is underway.”

¹ TDC Press Release “New action taken at Mistley Quay” 30.4.2012

² English Heritage *Understanding Place: Conservation Area Designation, Appraisal and Management, Appendix 1 Guidance on Making Article 4 Directions*, p20, March 2011

It is also claimed in the Statement of Reasons that the Council “*has made a number of unsuccessful attempts to meet with the owner to discuss the situation and come up with a suitable design*”. Again, this statement is untrue.

The Council made no contact about the fence between February 2010 and January 2011 following TWL’s offer in February 2010 to discuss a replacement. The only action by the Council in 2010 was the Article 4(1) application in spring 2010, which was not confirmed by the Secretary of State.

We met with the Council to discuss the fence a year later in January 2011 and again in June 2011. The Council declined to specify conservation design criteria (see above). The reclaimed wrought iron railings were acquired in August 2011. TWL notified the Council on August 12 2011 about the acquisition and the intended restoration work and we heard nothing from the Council for **over 8 months**.

When the Council did make contact again over 8 months later, installation and treatment specifications were complete and restoration works to the railings well underway. Contact had already been made with the County conservation officer by February 2012 after Philip Hornby had retired. Since February, I have been liaising with Gary Ashby to arrange a date to visit Mistley with the County’s conservation officer. In response to Mr Ashby’s email of 17 February 2012, we had a telephone conversation in late February and I also refer you to our email exchange of 2 March 2012 and 19 March 2012 and Mr Ashby’s email of 2 April 2012 concerning the planned on-site visit, curtailed by the sudden issue of this Direction without reason or notification.

Officers and Councillors are well aware this is the true course of events: the purported recent “detection” is easily evidenced to be spurious by reference to this correspondence.

On other planning matters, TDC has been exceptionally unresponsive and is acting unreasonably and improperly. TDC officers have avoided meetings with Mistley Port on important planning application and policy matters affecting the Port for well over six months. There is an extensive log of information now concerning this avoidance.

Running parallel are the Council's arguments into the High Court over the last 18 months claiming the Council intended only to apply an Article 4 Direction to domestic properties, that TWL were mistaken and had misunderstood the Council's intentions. Immediately following the High Court hearing at the end of March 2012, the Council has reverted and issued the Article 4(1) Direction against Mistley Quay. It is the timing of the court hearing – not the wholly spurious claim to be acting on *“received evidence suggesting that a new fence is due to go up”*³ – that has prompted the Council to issue the Direction in April 2012.

The Council has reverted to its former practice of lengthy inaction followed by an aggressive course of action, justified by misrepresentations of fact apparently intended to harm the reputation of TWL in the public eye.

Reasons

The Statement of Reasons, on a fair assessment of the known facts, fails to justify the service of an Article 4(1) Direction.

Nowhere within the Statement of Reasons, or the press release, does the Council admit its knowledge that the actual intention is to replace existing fencing with reclaimed wrought iron railings.

Existing Fence

The Council is aware in order for an Article 4(1) Direction to be lawful it is necessary to demonstrate there is a real and specific threat of PD development which could cause harm to the conservation area.

English Heritage advises the purpose of an Article 4(1) Direction applied to an existing boundary feature is to prevent maintenance works that could harm the heritage value of the feature and its contribution to a setting.

³ TDC Press Release 30.4.2012 claiming: *“The Council took the step after it received evidence suggesting that a replacement fence is due to go up at the site which is in the Conservation Area”*.

A substantial amount of the report is directed to the existing fence, which is due to be replaced by wrought iron railings. An existing boundary feature is irrelevant to the consideration of an Article 4(1) Direction unless it is itself considered to be of value and vulnerable to harmful change.

The existing fence was erected lawfully under PD rights in response to a HSE direction to take immediate action to secure the quay edge⁴. To seek to prevent repair of this fence, lawfully erected under PD rights, to effect removal of PD rights retrospectively would be an abuse of process and would be unlawful. The Council cannot apply an Article 4(1) Direction to remove lawfully erected PD development by seeking to prevent its repair and maintenance.

An Article 4(1) Direction would only have the effect of preventing change to the existing fence.

Claimed threat of a “proliferation” of fencing within the Direction area

The Council knows TWL intends to replace the existing fence and does not intend to erect additional fencing, characterised as a threat of a “*proliferation*” of new fencing in the red line area. It is suggested a Direction is needed “*in order to stop any proliferation of inappropriate fencing*” in the red line area. The claim is baseless.

Regard to immaterial considerations

There are recurrent allegations of rights of public access to Mistley Port in the report, of no relevance to the service of an Article 4(1) Direction.

At our meeting on 19 January 2011, Council officers assured us this would be a thing of the past, that the Council’s only concern was a conservation solution and agreed allegations of public rights were of no relevance to the matter in hand.

⁴ Under Statutory Instrument No.1655, Health and Safety, the Docks Regulations 1988, any dangerous edge or any place where a person working or passing may fall a distance of more than 2 metres must be securely fenced where it reasonably practical operationally to do so. The fence erected in direct response to the HSE direction in 2008 is the same fencing seen elsewhere around Mistley Quay and No.1 Maltings for many years and satisfied the immediate safety requirement.

The Direction and the Statement of Reasons signals a reversion to the Council's position pre-2011. Any reliance upon alleged but non-existent public rights in the determination process is unlawful.

The Council should also be aware TWL obtained copies of the emergency services logs which evidence no access/operational issues arose when a dinghy was capsized 1km from Mistley Quay off Nether Hall, Bradfield in 2010. Standard arrangements for future emergency access were reconfirmed in 2010 with the emergency services. It is important the Council does not promulgate false allegations in this regard.

Conclusion

The Council has waited until after the High Court hearing at the end of March 2012 to issue the Direction. The Council has known TWL is replacing the existing fencing with reclaimed wrought iron railings since August 12 2011: over 8 months before service of the Direction.

If the Council has reverted to its position pre-2011 and is intending to obstruct the erection of the wrought iron railings - because railings prevent unauthorised access from the water onto Mistley Port and prevent trespassers sitting on a bar fence above the quay drop - then the existing fencing cannot be replaced. To use an Article 4(1) Direction to promote this end would be unlawful and contrary to conservation area objectives, when there is no threat of harm and TWL's object is beneficial change.

PG SARGENT
COMPANY SECRETARY
T W LOGISTICS LTD

24 MAY 2012

Gary Ashby

From: Sarah Stevens
Sent: 24 May 2012 09:10
To: Gary Ashby
Subject: FW: MISTLEY QUAY

Gary
FYI
S

Sarah Stevens BSc (Hons), MSc, DipTP, DMS, MCMI, MRTPI
Temporary Head of Planning,
Tendring District Council,
Council Offices, Thope Road, Weeley, Clacton-on-Sea, CO16 9AJ
Tel 01255 686101

From: Richard Ling [REDACTED]
Sent: 23 May 2012 20:15
To: Sarah Stevens
Subject: MISTLEY QUAY

Dear Ms Stevens

Article 4 (1) Direction on Land at Mistley Quay

Thank you for your letter dated 27th April which was discussed by the Parish Council at its meeting on 21st May.

I was asked to inform you that my Council fully supports your Council's action and very much hope that the Direction is confirmed, after 6 months, on 27th October. It will be a great help in controlling some of the activities, such as the unwanted and unnecessary fence, that have taken place in the recent past.

Richard Ling - Clerk to Mistley Parish Council

RECEIVED
22 MAY 2012



Gary Ashby

Tendring District Council

Planning Department

Council Offices

Weeley CO16 9AJ

20th May 2012

Dear Mr Ashby

Re: Article 4(1) Direction in Relation to land at Mistley Quay, Essex

Further to your letter dated 27 April 2012, and your subsequent telephone conversation with my daughter, Joanna Young.

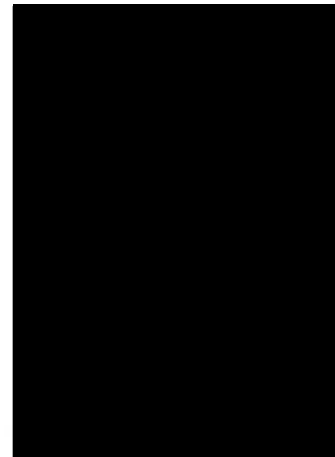
I wish to state that I am very much against the unsightly fence that I have to look at every day from my kitchen window, and I support any efforts you may be making to prevent any further actions or alterations that may make the fence even more distasteful.

I have lived here for over 50 years and have brought up two children here, and in all this time there has never been any health and safety problems.

Yours sincerely

Margaret Saxby

Mr & Mrs Bell



RE; ARTICLE 4 MISTLEY QUAY

22nd May 2012

Dear Sarah Stevens

We strongly support the council action on issuing the article 4 directive on Mistley Quay. We feel it will have long term benefits and protect the conservation area from further inappropriate construction. The existing fence is a blight and damages the character of the area and we hope that the council will take the strongest possible action should the article 4 not be adhered to.

Yours faithfully

Mr & Mrs Bell

RECEIVED
24 MAY 2012



Sarah Stevens
Temporary Head of Planning
Tendring District Council
Council Offices
Weeley
Essex

Dear Ms Stevens

Article 4 (1) Direction in relation to land at Mistley Quay, Essex

We refer to your letter of 27 April regarding the proposed Article 4 Direction at Mistley Quay, and requesting comments on it.

Our family have been long time residents of the Mistley area and, as you will see from our address, we live directly opposite the fence in question. We have also brought up two daughters and a son in this location, now adults with families of their own. We, therefore, feel we are ideally placed to comment on all aspects of this issue plus we are, of course, directly affected by the fence itself.

Firstly, may we say that we fully support the Council in its action to seek an Article 4 Direction. Whilst Mistley Quay is not "pretty" in the accepted sense, it has its own special local character and charm and makes, as the Council say, an important contribution to the area.

Such features can be seen to be fully compatible with the Government's "localism" agenda, where it aims at encouraging communities to identify and protect those very features and issues that give such a "sense of place".

Having given our general support to the Council in its current actions, we would like to comment on the Council's supporting Statement of Reasons as we believe that this must underpin and justify the rationale behind the direction. It is also clear from the recent actions of the owners of the Quay that they are unlikely to take any confirmation of the direction "lying down", so we consider it is vital that the supporting Statement of Reasons is as clear and robust as possible should any further legal action arise.

The following points are not aimed as criticisms of the Council, but at pointing out those areas where we feel the Statement could be clarified or enhanced.

For convenience, we will comment in the order of the sections and paragraphs as set out - (it might be helpful if the document was numbered).

Part 1 – Description of the Area

Para 3 –

This raises the issue of “public accessibility” of the Quay for “decades”. We fully support this description and, indeed, can confirm from our own experience that our family has enjoyed and made full use of this access as, indeed, they still do. We know that many local people have the same views as will, no doubt, be expressed in other responses. However, we are not fully clear as to how this affects the Council’s rationale for objecting to the fence. Later in the Statement the issue is discussed further, but we feel it would help if the relevance of the issued could be summarised at this point in the introduction.

Part 2 – History

Para 1 –

The issue of “public access” is again raised in the combination of issues relating to “access”, recreation and overall amenity, which could possibly apply.

Para 2 –

Comments are made about health and safety matters from both the owners and Council’s viewpoint. The views of the Health and Safety Executive are also mentioned. Whilst no doubt the Council could make the HSE views available as required, we think that a brief outline of what those are would be very useful in this Statement. This would, we hope, fully support the Council’s position and give the lie to the suggestion of the owners that the Quay is a dangerous place for the public and needs the fence to protect public safety interests. In this regard, we would make the point that during our whole family life here we never experienced concerns over the openness of the Quay for the safety of our children. Whilst the Council raises a recent river related incident, we are certainly not aware of any dangers over the years from NOT having the river frontage fenced.

This paragraph also makes the Council’s point that the fence is unsightly and detracts from the views of the estuary. We fully support this position, but we feel that the Statement should be clearer as to why it is felt to be unsightly as, of course, if it wasn’t, this Direction may not be needed.

Para 3 –

This refers to the incident that involved restriction to access for emergency services. This is clearly a vital concern and we fully support it. However, the last sentence criticises the fence “in its current form”. This implies that an alternative type of fence would be acceptable to the Council and, indeed, the whole point of an Article 4 Direction is to bring development within planning control which is currently outside it. This MUST imply that some form of fencing WOULD be acceptable to the Council. Given the Council’s concerns over historic public access and local amenity, it may be helpful if the Statement would give guidance as to the type of fencing that might be acceptable or, at least, set out criteria by which it would judge any future planning applications (perhaps based on the policies mentioned below?).

Part 3 – Reasons of Expediency for making the Article 4 Direction

Para 2 –

This section helpfully sets out in full the current Local Plan Policy LMM1 for the Mistley Urban Regeneration Area. The Council is, therefore, clearly using it to underpin its case for the Direction. We fully agree with and support the Policy.

However, we think it would be very useful if the Statement were to set out briefly what parts of the Policy are particularly relevant to this case and how the current fence falls foul of it. It seems to us that parts i, vi and vii are most likely to be relevant.

It may also be useful to set out how the proposed approach we suggest above (Part 2, Para 3) would meet the Policy.

We think that both these explanations would add to the robustness of the Council’s case.

Para 4 –

In a similar vein we think that this paragraph should outline what elements of the current fence are in conflict with the CAMP and what alternative approach may be considered more favourable were a planning application to be submitted. Again, we think this would make the planning arguments for the Direction more robust.

Para 6 –

This relates to the Council’s attempts to meet the owners. We think this should set out the reasons for this (presumably because the owners refuse to meet the Council or will not agree dates/times offered). As it stands, the Statement is neutral as to blame, but if the Council is using this as one reason for its actions, then the non-co-operation of the owners should be made clear.

In addition this would also show that the owners have little intention of meeting the Council’s aspirations and this would also add weight to the need to bring in additional controls in this important and sensitive area.

Part 4 – Expediency

Para 1 –

We think that sentence 3 should be far more robust and state that: “An Article 4(1) Direction **IS** considered expedient

The current use of the word “could” makes the Council’s position far weaker.

We also think that the final sentence should read: “.... duties to protect **OR** enhance

Part 5 – Conclusion

Para 5

This sets out the process for confirming the Direction.

Whilst this may be a very minor point, the wording of the last part of this paragraph **COULD** be read as the Council having already made up its mind on this matter. It is suggested, to avoid any accusation along those lines, that the wording of the last two sentences be changed to read:-

“If confirmed, the Direction will become permanent. The Council will give notice of such confirmation of the Direction as soon as practicable afterwards.”

We hope that the Council will accept these comments in the spirit in which they are meant. We fully support the Article 4 Direction, but feel that the changes we suggest would make the Council’s case for it far more robust, should it, as is probably likely, have to be defended either at an Inquiry or by Judicial Review.

Yours sincerely

Mr and Mrs Saxby

Gary Ashby

From: Jez Donovan [REDACTED]
Sent: 01 June 2012 10:52
To: Gary Ashby
Subject: RE: JD FW: Article 4(1) Direction relating to land at Mistley Quay, Essex
Follow Up Flag: Follow up
Flag Status: Red

Hi Gary,

Just to let you know we do not have any comments to make on the above-named Article 4(1) Direction.

Jez Donovan
[REDACTED]

Planning casework previously undertaken by the Government Office network is now dealt with by the National Planning Casework Unit. The main enquiry number is 0303 4448050.
e-mail: npcu@communities.gsi.gov.uk

From: Gary Ashby [mailto:gashby@tendringdc.gov.uk]
Sent: Tuesday, May 29, 2012 5:46 PM
To: Jez Donovan
Subject: RE: JD FW: Article 4(1) Direction relating to land at Mistley Quay, Essex

Dear Jez,

Many thanks for your reply. Friday is fine for us.

I look forward to receiving your response.

Kind regards,

Gary Ashby BSc(Hons) PGDip
Planning Officer
Planning Department
Tendring District Council
Council Offices, Thorpe Road, Weeley, Essex, CO16 9AJ
e-mail: gashby@tendringdc.gov.uk
tel: 01255 686137
web: www.tendringdc.gov.uk

[Planning Public Access](#)

From: Jez Donovan [REDACTED]
Sent: 29 May 2012 12:20
To: Gary Ashby
Subject: RE: JD FW: Article 4(1) Direction relating to land at Mistley Quay, Essex

Hello Gary,

Thank you for your e-mail about the Article 4(1) Direction relating to land at Mistley Quay, Essex. I am the case officer handling this matter at the National Planning Casework Unit.

I have been considering this Article 4(1) and just need to run it past one of my colleagues as its the first Direction I have dealt with for sometime. I will be doing this on Thursday and we should be in a position to respond by Friday if that is OK?

I hope this has not caused you any inconvenience.

Regards

Jez Donovan
[REDACTED]

Planning casework previously undertaken by the Government Office network is now dealt with by the National Planning Casework Unit. The main enquiry number is 0303 4448050.
e-mail: npcu@communities.gsi.gov.uk

From: NPCU
Sent: Tuesday, May 29, 2012 11:44 AM
To: Jez Donovan
Subject: FW: JD FW: Article 4(1) Direction relating to land at Mistley Quay, Essex

From: Gary Ashby [mailto:gashby@tendringdc.gov.uk]
Sent: Tuesday, May 29, 2012 11:11 AM
To: NPCU
Subject: JD FW: Article 4(1) Direction relating to land at Mistley Quay, Essex

Dear Sir or Madam,

I am just checking to make sure you received the notice below, as we will soon need to decide whether to confirm the direction, taking into account comments received during the consultation period, which ended last Friday (25 May 2012).

Please can you confirm that you had received the notice and whether you have any comments we ought to consider when deciding whether to confirm the direction, or not.

Kind regards,

31/07/2012

Gary Ashby BSc(Hons) PGDip
Planning Officer
Planning Department
Tendring District Council
Council Offices, Thorpe Road, Weeley, Essex, CO16 9AJ
e-mail: gashby@tendringdc.gov.uk
tel: 01255 686137
web: www.tendringdc.gov.uk

Planning Public Access

From: Gary Ashby
Sent: 27 April 2012 14:44
To: 'npcu@communities.gsi.gov.uk'
Subject: Article 4(1) Direction relating to land at Mistley Quay, Essex

Dear Sir or Madam,

Please find attached the following documents relating to the making and serving of the above Immediate Article 4(1) Direction (these documents have also been sent by post today):

- Covering letter dated 27 April 2012 (date Direction made and served);
- Scan of Signed and Sealed Direction;
- Map of area to which the Direction relates;
- The Council's statement of justification for the Direction; and
- A copy of the public notice displayed on site (today – i.e. 27 April 2012) and submitted for inclusion in the 4 May 2012 edition of the Harwich & Manningtree Standard.

I would be grateful if you could confirm receipt and look forward to receiving any comments the Secretary of State may have.

Kind regards,

Gary Ashby BSc(Hons) PGDip
Planning Officer
Planning Department
Tendring District Council
Council Offices, Thorpe Road, Weeley, Essex, CO16 9AJ
e-mail: gashby@tendringdc.gov.uk
tel: 01255 686137
web: www.tendringdc.gov.uk

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APPENDIX D

CHRONOLOGY

APPENDIX D

CHRONOLOGY

DATE	EVENT	COMMENT
09.08	Present fence erected on quayside	
16.02.10	TWL's letter of objection to the draft Mistley and Manningtree Conservation Area Management Plan	TWL wrote that it was " <i>not adverse to discussion with the Council's conservation officers on the appearance of quay fencing as a long-term conservation issue if the preservation of the integrity of the conservation area is a concern</i> "
03.10	Non-immediate Article 4 Direction made	withdrawn
11.10	Authority obtained for a further non-immediate Article 4 Direction.	Not proceeded with. Council instead looked to a negotiated settlement.
01.11	Meeting TWL and Council	TWL declined to discuss the fence in detail. Council indicated that it would welcome discussion and suggested a further meeting with TWL, preferably on site, to discuss ideas for the design of a new fence. No such meeting took place despite a number of attempts in February and March 2011 by the Council to obtain possible meeting dates.
03.11	Council sent TWL designs from the Broxap Street Furniture brochure that would have satisfied the HSE's health and safety concerns.	No response from TWL.
01.06.11	Meeting TWL and Council	Council's Heritage and Conservation Manager raised the ongoing fence

		<p>issue with TWL. He requested TWL to specify the health and safety requirements with which TWL had to comply. TWL declined to do so, but instead asked the Council to specify conservation design criteria for a new fence. The Heritage and Conservation Manager indicated that any design would be a matter of judgment and best addressed through discussion and negotiation.</p>
12.08.11	Letter TWL to Council	<p>Council first aware that TWL was seeking to replace fence. TWL said that the Council's Heritage and Conservation Manager would be invited to the workshop when the restoration process was underway. No invitation was forthcoming.</p>
12.11	Council's Heritage and Conservation Manager retired.	
03/04.12	Council unsuccessfully attempt to arrange a meeting with TWL	TWL did not respond with dates
04.12	Council received evidence that erection of a new fence was imminent.	
27.04.12	Immediate Art 4 (1) Direction	

APPENDIX E

FURTHER COMMENTS RECEIVED BY TWL ON 4 SEPTEMBER 2012 AND INITIAL OFFICER RESPONSE

OFFICER RESPONSE TO COMMENTS RAISED BY TWL IN ADVANCE OF THE 4 SEPTEMBER 2012 PLANNING COMMITTEE RELATING TO THE CONFIRMATION OF THE ARTICLE 4(1) DIRECTION ON LAND AT MISTLEY QUAY

Officer comments in response to each point raised by TWL (in bold) have been provided below. Many of TWL's comments are directed at the background rather than the substantive reasons for confirming the Article 4 Direction.

The matter is due to be considered by Members at the 2 October 2012 Planning Committee.

- 1. Mistley Quay is an industrial area, and the land in question is within the Port's ownership and is operated as part of the working, commercial Port. The land is governed by Dock Regulations and remains an important operational area of the Port where dock shunters, fork lift trucks, loading shovels and commercial HGVs frequently manoeuvre in the area.**

The Council's Committee Report at section 2.3 already clearly recognises the land is within the Port's ownership and is part of the operational area of the Port. The Report also acknowledges that some form of fence or barrier is required for health and safety reasons.

- 2. No established public rights of access exist on Port land.**

The Article 4 Direction is not intended to promote public access on Port land nor does the Committee Report imply this. The planning reasons for making and serving the Article 4 Direction are clearly set out in the Committee Report.

- 3. Following HSE visits in 2005, TWL were advised re the duty to protect the health and safety of all who may be affected by the company's activities in the subject area and, given the nature of the risks, fencing of the quay edge in this area of the Port was considered the means of fulfilling the company's legal obligations.**

The Council does not dispute the health and safety requirements that are imposed on the Port and recognises that some form of fence or barrier is necessary in order to comply with these. The Council has issued an Article 4 Direction to bring this area under better planning control in order to protect the Conservation Area.

- 4. In August 2008, HSE indicated that they would issue an 'improvement notice' unless the fence was erected along the quay edge by September 2008.**

A specification for the fence was agreed with HSE.

Again, the Council does not dispute the health and safety requirements that are imposed on the Port and recognises that some form of fence or barrier is necessary in order to comply with these. However, health and safety requirements are not the same as the requirement to preserve or enhance the character and appearance of the Conservation Area. The former is the responsibility of the HSE; the latter of the Council. The HSE has made it clear to the Council that the design of the fence erected along the quay was TWL's choice, not the HSE's. The HSE has also confirmed that a more appropriate design could have been used within the Conservation Area that still would

have met the health and safety requirements. The Council was keen to meet with TWL to discuss these issues and to agree on a suitable design but no meeting ever materialised.

- 5. TWL, who HSE hold responsible for all employee and public safety in the Port area, provided a full Risk Assessment to HSE.**

HSE confirmed that the current form of fence achieved compliance in controlling the risks to persons on the quay.

The Council has no reason to doubt that TWL provided an appropriate risk assessment to HSE or that HSE accepted that the current fence achieved compliance in controlling the foreseeable risks. However, those matters are beside the point. As is made clear in the body of the Committee Report, the Council has serious concerns as to whether the current fence is appropriate in this Conservation Area. Moreover, the HSE confirmed that a more appropriate design could have been used within the Conservation Area that still would have met the health and safety requirements. The Committee Report makes it clear that it is the appearance of whatever form of fence or barrier used and its impact upon the Conservation Area that is the issue.

- 6. Given no established public rights of access exist on Port land, it was agreed at a meeting with TDC officers in January 2011 that any discussion on a new fence design would only occur if TDC accepted that the fence design must be of a size which prevented attempts to climb over it, avoiding even greater health and safety risks. At low tide there is a 4 metre drop from the quayside to the river bed.**

The Council made it clear at the January 2011 meeting that it wished to have a detailed discussion about possible fence designs but it was agreed by both parties that a separate meeting should be held. However, no such meeting materialised despite a number of attempts by the Council in early 2011 to set up a meeting. Again, the Council accepts the health and safety reasons why some form of fence or barrier is required but insists that the design should also be suitable for the Conservation Area.

TWL had made the same offer in February 2010 - an offer to which TDC did not respond until 12 months later.

In its formal letter of objection to the Manningtree and Mistley Conservation Area Management Plan (CAMP) dated 16 February 2010, TWL wrote that it was "*not adverse to discussion with the Council's conservation officers on the appearance of quay fencing as a long-term conservation issue if the preservation of the integrity of the conservation area is a concern*". The CAMP at that time was being handled and processed by external consultants. The offer therefore may have been put aside and not taken up immediately, purely by mistake. At a meeting between the Council and TWL in January 2011 the Council made it clear that it would welcome a discussion and suggested having a further (separate) meeting with TWL to discuss ideas for the design of a new fence within the next few weeks (preferably on site, if possible) as it was not possible to talk about the fence in detail at that meeting. However no such meeting ever materialised.

- 7. Initial proposals made by the Heritage and Conservation Officer, Mr P Hornby, totally ignored this basic principle.**

The officer declined to put forward any conservation design parameters when asked to do so. Mr Hornby instead wished to obtain TWL's Risk Assessments to evaluate the Port's health and safety needs.

It was not the Heritage and Conservation Officer's responsibility to assess Port safety issues, nor was he qualified to do so.

Minimum health and safety requirements had to be clearly understood by the Council before any advice as to a Conservation Area friendly fence could be proffered. This level of discussion could have been held at the separate meeting, which unfortunately never materialised.

- 8. TWL proceeded with the acquisition of a heritage fence with a substantial period allowed for renovation.**

This was sourced after a lengthy search and at considerable cost given the material was wrought iron, and renovation work is time consuming.

TWL acquired the new fence without first seeking advice from the Council as to whether it would be appropriate, or not, within the Conservation Area. Apart from a brief reference in a letter to the Council dated 12 August 2011, TWL has never provided any details about its intentions to replace the fence.

- 9. TWL invited TDC to review the fence during renovation works, but this was not followed up until the County Council's Heritage and Conservation Officer replaced Mr Hornby who had retired.**

TWL's letter to the Council dated 12 August 2011 stated that the Council's then Heritage and Conservation Manager would be invited to the workshop when the restoration process was underway but no contact was made between 12 August and the end of December 2011, when the Heritage and Conservation Manager retired.

Correspondence and telecons between TWL and TDC took place between February and April 2012 regarding a meeting at the Port.

At no time did TWL decline to meet with representatives of TDC or Essex County Council.

The Conservation officer, we were informed, was only available on Thursdays and unfortunately TWL are required to make a 400 mile round trip to attend such a meeting.

The Council initiated the offer to meet again in February 2012 as some time had passed without any contact. TWL did not decline to meet representatives of TDC or Essex County Council but a number of attempts were made to ascertain TWL's availability for a meeting, without success. TWL was made aware of the availability of the County Council's Conservation Officer (who at the time was providing this Council with conservation and heritage support) in order to aid the setting up of the meeting. However, no such meeting materialised.

10. The LPA issued the Article 4(1) Direction in late April.

No requests were made of TWL to give specific details of fence materials or dimensions. Given that TDC / TWL were in discussion to set up a meeting to review fence renovation, we do not understand why TDC are relying on unnamed witnesses to provide information about the fence.

TWL mentioned in its letter to the Council dated 12 August 2011, amongst other issues, that it had '*pursued a conservation solution and had acquired reclaimed railings from an architectural salvage specialist*'. However, no specific details about the design, material or method of construction were provided. The invitation to meet sent by officers to TWL in February 2012 also included a request for more information about TWL's intentions to replace the fence but no information was provided. The meeting the Council was keen to set up would have been the opportunity to discuss TWL's intentions to replace the fence and to clarify any issues. The evidence received prompted the Council to make and serve the Immediate Article 4 Direction to prevent any works that could cause harm to the Conservation Area. The Committee Report clearly explains the reasons for this course of action.

11. Members should be aware that planning permission has in the recent past been granted for equally long stretches of fence in the vicinity of the quay.

The proposed heritage fence is of smaller dimensions than these fences and members should at least be made aware of the background to these related permissions.

Permission was granted for nearby similar fencing near the Stockdale Warehouse on the basis that it was considered to be a temporary measure to prevent trespass onto the land. It is clear in the officer's report attached to that planning permission that the fence was not to be a long-term solution. The primary reason why the Council made the Article 4 Direction on the specific piece of land at Mistley Quay was to protect views out across the River Stour from the High Street. This is one of the key features of this part of the Conservation Area. The area of land around the Stockdale Warehouse where the fencing referred to above was granted planning permission does not provide the same views from the High Street. The alleged design of the proposed replacement fence is very different to that of the current fence along the quayside. The Committee Report sets out clearly why the Council is concerned about this replacement fencing and the reasons why the Article 4 Direction was made.

12. The current fence along the quay edge has been wilfully damaged on many occasions over the last 4 years.

On each occasion the Police have attended the incident.

Fence panels have been replaced when necessary as failure to do so would add significantly to the H&S risks. Intervention by HSE would result, given the 'improvement notice' initiated in 2008.

The Council does not support or condone any such behaviour to attempt to damage or remove the existing fence. The Committee Report makes it clear that the Article 4 Direction cannot force the replacement or removal of the current fence.

- 13. TWL will continue to replace fence panels as necessary if and when damage occurs.**

This is consistent with Article 4(1) conditions where 'like for like' replacement does not require planning permission. Neither can an Article 4(1) Direction be applied retrospectively to development already undertaken or commenced.

The officer's report indicating that planning permission would be required before repairs take place is, in our view, incorrect.

Any such requirement would however be an incitement to further disorder and acts of malicious damage.

The Article 4 Direction removes certain 'permitted development rights' and so planning permission must now be sought for the following forms of development covered by the Direction, namely 'the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure'. If and insofar as any work of repair requires planning permission, then such permission must be sought. Any development that takes place without planning permission will be subject to enforcement action by the Council.

It is accepted that an Article 4 Direction does not affect the carrying out of development in an emergency.

It is neither possible nor desirable for the Council to indicate in advance what works of repair would or would not require planning permission.

- 14. In conclusion, the recently produced Tendring Draft Local Plan agreed at Cabinet includes an implemented Article 4(1) Direction policy as a means of controlling future development on Mistley Quay.**

It appears that the current steps are the foundations for that predetermination.

These comments are not fully understood. The emerging new Local Plan simply refers to the existence of the Article 4 Direction and the forms of development it seeks to control.