AVISON YOUNG

Defence Infrastructure Organisation

City of York Local Plan Examination

Phase 3 Hearing Sessions

Hearing Statement on behalf of Defence Infrastructure Organisation

Matter 5: Queen Elizabeth Barracks, Strensall (Sites ST35 and H59)

July 2022

Report Title: York Local Plan Examination – Phase 3 Hearing Statement – Matter 5 (QEB)

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For and on behalf of Avison Young (UK) Limited

1. Questions 5.1 and 5.2:

Are the proposed deletions of Policy SS19 and allocations ST35 and H59 necessary for soundness?

Could the difficulties identified by the Council and Natural England in relation to either site be overcome?

1.1 We address these questions together because they are interlinked. Indeed, if the answer to 5.2 is 'yes', the answer to 5.1 is necessarily 'no' and the allocations must be retained in the Plan. This is because the Council ("CYC") is only proposing that sites SS19/ST35 and H59 are deleted because it believes that, if they were to be developed with housing, it could not rule out the potential for the developments to have an adverse effect on the integrity of the SAC due to increased recreational pressure and urban edge effects. Sites SS19/ST35 and H59 are otherwise deliverable housing sites (see Statement of Common Ground between CYC, Natural England and DIO (SoCG)).

1.2 So the starting point is actually Question 5.2. The matters that the Examination needs to address in this regard are:

a) what is the 'baseline' or 'context' against which any possible risk or threat to the integrity of the SAC must be assessed, i.e. – why is the SAC an SAC; how is it used currently; what condition is the SAC in and is the current use of it impacting adversely on its integrity;

b) when considering whether it is acceptable, in habitat regulations terms, to allocate land for development, the use of which might have the potential to impact adversely on the integrity of the SAC, what tests must the plan-maker satisfy;

c) would the development of the QEB sites (ST35 and H59) result in the SAC being used more than it is currently for recreational purposes and, if the answer is yes, by how much might it's use increase;

d) what are the effects that might be caused by recreational use of the SAC and that CYC is concerned about?

e) what are 'urban edge effects' and would the development of the QEB sites necessarily give rise to such effects;

f) are there mitigation measures that could be implemented in association with the development of Sites ST35 and H59 and would these be effective;

g) are there other allocations in the Plan that would cause an increase the use of the SAC for recreation? If there are, how does the HRA deal with these and is its approach reasonable and consistent across all sites?

1.3 We address each of these points in the paragraphs that follow.

1.4 As the Inspectors will be aware, there is already a very large amount of material before the EiP on these issues, including several HRAs and the various representations that DIO has made at relevant points from Regulation 19 onwards. We would ask you to re-read DIOs Representations, including those submitted in July 2021 in response to CYC's Additional Consultation. In that document, DIO

presents a comprehensive review and assessment of the latest (2020) HRA which. Amongst other things, those Representations highlight critical issues with the way in which the HRA applies the legal tests and the analysis and judgements that it contains. The Representations also included a Shadow HRA and, within that, a QEB Mitigation Masterplan which, with the use of plans and images, explains how a large number of the mitigation measures that DIO is proposing could be implemented on site and off-site (i.e. within the SAC itself). We are not going to repeat large parts of our previous analysis in this Statement. We can refer to it during the Hearing Session if needs be. Instead, we focus in on what we believe are the critical issues and deal with these as simply as possible.

Why is the SAC an SAC, how is it used currently, what condition is the SAC in and is the current use of it impacting adversely on its integrity?

1.5 These are all matters covered in the SoCG. We summarise and, where necessary, expand on the points made in the SoCG as follows:

a) the SAC is designated because of its qualifying features, which are its North Atlantic Wet Heaths and its European Dry Heaths. There are typical species associated with the Heaths but the presence of these are not the reason why the SAC is an SAC and any harm caused to these (whilst plainly something to be avoided) would not harm the integrity of the Heaths or, thus, the integrity of the SAC;

b) the overwhelming majority of the SAC is owned by the Secretary of State for Defence (SofSD) and is used as a military training area. Public access to it is restricted in line with military activity and Bylaws that are designed to protect the environment of the training area. The training area includes live firing ranges where public access is denied at all times. When members of the public are allowed to use the training area (which is frequently), they use it for recreation (mainly walking and dog walking);

c) there is no data which confirms how many people visit the SAC on a daily, weekly, monthly or annual basis. The only data we have concerning the use of the SAC by members of the public is contained in the Footprint and PCP surveys which have limited sample sizes and are snap shots in time. That said, it is agreed that the surveys indicate that somewhere between 22 and 34 people enter the SAC per hour and around 70% of visitors stay for about an hour;

d) considerably more than half of visitors travel to the SAC by car (taking them into the SAC via the car parks), the overwhelming % of visitors travel more than 500m to get to the Common and a not insubstantial % of visitors travel more than 5km;

e) there have been times when the SAC has been subject to inappropriate behaviour, including livestock worrying and fires (although only 1 incident of livestock worrying since 2013). There is no log of these events that anyone can say is complete or entirely accurate but a list of the events that have been noted, either by NE or the Strensall Training Area Conservation Group, is included in the SoCG. Footprint also noted inappropriate behaviours when they visited the site (trampling, littering, dog fouling and graffiti / vandalism);

f) Natural England ("NE") has conducted two condition assessments of the SAC, one in 2011 and the most recent in 2021. In 2011, it found parts of it were in favourable condition and parts of it were in unfavourable / recovering condition. In 2021, all units within the SAC were found to be in favourable condition. This means that the condition of the SAC has improved since 2011. It has not deteriorated in spite of the fact that it has been used for both military and civilian (recreational) purposes throughout this period and in spite of it having occasionally been the subject of inappropriate behaviours;

g) the 2020 HRA takes no account of the 2021 Condition Assessment; and

h) CYC and NRE agree that there no evidence which indicates that the way in which the SAC is currently being used is having an adverse effect on its integrity.

1.6 The Ministry of Defence ("MoD") has a statutory responsibility to help protect, conserve and restore the protected habitats and species of European sites. At Strensall, it does this by, amongst other things, working with NE and the tenant farmer to implement an appropriate grazing regime and carrying out works within the SAC to walkways, fences, and to the habitats themselves. DIO does not, however, have a full-time presence within the SAC and it does not employ a warden.

1.7 The above is our baseline. The SAC has plainly been able to accommodate military and civilian use, including inappropriate behaviour, over at least the last 10 years without the levels and types of use it has been subject to causing harm to its integrity.

When considering whether it is acceptable, in habitat regulations terms, to allocate land for development, the use of which might have the potential to impact adversely on the integrity of the SAC, what tests must the plan-maker satisfy?

1.8 The issue for the Inspectors is whether the existing allocation of the QEB sites under policies SS19 and H59 is unsound. It will only be unsound if they conclude that the adoption of the Plan would contravene Regulation 105 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regs").

1.9 Reg 105(1) requires that, if it is likely that a land use plan will have a significant effect on a European Site, such as the SAC, the plan-making authority (CYC) must carry out an appropriate assessment of the implications of the Plan for that site. In the present case an appropriate assessment has been carried out, so that does not in itself provide any barrier to the adoption of the Plan including SS19 and H59. However, reg 105(4) provides that the Plan may only be adopted where:

> *"it has ascertained that [the Plan, or the policies in issue] will not adversely affect the integrity of the European site".*

1.10 Thus, the fundamental issue for the inspectors is whether they are satisfied that the adoption of the Plan with sites ST35 and H59 allocated for housing will not affect the integrity of the SAC.

1.11 In considering that question:

a) as to what is meant by an adverse effect to the integrity of protected site, the CJEU in *Sweetman v An Bord Pleanala* (C-258/11) [2014] PTSR 1092 explained that:

> *39. … in order for the integrity of a site as a natural habitat not to be adversely affected … the site needs to be preserved at a favourable conservation status; this entails … the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site ….*

b) in considering whether harm of this kind might occur (i.e. whether there is a risk to the site being preserved at a favourable conservation status, and / or whether there is a risk to the lasting preservation of the elements justifying the designation), the Inspectors should adopt the precautionary principle, which requires that the absence of harm must be demonstrated to a

"*high degree of certainty*", and that there should "*no reasonable scientific doubt*" as to the absence of such harm[1];

c) on the other hand, "*absolute certainty*" is not required. As the Court of Appeal observed in *R (Mynnyd y Gwynt Ltd) v SSBEIS* [2018] PTSR 1274:

> *(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned …*

d) the level of assessment required at the plan stage is of course less than would be required for a planning application. Thus it was said by the Advocate-General in Case C-6/04 ***Commission v UK*** at para. 49 that:

> *… an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure*.

e) finally, and with this point in mind, it must be remembered that the implementation of the plan, by the conversion of the site allocation into a planning permission, will only occur on the basis of a further assessment process, where the planning authority will be both entitled and obliged to refuse permission (notwithstanding the allocation) if is not satisfied that the detailed proposal before it will not offend the precautionary principle. Thus the issue for the inspectors is not whether some form of development in accordance with the site allocation will cause harm to the integrity of the SAC. It is whether the allocation commits the planning authority to a development which will cause such harm. Where the inspectors are satisfied that the relevant development (here, housing development at the scale contemplated in policies ST35 and H59) can be implemented without such harm, reg 105 of the Habitats Regulations does not constitute bar to the adoption of the Plan with those policies (and there can be no other reason to reject the allocation).

Would the development of the QEB sites (ST35 and H59) result in the SAC being used more than it is currently for recreational purposes and, if the answer is yes, by how much might it's use increase?

1.12 Redeveloping ST35 and H59 with housing is likely to result in there being more visits to the SAC for recreation than currently occur. None of the parties can predict how use of the SAC (with or without ST35 and H59) will change over time and neither can we quantify the likely number of visits that will be made to it for recreation with any degree of certainty.

1.13 However, as the SoCG records, the data in the Footprint and PCP surveys indicates that the development of ST35 and H59 could result in there being between 3 and 5 additional visitors to the SAC per hour.

[1] *See Holohan v An Bord Pleanala* (C-461/17) [2019] PTSR 1054, paragraphs 33-4.

1.14 It is DIOs view that this is de minimis and that it poses no measurable threat to the integrity of the SAC over and above existing levels of use.

What are the effects that might be caused by recreational use of the SAC and that CYC is concerned about?

1.15 The HRA states that:

> *"The screening exercise has concluded that a likely significant effect cannot be ruled out alone for the following policies: SS19/ST35, H59(A) & E18. This is because of concern that……..*
>
> *The increase in recreational pressure and urban-edge effects would inter alia lead to trampling, erosion and eutrophication of the fragile heathland communities, an increase in the effects of urbanisation (such as fire, vandalism and fly-tipping) and interfere with the management of the site by the disturbance of grazing stock especially by dogs"* (EX/CYC/XX, paragraph 4.2.1) (our emphasis)

1.16 The Footprint Survey additionally references: increased fire incidents, contamination of ponds, fly-tipping, littering and damage to infrastructure (gates etc.) whether through wear and tear or vandalism (EX/CYC/45a, Appendix D, page 58).

1.17 The SoCG records that NE noted the following 'threats' to the SAC when compiling its most recent Condition Assessment: scrub encroachment, grazing management, recreational disturbance and accidental fire.

1.18 The mitigation measures proposed by DIO have been specifically designed to deal with the above.

What are 'urban edge effects' and would the development of the QEB sites necessarily give rise to such effects?

1.19 The HRA states that urban edge effects can include: "*fly-tipping; cat predation of ground-nesting birds; arson; vandalism; and the creation of unauthorised entrances, including those made by householders on directly adjacent properties via their own gardens. Associated with this can be the unauthorised use of motorbikes and 4x4s although this can obviously involve users from further away*". (EX/CYC/45 paragraph 3.4.6).

1.20 It is not clear whether CYC/NE are asserting that there is a risk that the development of ST35 and H59 would give rise to all of these effects, but later in the HRA, reference is made to a shorter list comprising: fires, vandalism, fly-tipping and unauthorised use by vehicles. (EX/CYC/45 paragraph 3.4.43)

1.21 DIO can find no evidence which indicates that people who live immediately adjacent to an SAC (or within 400m of one) do harmful things more / more often than people who live further away. In the absence of any such evidence, DIO cannot accept (and neither should the Inspectors accept) that the development of these sites is likely to give rise to urban edge effects. In any event, and again, the mitigation measures that DIO is proposing deal specifically with these issues.

Are there mitigation measures that could be implemented in association with the development of Sites ST35 and H59 and would these be effective?

1.22 Notwithstanding the very small number of additional visits that are forecast to be made to the SAC by the residents of ST35 and H59, DIO is proposing a large number of mitigation measures, all of which are designed to satisfy CYC that the proposals are capable of being implemented without an adverse

effect on the integrity of the SAC. These are described more fully, and illustrated visually, in our Representations of July 2021 but comprise:

Mitigation Measure	Location	Issue Addressed	Control Mechanism
Substantial separation between proposed homes and the SAC boundary	On Site	Urban Edge Effects / Recreational Pressure	Parameter Plans, Planning Conditions and Reserved Matters
Provision of boundary and edge treatments which separate residents and pets of ST35 and H59 from the SAC and prevent indiscriminate access to it – forcing residents to enter the SAC via official routes.	On Site	Urban Edge Effects	Parameter Plans, Planning Conditions and Reserved Matters
Provision of a minimum of 12ha of public open space on-site, including at least 8ha of natural and semi-natural greenspace, giving residents convenient, safe and attractive spaces in which to walk and undertake recreation without having to go further, providing an alternative to the SAC for day to day activities	On Site	Recreational Pressure	Parameter Plans, Planning Conditions and Reserved Matters
Provision of way-marked footpaths / leisure routes and fitness trails within Site ST35 creating circular walks not less than 2.5km in length	On Site	Recreational Pressure	Planning Conditions and Reserved Matters

Provision of 4ha of natural AGS in the form of AGS2, containing footpaths / leisure routes with robust boundary and edge treatments to the boundaries with the SAC and Howard Road	Adjacent	Recreational Pressure	Planning Condition or Obligation
Provision of Information Packs to new residents of ST35 and H59	On Site	Urban Edge Effects / Recreational Pressure	Planning Obligation
Implementation of scheme of wardening (number of wardens required to be determined at planning application stage) with responsibilities in respect of the monitoring and management of visitors, the enforcement of Bylaws, and maintenance (including managing the maintenance of boundary treatments to ST35 and H59)	On Common	Urban Edge Effects / Recreational Pressure	Planning Obligation
Provision of additional and improved visitor signage / information and interpretation boards	On Common	Recreational Pressure	Planning Obligation
Improved Waymarking for Permissive Routes	On Common	Recreational Pressure	Planning Obligation
New and / or improved car park barriers to prevent access to the SAC by people in vehicles during unsociable hours	On Common	Recreational Pressure	Planning Obligation
Review of Existing Site Infrastructure (gates, fencing etc) and	On Common	Recreational Pressure	Planning Obligation

replacement, repair or upgrading where required			
Creation of addition boardwalks where required to mitigate trampling effects	On Common	Recreational Pressure	Planning Obligation
Review and updating of Bylaws as necessary and enforcement of these by Wardens	On Common	Recreational Pressure	Planning Obligation

1.23 DIO owns the whole of the SAC to the south-east of Ox Carr Lane / Flaxton Road / Lords Moor Lane[2] and, as landowner, it has the ability to deliver all of the 'on SAC' works and infrastructure referred to above. All of the 'on site' measures (such as ensuring separation between homes and the SAC and delivering appropriate buffers and boundary treatments) are controllable in perpetuity by planning condition and / or obligation.

1.24 There are existing Bylaws covering the vast majority of the SAC[3] and these contain provisions that are designed to restrict the public's use of the area in the interests of the land (see **Appendix 1**). But they are not enforced. Indeed, there is almost no current monitoring / management of the public's use of the SAC. A Warden (or Wardens) would have the ability to monitor, educate, manage and, importantly, enforce the existing Bylaws, and any new Bylaws that are deemed necessary. A Warden would also have the ability to monitor the relationship between the housing developments and the SAC, ensuring that boundary treatments (which could sit on MoD land if needs be) are maintained.

1.25 CYC appears to be questioning DIOs ability to deliver the mitigation measures that are proposed as a consequence of it not owning all of the SAC and because of provisions within the Strensall Common Act of 1884. DIO has taken Leading Counsel's Opinion on these matters and a copy of the Opinion it has received is attached at **Appendix 2**.

1.26 All of the mitigation measures that are proposed by DIO are being used at European Sites elsewhere, often on the recommendation of Footprint and with the endorsement of NE.

1.27 The HRA's assessment of mitigation measures is flawed, unsubstantiated and at odds with what we know (and the HRA accepts) to be common practice at European Sites elsewhere. It is also inconsistent in the way that it deals with the mitigation measures proposed at QEB compared with how it deals with the mitigation that it says will be acceptable for other allocations and its assessment of the effectiveness of mitigation measures in combination is almost non-existent. The result is an assessment that is unreasonable and unreliable. A full examination of the HRA's assessment of the mitigation measures is contained in our July 2021 Representations.

1.28 Ultimately, the question of whether the proposed mitigation measures will be effective is a matter of professional judgement. The legal test sets a high bar, but the decision to be made is one that is

[2] There is a small section of SAC that is owned by Yorkshire Wildlife Trust, some 2km north east of H59 and north of Lords Moor Lane

[3] And DIO has the power to make further Bylaws to protect its land and maintain it in good order, under the Strensall Common Act 1884

reliant on professional judgement having regard to the facts and evidence that is available. It is DIOs view that, on any reasonable analysis, the mitigation measures that are proposed by DIO are more than sufficient to ensure that the additional 3 to 5 people per hour that would visit the SAC from these developments would not pose a threat to its integrity. Moreover, the mitigation measures proposed by DIO would result in the existing users of the SAC being better controlled / managed, thus further safeguarding the baseline condition of the SAC.

Are there other allocations in the Plan that would cause an increase the use of the SAC for recreation? If there are, how does the HRA deal with these and is its approach reasonable and consistent across all sites?

1.29 The HRA reports the results of the Screening stage at paragraph 3.4.50. It states that:

> *There is a credible risk that recreational pressure from Policies SS19/ST35, E18 & H59(A), and SS9/ST7, SS10/ST8, SS11/ST9, SS12/ST14, SS15/ST17 & SS17/ST32, and H1a(A), H1b(A), H3(A), H7(A), H22(A), H23(A), H31(A), H46(A), H55(A), H56(A), H58(A), SH1 could undermine the conservation objectives of Strensall Common SAC and that a likely significant effect cannot be ruled out (alone). Consequently, an appropriate assessment is required.*
>
> *These policies are capable of resulting in a likely significant effect alone and, therefore, no residual effects are anticipated and there is no need for an in-combination assessment at this stage. This will be reviewed in the appropriate assessment.*

1.30 For the avoidance of doubt, all of the above ST and H sites are within 7.5km of the SAC.

1.31 Although all of these sites were taken forward for Appropriate Assessment, six were quickly excluded[4] because they have the benefit of a planning permission already and, in most cases, the approved schemes are already under construction.

1.32 As regards the remaining sites, the HRA assumes the following impacts on the use of the SAC:

- ST8 - +3%
- ST9 - +3%
- ST14 - +1%
- ST7 - Part of +1.6%
- ST17 - Part of +1.6%
- H56 - Part of +1.6%
- H7 - No Figure Quoted
- H22 - No Figure Quoted
- H31 - No Figure Quoted
- H46 - No Figure Quoted
- H55 - No Figure Quoted
- H58 - No Figure Quoted

1.33 In spite of the screening stage concluding that there is a credible risk that recreational pressure from all of the above sites could undermine the conservation objectives of the SAC, there is no attempt in the body of the HRA to quantify the impact that Sites H7, H22, H31, H55 and H58 might have on the HRA in terms of increased visits. However, the HRA concludes that none of these developments will

[4] ST32, H1a, H1b, H3, H23, and H56

have an adverse effect on the SAC, apparently on the basis that they are all more than 5.5km away from the SAC and would generate low numbers of additional visitors (EX/CYC/42, paragraph 4.2.64).

1.34 As regards the remaining 6 sites, the HRA notes that their combined 8.6% impact represents a considerable increase and that an adverse effect from these sites might still arise (EX/CYC/42, paragraph 4.2.271). However, for ST17 and H46, it says:

> *It should be noted that together, both allocations add up to less than 1.6% of the anticipated uplift in recreational pressure at Strensall (the remaining component being provided by SS7/ST9). Drawing on PCPs research, who estimated an average of 340 people would visit the Common every day, these three allocations would together, represent only a handful of people. Consequently, the risk of an adverse effect can be ruled out for both.* (EX/CYC/45 paragraph 4.2.277)

1.35 And, for the remaining 4 sites, it simply finds that their combined c7% impact can be mitigated through the provision of public open space associated with each development.

1.36 In the light of the above, we note the following:

a) CYC has judged that no harm will be caused to the integrity of the SAC in cases where the increase in visitor numbers is predicted to be very low even though it has not quantified what this means in real terms (e.g. most of the H Sites);

b) CYC has judged that a 1.6% increase will equate to just a handful of additional visitors and that this can be accommodated without there being any threat to the integrity of the SAC, not even a threat that requires mitigation – yet it has concluded that H59 must be deleted from the Plan even though this allocation is expected to increase the use of the SAC by just 1.2%;

c) CYC has concluded that a 7% increase may be mitigated by the provision of open space, even though CYC cannot say or guarantee how that space will be designed and, in reality, cannot evidence that it will reduce visitor numbers to a level that removes any risk of adverse effects; and

d) CYCs remarkably reasonable and positive assessment of sites ST7, ST8, ST9 and ST14 (as per (c) above) stands in marked contrast with its wholly negative and unreasonable assessment of ST35 and H59.

1.37 DIO has no objection to the judgements that CYC has made in respect of the other ST and H sites. Indeed, it considers that CYC has exercised reasonable and appropriate judgements in respect of those allocations. However, it has not applied the same reasonable and appropriate judgement to the assessment of the QEB sites. If it had, the HRA would find that the possibility of there being adverse effects on the integrity of the SAC could be ruled out with mitigation.

Conclusions on Questions 5.1 and 5.2

1.38 CYC, in consultation with NE, is pursuing the deletion of ST35 and H59 on the basis of a misinterpretation of the Footprint work which, contrary to what CYC has asserted, did not say that that adverse effects on the SAC could not be ruled out. It stated that adverse effects on the SAC could not be ruled out without mitigation. Ever since then it has taken a completely unreasonable stance against the allocations and, at every turn, has refused to consider and adopt reasonable / appropriate assessment of the proposals and the mitigation measures that are available. In so doing, it is proposing the deletion of policies that would facilitate the positive and sustainable re-use of surplus, brownfield public sector assets and the delivery of much needed market and affordable housing in the midst of a national housing crisis.

1.39 The reality is that the ST35 and H59 allocations would, at worst, give rise to only a very modest increase in the number of visits that are made to the SAC. Almost all visits will be regular / repeat visits made by the same people. These are people who are much more likely to value it than abuse it.

1.40 The SAC is in good condition. Indeed, its condition has improved over the last 10 years and this is in spite of it being used for recreation and having been the subject of some inappropriate behaviours from time to time. CYC / NE accept that there is no evidence of the current use of the SAC giving rise to adverse effects on its integrity. It has proven itself to be resilient. This is important because it means that something quite significant would have to occur (more significant than has occurred in the past) in order for its integrity to be harmed. That is not likely to happen with the addition of a further 3 to 5 visits per hour.

1.41 And even if we are wrong, and it is concluded that the addition of a further 3 to 5 visits per hour poses a risk that must be mitigated, the mitigation measures that are proposed by DIO are more than sufficient to ensure that this additional use will not adversely effect the integrity of the SAC.

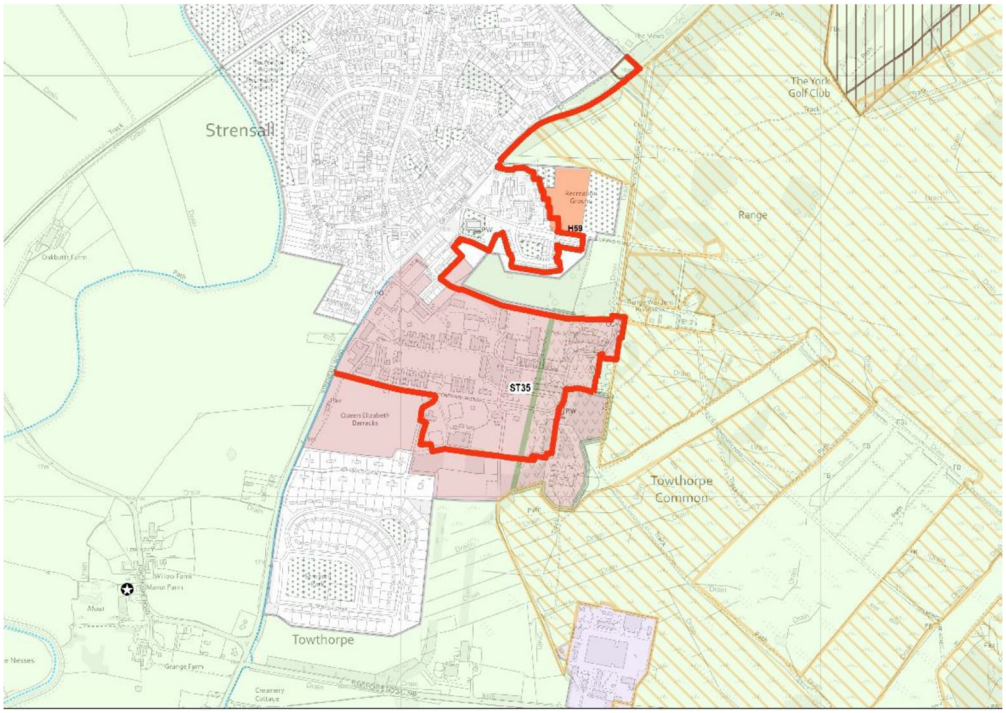
1.42 With specific regard to H59, we note above that the HRA dismisses any concerns about ST7, ST17 and H46(a) causing adverse effects because they will only increase the use of the SAC by 1.6%. H59 would increase its use by just 1.2% yet, even with all of the mitigation measures that are proposed, H59 is deemed unacceptable. That cannot be right.

1.43 DIO is firmly of the view that the concerns that CYC/NE have about the possible effects of ST35 and H59 have been addressed and that appropriate mitigation measures can be secured through policy, conditions and obligations in the normal way. As a consequence, it is absolutely not necessary to delete ST35 and H59 in order to make the Plan sound.

2. Question 5.3:

In the event of the deletion of either site or both, what is the intention in relation to the resulting Green Belt boundary?

2.1 CYC is only contemplating an outcome in which both allocations are removed from the Plan. In these circumstances, its intention is as per PM101 (EX/CYC/58). This proposes the Green Belt boundary below:



2.2 As can be seen, CYC is proposing that parts of QEB are washed over with Green Belt. This land contains buildings, roads, hard standings, open storage on a significant scale, an assault course, fixed plant, security fencing, formal landscaped areas, informal open spaces, and playing pitches. The majority of the land is not 'open' and those parts of it that are open (i.e. the grass pitches and informal open spaces adjacent to the Officer's Mess) are surrounded by buildings and / or are adjacent to urban and urbanising features. CYC is also proposing to include within the Green Belt the housing estate to the immediate south of QEB which is plainly not 'open'.

2.3 None of this land plays a part in the setting or special character of York as a historic city.

2.4 The majority of the land forms an integral part of an enclosed defence site and lies within the urban area. The development of the land would not constitute sprawl and any development of the land would in any event be restricted by built development and existing boundaries that comprise clearly recognisable physical features and are permanent.

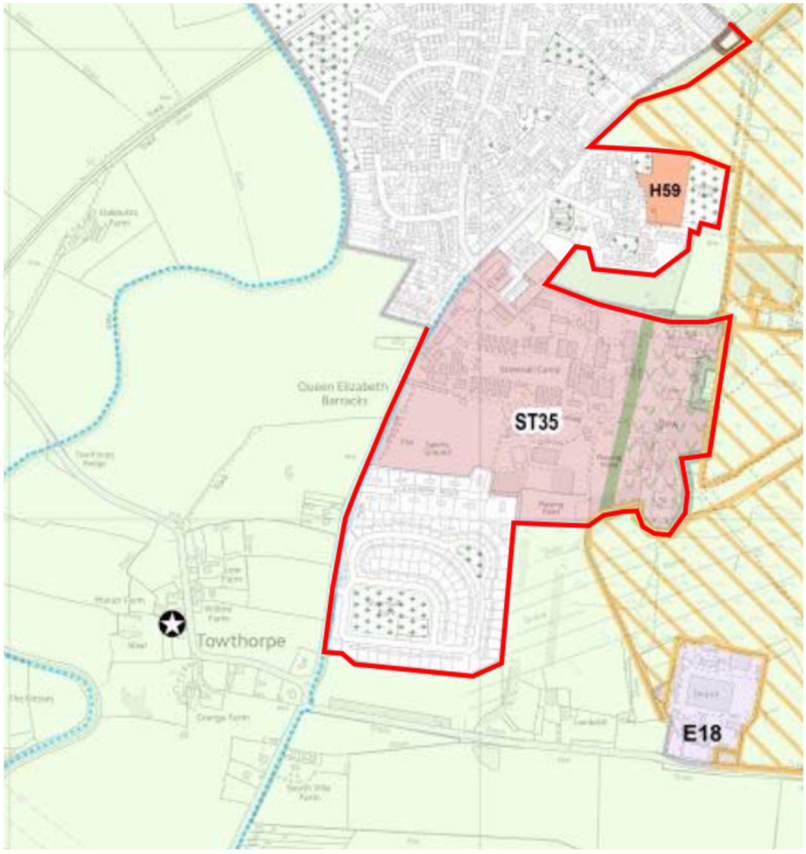
2.5 The land is not open countryside and does not have the character of open countryside.

2.6 The boundary line proposed by the Council does not follow physical features that are clear, readily recognisable and likely to be permanent and the development of the QEB sites would be entirely consistent with the Local Plan strategy.

2.7 The land occupied by the RFCA training facility and the existing housing off Alexandra Road and Strensall Park are built-up.

2.8 There are no sound Green Belt policy reasons for including this land within the Green Belt and the route of the boundary proposed by the Council is not policy compliant.

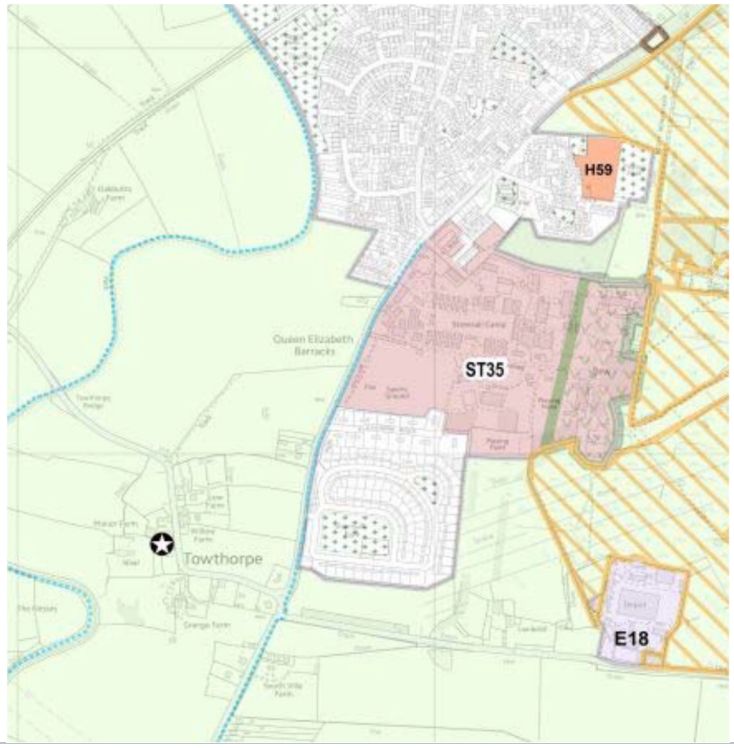
2.9 It is DIOs firm view that, in the event that ST35 and H59 are deleted from the Plan, the Green Belt boundary should be drawn as follows (i.e. kept as per the Plan as Submitted but with the RFCA facility also excluded from the Green Belt):



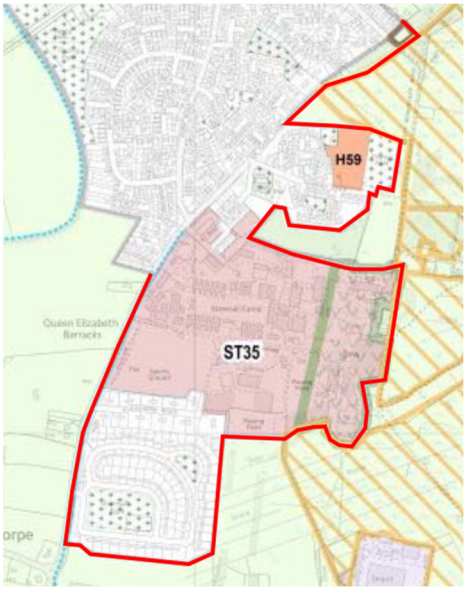
3. Question 5.4:

In the event of the retention of either site, or both, are the Green Belt boundaries reasonably derived?

3.1 The Green Belt boundary in the Submission Plan is as follows:



3.2 Whether one or both of the allocations are retained, DIO considers the Submitted boundary to be entirely consistent with the provisions of the NPPF with the exception of the section of development that at Submission was proposed to be included in the Green Belt. As we have previously submitted, this parcel of land is home to the Reserve Forces and Cadets Association (RFCA) which contains existing built development, does not contribute to the purposes of the Green Belt and the proposed Green Belt would better follow the eastern perimeter of the site as follows:



4. Question 5.5:

If any development of allocation H59 is to be governed by general development control policies, is this sufficient?

4.1 The development control policies in the Plan, together with the Policy in the current version of the NPPF and other material considerations (such as the National Design Guide and the provisions of the NPPG) are sufficient to ensure the delivery of an acceptable form of residential development.

5. Question 5.6:

Is allocation H59 deliverable?

5.1 It is common ground that CYC is only proposing the deletion of H59 because it is concerned that it cannot rule out the possibility of the development of this site having an adverse effect on the integrity of the SAC. It is agreed that it is otherwise a deliverable housing site. That is to say it is suitable, available and achievable. There is no doubt that housing could be delivered on site within 5 years of now.

6. Question 5.7:

Are there any site-specific issues (other than those in 5.2 above) relating to allocation H59?

6.1 No.

Appendix I

STATUTORY INSTRUMENTS
1972 No. 246

A/119/Yorks/1252

STRENSALL COMMON

BYELAWS 1972

Made by the Secretary of State for Defence, under the provisions of Section 6 of the Strensall Common Act 1884, for governing the use of the Strensall Common recreation ground land when not used for any military purpose.

STATUTORY INSTRUMENTS
1972 No. 246

DEFENCE

THE STRENSALL COMMON BYELAWS 1972

Made 14th February 1972

Coming into operation 24th May 1972

The Secretary of State for Defence in exercise of his powers under Section 6 of the Strensall Common Act 1884 (a), Section 2 of the Defence (Transfer of Functions) Act 1964 (b) and all other powers enabling him in that behalf hereby makes the following Byelaws for the government of the recreation ground land as hereinafter defined when not used for any military purpose, and for the preservation of order and good conduct thereon and for other purposes specified in the said Section 6:—

CITATION AND OPERATION

1. These Byelaws may be cited as the Strensall Common Byelaws 1972 and shall come into operation on 24th day of May 1972.

INTERPRETATION

2. (1) In these Byelaws—
"the recreation ground land" means the open portion of Strensall Common and other land described in sub-section 6 (1) of the Strensall Common Act 1884, which the Secretary of State is required by that sub-section to permit to be used for exercise and recreation when not required to be used for any military purpose, the boundaries of such portion of the said Common and other such lands being shown by a thick black line on the plan annexed hereto and identified as "Plan of the Recreation Ground Land"; and "projectile" includes any shot or shell or other missile and any part thereof.

(2) The Interpretation Act 1889 (c) applies for the purpose of the interpretation of these Byelaws as it applies for the purpose of the interpretation of an Act of Parliament.

(a) 47 & 48 Vict. ccix. (b) 1964 c.15 (c) 52 & 53 Vict. c.63

PROHIBITED ACTS

3. Within the recreation ground land the following acts are prohibited:—

(1) behaving in any manner reasonably likely to offend against public decency;
(2) wilfully interfering with the comfort or convenience of any person;
(3) using any language likely to cause reasonable offence or annoyance to any person;
(4) collecting or soliciting money;
(5) dropping or leaving litter except in a receptacle provided for the purpose;
(6) any act which pollutes or is likely to pollute any water;
(7) climbing, damaging or interfering with fences, railings, structures, the Rifle Range Butts, Notice Boards and Range Signals;
(8) obstructing any person in the execution of his duty in relation to the recreation ground land;
(9) unlawfully discharging any firearm;
(10) wilfully disturbing, injuring or taking any animal, bird or egg.

ACTS FOR WHICH WRITTEN PERMISSION IS REQUIRED

4. Within the recreation ground land the following acts are prohibited unless the written permission of the Secretary of State or the General Officer Commanding, the Army District or the Officer in Charge of the Strensall Ranges has first been obtained:—

(1) carrying on any trade or business;
(2) selling or distributing anything, offering anything for sale or hire, or making any offer of services of any kind for hire or reward;
(3) exhibiting or affixing any notice, advertisement or other written or pictorial matter;
(4) making or giving any display, performance or representation;
(5) making or giving a public speech or address;
(6) organising, conducting or taking part in any assembly, parade or procession;
(7) placing, erecting or using any tent, caravan or other encampment;
(8) sleeping out during the hours of darkness;
(9) lighting a fire or firework;
(10) any act causing or tending to cause an outbreak of fire;

(11) driving or riding, except on the roads shown on the Plan of the Recreation Ground Land, any vehicle other than
  (a) an invalid carriage, or
  (b) any other vehicle not mechanically propelled and no wheel of which (including any tyre) exceeds twenty inches in diameter;
(12) grazing any animal;
(13) cutting, digging, damaging or removing any grass, turf or growing crops;
(14) cutting, defacing or damaging any growing tree or shrub or removing any timber, tree, shrub or wild flower roots;
(15) fishing, bathing or boating;
(16) interfering with or removing any Government stores or property;
(17 digging, searching for, tampering with or removing any projectile or metal associated with a projectile.

OFFENCES AND EXEMPTIONS

5. Any person doing anything prohibited by Byelaw 3 or, without the authority of the Secretary of State or the General Officer Commanding, the Army District or the Officer in Charge of the Strensall Ranges first obtained, doing anything prohibited by Byelaw 4 shall be deemed to commit an offence against the Byelaw so contravened.

REVOCATION

6. The Byelaws made for Strensall Common and land adjoining or near it by the Secretary of State dated the 18th March 1936 (d) are hereby revoked.

Dated this 14th day of February 1972.

D. J. Chapman
By order of the Secretary of State for Defence.

(d) S. R. & O. 1936/395.

NOTICES

OFFENCES AND PENALTIES

1. By Section 6(4) of the Strensall Common Act 1884, it is provided:—

> **"A person who commits an offence against any such Byelaw* shall be liable, on summary conviction, to a fine not exceeding five pounds, and may be removed by any constable from the recreation ground land, and taken into custody without warrant, and brought before a Court of summary jurisdiction to be dealt with according to law".**

*that is to say, any Byelaw made pursuant to Section 6(3) of the Act.

REGULATIONS

2. The Secretary of State has made regulations under Section 6 of the Strensall Common Act 1884 entitled "The Strensall Common (Use for Military Purposes) Regulations 1971" (e), which came into force on the 30th day of November 1971 directing the time or times and periods during which the recreation ground land or parts thereof are required to be used for military purposes to the exclusion of the public.

PROJECTILES

3. Any person who finds a projectile within the area to which these Byelaws apply should report the finding of it and its approximate position to the Officer in Charge of the Strensall Ranges at Queen Elizabeth Barracks, Strensall or to the police at the earliest opportunity.

INSPECTION OF BYELAWS AND PLAN

4. A copy of these Byelaws and the Plan attached thereto and of the Regulations above referred to, may be inspected at the Police Station, Strensall. They may also be inspected at the Office of the Defence Land Agent, Ministry of Defence, 'Shenfield', Fulford Road, York, where copies may be obtained at the price of fivepence (5p) for each copy.

(e) S. R. & O. 1971/1376

Printed for Her Majesty's Stationery Office by Elliott Bros. & Yeoman Ltd., Liverpool.
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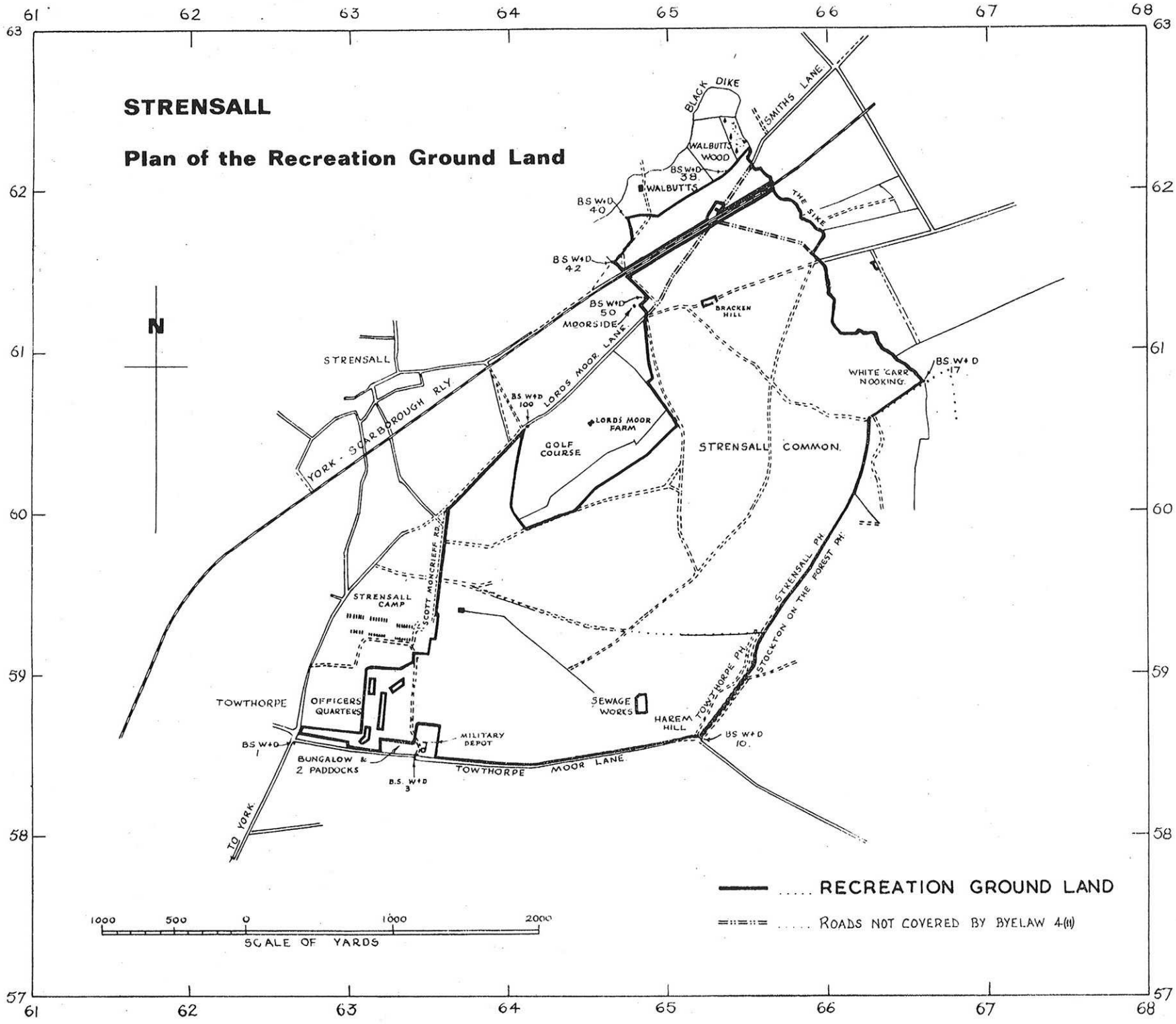

STRENSALL
Plan of the Recreation Ground Land
N
BLACK DIKE
SMITHS LANE
WALBUTTS WOOD
BS W+D 38
WALBUTTS
BS W+D 40
THE SIKE
BS W+D 42
BS W+D 50
MOORSIDE
BRACKEN HILL
LORDS MOOR LANE
STRENSALL
YORK - SCARBOROUGH RLY
BS W+D 100
LORDS MOOR FARM
GOLF COURSE
STRENSALL COMMON.
WHITE CARR NOOKING
BS W+D 17
SCOTT MONCRIEFF RD.
STRENSALL CAMP
STRENSALL PH
STOCKTON ON THE FOREST PH.
TOWTHORPE PH.
TOWTHORPE
OFFICERS QUARTERS
SEWAGE WORKS
HAREM HILL
BS W+D 10.
BS W+D 1
MILITARY DEPOT
BUNGALOW & 2 PADDOCKS
B.S. W+D 3
TOWTHORPE MOOR LANE
TO YORK
1000 500 0 1000 2000
SCALE OF YARDS
..... RECREATION GROUND LAND
..... ROADS NOT COVERED BY BYELAW 4(11)

STATUTORY INSTRUMENTS

1971 No. 1376

A/119/YORKS/471

STRENSALL COMMON

(USE FOR MILITARY PURPOSES)

REGULATIONS

Made by the Secretary of State for Defence, under the provisions of the Strensall Common Act 1884, for regulating the use of the Strensall Common recreation ground land.

STATUTORY INSTRUMENTS
1971 No. 1376

DEFENCE

THE STRENSALL COMMON (USE FOR MILITARY PURPOSES) REGULATIONS 1971

Made 12th August 1971

Coming into operation 30th November 1971

The Secretary of State for Defence in exercise of his powers under section 6 of the Strensall Common Act 1884 (a), section 2 of the Defence (Transfer of Functions) Act 1964 (b) and of all other powers enabling him in that behalf hereby makes the following Regulations:—

CITATION AND OPERATION

1. These Regulations may be cited as the Strensall Common (Use for Military Purposes) Regulations 1971, and shall come into operation on the 30th day of November 1971.

INTERPRETATION

2. (1) In these Regulations—
"the recreation ground land" means the open portion of Strensall Common and other land described in section 6 (1) of the Strensall Common Act 1884, which the Secretary of State is required by that section to permit to be used for exercise and recreation when not required to be used for any military purpose, the boundaries of such portion of the said Common and other such land being shown by a thick black line on the plan annexed to these Regulations and identified as "PLAN OF THE STRENSALL RECREATION GROUND LAND SHOWING RIFLE AND GRENADE RANGE AREAS"; and "the Rifle Range Area" and "the Grenade Range Area" mean the parts of the recreation ground land shown so marked on the said plan.

(2) The Interpretation Act 1889 (c), applies for the purpose of the interpretation of these Regulations as it applies for the purpose of the interpretation of an Act of Parliament.

USE FOR MILITARY PURPOSES

3. It is hereby directed that the following parts of the recreation ground land may be used to the exclusion of all persons whomsoever for the military purposes and at the time or times and during the periods hereinafter specified in relation to them, that is to say—

(*a*) The Rifle Range Area may be used as a rifle and small arms range while red flags by day or red lights by night

(a) 47 and 48 Vict. c.ccix. (b) 1964 c.15. (c) 52 and 53 Vict. c.63.

are hoisted at or near the locations indicated by black circles and the letters A, B and C on the plan annexed to these Regulations;

(*b*) the Grenade Range Area may be used as a grenade range while a red flag is hoisted by day at or near the location indicated by a black circle and the letter D on the said plan;

(*c*) any other area in which for the time being there is a danger to persons using the recreation ground land by reason of the presence of an unexploded missile or other hazard may be used for the purpose of removing or nullifying the danger while notices notifying the danger are exhibited in the vicinity of the area and the boundaries of the area are marked out;

(*d*) any other area may be used for military training which constitutes a danger to persons using the recreation ground land while notices stating that such training is being carried out are exhibited in the vicinity of the area and the boundaries of the area are marked out.

4. The General Regulation made by the Secretary of State under the Strensall Common Act 1884 dated the 28th November 1938 (a) is hereby revoked.

Dated this 12th day of August 1971.

D. J. Chapman

By Order of the Secretary of State for Defence.

NOTICES

OFFENCES AND PENALTIES

1. By section 6 (1) and (2) of the Strensall Common Act 1884, it is provided:—

"(1) Whenever the open portion of Strensall Common, and also any land held by the Secretary of State which adjoins or is near to Strensall Common and is for the time being uninclosed, is not required to be used for any military purpose, the Secretary of State shall permit the same to be used by Her Majesty's subjects for exercise and recreation, and such portion of the said common or land as is so permitted to be used is in this Act referred to as the recreation ground land.

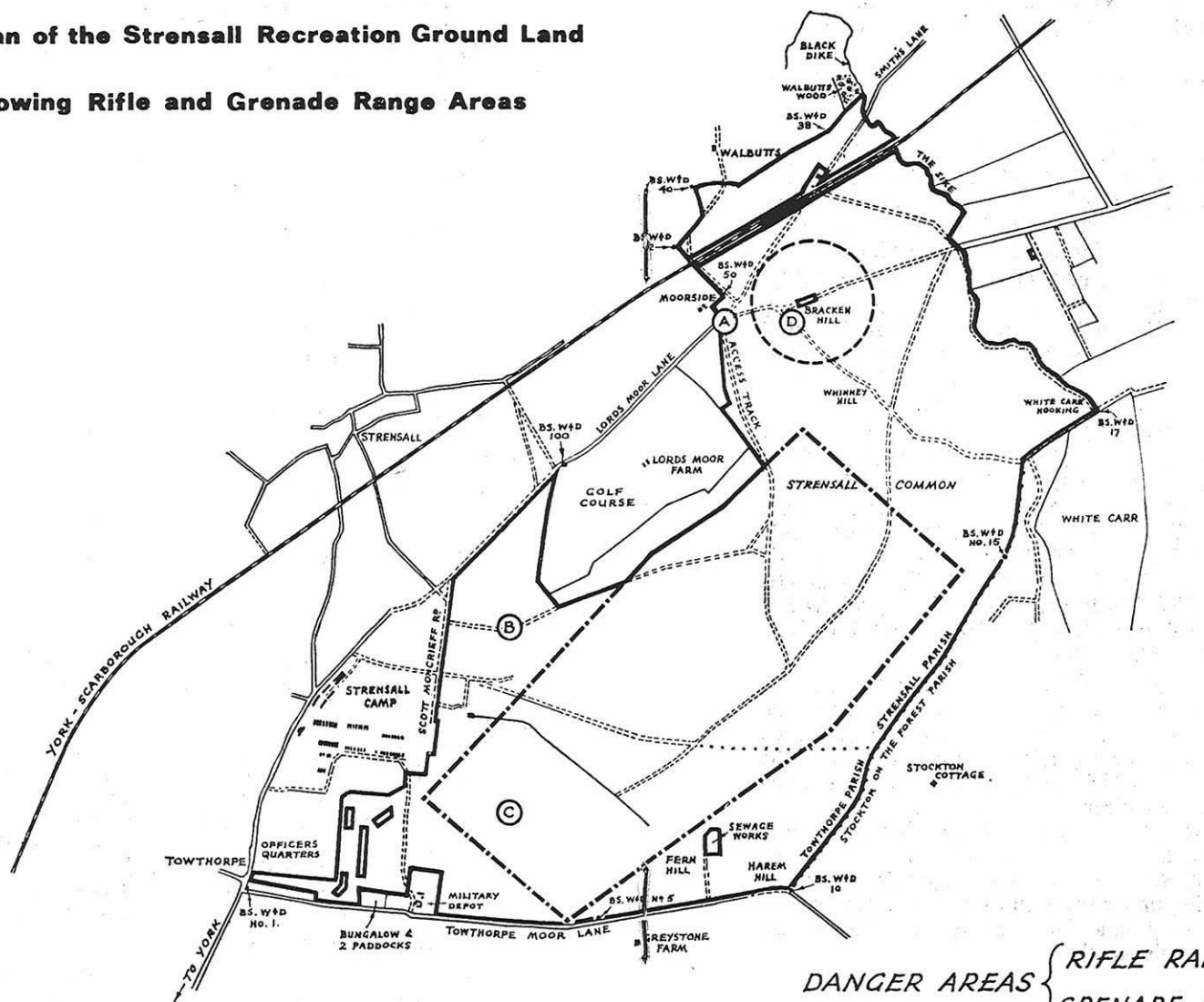
(2) Whenever the recreation ground land, or any part thereof, is required by the Secretary of State, or by any person acting under his authority, to be used for any military purpose, the following provisions shall have effect with respect to such land or part:—

(*a*) The Secretary of State and any of Her Majesty's forces, and any persons acting under the authority of the Secretary of State, may use the same for such military

(a) S.R. & O. 1938/1954.

Plan of the Strensall Recreation Ground Land

showing Rifle and Grenade Range Areas



DANGER AREAS { RIFLE RANGE .-.-.-. / GRENADE RANGE ---- }

WARNING SIGNALS { RIFLE RANGE Ⓐ Ⓑ Ⓒ / GRENADE RANGE Ⓓ }

RECREATION GROUND LAND ——

1000 500 0 1000 2000

SCALE OF YARDS

purpose, to the exclusion of all persons whomsoever, at such time or times and during such period as the Secretary of State by any general or special regulations may direct.

(*b*) A PERSON SHALL NOT, WITHOUT AUTHORITY FROM THE SECRETARY OF STATE, OR SOME PERSON ACTING UNDER HIS AUTHORITY, ENTER THE SAME OR ANY PART THEREOF, OR DRIVE ANY ANIMAL OR PLACE ANYTHING THEREON; AND IF HE DOES SO OR ATTEMPT TO DO SO SHALL BE LIABLE TO A FINE NOT EXCEEDING TWO POUNDS.

(*c*) A PERSON WHO OBSTRUCTS OR INTERFERES WITH THE USE OF THE SAME FOR ANY MILITARY PURPOSE, OR WITHOUT DUE AUTHORITY REMOVES ANY FLAG OR MARK THEREON, SHALL BE LIABLE TO A FINE NOT EXCEEDING FIVE POUNDS.

(*d*) A PERSON COMMITTING AN ACT FOR WHICH HE IS LIABLE TO A FINE UNDER THIS SECTION MAY BE REMOVED BY ANY CONSTABLE BY FORCE FROM THE SAID LAND OR PART, AND MAY BE TAKEN INTO CUSTODY BY ANY CONSTABLE WITHOUT WARRANT, AND ANIMALS AND THINGS ON SUCH GROUND OR PART MAY BE REMOVED BY ANY CONSTABLE, OR BY ANY PERSON AUTHORISED BY THE SECRETARY OF STATE.

(*e*) The Secretary of State shall cause notice to be given, so far as is reasonably practicable, of such part of the recreation ground land as is for the time being required to be kept clear for any military purpose, and of the time or times at which, and the period during which it is to be so kept clear, but the absence of such notice shall not exempt a person from any fine or liability under this section, nor interfere with the right of the Secretary of State, or of Her Majesty's forces, or persons acting under his authority, to use any part of the recreation ground land and exercise the powers conferred by this Act."

ENFORCEMENT

2. The following persons are hereby authorised by the Secretary of State to remove animals and things on the Rifle and Grenade Area pursuant to Section 6 (2) (*d*) of the Act, that is to say:—

(1) The General Officer Commanding the Army District;

(2) the Officer in charge of the Strensall Ranges;

(3) any officer, warrant officer, non-commissioned officer, service policeman in uniform and being for the time being under the command of the officers specified in paragraph (1) and (2);

(4) any person authorised in writing by or on behalf of the officers specified in paragraph (1) or paragraph (2);

(5) any member of a police force or any special constable under the control of the Defence Council.

INSPECTION AND COPIES

3. A copy of these Regulations and the Plan attached thereto may be inspected at the Police Station, Strensall. They may also be inspected at the Office of the Defence Land Agent, Ministry of Defence, "Shenfield", Fulford Road, York, where copies of the Regulations and Plan may be obtained at the price of five pence (5p) for each copy.

Notwithstanding any fine limit mentioned in the above byelaws the current maximum fine as at 01/09/2008 is the sum of £500 being the maximum on level 2 of the standard scale.

Appendix II

IN THE MATTER OF:

MINISTRY OF DEFENCE POWERS IN RESPECT OF STRENSALL COMMON SPECIAL AREA OF CONSERVATION

ADVICE

---

1. I am asked to advise the Defence Infrastructure Organisation ("DIO"), an executive agency in the Ministry of Defence ("the MOD"), as to the powers of the Secretary of State for Defence ("the Secretary of State") to control access to the Strensall Common Special Area of Conservation ("the SAC"). Issues arise as to the effect of the Secretary of State's ownership of the site, the effect of the Strensall Common Act 1884 ("the 1884 Act"), including the power to make byelaws, and the existence (if any) of rights of common over parts of the site.

2. The SAC was designated as a Site of Special Scientific Interest ("SSSI") in 1965, and as a Special Conservation Area / SAC in 2005.

3. I have been shown a plan ("the SAC Plan"[1]) which I annex which shows the extent of the SAC and SSSI by, respectively, blue and yellow diagonal hatched lines[2]. The SAC Plan also shows (by way of a solid red boundary line, described as the Strensall Common Act Boundary) the area of land which is *directly* subject to the 1884 Act ("the 1884 Act Land").

4. A further relevant sub-division of the SAC, relating to land ownership, arises from the fact that although the Secretary of State originally purchased all of the land which is subject to the 1884 Act, he later sold a parcel of that land to the Yorkshire Wildlife Trust ("the Trust"). So the 1884 Act Land can be sub-divided into two areas, the major part which is owned by the Secretary of State and the smaller part, in the north of the site, which is owned by the Trust.

5. As a result, there are four parcels of land in the SAC for which slightly different considerations apply in terms of understanding the Secretary of State's powers to control the land, albeit my conclusion is that, with only very minor variations, those powers are largely the same and are in any case extensive. Those four parcels, together with a summary of my conclusions as to the nature of the Secretary of State's powers, are as follows:

---

[1] My understanding is that the Plan has been produced by City of York Council ("CYC"), and that it represents their view, which I will assume to be correct for the purposes of this advice, as to the boundaries not only of the SAC, but also of the other areas to which I will refer.

[2] My understanding, confirmed by the SAC Plan, is that the SAC and the SSSI coincide precisely. In any case, I do not think that any minor divergence from that would have any bearing on this advice.

(i) "The SSD Strensall Common Land": This is the major part of the land which was previously Strensall Common, and which is directly subject to the 1884 Act. The 1884 Act extinguished previous rights of common over this land, so that the Secretary of State has the powers of an ordinary landowner, subject to the 1884 Act. The effect of the 1884 Act is that the Secretary of State is required to permit public access when the land is not in military use, but also has powers to make byelaws to govern public access and use when the land is not in military use. Those byelaws, as I explain below, can be (and indeed already are) deployed for the purposes of protecting the physical and natural features of the site.

(ii) "The Trust Strensall Common Land": This is the part of the 1884 Act land sold to the Trust in 1978. The Secretary of State does not enjoy the powers of a landowner in respect of this land, albeit the Trust (who can be taken to have to heart the interests of the conservation of the site) may do so. However, the Secretary of State enjoys the same power to make byelaws for this area as for other areas. In any event, I note that this parcel of land is furthest away from Queen Elizabeth Barracks ("QEB").

(iii) "The Towthorpe Land": This land is owned by the Secretary of State pursuant to a different, 1878, conveyance, but is not directly subject to the 1884 Act. However, for reasons I set out below, quite apart from acting as landowner, the Secretary of State has the like powers to make byelaws for this land as for the 1884 Act Land, for so long as the land remains unenclosed and the public are given access. I note that the existing byelaws do cover this land.

(iv) "The nr Golf Club Land": This is a very small area of land, owned by the Secretary of State, which is within the SAC but outside of the red line boundary, just south of the York Golf Club. Its legal position is the same as the Towthorpe Land i.e. the Secretary of State has the powers of a landowner, and also power to make byelaws for public access.

6. It follows that in my view, the Secretary of State has very considerable power to regulate public access to all areas of the SAC, in particular because he has power to make byelaws for the whole of the SAC under the 1884 Act. As matters stand the existing Strensall Common Byelaws 1972 ("the Byelaws") cover most of the SAC, but there is in any case nothing to prevent him making byelaws which cover

the whole of the SAC along with other adjoining land to which the public are given access.

7. I will set out the basis for these conclusions below.

THE 1884 ACT LAND

8. The Secretary of State for War, as predecessor to the current Secretary of State, acquired a piece of land at Strensall by way of a conveyance dated 3 December 1876. The land is identified and delineated on the attached deed plan as "Strensall Common". That land corresponds, at least so far as I can judge, to the area which the SAC Plan shows as what I have called the 1884 Act land.

9. The first recital to the 1884 Act recites that "soil in the common known as Strensall Common" was purchased by agreement pursuant to the Military Forces Localisation Act 1872 ("the MFLA").

10. The MFLA was repealed by the Defence (Transfer of Functions) (No. 1) Order 1964 (see Part II of Schedule 1). Section 2 of the MFLA formerly provided that the Secretary of State may – with a view to carrying into effect the purposes of building barracks and otherwise effecting the localization of the military – "*acquire such lands and execute such works as he may deem expedient*". All lands acquired vested in the Secretary of State.

11. Section 3 of the MFLA incorporated with specified modifications the Lands Clauses Consolidation Acts of 1845, 1860 and 1869 ("the LCCAs") "*with a view to the purchase of lands for the purposes of this Act"*. I note that section 6 of the Lands Clauses Consolidation Act 1845 provides for the purchase of land by agreement, so this provision was presumably relied upon for the purchase of Strensall Common.

12. The mere purchase of the land by agreement did not itself deal with any rights of common. However, that was dealt with by the 1884 Act (indeed, this seems to have been one of the primary purposes of that Act):

    (i) The recital to the 1884 Act refers to the purpose of "acquiring the rights of common and other rights in and over Strensall Common …".

    (ii) The 1884 Act also refers to the proposed use of the common for military purposes, and section 6 provides the Secretary of State with power to

exclude the public from Strensall Common either entirely (when the land is in military use) or subject to byelaws (when not in such use).

(iii) Section 2 of the 1884 Act provides that the Secretary of State "shall purchase and take … all commonable and other rights existing in or over Strensall Common" see section 2 and the preamble.

(iv) Critically, since section 2 incorporates the LCCAs, it also incorporated section 2 of the LCCA 1845. This provided:

> *The compensation in respect of the right in the soil of any lands subject to any rights of common shall be paid to the lord of the manor, in case he shall be entitled to the same, or to such party, other than the commoners, as shall be entitled to such right in the soil; and the compensation in respect of all other commonable and order rights in or over such lands, including therein any commonable or other rights to which the lord of the manor may be entitled, other than his right in the soil of such lands, shall be determined and paid and applied in manner hereinafter provided with respect to common lands the right in the soil of which shall belong to the commoners; and upon payment of the compensation so determined either to the persons entitled thereto or into the Senior Courts <u>all</u> <u>such commonable and other rights shall cease and be extinguished</u>.*

13. The effect of this is that, by virtue of the 1884 Act, any commonable rights over Strensall Common / the 1884 Act land were extinguished. As a matter of law, and notwithstanding common usage, the 1884 Act land is no longer a common at law. Its use by the Secretary of State and the public is subject to certain other provisions of the 1884 Act, to which I will return below.

14. At this time, there was no distinction in terms of ownership between different parts of the 1884 Act Land (i.e. Strensall Common, as originally constituted). However, that changed as a result of a conveyance in 1978, between the Secretary of State and the "Yorkshire Naturalists Trust Ltd" (i.e. the Trust). By virtue of that conveyance, what I have called the Trust Strensall Common Land was acquired by the Trust. I note that the 1978 Conveyance expressly provided that the Trust would hold the land "subject to (a) the Strensall Common Act 1884". This makes clear (what I would in any case expect) that the sale of the land did not override the obligations in section 6 of the 1884 Act relating to public rights to use the land and the corresponding power of the Secretary of State to make bye-laws.

15. The upshot of this is that:

(i) In respect of the land that formed "Strensall Common" in the strict sense, that land corresponds to the land covered by the 1884 Act.

(ii) The effect of the 1884 Act was to extinguish all rights of common over the land, so that the land is not a common as a matter of law.

(iii) The ownership of the land is split between the Secretary of State and the Trust in the way that I have described.

(iv) The powers of the land owners are qualified by the permission given to the public in section 6 of the 1884 Act to enter the land for recreation in certain circumstances, but that is in turn qualified by the power of the Secretary of State to make byelaws governing that use.

TOWTHORPE

16. The land immediately to the south of Strensall Common was acquired by the Secretary of State by a conveyance dated 1878, to which was attached a plan where that land is delineated as Towthorpe Moor. This land appears to include all of that land to the south of the 1884 Act land which forms part of the SAC, and also includes the land which is now QEB.

17. There is no suggestion in the 1878 conveyance, or elsewhere, that Towthorpe Moor was subject to rights of common. That of course is consistent with the 1884 Act itself, which post-dates both the 1876 (Strensall Common) conveyance, and the 1878 (Towthorpe) conveyance. The express purpose of the 1884 Act was to address the rights of common which plainly did exist over Strensall Common, and the refence in section 6 to adjoining land shows that it was enacted with cognisance of other land held by the Secretary of State, which were to be used henceforth for military purposes which would be inconsistent with those rights. Yet it was not seen as necessary to deal with rights of common over other such parcels of land. That is only consistent with the conclusion that there were no such rights on these other parcels of land.

18. That is consistent with a local land charges inquiry which DIO made to CYC in relation to the QEB land and also DIO desktop review of online data sources (including Magic Map and DEFRA's common land list). As I have said, the QEB land was included in the Towthorpe land acquired in the 1878 conveyance, and must have the same status as the rest of that land. On 20 January 2020, CYC confirmed that this land was not a common.

19. However, as I shall explain below, the Secretary of State's rights and powers over this land are nevertheless affected by section 6 of the 1884 Act.

OTHER LAND NEARBY LAND HELD BY THE SECRETARY OF STATE

20. The Secretary of State now holds other land in and around Strensall Common, including what I have inelegantly called the "Nr Gold Club Land", albeit this is the only such parcel of land which forms part of the SAC. I have not been provided with details of the conveyancing background to the Secretary of State's acquisition of this land, but I do not understand there to be any controversy around this. As with Towthorpe, the Secretary of State's use of the land is affected by the 1884 act in the way that I will now describe.

PUBLIC ACCESS, AND BYELAWYS, UNDER THE 1884 ACT

21. Section 5 of the 1884 Act provides that the Secretary of State may make undertake operations of various kinds on the 1884 Act land for military purposes.

22. Section 6(1) of the 1884 Act provides as follows:

> *(1) Whenever the open portion of Strensall Common, and also any land held by the Secretary of State which adjoins or is near to Strensall Common and is for the time being unenclosed, is not required to be used for any military purpose, the Secretary of State shall permit the same to be used by her Majesty's subjects for exercise and recreation, and such portion of the said common or land as is so permitted to be used is in this Act referred to the recreation ground land.*

23. This section therefore identifies a composite area of land, the "recreation ground land", which is comprised as follows:

    (i) The 1884 Act Land (i.e. the original Strensall Common), in so far as it is for the time being open land.

    (ii) Such adjoining / nearby land as is owned by the Secretary of State and which is "for the time being" unenclosed.

24. The first limb here is relatively fixed, save only that its precise extent may vary depending on which parts of the land are, for the time being, open[3].

[3] The "open" land is further defined in section 5, as being the land not currently used for constructions etc referred to in that section. Section 5 makes clear that this may itself vary from time to time, since the Secretary of State has power to undertake works "at any time or times after the passing of this Act".

25. The second limb is not fixed in extent, and will vary "from time to time" according to the extent of the Secretary of State's land ownership[4], and whether that land is for the time being "unenclosed". The exact extent of the land that might be regarded as "nearby" to Strensall Common may not be straightforward to determine but I would take it that it would clearly include both the Towthorpe Land (including QEB, albeit that is clearly enclosed) and the Nr Golf Club Land.

26. In respect of the recreation ground land as a whole, the Secretary of State[5] is thus required to permit public access for recreation etc, *when the land is not required for military use*. This is subject to, and clarified by, section 6(2) and (3).

27. Section 6(2) makes further provision about the Secretary of State's right to exclude the public when the recreation ground land is required for military purposes. It makes clear that the Secretary of State has power to use the land "to the exclusion of all persons whomsoever", and that anyone who enters the land, when in military use, and without authority, will commit an offence.

28. Section 6(3) deals expressly with making of byelaws *when the land is not in military use,* and the first underlined part (added by me) makes clear:

> *(3) The Secretary of State may from time to time make, and when made revoke and vary, byelaws for the government of the recreation ground <u>when not used for any military purpose</u>, and the preservation of order and good conduct thereon, and for the prevention of nuisances, obstructions, encampments, and encroachments thereon, and <u>for the prevention of any injury to the same, or to anything growing or erected thereon</u>, and for the prevention of anything interfering with the orderly use thereof by the public for the purpose of exercise and recreation.*

29. The purpose for which such byelaws are made is clearly very wide, including "preservation of order and good conduct", which itself is probably wide enough to encompass most activities on the land which would threaten its conservation objectives, but in any case it also includes (as the second underlined passage shows)

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[4] I do not think that section 6 imposes any duty on the Secretary of State either to acquire such adjoining land, nor any prohibition on its disposal. Rather, in respect of this adjoining land, the duty to admit the public, and the corresponding rights to make byelaws, attach to such land as the Secretary of State may own from time to time, without affecting the question of what land he can or should own.

[5] Although the extent of the adjoining land will vary according to the Secretary of State's land ownership, this is not true for the original 1884 Act / Strensall Common Land. For this reason, and given the reservations in the 1978 conveyance to the Trust, I will assume that the Trust is required to permit access to the Trust Strensall Common Land on the same terms as the Secretary of State, subject in turn to the Secretary of State's continuing power to make byelaws. However, if that is wrong, it means that the Trust is not required to permit public access at all, even subject to byelaws, in which case its power as a landowner, to exclude the public or to admit them only on terms, is unfettered by the 1884 Act.

the prevention of injury either to the land itself or to anything "growing thereon". In my view this clearly permits byelaws to be made for the purposes of, and so as to, protect all features of the SAC which are relevant to its conservation objectives. It is certainly wide enough to permit byelaws which, in addition to those already in place, would require dog walkers to keep dogs on leads, if that was considered necessary for the protection of the special features of the site.

30. In that regard I note that rule 3 of the current 1972 Byelaws prohibit, *inter alia,* leaving litter, any act which might pollute water, and "willfully disturbing, injuring or taking any animal, bird or egg". Rule 4 prohibits certain other matters without permission, including camping and sleeping overnight, various acts relating to making fires, cutting etc the land and plants / trees, fishing, bathing and boating. In my view, these prohibitions are all clearly lawful within section 6(3) of the 1884 Act. On the other hand this is not the limit of what may be dealt with, if there was a need to make more extensive provision for the protection of the SAC.

31. There are at present no wardens at the SAC, and the Byelaws make no provision for wardens. However, it strikes me as obvious that, if the Secretary of State were to make financial and administrative provision for byelaws, that could be very effective in ensuring compliance with byelaws (if, and to the extent that, there is or might be any issue about non-compliance).

32. Further, I see no reason why the role of wardens could not be integrated into the byelaws themselves, for example by making provision for members of the public not to do certain things without permission from the wardens (who would, for these purposes, stand in the shoes of the Secretary of State) or by requiring the public to comply with directions given by wardens, etc[6].

33. Section 6(4) of the 1884 Act provides that a person who contravenes byelaws made under section 6(3) will commit an offence. Thus the byelaws are backed up by the possibility of criminal sanctions. In that respect they have considerably more "teeth" than would an ordinary landowner. Thus the overall effect is to give the Secretary of State very considerable powers to control the use of the SAC land by

[6] There may well be limits to this. For example, I doubt whether it would be possible for the byelaws to confer special powers of arrest on wardens. But I see no reason why the byelaws should not confer on wardens certain authority / discretion which the Secretary of State would be able to exercise in making the byelaws, and which are to an extent built into the existing byelaws (for example, under rule 4).

the public, with a view to protecting the SAC from any activity which may pose a threat to its conservation objectives.

CONCLUSIONS

34. I summarise my key conclusions as follows:

(i) The Secretary of State owns all of the land which comprises the SAC, with the exception of the Trust Strensall Common Land in the north, which is owned by the Trust.

(ii) The Secretary of State has a near unfettered[7] power to exclude the public from any part of the SAC when he requires the land for military purposes.

(iii) The Secretary of State has powers to make byelaws over the whole[8] of the SAC land, and (so far as relevant) over other surrounding nearby land.

(iv) The purpose for which byelaws can be made is explicitly to regulate public use of the land when it is used by the public for recreational purposes, not when it is used for military purposes (when the public can be excluded altogether).

(v) The range of matters which byelaws can deal with is very wide indeed, and, at least subject to rationality, would include anything that is reasonably necessary to protect the conservation aims of the SAC. Given that those powers are backed up by criminal sanctions, and may be supplemented by the provision of wardens to enforce the byelaws, the Secretary of State has very extensive powers indeed to protect the SAC, over and above those that would be enjoyed by a private landowner.

(vi) The Secretary of State for Defence also has the ability to carry out works to the land for its general maintenance and for controlling its use in line with the provisions of the Strensall Common Act.

TIM BULEY QC

LANDMARK CHAMBERS

1 July 2022

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[7] This power is in theory subject to public law constraint, not to act unreasonably etc, but the circumstances in which a court is likely to consider excluding the public from land needed for military purposes are likely to be very rare indeed.

[8] The only *arguable* exception to this is the Trust land, but if the power does not extend to the Trust Land then the Trust will also be under no obligation to admit the public at all, and it can exercise all the powers of a private landowner to protect the land as it sees fit.

JOHNS ASSOCIATES

- Strensall Common Act Boundary
- Strensall Common SAC
- Strensall Common SSSI

CLIENT	Waterman Infrastructure and Environment Limited
TITLE	Strensall Common Boundaries

SCALE @ A3	CREATED BY	CHECKED BY
1:15,000	JS	NM
REFERENCE	**ISSUE/REVISION**	**DATE**
J00913-001		11/4/2022

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