

PLANNING REVIEW COMMITTEE

15th March 2017

Application Numbers: 16/02507/CND for route section H

16/02509/CND for route section I-1

Decision Due by: 21 November 2016

Proposal: Details submitted in compliance with condition 19 item 2 (operational noise and vibration) of TWA ref: TWA/10/APP/01 (The Chiltern Railways (Bicester to Oxford Improvements) Order - deemed planning permission granted under section 90(2A) of the Town and Country Planning Act 1990).

Site Address: Chiltern Railway From Oxford To Bicester (**East West Rail Appendix 1**)

Wards: Wolvercote, Summertown, and St Margaret's

Agent: ERM

Applicant: Network Rail

-
1. This covering report should be read in conjunction with the officer's report, dated 13th February 2017, to West Area Planning Committee on 21st February 2017 attached as an **Appendix – report to 21/02/17 west area planning committee**.
 2. The applications concern the partial discharge of condition 19 of the deemed planning permission for East West Rail Phase 1 (ref TWA/10/APP/01), namely discharge of the Noise Scheme of Assessments (NSoAs) for route sections H and I-1.
 3. Essentially, the decisions which are needed are:
 - i. whether the installation of rail damping is reasonable practicable; and,
 - ii. whether it is reasonable to retain a planning condition which restricts the pattern of rail services.

Introduction

4. At the West Area Planning Committee on 21st February 2017, Members resolved to approve the NSoAs with three conditions attached, two of which had not been recommended by Officers (Minutes attached as an **Appendix – Minutes 21/02/17 west area planning committee**). Those two conditions concern rail damping and restrictions on the patterns of rail services and read as follows:

2 Within three months of this partial approval under condition 19 of the deemed planning permission, proposals shall be submitted for the written approval of the local planning authority showing how at-source noise

attenuation by rail damping to at least the standard achievable by the use of Tata Silentrail can be incorporated into the scheme. The development to which this approval relates shall not be brought into operation EITHER without that written approval having been obtained and other than in accordance with such approved details OR without the Council having given written confirmation that it is satisfied that the provision of such rail dampening is not reasonably practicable.

Reason: The local planning authority is not satisfied that rail damping as an at source mitigation measure has been shown to not be reasonably practicable in the absence of any attempt on the part of the applicant to secure approval for the use of such a measure.

3 Passenger train movements on Section H between 0700 hours and 2300 hours shall not be in excess of 8 movements per hour. Freight train movements between 2300 hours 0700 hours on the following day shall not exceed 8.

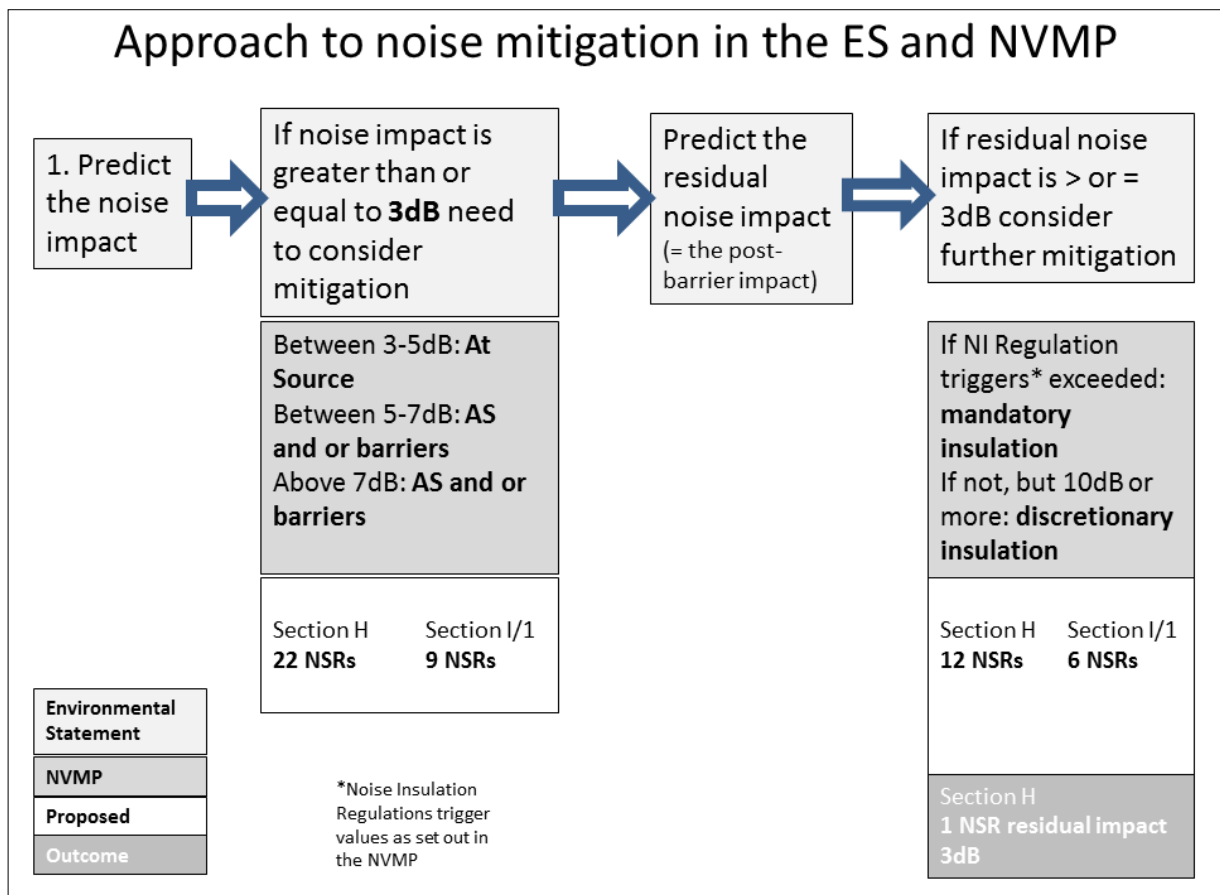
Reason - to ensure compliance with condition 19 of the planning permission deemed to have been granted (ref TWA/10/APP/01)

5. The applications have been called-in to the Planning Review Committee by Councillors Cllrs Hollingsworth, Upton, Kennedy, Fooks, Simm, Taylor, Clarkson, Sinclair, Henwood, Tanner, Lygo and Turner.
6. The call-in is on the grounds that the West Area Planning Committee decision of 21 February 2017 has continued with the imposition of the above two conditions against the advice of the council's external technical advisor Arup, the advice of Queens Counsel and the advice of the Head of Planning and Regulatory Services. The risks to the Council in the event of an appeal being lodged against these conditions and the ability for the Council as local planning authority to be able to defend this decision at appeal need to be reviewed.
7. This covering report provides some additional analysis of the issues, and aims to ensure that the Planning Review Committee, acting as local planning authority, has the opportunity to consider afresh all material facts, independent advice and potential risks to the Council:
 - i. it explains the decision sequence and considerations that the PRC decision must take account of;
 - ii. it sets out the background and context for rail damping more broadly for PRC members understanding and appreciation; and,
 - iii. it provides more detailed analysis of public comments about the case and how those comments are addressed by the technical and legal advice from Arup and Queen's Counsel (QC).
8. The Council has taken the mitigation of operational noise (and vibration) very seriously over a prolonged period and has instructed independent experts to assist it both on the technical and legal side. The Council has enabled significant public involvement in the process and has examined public responses thoroughly.

Through diligent pursuance of the requirements of the NVMP the set of points originally proposed at Bladon Close was moved; extensive noise barriers have been installed, tailored to local circumstances at Quadrangle House and Bladon Close; and noise insulation beyond statutory requirements has been secured. Mitigation at source (rail damping) has been pursued in detail and the report demonstrates that the Council as local planning authority can now be confident that to install rail damping is not reasonable practicable.

Decision sequence for Noise Mitigation

9. This is a very complex technical area. To assist the Committee, the diagram below summarises the decision making sequence which has been applied to determine the necessary mitigation of noise impacts in the two NSoAs. In the diagram, ES = Environmental Statement; NVMP = Noise and Vibration Mitigation Policy which was approved by the Secretary of State as part of the deemed permission.
10. The outcome (bottom right hand box) of all the mitigation applied (barriers and insulation) is that all significant noise impacts are mitigated apart from at one Noise Sensitive Receptor (NSR), a property in section H where there is a residual (post barrier) impact of 3dB.



Rail damping - background

11. Rail damping is a form of 'at source' rail noise mitigation which involves the installation of steel sections embedded in an elastomer coating which are clipped at intervals along each side of each rail. Rail damping can help to reduce noise that is radiated from the rails themselves, but it does not mitigate any of the engine, traction, wheel or other noise from locomotives and rolling stock. SilentTrack is the trade mark of a rail damping product made by TATA Steel.
12. Rail damping for EWRP1 had been examined both in the Environmental Statement and at the Public Inquiry. When the Secretary of State gave deemed planning permission for EWRP1 in October 2012, the NVMP was also approved which states that 'at source' mitigation including rail damping is the first preference for noise mitigation if it is reasonably practicable – where 'at source' measures are not reasonably practicable or sufficient to mitigate significant noise impacts, barriers and noise insulation are provided for (NVMP para 2.2).
13. When the NSoAs for route sections H and I-1 were first submitted to the Council, rail damping was not proposed as a mitigation measure because it was not 'Type Approved' by NR for use on high-speed tracks such as those proposed for EWRP1. Rail damping is in use at only one other location in the UK which is a low speed line at Blackfriars in London. NR's case was that rail damping was not available for use – the question posed in the NVMP however was not whether rail damping was available for use but whether it was reasonably practicable to install.
14. The NSoAs were approved in June 2015 and February 2016 respectively, because the Independent Experts and the Council's appointed expert, Arup, agreed that the NSoAs were robust and the mitigation requirements of the NVMP would be met. The Council as local planning authority took the view however, as recommended by officers, that NR should be required to demonstrate whether rail damping was reasonably practicable and imposed condition 2 above to secure that analysis. The condition stated that services should not operate on the line until either a scheme for the installation of rail damping had been approved or the Council had confirmed that it agreed that the provision of rail damping was not reasonably practicable.
15. In 2016 NR applied to the Council to have condition 2 lifted on the grounds that rail damping was not reasonably practical. Officers advised the West Area Planning Committee in September 2016 that NR had not demonstrated that rail damping was not reasonably practicable. Based on that officer advice the Committee refused the applications. Construction of the line continued and train services commenced in December 2016 but without the necessary approval/confirmation under the Council's condition.
16. Prior to making a planning appeal against the Council's September decision, NR has resubmitted the approved NSoAs to allow the Council time to re-

consider the imposition of the rail damping condition (and the condition restricting the pattern of train services). That reconsideration is the purpose of this report.

Analysis of key public comments

Comment - Rail damping will provide 4.4dB noise mitigation not 2.5dB to 3dB as claimed by NR and Arup.

17. Arup has reviewed the comments made by local residents, and in particular those made by Professor Buckley (**PRC Appendix 2**) which refer to Prof Thompson's estimates of the likely performance of rail damping in the UK. Arup maintains its view that 2.5dB is a reasonable estimate of the performance of rail damping though reiterates that, without undertaking further laboratory based testing and prediction work, a "best estimate" cannot be determined. Given this situation, Arup acknowledges that the alternative performance estimate provided via Professor Buckley should be taken into account as a potential outcome for the performance of rail dampers on EWR, albeit for a different damping product to SilentTrack and for a single type of rolling stock (**PRC Appendix 3**).

18. QC has reviewed the evidence and commentary supplied by NR, Arup and local residents (including the comments of Professor Buckley) and makes the assumption that "rail damping may mitigate noise impacts by 2.5dB" (QC Advice, para 4).

19. The debate as to whether rail damping provides 2.5dB or 4.4dB mitigation is not central to the Committee's decision however, because only one property has been identified as experiencing a residual (post barrier) noise impact of 3dB.

20. The scheme is not required to mitigate for noise at open windows, in open areas or in gardens - paragraph 2.6 of the NVMP refers to "*the noise levels predicted at the most exposed windows to noise sensitive rooms in noise sensitive buildings*".

Comment - NR is obliged to provide rail damping: the Secretary of State required rail damping to be provided as a planning condition for this development. The credibility of the planning process depends on the requirements of the original conditions being met.

21. The NVMP requires mitigation to be provided and sets out a sequential approach to the consideration of mitigation measures. It views rail damping as a first preference. However, the Council has already approved the barriers and they have been constructed. The question now is whether rail damping is required and is reasonably practicable in addition to, and not as a substitute for, the barriers.

22. Queen's Counsel advises that he "*cannot read the NVMP as always requiring 'at source' first irrespective as to the facts, the context and the efficacy of the*

various optionsThe NVMP does not require 'at source' if the other measures already provided will achieve the objectives" (QC Advice, para 77).

Comment - NR has reneged on its promises to provide rail damping. NR is being underhand and seeking to maximize profit. The Council must resist this attempt to override the planning system and stand up for the interests of local people.

23. The original Public Inquiry examined the possibility of providing rail damping. At a public meeting in 2015 at which the Rail Minister was present, NR representatives indicated that they would examine the possibility of providing rail damping by seeking Type Approval for its installation. At the same meeting the Minister urged NR to work hard to achieve Type Approval and followed that up with a letter to NR.

24. The task for this Council is to discharge the planning conditions of the deemed planning permission, as written and as the situation is at the current time – i.e. on the basis of what it has before it, irrespective of statements or promises around the subject made by relevant parties before or after the deemed planning permission was issued. It follows that whether or not it can be established that NR has reneged on a promise to provide rail damping is irrelevant to the Council's decision because such promises, if they exist, do not form part of the deemed planning permission issued by the Secretary of State.

23 It is fully appreciated that the existence of such discussions and perceived promises may lead local communities to have certain expectations from Network Rail. However the council as local planning will be required to judge the situation against the requirements of the NVMP.

Comment - The noise and vibration modelling is flawed. Without rail damping the noise environment for hundreds of children and thousands of residents will be intolerable. Without rail damping the internal and external learning environment at Phil and Jim School will be unacceptably impacted, and the children's health will be badly affected

25. The Independent Experts for noise and vibration agreed that the submitted Noise and Vibration Schemes of Assessment (planning applications refs 13/03202/CND, 14/00232/CND, 15/00956/CND, 15/03503/CND and 15/03587/CND) are robust in their prediction of operational noise and vibration, and that the predicted significant noise impacts will be sufficiently mitigated by the noise barriers and insulation proposed by NR.

26. Based on the advice of the Independent Experts the WAPC has already approved the Noise and Vibration Schemes of Assessment for route sections H and I-1 and so has given its approval to the predictions of operational noise and vibration and the mitigation proposals made by NR.

27. While local residents fear that the noise environment will be intolerable, the Secretary of State in giving approval to the scheme has concluded that with mitigation in place in accordance with the NVMP, the noise (and vibration)

environment will be acceptable. The WAPC has previously concluded that operational noise and vibration will be mitigated in line with the deemed planning permission. Through these current applications, officers, Arup and Queen's Counsel have re-visited the Noise Schemes of Assessment and have reaffirmed that they are robust leading to a recommendation that they be approved. The local noise (and vibration) environment will therefore be as the Secretary of State intended.

Comment - Concerns about the costs of a possible appeal is not good reason to cave in to NR's tactics

28. The Council as local planning authority has scrutinised all the material submitted as part of these applications and all the public comments made. It has thoroughly challenged NR's arguments and has employed external technical experts and taken the advice of Queen's Counsel. The point now reached is that the scheme meets the requirements of the NVMP and thereby, the requirements of the Secretary of State.

29. It would not be reasonable for the local planning authority to pursue this any further and the risks and costs of so doing need to be considered fully at this stage. The Monitoring Officer's Report (appended **PRC Appendix 4**) sets out that consideration in full.

Comment – NR's assessment of the costs of installing rail damping lacks a clear methodology, reveals significant contradictions and cannot be relied upon.

30. NR's methodology for estimating the costs of applying rail damping have been assessed by Arup and found to be appropriate.

Comment - Without restrictions on the number and patterns of trains the predictions of operational noise and vibration are invalidated. The predictions of operational noise and vibration do not take account of future increases in passenger and freight services on the line. Noise and vibration will be much worse leading to a need for greater mitigation.

31. The Secretary of State has set out in the NVMP (at paragraphs 1.8 to 1.10) the train number and timing assumptions that are to be used in modelling (known as the reasonable planning scenario) and provides that noise mitigation will be designed based on those assumptions. The Secretary of State has already anticipated and sanctioned the future traffic patterns which should be taken into account in the design of the scheme. The advice from the Queen's Counsel is that the council cannot override this accepted position in the deemed planning permission.

32. It can be noted that the reasonable planning scenario includes future passenger and freight services using East West Rail Phase 2 (Bicester to Bletchley).

33. The Queen's Counsel states that on the basis of paragraphs 1.8-1.10 of the NVMP the Noise and Vibration Schemes of Assessment are not required to address any possible future growth in rail traffic (QC Advice, para 84)

Comment - Restrictions on the speed of trains are needed to help reduce noise and vibration

34. Restrictions on the speed of trains do not form part of the deemed planning permission and cannot be imposed unilaterally by the Council. The source permission was granted by the Secretary of State and the Council has to abide by that.

Comment - De-vegetation has increased noise impacts and ruined the appearance of the area

35. Several residents have claimed that removal of vegetation has either increased or would be likely to increase perceived noise levels. This is not a factor explicitly referred to in the Noise and Vibration Mitigation Policy.

36. When the NSoAs were considered by Committee in 2015 and 2016 the Independent Expert was asked to comment on the relevance of trees to sound propagation. He advised that a band of trees several hundred feet deep is required to achieve significant noise attenuation. He also pointed out that the noise prediction calculations in the Noise Scheme of Assessment are appropriate. Taking these comments into account it is clear that the loss of trees and other vegetation is not material to the determination of the noise impacts.

37. On the visual impacts, it should be noted that NR is at liberty to remove vegetation within its operational land; and that the deemed permission does not require landscaping or tree planting in route sections H and I-1. NR is however re-planting where feasible to do so at the conclusion of the construction (see pp 37 and 52 of Appendix 2 hereto).

Comment - Monitoring of noise and vibration needs to start now so that a proper baseline can be established and the effects of trains in heavily populated areas can be studied and mitigated

38. The NVMP requires monitoring only of the mitigation measures installed. The source permission and the NVMP were specifically approved in this way by the Secretary of State and the Council has to abide by that. The council has already approved NR's monitoring proposals pursuant to this policy and there are no reasonable grounds for this Committee to change those views at this stage.

Comment - Impacts of diesel fume pollution

39. Air pollution is not the subject of condition 19 of the deemed permission to which these applications relate.

The reasonable practicability of rail damping in route sections H and I-1

40. Under the Council's condition 2 regarding rail damping (paragraph 4 above) NR is asked to demonstrate whether it is reasonably practicable to install rail damping. The context for this decision is that:

- i. the NVMP regards noise impacts of 3dB or more to be significant and in need of mitigation;
- ii. the NSoA for route section H (table 5.2 on pages 32-34) shows that after installed mitigation there is one property with a residual (post barrier) noise impact of 3dB in which the requirement for further mitigation needs to be considered; and,
- iii. the NSoA for route section I-1 (table 5.2, pages 29-30) shows that there are no properties with residual (post barrier) noise impacts of 3dB or more.

41. Queen's Counsel has advised that the crucial elements for the decision-maker in determining the reasonable practicability of using rail damping at the single NSR in section H which is predicted to experience significant residual (post barrier) noise impact are, "*The context, the severity of the impacts and the scale of the benefits and to how many people*" (QC Advice, para 79).

42. Taking into account all the material submitted and the representations made, the officer assessment in the terms suggested by the Queen's Counsel is as set out in the table below (this is based on updated advice from the Queen's Counsel which clarified typographical errors in his original letter):

Queen's Counsel's Updated Advice	Officer assessment
The context <ul style="list-style-type: none"> The NVMP does not require 'at source' if the other measures already provided will achieve the objectives (para 77) 	<p>In current circumstances with barriers and insulation already installed, the potential role for rail damping is only to supplement that existing mitigation at NSRs experiencing significant residual (post barrier) noise impacts (3dB or more) if reasonably practicable.</p>
The severity of the impacts <ul style="list-style-type: none"> Noise impacts below 3dB are not considered to be significant (para 58) 	<p>The barriers and insulation together meet the requirements of the NVMP (in both route sections H and I-1) apart from in relation to one Noise Sensitive Receptor (NSR) in section H where the residual noise impact is 3dB.</p>
The scale of benefits <ul style="list-style-type: none"> QC assumes that rail damping may mitigate noise impacts by 2.5dB (para 4) 3dB difference is at the margin of perceptibility (para 73) The NVMP standards concern internal, not external noise levels (para 14c) 	<p>A 2.5dB difference is less than the level considered to be "significant" for residual noise impact purposes by the approved NVMP.</p> <p>Rail damping could only be relevant at the <u>one</u> NSR referred to above where the residual noise impact is 3dB.</p> <p>The approved NVMP does not require mitigation of noise to open areas or gardens.</p>
How many people will benefit <ul style="list-style-type: none"> For those who already have noise insulation, open window noise will be reduced At one house there will be noise reduction from 3db 	<p>Not relevant to this decision - the approved NVMP does not require mitigation of noise where windows are opened.</p> <p>The one NSR benefit will involve mitigation of a noise impact which is of itself at the limits of perceptibility.</p>

43. It can be concluded therefore that a reduction in residual noise which is of itself at the margins of perceptibility, occurring at only one NSR, is of such limited benefit that, given the costs indicated in the submissions for the installation of rail damping, it is not reasonably practicable to install rail damping in route sections H and I-1.

44. The recommendation is therefore that the NSoAs relating respectively to route sections H and I-1 be approved subject only to a condition specifying conformity with the documents that form part of the application and excluding the previously imposed condition regarding rail damping.

Restrictions on the pattern of train services

45. Condition 3 (reproduced in paragraph 4 above) limits train movements to the number and pattern of movements used to predict operational noise and vibration as set out in the NVMP (paragraphs 1.8 to 1.10) - the reasonable planning scenario. The reason for this condition was to limit the actual operation of services on the line to the pattern set out in the reasonable planning scenario given that any changes to services could have different and possibly unacceptable operational outcomes for noise (and vibration) which might require further mitigation.
46. At the time the condition was imposed by WAPC, officers advised that there was no legal basis for this condition because the deemed permission did not include any control over the number and pattern of services. This was notwithstanding the many representations from local people that significant increases in services and altered types of services including longer trains are in prospect. In other words that the modelled pattern of services was unlikely to be adhered to.
47. Queen's Counsel has since advised that the NVMP does not require any assessments to address any future increases in service and that such potential changes do not need to be modelled (QC Advice, para 84). Through the granting of the original permission, NR was given the right to increase services without being in breach of condition 19 of the deemed planning permission, and NR does not need to seek further permission or consent to make such changes (QC Advice, para 85).
48. It is clear therefore, that there is no legal basis for the imposition of this condition.

Conclusions:

49. The Council has taken these issues very seriously over a prolonged period and has instructed independent experts to assist it both on the technical and legal side. The overall position is that barriers have been installed and have provided substantial mitigation to most houses such that the impacts will be below the threshold of significance. For some houses, the residual impacts (after barriers) will remain high (greater than 10db) and for those noise insulation has been provided.
50. The role of rail damping and whether it is reasonably practicable has to be considered in the light of the installed barriers, and the costs of installing rail damping. One house has been identified which, after barriers has a 3db impact (the lowest relevant impact). 3db is at the limit of perceptibility, given which, that property would potentially secure a 'just-noticeable' gain from rail damping. As set out in paragraphs 40 and 41 above, it can be concluded it is not reasonably practicable to install rail damping in route sections H and I-1.
51. There is no legal basis for the local planning authority to impose a condition restricting the pattern of services using the line.

52. The recommendation is therefore that the NSoAs relating respectively to route sections H and I-1 be approved subject only to a condition specifying conformity with the documents that form part of the application and excluding the previously imposed conditions regarding rail damping and restricting the pattern of train services.

Human Rights Act 1998

Officers have considered the Human Rights Act 1998 in reaching a recommendation to grant planning permission, subject to conditions. Officers have considered the potential interference with the rights of the owners/occupiers of surrounding properties under Article 8 and/or Article 1 of the First Protocol of the Act and consider that it is proportionate.

Officers have also considered the interference with the human rights of the applicant under Article 8 and/or Article 1 of the First Protocol caused by imposing conditions. Officers consider that the conditions are necessary to protect the rights and freedoms of others and to control the use of property in accordance with the general interest. The interference is therefore justifiable and proportionate.

Section 17 of the Crime and Disorder Act 1998

Officers have considered, with due regard, the likely effect of the proposal on the need to reduce crime and disorder as part of the determination of this application, in accordance with section 17 of the Crime and Disorder Act 1998. In reaching a recommendation to grant planning permission, officers consider that the proposal will not undermine crime prevention or the promotion of community safety.

Background Papers: 16/02507/CND; 16/02509/CND

Contact Officer: Fiona Bartholomew

Extension: 2774

Date: 8th March 2017