

	Full Council
Month	June 2022
Report Title	Rival Market
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Purpose of Report	<p>To inform Council of a recent planning application submitted to Uttlesford District Council as the Local Planning Authority:</p> <p><i>UTT/22/1523/CLP Land To The North Of Cornell's Lane Widdington Essex. The formation, laying out and construction of a means of access to Cornell's Lane, in connection with the use of land (up to 14 days per calendar year) for the purposes of the holding of a market</i></p> <p>This would be a new market, operating on private land approximately 4 miles from Saffron Walden Market Square.</p> <p>This report seeks firstly to inform Council of the situation and secondly to seek instruction from Council regarding any remedial or preventative action.</p>
What is a Market?	<p>Markets are a concourse¹ of buyers and sellers. Any person who erects stalls on their land and takes rent in the nature of stallage from persons who have brought goods there to sell will be conducting a market, as will a person who uses their land to encourage and provide for a concourse of buyers and sellers. The term market includes both a fair and a car boot sale.</p>
How was Saffron Walden Town Council was Market Established	<p>There are various ways of establishing Market Rights²:</p> <ul style="list-style-type: none"> • <i>By grant from the Crown in the form of Charters and Letters Patent;</i>³ • <i>By Local Act of parliament passed for the express purpose of establishing and regulating a market or fair, which generally</i>

¹ The definition of a market is a concourse of buyers and sellers. Viscount Simmonds in the case of *Scottish Co-operative Wholesale Society Limited-v-Ulster Farmers' Mart Co. Limited (1960) AC63; 57LGR275 (1959) 2ALL.E.R.486*, referred to a market as “**the provision of facilities for a concourse of buyers and sellers**”. In an earlier case the *Marquis of Downshire-v-O'Brien (1887) 3 L.R.19LR.380* Vice-Chancellor Chatterton said “**A market is, properly speaking, a franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise was given.**”

² In recent years probably one of the most important decisions on the relative strengths of markets created under different powers is *East Lindsey District Council v Hamilton (1984) The Times, 2nd April 1984*. It was accepted by the Court of Appeal that a market created under legislation enjoys all the same benefits as a market created under Charter unless there is some specific provision within the legislation to the contrary. The same point was considered in an earlier case of *Wakefield City Council v Box (1982) 3All.E.R.506*.

³ Markets go back hundreds of years. Legislation relating to markets is of relatively modern origin. An interesting question has arisen in the past regarding the relative importance of markets created by Royal Charter/Letters Patent and those created by Statute. This issue arose in the case of *Mayor of Manchester v Lyons (1882) 22Ch.D.287* when in part of his judgement Lord Justice Bowen said “**Where there is a franchise created by Charter, and the legislation afterwards operates upon it, it is obvious that the legislation can do exactly what it pleases. It can either leave the old franchise standing, and place new parliamentary rights beside it, or it may leave the old franchise standing and incorporate certain statutory incidents into the old franchise, providing it makes its intention clear; or it may extinguish the old franchise, expressly or by implication, and substitute in its place, not a franchise properly so called, but parliamentary rights and obligations as distinct from a franchise...**”

	<p><i>incorporates the whole or some part of the Markets and Fairs Clauses Act 1847</i></p> <ul style="list-style-type: none"> • <i>Under powers in Public Acts, i.e. The Food Act⁴ 1984 part 111 section 50-53 (as amended). Council Min ref P&S 547 15th Feb 2015</i> • <i>Parliamentary statutory instrument no 1123 of 1979</i> • <i>By prescription or lost grant</i> <p><i>The Market Rights of Saffron Walden Town Council have been established under all of the above criteria.</i></p> <p>The Town's Market Charter was further endorsed and strengthened under Statutory Instrument (SI) No 1123 dated 4.9.1979 under the Local Authority Miscellaneous Provisions Order. This SI provides UK towns with the power to run markets, with clause (7) (7) noting: "<i>any powers to maintain markets exercisable immediately before 1st April 1974 by the corporation or council of the borough of Saffron Walden under any franchise⁵ or by virtue of prescription shall be exercisable by the Town Council of Saffron Walden</i>".</p>
<p>What is a Rival Market?</p>	<p>To consider if a market is seen as a rival market relevant tests need to be looked at to determine whether a concourse of buyers and sellers exists.</p> <p>The following are relevant:</p> <ul style="list-style-type: none"> • Is the market open to anyone to come, buy and sell? • Is there space with facilities for several sellers? 5 or more stalls • Are goods sold of the same type, or substantially of the same type, found in markets generally? • Is security of tenure is given to individual stall holders? • Is the operator actively encouraging people to come to do business by, for example, advertising or putting on special features or entertainment to attract the public? • Has the operator an interest in the day to day running of the activity, for example, by controlling the hours of opening, by appointing a manager to resolve disputes between traders or by laying down rules and regulations for the management of the activity? • Who owns and erects the stalls? Are they owned and erected by individual sellers? Is there security of tenure as in recent case law this of particular importance.

⁴ Under the provisions of the Food Act 1984, at Section 50(1)(b) a local authority is entitled, inter alia, to acquire by agreement, either by purchase or on lease, the whole of any part of an existing market undertaking within its area and any rights enjoyed by any person within its area in respect of a market and tolls. The provisions in Section 50(1)(b) are further extended by the provisions in Section 51 which provide additional powers to the owner of a market undertaking to sell to a local authority. Such a transfer will normally be undertaken by deed.

⁵ [Practice guide 18: franchises - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<p>Distance between markets as a right of protection</p>	<p>A long-established right is a local authority is entitled to a right of protection within a common law distance of 6 2/3 miles⁶. The 6 2/3 miles requirement goes back to the Middle Ages when the country was largely made up of an agricultural society and the distribution of markets was determined to a great extent by the time it would take to travel to the market⁷, dispose of the produce and travel home again before dusk. Any infringement to the 6 2/3 miles may be regarded as the distance which could give rise to the disturbance of a lawful market⁸.</p>
<p>Other matters to consider</p>	<ul style="list-style-type: none"> • Is it a temporary one-off event or long term? • for charity purposes? • the type of market itself • Trading days • Is the rival market established and reputable? <p>Information can be sought through a review of their advertising or newspaper articles and by talking with other operators and traders.</p> <p>Saffron Walden Town Council has historically sought to protect its market rights against rival markets, usually by way of conversations between the Operator and the Market Manager.</p> <p>These conversations have historically proven beneficial with potential market operators ceasing their market operation (or proposals for same). Threat of legal action has been made previously, but not taken; the threat itself has been sufficient.</p> <p>Although the proposed market day has not been specified in the application market right exist the day before and the day after an existing Market</p>

⁶ There was at one stage a dispute whether the distance is 6 2/3 or 7 miles. Subsequently the distance was accepted by the Court of Appeal in the case of *Sevenoaks District Council-v-Pattullo & Vinson Ltd. (1984) 1AII E.R.544* as being 6 2/3 miles. While the decision in this case firmly established the validity of the 6 2/3 miles it is interesting to note that Lord Justice Slade in his judgment expressed the view that the law on the subject generally is "confused" and "might well benefit from attention on the part of the legislature". Perhaps it is appropriate to acknowledge that many people find the 6 2/3 miles rule somewhat difficult to follow in a modern commercial context.

⁷ Another aspect concerning the distance is whether the distance should be measured from where the market is actually held or from the boundary of the area within which a local authority is entitled to establish a market. This argument was finally settled by the case of *Birmingham City Council-v-Anvil Fairs (1989) 87L.G.394* when it was held that the distance was to be measured from the place at which the market was actually held not the boundary of the authorised area

⁸ Another interesting element of the 6 2/3 miles rule is whether the distance should be measured by the nearest road or in a straight line. It might be thought that the proper way is to measure the distance by the nearest road. However, the courts have generally favoured the distance being measured "**as the crow flies**". The issue fell for consideration in the case of *Newcastle-Upon-Tyne City Council-v-Noble (1991) 89L.G.R. 618* where Mr. Justice Maddox, after reviewing a number of earlier decisions, made the following judgment:-
"....roads might vary from time to time. I think the more rational approach, whatever the origins of the common law distance, is to suppose that the common law distance crystallised as a simple fixed distance measured as the crow files; that is to say as a radius, based perhaps on the old concept, but not in other respects tied to it....."

As a final point in relation to the 6 2/3 miles rule it is important to point out the importance of the case of *Halton Borough Council-v-Cawley (1985) 1W.L.R. 15* where the local authority sought to deal with a rival market which was set up outside its administrative area. The court held that the 6 2/3 miles rule applied and in such circumstances and the local authority was entitled to pursue a legitimate claim in the area of another local authority area.

The case of *Tamworth Borough Council-v-Fazeley Town Council (1979) 77L.G.R 238*⁹ is relevant regarding markets held on the same day as Saffron Walden market.

The situation is slightly different regarding rival markets held on days other than when Saffron Walden Town's market operates as actual damage must be proved. At interlocutory injunction stage, it may be sufficient to demonstrate a likelihood of damage is going to occur, however any court case again cannot be relied upon as in *Warwick Corporation-v-Maby (No. 2) (1972) 116Sol.J.137*.

It is important Council has a Market licensing policy - the *Leeds City Council The Watkins and Whitely (2003) LLR 477*¹⁰ case evidences it would be difficult to enforce market rights on days the councils markets are not normally held on.

Uttlesford District Council has not enacted Section 37¹¹ of the Local Government (Miscellaneous Provisions) Acts 1982, dealing with the provision of street markets and temporary markets. It is important to note this power cannot be used in this or any dispute within the district.

Permitted development¹² has been amended to allow temporary markets to be set up now for 28 days (previously 14) in any year without planning permission; this does not supersede the requirement to seek permission from the holder of market rights for the area where any new market is proposed.

Is there a Potential for a loss of revenue? As any rival market may take trade; both in terms of traders and public.

A rival market could be in contravention of The Food Act 1984 part 111 sec 50,

The Charter and Statutory Instrument 1123 from 1979

⁹ *Tamworth Borough Council-v-Fazeley Town Council (1979) 77L.G.R 238*. In this case the Borough Council held a Saturday market which had been in existence for several hundred years. In 1977 the Town Council started to hold its own market within one and a half miles of the Borough Council's market. The court held, in granting the injunction sought, that there was an irrefutable presumption that the new market was a nuisance to the old.

¹⁰ [Leeds City Council v Watkins & Anor | \[2003\] EWHC 598 \(Ch\) | England and Wales High Court \(Chancery Division\) | Judgment | Law | Case Mine](#)

¹¹ [Local Government \(Miscellaneous Provisions\) Act 1982 \(legislation.gov.uk\)](#)

¹² Another important aspect of the planning situation often arises when a market operator argues that the receipt of planning permission enables him to operate a market irrespective of the existence of a local authority's market rights. The position of planning vis-à-vis market rights has arisen in a number of court cases. One is *Delyn Borough Council-v-Solitaire (Liverpool) Limited and another (1995) 93L.G.R.614; 159*.

Delyn held a Saturday market in their area in 1991 pursuant to Section 50 of the Food Act 1984. In July 1994 the defendants opened a Saturday market three miles from Delyn's market pursuant to a planning permission granted by Delyn 1983. Delyn brought proceedings seeking an injunction.

The defendants raised a number of defences including that the grant of planning permission in 1983 itself amounted to the establishment of a market within the meaning of Section 50 of the Food Act 1984. If this proposition was right then the defendants had a potential legitimate defence since Delyn's proposal in respect of the market opened in 1991 did not emerge until 1994. Under section 50(2) of the Food Act 1984 protection is given to an established market. Alternatively, argued the defendants, the grant of planning permission amounts to consent or a statutory authority to run a market in accordance of that permission. In granting the application by Delyn Mr. Justice Jacob held planning permission does not confer the right to hold a market. It does no more than to remove the impediment on use or development which is imposed by planning law.

	Legal action needs to be balanced against previous case law success or failures and will involve employing legal experts and associated costs.
European Services Directive:	EU legislation ¹³ is enshrined into UK law, including competition law. The principles of these laws (specifically the market rights) were tested in the case of <i>Leeds City Council –v- Watkins and Whiteley (2003) LLR477</i> ¹⁴ and <i>South Pembrokeshire District Council-v-Wendy Fairs Markets Limited (1994) 1C.L.R.213</i> ¹⁵ in 2003. These are important case laws where the Councils sought protection under the 6 2/3-mile distance rule. The defence claimed their markets should be allowed, citing EU Law, specifically The Competition Act 1988 and Articles 81 and 82 of the European Treaty. Both cases were awarded in favour of the Councils, providing credibility and legal weight to their argument under the 6 2/3-mile rule which took precedence over EU law.
Background Papers and Consultation	Reference to NABMA ¹⁶ website and publications. Pease and Chitty ‘Laws of Markets and Fairs’

¹³ This was a necessary process as part of the UK’s departure from the European Union in 2020

¹⁴ The most recent example of a case involving principles of European Law is *Leeds City Council –v- Watkins and Whiteley (2003) LLR477*. This is an important case for many reasons and particularly because arguments were advanced regarding the role of NABMA and whether such a role is in contravention of the competition requirements of the European Treaty. The action was brought by Leeds City Council against Mr. Watkins and Mr. Whiteley in which they sought injunctions restraining them from holding Sunday car boot sales without a licence or consent in breach of the Council’s Charter and statutory market rights.

Mr. Whiteley took no active part in the Court proceedings, contested Leeds City Council market rights in a number of ways. Firstly he sought to establish that the granting of an injunction was not appropriate and then he sought to raise defences under the Competition Act 1998 and finally he sought to raise defences under Articles 81 and 82 of the European Treaty.

A reading of the full Judgment is worthwhile because it has so many important aspects both in respect of European issues and other market matters covered elsewhere in this publication. Leeds City Council was successful in obtaining its injunctions and Mr. Watkins’ counterclaim in respect of the alleged infringement of the Treaty of Rome was dismissed.

¹⁵ In *South Pembrokeshire District Council-v-Wendy Fairs Markets Limited (1994) 1C.L.R.213* the local authority was successful in obtaining an interlocutory injunction in respect of the defendants who were intending to hold two separate markets within 6 2/3 miles of the local authority market. Among the arguments advanced by the defendants was that they were entitled to rely on Article 30 of the Treaty of Rome. Using Article 30 the defendants sought to argue that there was a possibility of a hindrance on inter-state market rights. The argument did not commend itself and was not sufficient to persuade the court that an injunction should not be granted.

¹⁶ <https://nabma.com/members-exclusive-content-area/>

OPTIONS:

The following options are available to Council:

Option	Narrative	Risk(s)
A	<p>Take no action, allowing the rival market to continue, it is approximately 4 miles away.</p> <p>It is likely there will interference to the Council's market</p>	<p>Loss of established market and income.</p> <p>Failure to protect SW market in this instance, will render it difficult to prevent or restrict any further market operators</p> <p>Council must consider if a rival market would affect the profitability of its market so it can take injunction proceedings to restrain it. An injunction is a discretionary remedy; the Courts will only grant it if it can be shown there is an entitlement to the remedy, examples include:</p> <ul style="list-style-type: none"> • Proof of the Council's Market Rights;(as above) • Council has a current Market Licensing Policy • Evidence the market has taken place or clear evidence it will be held • If the rival market is on another day to the Council's, proof of damage. <p>No enforcement has the potential to lead to the establishment of other rival markets within 6 2/3 miles of our market.</p>

Option	Narrative	Risk(s)
B	For SWTC to submit a letter of objection, opposing the planning request and advising the LPA that granting of any planning permission breaches prevailing market legislation	
C	Should UDC be minded to grant the planning application, SWTC Officers to make contact with the Organisers of the proposed markets pointing out the situation and to offer to licence the new markets for a fee	This method has been successful in the past and is the easiest option.
D	Should UDC be minded to grant the planning application, to write a cease-and-desist letter to the new Market Operator reaffirming the Councils Market Rights and the implications concerning rival markets.	
E	Should UDC be minded to grant the planning application, SWTC Officers to engage solicitors, seeking legal advice from NABMA and Pease and Chitty: Law of Markets and Fairs, regarding injunctions and action required to protect the Councils Market rights.	Potential for costs and an award of damages being made should any action taken be unsuccessful.

RECOMMENDATIONS:

- (a) It is recommended Council assumes options B – E (in sequential order) as above with the first step being:
- (b) Submission of an objection to the planning application, citing the reasons as stated above and quite specifically noting that SWTC's market is protected under statutory legislation. As such, should the Local Planning Authority be minded to grant the application, it would be condoning an illegal act.
- (c) That a request is made to the UDC Ward Cllr covering the Widdington area to call in the planning application, so that it is considered by UDC's Planning Committee, as opposed to being a delegated Officer decision
- (d) That a representative from SWTC attends the UDC Planning Committee to further represent SWTC's objection, specifically noting that the LPA would find itself in breach of market legislation should it be minded to grant the application
- (e) The Town Clerk reports back to Council at the earliest opportunity