

# Planning Committee meeting 6 September 2016

Reference: **152817: Site known as SR6: Lakelands, Stanway**

Proposal: **28 residential units**

Commentary on Legal Opinion provided to Stanway Parish Council by Mr Jonathan Clay, barrister at Cornerstone Chambers, London (Opinion dated 20 August 2016)

In commenting particular reference is drawn to the following sections of Mr Clay's Opinion (of which copies are available on request and will be available at the Committee meeting):-

## Lawfulness of the outline permissions

10. I agree with Simon Pickles that the new conditions [attached to 121040 & 1231041, the later outline permissions] are "more clear-cut or prescriptive than their predecessors". Thus the new conditions appear to more tightly tie the development to the specific Phase 2 DAS or its updates and specifically made compliance with the Phase 2 DAS (or as updated to reflect changes in circumstances or guidance) a requirement of the permissions....

## Validity of 2012 outline planning permissions

13. Nevertheless, I agree with Simon Pickles that the validity of the permissions 121040 & 121041 granted by notices dated 4 September 2102 cannot now be challenged. Those are the operative outline permissions for the development....

## Local Plan

- 21 Simon Pickles concludes that "*The Local Plan land use allocation has no bearing on the proper interpretation and effect of those permissions. The Phase 2 DAS is the primary decision making tool in this context, although the Local Plan may have some residual role to play in informing judgements that remain to be made as to detail*" [SP Opinion para 17].
22. A decision to approve reserved matters is in my view, clearly a determination under the planning Acts for the purposes of section 38(6) and I do not consider the statutory presumption that decisions will accord with the Adopted Local Plan can be disregarded.

- 23 However, I do accept that once the principle of development has been decided by the outline permission, the planning authority are not entitled to refuse to approve reserved matters on grounds going to the principle of the development itself and which are therefore already implicit in the grant of the outline planning permission.24. I depart from the Opinion of Mr Pickles where he describes the current position as a fall-back position, if he means that the land can lawfully be developed without the need for further consents..
28. The current application for approval of reserved matters provides a scheme for the site which include some open space, although it is much less than the part of SR6 which is identified for retention of open space in Local Plan policy DP15. 12 out of the 28 units proposed are on the DP15 open space. Following the approach in the *Newbury* case, to exclude consideration of the provision or retention of open space on the site would be “*wrong*”.
29. The LPA has been advised by their counsel that in determining the application they must wholly disregard the Local Plan, including policy DP15 (and presumably by inference the guidance in paragraph 74 of the NPPF) and that it would be unreasonable to refuse the reserved matters application because of the loss of open space, because the Council’s hands are tied because this part of the site is shown on the masterplan in Phase 2 DAS as providing residential development.
- 30 Whilst I agree with Simon Pickles that the Local Plan does not trump the terms of the outline permission read together with its conditions, I would suggest that the decision is one that may benefit from being considered in a sequence of questions or stages. Simon Pickles does not appear to have been asked to approach it in this way, so it is not possible to assume that he would reach different conclusions.
32. In my opinion the Local Plan is a relevant consideration and cannot be disregarded. The NPPF is also a relevant consideration. However their effect under section 38(6) is constrained by the terms of the outline permissions.
34. In my view the presumption in section 38(6) cannot over-ride the lawful outline permission and the Council must accept that any reserved matters application should broadly comply with the Phase 2 DAS as approved or where relevant as updated.
- 36(I)However, absent an update to retain the DP15 land as open space, what is at issue is not the principle of provision of open space on land identified in the DAS for residential development, but rather the extent of the balance of housing and open space on the site – which is a matter of degree. Whether the open space to be provided in the current reserved matters application is satisfactory is a matter of planning judgement for the LPA which, provided it is exercised reasonably, cannot be interfered with by the Courts or provide a foundation for an award of costs in the event of an appeal. In making that decision, they would be entitled to have regard to the relevant national and local policy, including Local Plan DP15

and NPPF paragraph 74, as well as the specific layout, form and scale of the open space to be provided.

- 36(l) If they were to do so, there is well established legal authority for the proposition that permission for development may be refused, if it is considered that a better scheme could be achieved. In the *West End Green* case the Court of Appeal held: *“There is certainly no legal principle ..... that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In such a situation, permission **may be refused** but it does not have to be refused.”* [my emphasis]. I do not see any reason why that principle should not apply to reserved matters applications. Therefore, while I do not suggest that the existing proposals *must* be refused, it is, in my opinion, legitimate and reasonable for the LPA to decide to refuse it on account of the effect of the proposals on the provision of open space to serve the development, having regard to local and national policy. Whether they do so or not would be an exercise of discretion in the exercise of their planning judgement by the LPA.
40. In my view it is therefore reasonable to conclude that the LPA would be entitled to refuse to approve the reserved matters for SR6 because of (inter alia) the extent of proposed loss of existing and established open space on the eastern part of the site resulting in unsatisfactory development and a better alternative which retains more open space could be produced consistent with the DAS and policy. This approach would be given greater certainty and clarity if an update to parcel SR6 was submitted and considered alongside the application for reserved matters.
- 41 Refusal of permission in these circumstances would not involve the LPA in paying compensation although it could result in an appeal under section 78 of the Town and Country Planning Act 1990. On any appeal the refusal would not be likely to be found unreasonable so as to lead to any award of costs against the LPA, provided it was to be supported by relevant and cogent evidence, and particularly if, by the time the appeal is heard, the Phase 2 DAS has been updated to reflect the Local Plan.

## Officer comment

The Advice provided by Mr Clay is noted and it is recognised that in most areas he agrees with the Advice provided to the Council by Mr Pickles.

Simon Pickles comments on the Opinion of Jonathan Clay (‘JC’) as follows:

1. I previously advised – in response to the question ‘Does the Phase 2 DAS *de facto* surplant the land use allocation in the Local Plan such that subsequent such that the Council should accept the reserved matters approval for residential development?’ - as follows:

*‘The Council should approve the reserved matters application insofar as it provides for the residential development of the site because condition 1 attached to permissions 121040 & 121041,*

*the Phase 2 DAS and masterplan provide that development of the site should take that form. The Local Plan land use allocation has no bearing on the proper interpretation and effect those planning permissions. The Phase 2 DAS is the primary decision-making tool in this context, though the Local Plan may have some residual role to play in informing judgments that remain to be made as to detail.* (SP First Opinion [17], cited by Jonathan Clay ('JC') in part at [21] (as above); underlining added)

2. JC agrees that the presumption in section 38(6) of the 2004 Act (determination of planning applications in accordance with the development plan unless material considerations indicate otherwise) does not 'trump' [30] or override the lawful outline permission [34]. He agrees secondly, in effect, that the Council should properly, in light of condition 1, approve an application for reserved matters provided it 'broadly' complies with the Phase 2 DAS [34] but considers that the balance of housing and open space alongside it remains a key issue [36(i)]. He expresses the view, thirdly, that it may be reasonable to refuse to approve the current reserved matters application based on a planning judgment concerning the adequacy or appropriateness of the proposed open space 'to serve the development, having regard to local and national policy' [36(l)]. He concludes, fourthly, that a refusal would not be likely to be found unreasonable so as to result in an award of costs against the Council in the event of an appeal - 'provided [the decision to refuse] was to be supported by relevant and cogent evidence' [41].
3. It does not appear to me that there is a significant issue of law between us insofar as the determination of the current application is concerned.
4. Most significantly, JC rejects the prospect, on behalf of the Parish Council, that it may be reasonable to refuse to approve the current application because it proposes residential development contrary to the land use allocation in the Local Plan (first point at paragraph 2 above). It will be apparent from the extract at paragraph 1 above that I did not advise that the Local Plan was in all respects irrelevant and to be ignored. I advised instead that Local Plan Policy DP15 could not, as JC agrees, be relied upon to contradict condition 1 and its support, in light of the Phase 2 DAS (and the absence of any update), for the approval of residential development on the site. I note that officers' assessment of the site does not, in any case, support its retention as open space on the planning merits (see eg [12.11]).

5. The Local Plan and national policy continue, as previously advised, to provide the policy framework within which outstanding matters in respect of reserved matters applications fall to be determined (a role described as '*residual*' above). Those outstanding matters include density, amenity & highways. They also include the balance between housing and open space, to which JC refers. Local Plan Policy DP16 provides the development plan policy framework within which that particular matter is properly to be determined. Officers address compliance with Policy DP16 at [7.3] and s.12 of their report ('OR'). JC does not refer to Policy DP16 or explain on what basis the Parish Council contends, if it does, that the proposed open space provision is inadequate when assessed against it.
6. The third and fourth matters referred to at paragraph 2 above concern the exercise of planning judgment rather than matters of law. JC does not explain on what '*relevant and cogent*' evidential basis it may be reasonable, by reference to Policy DP 16 or otherwise, to refuse the current application on grounds of inadequate open space provision. OR s.12, on the other hand, carefully considers the proposed provision of open space in the context of Policy DP16. I do not respectfully agree, in light of the OR and discussion with the Case Officer, that the refusal would not be likely to be found unreasonable so as to result in an award of costs against the Council in the event of an appeal. JC [41] very properly includes a proviso concerning the need to support a refusal with '*relevant and cogent evidence*', but does not explain what that evidence might be or demonstrate.

Both barristers are agreed that reserved matters in respect of residential development of SR6 should be approved subject to consideration of other detailed matters.

Members will note that in the report officers have provided a full analysis of the merits of the reserved matters against policies DP15 and DP16.

-In particular within paragraphs 12.2, 12.3, 12.4, 12.8, 12.10, 12.11 of the report.

Officers have, as a matter of fact, considered the merits of the site for open space provision in the context of Local Plan Policy DP15 and the open space provision alongside the residential development proposed in the context of Policy DP16. They have concluded that the proposed reserved matters are acceptable in the context of Policies DP15 and DP16 and all other material planning policies and considerations.

Vincent Pearce

Planning Projects Specialist

5 September 2016