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**Item No:** 7.1

**Application:** 180733

**Applicant:** Mr Roger Raymond, NEEB Holdings Ltd

**Agent:** Mr John Mason, Carter Jonas

**Proposal:** Outline application for 26 dwellings including 30% affordable housing, vehicular and pedestrian access from Coopers Crescent, pedestrian access from Armoury Road, public open space and landscaping with details of access and structural landscaping (matters of internal landscaping, appearance, layout and scale reserved).

**Location:** Land Adj, Armoury Road, West Bergholt, Colchester

**Ward:** Lexden & Braiswick

**Officer:** Sue Jackson

**Recommendation:** This application was deferred under the DROP procedure

## 1.0 Introduction

- 1.1 Members will recall this application was considered at the last meeting of the Planning Committee on the 5 July. Members invoked the Deferral and Recommendation Overturn Procedure (DROP) and instructed officers to review the harm that would result from the development and to provide a further report.
- 1.2 In accordance with the agreed procedure this report focusses solely on the motion to overturn the recommendation, and relates to the risks and implications as opposed to introducing any new material on the general issues/merits of the case previously discussed.
- 1.3 The previous report to Members is included in appendix 1. The report has been updated to include the matters previously set out in the amendment sheet and the updates to the report described to Members during the presentation. All the updated information is shown **in bold text**.

## 2.0 Further Report

### Introduction

- 2.1 This report sets out material planning considerations, it considers each in turn and then assesses the risk of costs being awarded against the Council at appeal.

### Government Advice

- 2.2 The National Planning Policy Guidance (NPPG) sets out when an award of costs might be made against a local planning authority. The following is an extract from the NPPG.
- 2.3 **“What type of behaviour may give rise to a substantive award against a local planning authority?”**  
Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include:
  - preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
  - **failure to produce evidence to substantiate each reason for refusal on appeal.**
  - **vague, generalised or inaccurate assertions about a proposal’s impact, which are unsupported by any objective analysis.**
  - refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead

- acting contrary to, or not following, well-established case law
  - persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable
  - not determining similar cases in a consistent manner
  - failing to grant a further planning permission for a scheme that is the subject of an extant or recently expired permission where there has been no material change in circumstances
  - refusing to approve reserved matters when the objections relate to issues that should already have been considered at the outline stage
  - imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations
  - requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the National Planning Policy Framework, on planning conditions and obligations
  - refusing to enter into pre-application discussions, or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal
  - not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.
  - if the local planning authority grants planning permission on an identical application where the evidence base is unchanged and the scheme has not been amended in any way, they run the risk of a full award of costs for an abortive appeal which is subsequently withdrawn
- (This list is not exhaustive.)”

- 2.4 The second and third bullet points (in bold type) make it clear Local Planning Authorities have to produce evidence to substantiate each reason for refusal on appeal and that assertions about a proposal’s impact have to be supported by objective analysis.

#### Highway Matters

- 2.5 The Highway Authority (HA) raised no objection to the application subject to conditions; one of which precluded all vehicular traffic including construction traffic from using Armoury Road. The application originally proposed a through route, so vehicles could access the site from either Colchester Road or Armoury Road. Following the response from the HA the application was revised so all vehicular traffic was from Colchester Road. Access to the site from Colchester Road involves the use of private roads; Maltings Park Road and Coopers Crescent .

- 2.6 Following the deferral the HA has been asked to confirm that the existing roads, Maltings Park Road and Coopers Crescent, are suitable in highway terms for use by the traffic generated by an additional 26 units. The HA has confirmed this is the case. They have also been asked to consider whether Armoury Road could be used for construction traffic and if so what improvements would be required. The HA has commented *“Armoury Road is classified in the s36 register as part Private Road and part Private Street. Public Footpath No 23 runs along its length and it is assumed that the PRow rights exist across the entire width of the road and verges. Paved footways extend along one side for about 150 metres or so one side then change to grass verges further along, both providing safe refuge for pedestrians. Visibility at the junction of Armoury Road with Colchester Road is sufficient when emerging and looking right, slightly less but not hazardous or dangerous when looking left. There are no Personal Injury Accidents (PIA’s) recorded at or in the vicinity of the junction. Junction geometry is adequate for its purpose. With the above in mind as well as the relatively modest increase in traffic flow, it is the Highway Authority’s view that no mitigation works to Armoury Road would be required.*
- 2.7 The HA has confirmed they consider the private roads are suitable for the additional traffic generated by 26 dwellings. They also consider visibility at the Maltings Park Road/Colchester Road junction is acceptable. Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal were based on impact on highway safety/capacity matters.

#### Impact on Residential Amenity

- 2.8 Although the application is for outline planning permission the recommendation includes several conditions to protect resident’s amenity both during construction and from the development itself. The conditions include a Construction Method Statement, restricting the number of units, requiring single storey dwellings and the removal of permitted development rights.
- 2.9 Officers have asked the HA whether they would agree to the use of Armoury Road for construction traffic and as noted above they have raised no objection.
- 2.10 Following the committee meeting Environmental Protection were reconsulted and asked to consider whether there were any grounds to refuse the application due to adverse impact, including the use of the existing roads by the additional traffic, on the amenity of existing residents. Environmental Protection have commented, *“We would recommend that the construction traffic enters the site via Armoury Road and that the usual restrictions on construction hours and other controls apply to minimise any disturbance from the construction phase.*

*We would also recommended that the access for residents via existing residential is on a hard surface rather than gravel and if possible, a closed-boarded fence of 2m in height is erected alongside the entrance with*

*existing properties. Vehicular disturbance from residents accessing and leaving the site will be minimal owing to the small number of units and slow vehicular speeds. From an EP perspective there would be no reasons for refusal”.*

- 2.11 Vehicular access is proposed via private roads. Whilst ownership and private rights of way are not planning matters the applicant has submitted Land Registry documents which they consider indicate they have a right of access over these roads. The applicant has also agreed to a clause in the legal agreement which would require the new residents to contribute to maintenance costs.
- 2.12 Officers consider the recommended conditions would protect residents amenity during the construction process, (especially if this traffic used Armoury Road), and from overlooking and loss of privacy from residents of the buildings, Environmental Protection has confirmed disturbance from the new traffic would be minimal.
- 2.13 Members are advised that without the support of Environmental Protection it would be difficult to provide evidence at appeal to support a reason for refusal based on impact on residential amenity. There is therefore a risk of costs being awarded against the Council at appeal.

#### Impact on Landscape

- 2.14 A Landscape Appraisal has been submitted with the application and a “Zone of Theoretical Visibility”
- 2.15 The Landscape Officer has considered this information and has commented as follows *“Whilst the application site lies on the southern edge of Character Area B6 – Great Horkesley Farmland Plateau in the Colchester Borough Landscape Character Assessment, it is not typical of the wider character area; it is not an area of farmland (and has not been farmed for many years) and its character is strongly influenced by the surrounding built development of West Bergholt which largely encloses the application site and all but cuts it off from the surrounding landscape.*

*The proposed development fills in an existing gap in the settlement between Colchester Road and Armoury Road, connecting into the existing settlement both to the south (via Coopers Crescent) and to the north (via Armoury Road). Development in this location would respect the existing settlement pattern of West Bergholt which is nucleated and would be of a similar scale and density as the surrounding areas of the settlement.*

*The Site does not contribute to this wider setting and the introduction of development on it would not alter the character of the setting. Furthermore, the introduction of development on the Site would not cause the village to link with the main Colchester settlement or contribute to a reduction in the gap between the settlement edges of the two settlements”.*

- 2.16 Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal was based on adverse impact on the landscape.

#### Archaeology

- 2.17 The Councils Archaeologist considers *“There are no grounds to consider refusal of permission in order to achieve preservation in situ of any important heritage assets. However, in accordance with the National Planning Policy Framework (Paragraph 141), any permission granted should be the subject of a planning condition to record and advance understanding of the significance of any heritage asset before it is damaged or destroyed. In this case an archaeological condition is recommended.”*
- 2.18 Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal were based on adverse impact on archaeological assets.

#### Impact on Heritage Assets

- 2.19 Heritage Officer concludes *“It is considered that the proposed development will not cause further harm to the setting of the identified heritage assets. In view of this, there is not an objection to this application from a heritage standpoint”*. Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal were based on adverse impact on heritage assets.

#### Drainage and Flood Risk Issues

- 2.20 The application includes a Flood Risk Assessment and Foul Surface Water Drainage Strategy. Additional information and clarification was requested by Essex County SUDS Team prior to them raising no objection to the granting of planning permission subject to the imposition of conditions. Anglian Water has also raised no objection subject to conditions.
- 2.21 Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal were based on drainage/flood risk matters.

#### Ecology

- 2.22 The Ecological Survey and the results of additional survey work submitted during the course of the application indicate that protected species are either not present or appropriate mitigation is proposed; with the exception of hazel dormice where survey work is ongoing.

- 2.23 As set out in the report the application site includes boundary hedgerows which include areas of hazel and other hedgerow species which dormouse will forage within. Areas of bramble scrub also provide suitable nesting habitat as well as foraging. Given the presence of a local record within 1km of the site there is the potential for hazel dormouse to use the site. Whilst some survey work has been carried out further survey work until November is required.
- 2.24 Your officer has consulted EECOS on the application and discussed the application with them. Due to the location of the site and the proximity of residential development the likelihood of hazel dormice being present on the site is low. If they are present it will be within the hedgerow/s and small areas of bramble/blackthorn scrub not the main part of the site which is unmanaged grassland.
- 2.25 Suggested conditions, which EECOS consider appropriate in this instance, require the reserved matters submission to include the results of the continued hazel dormice survey work and appropriate mitigation. Should there be evidence of hazel dormice on the site the mitigation should require the retention, strengthening and protection of hedgerows and scrub which would not preclude development taking place.
- 2.26 It is considered the recommended conditions would protect ecological interests, secure retention and provision of new habitats and require appropriate new tree and hedgerow planting. Your officers therefore could not produce evidence to support a reason for refusal based on the adverse impact of the development on ecological interests and Members are advised there would be a high risk of costs being awarded against the Council at appeal.

#### Impact on Natural Features

- 2.27 The Arboricultural Officer has considered the Arboricultural Survey and Report and has raised no objection to the development subject to conditions to protect existing landscape features during construction. Members are advised there would be a high risk of costs being awarded against the Council at appeal if a reason for refusal were based on adverse impact on landscape features.

#### Other Material Considerations

- 2.28 The Contaminated Land Officer has considered the Phase 1 Desk Study and Preliminary Risk Assessment and considers that based on the information provided, the conclusions and recommendations are considered reasonable. Consequently no objection is raised subject to the inclusion of a condition. Environmental Protection have raised no objection in respect of noise or air quality.

- 2.29 Members are advised your officers consider there are no other material considerations where evidence could be provided to support a refusal at appeal.

#### Planning Obligations

- 2.30 The applicant has agreed to all the obligations requested by the Development Team these include contributions towards Primary Education; Open Space, Sport & Recreation and Community Facilities. 30% affordable housing is proposed which exceeds the current policy requirement. A broadband contribution is also offered although there is no policy requirement for this.
- 2.31 If Members are minded to approve the application a legal agreement will be required to secure these obligations. However if Members are minded to refuse planning permission the lack of a legal agreement to secure these obligations should also form a reason for refusal.

#### Policy

- 2.32 The report sets out the detailed response from Spatial Policy. In summary *“the proposed development site is located outside the West Bergholt settlement boundary as shown on the Proposals Map for the Adopted Local Plan. The proposal is considered to be in contravention of current adopted local policies. The Councils housing supply assessment has been updated for the period from 1.4.18 and a report on this has been published on the Councils website. This demonstrates a 5 year supply of deliverable sites. Furthermore, the proposal conflicts with the emerging Local Plan together with the emerging Neighbourhood Plan, which will plan for the most appropriate additional growth in West Bergholt looking ahead to 2033. It is understood that there are no other grounds for refusal and in a situation such as this the planning balance will need to be applied and permission should only be granted if other material considerations outweigh the presumption against development outside settlement boundaries contained in the development plan”*.
- 2.33 The original report sets out why your Officers consider a refusal based solely on conflict with the Local Plan in respect of the settlement boundary and a 5 year housing land supply are not necessarily sufficient for an appeal to be dismissed if the Local Planning Authority cannot also demonstrate harm.

### **3.0 Conclusion**

- 3.1 To summarise, following the deferral of the application your Officers have carefully considered the harm that might result from the development, the Highway Authority and Environmental Protection have also been reconsulted and asked to comment on potential harm. The material planning considerations are set out above. The comments from the in-house specialists and external consultees are set out in detail in the original report and summarised above. Members will note that no objection is raised by

any of the specialists or consultees. Should planning permission be refused for reasons relating to any of these matters the specialists and consultees would not be able to provide any evidence to support the Council at appeal. The Council would therefore not be able to substantiate these reason/s for refusal and the likelihood of costs being awarded against the Council would be high.

- 3.2 However if Members conclude that having applied the planning balance the benefits of the development are outweighed by the conflict with the Local Plan and resolve to refuse planning permission for these reasons alone; they could be evidenced at appeal. Whilst a subsequent appeal might be allowed the award of costs against the council is unlikely.

#### **4.0 Recommendation to the Committee**

- 4.1 The Officer recommendation to the Committee is that if Members are minded to refuse planning permission the following reasons are suggested;

##### **Reasons for Refusal**

1. Colchester Borough Council's current Development Plan consists of the Core Strategy (adopted in 2008 and subject to a Focused Review in 2014), Site Allocations DPD (adopted 2010), and Development Policies DPD (adopted 2008 and reviewed 2014). The Development Plan informs development within the Borough up to 2023 including the allocation of new housing sites as detailed in the Proposals Maps. The proposal is for new residential development which is not allocated through the Site Allocations DPD in accordance with the settlement hierarchy and is therefore contrary to Colchester Borough Core Strategy Policy SD1 (spatial strategy), found sound in 2014 following a Focussed Review carried out after the publication of the National Planning Policy Framework (NPPF) and underpinning other development plan policy. Policy SD1 does however contain reference to an out of date housing target so although part of the policy can be afforded full weight, part is inconsistent with the NPPF and should only be afforded limited weight (housing requirement and approach to PDL). Policies which flow from the strategic nature of SD1, will need to be considered using the same weighting. The application also proposes development outside the settlement boundary for West Bergholt as defined in the Core Strategy. The proposal is therefore contrary to Core Strategy Policy ENV1 (unallocated greenfield sites outside settlement boundaries) and H1 (housing delivery). Policy ENV1 states that unallocated greenfield sites outside of settlement boundaries will be protected and where possible enhanced. Policy ENV1 has application beyond limiting isolated residential development in the countryside; by restricting development to within settlement boundaries. Given that the proposed site is outside of the settlement boundary it is contrary to this Policy. The Core Strategy sets out how the Council would manage the delivery of at least 19,000 new homes between 2001 and 2023. The overall distribution of new housing is set out in Policy H1 and Table H1a, guided by the Settlement Hierarchy. Since adoption of the Core Strategy the Council has

continued to update its evidence base and has taken into account policy changes at a national level. The Council has continued to deliver new homes, over a prolonged period. Since the beginning of the current Plan period (2001), the Council has exceeded its housing requirements by 939 new dwellings, with a continued good track record of delivery. Whilst there has been a small shortfall since 2013 (the base date of the emerging local Plan) this will be addressed in the next 5 years. An updated 5-year housing land supply report (June 2018) show a 5-year supply can be delivered without including emerging allocations.

The Council is preparing a new Local Plan for the Borough to replace the adopted Local Plan and guide development over the period 2017 to 2033. It will include new housing allocations to meet predicted growth of the Borough over that period. The Local Plan process ensures that potential development locations are the subject of thorough assessment, consideration of alternatives and meaningful engagement with residents, service providers and other key stakeholders. As well as preparing a new Local Plan for Colchester, the Council are also currently supporting a number of Parish Councils, to develop Neighbourhood Plans for their respective parishes. The West Bergholt Neighbourhood Plan group are actively progressing their Neighbourhood Plan and Regulation 14 consultation on the draft plan commenced on June 4 2018. West Bergholt Parish Council and Neighbourhood Plan Group indicated a preference for allocating sites through their emerging Neighbourhood Plan. The emerging Local Plan therefore identifies a broad area of growth for West Bergholt, located to the north-east of Colchester Road, and the Neighbourhood Plan has identified sites within this broad area and this approach is supported by Policies contained in the emerging Local Plan. The allocation of housing sites through the Local Plan and Neighbourhood Plan process ensures that new development has been thoroughly assessed for all of its potential impacts so that effective mitigation measures can be prepared. The Local Plan and Neighbourhood Plan process also ensures that potential development locations are the subject of meaningful engagement with residents, service providers and other key stakeholders and that a comprehensive strategic approach to site allocations is undertaken, including sustainability appraisal and consideration of alternatives. The proposed site is not located within the identified broad area of growth and is therefore contrary to the emerging Colchester Local Plan. Both the Local Plan and the West Bergholt Neighbourhood Plan are subject to Examination before Adoption so therefore do not carry full weight in determining this application. However, it should be acknowledged that the Local Plan is at an advanced stage; it has been submitted and examination has commenced on Section 1. The Neighbourhood Plan is at Regulation 14 stage following significant work, evidence gathering and engagement with a programme to proceed expediently to Regulation 16 / Submission before Adoption of the Local Plan. Neither emerging Plans lend policy support for the proposed development. Approval of a planning application outside and circumventing the Local Plan process would undermine proper strategic planning, prejudice the formulation

and adoption of the emerging Local Plan and Neighbourhood Plan and is considered to be premature.

The Council has assessed the public benefits that the application would deliver, including those set out in the application Planning Statement and the proposal for 30% affordable housing. However the Council can demonstrate in excess of a five- year housing land supply and considers that in this case, the public benefits are outweighed by the conflict with the Local Plan, emerging Local Plan and the West Bergholt Neighbourhood Plan.

2. The application fails to include a legally binding mechanism to secure a range of planning obligations (30% affordable housing and financial contributions towards Open Space, Sport and Recreation; Community Facilities; Primary Education and Broadband) that a major development of the scale proposed requires. The proposed development is therefore contrary to: the sustainable development principles at NPPF paragraphs 7, 17, 50, 70, 73; Core Strategy (adopted 2008 revised 2014) Policy SD2 (Delivering Facilities and Infrastructure) and Policy H4 (Affordable Housing) (revised July 2014); and adopted Development Policies (adopted 2010 revised 2014) Policy DP3 (Planning Obligations and the Community Infrastructure Levy). It is also contrary in this context to the following adopted guidance adopted by the Council: Supplementary Planning Document Affordable Housing (adopted 15th August 2011); Provision of Community Facilities (adopted 28th September 2009 updated July 2013) and Supplementary Planning Document Provision of Open Space, Sport and Recreational Facilities (adopted 24 July 2006). It is contrary, finally, to Supplementary Guidance issued by Essex County Council (Developers' Guide to Infrastructure Contributions (revised 2016).