

# **EASTERN AREA PLANNING COMMITTEE**

## **MINUTES OF THE MEETING HELD ON WEDNESDAY, 20 DECEMBER 2017**

**Councillors Present:** Peter Argyle, Keith Chopping, Richard Crumly, Marigold Jaques, Alan Law (Vice-Chairman), Alan Macro, Tim Metcalfe, Graham Pask (Chairman), Richard Somner and Quentin Webb (Substitute) (In place of Graham Bridgman)

**Also Present:** Sharon Armour (Solicitor), Stephen Chard (Principal Policy Officer) and David Pearson (Development Control Team Leader)

**Apologies for inability to attend the meeting:** Councillor Pamela Bale, Councillor Graham Bridgman and Councillor Emma Webster

### **PART I**

#### **40. Minutes**

The Minutes of the meeting held on 29 November 2017 were approved as a true and correct record and signed by the Chairman.

#### **41. Declarations of Interest**

Councillors Richard Crumly and Alan Macro declared an interest in Agenda Item 4(1), but reported that, as their interest was a personal or an other registrable interest, but not a disclosable pecuniary interest, they determined to remain to take part in the debate and vote on the matter.

#### **42. Schedule of Planning Applications**

##### **(1) Application No. & Parish: 17/02295/MDOPO - 129, 129a, 131, 133, 137 and land at 139 and 141 Bath Road, Thatcham**

*(Councillor Richard Crumly declared a personal interest in Agenda Item 4(1) by virtue of the fact that he was a Member of Thatcham Town Council and was present at the Town Council meeting when this application was discussed. However, he abstained from commenting on the application at that time. Councillor Crumly stated that he had not predetermined the application and remained of an open mind, he would not form a view on the application until the item had been subject to a full debate. As his interest was personal and not prejudicial or a disclosable pecuniary interest, he determined to remain to take part in the debate and vote on the matter.)*

*(Councillor Alan Macro declared a personal interest in Agenda Item 4(1) by virtue of the fact that he was previously on a Management Committee of an organisation which had entered into a property transaction with the applicant. However, Councillor Macro was no longer on this Management Committee and he believed that the business of this transaction had completed. As his interest was personal and not prejudicial or a disclosable pecuniary interest, he determined to remain to take part in the debate and vote on the matter.)*

The Committee considered a report (Agenda Item 4(1)) concerning Planning Application 17/02295/MDOPO in respect of an application to modify the planning obligation to discharge the S106 obligation in connection with planning consent 15/02077/OUTMAJ (outline application for development of 26 apartments and 7 houses, matters to be considered: access, layout and scale).

## **EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES**

In accordance with the Council's Constitution, Mr Duncan Crook, applicant, addressed the Committee on this application.

Mr Crook in addressing the Committee raised the following points:

- The purpose of this application to modify the planning obligation was to avoid a repeat of the lengthy economic viability process that would be necessary if the obligation for an overage clause was to remain a requirement. This would delay the planning process and would create unnecessary costs for both the local authority and his company.
- Mr Crook had brought this application forward to correct what he believed to be a mistake in law as numerous planning appeal decisions across the country had indicated that the imposition of overage clauses was not normally justified, particularly for small housing developments that were likely to be built out quickly rather than phased over time.
- An additional Community Infrastructure Levy (CIL) payment of £100k would still be received by the Council over and above the original sum anticipated.
- There would also be additional costs in implementing the S106 Agreement and these, together with the CIL surplus payment and inflationary rises, which included construction costs and higher interest payments arising from the imposition of the agreement, would result in additional costs of approximately £300k.
- As already explained, a continued requirement for overage would result in further delays to the scheme (approximately four months) and a further delay to bring this back before the Committee (around ten months).
- Mr Crook was hopeful that the Committee would approve the application for the reasons explained.

This was followed by a number of questions being posed by the Committee to Mr Crook.

Councillor Crumly sought clarity on the total CIL payment. Mr Crook explained that the additional £100k referred to was a payment to resolve a technical issue that was in addition to the £134k from the CIL assessment. The CIL payment therefore totalled £234k. In response to Councillor Crumly's follow up question on when payment would be made, Mr Crook explained that £142k had already been paid which included interest. Mr Crook had made a request to West Berkshire Council that the remaining payment not be required until practical completion of the scheme, expected around July 2018. If this request was refused then payment would be made in January 2018.

Councillor Keith Chopping pointed out that Mr Crook had signed the legal agreement which included the overage clause for a potential affordable housing contribution. This contribution would be 60% of the development profit after accounting for developer profit identified in the viability review. Mr Crook acknowledged this fact, but explained that he sought to discharge the overage clause and avoid a repeat of the economic viability process. The overage process was far from straightforward and there was no guarantee of a financial return for the Council. Mr Crook continued by explaining that the inclusion of the overage clause was contrary to national guidelines and this view had been supported/upheld at planning appeals. Mr Crook went on to restate his view that the overage provision was unlawful and added that this had also been the conclusion of the Council's Planning Officers. He felt there was no value in seeking a new viability assessment and it would in fact create costs for both parties.

## **EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES**

Councillor Chopping then sought to clarify Mr Crook's plans/timeframes for selling the site and the dwellings. Mr Crook advised that a show home would be completed by January/February 2018.

Councillor Chopping queried the gross financial return that was anticipated, whether this was higher than originally expected and whether this would create an overage payment. Mr Crook explained that the local indexation for West Berkshire showed a 4% rise in inflation and the properties would be sold at the market rate. He remained of the view that no overage payment would be made for the scheme, but the agreement was unlawful in any case.

Councillor Chopping queried if the inclusion of an overage clause was contrary to or not supported by national policy. Mr Crook stated his view that it was contrary to the Government's Planning Practice Guidance (PPG). He added that overage could only be a consideration and values reassessed for large scale, phased, developments. Mr Crook clarified that this site was small and would be developed and sold within one phase. This was made clear within the planning conditions for the approved scheme.

In response to further questions from Councillor Chopping, Mr Crook advised that he had no right to appeal the decision should the Committee be minded to refuse this application other than via a Judicial Review (JR). While such a course of action would be a decision for individuals other than solely himself, he personally would not want to pursue a JR.

Mr Crook also explained that the inclusion of overage in the S106 Agreement meant that additional ongoing costs were being incurred and, as described, this application was to seek to lessen costs. Mr Crook also reiterated that should the overage requirement remain then a new economic viability assessment would be needed and this would create additional costs to the developer and the Council.

Mr Crook made reference to case law which supported his views that overage could not be pursued. Local authorities were not able to make decisions that were contrary to the views of the Planning Inspectorate. The Planning Inspectorate had concluded locally and in other areas of the country that overage for this type of development was contrary to law. Councillor Chopping stated that he would seek a legal view from the Council's Solicitor as part of questions to Officers.

Councillor Alan Law questioned the assertion of Mr Crook that it would be unlawful to pursue the overage clause. He accepted that it was not supported by Policy, but did not believe it was contrary to the National Planning Policy Framework (NPPF).

Councillor Law then questioned Mr Crook over his concerns of conducting the economic viability assessment. Concerns of costs had been highlighted but there was an awareness of these when the application was approved with the overage clause by Committee in June 2016. Inflationary rises were noted but this would be a factor with any viability assessment. Mr Crook explained that inflationary increases were higher than those shown in the original viability assessment and his organisation was also experiencing an increase in its operating costs. A new economic viability assessment could be produced but this would incur a cost and would not be expected to significantly change the view on viability/result in an overage payment.

Councillor Law questioned whether there was not an awareness of these points when the legal agreement was signed in September 2016. Mr Crook felt there was a risk at that time of non-approval if the agreement was not signed and he felt this was the only pragmatic course of action open to him. An appeal of the Committee's decision for overage at that stage would have resulted in delays and increased costs. However, he had been clear at the Planning Committee that he did not want to repeat the viability assessment for the reasons explained.

## **EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES**

In response to Councillor Law's next question on the benefit to the developer if the planning obligation was discharged, Mr Crook explained that he anticipated a benefit of around 4%. Councillor Law noted therefore a benefit to the developer, but questioned benefits to residents, i.e. from an affordable housing contribution. Mr Crook felt that the retention of the overage clause was unlikely to achieve any benefits for residents.

Councillor Law then questioned whether it was appropriate for developers to not have an upper threshold of profitability before they were then required to make a S106 contribution. Mr Crook explained that at the very least a net loss had to be avoided. A recommended threshold of profitability was for 20% of the total scheme, if this was to be reduced to 15% then the annualised rate of return would equate to around 6%. Such a low rate of return was of concern when considering the need to meet the company's overheads.

In terms of the points raised in relation to whether or not the overage requirement was contrary to the NPPF, Mr Crook explained that the NPPF required a scheme to be economically viable. The original viability assessment was based on the cost awareness at that time and this should only be revisited for phased developments. The Planning Inspectorate had been consistent in stating that if a development was not phased then it was contrary to the NPPF and PPG to seek overage. By law, planning authorities were not allowed to make a decision contrary to the view of the Planning Inspectorate.

Councillor Crumly asked Mr Crook to clarify the point he made in relation to having a holding position on the land. Mr Crook explained that he had brought some of the land in question, but he still needed to meet holding costs for the remainder of the land, i.e. fees paid to the landowner, utility bills and Council Tax.

Councillor Marigold Jaques noted Mr Crook's point that this development was not phased, she therefore sought clarity on how this affected plans for numbers 139 and 141 Bath Road. Mr Crook clarified that 139 and 141 Bath Road were part of a separate planning permission and these homes fell outside of this permission. The land for these two dwellings was only referred to in this application due to the shared access road. Mr Crook reiterated that this development was not phased in any way. The planning consent included the construction term of May 2017 to July 2018 and this did not constitute a phased development.

Members then asked questions of Officers. Councillor Law queried whether Planning had accepted that the development was not phased and that the construction term aligned with this. David Pearson explained that this had been accepted and added that it would be difficult to demonstrate that it was phased.

Councillor Law then queried whether Planning Inspectors had stated that overage requirements for relatively small scale developments such as this were contrary to or not supported by the NPPF. David Pearson advised that the Planning Inspectorate would tend to state 'not supported by' as there were often material points to consider in certain circumstances. The Committee could determine to refuse the application based on this, but this could be subject to challenge.

Sharon Armour added that overage clauses were not contrary to the NPPF or unlawful per se. However, in light of recent appeal decisions/case law, Planning Officers did not feel it was appropriate to pursue overage. She supported this view by explaining that the Planning Inspectorate would consider the length of the build in judging the reasonableness of pursuing overage and this time period was relatively short. A phased development and potential for overage would be reflected by a longer construction period. In addition, the housing numbers were not expected to change. The shortage of

## **EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES**

affordable housing was a consideration for the Inspectorate but they considered that there were much more severe concerns in other parts of the country.

Sharon Armour continued by referring to Mr Crook's concerns. His application to remove the overage clause was based on this case law, as well as concerns of costs to both himself and the Council from a new viability assessment, with a view from him that no affordable housing contribution would materialise as a result.

Councillor Chopping queried the options available to Mr Crook should the application be removed beyond JR. Sharon Armour explained that a second application could come forward retrospectively. In terms of a potential JR, this would also consider the reasonableness of the Council's decision and not just whether the Council had followed the correct procedures. Any consideration as to the reasonableness of the Council's decision would take into account the size of the scheme and affordable housing provision in the area compared to elsewhere.

Councillor Law queried, with the benefit of hindsight, whether Officers would support the inclusion of an overage clause should the original application for the site come forward at this time. Both David Pearson and Sharon Armour advised that they would advise against such a requirement.

Councillor Crumly referred to the total CIL payment of £234k and queried when this figure was confirmed as it was not referred to in the report. David Pearson explained that CIL was not a material planning consideration. It was a separate tax based on the floor space of a development and developers were aware that they could be liable for CIL for residential developments in excess of 100 square metres. However, he added that CIL was still a relatively new process and consideration. S106 contributions for affordable housing were separate to CIL.

Councillor Graham Pask stated that it was a Council priority to provide more affordable housing. This was in line with national requirements and was something Members wanted to pursue for the benefit of residents. Overage was seen as a potential way to benefit local residents via affordable housing if a certain level of profit was made from a development. He therefore felt that it had been important to permit this detailed questioning.

Debate of the item then commenced. Councillor Quentin Webb noted the Planning Inspector decisions contained within the papers which showed that the Inspectorate consistently dismissed appeals for viability overage clauses. He was also opposed to overage clauses due to the difficulties they created for developers. In addition, he felt that it would be difficult to insist that viability be reassessed and any return would be minimal. Councillor Webb was therefore supportive of Officers' recommendation to grant planning permission.

Councillor Alan Macro referred to Appendix 5 to the report which listed relevant appeal decisions in other parts of the country. In particular, the decision made by the Planning Inspector to allow the use of an overage clause for a non-phased development in East Devon. However, in this particular instance the East Devon Local Plan, which was adopted post publication of the NPPF, contained specific wording to allow overage provisions. Councillor Macro therefore suggested that this be shared with Planning Policy to ensure that overage could become a consideration moving forward in West Berkshire's new Local Plan. Councillor Pask agreed and advised that he had already requested this with Planning Policy.

Councillor Macro then made reference to Government policy on affordable housing, unfortunately this was introduced during a recession and viability had become more of a concern since that time. He noted the unforeseen costs described by the developer but

## EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES

felt that it was regrettable that it appeared that an overage clause would be difficult to defend at an appeal in this instance. He reluctantly added his support to Officers' recommendation.

Councillor Law asked Officers if they had any comment on the statements made by the applicant in terms of increased costs, i.e. construction and whether these statements had been verified. David Pearson confirmed that the Case Officer continued to be in correspondence with the applicant, the most recent being a request on 20 December (date of Committee) for further details on these increased costs. A response had yet to be received, but Mr Pearson was of the view that the Committee had sufficient information on which to make its decision.

Councillor Law stated that he was supportive of overage clauses. He did however accept that they could cause concern for smaller scale developers due to the time taken to consider overage, the impact that could follow on their financial return whilst still needing to meet their overheads. Councillor Law was assured, after this considerable debate, that the request for an overage clause was not illegal or contrary to policy. However, he felt that if the original application were to come forward as a new application now then overage was unlikely to be pursued, although viability could still be challenged.

Councillor Law agreed that Planning Policy, in liaison with the Planning Advisory Group, should seek to include scope for overage clauses within the new Local Plan. He added his reluctant acceptance of Officers' recommendation.

Councillor Chopping was of the view that Officers' recommendation should be overturned. The applicant had willingly entered into the Legal Agreement and this should be honoured and acted upon. If its requirements became a concern for a party, in this case the developer, then they would need to take the necessary actions, potentially a JR, if they were unwilling to consider their level of profit at the completion of a scheme. Councillor Chopping wanted to continue to ensure that local residents would benefit from the application via an affordable housing contribution if this became possible.

Councillor Crumly felt that an element of affordable housing should be a requirement for a development of this size. He noted from paragraph 4.2 of the report that, after taking into account sufficient developer profit, a contribution of up to £1.1m could be made available for affordable housing which was a significant sum. Councillor Crumly was concerned that if this application was approved then there would be no contribution to affordable housing which was contrary to the Council's policies. CIL, as described by the Planning Officer, was a taxation separate to, and could not be used for, affordable housing. He, like Councillor Chopping, did not support Officers' recommendation. He acknowledged that the calculation of overage from a viability assessment would incur a cost but a financial risk should be accepted to meet the requirements of the Legal Agreement.

Councillor Webb proposed to accept Officers' recommendation to grant permission of the application to modify the planning obligation on the basis that an overage clause was not appropriate for this application. This was seconded by Councillor Jaques.

**RESOLVED** that the Head of Development and Planning be delegated to grant permission for the obligation as set out in Schedule 3 of the Legal Agreement dated 26 September 2016, for an overage clause to be included, to be discharged.

Councillor Pask concluded the item by stating that this had proved to be a very useful and fascinating debate. The decision made by the Planning Committee in June 2016 was a valid one and the request for an overage clause reasonable. This caveat had then formed part of the Legal Agreement agreed with the developer in September 2016. This

## **EASTERN AREA PLANNING COMMITTEE - 20 DECEMBER 2017 - MINUTES**

application to remove the overage clause was therefore of particular concern to Members as indicated by the level of questioning.

Councillor Pask voiced his agreement to the need for discussion to take place at the Planning Advisory Group on ensuring West Berkshire's new Local Plan allowed for overage clauses to help meet the affordable housing needs of the district alongside noting what was contained in the NPPF. This was particularly important when considering the high cost of housing in the area. Agreement had already been made with the Chairman of Planning Advisory Group to hold this debate.

Councillor Webb agreed this would be useful, while he proposed approval of this application he would value planning policy guidance on the potential for overage clauses to be developed as part of the new Local Plan to help inform future decision making.

### **43. Appeal Decisions relating to Eastern Area Planning**

Members noted the outcome of appeal decisions relating to the Eastern Area.

### **44. Site Visits**

A date of 10 January 2018 at 9.30am was agreed for site visits if necessary. This was in advance of the Eastern Area Planning Committee scheduled for 17 January 2018.

*(The meeting commenced at 6.30pm and closed at 7.40pm)*

**CHAIRMAN** .....

**Date of Signature** .....