

REPORT RELATING TO SIGNIFICANT COSTS WARNING

APPLICATION 18/501745/REM – LAND TO THE EAST OF HERMITAGE LANE, MAIDSTONE, KENT

1.0 Recommendations

Recommendation 1: That Planning Committee does not pursue the reasons for refusal of the reserved matters details as advanced at the Committee meeting on 8 November 2018.

Recommendation 2: That Planning Committee agrees either route option 3 or 2 through the woodland, and approves the reserved matters details, and provides a justification for the choice.

2.0 Reasons for Recommendations

2.1 There is considered to be no realistic prospect of defending the Planning Committee's reasons for refusal at appeal. Attempting to defend the reasons for refusal will expose the Council to a high risk of a significant adverse costs award. This is on the grounds of unreasonable behaviour, through inappropriately applying paragraph 175(c) of the NPPF to the reserved matters details. This risk of an adverse costs award is in addition to the Council's costs of defending an appeal, which would also be significant.

2.2 On this basis, Planning Committee is strongly recommended to approve either route option 3 or 2 through the woodland, and approve the reserved matters details, and provide a justification for the choice.

3.0 Background

3.1 This application for reserved matters details was originally reported to Planning Committee on 27th September 2018 with a recommendation for approval. The layout details recommended for approval included a route (Option 3) through Ancient Woodland in order to link the site to earlier phases of the approved development. Members deferred a decision for the following reasons:

1. Examine in more detail the impact of vehicular access Options 2 and 5 through the woodland taking into account the visual impact of the works and any works necessary to meet health and safety requirements, including lighting; and

2. Ask whether further renewable energy measures can be provided in this Phase of the development and whether tunnels can be provided under roads to facilitate the safe passage of wildlife.

3.2 The applicant worked up detailed plans for Options 2 and 5 as requested and the application was reported back to Planning

Committee on 8th November. Officers advised Members that Option 3 remained the acceptable and appropriate route. This also remained the applicants preferred route but Option 2 was forward as an alternative should Members wish to pursue it, as it did not result in the loss of any Ancient Woodland. Therefore exceptionally, the Committee had two alternative layout routes before them.

3.3 Members decided, contrary to the recommendation of the Head of Planning and Development, to refuse permission for either layout route (Options 2 and 3) for the reasons set out below:

1. The loss or deterioration of ancient woodland which would result from this reserved matters application would be contrary to paragraph 175 (c) of the National Planning Policy Framework and no wholly exceptional reasons have been identified for that. The two proposed routes through the woodland would either lead to direct loss or deterioration of ancient woodland through damage to the integrity of the woodland block which would undermine its ecological function.

2. The disturbance caused at construction and operational stage would further disturb and damage the ancient woodland.

3.4 Prior to the vote being taken, the Development Manager advised the Committee that the proposed reasons for refusal were not sustainable and could result in significant costs against the Council at appeal and issued a significant costs warning. Since a significant costs warning had been issued, and the Committee agreed to refuse permission, the decision was deferred until its next meeting pursuant to paragraph 30.3 (a) of Part 3.1 of the Council's Constitution and paragraph 17 (a) of the Local Code of Conduct for Councillors and Officers Dealing with Planning Matters (Part 4.4 of the Constitution).

3.5 Both committee reports are attached at the **Appendix**.

3.6 Counsel's advice has been sought on the proposed grounds for refusal, the likelihood of success at appeal, and the financial implications but is subject to legal privilege and so cannot be disclosed at this time for the risk of prejudicing any potential future appeal. However, in considering the advice, commentary on these issues is included under Section 4.0 below.

4.0 Advice

Recommendation 1: That Planning Committee does not pursue the reasons for refusal of the reserved matters details as advanced at the Committee meeting on 8 November 2018.

4.1 This is an application for the approval of reserved matters details pursuant to outline permission 13/1749, which was allowed at appeal by the Secretary of State (SoS) in 2015. It relates to, amongst other

things, the layout of Phase 4 of the development and so involves settling the siting of an internal access road through the woodland to connect Phase 4 to the main development.

- 4.2 At the public inquiry, three routes through the woodland were included in the applicant's proposals and the applicant's preferred route was known as Option 3. The SoS decided that:

"Option 3, if taken forward, would result in an absolute loss of about 0.03ha of Ancient Woodland, equating to only 1.8% of the designated area... The Secretary of State agrees with the Inspector's assessment ...of the ecological effects of the proposal on the basis of option 3. Although the small loss of Ancient Woodland would technically infringe the requirements of adopted Local Plan policy H12 which calls for the retention, without qualification, of trees and woodland, the Secretary of State agrees with the Inspector that the ecological effects of option 3 would be acceptable, notwithstanding the minor loss. He therefore agrees that the tests of Framework paragraph 118, bullets 1 and 5 are clearly met in this case...." (paragraph 14)

- 4.3 The tests of paragraph 118 no longer exist as the new NPPF has a different wording. However, of great importance is the fact that the SoS held that bullet 5 of paragraph 118 was met by Option 3. This was that the loss or deterioration of Ancient Woodland was clearly outweighed by the need for and benefits of the development in this location. The outline permission did not require the implementation of Option 3 because the SoS accepted that there might be better options once detailed appraisal of alternatives had taken place at reserved matters stage. However, the SoS had decided upon a principle issue that a route was possible to Phase 4.

- 4.4 Case law has established that reserved matters approval cannot not be withheld on a ground that has already been decided in principle at the grant of outline planning permission. Otherwise this would be to reopen an issue already decided and frustrate the permission that has been granted. The SoS has decided as a principle issues that an acceptable route is possible to Phase 4.

- 4.5 An application for reserved matters approval is not an application for planning permission. This is relevant because paragraph 175 of the revised NPPF states (with my underlining):

When determining planning applications, local planning authorities should apply the following principles:.....

c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons⁵⁸ and a suitable compensation strategy exists; ...

Footnote 58: For example, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or deterioration of habitat.

- 4.6 The application before the Committee is a reserved matters application, it is not a planning application and so the advice in paragraph 175 of the NPPF does not apply to it. The impact upon Ancient Woodland was a principle matter that was decided upon by the SoS at the outline application stage. The SoS expressly found that the harm caused by Option 3 was clearly outweighed by the need for and benefits of development in this location, which was the necessary test at the time of the outline application.
- 4.7 The grounds for refusal refer to the loss of Ancient Woodland (Option 3) and deterioration of Ancient Woodland (Option 2), and undermining the ecological function of the Ancient Woodland through damage to the integrity of the woodland block, and that this would be contrary to paragraph 175 (c) of the NPPF without exceptional reasons. The second reason refers to disturbance and damage caused through construction and it is assumed that 'operational' means once occupied.
- 4.8 For the reasons outlined above, paragraph 175(c) is not grounds for refusing both layout options and to do so would take into account irrelevant considerations for a reserved matters application. Indeed, the reason paragraph 175 and other paragraphs in the NPPF are worded this way are so any changes to national policy are not applied to reserved matters details, as this would unreasonably frustrate an outline permission. In addition, it is an overriding matter that the SoS found there is a route to Phase 4 which passes the balancing exercise set out in national planning advice, so to refuse the proposed options would deviate from the outline planning permission and re-open a principle issue which has already been determined.
- 4.9 On this basis, Counsel's advice is that to pursue the grounds of refusal for either layout route (Options 2 and 3) would be entirely unreasonable, would have no chance of success at appeal, and will expose the Council to a high risk of a significant adverse costs award.

Recommendation 2: That Planning Committee agrees either route option 3 or 2 through the woodland, and approves the reserved matters details, and provides a justification for the choice.

- 4.10 If Planning Committee decide not to pursue the grounds for refusal the changes to national policy are material considerations but the higher bar now set by paragraph 175(c) is simply not engaged. Exceptionally Planning Committee has two route/layout options before them from the applicant, and needs to decide how it balances the loss of Ancient Woodland from Option 3, against a greater overall ecological harm from Option 2. It would not be unreasonable to decide that Option 2 is preferable, for example, on the basis that as a material consideration, revised national policy gives a high level of protection to Ancient

Woodland but the Committee should express clear reasons if it prefers Option 2 to Option 3 or vice versa.

- 4.11 As has been advised throughout by officers and KCC ecologists, the ecological impact of Option 2 is considered to be greater than Option 3 for the reasons outlined in the committee reports, and officers therefore continue to recommend Option 3.

5.0 Alternative Action and Process

- 5.1 Should Planning Committee continue with the grounds for refusal the Head of Planning and Development (or his representative) will on the advice of the Legal Officer present and in consultation with the Chairman of the meeting, immediately after the vote has been taken, refer the application to a special meeting of the Policy and Resources Committee for determination, in line with the Council's Constitution.

6.0 Conclusion

- 6.1 For the reasons set out in this report, Members are advised that the Council's reason for refusal could not be sustained at appeal and attempting to defend the reason for refusal would be unreasonable, thereby exposing the Council to a significant adverse costs award, in addition to having to bear the its own costs defending the appeal. It is therefore recommended that Planning Committee does not pursue the reasons for refusal of the reserved matters details as advanced at the Committee meeting on 8 November 2018.

- 6.2 It is advised that Planning Committee agree either route Option 3 or 2 through the woodland, and approve the reserved matters details, and provide a justification for the choice. Officers continue to recommend route Option 3.

7.0 Relevant Documents

- 7.1 Appendix: Committee Reports (27th September and 8th November)