

ADVANCE SUPPLEMENTARY REPORT
TO THE PLANNING COMMITTEE
5th August 2014

Agenda item 6

Application ref: 13/00970/OUT

Land off Pepper Street, Keele

Since the preparation of the agenda plans the following have been submitted:

1. Further comments from **Keele Parish Council** raising concerns that thermal image information relating to the burning spoil heap, which is the one very special circumstance that the Council has accepted for development in the Green Belt, has only recently been submitted and this has meant that they have not been able to obtain expert independent advice. To ensure that the thermal images are given full consideration, as they deserve, they request that the final report on the application is not submitted (i.e. that a decision is deferred) until these images have been fully examined. This would enable officers' time to fully consider the implications of this new evidence and would give representatives of the local community sufficient time to produce and submit reasoned and evidence based comments on the significance of these images.
2. Further comments of the **Environmental Health Division (EHD)** have been received following a review of the Overview of Thermal Imaging Report, the accompanying report and addendum report. They say the report provides details of surface temperatures observed on the spoil heap on the date of the flyover. They comment that it should be borne in mind that temperatures within the spoil heap are likely to be significantly higher than those measured on the surface. The information does not provide any evidence of the bonfires, referred to by third parties, and the hotspots, featuring in the thermal imaging report, appear quite diffuse in extent leading them to believe that the heat signature is originating from heat within the spoil heap rather than localised burning on the surface. The report provides clear evidence that the spoil heap remains alight and supports the applicant's case and EHD's view that the tip fire and surface instability (including any associated gases and voids that may be present within the spoil heap) pose a significant risk to life and bodily harm to trespassers and third parties accessing the site.

The comments acknowledge that the report to the Committee has correctly reported the position regarding the landfill and has made provision for it to be either incorporated into the development as public open space (subject to an appropriate contamination assessment and mitigation measures to protect human health) or to be kept in its current state as a closed landfill with no public access. A condition or an appropriately worded obligation is recommended to secure approval of the means of preventing access to the land and its future maintenance if it is not to be brought into use.

The EHD advise that the National Planning Policy Framework requires applications for development to be accompanied by a desk study and site reconnaissance as a minimum and that there is no requirement for comprehensive site investigation works to be undertaken at the application stage. The contaminated land conditions that the EHD recommend are the

model conditions that were devised by the Government and indicate that the development cannot commence until further information have been submitted and approved. The EHD indicates that they would need to be satisfied that, as a minimum, the land should not be capable of being determined as contaminated land under Part 2A of the Environmental Protection Act 1990 and this will require further site investigations. They advise that the additional information will inform a revised risk assessment and any remediation that is necessary to ensure that the proposed development is safe and which should take account of the geological information and other relevant technical information.

The EHD do not dispute that the remediation of the burning spoil heap has the potential to create significant smoke, fumes and dust which have the potential to harm human health and the environment. Following advice from Public Health England and further discussions with the applicant they now consider that these issues could be dealt with through appropriately worded conditions.

3. 10 additional **representations** have been received objecting to the proposal, including a petition with 200 signatories and two further representations from Cllr Kearon (one being his presentation to the previous meeting). Any comments contained within these representations that have not already been reported are summarised as follows:-

- If members of Planning Committee are not allowed to walk on the landfill site during the committee site visit due to health and safety issues around toxic waste the Council should not be supporting new dwellings on such land.
- Disturbance of the underground fire could be catastrophic.
- The Council should not accept the thermal images submitted by the applicant. The Council should undertake a sequence of independent thermal images and should examine the toxicity of the remainder of the site before decisions are made.
- If thermal images are to be given any weight they should have been done over a period of time to show the monitoring of the fire and how it has changed but this has not been done.
- The proposed housing is, in part, on undeveloped land and will destroy the openness of this rural field for residents and would be visually intrusive.
- There have been no complaints about the underground fire or any complaints about illness. It is puzzling therefore why the underground fire has now become such a major issue.
- Not all of the inaccuracies and omissions of the report previously highlighted have been addressed.
- Unless additional time is given to comment on the submitted thermal imaging it will seriously prejudice all parties, will be unfair and could lead to complaint.
- Concern has been expressed by many including the consultees about the disruption and health risks that would be caused by putting out the fire. Residents don't believe that the "nuisance" is outweighed by the long term benefits of putting out the fire taking into account the years of disruption with building works on the site.
- The report does not assess whether the impact of the development on the openness of the Green Belt is acceptable.

- There is no assessment about the number of houses, why the proposed 100 houses are acceptable and whether a lesser number of houses would have less impact.
- The report focuses on the locational issue of sustainability and does not assess the economic and social dimensions in accordance with the NPPF.
- The comments of the Highway Authority are incorrect.
- The recommendations are not lawful as the applicant has refused to pay any financial contributions for affordable housing and as such the recommendation should be to refuse. In addition the means of access is not reserved for subsequent approval and as such a condition which seeks to change the approved access plan does not make sense. The required amendment is incompatible with the access details.
- Any Section 106 agreement should secure a scheme for the long term maintenance and monitoring of the effectiveness of the remediation of the fire and decontamination; a monitoring fee for the specialist assessment and monitoring of the ground contamination programme; improved pedestrian and cycleway linkages; and a financial claw back if the remediation works are less than indicated and the houses are sold for more than the claimed sales price.

Officer comments

The thermal imaging reports show images taken during a short period on 11th July. The images show surface temperatures up to a maximum of 100 degrees Celsius. The overview report indicates that temperatures within the burning spoil heap will be several hundred degrees and probably in excess of 700 degrees C, although it should be noted that no measurements have been taken of the temperature within the burning spoil heap on this particular site. Whilst the thermal images only provide a 'snap shot' of the temperatures at the surface of the spoil heap at one particular point in time the information provided does support the conclusion already reached that the fire within the spoil heap continues and that it poses a health and safety risk.

Within the recommended conditions, condition 9 indicates that the area identified as public open space (the landfill site) should be fenced off and access prevented unless the contaminated land conditions have been satisfied. As such the recommendation of the Environmental Health Division has been partially addressed. Upon reflection, however, it is considered that the future maintenance of such a boundary treatment could not be properly secured through a condition and would need to be addressed within the recommended Section 106 agreement

Notwithstanding the criticisms received regarding the contents of the report it is considered that all the key issues have been identified and appropriately addressed.

The suggestion that the recommendations are unlawful is refuted for the following reasons:

- The applicant has put forward a case that sought to demonstrate that the development would be unviable if affordable housing and financial contributions, as required by policy, were to be secured. Such a case has been independently assessed and has not been fully accepted as it is the conclusion of the DV, on the basis of the current information available to him, that some affordable housing and an education contribution could be secured without rendering the development unviable. The applicant has not stated, at

this time, that they do not accept the DV findings and would not enter into a Section 106 agreement to secure affordable housing and an education contribution. Their current position (as set out by Mr Copestake in his presentation to the Committee) is to acknowledge that discussions are ongoing about the level of contributions that the proposal can make and that the applicant is committed to making a contribution towards local education provision and children's play facilities. Your officer notes that no commitment to the provision of affordable housing has been given and no specific contribution figure yet agreed to by the applicants. The recommendation (B) within the report does however address this stating that if the necessary planning obligation, taking into account viability, is not secured by a certain date then the application should be refused. This approach is in line with the NPPF and The Council's Legal officer sees no difficulty with such an approach.

- The required amendment to the access is not incompatible with the submitted access details as suggested. The required amendments would result in the access being widened from the 5.3m width shown on the plans to 5.5m. This can be dealt with by a condition.

As to the suggestion that the recommendation and thus any positive decision based on it may be open to challenge by way of judicial review (which is not supported by any other points other than those made above), that is of course the case with all decisions. The Council's Legal officer has advised that the key issues (with respect to the likely chances of such a review being successful) are

- Is the Council taking into account any immaterial planning considerations or alternatively failing to take into account a material consideration? Your officers are of the view that the report before members correctly identifies the appropriate material planning considerations
- Would a decision to grant planning permission in this case be so "unreasonable" or perverse as to be a decision that no reasonable person would make? In that the decision comes down to a matter of judgement by the Committee as to the weight to be given to the harm to the Green Belt and any other harm, relative to the claimed for benefits of the scheme, such an allegation is not accepted.

A number of planning obligation related matters have been raised in representations and a response is set out below.

- It has been suggested that an obligation should secure the long term maintenance and monitoring of the effectiveness of the remediation of the fire and decontamination. A condition has been recommended that seeks the approval of details of the methodology of the remediation of the burning spoil heap and its subsequent implementation; and contaminated land conditions. There is no basis to consider that these are not matters that could be addressed by condition and therefore it is not necessary to address this through a Section 106 agreement.
- It is considered that it would not be unlawful to secure, by means of a planning obligation within an agreement, a monitoring fee for the specialist assessment and monitoring of the ground contamination programme. It has not been the practice of this Council to seek monies to fund the monitoring of conditions of permission, and this has not been anticipated within the adopted Developer Contributions Supplementary Planning Document. Although the proposal is unusual there is no basis to consider that the Council could not

effectively monitor compliance with conditions in the absence of such a contribution and as such it is not considered that it could be justified. In addition it should be noted that such a fee if secured would affect the viability of the development, and thus its ability to support other financial contributions. It will be recalled that the Committee fairly recently rejected proposals to seek a fee for the monitoring of the requirements of planning obligations for that very reason.

- It is considered that improved pedestrian and cycleway linkages can be secured by condition and such a condition is recommended (4).
- Securing a financial 'clawback' if the costs of remediation works are less than indicated and the houses are sold for more than the claimed sales price as suggested would be contrary to the guidance of RICS on financial viability in planning. The guidance clearly states that any re-appraisal of viability should always be undertaken prior to the implementation of a scheme or phase in order to fully account at the time for the risk the developer is undertaking and therefore the appropriate return.

The same guidance advises generally against re-appraisals (and adjustment of contributions and/or the level of affordable housing) other than in exceptional circumstances (because of the additional uncertainty that they result in).

The general approach taken by this Authority has been to seek a reappraisal should there not be a substantial commencement of the development by a certain date (on the basis that within appraisals may well change significantly due to changes in values and costs, and in some cases where continued delivery is a key factor in the acceptance of a non-policy compliant scheme to include as a trigger for reappraisal a failure to complete a certain number of dwellings per annum.

In this case upon further reflection the suggested approach would be to require an appraisal (and the adjustment of contributions based upon that appraisal) should the development not be substantially commenced (by the completion of the remediation works) within 18 months of the date of the permission being granted. The DV recommended a period of one year but your officers have taken into account a development programme submitted by the applicant, and consider 18 months to be a reasonable period. Given the anticipated cost of 'substantial commencement' as so defined there would be a strong incentive for the development to then continue.

Your Officers had been expecting to be able to confirm the DV's view on the level of affordable housing that could be sustained with a scheme that achieves a policy compliant education contribution. It is not yet possible to, with confidence, provide this figure (because the amount of RSL rented housing affects the required education contribution and the timing of payments may affect the calculation as well), but the expectation is that it will be available by the date of the Committee itself

Revised Recommendations

- A.
- i. Subject to the receipt and consideration of further advice from the District Valuer as to what affordable housing provision this development could support if the full education contribution is to be secured**
 - ii. the applicant entering into a Section 106 obligation by 5th October 2014 to require:-**
 - 1. A policy compliant contribution towards school**

2. **Affordable Housing provision (the level of which is to be recommended following the outcome of (i) above;**
3. **The entering into of a Management agreement to secure the long term maintenance of the public open space and any play equipment provided to meet the needs of the residential development, and the maintenance of any boundary treatment to prevent access to the landfill site;**
4. **A Travel Plan monitoring fee of £6,100;**
5. **A financial bond (the precise amount to be agreed) to be held by the council to be used to fund the works necessary to complete the process of extinguishing the fire and reinstating that part of the site affected by such works should the developer fail to do so following commencement of such works; and**
6. **That a financial viability reappraisal be undertaken if the development has not been substantially commenced within 18 months, from the grant of this outline planning permission and appropriate adjustments be made, on the basis of such reappraisal(s) to the level of affordable housing referred to in 4) above with a cap of 25% and a floor of the level of affordable housing referred to in 2) above;**

Permit subject to the conditions set out within the agenda report with the following amendment/clarification:-

9. **Area identified as public open space shall be fenced off in accordance with approved details and access prevented unless the contaminated land conditions have been satisfied.**

B. Failing completion by 5th October 2014 of the above planning obligation, that the Head of Planning be given delegated authority to either refuse the application on the grounds that in the absence of such obligations the proposal fails to provide appropriate level of affordable housing which is required to provide a balanced and well functioning housing market, secure the on-going maintenance of on site open space provision, secure effective monitoring of the Travel Plan, and an appropriate contribution towards school provision; or, if he considers it appropriate, to extend the period of time within which the obligation can be secured.