

IN THE MATTER OF:

**LAND BETWEEN ROYSTON ROAD AND CAMBRIDGE ROAD, BARKWAY,
HERTFORDSHIRE**

ADVICE

Introduction

1. I am instructed by Paul Wakefield of Shakespeare Martineau LLP to advise in respect of an application under section 73 of the Town and Country Planning Act 1990 ('the 1990 Act') to modify a condition associated with the grant of outline planning permission under reference 18/01502/OP ('the OPP'). In advising I have had sight of the OPP and the associated documents.

Factual background

2. Outline planning permission with all matters reserved other than strategic point of access onto Royston Road and Cambridge Road for the erection of up to 140 dwellings and a new shop ('the Scheme') was granted by North Hertfordshire District Council ('the Council') in respect of land between Royston Road and Cambridge Road, Barkway, Hertfordshire ('the Site') on 25 July 2023. The OPP was granted subject to 25 conditions.
3. Of relevance to this advice is condition 3, which states:

The development hereby permitted shall be carried out wholly in accordance with the details specified in the application and supporting, approved documents and plans, together with the reserved matters approved by the Local Planning Authority, or with minor modifications of those details or reserved matters which previously have been agreed in writing by the Local Planning Authority as being not materially different from those initially approved.

Reason: To ensure the development is carried out in accordance with details which form the basis of this grant of permission or subsequent approval of reserved matters.

4. The OPP describes the following documents as "Plan Nos:"

197-30-100 G; 1797-30-101 E; 1797-30-103 E 1797-30-110; 1/6; 2/6; 3/6; 4/6; 5/6; 6/6; 1797-30-104-A 1797-30-105-A 163462-002-A 163462-004-B; 163462-005-A 163462-006-A 163462-007-A 163462-008 Master planning Summary Document ('the Approved Plans').

5. In August 2024 Redrow Homes South Midlands ('the Developer') submitted to the Council an application for Reserved Matters under reference 24/01883/RM ('the RM Application').
6. The RM Application was accompanied by a letter from the Developer dated 19 August 2024, which I have seen. This letter sets out the information submitted as part of the RM Application and provides a detailed discussion of the extent to which the RM Application is its compliance with the approved plans. Its conclusions are summarised in a table on page 6, which sets out the Scheme components which are "wholly in accordance" with the approved plans, "broadly in accordance" with the approved plans and "not in accordance" with the approved plans.
7. The letter includes detailed observations on the plans, or details within the plans, which are marked "illustrative" or "indicative."
8. It became clear in the preparation of the RM Application that it was not possible to develop the Scheme wholly in accordance with the plans specified in the OPP, and so the Developer submitted an application under reference 24/01994/S73, to modify the restrictive nature of Condition 3, pursuant to section 73 of the 1990 Act ('the Section 73 Application'). The proposed modification reads as follows:

The development hereby permitted shall be carried out wholly in accordance with ~~the details specified in the application and supporting, approved documents and plans~~ Location Plan (dwg ref 1797-30-110), the Land Use Plan (dwg ref 1797-30-101E) and the Site Access Plans (dwg refs 163462-006A and 163462-007A) and broadly in accordance with the Proposed Access Arrangements Plan (dwg ref 163462-005A), the offsite highway works plans (dwg refs 163462-002A, 163462-004B and 163462-008), the Access and Movement Plan (dwg ref 1797-30-103E), the Urban Design Parameter Plan (dwg ref 1797-30-104A), the Landscape Parameter Plan (dwg ref 1797-30-105A), the Illustrative Masterplan (dwg ref 1797-30-100G) and the Masterplan Summary Document (dated March 2022), together with the reserved matters approved by the Local Planning Authority, or with minor modifications of those details or reserved matters which previously have been agreed in writing by the Local Planning Authority as being not materially different from those initially approved.

9. I am informed that the timing of the determination of the Section 73 Application and the RM Application has been the subject of discussion between the Developer and the Council. I further understand that the Developer has provided the Council with a letter from its solicitors which addresses these points. Addressing this point falls outwith the scope of my instructions on this matter.
10. I understand that both the RM Application and the Section 73 Application remain undetermined.

My instructions

11. I am instructed to consider the legal basis on which the Section 73 Application to modify Condition 3 has been made.

Legal framework

The significance of “illustrative” plans in outline applications

12. It is established in both case law and policy that details which have been submitted as part of an outline application cannot be excluded from the grant of outline planning permission and reserved for the LPA’s determination at a later date. However, the exception to this principle is where it has been made clear by the applicant that any such details have been submitted for illustrative purposes only.
13. In *R. v Newbury DC Ex p. Chieveley Parish Council* [1997] J.P.L. 1137 Carnwath J (as he was then), found that plans which were not marked as “illustrative” were to be determined as part of an outline application, while those marked “illustrative” or lacking specificities such as dimensions were:

“not intended to be definitive but rather to illustrate the effect... On balance, I think these should not be treated as part of the application.”

14. This interpretation was affirmed by the Court of Appeal,¹ and the principle is now expressed in the National Planning Practice Guidance ('the NPPG'):²

Where details have been submitted as part of an outline application, they must be treated by the local planning authority as forming part of the development for which the application is being made. Conditions cannot be used to reserve these details for subsequent approval. The exception is where the applicant has made it clear that the details have been submitted for illustration purposes only.

15. The relationship of reserved matters applications vis-à-vis outline permissions was summarised by Dove J in *R (on the application of) Village Concerns v Wealdon District Council* [2022] EWHC 2039 (Admin) (with emphasis):

43. It needs to be borne in mind that, of course, reserved matters pursuant to an outline planning application are defined within article 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, as part and parcel of the provisions under articles 5 and 6 of the 2015 Order which regulate applications for outline planning permission and applications for approval of reserved matters. The principle which obviously flows from these legal provisions is that a reserved matters application must be within the scope of the outline planning permission which was granted, and must provide for reserved matters details consistent with the grant of outline planning permission. These provisions help explain the case of Proberun and support the proposition that the outline permission sets the perimeters or framework for the consent which is being granted and following which reserved matters are then submitted.

Unreasonable planning conditions

16. The power to grant planning permission subject to conditions is contained in section 72 of the 1990 Act. Section 72 does not itself contain any express limitation on that power. The limitations have emerged in case law, in particular the House of Lords' judgment in *Newbury District Council v Secretary of State for the Environment* [1978] 1 W.L.R. 1248.

17. The three principles set out in *Newbury DC* can be summarised as follows: (1) a condition must be imposed for a "planning" purpose and not any ulterior purpose; (2) a condition must fairly and reasonably relate to the development permitted; and (3) a

¹ *R. v Newbury DC Ex p. Chieveley Parish Council* [1998] EWCA Civ 1279, 1998 WL 1042183

² NPPG Use of Planning Conditions §005. See also NPPG Making Applications §35

condition should not be so unreasonable that no reasonable planning authority could impose it. These principles are now expressed in the National Planning Policy Framework ('the NPPF') paragraph 57, which additionally identifies that conditions should be "enforceable" and "precise".

18. Planning conditions must not be manifestly unreasonable. In order to be invalid under this ground, a "*condition must be so unreasonable that no reasonable planning authority could have imposed it.*"³ This is not an easy hurdle to clear, as set out in an alternative formulation, provided by Lord Denning in *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 at pg 678:

"a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results."

19. The approach to the interpretation of planning conditions is provided in the leading judgment of *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 W.L.R. 85.

"...it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference... or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

Summary of advice

20. My view, for reasons set out in more detail below, is that Condition 3 is unlawful, in that it purports to compel the Developer to act wholly in accordance with plans which are clearly identified as "illustrative" or "indicative." I also consider that the Condition

³ *Kingston-upon-Thames Royal LBC v Secretary of State for the Environment* [1974] 1 All E.R. 193 at [96], per Lord Widgery CJ.

is so imprecise as to be fatal to its operation. Should the Developer be minded to appeal the Section 73 Application, I consider that there are good prospects of success.

21. I consider the modification proposed to Condition 3 as part of the Section 73 Application to be legally sound. I also note that it is of a formulation commonly employed by Inspectors when determining applications for outline permission.

Detailed advice

Reliance on “illustrative” materials in Condition 3

22. In the absence of any explicit exclusion, per the court’s guidance in *Trump*, Condition 3 must be taken as binding the Developer to act “wholly in accordance” with all of the plans set out at the top of the OPP and reproduced at §4 of this advice. These plans include the following:

- a. 1797/30/100 – Illustrative Masterplan;
- b. 1797/30/103 – Access and Movement, including “indicative secondary street network;”
- c. 1797/30/104A – Urban Design Parameter Plan, including both fixed and indicative parameters;
- d. 1797/30/105A – Landscape Parameter Plan, including both fixed and indicative parameters;
- e. 163462-002 – Alternate Royston Road Crossing Improvements, with the note “design subject to topographical survey and detailed design.”
- f. 163462-004 – Cambridge Road Potential Gateway Feature and Foot/Cycleway Extension, with the note “design subject to topographical survey and detailed design.”
- g. 163462-005 – Proposed Access Arrangements, with the note “Subject to arboriculture/ecology review. Proposed levels to be reviewed. Subject to additional topographical survey to verify visibility. Subject to RSA at s278 stage.”
- h. 163462-006 – Proposed Access – Royston Road, with the note “Subject to arboriculture/ecology review. Proposed levels to be reviewed. Subject to

additional topographical survey to verify visibility. Subject to RSA at s278 stage.”

- i. 163462-007 – Proposed Access – Cambridge Road, with the note “Subject to arboriculture/ecology review. Proposed levels to be reviewed. Subject to additional topographical survey to verify visibility. Subject to RSA at s278 stage.”
- j. 163462-008 – Indicative Pedestrian Improvements Plan;
- k. Masterplan summary report, the scope of which is described at 1.3 thus: “this document summarises the contextual analysis and design principles which underpin the site masterplan and explains the design parameters which form part of the application.”

23. Only plans 1797/30/101 and 1797-30-110; 1/6; 2/6; 3/6; 4/6; 5/6; 6/6 include no reference to being illustrative or containing indicative information. The rest of the plans, as set out above are either wholly or partially composed of illustrative or indicative information.

24. I pause here to consider the difference in meaning between “illustrative” and “indicative”. The Oxford English Dictionary defines indicative as “acting as a sign”, while illustrative is defined “acting as an example or explanation.” I consider that these words are synonymous and treat them as such.

25. As set out at §§12-14, both policy and case law are clear that applicants have the right to provide illustrative materials as part of an application for outline permission. This illustrative material, when described as such by an applicant, may not form part of the detail on which the outline permission is based.

26. In my view, Condition 3 as it is currently worded imposes the requirement upon the Developer to at “wholly in accordance” with illustrative plans. This condition is unreasonable and is ultra vires. It cannot be enforced.

Imprecision

27. In addition, I consider that Condition 3 is imprecise in its drafting. It seemingly requires the Developer to carry out development “wholly in accordance” with the details specified in the application but provides an exception for “*minor modifications of those details or reserved matters which previously have been agreed in writing by the LPA as being not materially different from those initially approved.*”
28. Notwithstanding the point above that, of the plans specified in the OPP, only two series might be considered initially approved, the obligation to develop wholly in accordance with the plans is rendered nonsensical by the apparently simultaneous ability to agree minor modifications of those plans.
29. This provision also serves to make it entirely uncertain what is permitted and what is not; the question is likely to come down to the exercise of planning judgment in respect of what constitutes a “minor modification.”
30. Furthermore, in my view, this final clause may serve the same purpose as a tailpiece, in that it purports to allow for the Developer and the Council to agree between themselves how the condition should be satisfied and, as such, could be considered unlawful in that it allows the circumvention of the statutory scheme for the amendment of conditions, namely section 73 of the 1990 Act.⁴
31. This view is supported by the Council’s explanation for the imposition of this condition, as set out in an email I have seen from Mr Ben Glover to the Developer dated 26 February 2025. He states:

The variation of conditions on the outline needs to align to the rigors that we apply to all masterplanned sites currently being processed. We will be happy to vary the outline appropriately, and discuss these processes, during the negotiations regarding the fundamentals of the reserved matters. In addition, the objective of the S73 application may not be achieved with the current re-wording of the condition and only raise further questions and interpretation issues

⁴ (see Keene LJ at [51]-[54] of *Henry Boot Homes Ltd v Bassetlaw District Council* [2002] EWCA Civ 983, and Ouseley J at [66]-[70] of *R (Midcounties Co-operative Ltd) v Wyre Forest District Council* [2009] EWHC 964 (Admin))

32. Regardless of whether the Council considers it more convenient to agree informal modifications in the course of determining the RM Application, this process would effectively go behind the statutory regime set out to regulate the modification of conditions.

Proposed modification to Condition 3

33. Given the interaction between outline planning permissions and applications for reserved matters explained by Dove J at §15, it is common for Inspectors to bind developers to the principles examined and agreed during at the outline permission stage, while recognising the need for flexibility to accommodate the details which come forward as part of a reserved matters application. This flexibility is most commonly expressed by wording which requires the developer to act in complete accordance with some plans, and in broad accordance with others.
34. One such example (there are many) can be seen in *23 Dark Lane and land adjoining, Backwell, Somerset BS48 3NT*,⁵ in which the Inspector granted outline planning permission for up to 125 dwellings with all matters reserved except for access. Condition 5 requires development relating to access to be carried out “in accordance” with the plans, while condition 6 states:

Applications for clearance of the reserved matters shall be broadly in accordance with the details set out upon and within the following plans and documents: edp8264_d106a; edp8264_d017a; edp8264_d018e; edp8264_d019d; Design and Access Statement Ref. edp8264_r002c

Conclusion

35. In my view, the condition proposed by the Section 73 Application is a sensible way to ensure that the development comes forward in accordance with the details agreed at the OPP stage, but without unlawfully obliging the Developer to be bound by the illustrative plans which it submitted. The proposed modifications follow a well-established formula, which is frequently used by Inspectors at appeal. In granting the Section 73 Application, the Council will address the legal error which infects Condition 3 in its current state, without relinquishing an inappropriate measure of control over development. Failure to grant the Section 73 Application leaves the Council open to the – in my view likely – prospect of an Inspector allowing the

⁵ Appeal Ref: APP/D0121/W/24/3354477

modification to Condition 3 at appeal, and a real risk of a costs awards based on the Council's unreasonable behaviour.

Thea Osmund-Smith
No5 Chambers

30 June 2025