ADDENDUM 1

RE: GREGSON GREEN COMMUNITY INITIATIVE

A D V I C E

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1. The following application has been submitted to South Ribble Borough Council and was valid on 9th January 2018 (App Ref: 07/2017/4115/FUL):

> "Application for planning permission for the demolition of the existing Community Centre and associated structures and the erection of a new Community Centre incorporating main hall, changing rooms, toilets and associated facilities, in addition to the provision of car parking and landscaping, together with the erection of 75 residential dwellings with access road, landscaping and open space."

2. The application was made by the Gregson Green Community Initiative which consists of Gregson Green, the owner of the residential site Jennifer Turner and Rowland Homes who together are seeking to facilitate the construction of a new Community Centre at Gregson Lane Recreation Ground for the communities of Gregson Lane and Coupe Green, wholly funded through the development of a high quality residential scheme off Daub Hill Lane, Gregson Lane. The proposed development has been through extensive public consultation and the Applicants are confident that there is a very strong level of community support for the proposals.

3. The housing element of the land is designated as Protected Open Land (it was previously safeguarded land) which is akin to a countryside designation. It is adjoined by Green Belt on two sides and the Settlement Boundary on two sides.

4. I am asked whether the two elements of the application can be fairly linked by the LPA so that the provision of funds for a Community Centre can properly be regarded as a proper material consideration in consideration of the housing element of the scheme. The background to this request for advice is that the Council have been provided with an Advice prepared by Mr Graham of Counsel dated 31st January 2018 which expresses doubt as to whether the provision of the Community Centre is a legitimate material consideration in respect of the housing element of the proposal. The advice further suggest that the Regulation 122 tests are not met. The advice concludes that these concerns should be brought to my clients' attention and they be invited, if they so wish, to furnish an Opinion from Leading Counsel.

Analysis

5. There is no legal impediment to granting a planning permission for two different land uses within one planning application. That is evidenced from the facts of two of the cases relied upon by Mr Graham, namely the *Derwent Holdings* case (one application for a superstore and the development of Old Trafford cricket ground) and the *Monahan* case (one application for the redevelopment of The Royal Opera House and unrelated office development which was intended to cross-subsidise the Opera House work). I do not understand Mr Graham to be arguing that in the present case the two elements of development cannot properly be contained in one application, but rather he appears to suggest that the benefits associated with the provision of a Community Centre cannot be weighed as material considerations when considering the acceptability of the housing elements of the scheme. I say at the outset that I cannot agree with Mr Graham's argument.

6. It is trite law that any consideration relating to the use and development of land is capable of being a material consideration. The definition of what is a material consideration has been the subject of recent jurisprudence. In *Baroness Cumberlege of Newick v. SoSCLG* [2017] EWHC 2057 (Admin) it was suggested that the test is whether no reasonable decision-maker would have failed to take the matter into account. A slightly different formulation/test was advanced in *R (on the application of Leckhampton Green Land Action Group Ltd) v. Tewkesbury BC* [2017] EWHC 198 (Admin), namely is the matter one which, when placed in the balance, would tend to

tip the scales to some extent? Whichever "test" is adopted, it appears extremely odd to suggest that in a composite application (such as the Gregson Green application) the benefits arising from one aspect of the development proposed cannot be weighed against any harm associated with a different aspect of the development.

7. It is settled law that a financial contribution arising from "enabling development" may be a material consideration in the determination of a planning application. In *R v. Westminster Council ex p Monahan* [1988] 1 QB p.87 Kerr LJ Noted:

> "Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, ie related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation."

8. In *R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v. Wolverhampton CC* [2010] UKSC 20 Lord Collins observed:

> "70, What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite

> development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Monahan* about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development."

It is important to pause at this point and note that the Gregson Green development is a composite proposal in which one element will serve to finance another element which has clear community benefits attached. This is not a case of provision of "off-site" benefits.

9. In *Derwent Holdings Ltd v. Trafford BC* [2011] EWCA Civ 832 (see earlier) the court said:

> "18. Arguments about the legality of 'enabling developments' have a long history. Particular problems have arisen where there is no direct link between the two proposals under consideration. That was the issue before the Supreme Court in *R (Sainsbury's) v. Wolverhampton CC* [2010] 2WLR 1173. It was held that the relationship between Tesco's proposed superstore on the outskirts of Wolverhampton, and the site on which it had offered regeneration benefits in the city centre, was not sufficient close for the latter to be taken into account as justifying a compulsory purchase order for the former. This case was contrasted (see per Lord Collins at para 42-3) with *R v. Westminster City Council ex p Monahan*[1990] 1 QB 87, where the two elements were directly linked as part of a single application. It was common ground that in such a case it was permissible to take account of the benefits of the one as offsetting the possible planning objections to the other.
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> 19. A similar contrast can be drawn in this case. Derwent, shortly before the committee meeting, had offered to match Tesco's cross-subsidy with its own contribution of £21 m to the development of the cricket ground. The members were understandably advised that this was not relevant to the merits of Derwent's proposed retail development, given the lack of any sufficient relationship between the Derwent site and the cricket ground. In the joint application, however,

> there was a direct relationship. The two elements were in close proximity and physically linked, and they were reasonably included in a single application. Even if, as Mr Tucker submits, some members may have been confused into thinking that they could take account of the overall benefits of the two elements, it is not clear to me why that would have been legally objectionable."

10. While it is the case that some connection should exist between the "enabling development" and the enabled development, there is no legal basis for saying that the connection must be functional or have some basis in proximity. The Court in ***Derwent*** ibid noted these connections existed in that case, but they are not, as a matter of principle, necessary pre-requisites and there is no authority that states as much.

11. I pause here to note that Mr Graham has drawn attention to ***R (Peter Wright) v. Forest of Dean DC*** [2016] EWHC 1349 (Admin). I cannot see that this advances matters at all. Its facts were extreme and it involved an off-site payment which is not the case here. In the ***Peter Wright*** case a windfarm developer offered a sum of money to the local community without any specific end use for it being identified. It was a classic case of an attempt to "buy" a planning permission and observations in that case have to be read in the extreme factual matrix.

12. A case that has not been referred to but which is highly relevant is ***R (on the application of Thakeham Village Action Ltd v. Horsham DC***, Administrative Court, 29 January 2014 - a judgment of Lindblom J (as he then was). In that case two sites, A and B, had both been used for mushroom growing. Permission was granted for housing on Site A tied to a Section 106 obligation to pay £3,750,000 for the provision of a new mushroom facility on Site B. Sites A and B were the subject of independent applications but were expressed as being mutually interdependent. The judgment merits setting out below at length:

> "207. The two proposals were mutually dependent. They were, in effect, a comprehensive scheme for the redevelopment of both sites. The connection between them was a matter of economic reality. The consolidation of the mushroom operation on Site B would not be achieved unless the development proposed on Site A was permitted. This was so when the original proposals were submitted in July 2010.

And it was still so after Monaghan Mushrooms had become involved as the operator intending to run the business on Site B once it was redeveloped to accommodate all of the plant. The Council knew that Monoghan Mushrooms was aprofitable company, and was prepared to invest in Site B provided the subsidy promised by the development of Site A was released. It knew that there was no prospect of mushroom production continuing in Thakeham unless Monaghan Mushrooms was prepared to make that investment. And it knew that there was no other likely source of the funds required.

208. The proposals were also directly linked to each other in a practical way. The proposed redevelopment of Site B depended on the financial contribution from the redevelopment of Site A. The latter would only go ahead once the works it was funding on site B had been completed. The whole operation, including the activity previously undertaken on Site A, could then be located on Site B and would be able to continue in a viable form.

209. When the revised scheme for the two sites was being considered in September and October 2012, before the s.106 agreement was completed, the Council had to consider whether the contribution of £3.75 million now being offered was necessary to ensure that the Site B development would proceed. In the light of the independent advice it had from Ernst & Young, it satisfied itself that Monaghan Mushrooms' business plan was sound and that a contribution at that level was required.

210. This is the kind of situation contemplated by the Court of Appeal in *Monahan*, as described by Kerr LJ in the second of the two paragraphs I have quoted from his judgment (see [167] above). This is a case of 'composite or related developments'. The relationship between the two proposals was such that they could and should 'properly be considered in combination'. The aim of securing mushroom production in Thakeham and the jobs involved in it was a proper planning purpose. Achieving it depended on the injection of capital that would flow from the redevelopment of one of the two sites originally used for mushroom production into the regeneration of the other as a mushroom nursery. This was not a case of unlawful enabling development, or of planning permission being bought or sold. The commitment to funding in the s.106 agreement was not an obligation unconnected with the proposal for housing on Site A apart from its being put forward by Abingworth as development. It was not an immaterial consideration. The Council was right to take it into account. To have failed to do so would have been to ignore a factor relevant to its decision on the Site A proposal.

211. I do not accept that the Council failed to consider each of the two proposals on its own merits. As I have said (in [150]-[159], and]184] above), it is clear from the committee reports, from the minutes, and from the summary reasons in the two decision notices that the Council did consider each application on its individual merits, whilst recognising that the merits of the proposal for Site A included its ability to support the redevelopment of Site B.

212. I reject Mr Fookes' submission that the Council's approach went against any principle in the jurisprudence, and in particular in the decision of the Court of Appeal in *Derwent Holdings*. In that case, the Court of Appeal applied the principles endorsed by the Supreme Court in *Sainsbury's Supermarkets*. The Court of Appeal did not say that the submission of a single application was a prerequisite to those principles being satisfied. It did not say that one part of a composite scheme could only be regarded as financially dependent on another if they were combined in a single proposal. It did not say that the requirement for there to be 'a real connection between the benefits and the development', as Lord Collins put it in his judgment in *Sainsbury's Supermarkets*, could only be met in that way. In this case the connection was undoubtedly real, regardless of there being one application not two.

213. I do not believe that the principles of enabling development are limited to ventures that would protect a heritage asset or a facility that serves or is accessible to the public. And I also reject the submission that those principles do not extend to a financial contribution that would support development undertaken by another company on another site. The jurisprudence does not support either of those concepts.

214. The scope for enabling development is wide. There are many ways in which it may serve a proper planning purpose. It may fund works of repair or improvement to a listed building. It may fund the protection of a particular habitat. It may fund the provision of a swimming pool for public use, or some other public facility. But that is far from being and exhaustive list of the benefits it may help to provide.

215. This case may be an example of what Kerr LJ in his judgment in *Monahan* described as 'compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest'. This can happen in cases of many kinds. It can happen when jobs in a long-established local business will only be saved, or new jobs and investment secured, if a proposal that makes this possible is granted permission though normally it would be turned away. The fact that the business is run by a 'private company' does not mean that the jobs and the

> investment cannot be seen as beneficial in the public interest. Nor does it mean that the enabling development is tainted by an irrelevant or unlawful purpose, or that the economic benefit it will produce should not bear on the planning decision.
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> 216. On each of these two applications the Council had to ask itself whether, in the public interest, planning permission should be granted. The aim of safeguarding in Thakeham an industry that had been there for a very long time and the jobs associated with it was, in the Council's view, a legitimate planning objective. It was right about that. The fact that the land and buildings on Site B were going to be owned and used by a company engaged in a commercial enterprise for profit was no bar to the Council taking into account the financial contribution as a material consideration in determining the proposal for Site A."

13. The ***Thakeham*** case is not dissimilar to the present case, ie enabling development on two separate but proximate sites. In the present case the two elements of the single proposal are presented under one application and are mutually dependent. That mutual dependency is the connection that is necessary in law. The clear and undoubted task of the LPA is to consider the application as made and to carry out a full planning balance exercise which will necessarily involve weighing the benefits of the community proposals against any disbenefits. To ignore the benefits of this element of the scheme would be, without more, irrational.

14. The Section 106 payments is Regulation 122 compliant, ie it is necessary as it is an element that helps to ensure delivery of the community benefit; it is directly related to "the development", ie "the development" includes the community facility in terms and it is fairly and reasonably related in scale, ie it is an evidenced sum which properly covers the cost of provision.

Conclusion

15. There can be no doubt at all that the community benefit is a material consideration and that the payment is CIL compliant. Mr Graham has, with all due respect to him, fallen into error insofar as he has assumed a need for some functional or physical linkage. No such need exists in law. Similarly, his approach to the Regulation 122 issue is that

he treats "the development" as the residential element of the proposal. In fact, it is a composite proposal and the Regulation 122 requirement re "the development" is a reference to the development applied for. There is no legal basis for somehow splitting it up into its component parts.

I so advise.

KINGS CHAMBERS
36 Young Street
MANCHESTER
M3 3FT
DX 718188 (MCH 3)

D E MANLEY QC

5 Park Square East
LEEDS
LS1 2NE
DX 713113 (LEEDS PK SQ)

Embassy House
60 Church Street
BIRMINGHAM
B3 2DJ
DX 13023 BIRMINGHAM

9th February 2018

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