

**RE: PROPOSED DEVELOPMENT AT GREGSON GREEN, LEYLAND**

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**ADVICE**

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1. I am asked to advise South Ribble Borough Council ("the Council") upon its consideration of a planning application ("the Application") for a proposed development at Gregson Green, Leyland, and in particular in relation to whether the promise of a new community centre is a proper material consideration in the determination of the Application.

**BACKGROUND**

2. The salient background facts are set out in my Instructions to which I refer and on which basis I advise. The proposed development for which planning permission is sought is described in the Application dated 20 December 2017 as:-

*“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 roads, landscaping and open space”.*

The Applicant is the “Gregson Green Community Initiative”, which comprises Gregson Green, Jennifer Turner and Rowland Homes. The Application relates to two sites, namely at Gregson Lane in relation to the new Community Centre and at Daub Hall Lane in relation to the residential development. The Application is made on the basis that it seeks to facilitate the construction of a new Community Centre for the communities of Gregson Lane and Coupe Green through the development of a cross-funding residential scheme.

3. The residential site is designated as Protected Open Land to which Policy G4 of the South Ribble Local Plan applies. The residential proposals are accepted by the Applicant as being in conflict with that Policy. However, it is contended that the funding to provide the new Community Centre is a sufficient benefit to outweigh such conflict. It is proposed that the housing developer will provide £1.2m to the Council

prior to the commencement of the residential development in order to fund the new Community Centre, although there is no proposed mechanism to ensure the delivery of the Community Centre in that the residential developer is not itself prepared to deliver it. It is anticipated that the £1.2m will be returned by the Council if the Community Centre is not built within 5 years.

4. The Council and the Applicant have exchanged legal advice in relation to the determination of the Application. I have read the Advices provided by Tom Graham on behalf of the Council dated 31 January 2018 and 14 March 2018, and by David Manley QC on behalf of the Applicant dated 9 February 2018 and 20 April 2018.

#### **MATERIAL CONSIDERATION**

5. The first and fundamental issue is whether the funding of the Community Centre is a material consideration in the determination of the Application. Planning permission is sought for the residential development on the basis that it will amount to enabling development for the new Community Centre.
  
6. Enabling development has been the subject of considerable caselaw, which is referred to in the Advices of Counsel and Leading Counsel referred to above. The starting point is the Court of Appeal's decision in *R. v. Westminster City Council ex parte Monahan*.<sup>1</sup> The Court held that since, in reality, financial constraints on the economic viability of desirable planning developments were unavoidable, it would be unreal to exclude them from the range of considerations which might properly be regarded as material in determining planning applications. Provided that the ultimate determination of a planning application was **based on planning grounds** and not on some ulterior motive, and was not irrational, financial considerations which **fairly and reasonably related to the development** were capable of being material considerations which could be taken into account in reaching that determination. Hence, in that case, the local planning authority had been entitled, in deciding to grant planning permission for the erection of offices which were contrary to the development plan, to balance the fact that the improvements to the opera house would not be financially viable if the permission for the offices was not granted.

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<sup>1</sup> [1990] 1 QB 87.

7. It is apparent from that decision that a financial contribution arising from an enabling development is capable of amounting to a material consideration provided that it is **fairly and reasonably related to the enabling development** and the determination is based on proper planning grounds. That is consistent with the approach in the House of Lords in *Newbury District Council v. Secretary of State for the Environment*<sup>2</sup> that planning conditions must be for planning purposes and must fairly and reasonably relate to the development permitted. Material considerations should follow that approach if they are to be material and to be taken into account in the determination of an application.
8. That approach has been followed in subsequent cases. In the decision of the Supreme Court in *R. (on the application of Sainsbury's Supermarkets Ltd) v. Wolverhampton City Council*,<sup>3</sup> Lord Collins usefully summarised the relevant legal principles in the planning context at paragraph 70 where he stated:-

*“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 Ex p Monahan [1990] 1 QB 87 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.**”* (my emphasis).

In that instance, it was held that the relationship between Tesco's proposed store on the outskirts of Wolverhampton, and the site on which it had offered regeneration benefits in the city centre, was not sufficiently close for the latter to be taken into account as justifying a compulsory purchase order for the former. The case was usefully contrasted with the *Monahan* decision where the two elements were directly

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<sup>2</sup> [1981] A.C. 578.

<sup>3</sup> [2010] 2 WLR 1173.

linked as part of a single application and in which it was found permissible to take account of the benefits of the one as offsetting the planning objections to the other.

9. Further, in *Derwent Holdings Limited v. Trafford Borough Council*<sup>4</sup>, the Court of Appeal identified similar useful contrasting positions. The case involved a joint application for a large superstore on land owned by the Council, and the redevelopment of the nearby Old Trafford Cricket Ground as an improved stadium for international cricket. The two parts were linked by a pedestrian walkway. It was intended that, if permission was granted, the Council would sell their land to Tesco for £21m and the proceeds of sale would then be passed on to the Cricket Club to subsidise their redevelopment. Derwent Holdings was the owner of an existing retail park known as several hundred metres away from the Tesco site who had made an application for permission to create a new food store and to refurbish existing units. Carnwath LJ (as he then was) identified the following contrast at paragraph 19:-

*“Derwent, shortly before the committee meeting, had offered to match Tesco's cross-subsidy with its own contribution of £21m 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.**”* (My emphasis).

10. It is thus apparent from such caselaw that there must be a real connection and a direct relationship between enabling development and the development it enables for the latter to be a material consideration in the determination of whether to grant planning permission for the former. That relationship can arise in different ways, such as by physical links, geographical proximity, functional links or financial dependency.
11. Applying that legal framework to the Application, it is my opinion that there is a real connection between the two elements of the proposed development for the following reasons:-

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<sup>4</sup> [2011]EWCA Civ 832.

- a. The two elements are part of a composite planning application. That is an important factor, and indeed in the recent decision of Mrs Justice Lang in *Amstel Group Corporation v. Secretary of State for Communities and Local Government and North Norfolk District Council*,<sup>5</sup> it was found that an inspector had erred in law in failing to take into account the benefits of a new school which was part of a composite application including residential development. That was so despite the inspector having found that the benefits of the school were not CIL compliant.
- b. The Application is made not merely by the residential developer, but by the Gregson Green Community Initiative. The Charity Trustees of Gregson Green are thus directly involved in the Application.
- c. The two sites are relatively proximate in geographical terms. In particular, they are both within the settlement of Gregson Lane.
- d. The two elements are financially connected to the extent that the proposed financial contribution would be sufficient to fund in full the provision of a new Community Centre.

Given those factual circumstances, it is my view that the financial contribution to the Community Centre fairly and reasonably relates to the residential development and there is a real connection between the two.

12. In addition, the benefits of a new Community Centre are proper planning considerations.

13. It follows that it is my view that the financial contribution to the provision of the Community Centre is a material planning consideration which should be taken into account by the Council in determining the Application, and which should be weighed against the residential development's conflict with the Development Plan.

## **WEIGHT**

14. As to the weight to be attributed to the benefits of the new Community Centre, that is ultimately for the Council as decision maker to determine taking all relevant circumstances into account. They include matters such as the extent of the benefits, the likelihood of them otherwise being achieved, and the likelihood of the Community

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<sup>5</sup> [2018] EWHC 633 (Admin).

Centre being delivered. If the delivery is not fully secured, that is not a reason to regard the provision of the Community Centre as not being a material consideration but, rather, a reason to reduce the weight given to it accordingly.

15. As to such delivery, I understand that the financial contribution is to be secured by way of a section 106 agreement and the funds would be required to be provided prior to the commencement of the residential development. In addition, the Applicant has indicated that it would be agreeable to a term in the agreement that no residential development would take place until a formal Building Contract has been completed for the construction of the Community Centre in accordance with the approved drawings. Although such would not guarantee its delivery, it would appear from the information I have seen that it would result in such delivery being reasonably likely.

16. I note that the Council is the freeholder of the Community Centre site, and I concur that it cannot contract with itself in its capacities as landowner and local planning authority given that it is one corporate body and so one legal entity. However, the reason for all those with an interest in relevant land generally being a party to a section 106 obligation is not due to a legal requirement but, rather, due to a local planning authority's ability to adequately enforce it. It cannot enforce the obligation against a person or body who is not a party nor against their successors in title. I assume that those with an interest in both sites would be parties to the obligation with the exception of the Council in its specific capacity as landowner. Hence, the provision of the funds would be ensured. As to the provision of the Community Centre, I am unsure as to the proposals for that, such as whether it is intended that the leaseholder will enter into the building contract for its provision. In other words, I am unaware of the proposed term in the section 106 agreement which the Council is seeking in order to secure the provision of the Community Centre. However, insofar as the leaseholder may surrender the lease or become insolvent, the Council as landowner would still retain control over the provision of the Community Centre in the absence of the Council local planning authority being able to enforce against the failure to provide it under the section 106 agreement. The Council would hold the requisite funds, and have the ability to impose appropriate terms on any subsequent leaseholders to require its provision, or on any subsequent landowners, or to enter into a building contract to do so itself. Thus, although the Council as landowner could not

contract with the Council as local planning authority in a section 106 agreement, the Council would nonetheless retain sufficient control over the provision of the Community Centre as landowner.

17. I advise accordingly, and if I can be of any further assistance, please do not hesitate to contact me.

**RUTH A. STOCKLEY**

08 May 2018

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**ADVICE**

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