

APPEAL REF: APP/Q3115/W/19/3228431

Land at The Elms, Upper High Street, Thame OX9 2DN

PRE-INQUIRY NOTE

1. Introduction

- 1.1 This note has been prepared following the Case Management Conference Note dated 10 July 2019 in light of the receipt of the evidence from the parties to update some administrative matters, seek clarification and ask the parties to consider various matters.
- 1.2 It is not anticipated that there should be any response to this Note prior to the opening of the Inquiry on Tuesday 24 September 2019.

2. Inquiry order

- 2.1 In light of the representations of the main parties and the differences between them it has been agreed that heritage should now be the subject of conventional inquiry format. This has been communicated to the main parties by the Case Officer. I have also noted the unavailability of the heritage witness for the appellant on Thursday 26 September.
- 2.2 It is also noted that, subject to the confirmation that the amended plans form part of the to be determined appeal, the Council has withdrawn reason for refusal 3. I can confirm that I am content to incorporate those plans into the appeal and consequently can confirm there is no longer a need to have a session on living conditions at the Inquiry. This has also been communicated to the main parties by the Case Officer.
- 2.3 In light of this, my anticipation is that the Inquiry would take the following order:
 - Openings
 - Third parties
 - Heritage witnesses (Council and appellant)
 - Fall-back round table
 - Planning witnesses (Council and appellant)
 - Conditions and obligations round table
 - Closings
- 2.4 I would not anticipate there is a need to call the housing need or design witnesses, although I appreciate that in light of the rebuttal from Mr Danogh, the appellant may wish to call him. This can be discussed at

the opening of the Inquiry. If this is done, Mr Donagh should appear before or after Mr Sitch.

- 2.5 Timings of the various elements of the Inquiry have yet to be discussed and I would be grateful if the advocates could provide me with their estimates at the opening of the Inquiry. However, I would have hoped that the Inquiry should be completed within 4 days, if not less.

3. The nature of the accommodation to be provided

- 3.1 In the Statement of Common Ground dated 1 July 2019 between the Appellant and the Council in paragraph 6.37 it is stated: *"It is agreed that the proposed development would fall within Class C2 use as opposed to C3"*.

- 3.2 I have concerns about this agreement and feels this should be in front of the main parties so that they can consider this and address me on this point. The concerns are two-fold.

Whether as a matter of first principles a description of any application for planning permission for the erection of a building can legitimately include a Use Class?

- 3.3 The purpose of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the Use Classes Order) is to mean that changes of use, whether material or not, are said not to be "development" as defined under Section 55 of the Town and Country Planning Act 1990 (as amended) (the TCPA).
- 3.4 Rather than have arguments as to whether a change from such and such a use to another use is 'material', the Use Classes Order says that if the existing use and the new use fall in the list of uses in the same Use Class then "development" is not involved¹.
- 3.5 It is at least arguable for the Use Classes Order to operate the originating use must be operational. In other words, unless and until a use is existing somebody wishing to use the land in another way cannot take advantage of the provisions of the Use Classes Order.
- 3.6 To use an example well away from the "C" uses, it would not be possible to obtain planning permission to build a cinema and then build the building but first operate it as a dance hall (both uses fall within Class D2 (assembly and leisure). Clearly, once operational as a cinema the use could then be changed to a dance hall without "development" occurring, but that is a separate, subsequent matter.
- 3.7 It therefore follows that to describe anything as a "Class Q" (where "Q" is a non-specific reference) before it has been constructed may be incorrect. When constructed and operational then a proper analysis of an existing use can be made, and a comparison made as to whether the proposed use

¹ Subject to other matters such as a consideration of intensification or a planning condition.

would also fall within the same Use Class and a change proposed use would represent "development".

- 3.8 Thus, to describe an application for planning permission as for "Class Q" may be incorrect, and, perhaps should be omitted from the description of the application.

How the current proposal should be considered

- 3.9 In Mr Sitch's Proof of Evidence (paragraph 8.25) there is reference to Counsel's Opinions and these being included in the Core Documents. Could I please be directed to where these are, or if they are not included can they please be provided?
- 3.10 Omitting reference to the Use Classes Order the description of the proposal would be: *"The erection of a 'Housing with Care' development and a communal residents centre; the creation of new public open space; the provision of new pedestrian/cycle links from Upper High Street to Elms Road and Elms Park; repairs and alterations to the boundary walls and entrance of Elms House; and associated infrastructure works and landscaping."*
- 3.11 The Planning Practice Guidance (the PPG) states²: *"It is for a local planning authority to consider into which use class a particular development may fall. When determining whether a development for specialist housing for older people falls within C2 (Residential Institutions) or C3 (Dwellinghouse) of the Use Classes Order, consideration could, for example, be given to the level of care and scale of communal facilities provided"*.
- 3.12 The PPG also states³: *"Not all uses of land or buildings fit within the use classes order. ... Where land or buildings are being used for different uses which fall into more than one class, then the overall use of the land or buildings is regarded as a mixed use, which will normally be sui generis. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary. For example, in a factory with an office and a staff canteen, the office and staff canteen would normally be regarded as ancillary to the factory."*
- 3.13 I am not aware of any definition of "dwelling" or "dwellinghouse" in the TCPA. However, the Courts in *Gravesham BC v SSE and O'Brien*, [1983] JPL 306 accepted that the distinctive characteristic of a dwellinghouse was its ability to afford to those who used it the facilities required for day-to-day private domestic existence.
- 3.14 I would also like to refer the parties to the case of *Church Commissioners v SSE* [1996] JPL 669 where it was held that a single unit within a shopping mall, occupied by an individual trader, was a separate planning unit, with its own individual primary use, despite the fact that the whole centre could be said to be occupied for retail purposes by the landowners.

² Reference ID: 63-014-20190626

³ Reference ID: 13-010-20140306

- 3.15 I appreciate the comments made, in particular on behalf of the appellant, as to the relationship with the proposed Planning Obligation.
- 3.16 I would like to be assisted on the following points:
- (i) What is the planning unit at present;
 - (ii) What would be the planning unit(s) following completion of the development;
 - (iii) If the appeal is granted, implemented completed, would each individual 'House with Care' represent an individual planning unit;
 - (iv) Would each 'House with Care' represent a 'dwelling';
 - (v) How should the communal accommodation be considered;
 - (vi) Would any element, and in this I am referring to the use of a building and its immediate grounds, represent an ancillary element, and if so, what would it be ancillary to and what would the planning unit be;
 - (vii) Does the physical disposition of buildings upon a site make any difference to the proper consideration of these matters;
 - (viii) Can a Planning Obligation make a difference as to how uses should be considered, both in law and practice;
 - (ix) Is there merit in the proposition that, if the appeal is granted, implemented and completed that a mixed use would occur, made up of a planning unit consisting of the 'Houses with Care' and the communal accommodation, with other planning unit(s) for the public open space and other elements of the proposed development;
 - (x) Is there merit in the proposition that, if the appeal is granted, implemented and completed, the site would consist of a number of planning units, with the 'Houses with Care' being 78 individual units, the communal accommodation being another, with other planning unit(s) for the public open space and other elements of the proposed development?

4. Drawings

Identification

- 4.1 I would be grateful if the appellant, in conjunction with the Council, could please draw up a complete list of the documents that make up the proposal to be determined. This should be in two parts; firstly, a list of the drawings, including their full referencing (title, drawing number and revision), and, secondly, all other accompanying documents. Could this please be forwarded to the Case Officer in Word format.

North point

- 4.2 Could the north point on the appeal drawings please be checked? In looking at the Ordnance Survey plans (for example, those provided in

Appendix 15 to Dr Miele's proof of evidence) with the Site Location Plan (CD A29) the north points appear to be at different angles.

- 4.3 If there is a discrepancy on this, what is the difference and what, if any, are the implications?
- 4.4 Are all the appeal drawings based on the same north point?

Works to Ha-ha

- 4.5 In the Planning History of the site there is reference to the various listed building consents. I believe what is referred to as the "Third Listed Building Consent" (Council ref: P18/S3597/LB) is the latest.
- 4.6 I do not appear to have the drawings for this. I am particularly interested in point (v) in the description which is "*repairs and refurbishment of existing stone ha-ha and provision of new metal fencing*". The Hardworks Proposals Sheet 1 of 4 (CD A20) has on it "*Existing ha-ha retained and repaired Refer Yiangou dwg 1981-118 for details*". Could the Yiangou drawing please be provided? (The other drawings associated with this consent are less material.)
- 4.7 I appreciate that is the latest listed building consent and may or may not have been implemented. I am assuming that this is the same work as point (viii) on the First Listed Building Application (Council ref P14/22395/LB) which it is agreed has been implemented. Could my assumption please be confirmed, but if they are different can I also have a drawing showing those works.

Figure E to Mr Williams' Proof of Evidence

- 4.8 The print version of Mr Williams' Proof of Evidence is missing this Figure. I suspect this is a printing problem since I have been unable to print it off the electronic version. Could this page please be provided in paper format?

5. Trees

- 5.1 Mr Sitch in his proof indicates (paragraph 3.3) that some of the trees on the site are protected by a Tree Preservation Order, as well as being protected through being in a Conservation Area. I do not appear to have a copy of this Order. Could I please be provided with it?
- 5.2 In their proofs both Mr Chambers (paragraph 4.32) and Mr Sitch (paragraph 8.45) have referred to some of the trees on the appeal site as being 'veteran'. I have searched both the Ecology and Protected Species Appraisal (CD A11) and the Tree Survey and Proposed Tree Retention and Removal Assessment (CD A12) for a reference to veteran tree. Apart from a reference in the key in the latter document have not found any trees identified as veteran.

5.3 Could I please be provided with a reference to where I can find which trees are considered to be 'veteran' (noting the definition in the glossary to the National Planning Policy Framework), how they were identified and whether they have been the subject of any sort of formal designation?

RJ Jackson

Inspector

19 September 2019