

STOUR VALLEY ACTION GROUP
RE: HORKSELEY PARK PROPOSALS

ADVICE

Introduction

1. I am instructed to advise the Stour Valley Action Group (SVAG) on the appropriate approach in policy to the application due to be determined by Colchester Borough Council as local planning authority on 28 February 2013 relating to the application for planning permission for the Stour Valley Visitor Centre at Horkesley Park, Colchester and the recent conduct of the Council's officers with respect to the application.
2. This is an application for a major EIA development in the countryside well outside the built up area of the town. The application site comprises a total of 47.41 ha the majority of which lies with the Dedham Vale Area of Outstanding Natural Beauty. That which lies outside the AONB boundary is in part occupied by redundant agricultural glasshouses [4.2 ha], other buildings and their gardens [2.32] and a small amount of open countryside.
3. The application is the last in a line of similar applications seeking the redevelopment of this site over the past decade or so. All such applications have attracted a substantial volume of controversy and objection.
4. The current application was designed to be considered alongside the policies of the former RSS14, the East of England Plan, which contained a relevant policy, policy C2 relating to tourism proposals of regional significance. With effect from

the 3rd January 2013 the EEP was revoked and that policy is now of no weight whatever. This foundation having disappeared the application now has to be considered against the remaining elements of the development plan and the NPPF, which was also published after the application was made.

5. In this advice I will consider the current procedural position, the appropriate policy approach as a matter of law and the material considerations that CBC will have to weigh in the balance when determining the application. In doing so I am assisted by the summary of the economic case relating to the development and the policy position that are attached to this Advice.

Procedural Position

6. The Council's consideration of this application has been in the context of a Planning Performance Agreement. This has led to close liaison and exchange of information between the Council and the applicant much of which has not been shared with third parties, including SVAG. I will now turn to the catalogue of shortcomings in the procedure adopted by the Council to date.
7. The Officers of the Council with primary responsibility for assessing the application and reporting on it to members met with representatives of SVAG in August 2012. At this meeting SVAG were informed that the Council were going to employ three independent consultants to advise them respectively on the business case for the proposals, the highways and transportation implications of the proposals and their planning policy implications. At this meeting SVAG were told that the reports would be published on the Council web site. (with the exception of the report into the confidential business plan). This did not happen. Only after a further meeting between SVAG and the Council on January 3rd 2013 did they release copies of these reports on January 7th 2013, those relating to the business case being so heavily redacted that the public have little insight on the material relied upon by the applicant to support what is, as I shall demonstrate later, a vitally important aspect of the case.

8. Moreover, these reports had plainly been shared by the Council with applicants for a substantial period of time before their release into the public domain as all had already been the subject of strenuous, albeit unconvincing, comment by way of rebuttal from the appellants and their consultants. This is contrary to the assertion contained on the Council's web page dedicated to this application that states: *'These consultants were instructed by the Council and paid by the Council with no input from the applicant'*. However, there has been extensive input from the applicant to the supplemental material provided by the economic consultants Britton McGrath Associates ['BMA'], the key elements of which have been redacted so that their reasoning is largely unintelligible.
9. Undoubtedly the most serious shortcoming of the procedure adopted by the Council is the fact that they published a notice on the web page dedicated to this application in the following terms posted by the Council's Development Services Manager on 21 December 2012:

'I would like to advise you that following detailed consideration of the merits of the planning application officers of the Planning Service are now in a position to prepare the relevant officers' report to Planning Committee.

The application will be included on the Planning Committee agenda for the scheduled meeting of Thursday 14 February 2013 and I have made arrangements with the Democratic Services Manager to use Moot Hall as the venue for the meeting on the basis that there has been much public interest in the proposal and the meeting is therefore likely to be well attended .

I wish to advise you that based on our full professional analysis of the merits of the proposal the Planning Service's balanced recommendation will be favourable.

For the next month officers will be producing a complex and comprehensive Planning Committee report within which all of the various planning issues will be thoroughly explored. These will include looking at the impact of the National Planning Policy Framework (NPPF) which did not exist when the Council last considered a proposal on this site. The report will also consider the impact of the recent announcement that the East of England Plan will be abolished at the start of 2013.

It is my intention to publicise the relevant committee report on the Council's planning web-site earlier than statutorily required (which is 5 working days before the Committee meeting) in order to allow all interested parties greater time to consider the report and formulate their own reaction.

I should remind you that this update represents an officer opinion and it is not binding on the Council or the Planning Committee. Members on the Committee will judge the merits of the proposal 'on the night' based on the all the arguments and evidence presented (whether that be in writing or in verbal representations). (my emphasis)

10. This is the clearest possible indication to the public that although their opportunity to comment on the applications in the light of the recently released consultants' reports and the abolition of the EEP is still to come whatever they say on these important matters be of no or little value in the sense that the relevant officers of the Council have already determined that the report will support the application and recommend it for approval. This is plainly unfair and flies in the face of the well established principles of procedural fairness in public law i.e. that the objectors, along with all participants on the planning process, should be accorded "a fair crack of the whip"¹ and that consultation should be genuine in that it is undertaken before conclusions are reached and that the product of consultation must be conscientiously taken into account when the ultimate decision is taken².

11. This predetermination or bias on the part of the officers is a blatant error and is further confounded by the following features of the stance adopted by them; namely (i) They have decided to support the application before they have received the advice of their colleagues responsible for policy matters on the proper approach to the application in terms of policy following the revocation of the EEP. (ii) They have decided to support the application before they have written their report on the application. (iii) They have indicated that they will apply a policy test to the application which is at odds with the advice they have received from their policy section and which is incorrect as a matter of law.

12. Had this been the conduct of the councilors determining the application it would be sufficient to render their determination of the application unlawful. However,

¹ Fairmount Investments v. Secretary of State for the Environment [1976] 1 WLR 1255

² E.g. Lord Woolf MR in R.v. NE Devon HA ex parte Coughlan [2001] QB 213

the members still have the opportunity to take steps to try and remedy this tale of procedural unfairness and substantive error in their determination of the application.

13. Why or how has this somewhat extraordinary state of affairs arisen? Without in my view being either unfair or cynical about the matter there is one obvious answer that stares out from the papers. I refer to the threat articulated by the appellants for example to BMA at a meeting on 11 December 2013: *“if CBC were not able to confirm their support of the scheme by the end of play on Thursday 20th December, they would, subject to instruction by their client, lodge an appeal.”*

14. The implications of this state of affairs are in the first place for the members of the Council determining this application. References to the monitoring officer of the Council and complaints of maladministration fall outside the remit of this advice. I limit my observations to the point that these events serve to undermine the confidence that the public and members could otherwise have on the objectivity and the reliability of the report they will receive from their officers on this application and lay stress on the need for members to take pains to exercise their own independent judgment on these matters.

15. The next procedural issue that is of concern to my clients, and no doubt to other objectors who find themselves in a similar position, concerns the paucity of information in the public domain as to the viability of the proposals. The applicants have judged, correctly in my view, that they should support their application by a demonstration of its viability. As Mr Jonathan Eddis of SVAG observes in his representation, which is an incisive examination of the material on the viability of the proposals: *“Viability is absolutely critical to any assessment of this project. If the proposition is not viable, then none of the purported benefits will be achieved.”* That need is supported by the policy analysis. In brief, the Council needs to be satisfied that the proposal as described in the application will be forthcoming and be likely to be viable before it can either give substantial weight to the benefits alleged to flow from it or be satisfied that it will not be the

cause of the sort of harm alleged by objectors who claim that it is likely to fail and if so could be a Trojan horse for the introduction of other and more harmful uses on the site which will be provided with a car parking capacity equivalent to that of a modern superstore.

16. The information made available to the public in the reports published on 7 January 2013 is heavily redacted at the insistence of the applicant who claims that it contains confidentially sensitive information. Why this information should have this character is not stated. As there is no suggestion that a rival or similar proposal is in the offing it is difficult to understand what would be commercially sensitive about releasing the key inputs to the viability equation. All that has been revealed to date is the estimated annual visitation rate (a product of the assumed penetration rate within an assumed catchment population) and the estimated entry charge, all the rest is undisclosed although, as will be seen from the accompanying SVAG analysis, some other figures may be derived from the data. This feature seriously impedes the public understanding of the case in a demonstrably unfair way. However, the Council's own independent economic analysts, Britton McGrath Associates ['BMA'], have reached some significant conclusions on the allegedly confidential information that was released to them. The absurd lengths to which this process of redaction has gone is revealed by two examples from the main report of BMA dated November 2012 page 52 where all the figures relating to viability other than visitor numbers are redacted and on page 53 where BMA's own conclusions as to the likely turnover of the business and the likely staffing level are redacted, the latter being matters which on any view cannot be confidential to the applicants since they are the opinion of the consultants.

The Policy Approach

17. The interpretation of policy is ultimately a question of law: Tesco Stores Ltd. v. Dundee City Council [2012] UKSC 13.
18. The starting point is the test established by s.38(6) Planning and Compulsory Purchase Act 2004: *'If regard is to be had to the development plan for the*

purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise’.

19. Thus the first question for the Council to address is whether the proposals comply with the policies of the current statutory development plan and not the question set out on the web page.
20. The Council has received independent advice on the planning policy status of the proposals from Nathaniel Lichfield and Partners [‘NLP’] planning consultants with a well established national reputation which is reinforced by the careful and comprehensive advice received from the Council’s own planning policy section dated 4 January 2013 which should be read by all members. This is summarised in the paper produced by SVAG’s planning consultant, Mr Robert Pomery of Pomery Planning Consultants, to accompany this advice and I will not set this out further.
21. When the proposals were submitted that plan included the RSS14, the East of England Plan and the applicants were at pains to seek to justify the application by reference to policy C2 of that plan which provided guidance on proposals for leisure, sport, recreation, arts, tourism and cultural facilities which were of regional or national significance. Such proposals would be acceptable in rural locations such as this where exceptional circumstances were demonstrated. As stated above that policy is no longer of relevance. However it should be noted first, that the EEP contained no definition of the concepts or regional significance or of what constituted exceptional circumstances and secondly that the East of England Development Agency considered the proposal of 2009 which claimed to be likely to attract 485,000 visitors per annum, create some 226 jobs and generate £2.7m of additional expenditure in the area would be of only *“sub-regional significance”* i.e. as NLP observe in their report to the Council, *“a facility a step below regional significance, but above local significance”*.
22. Nevertheless, the applicant still prays in aid of the proposals their alleged regional significance as a material consideration. Whether they are correct in doing so and the weight to be afforded to this matter is plainly for the decision maker to judge. However, it seems reasonable to assume that EEDA understood what was and what was not of true regional significance within their region so that if the 2009 proposal did not reach that status the current proposal with a substantially reduced volume of annual visitors (316,250) on the appellants case and 100,000 to 130,000 as advised by BMA or a reduction of between 40 to 80%) and of employment figures (106.5 appellants and circa less than 50 SVAG analysis or a reduction of between 50 and 70% or more) will not do so. As the Council’s

own consultants demonstrate, the visitation figures and the consequent turnover derived from entry fees are grossly exaggerated and the further income from on-site sales (catering and retail) are also excessively optimistic. On this basis it is self evident that nothing of regional significance, whatever that nebulous concept means, can be produced.

23. Further, BMA in their heavily qualified Supplementary Review of the Potential for Horkesley Park to deliver Regional Status dated 18 December 2012 (recently disclosed) only admit of the *potential* for the proposals to become a regional attraction (for which they provide no criteria) provided three significant provisos are met and three “*over-riding caveats*” are taken into account. Thus any conclusion to the effect that the proposals would be of regional significance would fly in the face of the independent advice provided to the Council in the absence of a convincing demonstration that the provisos are met and the caveats, which, as we will see, require amongst others the submission of a revised Business Plan, are satisfied.
24. It follows from the analysis provided to the Council by its own specialist officers and that from its independent consultants that the scale of the proposals is inappropriate to a rural location and the accessibility of the site by sustainable means of travel other than the car dictate that the proposal is contrary to the policies of the development plan and it is necessary for the decision maker therefore to consider whether the balance of material considerations indicate that that the proposals should not be refused.
25. The first among these material considerations is the NPPF. In general terms that advocates sustainable development which it describes as “*a golden thread running both through plan making and decision-taking*” (para 14). The same paragraph advises that when, as here, one is decision making one should approve proposals that accord with the development plan “*without delay*” and “*where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework as a whole; or specific policies in the Framework indicate development should be restricted*”.
26. This poses the following questions:
 - i. Is the development plan absent, silent or relevant policies out of date?
 - ii. If so, do the adverse impacts significantly and demonstrable outweigh the benefits when assessed against the NPPF as a whole?
 - iii. Do specific policies of the NPPF indicate that development should be restricted?

27. The Core Strategy is present and is not out of date as it was adopted under the provisions of the 2004 Act. Is it silent? The advice of the Council's own policy team and NLP is that it is not. The policies clearly make provision for tourist facilities in the countryside, for sustainable development and transport accessibility. The relevant policies are carefully identified for members by their policy unit, the departures from them are identified and NLP accord with that view. In my opinion these analyses are accurate as a matter of law
28. If the above analysis is correct one does not go to the second test, as the web page note of 21 December 2012 claims, but back to the test set out in s.38(6) of the Act applying the presumption in favour of sustainable development as advised in paragraphs 196 and 197 of the NPPF which requires the decision maker to decide whether the proposals do accord with the Framework.
29. In striking that balance it is essential for the members to decide whether or not the scheme is likely to be viable as only if it is viable would it have the claimed advantages of regional status, economic benefits to the wider area including expenditure in the local catchment and new employment that are prayed in aid as example of the economic and social sustainability of the proposals and which are said to justify any departure from the development plan that may arise. Equally the issue of viability is important as it lies at the heart of the concern of SVAG and others that if this scheme were to fail there would be left a large white elephant in an unsustainable location in the countryside and in the AONB looking for a new use that might be even more incompatible with its surroundings and its rural location.
30. That requires the members to consider the three provisos and the '*overriding caveats*' set out by BMA. I take them in turn below.
31. Proviso 1: '*the investment in the Chinese Garden is forthcoming to the levels indicated and is executed to a high quality*'. There is as yet no design for this garden in the public domain although it forms part of the proposals for which permission is sought. It lies within the AONB and will include new structures. One would anticipate that the Council would require some better information as to its design and the required structures before it could determine the application. One of the reasons for rejection of the previous application 090231 was the presence of new structures (the Warren) in the AONB and one might expect the same principle to apply here. It is of note that on page 39 of the Sykes Leisure Projects report dated May 2012 which forms part of the EIA it refers to a request from Essex County Council to include the Chinese Garden feature to "strengthen links with Jiangsu Province with which Essex is twinned". A letter from Cllr

Martin, Leader of the Council, dated 11th October 2012 makes it clear that any statement made does not imply that ECC is promoting the application. Of equal importance is the fact that the public do not know and cannot comment on that level of investment since it has not been disclosed. Furthermore the report makes it clear that this central element to the scheme was not included in the Business Plan and recommends that *'future iterations of the Business Plan should include the cost of the Chinese Garden within the value of the project'*. Therefore in addition to an identification of the nature of this part of the proposals the Council needs to be provided with and take advice upon, and the public needs to be consulted on, a revised Business Plan. Also close scrutiny needs to be given as to whether the required funds are secured as without them the scheme will fail.

32. Proviso 2: *'the Constable Country offer is further developed and defined and include the exhibition of at least a few authentic Constable paintings in the Chancery'*. This nebulous and ill-defined aspect of the proposal appears to require further, as yet unidentified, work to be done to develop and define it. This has long been the case. For example, I am instructed that as long ago as 2005 the applicant claimed to have original works available from public collections. A claim that was demonstrated to be without foundation on the intervention of Mr Stephen Deuchars, the then director of Tate Britain and currently the Director of the Art Fund. Again the applicant is being pressed to introduce some element of authenticity to this aspect; namely to be able to display some work of Constable himself. There is nothing in the public domain to give members any reassurance on these matters. The consensus of view of distinguished commentators with unparalleled expertise and authority in the field demonstrates there is no realistic prospect of this condition being satisfied by either purchase or loan of authentic works whether from public or private collections. I here refer to the representations, among others of Mr Conal Shields³, one of the foremost modern scholars of Constable, Professor Michael Rosenthal⁴, Mr William Feavor⁵ and Mr Robin Duthy⁶.

³ Former Head of Art History and Conservation at the London Institute, currently co-curator of the Thomson Collection and the Thomson Archive of Art, and fine art advisor to Lord Thomson of Fleet, whose collection of paintings, drawings and prints by John Constable is the largest in private hands, co-organiser of two Tate Britain exhibitions devoted to John Constable, one of these the official bicentennial celebration, co-curator 2015 Constable exhibition for the Royal Academy, London, the National Gallery of Canada, and the Clark Institute in the U.S.A.

⁴ Professor Emeritus of Art History, University of Warwick, author *Constable, the Painter and his Landscape* (Yale, 1983) and *Constable* (Thames and Hudson 1987)

⁵ Former art critic for the Observer , curator, including the exhibition of Constable at the Louvre, historian , broadcaster, author of *Lucian Freud on John Constable*, *Pitmen Painters*, and many other books, currently the Lucian Freud biography

⁶ Managing Director of Art Market Research a company which has for thirty years created indexes and provided analytical reports on all sectors the international art market.

33. Proviso 3: *'the plans to integrate the Suffolk Punches as part of the visitor offer are realisable'*. This is yet another conclusion to the effect that current plans for the scheme are inadequate and require further work before the Council could be satisfied that its content has even been settled.
34. Caveat one: *'that the development will be of high quality'*. This is not something that can simply be settled by drafting conditions or a s.106 obligation. In order to overcome this hurdle the Council should require a demonstration first, that the proposals have been adequately costed and second, that the funds are available to achieve this result in terms of high quality.
35. Caveat two: *'that the balance of investment between 'content' and infrastructure is addressed'*. This raises yet further issues with the reliability of the business plan submitted to CBC and the need for yet further funding to be obtained.
36. Caveat three: *'that the promised programme of events is forthcoming'*. Further assurance therefore needs to be required of the applicant by the Council before the application is ready for determination.
37. In addition to these many flaws in the economic case for the proposals I draw attention to the conclusions reached by the analysis undertaken by SVAG of viability issues. In particular they have deduced from such figures as are disclosed by BMA that the maximum number of employees that they consider that could be afforded by the projected turnover of c£1.4m and on the BMA maximum visitor attendance rate 130,000 pa is c.40 FTE, when the scheme would be running at an annual loss of c.1.8m. The further figure they deduce from the BMA report is that the predicted capital cost of the proposals, before satisfying the provisos and overriding caveats in BMA's Supplementary, is likely to be in the order of at least £19m. It would be wholly irresponsible to grant planning permission to this scheme without a convincing demonstration in the public domain that such funds as are necessary to produce the scheme in a satisfactory form will be available to the applicant.
38. The members of the Council should be clear that if they were to approve these proposals they would be flying in the face of the guidance they have received from truly independent experts as to the essential lack of viability of these proposals with all the risks that that course of conduct entails. It would be premature and irrational therefore for them to do so in the public law sense until the applicant has demonstrated that the legitimate concerns of their experts as represented by the provisos and 'overriding caveats' to their opinion have been satisfactorily addressed.

39. It should be noted that there are also important issues with respect to the impact of the proposals on the nearby Church of All Saints, a Grade 1 heritage asset and on ecology in light of the objection from English Nature. These matters both fall outside the scope of my instructions.

Conclusions

40. I have reached the following conclusions for the reasons set out above:

- i. There is inadequate material in the public domain for the public adequately to understand the applicant's case that this proposal would be viable. This prevents the public from proper participation in the process of public consultation on the application. The need for this impediment has not been demonstrated. The inference is that commercial confidence is raised not because of the existence of any such confidence with respect to the business plan in reality but to inhibit informed debate.
- ii. The senior officers of the Council who are to report the application to members have compromised their independence and tarnished their appearance of fair dealing by predetermining their approach to the application before the completion of the public consultation process and their own internal consultation process, critically with their policy team.
- iii. The approach to the issues that those officers have indicated that they intend to adopt is wrong in law and that advised by the Council's own policy team and their independent planning consultants is correct.
- iv. It has been demonstrated by the Council's own policy team and the retained independent planning consultants that the proposals are plainly in breach of the development plan, which is to be regarded as up to date for these purposes. Therefore, pursuant to s.38(6) of the 2004 Act, can only be justified if the balance of material considerations indicates that they should nevertheless be granted planning permission.
- v. The view of the independent economic, transport and planning consultants engaged by the Council is that these are not sustainable proposals in the sense used in the National Planning Framework.
- vi. There is compelling evidence from the independent economic consultants appointed by the Council to the effect that the proposals in their current condition are not viable, are likely to fail and will not bring about the tourism, economic and social benefits claimed for them. That is supported by the further analysis from SVAG.
- vii. The Council has received advice from the same experts that six pre-conditions should be overcome before the Council would be in any position to consider giving support the application's propensity to provide a regional facility. Those include such important matters such as a revised

Business Plan, acquisition of original Constable artworks, better definition of the Constable link and additional funding requirements. All of these are issues on which the Council presently have no information.

- viii. The lack of definition of such major proposals advanced as an exception to established policies, particularly with regard to the scale of development acceptable within the AONB, is remarkable and should be noted by members. As a result members should be extremely wary of the claimed benefits of the proposals and alert to the real risk that the grant of planning permission to such an ill-defined collection of uses could lead to very substantial problems in the future should there be pressures to vary the proposals in order to provide something that is more likely to enjoy economic viability. In other words, they should not sell the pass to major redevelopment on this site unless they are satisfied that the proposals are both fully defined and assessed as likely to be viable.
- ix. The Council has also received advice from its independent transportation experts that the proposals are in an unsustainable location which is not a matter which the applicant can or is likely to be able overcome.
- x. In the circumstances it is difficult to see how members approaching this application with an open mind could rationally conclude that it would be appropriate to grant planning permission.

7th February 2013



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