WAVERLEY BOROUGH LOCAL PLAN PART 1 EXAMINATION

FURTHER NOTE ON BEHALF OF WAVERLEY BOROUGH COUNCIL IN RELATION TO THE MILFORD GOLF CLUB COVENANTS

This further note is written in response to the Inspector's invitation to the Council to provide further submissions in relation to the note provided by DMH Stallard dated July 2017 and counsel's advice produced on instructions from Mr and Mrs House dated 6 July 2017. It responds, point by point, to the DMH Stallard note, adopting the paragraph numbering from that note.

1. The Council did not prepare a joint statement because the position is not agreed with Mr and Mrs House. The Council *does* agree with the submissions made on behalf of Crown Golf Property Ltd ("CGPL"). The Council notes that CGPL have told the Council they will make an application to vary or modify the covenant *if* it transpires that one is necessary. Further, as has previously been discussed, disclosure on behalf of Mr and Mrs House has been both late and partial. For example, the conveyancing file has not at any stage been made available to the Council. As to whether the issue is new, it is worth recapping that the hearing statement dated May 2017, which did have a level of detail to it, simply did not mention, still less rely upon, the covenant point. So far as the Council is aware, it was first mentioned in the DMH Stallard letter of 14 June 2017 to the Inspector enclosing the letter to CGPL of the same date. Those letters were brief and did not discuss the issue of potential modification, or the contents of the conveyancing file. Naturally, the Council does not routinely conduct title searches in relation to pieces of land which come forward through a call for sites or indeed the local plan exercise. In those circumstances the nature of the way this recent development came about and the material said to support it deserves closer consideration.

2. Mr and Mrs House rely heavily on counsel's opinion (which appears to have been obtained as a matter of urgency in response to the Council alerting DMH Stallard to the absence of any such material outside an examination session, and reference to that absence in the Council's first note on this issue). However:

    a. That opinion is heavily and carefully caveated: see §4 *"opinions expressed in this note are based on the limited documentation I have seen and a number of assumptions . . . [§5] . . . This opinion is given at a very early stage and without the benefit of expert evidence or sight of a detailed plan of the proposed development . . ."*. See also §14. By way of further example the documentation provided to counsel was apparently limited to the sparse documentation referred to at §5.

    b. The material supplied to counsel did not include even the conveyancing file which is capable of being critically important both to whether covenants are enforceable and also to the issue of public interest (because, and simply by way of example, the file will demonstrate what knowledge Mr & Mrs House purchased the land with).

c. §19 of the opinion proceeds, wrongly, in testing the issue of proposed user in the absence of planning permission ("PP"). As previously explained in the Council's first note, it is for that reason, amongst others, that developers typically seek to obtain PP *before* applying to discharge or modify such restrictive covenants. Similarly, §§21-23 have no application to the facts which are likely to exist – i.e. a grant of planning permission (if permission is refused no application to vary is likely to be made). The points made are, perhaps, reflective of the very limited material provided to counsel.

d. The opinion does not deal at all with the detailed set of transactions which occurred after the relevant covenant was entered into (see para 2 of the Council's initial note).

e. The opinion does not discuss (or even identify) the statutory test actually contained within s.84(1B): see para 6 of the Council's initial note and c.f. the discussion of those tests in para 7 of the Council's initial note. Nor are the individual components of that test the subject of discussion within the opinion. For example, the development plan is simply not mentioned.

f. The suggestion at §34 of the opinion that practical benefits identified by counsel could not be compensated by money is simply wrong. There are examples where the Upper Tribunal has awarded compensation for, for example, the loss of views or other impacts on amenity caused by increases in density of dwellings in cases where such impacts were adjudged to be substantial.

g. In those circumstances it is plainly not a finalised view provided by counsel and little reliance can be placed upon it for present circumstances.

3. The Council responds to this paragraph as follows:

a. It is not for the Council to present evidence about the benefit and burden of the covenant. The Council only has access to the land registry entries whereas Mr and Mrs House have access to, for example, all of the conveyancing documentation. Mr and Mrs House have chosen not to disclose it in pursuing their current objection to the eLP, nor did they give that material to counsel advising them.

b. Neither DMH nor counsel – see §33 of counsel's advice - cite any authority supporting the proposition that a public interest argument will or is likely to fail simply because there are also other sites that may be available. The issue of public interest, and the case that exists for this site, is summarised in the Council's initial note on this issue.

c. It is clear that in expressing the view at §33 counsel did not have the benefit of *any* of the planning material placed before the examination in relation to

the need for housing land and the suitability of this particular allocation in that context.

d. In addressing the public interest test (or the reasonable proposed user test) counsel does not identify or discuss the impact of the necessary prior conclusion that exceptional circumstances exist so as to justify removing this land from the GB. The importance of this factor to the public interest test is obvious.

e. Counsel appears (implicitly and correctly) in §24 to accept that if PP were granted, residential use of the land would be a reasonable user.

f. Once the public interest test is satisfied it is no bar to modification or discharge that the covenant if enforced would continue to secure a practical benefit to the Houses, because the statutory tests are alternatives: see para 4 of the Council's initial note (Counsel's opinion does not set out the relevant statutory section or acknowledge this point).

g. In any event, the Council does not accept that the Houses would necessarily be able to demonstrate that continuing to enforce the covenant would secure a practical benefit of substantial value or advantage under the other limb of ground (aa). In summary, that is because:

    i. The covenant does not prohibit development. As the Houses acknowledge, the total number of units which could be built consistent with the covenant is 81: 27 main dwelling houses together with up to two units of staff accommodation on each plot (see §29 of counsel's opinion).

    ii. Whether 27 or 81 is used as the number of units that could be built consistent with the covenant, any additional disruption would not be sufficiently substantial to satisfy the test. The existing house is well set back from the boundary line and shielded by a mature boundary of trees and hedgerow. The house cannot be seen from the development land. In addition, there is no good evidence (indeed any evidence) to show that any reduction in value to the House's land would be significantly affected by whether the development was 27, 81 or 180 units.

4. The issue of delay is overstated. As pointed out in the Council's initial note, a landowner like CGPL faced with these circumstances will typically seek to secure PP first in order to substantially strengthen an application to vary or discharge the covenant. The DMH Stallard note fails to appreciate the implications of this typical approach in making the suggestion that there will not be developer interest until the covenant issue is determined. In relation to any necessary proceedings, there can be no sensible doubt that the value of the covenant can be calculated, and so the only issues arising at the first stage of proceedings would be whether the covenant was in

fact enforceable and, if so, whether or not it ought to be varied or discharged. Such determinations do not require substantial evidence or substantial court time. Hearings dealing with matters of public interest can be expedited. They can be arranged in short order and well inside the suggested period of 12 months. It is neither sensible nor necessary to factor into that timescale the speculative idea of appeals for present purposes.

5. It is of note that the passage of the NPPG Mr and Mrs House rely upon does not cite restrictive covenants; but gives much more fundamental examples about ownership or possession of land. In this case it is clear that CGPL owns all the land required. In any event, the balance of the same para of the NPPG continues *" . . . Where potential problems have been identified, then an assessment will need to be made about how and when they can realistically be overcome . . ."*. This advice was intended to apply to much more fundamental issues than restrictive covenants, but in any event, the Council has set out how in its view the issues can realistically be overcome.

6. For the reasons set out in its initial note and above, the Council agrees with CGPL that the covenant is, *if necessary,* very likely to be modified if not negotiated away.

7. For all those reasons there is nothing sufficient to demonstrate that Milford Golf Club should not be allocated within the eLP.

WAYNE BEGLAN

CORNERSTONE BARRISTERS

27 OCTOBER 2017