FLINTSHIRE COUNTY COUNCIL

REPORT TO: PLANNING & DEVELOPMENT CONTROL COMMITTEE

DATE: WEDNESDAY, 20 JUNE 2012

REPORT BY: HEAD OF PLANNING

SUBJECT: GENERAL MATTERS - VARIATION OF CONDITION NO. 3 ATTACHED TO OUTLINE PLANNING PERMISSION REF. 035575 TO ALLOW 7 YEARS FOR THE SUBMISSION OF RESERVED MATTERS FROM THE DATE OF THE OUTLINE PLANNING PERMISSION BEING GRANTED RATHER THAN THE 5 YEARS PREVIOUSLY PERMITTED AT CROES ATTI, CHESTER ROAD, OAKENHOLT.

1.00 APPLICATION NUMBER

1.01 49154

2.00 APPLICANT

2.01 Anwyl Homes Ltd.

3.00 SITE

3.01 Croes Atti, Chester Road, Oakenholt.

4.00 APPLICATION VALID DATE

4.01 21/10/2011

5.00 PURPOSE OF REPORT

5.01 Members were informed at the 14th March 2012 committee that an appeal against non-determination had been lodged with the Planning Inspectorate. The appeal is to be heard by way of a public inquiry on 20th – 22nd August 2010. Members resolved that the Flintshire Council stance in respect of the appeal was to request that the Inspector allow the appeal subject to a Section 106 Agreement and conditions listed in the officer's report for that Committee. However, in addition to endorsing the conditions and Legal Agreement recommended by

officers, the Committee also stipulated a further condition requiring that the play area be up to adoptable standards, that it be offered to Flintshire County Council for adoption and that a 10 year maintenance sum be requested if the play area was adopted. The report to the Committee on 14th March is appended to this report.

5.02 The Public Inquiry requires final proofs of evidence in respect of this matter to be presented 4 weeks before the Inquiry date i.e., 20th August 2012.

5.03 Upon receipt of legal advice from Counsel appointed to appear at the Public Inquiry, Members are asked to consider further the stance to be adopted by the Council in respect of the appeal.

6.00 REPORT

6.01 Following the Committee resolution of 14th March 2012, Counsel has been instructed in respect of the appeal. The strength of planning conditions and the proposed Section 106 Legal Agreement have been assessed. Counsel considers that an arguable case can be presented in respect of the majority of the conditions/Legal Agreement, but in respect of the condition requested by Members to be imposed regarding the provision and maintenance of the play area for the site, Counsel's Advice is that a case cannot be reasonably advanced for such a condition.

6.02 In his Advice, Counsel,points out that that Paragraph 72 of Welsh Office Circular 35/1995 (*The Use of Conditions In Planning Permissions*) states:-

"Conditions may not require the cession [or giving up] of land to other parties, such as the highway authority."

Therefore, it is clear from the Circular that such a condition would in any event be contrary to national policy. As such, Counsel's view is that it is practically inevitable that the Inspector in this appeal would refuse to impose the condition.

6.03 Counsel accepts the reason behind the Committee's request for a condition to this effect was concern about the provision and maintenance of the play area. In itself that is a legitimate concern and planning consideration. Moreover, if the Appellant were willing to enter into a planning obligation to secure the transfer of the play area to the Council and to provide a sum for its maintenance, there would be nothing objectionable in that. The difficulty lies in the fact that the Council could not insist upon the Appellant doing so if they were unwilling for the following main reasons:-

- It was not required in the original grant of consent and it is unclear what material change of circumstances the Local

Planning Authority could rely on to justify its change of position, e.g. there does not appear to have been any material change in policy justifying the change of position.

- The local policies and supplementary planning guidance in force in relation to play areas and new residential development do not require that they should be given up for adoption by the Local Planning Authority. Rather, developers are advised that they have the option either to arrange for the maintenance of the site themselves (e.g, through a management company), or to dedicate the site to the Council and provide a commuted sum. Accordingly, there does not appear any policy basis for an insistence on transfer to the Local Planning Authority.
- In any event, concerns regarding whether the developer or third party will adequately provide or maintain a play area or open space can be addressed without the need to require the transfer of the area to the Local Planning Authority. For example, if a scheme is to be submitted under condition (or if the matter is dealt with alternatively by way of planning obligation), requirements can be imposed as to the standard of provision or maintenance which can then subsequently be enforced if there appears to be non-compliance.

In Counsel's view, it is therefore likely that the Inspector would consider that the Council would be acting unreasonably.

6.04 In that context, Counsel considers the following provisions of Welsh Office Costs Circular (no. 23/93) to be of particular relevance:-

"In any appeal proceedings, the authority will be expected to produce evidence to substantiate each reason for refusal, by reference to the development plan and all other material considerations. If they cannot do so, costs may be awarded against them. This is the ground on which costs are most commonly awarded against a planning authority. Each reason for refusal will be examined for evidence that the provisions of the development plan, and relevant advice in Departmental planning guidance in PPGs, RPGs, MPGs or Circulars, and any relevant judicial authority, were properly taken into account; and that the application was properly considered in the light of these and other material considerations. In any such proceedings, authorities will be expected to produce evidence to show clearly why the development cannot be permitted." (annex 3, paragraph 8)

"[another] example of unreasonable behaviour is when a planning authority cannot show good reason – such as a material change in planning circumstances – for failing to renew an extant or a recently expired planning permission." (annex 3, paragraph 19).

6.05 Counsel also has concerns regarding the non-determination of the application. The Costs Circular gives specific warning that an

inadequately explained failure to determine applications within the statutory period may also be met with an award of costs:-

"If a planning authority fail to determine an application within the statutory period, or any extended period to which the applicant agrees, the applicant may appeal to the Secretary of State [now the Welsh Ministers]. Paragraph 7 of Circular 22/80 (WO 40/80) advises that, if a decision will be unavoidably delayed, the applicant ought to be given a proper explanation, including information about any consultation with other bodies and some indication when a decision is likely to be given. In any appeal under section 78(2) of the 1990 Act, the planning authority will be expected to show that they had specific and adequate reasons for not reaching a decision within the time-limit. An example is where they were discussing relevant issues with the appellant and had requested an extended period, or required further information which was requested but not received from the appellant soon enough to enable a timely decision to be made. An award of costs may be made against the planning authority if, in the appeal proceedings, they cannot show that they had specific and adequate reasons for failing to make a decision; or if they cannot produce evidence to substantiate each of their stated reasons why they would have refused planning permission (if they had determined the application within the prescribed period)." (annex 3, paragraph 26)

In this case, Counsel considers that he has not seen any cogent reasons why the application was not determined in time.

6.06 Accordingly, the advice of Counsel in this matter is quite clear, that any attempt to impose the additional member requested Public Open Space condition during the course of the appeal proceedings is quite likely to be judged unreasonable, an application for costs will be made, and will be successful. In addition Members should be mindful that the appeal is against non-determination and there has been a duplicate application which Members resolved not to determine, which could give rise to a further costs application in the event of an appeal in that case.

6.07 Members will also recall that when the stance for the appealed application was presented to Committee on 14th March 2012 the Council were still in the process of clarifying whether or not an additional financial contribution would be required in addition to land "gifted" over to the Council to provide for a school, as set out in the existing Section 106 Agreement relating to the site. Members endorsed the stance that, if deemed necessary, a financial contribution for enhanced educational facilities be made for schools that are reasonably served by the development. In the report to the 18th April 2012 Committee which dealt with a duplicate application Ref: 044426, Members were informed that late observations received from the Head of Education and Resources confirmed that in addition to the "gifted" over of land to provide for a new school, an educational contribution of £290,500 would be required. Members' resolution was

that the application should be deferred.

Therefore, at that time officers progressed the Council's appeal stance on the understanding that a financial contribution would be required. During the progression of the Council's appeal statement, the Head of Education and Resources has reviewed the background data on justifying the need for an educational contribution and now is of the opinion that it would be unreasonable to require such a contribution. This being the case, Members are requested to allow the Council's stance on the appeal to be progressed without reference to a need for any commuted sum payment in regards to educational provision.

7.00 RECOMMENDATIONS

7.01 That the Planning Committee reconsiders the Council's stance in this appeal and resolves in accordance with the recommendation in the report to the 14th March 2012 Planning & Development Control Committee) as follows:-

Not to object to the grant of planning permission pursuant to the appeal, subject to the re-imposition of all previous planning conditions attached to the outline planning permission and to the appellant entering into a section 106 Obligation/Unilateral Undertaking to re-impose all the requirements of the original legal agreement attached to the outline planning permission i.e.

- scheme to be in general conformity with the Revised development Brief,
- construct or to reimburse the Council for the reasonable cost of a footpath/cycleway linking the site with Leadbrook Drive,
- phasing/occupation of housing,
- setting aside of 1.5 hectares of land and its transfer for a school site and an extension to the school site of not less than 1.0 hectare.
- setting aside of land for a shop site,
- setting aside of a site of 0.45 hectares for a health centre,
- setting aside of a site of 0.25 hectares for a community centre and its transfer
- provision of 4.5 hectares of open space including an enclosed equipped
- children's play area, a landscape strategy, a management strategy for open space areas including establishment of a management company
- Provide for a maximum of 10% of number of dwellings for affordable use.

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