SHROPSHIRE COUNCIL

IN THE MATTER OF THE INDEPENDENT EXAMINATION OF THE SAMDev LOCAL PLAN

OPINION

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1. I am instructed on behalf of Shropshire Council in connection with the independent examination of the SAMDev Local Plan. As a result of issues that arose during the oral hearings sessions in December 2014, and in particular the status of a piece of land between the A5124 and Battlefield Brook ("the Land"), the Inspector asked the Council to answer the questions in her "Protected Employment Site Inspector's Additional Questions to the Council" document dated 5 January 2015. In providing the answers submitted to the inspector I was consulted and gave the Council advice. The Inspector has since asked if she can see my opinion. My advice to the Council did contain my opinion on the law, but also covered other matters. I have therefore agreed to provide this opinion which simply sets out the law on the issues the inspector raised; I understand this opinion will be sent to the inspector and will therefore become a public examination document.

2. The SAMDev as submitted includes:

    a. Policy MD9 which protects "existing employment areas shown on the policies map";
    b. A policies map which identifies the Land as an existing employment area;
    c. Policy MD4 which protects committed and allocated employment land identified in policies S1 to S18 and shown on the proposals map (S16 inset 1 is the map which covers the area in which the Land is situated).

3. Both the policies map and s16 inset 1 show the Land as safeguarded as being within an existing employment area. It is not 'allocated' for employment use because it is at present regarded as an existing employment area.

4. The first inspector's question ("IQ1") was "Is it [the Land] existing employment land that can be safeguarded? The inspector refers to existing employment land, she appears to regard all land within an 'existing employment area' as being existing employment land.

5. The SAMDev does not define "existing employment land". Paragraph 4.78 of the SAMDev provides:

> "As required in policy CS14, the protection of existing employment areas is based on evidence of the purpose, viability and redevelopment potential of the sites. This evidence is set out in the Shropshire Strategic Sites and Employment Areas Study for Shrewsbury (Phase 1) and the Market Towns and Key Centres (Phase 2). These studies identify a hierarchical ranking of existing employment areas in the principal settlements of the County which is explained in Table MD9.1"

6. It would appear, therefore, that existing employment areas are made up of sites identified in the evidence base. The Land is identified as being part of the Greenhills Enterprise Park

7. I understand that the evidential basis for including the Land within the definition of an existing employment area (and therefore within the Inspector's classification of existing employment land) is that it was thought to benefit from an extant grant(s) of planning permission:

   a. 02/1429/O – a hybrid permission approving highways infrastructure works in detail and employment development plots in outline.
   b. 06/1117/F – a full permission for the Food Enterprise Centre on plot 5a.
   c. 08/0484/F – a full permission for three Class B industrial units on plot 2 (which lapsed without having been implemented in 2012).
   d. 12/0357/F – a full permission for a Mercedes car dealership completed in 2014.

8. Therefore it was apparently the case that the remaining plots (2, 3, 4 and 5b) were included in the safeguarded existing employment area on the basis of the 'existing' permission 02/1429/O.

9. However, it is now realised that in respect of plots 2, 3, 4 and 5b permission 02/1429/O cannot be relied upon. While condition 4 of 02/1429/O did not specify a date by which reserved matters applications should be made, s92 of the Town

and Country Planning Act 1990 deems that such applications should have been made within 3 years of the date of the grant of outline permission. Further, s73(5) now prevents an application under s73 to extend the period for submitting details of reserved matters from being made to effectively extend the life of an outline permission. Employment development on these remaining plots now would require a fresh grant of outline permission (or full permission).

10. It would therefore appear to be the case that insofar as these plots were included within an existing employment area on the basis that they were subject to an extant grant of planning permission, the evidence base was not accurate.

11. I am instructed that at the hearing sessions in November 2014 the Council, having accepted (whether on a preliminary basis or otherwise) the lapsing of the outline elements of hybrid permission 02/1429/O, sought to justify the continued inclusion of the Land as an existing protected area on an alternative basis. It was also apparently canvassed at the hearing sessions that if sites without the benefit of an extant permission could not be protected as 'existing employment land' under policy MD9 then it might be possible to allocate the Land for employment purposes under policy MD4.

12. As a matter of law, in my opinion, (and in answer to IQ1) what are now plots 2, 3 and 4 do not benefit from an extant grant of planning permission. Any development on these plots would require a fresh grant of outline/full permission.

13. However, again as a matter of law, this does not necessarily disqualify these plots from forming part of an existing employment area and the identification of these plots as being part of an existing employment area could be sound, as a matter of planning judgment, if there is an evidence base justifying such an approach. There is no definition of an "existing employment area" in the Core Strategy or SAMDev which limits inclusion within such an area to only those sites with an extant permission for employment-related development.

14. IQ2 addressed the engineering works (laying out of access ways and some engineering landscaping works) carried out in purported reliance on 02/1429/O; The inspector asked first "Were these works carried out lawfully?"

15. Development is carried out 'lawfully' when what is done is authorised by a grant of planning permission (whether an express grant or a grant by Development Order).

16. The applicable law is as stated by the Court of Appeal in *Greyfort Properties Ltd v SSCLG* [2012] JPL 39; [2011] EWCA Civ 908.

17. The 'starting point is the '*Whitley* principle' as set out by Woolf LJ in *Whitley & Sons v Secretary of State for Wales* (1992) 64 P&CR 296 at p302: If (in this case engineering) operations contravene the condition on a planning permission they cannot be properly described as commencing the development authorised by the permission – any such operations are regarded, in common law, as having been carried out without any grant of permission.

18. However, there have been a number of limited exceptions subsequently recognised by the courts to this judge-made 'general rule'. Of relevance to this case are:

    a. Where the requirements of a condition have been met in substance, although not in form: *R v Flintshire CC ex p Somerfield Stores Ltd* [1998] P&CR 336. In that case the relevant report had been submitted and approved but the relevant formalities, including a written notice of approval, had not been achieved by the time work began on site.
    b. Where the LPA had approved details required by condition but after the work had been carried out. This has the effect of retrospectively making the work carried out lawful: *Leisure Great Britain plc v Isle of Wight Council* (1999) 80 P&CR 370.
    c. Where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development: *R (Prokopp) v London Underground Ltd* [2003] EWCA Civ 961, [2004] 1 P&CR 31 at [85] per Buxton LJ.
    d. Where the condition does not go to the 'heart of the planning permission', so that failure to comply with it will mean that the entire development, even if completed and in existence for many years must be regarded as unlawful and thus producing an absurd result: Richards LJ in *Greyfort Properties Ltd* at [19] approving the approach of Sullivan J in *R (Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] EWHC 840 (Admin). However, it should be noted that whether a condition does 'go to the heart

of the permission' is (a) fact sensitive and (b) a matter of planning judgment for the decision-maker (ie a LPA or inspector).

19. Condition 2 attached to permission 02/1429/O provided that any development except "the access shown on plan no 900" could not be commenced before the approval of the reserved matters. On the face of it therefore development could be lawfully commenced by the construction of the access shown on plan 900 in advance of the approval of reserved matters without further approvals unless other conditions operated to prevent it.

20. In the instant case, the ***Whitley*** principle is plainly engaged because other conditions did require further acts of approval before any development (ie including "the access shown on plan 900") commenced:

    a. Condition 11 – any development except for "structural landscaping" before the approval of a scheme of landscaping "in relation to the individual buildings". This would therefore 'bite' against the development shown on plan 900.
    b. Condition 10 – any development before the approval of facing materials for buildings.
    c. Condition 17 – any development before the approval of a scheme for wheelchair accessible parking spaces.
    d. Condition 18 – before the approval of details of surface water drainage.

21. While construction of 'structural landscaping' is not caught by condition 11, condition 2 operates in respect of structural landscaping, because it requires approval of details of all landscaping as a reserved matter.

22. Condition 20 is not a 'condition precedent' preventing any development before the approval of details, but only "above ground development".

23. Condition 23 is also not a 'condition precedent' preventing any development before the approval of a masterplan, because it expressly excepted "the main road access and structural landscaping" from the prohibition.

24. Reading the permission as a whole, it would appear that Shrewsbury and Atcham Borough Council, who granted the hybrid permission, probably intended that the

construction of the access shown on plan 900 and the structural landscaping could be carried out without further approval of details. However, that is not what was achieved by the words used on the face of the grant.

25. At the time the access works which purported to be in reliance on the permission were carried out it is next necessary to determine whether all of the 'conditions precedent' identified above had been discharged.

26. However, in the event that they had not been so discharged, then the question arises as to whether any of the exceptions to the ***Whitely*** principle can properly apply. This is essentially a matter for the Inspector (being the person at present exercising the planning judgment), but it would, in my opinion, be relevant to consider in particular:

    a. Whether the details required under conditions 10, 11, 17 and 18 had in fact been approved prior to the works being commenced? If so the ***Whitley*** principle would be satisfied.
    b. Whether the details required under conditions 10, 11, 17 and 18 were in fact approved after the works were commenced? If so the first or second exception to the ***Whitley*** principle would be made out.
    c. In respect of the access works shown on plan 900, whether the requirement to have approved in advance a scheme of landscaping "in relation to the individual buildings" (condition 11), the approval of facing materials for buildings (condition 10), a scheme for wheelchair accessible parking spaces (condition 17) and the details of surface water drainage (condition 18) went to the heart of the permission to build the access? If not, then the fourth exception to ***Whitley*** principle could be made out.

27. The next question to be resolve is factual: What were the access road works approved by virtue of their being shown on plan 900?

28. It would appear that plan 900 dealt with what would now be regarded as 'points of access to the highway' (ie highway junctions) – there being other plans which dealt with other access issues. The permission is clear that only these works shown on plan 900 can be carried out before approval of reserved matters.

29. It is next appropriate to consider the position of the engineering and other works of structural landscaping that have been carried out. It appears that there was not an approved plan showing structural landscaping. If that is the case then the details must have been elsewhere in the application documents or were to be provided as part of the reserved matters application. The permission 02/1429/O itself recites that what is granted permission is "for the development proposed by you in your application". It therefore follows, in my opinion, that the structural landscaping details could have been approved at the time of the grant if the detail was proposed and shown in the application.

30. However, if it was not, then the following questions of judgment fall to be considered by the Inspector in respect of structural landscaping:

    a. Were details ever approved (for instance when the masterplan required under condition 23 was approved)? If so, would it be irrational or an abuse of power to regard the construction of the structural landscaping as being unauthorised?
    b. If the details were not approved, did the detail of structural landscaping go to the heart of the permission?

31. Once these issues are established, what was actually carried out by way of access construction and structural landscaping can be compared with what was approved and a conclusion reached as to whether the works fell within the ambit of the permission. In this context the law is that a developer is not required to build a development precisely or exactly as shown on approved plans. In *Lever (Finance) v Westminster City Council* [1971] 1QB 222 at page 230B Lord Denning MR said that a planning permission covered the work specified in the plans and "any immaterial variation therein". Although *Lever (Finance)* went on to deal with the effect of a decision by the planning officer that a variation was immaterial, in terms of estoppel, which is not now appropriate in the light of decisions such as *R (Reprotech (Pebsham) Limited) v East Sussex District Council* [2002] UKHL 8, [2003] 1WLR 348, the starting point for Lord Denning's analysis was that a planning permission actually covered what was specified in it together with immaterial variations. This approach accords with the observations of Lord Hobhouse in *Sage v SS ETR* [2003] 1 WLR 983 at [23] and that of Collins J in *Townsley v SS CLG* [2009] EWHC 3522 (Admin) at [20] and was accepted by Ouseley J in *R(Midcounties Co-operative) v Wyre Forest DC* [2009] EWHC 964 (Admin).

32. My attention has been drawn to the possibility that "non material amendments" or "working amendments" were made to the outline elements of the hybrid permission or the plans approved under it in respect of the roads shown on the masterplans and drawings accompanying the original planning application.

33. In respect of this suggestion I make the following observations:

a. The approval of any such amendments makes no difference to the principle as to whether the outline permission was lawfully implemented. The question still remains whether the conditions precedent were complied with before the development was commenced. So the fact remains:
   (1) Was development commenced before the details of the siting design and external appearance of the buildings were approved? (condition 2);
   (2) Was development commenced before the approval of a scheme of landscaping "in relation to the individual buildings"? (condition 11);
   (3) Was development commenced before the approval of facing materials for buildings? (condition 10);
   (4) Was development commenced before the approval of a scheme for wheelchair accessible parking spaces? (condition 17);
   (5) Was development commenced before the approval of details of surface water drainage? (condition 18).

b. The fact that plan 900 may have been amended, or the masterplan agreed and then varied makes no difference to the ***Whitley*** principle that development carried out in breach of a condition is, prima facie, not development in accordance with the permission on which the condition appears.

34. However, the history of any such amendments is potentially legally relevant to the question as to whether an exception to the ***Whitley*** principle is made out. As explained above the Court of Appeal in ***Greyfort*** recognised that the relevant exceptions are a matter of planning judgment for a decision-maker and not a matter of law for the courts (or counsel).

35. The Council should be cautious in asserting that the acts of its predecessors in (helpfully?) agreeing to 'non-material' amendments now operate to bind the Council. Of course a planning authority can approve anything when it has the power to do so, but the law is now settled that any 'informal' approvals will not run in circumstances where the statutory planning code provides for a formal route to approval that involves the public (eg s73).

36. There was once (but is no more) a further exception to the *Whitley* principle: where the local planning authority have agreed that development could commence without full compliance with the relevant conditions - *Agecrest Ltd v Gwynedd CC* [1998] J.P.L. 325.

37. But it is now accepted that the case law (and indeed the statutory framework in respect of time limits) has moved on since the *Agecrest* decision. In particular the scope for waiver by non-statutory means of the need to comply with a condition is extremely limited, whether it is a case of an alleged waiver of a condition in total, or an allegation that the local planning authority had allowed development to take place in a phased manner, contrary to a condition. In *Henry Boot Homes Ltd v Bassetlaw District Council* [2003] 1 P. & C.R 23 the Court of Appeal took the view that conditions on a planning permission had either to be complied with, at least in substance, or if it was sought to vary or discharge them, the mechanism laid down in s.73, or in appropriate circumstances in s.73A, had to be used (even this statutory route has become more limited with the addition of s.73(5) to the Act). The Court held that whilst it may be possible that circumstances might arise where it was clear that there was no third-party or public interest in the matter to enable a legitimate expectation to arise, such cases would be very rare.

38. The *Henry Boot* approach was approved by the House of Lords in *R(Reprotech (Pebsham) Limited) v East Sussex CC* [2003] 1 W.L.R. 348 and applied since in cases such as *R v Leicester City Council Ex p. Powergen UK Ltd* [1999] 4 P.L.R. 91 and *Coghurst Wood Leisure Park Limited v Secretary of State for Transport Local Government and the Regions and Rother DC* [2003] J.P.L. 206.

39. Therefore, as a matter of law, if the Council's predecessor gave informal consent to amendments to the outline elements of the hybrid planning permission, these amendments will not operate to make implementation of the permission lawful where it was unlawful under the terms of the original permission.

40. At IQ3 the Inspector asks: "What are the implications for the lawful use of the site?"

41. The access and structural landscaping works that have been carried out were either lawful (in the sense that they were authorised by the permission) or although unauthorised, the physical works are now immune from enforcement (ie they cannot be required to be removed). In IQ3 the inspector seems to be concerned that while this might be the case, there is no lawful basis for actually using the access road to gain access to the development plots.

42. In respect of the plots that are now in use pursuant to a later grant of planning permission (the Food Enterprise Centre and the Mercedes car dealership) it would, in my opinion, plainly be irrational or an abuse of power to regard the use of the access roads to these plots to be in breach of planning control when the use was assumed to be lawful at the time of the later grants. If that is not the case, then it would, in my opinion, be highly unlikely to be expedient or proportionate to take enforcement action if such use had not persisted for 10 years.

43. In respect of the other undeveloped plots the access roads have no relevance to the use of those plots because a fresh grant of planning permission would be required before any lawful use could be made of them.

44. Therefore, in my opinion, it would be open to a decision-taker, as a matter of planning judgment, to regard the use of all the access roads to be lawful because their physical construction is immune from enforcement (ie the Council could not require their removal) and to try to prevent use of them would be irrational or perverse (under a still recognised exception to the ***Whitley*** principle).

45. At IQ4 the Inspector asked whether the fact that the site may be judged to be "readily available land" for the purposes of Core Strategy policy CS14 has "any relevance to the existing status of the land".

46. If the Inspector means the 'planning status' of the land in the sense of what extant planning permissions pertain to it, then the answer is plainly "no".

47. At IQ5 the Inspector turns to examine a different question / issue. Her question is put on the basis that the Land does not fall within the definition of an "existing employment area" for the purposes of policy MD9.

48. If that is the case then in my opinion (but subject to the exercise of planning judgment), the 'obvious solution' is to allocate the land for employment use on the proposals map under policy MD4.

49. The Inspector appreciates that in order to do so it is necessary to determine that such an allocation would have to be 'sound' in the sense that it would be consistent with national policy (see paragraph 182) of the NPPF – "the plan should enable the delivery of sustainable development in accordance with the policies in the Framework".

50. In IQ5 the Inspector is also asking the Council to identify the evidence base that would support such an allocation. That is not a strict matter of law for me, however the SA/SEA may need revising to assess the site for allocation (at present it will have been treated as a 'commitment').

51. I trust that this opinion is of assistance to both the Council and to the Inspector. If anything further arises, those instructing me should not hesitate to contact me.

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OF THE SAMDev LOCAL PLAN

OPINION

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