

**INQUIRY INTO THE APPEAL BY CASTLEFIELD INTERNATIONAL LIMITED
AGAINST REFUSAL OF RESERVED MATTERS APPLICATION BY
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL AT
LAND AT TEVERSHAM ROAD, FULBOURN**

APP/W0530/W/22/3291523

**SUBMISSIONS ON BEHALF OF
SAVE FULBOURN FIELDS AND FULBOURN FORUM
ON THE ISSUE OF THE INVALIDITY OF
THE RESERVED MATTERS APPLICATION**

Introduction

1. The reserved matters application which is now being pursued by the Appellant is invalid for three reasons:
 - a. First, no valid reserved matters application was submitted within the 2 year time limit as set out in the outline planning permission ('OPP');
 - b. Second, the reserved matters application which is now pursued is so changed from that originally submitted that it can only reasonably be viewed as a new reserved matters application, which itself is out of time;
 - c. Third, the reserved matters application now pursued does not accord with the Parameters Plan as required under condition 4 of the OPP and continues to be missing key material details in particular in relation to scale.

Each of these matters is addressed in turn below.

(1) No Valid RM Application within the 2 year time limit

2. An outline planning permission sets the ambit for an approved development. Typically, as here, it will lay down parameters and limitations with which a reserved matters application and approval must comply. Necessarily therefore, for a reserved matters application to be valid it must properly sit within the ambit and limitations of the outline planning permission. In *Heron Corporation Ltd and Another v Manchester City Council* [1978] 1 W.L.R. 937 Lord Denning stated:

‘I must, however, add this word of warning. When an application is made for approval of a reserved matter, the application must be within the ambit of the outline planning permission and must be in accordance with the conditions annexed to the outline permission. There is no provision whereby the applicant can, at his own instance, modify the permission. Only the planning authority can do it under section 45 of the Act. If the applicant desires to depart in any significant respect from the outline permission or the conditions annexed to it, he must apply for a new planning permission.’ (at 944).

3. Further, Parliament has laid down in statute that the ability to apply for reserved matters relating to a planning permission is not open ended but is time-limited. Material parts of section 92 of the Town and Country Planning Act 1990 state:

‘(2) Subject to the following provisions of this section, where outline planning is granted for development consisting in or including the carrying out of building or other operations, it shall be granted subject to conditions to the effect –

- (a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission;

...

- (4) The authority concerned with the terms of an outline planning permission may, in applying subsection (2), substitute, or direct that there be substituted, for the periods referred to in that subsection such other periods respectively (whether longer or shorter) as they consider appropriate.

(6) In considering whether to exercise their powers under subsections (4) and (5), the authority shall have regard to the provisions of the development plan and to any other material considerations.’

4. If an application for the approval of reserved matters is made after the date provided for in the conditions of the outline permission then it is to be treated as not made in accordance with the terms of the permission: s.93(4)(b).
5. Further, a condition requiring reserved matters to be approved within a certain period of time may not be amended so as to extend that time via s73 TCPA 1990 (see s73(5)).
6. Therefore, it is clear from the statutory requirements in the TCPA 1990 that Parliament considers that it is of the utmost importance that reserved matters applications are made within a specified period which is set out in the outline permission.
7. In this case, the Council decided to reduce the default statutory time limit for the application of reserved matters from three years to two years (see condition 2 of the OPP (**CD B1**)). Therefore, it was incumbent upon the Appellant to submit a reserved matters application which accorded with the OPP on or before 25 October 2019.
8. It is clear that an applicant cannot submit a reserved matters application which does not accord with an outline permission and then, after the time limit has expired, seek to amend the application such that it accords with the outline permission.
9. In *Inverclyde District Council v Lord Advocate* (1982) 43 P & CR 375 the House of Lords considered a Scottish case whereby the appellant argued that the reserved matters application was contrary to the outline planning permission as it included residential development on an area which was forbidden by the outline permission. The appellant argued that the reserved matters application could not subsequently be amended by the Secretary of State. The House of Lords considered the issue and notably did not confirm that it was lawful for such an amendment to be made out of time (thereby rendering the application valid). Rather, the House of Lords found (on the specific facts of that case) that

the proposal for residential development in the area forbidden by the outline permission was ‘properly to be regarded as a fresh application for planning permission for that area’ (*per* Lord Keith at p.71).

10. Lord Keith went on to state that

‘[T]he only way it was possible to reopen the development status of the hatched area was by a new application for planning permission, and I think it is reasonable to infer that the second respondents were proceeding in a manner which was capable of producing a result consistent with the planning legislation, rather than in a manner which was not so capable....’ (p.71)

11. Thus, Lord Keith recognized that had the reserved matters application (as opposed to a separate application for full planning permission) included residential development on the forbidden area then it would have been contrary to the planning legislation and therefore invalid.

12. Therefore, the necessary question is whether the original reserved matters application made on 19 September 2019¹ was in accordance, or within the ambit of the original permission.

13. The High Court has recently considered the issue of whether an application for the approval of details under conditions can be said to be in accordance with those conditions. In *R(oao Swire) v Canterbury City Council* [2022] EWHC 390 (Admin) Mr Justice Holgate considered a challenge whereby the claimant argued that the approval of details of a masterplan under a condition of an outline planning permission were contrary to a separate condition of that outline permission as they did not accord with a parameters plan. The Judge recorded (at para.30) that the parties agreed that the ground depended upon the ‘true interpretation of the relevant conditions in the OPP’ and that this ‘is an objective question of law for the court to determine’.

¹ It can be noted that no amendments were made to this reserved matters application within the 2 year time limit.

14. In *Swire* the judge noted that the meaning and effect of a particular condition depended upon a combination of inter-related factors ‘the meaning and effect of the words “in accordance with”, the nature of the parameter plans to which condition 6 relates, and how condition 6 sits with other conditions of the OPP’ (para.42). The conditions and relevant plans in the *Swire* case were different from those which are in issue here. However, at paragraphs 43 and 44 the Judge noted that ‘[D]eciding whether a development is in conformity or harmony with parameter plans may well involve matters of planning judgment and degree.’

15. Following *Swire* this matter must be considered on the basis of the proper construction of the OPP and what it required followed by consideration of whether the RMs submitted on 19 September 2019 fell within its ambit.

16. The OPP (granted 26 October 2017) (**CD B1**) comprised:

‘outline planning permission for consideration of access points, for residential development of up to 110 dwellings with areas of landscaping and public open space and associated infrastructure works.’

17. Condition 4 states:

‘The development hereby permitted shall be carried out in accordance with the following approved plans: M02 rev C – Site Plan; M06 rev E – Parameters Plan; P2 – 50m Exclusion Zone B; B411/008 Rev 1 – Cox’s Drove Emergency Vehicle Access; and B411/SK/09 Rev 2 – Indicative Full Right Turn.

(Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.)’ (emphasis added)

18. It can be noted that condition 4 states ‘in accordance with’ rather than ‘in general accordance with’. Nor does it state that any of the listed plans are ‘illustrative’. This is in

contrast to condition 6 which provides that there should be ‘general accordance with the illustrative layout (Drawing number ‘M03 Rev C’)...’ (emphasis added).

19. Condition 28 provides that ‘[N]otwithstanding the particulars shown on the parameters plan, the numbers of storeys and height of the eaves and ridge above AOD of any built development hereby approved shall be determined through Reserved Matters applications’. Thus, this is the only detail in the parameters plan which was left over to the approval of the reserved matters. There is no opportunity for any other detail on the Parameters Plan to be varied under the reserved matters. The scope of the OPP was therefore defined by the list of approved plans at condition 4 (including M06 rev E – Parameters Plan).

20. Conditions 1 and 2 of the OPP address the approval of reserved matters and the time limit for a submission of those matters. They state:

‘1. Approval of the details of the layout of the site, including the scale and location of public open spaces and play areas, the scale and appearance of buildings, and landscaping (hereinafter called "the reserved matters") shall be obtained from the Local Planning Authority in writing before any development is commenced. (Reason - The application is in outline only.)

2. Application for the approval of the reserved matters shall be submitted to the Local Planning Authority before the expiration of two years from the date of this permission. (Reason - The application is in outline only.)’

21. It follows from condition 4 that the reserved matters were required to be in accordance with M06 rev E – Parameters Plan (**CD C3**) (‘the Parameters Plan’). Any reserved matters which were not in accordance with M06 ref E would not be reserved matters pursuant to the OPP as they would not be within its ambit.

22. It can be noted that the Parameters Plan is a drawing at 1:1000@A1 scale. It clearly marks out areas of the Site which are to be used for certain types of development. This includes:

- a. Residential Development (shown in orange);
 - b. Open Space, including proposed planting, children's play areas, footpaths, boardwalks, SuDS and occasional parking (shown in light green);
 - c. Existing vegetation to be retained (shown in darker green);
 - d. Proposed Boundary Planting (shown in darkest green);
 - e. New Boundary Planting within Open Space (hatched green);
 - f. Zone for Vehicular Route (shown with black diagonal lines); and
 - g. Zone for up to 2 Vehicular Links (shown with brown diagonal lines).
23. Nowhere does the plan indicate that any of the areas corresponding to the descriptions above are 'indicative'.
24. Further, the orange and green areas are hard edged and defined. Whereas, some areas (for example zone for vehicular route (black diagonal lines)) do denote some flexibility.
25. On 19 September 2019 the Appellant submitted what purported to be its first reserved matters application to the Council. However, this did not comply with M06 rev E in several important respects. These are illustrated in figures 2 and 3 of Appendix 1 to Mr Kingsley's proof and comprise:
- a. The inclusion of residential development in the north east of the westernmost parcel of development which was shown as open space on the Parameters Plan;
 - b. The inclusion of built development to the west and east of the southernmost development parcel also in the light green open space zone on the Parameters Plan (extending up to 5m into the green zone to the west and 3m to the south);
 - c. The inclusion of an electricity sub-station, pumping house and associated road and hardstanding in the area shown as open space to the south of the western development parcel.
26. In context, these represent significant non-compliance with the Parameters Plan. The Parameters Plan shows a clear boundary to the south of the development parcels which was

to be formed of continuous open space, boundary planting and new boundary planting with open space.

27. The effect of incursion of built form to the south of both the western development parcel and also the south eastern development parcel is to reduce that continuous open space to an area which is interrupted by built development. In the case of the south eastern development platform the proposed incursion of development into the open space reduced that slim areas into a mere slither.

28. It can be noted that the Council and the Appellant has recognized that the original RM application was not in accordance with the Parameters Plan. In its letter dated 15 April 2021 on behalf of the Appellant (Appendix 1 to R6 SoC) Barton Willmore stated that its proposed changes ensured that the development of the southern parcel within the eastern field was 'now fully in accordance with the parameters plan, ensuring a more appropriate relationship between the development and existing properties'. Further, paragraph 3.16 of the Statement of Common Ground states: 'It is acknowledged that the reserved matters application, as submitted in September 2019 did include built form that extended beyond the parameters of the development parcels.' The Appellant must therefore recognise that its original submission was not in accordance with the Parameters Plan. The Council's email dated 15 March 2021 at Appendix 5 of the R6 SoC also shows that the Council's view was that the original RMS (and some amended details which followed) were not in accordance with the Parameters Plan.

29. Therefore, put simply, the application submitted on 19 September 2019 was not a reserved matters application which was within the ambit of the Outline Permission. Further, no application which complied with the terms of the Outline Permission was made before the expiry of the time for such a submission (25 October 2019, Condition 2 OPP). As such, the OPP has now lapsed and the Inspector has no power to determine this application.

30. Further, and in any event, the RMs as originally applied for were materially deficient in one other respect. Condition 1 of the OPP states that one of the Reserved Matters includes

the ‘scale and appearance of buildings’. Scale is defined in Article 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 as ‘the height, width and length of each building proposed within the development in relation to its surroundings.’ Here, the buildings include both the residential development and the built platforms (see definition of a building at s336 TCPA 1990). Moreover, as set out above, condition 28 of the OPP requires the reserved matters application to determine the ‘height of the eaves and ridge above AOD of any built development’. There can therefore be no doubt that the reserved matters application was required to include the scale (including height above AOD) of both the platforms and the houses.

31. None of the plans submitted with the application (Plans at **CD A4**, October 2019) contained the height of the buildings above AOD. Nor did any of the plans show the height or any other detail of the platforms on which the buildings will sit. It has become clear in subsequent information provided in relation to flood risk that the proposed houses will have to be materially elevated on top of platforms. This appears to have first become explicit in the ‘Review of surface water flood management’ by HR Wallingford dated August 2020 (**CD G4**) where at figure 3.1 the report refers to ‘raised platforms’. The conclusions state: ‘It is possible to raise the development so that it is unaffected by surface water flooding’ (p.16). The report gives no detail as to the height of the platforms or the finished floor levels.
32. A note by Cannon Consulting dated 12 August 2020 (**CD A4**) indicates that some of the development platforms would be 500mm (see second para. on p.2). It also states (on p.3) ‘As levels are not one of the five Reserved Matters, the levels will not be set at this stage (although a condition may be added to the Reserved Matters permission if deemed necessary). That statement is wrong. It is clear that the Appellant is requesting permission for built development in the form of platforms as part of its scheme. In order to assess the scale of these (one of the reserved matters) the dimensions need to be known. Further, the height of the platforms has an obvious effect on the height of the dwellinghouses. It is clear that this needs to be approved as part of the reserved matters (both due to scale being a reserved matter and due to the terms of condition 28). This is not a matter which can be left over to a condition.

33. Therefore, the failure to include any details as to the scale of the platforms or the eventual height of the proposed houses above AOD as part of the original RMS application was a material omission and means that no valid RMS application was submitted within the time limit set out in Condition 2 of the OPP.

(2) The RMs now pursued are new RMs and out of time

34. The application which is now pursued before this appeal has been so changed from the application first submitted on 19 September 2017 that it now amounts in substance to a new application. This is not permitted as was made clear by Lord Keith in *Inverclyde*.

35. In *Inverclyde* the House of Lords considered a submission by the appellant that no amendment (however minor) to a reserved matters application could be validly made once the time limit for the submission of reserved matters under an outline planning permission had come to an end (see judgment of Lord Keith at 73). The Court disagreed that no amendment may be made. Lord Keith stated:

'The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry of the period limited for application for approval of reserved matters...an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent.'

(emphasis added)

36. It can be noted that Lord Keith did not comment upon a situation where there was not merely one amendment but a series of amendments over a number of years.

37. However, applying the approach of Lord Keith to the repeated amendments which have occurred in this case, the proper approach must be to compare (a) the RMs which were submitted originally (19 September 2019) with what is now pursued by the Appellant. To apply an incremental approach (i.e. looking at each amendment in isolation as against what it amended) would not be correct. This is because Lord Keith's statement recognises that the issue is whether what is now pursued is out of time. All of the amendments to the reserved matters were made beyond the two year time limit. They must therefore be considered collectively in the round.
38. Further, when considering whether what is now pursued is in substance a new application, it is necessary to bear in mind the context and scope of the outline permission and that any reserved matters application will have to be within its ambit. Therefore, it would not be sufficient to conclude that because what is now pursued is for 110 houses split between three development parcels which is as was proposed in the original reserved matters application, the two are materially the same. The consideration as to whether what is now pursued is in substance a new application must be made against the background of the OPP and the expectation (notwithstanding the submissions above) that any reserved matters application should accord with it.
39. At paragraph 2.1 the Planning Update March 2020 by Barton Willmore (Appendix 3 to Mr Kingsley's proof of evidence) describes the 'amendment package' (at that time, further amendments having since been made) as involving the following 'main changes':
- Revised site layout;
 - Revise the four detached two and a half storey properties to two storey properties;
 - Reduce the density of development to the northern boundary parcels;
 - Redesign of the apartment blocks including reduction of amount of two and a half storey elements, a general reduction in height, and a more active ground floor frontage;
 - Revised affordable housing to ensure spread across the site, including affordable rented and shared ownership housing;

- Minor revisions to window arrangements to create more positive relationships between units and improve surveillance of public spaces;
- Provision of common amenity space to Apartment Blocks A and B;
- Revised materials palette to units;
- Increases in back to back distances between specified units;
- Revision of parking areas to provide an improved landscape led street scene;
- Introduction of further trees to the proposal;
- Removal of road loop at the eastern end of Linear Park; and
- Provision of details regarding the balconies to the apartments.

40. The letter from Barton Willmore dated 10 May 2021 (Appendix 3 to Mr Kingsley’s proof of evidence) sets out the changes which were included in the application made in April 2021. These were described as follows:

‘Main Layout Changes

- All built form has been moved back onto the parameter platforms
- The road access to Apartment Block A has been realigned to fit on the parameter platforms, requiring an amended layout and associated landscaping in this area and a dwelling omitted from this area.
- Road to serve plot 86 moved westwards and plot 90 added in this area
- Road to become a shared surface from plot 104 eastwards
- Amended turning head to eastern end of northern parcel
- Realignment of footways around platforms
- Addition of new drainage mitigation basin to southern boundary of eastern parcel.

House Changes

- House Type changes to plots 1, 2, 36, 55, 60, 66, 76, 77, 78, 81, 82, 83, 87, 91, 96, 97, 107, 108 & 109 (note – the amendment does not introduce any new house types beyond those previously submitted)
- Bay windows omitted to plots 38, 56, 67, 92, 101, 102 & 110
- Plot 16 has moved slightly south to increase separation from Block D1

- Amendment to layouts in and around Apartment Blocks A & B
- Revised parking location to plots 57, 68 and 78
- There have been a number of internal boundary changes between units, generally to the rear plots. In particular plot 86-91 and plots 105-109.

41. The appellant's own material thus indicates the very great extent to which changes have been made.

42. The proof of Eliot Kingsley attempts to demonstrate the number and nature of the amendments which have been made since the submission of the original RMs. The level of changes are such that there is little point in seeking to overlay the September 2019 plans with that which is now pursued as the differences are so numerous. The Inspector is requested to carefully compare and contrast the various plans highlighted in the evidence of Mr Kingsley where the changes are helpfully highlighted in a diagrammatic form. They cannot feasibly be repeated here. However, the following points are highlighted:

- a. Of the 81 plans² originally submitted in September 2019 only 1 (Site Boundary Plan) remains extant/pursued; all of the others have been superseded (even this plan continues to show a layout different to the one now pursued);
- b. As demonstrated by figures 7-17 of Appendix 2 to Mr Kingsley's proof there is no part of the site's layout which remains un-amended. The amendments touch upon the entirety of the proposal;
- c. Roads and footways have been moved;
- d. A significant number of houses have been moved;
- e. The cow lane flood basin has been added to the southern boundary of the site which removes a significant area of open space; and
- f. The housing mix has been amended and house types shifted.

43. Further, the amendments have been accompanied by some updated reports and assessments, including:

² Number taken from list at Appendix 2 to the SoCG

- a. Planning Update, Barton Willmore (2020)
- b. Additional Surface Water Modelling Note, Cannon Consulting (August 2020)
- c. Amended Landscape and Biodiversity Management Plan (July 2021)
- d. Design and Access Statement Addendum, Barton Willmore (March 2020)

44. It is notable that the Council recognized that the changes were so great since the original RM submission that an additional consultations were held in March/April 2020 and in April 2021. This included the consultation of the public as well as the re-consultation of statutory consultees. This is a clear indication that the package of reserved matters pursued at the time of the Committee's decision represents a new application.

45. Ultimately the number and extent of amendments which have been made by the appellant since the original submission of the RMs (even if no further application for amendment is to be made) are so great as to amount to what is in substance a new application. They are therefore pursued out of time. This application is invalid and the Inspector has no power to determine them.

(3) The RMs now pursued are contrary to the OPP

46. Even now, despite all of the many and various amendments, the RMs which are pursued are not in accordance with the Parameters Plan (as required by Condition 4 of the OPP). The greatest areas of conflict relate to the area of open space to the south of the site. On the Parameters Plan this is marked as:

- a. Light Green – Open Space, including proposed planting, children's play areas, footpaths, boardwalks, SuDS and occasional parking;
- b. Dark Green – Existing Vegetation, including root protection areas, to be retained, managed and enhanced. Note: clearance as necessary to enhance stream ecology and accommodate vehicular route as indicated and pedestrian/cycle crossings as appropriate;
- c. Hatched Green – New Boundary Planting within Open Space.

47. Contrary to the Parameters Plan the Appellant has sited the following pieces of infrastructure within that area:
- a. Cow Lane Flood Basin;
 - b. electricity sub-station;
 - c. pumping station; and
 - d. associated roadway.³
48. As set out in the evidence of Alex Bennett the Cow Lane Flood Basin is not part of a sustainable urban drainage system. Rather, it amounts to flood risk mitigation.
49. Clearly neither the electricity sub-station nor pumping station fit within the definitions of ‘Open Space’, or ‘New Boundary Planting’ which is where they are now proposed to be sited.
50. The effect of these additions in the southern area of the site is to reduce that area to a slither of interrupted open space which is clearly different from what was set out in the Parameters Plan. This cannot be argued to be in accordance with the Parameters Plan.
51. Further, there appear to be other non-conformities which include the extension of the north eastern corner of the western development platform into the light green zone on the parameters plan. The main use of this part of the platform appears to be car parking. It is acknowledged that the parameters plan indicates that ‘occasional parking’ could be accommodated in the light green zone. However, the term occasional parking denotes a temporary use as opposed to permanent parking upon a raised platform.
52. Overall, the plans submitted are not in accordance with the Parameters Plan. They therefore contravene Condition 4 of the OPP and are outwith its ambit. Therefore, the Inspector has no power to grant permission for the RMS as sought by the appellant.

³ The substation, pumping station and road way can be seen on the Hard Landscape Strategy Sheet 1 – TRF-CBA-1-GF-M2-L-1010. The Cow Lane Flood Basin appears on Hard Landscape Strategy Sheet 2 TRF-CBA-1-GF-M2-L-1011.

53. Finally, the RMS applied for continue to fail to explicitly set the details of the platforms (including their scale and appearance) and the height of the dwellinghouses above AOD. These details do not appear on any of the refused plans at Schedule 1 to the SoCG. As set out above, what appears to be the proposal of the Appellant to leave these matters ‘at large’ remains contrary to conditions 1 and 28 of the OPP and the RMS applied for cannot be approved in their current form.

Conclusion

54. In short summary, the application which is now pursued by the Applicant is invalid and the Inspector has no power to grant permission for the RMS. This is because:

- a. No RMS application which accorded with the ambit of the OPP was validly made in accordance with the time limit in permission 2. The RMS application which was made did not accord with the Parameters Plan in condition 4 of the OPP;
- b. The RMS application contained no detail as to the scale of the development platforms or the eventual height of the dwellinghouses above AOD. It therefore failed to accord with conditions 1, 2 and 28 of the OPP;
- c. The RMS now pursued have been amended to such a degree from those originally submitted that they amount to what is, in effect, a new application submitted outside of the time limit in condition 2 of the OPP;
- d. The RMS continue to be contrary to the terms of the OPP in that they do not accord with the Parameters Plan (contrary to condition 4 of the OPP); and
- e. The RMS now pursued still fail to contain key details relating to scale and the height of the dwellinghouses above AOD (contrary to conditions 1, 2 and 28).

VICTORIA HUTTON

39 Essex Chambers

26 April 2022