

**UTT/19/1508/FUL**

(MAJOR))

**PROPOSAL:** Construction of 22 no. custom / self-build dwellings (revised scheme to UTT/17/3623/DFO)

**LOCATION:** Land East of St Edmunds Lane, Great Dunmow

**APPLICANT:** Mr R Kirby

**AGENT:** Mr S Bampton

**EXPIRY DATE:** 23 September 2019 (Further extension of time agreed to 1 July 2020)

**CASE OFFICER:** Clive Theobald

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**1.0 BACKGROUND**

1.1 Members will recall that on 6 May 2020 the above planning application was presented to the Council's Planning Committee. The application was recommended for approval with conditions subject to the applicant entering into a S106 legal agreement.

1.2 At the meeting, Members resolved to approve the application subject to a S106 agreement being entered into between the Council and the applicant relating to the following matters;

- commuted sum payments
- supervision of the delivery of the discounted market units
- protection of the frontage hedge
- negotiated terms of any agreed draft S106 being reported back to Members for their further consideration.

It was also agreed that the presented scheme should be subject to a revised proposed site layout drawing being submitted to and approved by the LPA showing the formation of a hammerhead at the end of the proposed service road whereby this additional site requirement was to be conditioned as an additional condition on any planning permission granted.

1.3 Members will find the original committee report, minutes and map appended to this report for ease of reference.

**2.0 SUBSEQUENT OFFICER DISCUSSIONS AND RECEIPT OF COUNSEL ADVICE**

2.1 The applicant raised legal concerns regarding the resolution. Council Officers held a meeting with the applicant and their agent when it was agreed that Counsel advice would be sought seeking legal clarification on various matters.

2.2 Counsel advice has subsequently been received whereby Counsel has advised that in relation to the provision of community benefits for this application that these

benefits turn on four key issues, these being;

- Whether the application proposal is a self-build scheme as currently understood;
- Whether the terms on offer for resolution of the Affordable Housing issue should be acceptable to the Council or not;
- Whether the scheme is likely to make a CIL contribution in the future in the event that UDC becomes a CIL authority;
- Whether UDC should persist in the stance it has taken with respect to the form of the s.106 Obligation, i.e.; rejecting a unilateral undertaking as submitted by the applicant and requiring either a two or three way agreement.

2.3 With regard to the first issue – *“Whether the application proposal is a self-build scheme as currently understood”*, Counsel have advised that unless there is something in the terms of the application which says to the contrary (which it does not) that the application as submitted is an application for 22 self or custom build dwellings to accord with the conventional definition of self-build as contained in the Glossary to the NPPF and the Self-Build and Custom Housebuilding Act 2015 and should be treated as such. Counsel have further advised that for the avoidance of doubt that a user condition could be attached to any planning permission granted by the Council to reinforce the terms of the unilateral undertaking that require it to be such accommodation, although Counsel advises further that no such condition was required in 2015 for the unilateral undertaking submitted for the in-principle outline application ref; UTT/14/0472/OP for 22 dwellings and that this should be borne in mind.

2.4 With regard to the second issue – *“Whether the terms on offer for resolution of the Affordable Housing issue should be acceptable to the Council or not”*, Counsel have advised that it is clear that if this unresolved matter went onto appeal as the applicant has indicated that it would consider doing that the appeal would be determined on the basis that the subject matter of the application was the erection of 22 no. self-build houses. Counsel further advises that unless either the terms of the application or the s.106 Obligation identify any of those units as affordable housing units (in which case a mechanism would be required to secure them as affordable housing units) that there is now no justification for the Council to require any such equivalent affordable housing contributions given the clear terms of up to date national policy guidance in the form of paragraph 64 of the NPPF which states that exemptions to affordable housing requirements include, inter alia, where the site or proposed development c) “is proposed to be developed by people who wish to build or commission their own homes”. Counsel reinforces this view in that there appears to be no basis to say that the 30% Open Market Value discount equivalence sum for the nine discounted market plots on the site offered by the applicant in the current application (£288,424.80) is considered to be unacceptable now when the offered 30% discount was considered acceptable to the appeals inspector in the unchallenged 2015 appeal decision for application UTT/14/0472/OP.

2.5 Counsel concludes on this issue that if this scheme is to be considered to be self or custom build, then there are no grounds under current NPPF policy advice under which the Council can reject the proposal for failing to make provision for on-site affordable housing or, in the alternative, requiring a financial contribution towards affordable housing provision for the district. Counsel advises from this that *“It follows that the offer of a contribution is a bonus which is not necessary to make the proposal acceptable, but which would be provided by the UU currently on*

*offer*".

- 2.6 With regard to the third issue – *"Whether the scheme is likely to make a CIL contribution in the future in the event that UDC becomes a CIL authority"*, Counsel has advised that there is no reason in principle why the proposed accommodation should not qualify as self-build under the CIL regulations in due course. Counsel further advises that it is up to the Council to enforce the terms of any planning permission granted and the terms of the unilateral undertaking offered to ensure that what is provided meets the appropriate description whereby *"not to grant planning permission for it is one thing, but to regulate it is another"*.
- 2.7 With regard to the fourth issue – *"Whether UDC should persist in the stance it has taken with respect to the form of the s.106 Obligation, i.e.; rejecting a unilateral undertaking as submitted by the applicant and requiring either a two or three way agreement"*, Counsel advises that there is no justification for rejecting the mechanism of a unilateral undertaking in this particular instance and requiring instead a bipartite agreement with UDC or a tripartite agreement to include both UDC and ECC. Counsel further advises that it would be perverse for the Council to require an agreement to provide a contribution to which the Council is not entitled under current national policy and which it is required to disregard in its decision making with reference to CIL regulation 122.
- 2.8 The additional issue of whether the Council would be entitled to require a highway contribution towards a Great Dunmow sustainable transport strategy as promoted through the Great Dunmow Neighbourhood Plan as requested by ECC Highways has also been discussed and this has been subject to separate Counsel advice. Members will recall in this regard that a commuted sum of £81,000 (index linked) would be subject to payment by the applicant prior to first occupation of the development and that the applicant had agreed to make this payment as part of the submitted unilateral undertaking for the current application.
- 2.9 *"Whether the Council would be entitled to a highways contribution"*: Counsel has advised that the 2015 planning permission is a relevant material consideration as a fall-back position when considering the current application and that the Council should give this weight in proportion to the likelihood that this still extant scheme would be built out if the current revised application were to be refused. Counsel further advises that this fall-back position should not be treated as the starting point for the consideration of the requested highways contribution where the proper starting point is the development plan under s.38(6) of the T&CP Act and then to consider whether it is outweighed by other material considerations, including the fall-back position. The development plan supports the making of the requested highways contribution as public transport provision in respect of the current application whereby this contribution did not exist for the 2015 appeal decision as that decision pre-dated the making of the Great Dunmow Neighbourhood Plan (GDNP (2016) and where there was no extant proposal at that time to improve the sustainable bus strategy for the town.
- 2.10 Counsel have advised that the fall-back may be taken into account when deciding whether or not to seek the contribution if the Council has some legitimate reason for preferring the applicant to proceed with the current revised proposal instead of the 2015 scheme and has some reasonable basis for assuming that this is what the applicant is likely to do should the Council refuse the current scheme for failing to provide the contribution where *"the benefit to be derived from the contribution is outweighed by some material improvement in planning terms identified with the current scheme over that of the 2015 scheme"*. However, Counsel further advises

that there are no obvious reasons why the fall-back makes it inappropriate or unreasonable to require the highways public transport contribution in this instance where the Council's request appears to meet the requirements of CIL regulation 122. As such, it is Counsel's opinion that there is no objective justification that the contribution is unreasonable to request where it should be noted that it is one which the applicant has chosen to include in its own draft unilateral undertaking submitted to support the grant of permission for the current application.

- 2.11 Counsel concludes for this additional raised issue that it cannot see any reason why the Council should accept the existence of the fall-back position as outweighing the need for the current application to be supported by the requested highways contribution towards the enhancement of public transport provision within Great Dunmow in accordance with the made GDNP and ULP Policy GEN6 of the adopted Uttlesford Local Plan. As such, Counsel further advises that it would not be unreasonable to require the contribution to be made in association with any grant of permission for the current revised application for St Edmunds Lane in accordance with the committee resolution made by Members on 6 May 2020.

### **3.0 CONSIDERATIONS FOR UPDATED OFFICER REPORT TO PLANNING COMMITTEE ON 17 JUNE 2020 FOLLOWING COUNSEL'S OPINION**

- 3.1 Members will appreciate from the above legal synopsis that it is Counsel's held opinion for UDC that;
- (i) The current revised proposal for UTT/19/1508/FUL is an application for 22 no. self or custom build dwellings to accord with the conventional definition of self-build and should be treated as such,
  - (ii) There are no grounds under current NPPF policy by which the Council can refuse the application for the applicant failing to make provision for affordable housing or, in the alternative, requiring a financial contribution towards affordable housing provision (and this would include attempting to secure a higher "equivalent" discount market sum for the plots in question),
  - (iii) The submitted scheme would in principle qualify as self-build under CIL regulations,
  - (iv) There is no justification for rejecting the mechanism of a unilateral undertaking and requiring a s.106 agreement where this would be perverse, and
  - (v) There is no reason why the Council should accept a fall-back position to the 2015 submitted undertaking as outweighing the need for the current revised application to be supported by a highways contribution in light of a new material consideration which is the made GDNP which did not exist at the time of the 2015 appeal decision.
- 3.2 Officers are of the view that Members should accept Counsel's advice where not to do so would give rise to a very likely non-determination appeal as the applicant has so formally advised the Council in a letter dated 14 May 2020.
- 3.3 The Council has since received a revised and final unilateral undertaking from the applicant for the current application which has been updated to reflect Counsel's advices whereby the clauses relating to affordable housing have been removed, but retaining the same clauses from the extant undertaking relating to the

commitment to custom/self-build housing and education contributions, whilst it also has a commitment to pay the £81,000 index linked bus strategy contribution requested by ECC Highways to be paid as a lump sum. The Council's Head of Legal Services has seen the revised undertaking and has confirmed that it is acceptable.

- 3.4 The Council has now also received from the applicant a revised proposed site layout drawing showing the inclusion of a hammerhead at the end of the proposed service road for the proposed development in accordance with Members' request (drwg no. 0053C) which is considered acceptable to officers and also confirmation of agreement to an additional condition on any planning permission granted requiring that the frontage hedge be retained with the exception of that extent of the hedge to be trimmed down to 600mm where required for improved access sightlines and/or that a new hedge be planted behind the sight lines.

#### **4.0 RECOMMENDATION – APPROVAL WITH CONDITIONS WITH UNILATERAL UNDERTAKING**

**Members are requested to endorse their original committee resolution made on 6 May 2020 to grant planning permission for this self-build/custom build housing scheme subject to the planning conditions contained within the original committee report (Conditions 1-13), but with an additional condition as requested by Members on 6 May 2020 as follows:**

- 14 The site frontage hedge onto St Edmunds Lane shall be retained with the exception of that extent of the hedge to be trimmed down to 600mm where required for improved access sightlines and/or that a new hedge be planted behind the sight lines.**

**REASON: In the interests of visual amenity in accordance with ULP Policy GEN2 of the Uttlesford Local Plan (adopted 2005).**

**and subject to the revised unilateral undertaking submitted by the applicant/developer dated 27<sup>th</sup> May 2020 committing the applicant/developer to the following legal obligations:**

- **Commitment to self-build/custom build housing**
- **Payment of early years childcare, primary and secondary education contributions**
- **Highway contribution towards a Great Dunmow Bus Strategy.**