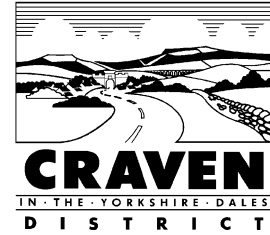


## Planning Committee – 24 November 2015



### PLANNING REF. 32/2015/15390. VARIATION OF CONDITIONS ATTACHED TO OUTLINE PLANNING PERMISSION

Report of the Strategic Manager for Planning & Regeneration.

Lead Member: Not applicable

Ward(s) affected: Glusburn

1. **Purpose of Report** – To consider the resolution of the Planning Committee on 26 October 2015 to refuse planning application ref: 32/2015/15390. (*‘Application to remove condition no. 11 and vary condition nos. 4, 5, and 17 of Planning Permission Ref. 32/2011/11429 granted on appeal’*).

2. **Recommendations** – Members are recommended to:

2.1 **Note the advice in this report; and**

2.2 **Agree to re-consider Planning Ref. 32/2015/15390 (in order that adequate reasons can be provided).**

3. **Report**

#### A. SUMMARY OF THE DRAFT RESOLUTION FROM 26 OCTOBER 2015.

3.1 Members will recall that at the meeting held on 26 October 2015 the Planning Committee resolved (against Officer advice) –

*‘That, the Strategic Manager for Planning and Regeneration was authorised to formulate reasons, as appropriate, based on grounds that in approving application 32/2011/11429 on appeal, the Planning Inspector imposed conditions which the Committee believes were intended to secure a development appropriate for the site and in keeping with its surroundings. The Committee resolved that it had not seen or heard anything which it considered justified setting aside or varying the conditions imposed’*

#### B. UNREASONABLE BEHAVIOUR AND COSTS AWARDS IN PLANNING APPEALS

3.2 Before considering the soundness of the potential reasons for refusal identified in this report it is extremely important that consideration is given to the circumstances

when an award of costs against the Council can be made. Advice within the Government's Planning Practice Guidance is of particular relevance. The following are relevant extracts from this guidance that should be considered by the Planning Committee: -

*'Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include:*

- *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.*
- *failure to produce evidence to substantiate each reason for refusal on appeal*
- *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.*
- *refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead*
- *persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable*
- *not determining similar cases in a consistent manner*
- *imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations.'*

### **C. DRAFT REASON FOR REFUSAL**

- 3.3 Members will be aware that although the formulation of reasons was delegated, the Strategic Manager for Planning and Regeneration is limited to formulating reasons within the parameters of the resolution and as raised by Members in the debate.

#### ***Draft Reason for Refusal***

*The Council considers that the merits of this development proposal have already been very carefully considered and assessed by the Planning Inspectorate who has imposed conditions that were necessary to ensure that a satisfactory standard of development is achieved. The removal or variation of these conditions will have an unacceptable impact on the character and appearance of the area as it would result in a development that is not in keeping with its surroundings. The omission or variation of the conditions would therefore be contrary to planning policy with the NPPF.*

### **D. COMMENT ON THE SOUNDNESS OF THE DRAFT REASON FOR REFUSAL**

- 3.4 The application proposes to remove one condition and vary three of the conditions. The soundness of the reason for refusal therefore needs to be considered with respect to each of the different proposals that form part of the planning application.

3.5 It is important that Members note the framework within which they are asked to determine the application. Members are required to consider any relevant saved local plan policies, the NPPF, material considerations and the conditions attached to the permission. The National Planning Practice Guidance advises that focus should be on national and development plan policies, and other material considerations which may have changed significantly since the original grant of permission. The emphasis is that applications must be determined in accordance with the current policies (not by reference to superseded policies or guidance which may have been relevant on determination of the “original” application).

**a) Removal of condition 11 of 32/2011/11429.**

3.6 Condition 11 is as follows:

*‘11. Development shall not begin until a scheme (including a timetable for implementation) to secure at least 10% of the energy supply of the development from decentralised and renewable or low carbon energy sources shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be implemented and retained as operational thereafter, unless otherwise agreed in writing by the local planning authority.’*

3.7 During the debate there seemed to be agreement amongst Members that this condition is no longer part of the Development Plan. However the resolution was to retain all conditions in the same form as imposed by the Planning Inspectorate.

3.8 As set out in the Officer’s committee report, the RSS planning policy that provided the justification for this policy has been revoked. There is no longer any justification to insist on the conditions requirements. In the Development Control Manager’s Opinion the condition is no longer necessary or relevant. A defensible argument to resist the removal of this condition could not be made. There would be a significant risk of an award of costs against the Council if the application was to be refused in accordance with the resolution that was made on the 26<sup>th</sup> October 2015.

**b) Variation of Condition 4 of 32/2011/11429.**

3.9 Condition 4 is presently as follows:

*‘4. The development hereby permitted shall be carried out in accordance with the following approved plans: G540/001c, G540/002a, 2270.3A, 2270.4A and G540/005a. In the event of conflicting detail, that shown on drawing no. G540/001c will take preference.’*

3.10 The application proposes the following alternative wording for condition 4: -

*‘4. The development shall not be carried out other than wholly in accordance with the following drawings nos:*

- 3901-014 PL-01 revision E (Site Layout Plan) Received 1/7/2015.
- 3901-014 PL-02 (Existing Site Layout) received 1/5/2015.
- 3901-014 PL03 (Location Plan) received 30/4/2015.

- 3901-014 PL-05 revision D (Sales Layout) received 1/7/2015.
- 3901-014 PL06 revision C (Proposed Site Sections AA & BB) received 1/7/2015.
- 3901-014 PL07 revision A (Proposed Site Sections C-C) received 1/7/2015.
- 3901-014 PL08 revision A (Proposed Site Sections DD, EE & FF) received 1/7/2015.
- 3901-014 PL09 revision A (Proposed Site Section GG) received 1/7/2015.

*The development shall be completed in accordance with the approved plans except where conditions attached to this planning permission indicate otherwise or where alternative details have been subsequently approved following an application for a non-material amendment.'*

- 3.11 The varied condition sets out an alternative set of approved plans for the outline planning permission (the outline plans comprise site layout information and cross sections through the site). Any developer is entitled to make an application for amendments to a planning permission to substitute the original approved plans for alternative plans. This process is referred to as an application for a material amendment. It is not reasonable for the Local Planning Authority to refuse an application for amendments to a permission simply because the proposals are different to what has previously been approved by an Inspector. It is practically inevitable in any major housing development that changes become necessary to an approved scheme. A decision to resist amendments because they are different from what an Inspector previously accepted would in the Development Control Manager's opinion put the Council at risk of an award of costs against it.
- 3.12 The Council needs to consider the acceptability of the changes and make a decision on them. In Officers opinion the amended plans for the outline planning permission are acceptable. There are a number of incremental changes to the scheme throughout the site, but there is nothing of significance that now means the development proposal is unacceptable.
- 3.13 It may be the case that there is particular aspect of the amended proposals that the Planning Committee considers to be unacceptable. The current resolution of the Planning Committee does not particularly clarify this, and makes the general comment that the changes are not in keeping with the site or surroundings. There is no explanation of precisely what is unacceptable about the amended plans. Members are reminded that it necessary to properly substantiate a decision to refuse permission. As advised by the Planning Practice Guidance, vague or generalised assertions that are unsupported by objective analysis will result in an award of costs against the Council.
- 3.14 In summary, in the Development Control Manager's opinion, the revised outline permission plans should be accepted and a vague or generalised reason for refusal (as currently proposed) will result in an award of costs against the Council.

**c) Variation of Condition 5 of 32/2011/11429.**

- 3.15 Condition 5 is presently as follows:

*5. No dwelling shall have more than two storeys.*

3.16 Following discussions with the applicant the application now proposes the following alternative wording for condition 4: -

*5. No dwelling shall have more than two storeys other than plot nos. 10, 11 and 12 as shown on the site layout plan no. 3901-014 PL-01 revision E received by the local planning authority on 1<sup>st</sup> July 2015.*

3.17 As explained in the committee report for application 32/2015/15390, the provision of 3 storey dwellings in this centrally located part of the application site is considered to be acceptable by Officers. At the meeting on 26 October 2015 members disagreed with this conclusion.

3.18 If members still consider that three storey dwellings are unacceptable, the reason precisely why they are unacceptable on the site needs to be better explained and justified. In considering this matter Members may wish to take into account the transitional character of the site from open countryside to a developed settlement (and the unsuitability of 3 storey dwellings in such a transitional area), the visual prominence of this hillside site when viewed from the south, and the setting of listed buildings to the south of the application site.

3.19 Providing the Council's case is properly substantiated, it is not considered that refusing to vary condition 5 should result in an award of costs against the Council. Furthermore there are reasonable prospects of the Council being successful on appeal. The fact that a Planning Inspector thought it necessary have a complete restriction on 3 storey dwellings by imposing this condition in the first place strengthens the Council case. Officer opinion remains that it would be acceptable for plots 10, 11 and 12 to be 3 storeys in height, but Officers should be able to mount a credible case in support of a decision to resist this change.

**d) Variation of Condition 17 of 32/2011/11429.**

3.20 Condition 17 is presently as follows:

*'17. The development shall not begin until a scheme for the provision of affordable dwellings on plots nos. 9, 13-23 inclusive, 40 and 43-49 inclusive has been submitted to and approved in writing by the local planning authority.*

*The affordable housing shall be provided in accordance with the approved scheme and shall include:*

*i) the tenure of the affordable dwellings, which shall comprise 70% rental and 30% shared ownership;*

*ii) the timing of the construction of the affordable housing and their phasing in relation to the occupancy of the market housing;*

*iii) the arrangements for the transfer of the affordable housing to an affordable housing provider;*

*iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and*

*v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.'*

- 3.21 Following discussions with the applicant and agreement with Strategic Housing the application now proposes the following alternative wording for condition 17: -

*'17). The development shall not begin until a scheme for the provision of affordable housing has been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved scheme. Affordable housing shall meet the definition of affordable housing in the NPPF or any future guidance that replaces it.*

*The scheme shall include:*

- i). the numbers, type, tenure and location on the site of the affordable housing provision to be made which shall consist of not less than 40% of housing units (subject to viability);*
- ii). the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing;*
- iii). the arrangements for the transfer of the affordable housing to an affordable housing provider [or the management of the affordable housing] (if no Registered Provider involved);*
- iv). the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and*
- v). the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced; or*
- vi). details of an equivalent affordable housing contribution to be provided in lieu of affordable housing on site and the means by which such a contribution shall be provided (alternatively, this may be a contribution that is to be provided partly on site and partly in lieu).*

*Informative: A viability assessment undertaken on behalf of the Council suggests that 16 affordable houses can be provided as part of the scheme. CDC Strategic Housing further advise that if HCA funding is provided for this development then the full 40% of affordable housing is likely to be achievable for the scheme in which case the Council's assessment of the financial viability appraisal may be re-considered.'*

- 3.22 The amended condition is the Council's new preferred standard condition to secure affordable housing. Essentially the same condition is recommended for other sites where there is a requirement for affordable housing provision.
- 3.23 The condition as drafted by the Planning Inspector specifies certain plot numbers to be the affordable units, but these are not the units that Strategic Housing wishes to see provided. Furthermore, due to the amended plans that have been received as part of this application the plot numbers are no longer correct.
- 3.24 The amended condition still requires 40% affordable housing provision, although in all cases that provision is subject to viability. In this case that viability assessment

has now been undertaken and subject to securing HCA funding the full contribution can be provided. Should that funding not be secured by Strategic Housing then 16 units (approximately 32.6% can be provided).

- 3.25 In summary, the amended condition is precisely that which would be now recommended by Officers had this been a new outline planning application. The draft reason for refusal, or members' resolution, provides no reasonable grounds to resist the application. Officers would not be able to defend this issue and there is a serious risk of an award of costs against the Council for unreasonable behaviour.

#### **E. ADVICE ON THE DETERMINATION OF APPLICATION 31/2015/15390**

- 3.26 The current resolution of the Planning Committee is to refuse the application outright. Such a refusal would be a decision of the Council that each of the four separate proposals that form the planning application are unacceptable (i.e. the proposal to remove condition no. 11 of 32/2011/11429 is unacceptable as are each of the proposals to vary condition nos. 4, 5, and 17 of 32/2011/11429). As set out in section D of this report, members are advised that there would be a serious risk of an award of costs against the Council for such an approach. Members are therefore recommended to approve the planning application as set out in the case officer's report.
- 3.27 Alternatively, if members consider that only certain aspects of the development proposal are unacceptable they should resolve to approve the application, but refuse to amend those conditions that they consider should remain unaltered. For example, the Planning Committee could decide to approve the application and agree to remove condition 11 and vary conditions 4 and 17 as recommended, but refuse to alter condition 5 (the condition that specifies that no dwelling should have more than 2 storeys). An amended planning permission would then be issued that varied / deleted those changes that were approved, but would re-impose those conditions that were still considered to be necessary. In such a circumstance the 'reason' for the retained planning condition should now specifically clarify why the condition was still considered to be necessary by the Council (comment on this is made at paragraph 3.18 of this report).
- 3.28 Notwithstanding the above, if Members did consider that they wished to retain the condition of the Planning Inspector that precludes any development over 2 stories in height, it would still be prudent to amend the condition slightly. This is because cross sections included in the amended plans do indicate development over 2 storeys in height at plots 10, 11 & 12. An amended condition could instead specify that 'Notwithstanding the details that are indicated in the cross sections for plots 10, 11 and 12, no dwelling shall have more than 2 storeys. The development shall not begin until revised cross sectional information for plots 10, 11 and 12 that indicates 2 storey properties (rather than 3 storey) has been submitted to and approved in writing by the Local Planning Authority. The development shall thereafter be implemented in accordance with the approved plans.'

#### **4. Implications**

- 4.1 **Financial and Value for Money (vfm) Implications** – There is a significant risk of an award of costs against the Council if the application is refused in accordance with the resolution that was made on 26 October 2015. The report above makes it clear why an award of costs against the Council is considered likely.
- 4.2 Members' attention is drawn to the fact that with respect to this site the Council has already had an award of costs totalling £111k against it on two separate occasions:
- An award of costs in favour of the appellant of £103k was made against the Council with respect to Planning Ref. 32/2008/8572 as the Council failed to substantiate the reason for refusal on the need to release this site for housing development.
  - With respect to application 32/2011/11429. Members originally resolved to refuse the planning application for 6 separate reasons. After further reconsideration the application was ultimately refused for two separate reasons. A partial award of the costs of £8k was awarded against the Council as it was not able to fully substantiate one of the two reasons for refusal.
- 4.3 **Legal Implications** – To avoid the risk of an award of costs against the Council it must be able to substantiate reasons for refusal.
- 4.4 **Contribution to Council Priorities** – N/A
- 4.5 **Risk Management** – Risks are as set out in the main body of the report, and the Financial & Legal Implications sections.
- 4.6 **Equality Analysis** – N/A
5. **Consultations with Others** – Financial Services, Legal Services, and Strategic Housing.
6. **Access to Information: Background Documents** – Planning application files (in particular planning ref. 32/2015/15390).
7. **Author of the Report** – (Ian Swain, Development Control Manager); telephone 01756 706455; e-mail: iswain@cravendc.gov.uk
- Note: Members are invited to contact the author in advance of the meeting with any detailed queries or questions.
8. **Appendices** – None