Waverley Borough Council Local Plan Part 2: Site Allocations and Development Management Policies

Matter 2: Housing requirements, supply and allocations Response to the Council's SoCG relating to Land Opposite Milford Golf Course

Further Examination Statement of Tim and Isobel House

(ID:19927457)

1. Introduction

1.1. This submission addresses the Statement of Common Ground (SoCG) relating to Land Opposite Milford Golf Course (the Site) which the Council submitted after the final hearing on 6 September 2022 (Document Reference: WBC-LPP2-44). It should be read in conjunction with all our previous written and oral submissions and Emily Windsor's advice note dated 24 August 2022 (see in particular Document Reference REP-19927457-002 and 002A).

1.2. The SoCG departs materially from the verbal update the Council gave on its discussions with relevant parties with interests in the Site at the hearing on 6 September 2022.

1.3. The SoCG also represents a considerable "pivot" away from the updated note Mr Beglan produced dated 19 August 2022 (on which he elaborated at the September hearing) and on which many of the parties' submissions on 6 September 2022 were focused.

1.4. The SoCG reveals no underlying belief in any prospects of success on a Section 84 LPA application, let alone "reasonable" prospects, whether in a five year period or longer. All pretence, therefore, that the Site is "deliverable" has been abandoned.

1.5. The Council now relies on expressions of hope about resolution through negotiation or on the future potential of deploying statutory powers under Section 203 of the Housing & Planning Act 2016, until now eschewed by the Council. This is in order to persuade the Inspector that the Site is "developable" more than 5 years in the future.

1.6. This submission therefore addresses three matters: (i) to correct the misleading information given previously by the Council as it relates to Section 84; (ii) to correct a misimpression created by the SoCG as to the likelihood of resolution by negotiation; and (iii) to explain why the possible future reliance on Section 203 will not assist the Council. None of these routes gives the Council a reasonable prospect of overcoming the covenant.

2. Timing and Fairness

2.1. There is a short preliminary point we would like to make about procedural fairness. All parties except the Council have been required to, and have respected, the need to make timely written submissions in advance of the designated hearing dates. This has been important so full discussion on those written submissions can take place in open forum where participants' oral submissions can be informed by open debate and discussion, and submitted to necessary scrutiny while advisers are present.

2.2. This ability to prepare in advance and to make cost efficient use of advisers is of particular importance to private individuals such as ourselves who are potentially seriously impacted by decisions made in this Examination and who do not have available to them the expert or administrative resources which commercial entities and the Council have.

2.3. The late delivery of a potentially important (and revealing) document such as the SoCG (with no explanation or justification for why it is late) in circumstances which deny the participants and the Inspector an opportunity to subject the Council and its Counsel to scrutiny on it is procedurally unfair.

2.4. The late submission of the SoCG is reminiscent of the late production by the Council of Mr Beglan's October 2017 note on the covenants to Inspector Bore, well after the LPP1 Examination hearings had closed, and which was not revealed to any of the participants at the time. That note, which no one had a chance to comment upon, was seriously misleading and the ramifications of it are still being felt.

3. Overcoming the restrictive covenant – no reasonable prospect

3.1. Negotiations

3.1.1. In paragraph 7 of Mr Beglan's Note on behalf of Waverley Borough Council in relation to the Milford Covenants dated 19 August 2022 (Document Reference: WBC-LPP2-34) (the "Updated Note") Mr Beglan said "…*for present purposes the Council proceeds on the basis that the covenant will not be removed by negotiation*". We took "*present purposes*" to be the LPP2 Examination.

3.1.2. However, in the SoCG the Council returns to and develops the theme of negotiation. The Council now seems to be changing direction and seeking to persuade the Inspector to accept its proposition that the Site is developable based on some future prospect of a negotiated solution. It seems to be predicated on an assumption that the dynamics may change when the much discussed, but so far yet to materialise, Section 84 application and supporting evidence is prepared (see SoCG paragraph 4.6).

3.1.3. In the process of preparing this SoCG, Mr Chantler (who is a signatory to the SoCG as a director of the owner SML) has referred to a single virtual meeting he had with us (See SoCG paragraph 4.4). That meeting, which was held at the request of SML's lawyers, was legally privileged. In referring to it in the SoCG Mr Chantler has unilaterally waived that legal privilege. We can therefore now provide full details of that meeting unconstrained by any obligation of confidentiality we owed to SML. We do so below in order to correct the misimpression that SML are trying to create that they are interested (or engaged) in any negotiation.

3.1.4. At the invitation of SML's lawyers, we had a single (virtual) meeting with Mr Chantler on 31 July 2020. (He declined our invitation to visit our property in person). With due respect to Mr Chantler, but by his own admission, at that meeting he was not aware of any of the details of the proposed development, the reasons for our objections to it, the terms of the restrictive covenant or the contents of our letter of 24 April 2020 to SML's solicitors which laid out in detail why we believed any threatened Section 84 application would fail. This made meaningful discussion with Mr Chantler unrealistic. During the conversation, we did however indicate a reasonable degree of flexibility around the strict application of the covenant provided SML would very dramatically moderate the overall scale of development. Mr Chantler said that he would reflect on this and revert to us within 4 weeks. He subsequently wrote to us on 1 September 2020 saying that he would respond further "*just as soon as I have made any progress*". We have heard nothing further from him since that date. In the course of this meeting he also suggested buying the family home we have lived in for 24 years, which we declined.

3.1.5. At paragraph 4.7 of the SoCG it is said SML will invite further discussions with us once their expert evidence has been obtained. However, a careful reading of paragraph 4.6 reveals how equivocal

SML really are about their intentions. It is all subject to their barrister's advice (as to which see below).

3.1.6. There are only two ways this could be resolved by negotiation. Either we could relent and accept payment to release the covenant or the proposed development could be moderated so its impact no longer causes us concern.

3.1.7. We have repeatedly indicated that we do not intend to be bought off.

3.1.8.

3.1.9. The result is that the better economic outcome for SML is to bring a Section 84 application, have it rejected by the Upper Tribunal and claim on their title insurance for the full loss of development potential at the currently proposed level of over development. It is not obvious to us that the Council fully appreciate this.

3.1.10. It is however highly material to the dynamics of any supposed negotiation. In our submission, the vague references in the SoCG about the prospects of future negotiation do not amount to a reasonable prospect that this route will lead to the covenant being removed. On the contrary, the Updated Note was correct to proceed on the basis that the covenant will not be removed by negotiation (see paragraph 7 of the Updated Note).

3.2. Section 84 LPA

3.2.1. There is little left to say about this, other than to correct a misleading impression Mr Longley gave the Inspector at the 6 September 2022 hearing.

3.2.2. Emily Windsor's note and oral submissions stand as a compelling explanation why any Section 84 application will fail based on the current proposed development. These submissions were supported on 6 September 2022 by Richard Moules in his submissions on behalf of Wates Developments (at 01:46:50 - 01:50:55).

3.2.3. No Section 84 application has yet been made. There is no explanation for the delay in making one. There is no current legal advice from anyone on behalf of SML, Cala Homes or the Council that suggests there is a reasonable prospect of success.

3.2.4. Current cases are taking 20 months to come to a hearing (as SML's barrister knows from a current Section 84 case he has before the Upper Tribunal scheduled to be heard in November 2022 on an application made in February 2021). Emily Windsor's estimate of 18 to 24 months is an accurate one.

3.2.5. SML's planning permission will have long expired by the time any Section 84 application is heard. LPP2 will therefore have to have addressed the shortfall before then and LPP1 will have to have been reviewed.

3.2.6. On 6 September 2022 Mr Longley said (starting at 00:56:44 of the recording):

> "*In addition Stretton Milford Limited (SML) have confirmed to us and have said that they are happy for it to be shared this morning that* ***they consider on the basis of legal advice that they have a strong case for securing the removal of the covenant through an application under s.84 of the Law of Property Act albeit they recognise the tribunal decision inevitably carries an element of uncertainty****. They say that work is currently being carried out to support the application including the preparation of valuation evidence. And finally they confirm that SML have at all times remained open to dialogue with Mr and Mrs House to try and secure a negotiated settlement and they will continue to seek this*." (emphasis added).

3.2.7. If the highlighted part were true, it is reasonable to expect the parties to have included this statement in the SoCG now they have been given time to prepare the document. However, the SoCG conspicuously does not make reference to any legal advice received. That is significant given the constant emphasis we have put on this point.

3.2.8. On the contrary, the SoCG is extremely carefully hedged by both signatories - the Council and Mr Chantler.

3.2.9. Paragraph 4.5 simply says Shoosmiths LLP as solicitors and Martin Hutchings QC (sic) of Wilberforce Chambers have been retained to advise in connection with a "*potential*" application.

3.2.10. Paragraph 4.6 says "***It is intended that*** *the application and the supporting evidence will be prepared in the next few months (****subject to*** *the barristers's advice and the expert evidence)"* leaving open the possibility that the advice and evidence will not support the intention. This paragraph conspicuously does not address what it is in the last 11 months since full planning permission was granted, and the 8 months since their barrister and expert attended a site visit at our home, that has led to such indecision and delay. Nor does it explain what further steps need to be taken in the "next few months".

3.2.11. Paragraph 4.8 says it all: "….*SML would finalise and,* ***if appropriate****, issue and progress the application*…" suggesting that even now they do not know whether or not they will be making an application.

3.2.12. Taken together with everything Mr Beglan's Updated Note <u>does not</u> say, and the Council's late pivot to the suggestion of negotiation and/or Section 203, none of this can amount to evidence that there is any prospect, let alone a reasonable prospect, of a Section 84 application succeeding at any time within the Plan Period.

3.3. <u>Section 203 Housing Act 2016</u>

3.3.1. In paragraph 10 of the Updated Note Mr Beglan said: "*As to s.203 of the Housing Act 2016, the Council's current position is that it does not intend to exercise that power*". That was the basis on which we and others prepared for the hearing on 6 September 2022.

3.3.2. At the hearing on that day the Council did not deviate from this position but (i) when questioned by the Inspector about the general requirements of Section 203, Mr Beglan listed the formal requirements, stating that some of the requirements would "*plainly require decision-making by the planning authority*" before Section 203 could be deployed (00:50:00 of the hearing recording) and (ii) after the hearing, placed some materials on Section 203 in the Examination Library.

3.3.3. When asked by the Inspector later on 6 September 2022 what the Council's position would be in relation to "alternative sites" and "solutions" in Milford and Witley if the Site were not to be

regarded as developable, Mr. Longley stated as follows (02:19:40 of the recording): "*We have obviously given our views on those alternative sites at some length in previous sessions. I think the only point I would make, and it is a matter of fact, the Council has done a lot of work and analysis in relation to those asterisked sites previously and that is a matter of fact and they have been in the public arena and in so far as.. we're not starting with a blank sheet of paper, I'll put it that way*."

3.3.4. The plain inference was that Section 203 is not seriously in consideration and, if the Site dropped out of the Plan Period because it was not developable, the solution would be the incorporation of other sites which had already been assessed in the LPP1 and LPP2 process, not resort to Section 203 powers.

3.3.5. The SoCG however, belatedly, strikes an entirely different note, necessitating a closer analysis of the potential application of Section 203 powers to the Site and the proposed development.

3.3.6. Paragraph 4.3 of the SoCG talks of Section 203 as a third option (in addition to negotiation and Section 84). It now says: "*This is not presently the Council's preferred approach but* ***will remain open for consideration*** *throughout this matter.*"

3.3.7. At Appendix 2, we attach a Further Note prepared by Emily Windsor and Barry Denyer-Green (also of Falcon Chambers) which explains the hurdles that have to be overcome in deploying Section 203 and why it is highly unlikely to represent an option in this case. Mr Denyer-Green is the author of the leading textbook on compulsory purchase, which is now in its 11th edition.

3.3.8. Given that:

(i) Section 203 should be used only as a "last resort",

(ii) it is not the Council's preferred option,

(iii) there are significant difficulties relating to timing and expiry of the planning permission; and

(iv) it is clear that, as stated by Mr Longley, there are other feasible, sensible and available alternatives to the Council which would deliver the housing requirement far more easily and quickly than undertaking the use of Section 203,

we submit that there is no evidence that suggests that a deployment of these statutory powers is a feasible or likely route for overcoming the covenants.

4. Conclusion

4.1. Nothing in the SoCG justifies a conclusion that the Site is deliverable.

4.2. Nothing in the SoCG justifies a conclusion that the Site is developable.

4.3. For these reasons, it remains our position that LPP2 should be regarded as unsound and Main Modifications should be proposed to address the very high probability that the Site will not deliver its proposed allocation of 160 dwellings in the Plan Period or at all.

Tim and Isobel House

Dated 14 October 2022.

Appendix 1– Insurance Policy

Attached on covering email

Appendix 2 – Section 203 note from Counsel

Attached on covering email