RE: DRINKWATER FARM, MALDON ROAD,
BRADWELL ON SEA, ESSEX, CM10 7HY

ADVICE

Introduction

1. I am instructed to advise Coldunell Limited ("Coldunell") in respect of proposals to develop a site known as Drinkwater Farm, Maldon Road, Bradwell on Sea, Essex CM10 7HY ("the Site") within the administrative area of Maldon District Council ("the Council"). The planning history of the Site is set out in full in my Instructions but for present purposes the following matters are material:

    a. In June 2008 a Planning Inspector granted conditional planning permission on appeal (Ref: APP/X1545/A/08/2064100) ("the 2008 Permission") for "12 new houses with workshops" on the Site ("the Approved Scheme").

    b. The 2008 Permission was lawfully implemented prior to its expiry and the Council has issued a CLEUD to that effect (Ref: LDE/MAL/14/00695).

    c. The 2008 Permission is subject to the following conditions which I shall refer to as Conditions 6, 7 and 8 respectively:

        > "(6) The business floorspace of each live/work unit shall be finished ready for occupation before the residential floorspace for each unit is occupied and the residential use shall not precede commencement of the business use.
        > (7) The business floorspace of each live/work unit shall not be used for any purpose other than for purposes within Class B1 in the Schedule to the [GPDO].
        > (8) The occupation of the residential floorspace of the live/work unit shall be limited to a person solely or mainly employed, or last employed in the business occupying the business floorspace of that unit, or a widow or widower of such a person, or any resident dependents."

    d. In 2011 the Council refused a s. 73 application to allow the Approved Scheme to be developed without compliance with

Conditions 6-8 above. The scheme for which permission was sought in 2011 was a wholly residential scheme with no business element whether tied to the residential floorspace or not. The reason for refusal states that:

> "the removal of [Conditions 6, 7 and 8] is deemed unacceptable as it would result in permanently occupied dwellings outside and remote from a development boundary in an unsustainable location without justification for their siting in a rural area."

e. In January 2017 another Inspector dismissed an appeal against the Council's refusal of a further s. 73 application to develop the Approved Scheme without compliance with Conditions 6-8 of the 2008 Permission. Although the application was made under s. 73 of the Town and Country Planning Act 1990 ("the 1990 Act") the underlying scheme was in effect a brand new scheme for 11 residential units (one fewer than that permitted under the 2008 Scheme) and 1 separate business unit as opposed to a scheme for 12 combined live/work units ("the Appeal Scheme");

f. The basis for the refusal of the Appeal Scheme is set out at para. 8 of the Decision Letter ("DL") in the following terms:

> "[the Appeal Scheme] removes the linkage between [the live and the work] elements and would be likely to significantly increase the number of trips to the proposed employment unit and from the proposed dwellings. Since most of those trips would be by private car, I consider that the travel patterns generated by the proposal would be unsustainable."

g. At DL para. 21 the Inspector further concluded that:

> "…even if the Council cannot demonstrate a five year supply of housing land, I find that the proposal's harmful effects on the environment significantly and demonstrably outweigh its benefits when assessed against the policies of the development plan and the Framework taken as a whole. Consequently I conclude that the proposal would not amount to sustainable development and so is not supported by the presumption in favour of sustainable development set out in Framework paragraph 14."

h. In July 2017 the Council adopted its new Local Plan for the period 2014-2029. While in the previous Local Plan the Site had been allocated for an employment use, in the new Local Plan it does not benefit from any allocation and proposals for its development

(whether for a wholly residential or a mixed residential/employment scheme) would conflict with the Local Plan such that obtaining a planning permission would depend on other material considerations. I do not understand the Site to be subject to any other spatial/landscape designations such as Green Belt, AONB, SLA etc.

2. Against that background I am instructed to advise on a strategy for obtaining planning permission for a scheme that is more viable than the Approved Scheme and on the evidence that would be required to support such a strategy.

Discussion

3. I am instructed that a live/work scheme along the lines of the Approved Scheme would be unviable. However there are two forms of development that would be financially viable, namely:

   a. A scheme in which the residential and the employment uses are physically separated. Such a scheme would be viable provided that there was no obligation to 'link' the residential and the business floorspace in the manner contemplated by Condition 8 of the Approved Scheme and/or a s. 106 obligation doing the same; and

   b. A wholly residential scheme without any separate employment unit/space along the lines of the scheme that was refused in 2011. The possibility of obtaining planning permission for such a scheme has been raised once again because the Council's new Local Plan does not allocate the Site for an employment use.

4. I consider both of these options in the discussion below.

Preliminary point: s. 70/s. 73

5. As a preliminary point it is my view that an application for planning permission for either of the two schemes outlined above should be made under s. 70 instead of s. 73 of the 1990 Act. This is because it is clear to me that both

would be materially different to the Approved Scheme which is a scheme for 12 live/work units. It is trite law that it is impermissible for a decision-maker to 're-write' a permission through the s. 73 process.

6. The upshot of having to make an application under s. 70 as opposed to under s. 73 is that the narrowing provision in s. 73(2) (i.e. that "On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted") is not engaged.

7. As a result the normal test for s. 70 applications in s. 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") is engaged and in order to secure a permission it will be necessary for Coldunell to demonstrate compliance with the development plan and, failing that, demonstrate that material considerations indicate that planning permission should be granted. I address the significance of this preliminary observation below.

Sustainability and transport

8. It is quite clear that the principal objection to any proposal for development on the Site relates to 'locational sustainability' in the sense that the Site is located relatively far away from any existing settlement(s) and the services and facilities contained within them. It follows that in order to obtain a consent for a mixed use scheme or a purely residential scheme it will be necessary to show (as a bare minimum) that the scheme in question does not perform any worse than the Approved Scheme.

9. I agree with Those Instructing me that the information submitted in connection with the application, and the appeal, for the Appeal Scheme was woefully inadequate in this respect. To my mind that information suffers from three critical defects:

    a. Firstly, it is based on the premise that "there is no guarantee that any of the residents living within the live/work units of the previously

consented would only work on the site" (see p. 1-2 of the Transport Note 2 dated 14.12.16). This is in direct contradictory to Condition 8 of the 2008 Permission which requires the occupiers of the residential units to be "solely or mainly" employed in the work units. I accept that there are some limited exceptions to this under Condition 8, but ultimately the very real prospect that in the baseline/fallback scenario the link contemplated by Condition 8 would indeed exist seems to have been ignored.

b. Secondly, it does not appear to be based on any empirical evidence regarding likely trip rates associated with the consented and the proposed development. It is highly unusual – in my experience – for statements regarding traffic generation to be unsupported by evidence from a TRICS database. That database is present and, to the best of my knowledge, is likely to contain enough material regarding existing live/work units to enable a consultant to predict with reasonable accuracy the trip rates that would be associated with the 2008 Permission as well as those that would be associated with any new scheme. Since the transport notes lack this supporting evidence, they also lack credibility.

c. Thirdly, it makes the mistake of assuming that the only issue with the Scheme, in sustainability terms, was a pure transport issue which fell to be tested in accordance with NPPF para. 33 bullet 3. Although plainly it is a major concern that as a result of its location the majority of journeys to/from the Site will be made by private motor vehicles, the concept of locational sustainability goes beyond this and engages wider concerns such as the ability of a scheme's future residents to integrate with an existing community by coming into contact with them, and whether there are sufficient community facilities nearby to enable the future residents of the scheme to enjoy a sustainable lifestyle etc.

10. I consider that any new application for planning permission will need to remedy these defects in the transport information.

11. It is essential that any application(s) will need to be supported by a thorough and evidence-based analysis of (i) the likely trip rates that would be associated with the 2008 Permission having regard to the likely effects of Condition 8 and the likely link between the residential and the employment space and (ii) the likely trip rates that would be associated with any new proposal.

12. I make it clear that I do not regard it as inevitable that the picture that this kind of analysis will paint would be so negative as to make a refusal inevitable. On the contrary, I can well see that 12 independent live/work units may well attract a similar amount of traffic (if not more) than a residential scheme with a separate single employment unit on the basis that:

    a. Deliveries/suppliers for 12 different businesses may be more in number than those required for a single employment unit, particularly if that unit was a B1(a) use rather than a B1(b)-(c) use – for example.

    b. Although the 2008 Permission requires the occupiers of the residential units to be "solely or mainly" employed in the work units, it does not impose any restrictions on the number of other employees (who do not live in the residential units) who can work at the work units. It follows that any number of 'external' staff could be employed at the units who would generate trips as well. This needs to be factored into any new transport assessment.

    c. Even the individual occupiers who are "solely or mainly" employed at the work units will generate traffic. This is not just because they will do things like drive to the shops and take their children to school and to visit their friends etc., but because even their employment could generate traffic. For example a barrister with a home office set-up will still need to visit court regularly and a planning consultant with a home office set-up will still need to visit sites and visit clients and attend public inquiries etc. Both would also be visited by clients. This kind of traffic needs to be considered.

d. In addition, any new transport assessment needs to factor in the traffic that would be generated by the "dependents" referred to in Condition 8, i.e. the other members of the household of the person "solely or mainly employed" in the work unit. I am not fully aware of the size of the live units in the Approved Scheme but on the basis that they are large enough to accommodate a family, clearly there is scope for traffic to be generated by (say) spouses, young children/young adults etc. living there but who do not work in the work units.

13. Essentially evidence needs to be produced that shows that there is a credible scenario in which the Approved Scheme will, in fact, give rise to comparable levels of traffic to any proposed scheme. I have a suspicion that the Council are of the view that the Approved Scheme will be a small community of self-employed individuals whose occupation of the live/work scheme will not generate traffic because they will essentially work from home most of the time.

14. This is a simplistic view which I find thoroughly unconvincing and unrealistic. In effect a revised transport assessment needs to demonstrate this by reference to as much empirical evidence as possible. It is my view that such a transport assessment would provide a much more sound basis for comparing the 'fall back scenario' with the predicted scenarios associated with any development proposals – which, again, do not appear to have been considered in any evidence-based manner in the transport assessments. I would be happy to advise in relation to the preparation and drafting of such a statement.

15. Although I have made the point above that the Council's concerns regarding sustainability are in all likelihood broader than simply traffic-related and concern wider issues such as the ability of residents of the scheme to integrate with and plug into existing communities. Concerns of this nature cannot be ignored or brushed under the carpet since there is some justification for them.

16. Since it seems clear that any proposed scheme would be unlikely to meet walking distance standards, Coldunell have to do their utmost to provide a package of locational sustainability-enhancing measures which should attract some 'credit' in the planning balance. Examples would include:

    a. Dedicated cycle storage facilities;

    b. Provision of a Sustainable Travel Plan to all occupiers and employees on the Site to be worked up in consultation with the Council and the County Council;

    c. Electric-car charging points at all residential and employment premises;

    d. The provision of an on-site 'Car Share' Scheme to depress levels of on-site car-ownership;

    e. Restrictions on levels of on-site car ownership or other incentives to depress car-ownership levels or incentivise electric car ownership levels;

    f. The provision of high-speed broadband internet at the Site to encourage take-up of flexible working provision and increase levels of working from home;

    g. Undertaking to market the units as (for example) 2/3-bed 1-study units instead of 3/4 bed flats to encourage home-working patterns;

    h. Investigation of whether a bus stop can be provided (and possibly, the frequency of services improved) at Coldunell's cost at or near the proposed access to the Site;

    i. Investigation of whether any of the local schools would divert their bus services into or near to the Site (again at Coldunell's expense, at least temporarily);

    j. The provision of free Bus Passes or Park & Ride Passes (as appropriate) to residents of the Scheme; and

    k. Exploring the way in which the unit size and unit tenure of the proposed residential units would affect traffic patterns (for example the smaller the unit sizes the less likely they would be occupied by car-owning families etc.);

17. To my mind it is clear that the Site will only pass muster from a broader sustainability point of view provided that Coldunell show that they have done everything that they possibly can do to maximise the sustainability credentials of the scheme such that credit can be claimed for them in the overall planning balance and, in particular, in the context of NPPF para. 14 bullet 2 as well as other provisions of the NPPF such as (for example) para. 32 bullet 1 (taking up sustainable modes of transport depending on the nature and location of the site).

Viability

18. I agree with Those Instructing me that making a case based on the non-viability of the Approved Scheme is likely to be prejudicial to the prospects of obtaining a further planning permission for the Site. If the Approved Scheme is not viable then there is a realistic possibility that it will not be built out. That would mean that it would not be a material consideration, or at the very least it would be a material consideration which carried only limited weight in the overall planning balance because the more likely fall back option is that the Site is *not* built out.

19. It is clear to me that the only proper way to promote this Site for alternative development is to demonstrate that it would amount to an improvement on over the baseline position. Certainly, Coldunell can be candid that any schemes for which consent is sought in the future are *more* viable than the Approved Scheme. But the future it will be important to avoid giving the impression that the Approved Scheme is unviable, since to do so would have the likely effect of making it difficult if not impossible to rely on the Approved Scheme as a fall back/baseline position.

Consequences of the new Local Plan

Affordable housing

20. Now that the new Local Plan has been adopted there is a very real prospect that any fresh development proposals for the Site would need to either provide on-site affordable housing ("AH") or make a contribution in lieu of such provision. Policy H1 of the Local Plan indicates that 25% provision should be made for development in this area.

21. I am not instructed as to whether Coldunell are, in principle, willing to provide any on-site AH or to make a financial contribution in lieu of such provision. Self-evidently from a presentational point of view it would be highly desirable if a future scheme were to make some AH provision since that would be a matter which would add to the social sustainability merits of the scheme and would carry significant weight in the overall planning balance. It would also make a scheme comply with Policy H1 of the Local Plan.

22. For the avoidance of doubt I do not consider that it would be attractive to promote a scheme which made no provision for AH since it is clear that the policy framework since 2008 has changed significantly and in particular the new Local Plan does require developments for 10 or more units or 1,000 sq m floorspace to make an AH contribution. I consider that a scheme which failed to provide any AH contribution would breach Policy H1, notwithstanding the existence of the Approved Scheme, because H1 is clear that "all housing developments…will be expected to contribute towards AH provision". There is no exception save where a contribution would be unviable or undeliverable.

23. In the event that Coldunell are minded (notwithstanding my advice above) to not make a 25% AH provision, care needs to be taken to ensure that the viability of the Approved Scheme is not brought into question through the 'back door'. There is a risk that if it is claimed that a fresh scheme is not viable enough to support an AH contribution, an objector including the Council could question the viability of the Approved Scheme by extension. For the reasons set out above it is highly desirable to avoid this scenario.

24. In my view if Coldunell wish to make an off-site contribution in lieu of on-site provision then the best way to secure the Council's assent to doing so would be to demonstrate that 2/3 AH units on site would be unappealing to an RP who would prefer to have more units in one place for management purposes, and would therefore prefer a commuted sum in this instance. Clearly some pro-active engagement with the RPs will be necessary to achieve such an outcome.

Employment use

25. The *principle* (as opposed to the practicalities, i.e. the increase in car usage) of the de-coupling of the residential and the employment space is established by the DL at para. 15 of which the Inspector states that "there is nothing to suggest that the [Appeal Scheme] would lead to fewer job spaces at the Site or that the single employment unit could not be occupied by a number of businesses. I am not persuaded therefore, that the proposal would result in the loss of employment opportunities or economic output". I would not expect this to be disputed in the event of a further application for such a scheme.

26. The Site used to be, but is no longer, allocated for an employment use in the development plan. This raises the prospect of whether an application for planning permission for a scheme without *any* employment provision would have any merit, the situation having changed since 2011 when an appeal for such a scheme was dismissed.

27. Policy E1 of the new Local Plan provides that "Proposals which cause any loss of existing employment uses, whether the sites are designated or undesignated, will only be considered if [certain criteria are met]." What is meant by an "existing employment use"? I do not consider that an 'existing employment use' means a site on which there is no existing employment use as a matter of fact, but simply a planning permission which if built out and occupied, would be an existing employment use. To my mind that is a *potential* employment use rather than an existing one.

28. There has not been a material change of use at the Site just because of the implementation of the 2008 Permission since the permitted use of the units consented in 2008 have not yet been constricted, let alone used for those purposes. My interpretation of the policy is supported by the fact that I am instructed that the Site is not included as an employment site in the Council's 2015 ELR (although part of it had been included in a previous version). I therefore consider that not providing any employment space on the Site would not therefore breach Policy E1 - or, at least, would not result in a requirement to secure compliance by meeting criteria (1) – (3) as set out in the policy.

29. That is not the end of the matter, however, since the Council would be entitled be claim that notwithstanding the policy position, the loss of potential/consented employment units would be a material consideration. Although I would be happy to argue the contrary at an Inquiry, for example, I consider that there would be some merit in such an argument. Certainly my suspicion is that at the very least an Inspector would be sympathetic to it – particularly having regard to the planning history of the Site and the indication in Policy E1 that "The Council will support and encourage the development of better quality and flexible local employment space to meet the employment target including live work accommodation."

30. Although it is a matter for Coldunell to determine, I consider that the prospects of securing permission for a wholly residential scheme are likely to be less than the prospects of securing permission for a mixed scheme, provided that the fundamental sustainability objection identified by the Inspector in the DL can be overcome. The exception to this would be if it could be shown in a comprehensive and evidence-based transport assessment that the replacement of the employment units with residential floor space would in fact reduce traffic and emissions associated with the Site's development. This needs to be investigated thoroughly.

31. If a single employment unit is to be retained I consider that it would be worth exploring the possibility and feasibility of committing (through a s. 106 obligation) to *marketing* the completed units as live/work units (albeit with on-site rather than conjoined work space) for a specified period of time, say 6 months, in order to seek to secure occupiers who would also work on Site in the first instance, and to offer such prospective buyers discounted rates on the employment space (as suggested in the 2016 application material). A s. 106 could easily make provision for the Scheme to be marketed in a manner agreed by the Council for a 6-month period. It may be that this goes some way towards addressing their concerns – albeit in a manner which preserves the ability of Coldunell to revert to a non-linked scheme should the take-up not materialise.

Housing land supply

32. In my view it will be important to demonstrate that there is a lack of a 5 yr housing land supply in the District at the time of making a new application in order to engage the 'tilted' planning balance in NPPF para. 14. I consider that more should be made of this in any future application since it is an obvious way of increasing the chances of obtaining a permission.

Strategy going forward

33. I have set out my conclusions on the matters I am instructed to advise on above. Given that the Site does not benefit from an allocation in the Local Plan, it is likely that any scheme on the Site will be contrary to the development plan and will need to be promoted on the basis of material considerations and the benefit of the tilted test in NPPF para. 14.

34. I consider that, in broad terms, the site should be promoted along the following lines. The Site is in a rural area which is not as sustainable as an urban area – and the starting point is that allowances have to be made for the reality of this. However it is a consented site that is, as a matter of fact, going

to be built out in the future. The proposed scheme (whatever that is) has been carefully designed to secure a wide range of sustainability enhancements over and above what is secured as part of the consented scheme. Much should be made of the matters I have referred to above, together with any design enhancements which can be achieved - such as a commitment to achieving BREEAM/BFL standards, low-energy/green roofs etc. In the context of a recognised housing shortage, which causes NPPF para. 14 to be engaged, the fresh scheme offers an important opportunity to maximise the delivery of housing (including affordable housing). Since the scheme offers *improvements* in sustainability over the consented scheme, there cannot be said to be any disadvantages to granting consent that "significantly and demonstrably" outweigh the advantages of granting permission.

35. Please get in touch with me directly in Chambers if I can assist further.

GEORGE MACKENZIE

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9 November 2017