

**STATEMENT OF
COMMON GROUND**

Prepared by:

**Woolf Bond Planning LLP
(representing Appellant)
and
Royal Borough of Windsor and Maidenhead Council**

FORMER MISSANDA, WELLS LANE, ASCOT, SL5 7DY

LPA REFS: 18/03634 and 18/03705

WBP REF: DB/JS/7868

PINS REF: 3235880 & 3235884:

January 2020

1. Introduction

- 1.1. Preparation of this document follows discussions between Woolf Bond Planning LLP, acting on behalf of the appellant and The Royal Borough of Windsor and Maidenhead Council ('the Council').
- 1.2. The appeals relate to the Council's refusal to discharge conditions in respect of the construction of 2 detached dwellings following demolition of an existing dwelling and outbuildings. The conditions are attached to planning permission 15/02893/FULL, varied pursuant to an application under section 73 of the Town and Country Planning Act 1990 under reference 16/03736/VAR . The permissions relate to land known as Missanda, Wells Lane, Ascot.
- 1.3. The discharge of conditions applications the subject of these appeals are set out as follows;
18/03634/CONDIT
Details required by condition 2 (SANG and SAMM) 3 (external materials)
Submitted 14/12/18
Validated 17/12/18
Refused 14/06/1
18/03705
Details required by condition 4 (finished slab and floor levels) 5 (tree protection) 6 (retaining wall) 7 (siting and design of means of enclosure) 8 (underground utilities) 9 (hard and soft landscaping) 10 (construction environmental management plan) 12 (sustainability measures) 13 (water butt) 15 (fixed and obscure windows) 16 (construction management plan) 19 (porous hard surface) 20 (roof lights)
Submitted 20/12/18
Validated 03/01/19
Refused 14/06/19
- 1.4. The description of application 18/03705 was amended during the course of the Application to remove reference to condition numbers 15, 19 and 20.

2. Consideration of the Appeal Applications by the Council and the Reasons for Refusal

- 2.1. The appeal applications were refused on 14th June 2019 for the reasons set out in the two decision notices.
- 2.2. In respect of reasons for refusal for conditions 3 (external materials), 4 (finished slab and floor levels) 5 (tree protection) 6 (retaining wall) 7 (siting and design of means of enclosure) 8 (underground utilities) 9 (hard and soft landscaping) 10 (construction environmental management plan) 12 (sustainability measures) 13 (water butt) and 16 (construction management plan), the wording of the relevant parts of the decision notice expressly states that the information submitted in respect of each matter is acceptable.
- 2.3. Consequently, the Materials Schedule (condition 3), drawings 14-P1039 – 306 Rev B (conditions 4, 5, 7, 9, 13), the GHA Arboricultural Method Statement (condition 5), 14-P1039 – 307 Rev B (condition 8), 14-P1039 – 306 Rev C (conditions 10), AAE Construction Environmental Management Plan (April 2019) (condition 10), Energy and Sustainability Report Issue 1 (condition 12), are all considered acceptable to the Council in respect of the conditions as set out in the decision notices.
- 2.4. The Site Management Plan (Drawing 14-P1089-308 Rev C) and the Construction Environmental Management Plan (April 2019) are also considered to be acceptable in respect of condition 16 (construction management plan), however this was left off of decision notice 18/03705 in error.

3. Agreed Matters

- 3.1. All of the details submitted for approval by the Council pursuant to the conditions were considered to be acceptable by the Council. The refusal to approve details related solely to the issue of the section 111 agreement.
- 3.2. The works on site on 29 January 2019, comprising the digging of a trench, are capable of constituting "material operations" sufficient to commence the development. The

appellant sent in a surveyors report with plans and photographs confirming the location and extent of the trench and the timing of these material operations to the Council (See appellants statement of case document 4). The appellants believe this evidence confirms a material commencement of the development has occurred prior to the deadline.

- 3.3. The issue of evidence of material operations did not form part of the refusal of approvals under the conditions (18/03705).

4. Agreed Chronology

Planning permission was granted for the construction of 2 detached dwellings on 4 February 2016 (reference 15/02893/FULL);

- 4.1 An application was submitted under section 73 of the Town and Country Planning Act 1990 to vary condition 20 of 15/02893/FULL. This was granted on 21 February 2017 (reference 16/03736/VAR). This is a new planning permission and was subject to 21 conditions which, save for the time for commencement condition 1 and condition 20, repeated the conditions that 15/02893/FULL was granted subject to.
- 4.2 Condition 1 required the development to commence by 4 February 2019.
- 4.3 Condition 2 of 15/02893/Full and 16/03736/VAR states:
"No development shall take place until a scheme for the mitigation of the effects of the development on the Thames Basin Heaths Special Protection Area has been submitted to and approved in writing by the Local Planning Authority. The scheme shall make provision for the delivery of Suitable Alternative Natural Greenspace (SANG) and for provision towards Strategic Access Management and Monitoring (SAMM). In the event that the proposal is for the physical provision of SANG, the SANG shall be provided in accordance with the approved scheme before any dwelling is occupied.
- 4.4. Reason: To ensure that the development, either on its own or in combination with other plans or projects, does not have a significant adverse effect on a European site within the Conservation of Habitats and Species Regulations 2010."

- 4.5 A letter was written to RBWM by the appellants architects (Ascot Design) on **11 December 2018** titled "MISSANDA CONDITION 2 – SANG/SAMM ref 16/03736 15/02893/FULL". That letter stated:
- 4.6 "We can confirm on behalf of our clients for this site, Pipeline Worldwide SA, that they are willing and able to agree provision towards SANG and SAMM relating to this site.
- 4.7 We await the requisite paperwork for consideration / agreement in order that this matter can be resolved as quickly as possible."
- 4.8 An application to discharge conditions 2 and 3 in respect of the original planning permission 15/02893/FULL was submitted on **14 December 2018** (reference 18/03634/CONDIT).
- 4.9 An application to discharge conditions 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19 and 20 of the section 73 planning permission 16/03736/VAR was submitted on **19 December 2018** (reference 18/03705) and registered by RBWM.
- 4.10 On **3 January 2019** Select Business Services: Legal Solutions (the combined legal department for Wokingham Borough Council and the Royal Borough of Windsor and Maidenhead) were instructed to prepare a s111 agreement to deal with Condition 2 of the planning permissions 15/029893/FULL and 16/03736/VAR. On **8 January 2019** Select Business Services: Legal Solutions, wrote to the appellants agents enclosing a draft agreement to be made under section 111 of the Local Government Act 1972. That letter referenced a requirement to secure a SAMM Contribution and a SANG Contribution "by a s.111 Agreement prior to Commencement of Development". The letter states that this is required by condition 2 of 15/029893/FULL and 16/03736/VAR.
- 4.11 The definition of Planning Permission in the draft agreement refers to both of these planning permissions. That draft agreement required payment of:
- a. A SAMM contribution of £1,524 (index linked) "towards the costs of a mitigation package towards the management and monitoring of public access and the impact of the Development on the Thames Basin Heath SPA"; and

- b. A SANG contribution of £12,080 (index linked) "towards the cost of the provision and maintenance of the Allen's Field SANG".
 - c. The draft agreement was drafted as between the Council, Wild Orchid Limited and Croy Limited. The two latter parties were the relevant owners of the land.
 - d. The signature page of the draft agreement (page 12) provided space for two directors or one director and a director/secretary for each company to sign. However the draft deed sent by the Council still didn't have an option for attestation.
- 4.12 The s111 agreement was signed by one director of Wild Orchid Limited and one director of Croy Limited and sent back to the Council at some point in **January 2019** (precise date unknown).
- 4.13 On **8 January 2019**, Ascot Design emailed the Council to get an update on progress and to see whether they required any further information. On **10 January 2019**, the Council replied stated that "it seems like we have everything but I will have a proper look in the next week or so and let you know if there are any issues".
- 4.14 The Council was informed that development was to commence by digging a trench by email from the appellant's architects to Jo Richards, Principal Planning Officer at the Council, dated **22 January 2019**. The email stated:
- 4.15 "With regards to both the applications 18/03634 & 18/03705 [the condition approval applications] we are aware that they have now been running for a number of weeks therefore we would like to notify you that our client intends to start by commencing the trench dig, however this is as far as we intend work to proceed until we have your discharge decision. I trust that this is acceptable."
- 4.16 On **28 January 2019**, Ascot Design emailed a Senior Planning Officer again asking for an update on progress, and whether any further information was required to discharge the conditions. On **29 January 2019**, Ascot Design also emailed the Principal Planning Officer for an update on their progress with the applications.
- 4.17 The Senior Planning Officer at the Council responded on **29 January 2019** to say "As

far as I am aware I have everything I need. If there are any issues with this or if I require further information I will let you know as soon as possible". On the same day, the Principal Planning Officer replied to say that the condition 2/3 application was "being progressed by the Council's legal department" and that – for the remaining conditions – the officer was "waiting to hear back from the ecologist and highways officer". The Council also informed Ascot Design that it would need amended details in response to comments by the Tree Officer.

4.18 Jo Richards of the Council also emailed on **29 January 2019** in respect of the proposed commencement works. That email stated:

"I have just spoken to the enforcement team about this and because the CONDIR applications have already been submitted and the information is under consideration, it would be unreasonable for the Planning Authority to take any action against the carrying out of such works at this stage."

4.19 The trench digging works were carried out on the land on **29 January 2019**. A site inspection report of the trench dig was completed on **4 February 2019**.

4.20 Select Business Services: Legal Solutions received and scanned in the s111 agreement signed by one director for Wild Orchid Limited and Croy Limited on **4 February 2019**.

4.21 By letter dated **6 February 2019** Helena Stevenson of Select Business Services: Legal Solutions stated that it had been incorrectly executed/signed. The letter stated as follows:

4.22 "Re: s.111 Agreement relating to Missanda, Wells Lane, Ascot. We have received the returned document sent to the Council in this matter, however, they have not been executed correctly as only one director has signed for both Wild Orchid Limited and Croy Limited.

4.23 Please therefore find enclosed the executed s.111 Agreement relating to the above property which requires a further director/secretary signature acting for both Wild Orchid Limited and Croy Limited. Please also ensure that the second signatory signs

the plan attached to the agreements."

- 4.23 On the **8th February 2019** an email was sent to the Douglas Bond of Woolf Bond Planning and Andrew Ladsky by Helena Stevenson of Select Business Services: Legal Solutions attaching a completed s.111 agreement clearly advising that this related to a separate planning appeal matter for the same site (planning reference 17/03992/FULL) advising that the agreement for the appeal had completed which was required for the appeal deadline of the 8th February 2019.
- 4.24 A further letter was received from Select Business Services dated **26 April 2019**. It referred to planning permission 15/02893/FULL but this was a mistake by the Council. The content of the letter related to a different development on the land as mentioned in paragraph 4.23.
- 4.25 Select Business Services: Legal Solutions wrote to the appellant's architects on **30 April 2019** asking for the re-executed s111 agreement following the Council's refusal to accept the previously executed agreement.
- 4.26 The considerations of the applications to discharge conditions 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19 and 20 of the section 73 planning permission 16/03736/VAR were, at this time, still being considered and further information in respect of some of the conditions was still being requested. Jo Richards of the Council wrote to the appellant's architects by email dated **14 May 2019** stating:
"You will be pleased to hear that I am nearly in a position to discharge these conditions! Would you be able to agree an extension of time for this one until 17th May 2019?"
- 4.26 The application to discharge conditions 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 19 and 20 of the section 73 planning permission 16/03736/VAR was refused on 14 June 2019, the reasons given for each refusal are identical save for the drawing numbers (the reason for refusal of the details submitted for condition 4 only is reproduced below):
"Whilst the details as shown on drawing no. 14-P1089 - 306 Rev B are acceptable the LPA can no longer agree these details as planning permissions 15/02893/FULL and 16/03736/VAR have expired. The works undertaken on site are not considered to have lawfully begun the development approved by these applications as Condition 2 (SANG)

which is considered to go to the heart of the permission and is clearly phrased as an express requirement that the actual start of development is conditional upon the condition being satisfied (*Whitley v Secretary of State for Wales* (1992) 64 P&CR 296) has not been discharged and can no longer be discharged as the time limit for commencement has expired."

- 4.27 The application to discharge conditions 2 and 3 in respect of the original planning permission 15/02893/FULL (but not 16/003736/VAR) was refused on 14 June 2019, the reason given was:

"Condition 2 SANG and SAMM

No mitigation has been secured to mitigate the effects of the development on the Thames Basin Heaths Special Protection Area as the necessary s111 agreement has not been satisfactorily completed or alternative mitigation secured.

Additionally the applicant is advised that the Local Planning Authority consider that this condition goes to the heart of the planning permission and is clearly phrased as an express requirement that the actual start of development is conditional upon the condition being satisfied (*Whitley v Secretary of State for Wales* 1992). As such the Local Planning Authority consider that the works as carried out on site in order to commence development have not lawfully begun the development approved. Given that condition 1 of planning permission 15/02893 required development to commence by 4th February 2019 planning permission 15/02893 is no longer extant and neither is permission 16/03736/VAR.

Condition 3 Materials

The materials schedule dated December 2018 is acceptable. However these details can no longer be agreed as planning permission 15/02893 and 16/03736 are no longer extant permissions."

- 4.28 The appellant's planning consultant challenged the Council's position by email dated 12 June 2019. In addition, the appellant's instructed Penningtons solicitors, who wrote a letter to the Council on 24 June 2019. The Council maintained their refusal in

reply to the letter, and the appellant lodged the appeals on 23 August 2019.

5 Matters in Dispute

5.1 These appeals raise three matters, all of which are in dispute:

- (a) Whether condition 2 was complied with because the Council had, by the date of the commencement of the works, "approved" a mitigation scheme by the act of sending the draft s.111 agreement. In other words, is the execution of the deed a requirement of compliance with condition 2?
- (b) If condition 2 was breached, was the effect of the breach such as to render the development as a whole unlawful? This concerns the question of whether condition 2 goes to "the heart of the permission".
- (c) If the condition does go to "the heart of the permission", do any of the exceptions to the so-called *Whitley* principle apply?

6. Agreement

6.1. This document is accepted as the agreed Statement of Common Ground for the appeal. It has been duly signed by representatives of the appellant and Royal Borough of Windsor and Maidenhead Council

Signed on behalf of the Applicant

Name.....DOUGLAS BOND

Date.....13/01/2020.....

Signed on behalf of Royal Borough of Windsor and Maidenhead Council.

Name.......... V C GIBSON

Date..... 13/01/2020.....