

LAND AT FARTHINGLOE/WESTERN HEIGHTS, DOVER

DOVER DISTRICT COUNCIL

ADVICE (No.4)

1. I am asked to advise Dover District Council ("the Council") as to the approach to be taken when determining an application for planning permission ("the Planning Application"¹) made by China Gateway International Limited ("the Applicant") to develop land at Farthingloe and Western Heights, Dover.
2. I advise further to my Advice dated 18th July 2011 ("my First Advice"), my Advice (No.2) dated 24th January 2013, and my Advice (No.3) dated 6th February 2013.

The Main Relevant Facts

3. I do not repeat the summary of the facts set out in my previous Advices.
4. I have been provided with copies of:
 - a. Design and Access Statement (May 2012) ("the DAS"), and extracts from the DAS which have been highlighted by Richard Tilley of CGMS (the planning consultant instructed by the Applicant).
 - b. Planning and Regeneration Statement (May 2012).
 - c. Planning and Regeneration Statement update (December 2012).
 - d. Supporting Paper on Tourism and Benefits prepared by BBP Regeneration (December 2012).
 - e. Heritage Statement (May 2012).
 - f. Farthingloe Design Guide (December 2012), and extracts from the Design Guide which have been highlighted by Richard Tilley of CGMS.

¹ LPA reference

- g. Western Heights and Farthingloe – Phasing of Heritage Benefits (note submitted by the Applicant) (“the Phasing of Heritage Benefits Note”).
 - h. A note prepared by the Applicant entitled “An Executive Summary Statement – The Case for Comprehensive Regeneration” (“the Comprehensive Regeneration Note”).
 - i. Monetary S106 requests/proposed contributions for Farthingloe Western Heights (this note addresses requests for contributions other than the proposed £5m contribution towards heritage benefits).
5. The Planning Application comprises a number of different elements:
- a. A proposal to provide up to 521 residential units, a 90 apartment retirement village, a health facility, and to convert existing buildings to be used as shop, pub/restaurant, and to provide a bed and breakfast facility at Farthingloe.
 - b. A proposal to provide up to 85 residential units (the number of residential units proposed has now been reduced to 31²), a 130 bed hotel and conference centre, and to convert Victoria Halls to provide 9 residential units at Western Heights.
 - c. A proposal to provide a visitor centre at Drop Redoubt, Western Heights.
 - d. A proposal to provide a pedestrian network to facilitate enhanced recreational access and associated landscaping and works at Farthingloe and Western Heights.
6. The Applicant intends to enter into a planning obligation, one term of which would secure the payment of £5m to the Council with the intention that the money would be used to fund works to heritage assets, namely the former military structures at Western Heights.
7. The Planning Application is put forward on the basis that the proposals will contribute to Dover’s overall regeneration strategy (Planning and Regeneration Strategy paragraph 2.3). A ‘Countryside Access Area’ is to be provided (Planning and Regeneration Statement paragraph 5.11).
8. The Applicant has indicated that it is intended that an upper mid range hotel will be provided in order to meet the need identified in the core strategy (Planning and Regeneration Statement Update paragraphs 2.38 and 2.43³).

² See email from Peter Wallace of the Council to Richard Tilley of CGMS dated 11th April 2013 setting a revised description of development

³ It is indicated that the quality of the hotel (4* and above) will be controlled by a planning obligation

9. It is proposed that the contribution of £5m will be made towards the cost of restoring the heritage interest of, and opening up public access to, the military structures at Western Heights ("the Heritage Fund"). The Applicant does not own the military structures that are to be restored, and therefore a payment will be made to the Council, which can then take steps to ensure that the money is spent on the restoration project/s.
10. The Phasing of Heritage Benefits Note indicates that the £5m will be made available in phases.
- a. £1m will be payable on commencement of development of each phase of development, and will include payments to allow the swing bridge to Drop Redoubt to be re-instated.
 - b. £1.85m will be paid at the Phase 2 stage; a visitor centre will be provided at Drop Redoubt in this phase. This payment will be made on completion of the Area A development and after the first 100 units are provided on Areas B and C.
 - c. The final payment of £2.15m will be made on completion of Areas B and C. This will include payment for refurbishment of the interior of the Grand Shaft, landscape improvements and a payment towards running costs associated with the heritage attraction.
11. The 'Supporting Paper on Tourism and Benefits' prepared by BBP Regeneration (December 2012) states the Countryside Access Area will provide a new publicly accessible open space for Dover residents and provide improved access over the Farthingloe/Western Heights ridge and improved access to the heritage assets (paragraph 16)⁴.
12. Part of the Planning Application site at Western Heights falls within a Scheduled Ancient Monument ("SAM") and within a conservation area⁵. Part of the site lies within a local nature reserve. All the parcels at Farthingloe fall within an area of outstanding natural beauty ("AONB").
13. Part of the Farthingloe element of the Planning Application site was used to house construction workers while the Channel Tunnel was being constructed⁶. By a decision notice dated 26th September 1996 planning permission was granted for the development of a business park comprising 19,510 sq m of B1

⁴ See also page 15 of the DAS

⁵ Scoping Opinion delegated report, 2nd page

⁶ Planning and Regeneration Statement paragraph 4.2

units ("the 1996 Planning Permission"⁷). The 1996 Planning Permission was implemented.

14. The Applicant relies upon the need for development in support of its argument that planning permission should be granted for major development in the AONB. In support of that argument the Applicant refers to "the shortfall in the 5 year housing land supply..⁸".

15. The most recent Local Plan Annual Monitoring Report ("AMR") is that for 2011/2012, which is dated January 2013.

- a. The five year housing land supply position is set out at paragraph 4.8.
- b. The Table at paragraph 4.8 indicates that, with a 5% 'buffer', the shortfall is 620 and with a 20% 'buffer' the shortfall is 999.

16. The housing land supply requirement is derived from the Dover Core Strategy (adopted in February 2010) ("the CS").

- a. Policy CP2 states that provisions should be made to bring forward 14,000 new homes in the period 2006-2026.
- b. Policy CP3 of the CS provides that land will be allocated to meet the housing provisions of policy CP2 with a distribution of 9,700 to Dover.
- c. Paragraph 3.31 of the CS states:

"The Site Allocations Document shall allocate land for housing development to meet the following requirements inclusive of completions since 2006:

Dover – 2,950 homes

....."

17. In December 2012 the Council published the Dover District Land Allocations Pre-submission Local Plan ("the Land Allocations Plan"). The table at paragraph 3.1 of that draft plan indicates that the requirement for housing provision at Dover is to be met by allocating sufficient land for 1,010 dwellings and relying on windfalls to bring forward sites to make up the remaining requirement of 610 homes⁹.

⁷ LPA ref DOV/94/1095

⁸ Planning and Regeneration Statement paragraph 7.25

⁹ The figure should in fact be 510 homes as the figure for 'residual amount to be allocated' should be 1,520, being 2,950 less 1,430.

18. The Applicant has provided a Briefing Note dated 15th May 2013 which has been produced by Pinsent Masons, solicitors ("the Briefing Note"). In that note, arguments as to why it is said that the planning obligation offered by the Applicant (which would secure the payment of £5m to the Council to fund works to the heritage assets at Western Heights) would comply with the requirements of regulation 122(2) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations 2010").

19. The arguments advanced by the Applicant in the Briefing Note are as follows:

Necessary to make the development acceptable in planning terms

- a. The development proposals constitute a comprehensive scheme which will give rise to regeneration benefits, in particular the carrying out of works to heritage assets ("the Heritage Benefits") which will be funded by the Heritage Fund. "*..... the Heritage Benefits will deliver heritage and tourism regeneration benefits to Dover*"¹⁰.
- b. Given the impact on the SAM and the AONB, it is likely that the proposed development would not be considered to be acceptable in the absence of the Heritage Fund¹¹.

Directly related to the development

- c. The residential development at Farthingloe will be connected to the Western Heights area by an existing pathway, the Countryside Access Area, and trails, thereby giving those living in the Farthingloe development improved access to the heritage assets.
- d. The restoration of the heritage assets are necessary to secure the regeneration benefits which the development as a whole will bring.
- e. The restored heritage assets provide new recreational facilities which, in part, compensate for loss of recreational potential at Farthingloe¹².

Fairly and reasonably related in scale and kind to the development

- f. The Heritage Fund has been calculated as the cost of carrying out works to the heritage assets and in providing on-going management.

¹⁰ Briefing Note paragraph 4.18

¹¹ Briefing Note paragraph 4.19

¹² Briefing Note paragraph 4.22

Instructions

20. I am asked to advise on the following issues:

- a. Whether the proposed contribution of £5m can, in accordance with the requirements of regulation 122(2) of the CIL Regulations 2010, constitute a reason for granting planning permission for the proposed development.
- b. If the proposed contribution cannot constitute a reason for granting planning permission, to consider the consequences, and any practicable means of remedy.
- c. To consider the issues raised in the Briefing Note.

21. At paragraph 2.1 of the Briefing Note, the Applicant requests that I consider:

- a. Whether the proposed contribution of £5m can, in accordance with the requirements of regulation 122(2) of the CIL Regulations 2010, constitute a reason for granting planning permission for the proposed development, and in particular, whether:
 - i. The link between the various elements has been established so as to enable and require the scheme to be treated as a composite whole;
 - ii. The connection between the Farthingloe element of the development proposal and the Heritage Benefits has been established; and
 - iii. The restoration of the heritage assets can be said to form part of the overall regeneration scheme proposed in the application.
- b. The draft of a report prepared by the Council's officers to assist members in their consideration of the Planning Application.

22. I have not been provided with a draft of the officers' report and so do not comment on it¹³.

¹³ I was provided with an extract from the draft report. The extract addressed 'Housing Delivery'. I made some oral comments to my instructing officers in telephone consultation on 21st May 2013. The extract was provided to me to assist my understanding of the housing

23. I will address the issues raised taking the three requirements identified in regulation 122(2) of the CIL Regulations 2010 as headings.

Advice

24. Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations 2010") provides:

(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

25. A single planning application has been made which proposes development at Farthingloe and at Western Heights.

26. An explanation has been provided as to how the various elements of the application are connected or linked in one scheme. That scheme is proposed in order to achieve regeneration objectives and it is proposed (as part of the development) that those elements are linked by an area of open space available for countryside access which will contribute to the tourism and regeneration objectives.

27. It is clear from the principles summarised in the Sainsbury's¹⁴ case that the fact that the financial viability of one part of a scheme will fund another part of the scheme is capable of being material, although there must be a real connection.

28. In this case the Applicant does not have control over all the heritage assets and is therefore proposing to make a financial contribution to the Council secured by a planning obligation (to be spent on restoring heritage assets). Two main questions arise, is the proposed contribution a consideration which can be taken into account when determining the application and, are the CIL Regulations requirements satisfied.

land supply position. I was not asked to comment on the content of the extract. I did point out possible inconsistencies between the position taken on the means by which the Core Strategy housing requirement would be met in the extract from the draft officers' report and in the draft Land Allocations Local Plan.

¹⁴ R (Sainsbury's Supermarkets Ltd) v. Wolverhampton City Council [2011] 1 AC 437 at paragraph 70

Is the proposed contribution capable of being a material consideration?

29. On the first question, on the facts now before me, it is my view that there is a real connection between the contribution and the development proposed. The development at Farthingloe is required to generate a surplus to fund the contribution that is to be made. The purpose of the development is, in part, to secure the regeneration of the area, in particular to stimulate tourist activity and economic regeneration. The restoration of the heritage assets is an essential part of that regeneration proposal and of the tourism aspect of it, and so there is a real connection between the financially viable part of the scheme and the restoration proposals.

Regulation 122 of the CIL Regulations

30. The second question, namely compliance with regulation 122(2) of the CIL Regulations, requires three sub-questions to be answered, namely, is the proposed financial contribution (to be secured by planning obligation):

- a. Necessary to make the development acceptable in planning terms
- b. Directly related to the development; and
- c. Fairly and reasonably related in scale and kind to the development.

31. It is for the Council to come to a judgment on each of those issues on the facts¹⁵.

Necessary to make the development acceptable in planning terms

32. As noted above when referring to the position as set out in the Briefing Note, the Applicant acknowledges that, absent the Heritage Fund, the adverse impact of the proposed development on parts of the Scheduled Ancient Monument and on the area of outstanding natural beauty ("AONB"), would be likely to cause the development to be considered to be unacceptable.

33. The Heritage Fund will enable works to be carried out to the heritage assets, and make them accessible to visitors. The Heritage Fund can therefore be said to be necessary to overcome the otherwise unacceptable impact on the heritage assets as a result of the development of the hotel and residential uses at Western Heights.

¹⁵ See R (Lyon) v. Cambridge City Council [2013] Env LR 11, at paragraph 59

34. It is also necessary to consider whether the Heritage Fund can be said to be necessary to make the otherwise unacceptable development at Farthingloe acceptable in planning terms. The main unacceptable impact arising as a result of the Farthingloe element of the development will be on the area of outstanding natural beauty. The development as now proposed is intended to secure overall regeneration and tourism related benefits. The tourism related benefits are focussed on the restoration of the heritage assets, but also include benefits to be derived from the Countryside Access Area¹⁶.
35. In my view it is open to the Council to conclude that, given the links proposed between Farthingloe and Western Heights, and given the relationship between heritage assets, countryside access, and tourism related regeneration benefits, each element of the scheme is required in order to realise the overall benefits and can therefore be regarded as a composite whole.
36. The Applicant seeks to argue that the recreation opportunities offered by the restored heritage asset in part compensate for the loss of recreational potential at Farthingloe¹⁷. Although some weight might be given to that argument, the provision of alternative recreational opportunities is unlikely to be said to be sufficient, in itself, to outweigh adverse impact on the AONB. The duty imposed by section 85(1) of the Countryside and Rights of Way Act 2000 is as follows:
- (1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.*
37. Even if alternative recreational provision is made, it will not address the objective which is sought to be advanced by section 85(1) of the 2000 Act.
38. However, it is open to the Council to conclude that other benefits, such as the regeneration and tourism benefits on which the Applicant relies, are such as to outweigh the adverse impact on the AONB. In order to form a judgment on that issue, the Council will have to form a view as to the prospects of restoration taking place if the funds are made available.
39. It is clear that, on the Applicant's own analysis, the Heritage Fund, and more particularly the restoration that will be achieved with that fund, is essential if regeneration benefits are to be secured. As a result it is clear that, in the event that the Council decide, that the regeneration, tourism and heritage

¹⁶ See paragraph 42 of the Supporting Paper on Tourism and Benefits

¹⁷ Briefing Note paragraph 4.22

benefits outweigh the adverse impact on the AONB, the Heritage Fund will be necessary to make the development acceptable in planning terms.

40. For those reasons, and subject to the exercise of its judgment, it is open to the Council to conclude that the Heritage Fund is necessary to make the development acceptable in planning terms, in that the benefits to be derived are necessary to outweigh harm to the scheduled ancient monument and to the AONB.

Directly related to the development

41. As noted in my First Advice the requirement of regulation 122(2)(b) goes beyond requiring a real connection between the financial contribution and the development proposed; the planning obligation must be directly related to the development.
42. Although the facts of this case can be distinguished from those considered in Derwent Holdings v. Trafford BC and others¹⁸ some assistance can be derived from the judgment of Carnwath LJ in that case.
43. In the Derwent case the applicant contended that both elements of the development proposed (a Tesco store and refurbishment to Old Trafford Cricket Ground) were acceptable in principle, but that the cricket club element would only come forward in the event that the whole development was approved, as the proceeds received on sale of the store site to Tesco would be used to fund the works to the cricket ground. In this case it is not contended that the Farthingloe and Western Heights elements of the proposed development are both acceptable in themselves. It is said that: "... it follows that without the Heritage Fund and the consequent restoration, enhancement and management of the heritage assets, it is likely that the Development would not be considered acceptable, given its impacts on parts of the Scheduled Ancient Monument and the Area of Outstanding Natural Beauty. ..." ¹⁹.
44. Carnwath LJ described the relationship between the Tesco store and the cricket ground as 'direct', and stated (at paragraph 19):

19 A similar contrast can be drawn in this case. Derwent, shortly before the committee meeting, had offered to match Tesco's cross-subsidy with its own contribution of £21m to the development of the cricket ground. The members were

¹⁸ [2011] EWCA Civ 832

¹⁹ Briefing Note paragraph 4.19

understandably advised that this was not relevant to the merits of Derwent's proposed retail development, given the lack of any sufficient relationship between the Derwent site and the cricket ground. In the joint application, however, there was a direct relationship. The two elements were in close proximity and physically linked, and they were reasonably included in a single application. Even if, as Mr Tucker submits, some members may have been confused into thinking that they could take account of the overall benefits of the two elements, it is not clear to me why that would have been legally objectionable.

45. Carnwath LJ did not make express reference to regulation 122(2), and appears (in the passage quoted) to have been considering materiality, as distinct from compliance with regulation 122. Nonetheless Carnwath LJ's description of the relationship between the store and the cricket ground as being 'direct' a result of proximity and a pedestrian walkway²⁰ provides some helpful guidance.
46. In this case the two elements of the application site, Western Heights and Farthingloe, are in close proximity and linked by a footpath. The Heritage Fund will be used to fund restoration of the military sites at Western Heights. The connection is, in many ways, closer than the relationship between the cricket ground and the store as considered in Derwent, as there is a functional relationship between the Heritage Fund contribution and the development proposed. The restoration of the heritage assets (which will be funded by the payment proposed) forms part of the overall regeneration scheme, and each element of the development forms part of a composite whole.
47. As a result, it is open to the Council, in the exercise of their judgment to form the view that the payment is directly related to the development.

Fairly and reasonably related in scale and kind

48. The Phasing of Heritage Benefits Note identifies the way in which the Heritage Fund is intended to be spent.
49. Restoration of Drop Redoubt fort has been identified as a priority.
50. The £5m contribution, to be made in phases, would enable the reinstatement of the swing bridge to Drop Redoubt, and related access works, would allow visitors to access the fort.

²⁰ See paragraph 1 of the judgment, where there is a reference to a pedestrian walkway

51. The works to the fort and the provision of a visitor centre, and continued management, would enable those who visited the fort to appreciate its heritage significance.
52. The funding of works to the Grand Shaft, and associated areas would enhance the visitor experience.
53. The Supporting Paper on Tourism and Benefits²¹ identifies restoration of Drop Redoubt and the Grand Shaft as key components of the tourism development plan.
54. The restoration of Drop Redoubt and Grand Shaft will restore the heritage assets in such a way as to provide an attraction for those living in Farthingloe, and a destination for those who use the connecting footpath and trails, and the 'heritage trail' in particular.
55. The scale of the contribution is related to the scale of the works required to the heritage assets as part of the comprehensive scheme, and therefore it is my view that it is open to the Council to form the view that the planning obligation offered is reasonably related in scale and kind to the development proposed.

Conclusions

56. For the reasons set out above, my conclusions on the issues on which I am asked to advise are as follows:
 - a. A planning obligation can be a reason for granting planning permission if all the requirements set out in regulation 122(2) of the CIL Regulations 2010 are satisfied.
 - b. Whether a planning obligation offered complies with regulation 122(2) is a matter of judgment for the decision maker (in this case the Council) on consideration of the facts.
 - c. It is open to the Council, to conclude that the Heritage Fund planning obligation satisfies the requirements of regulation 122(2), and the Heritage Fund is capable of constituting a reason to grant planning permission in this case.
 - d. The second question posed in my instructions does not arise.
 - e. I consider that the scheme can be considered to be a composite whole.

²¹ At paragraph 28

- f. A connection has been established between the Farthingloe element of the scheme and the Heritage Fund.
- g. The restoration of the heritage assets can be said to form part of the overall regeneration scheme.
- h. I have not been provided with a draft of the officers' report and so have not commented on it.

57. In this Advice I have restricted my consideration to the issues identified in my instructions. Other issues on which I have been asked to advice, including the approach to be taken when considering viability, the application of policy relating to areas of outstanding natural beauty, the form in which planning permission can be granted, environmental impact assessment and habitats are covered in my previous Advices.

58. If I can be of any further assistance at this stage, please contact me in chambers.

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QC

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Neil Cameron

28th May 2013

**LAND AT FARTHINGLOE AND
WESTERN HEIGHTS, DOVER**

DOVER DISTRICT COUNCIL

ADVICE (No.4)

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