

# Appendix 3.3 - Leading Counsel's Opinion (28 May 2020)

**Payne, Hannah**

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**From:** Guy Pearson-Gregory <guy.pearson-gregory@accruicap.com>  
**Sent:** 01 June 2020 16:32  
**To:** Coley, Rebecca  
**Cc:** Debra Harrison (Debra.Harrison@trafford.gov.uk); sara.todd@trafford.gov.uk; andrew.western@trafford.gov.uk; Stephen Webster  
**Subject:** Trafford Place, Stretford  
**Attachments:** Trafford Place, Stretford - Alexander Booth QC.pdf

Dear Rebecca,

Following the non-validation of our application, and WSP's recent dialogue with Debra Harrison, we have sought further legal advice.

We feel strongly that our application should be validated immediately and I attach an opinion from Leading Counsel which supports this view.

We have also taken further advice from Leading Counsel in relation to the Trafford Bruntwood application, on which we have previously made comment, including how it is being handled compared with our application. We are continuing to consider the various options available to us in relation to this application.

So that we can move forward can you please respond to this e-mail, confirming the Council's position in relation to the validation of our application, by 5<sup>th</sup> June 2020.

Kind regards,

Guy

**Guy Pearson-Gregory**

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Re: **Accrue (Forum) 1 LLP**

**IN THE MATTER OF**

**The former B&Q Site, Great Stone Road, Trafford**

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**OPINION**

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**Preliminary**

1. I am asked to advise Accrue (Forum) 1 LLP ('the Company') in connection with its proposals to bring forward development on the former B&Q site at Great Stone Road, Trafford ('the Site'). The Company is the freehold owner of the Site, which runs to approximately 1 hectare in extent and is located adjacent to the Old Trafford cricket ground.
2. My advice is sought in respect of a discrete procedural issue which has arisen in the course of the Company's promotion of development at the Site.
3. In this regard, by way of very brief background, I note that on 19 March 2020 the Company submitted a planning application ('the Application') to the local planning authority Trafford Metropolitan Borough Council ('the Council'), seeking planning permission for a residential led, mixed-use scheme of development on the Site ('the Scheme'). The Scheme would deliver some 333 dwellings, together with commercial floorspace, public realm and associated development.
4. However, by way of correspondence dated 3 April 2020 the Council informed the Company that it would not validate the Application until further information was provided in support. In particular, the Council indicated that the Application would not be progressed unless and until a "...*Viability Appraisal which complies with the requirements of Appendix 1 SPD1*" was submitted.
5. There has since followed a series of exchanges between Mr Matthew Hard of WSP (planning consultants acting for the Company), and Ms Debra Harrison, a Major Planning Projects

officer at the Council. Mr Hard has explained the basis on which the Company declines to provide such an assessment; in particular he observes that there is no policy justification for the Council's demand that a Viability Appraisal be submitted. In response, Ms Harrison maintains that there is policy support for the Council's position, and that the Council is entitled to refuse to validate the Application pending the Appraisal's provision.

6. It is in this context that my advice is now sought. Specifically I am asked to consider whether, having regard to the relevant planning policy matrix, the Council is justified in refusing to progress the Application due to the absence of the Appraisal requested.
7. In the paragraphs below, I set out my view and summarise the analysis which underpins it.

#### **Requirement as to Viability Appraisal**

8. I have considered the Council's stance in respect of this issue. In particular, I have had regard to the exchange between Mr Hard and Ms Harrison, in which the latter sets out the Council's position in an email dated 20 April 2020 ('the 20 April Email'). Having considered this position, together with the relevant planning policy framework, it is my view that the Council's stance is unsound.
9. That is, I do not consider that the Council is entitled to make provision of a Viability Appraisal by the Company a pre-requisite to validation of the Application.
10. In this regard I note by way of context to the analysis which follows, the decision of the Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] UKSC 2013. In that decision, as Instructing Solicitor is of course aware, the Court rejected a submission to the effect that:

*"...the meaning of the development plan was a matter to be determined by the planning authority [where] the court..., had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational"*

11. Significantly, in the leading judgement Lord Reed observed<sup>1</sup>:

*"The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by*

<sup>1</sup> See Paragraph 18 of Tesco Stores.

*planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. **Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases...***" (emphasis added).

12. Putting matter somewhat more directly, Lord Reed concluded<sup>2</sup>:

*"...planning authorities do not live in the world of Humpty Dumpty: **they cannot make the development plan mean whatever they would like it to mean**"* (emphasis added).

### **Policy Framework**

13. Local planning authorities are entitled to identify materials which they can require must be provided in support of an application for planning permission. Such materials are referred to in national policy as 'local information requirements'. In this regard, the NPPF states<sup>3</sup>:

*"Local planning authorities should publish a list of their information requirements for applications for planning permission. These requirements should be kept to the minimum needed to make decisions, and should be reviewed at least every 2 years. Local planning authorities should only request supporting information that is relevant, necessary and material to the application in question".*

14. The Planning Practice Guidance provides further detail in this regard, stating<sup>4</sup>:

*"A local planning authority may request supporting information with a planning application. Its requirements should be specified on a formally adopted 'local list' which has been published on its website less than 2 years before an application is submitted. Local information requirements have no bearing on whether a planning application is valid unless they are set out on such a list".*

<sup>2</sup> See Paragraph 19 of [Tesco Stores](#).

<sup>3</sup> See Paragraph 44 NPPF.

<sup>4</sup> See Paragraphs 39 and 40 PPG

*The local list is prepared by the local planning authority to clarify what information is usually required for applications of a particular type, scale or location.*

*In addition to being specified on an up-to-date local list published on the local planning authority's website, information requested with a particular planning application must be:*

- *reasonable having regard, in particular, to the nature and scale of the proposed development; and*
- *about a matter which it is reasonable to think will be a material consideration in the determination of the application.*

15. In this context, I have been provided with the Council's 'Application Validation Checklist', which I note was adopted in November 2018.

16. At a local level the key consideration is Policy L2 of the Core Strategy, entitled 'Meeting Housing Needs'. This policy is extensive and covers a range of housing-related issues. However, for present purposes it is sufficient to consider Paragraph L2.12, which provides as follows:

*'Under normal market conditions a geographically variable target, based on "cold", "moderate" and "hot" market locations, will be applied to all qualifying developments, (except residential care homes) to assess the appropriate level of affordable housing contribution as follows:*

- *Within "cold" market locations, a 5% contribution will be sought;*
- *Within "moderate" market locations, a 20% contribution will be sought;*
- *Within "hot" market locations, a 40% contribution will be sought; and*
- *In those parts of Trafford Park identified for residential development, or in areas where the nature of the development is such that, in viability terms, it will perform differently to generic developments within a specified market location the affordable housing contribution will be determined via a site specific viability study, and will not normally exceed 40%'*

17. With regard to the wording of this provision, it is common ground between the parties that the Site is located within a 'cold' market location.

18. Also relevant in this context is the Council's Supplementary Planning Document 1 ('SPD1'). Here I note that Paragraphs 3.13 and 3.14 state respectively:

*"Within "cold" market locations no more than a 5% affordable housing target will be applied under normal market conditions, with a flexibility to raise this to a 10% requirement under "good" conditions. The supporting text of Policy L2 recognises that under "poor" market conditions a 5% contribution could inhibit development in cold market locations and therefore applications for development under these market conditions will not trigger a requirement for the provision of affordable housing.*

*In those areas where the nature of the development is such that, in viability terms, it will perform differently to generic developments within a specified market location, the affordable housing contribution will be determined via a site specific viability study, and will not normally exceed 40%. This will apply in the case of most of the strategic locations".*

19. As regards the matters set out above, I note two matters in particular, namely:

- The Council's Planning Committee resolved on 22 November 2018 that for development control purposes going forward, market conditions should be regarded as 'good'.
- The Lancashire County Cricket Club Quarter in which the Site is located is identified as a 'strategic location', pursuant to Policy SL3 of the Core Strategy.

## **Discussion**

20. The Application proposes 10% Affordable Housing provision. It does so having regard to the first bullet point of Policy L2:12 ('the First Bullet'), together with the further guidance contained in Paragraph 3.13 of SPD1. That is, in circumstances where a development is proposed in a 'cold' location in 'good' market conditions, Affordable Housing provision of 10% may be required. The Company notes that the First Bullet stipulates no requirement to provide a Viability Assessment, but instead provides for Affordable Housing provision at 10% (having regard to Paragraph 3.13 of SPD1).

21. The position of the Council, summarised in the 20 April Email, is as follows

*“...it is considered that the fourth bullet point of Core Strategy Policy L2.12 is the applicable point which is relevant to this specific planning application. The element of L2.12 sets out that a site-specific viability appraisal is required to be submitted in support of planning applications where the nature of the proposed development is such that, in viability terms, it will perform differently to the generic development within the specified market location that the site sits within, when the plan was adopted. ...*

*Colleagues in Strategic Planning have confirmed that ‘generic development’ as referred to within policy L2.12, does refer to the housing stock which existed at the time of the adoption of the Core Strategy and had transactions on the VOA website. In Old Trafford, the viability study tested developments which were small terraced properties, not apartment style developments and that is what determined the OT market area, in which this application site is located.*

*Trafford Council remain of the view that the proposed development of 333 residential units within an apartment block, in this location will perform differently, in viability terms, to the generic development in the area and a site specific viability appraisal must be submitted as part of the planning application to determine the viable level of affordable housing provision which should be provided on-site’.*

22. Having regard to the above, the dispute essentially turns on the question of whether the Scheme is properly regarded as a ‘non-generic’ form of development, so as to require bespoke viability analysis pursuant to the ‘Fourth Bullet’ of Policy L2:12. In this regard, I note from the 20 April Email Ms Harrison maintains that the Scheme, as a “*high density residential development*”, will perform differently to the ‘generic’ terraced “*housing stock which existed at the time of the Core Strategy*”.

23. Having regard to the wording of the policy, I consider that the Council’s approach is misconceived. I express this view on the following two bases.

#### Policy Wording

24. First, I note the actual wording of the Fourth Bullet. This states that:

*“...in areas where the nature of the development is such that, in viability terms, it will perform differently to generic developments within a specified market location the affordable housing contribution will be determined via a site specific viability study...”*



25. On a fair and objective reading of its text, what the policy requires is a comparison between the scheme the subject of a planning application (in this case, the Scheme), and the typical, (i.e. 'generic') development currently coming forward in that location. Where the development in question is expected to "*perform differently*" to other, 'typical' development proposals coming forward in that area, then it will be treated differently to those other, 'typical' developments.
26. Significantly, the policy does *not* provide for a comparison between a development proposal and existing housing stock; it is simply not what the policy says. Had the Council wished to the policy to operate in this way, it was open to the Council to word the policy accordingly. However, the Council did not do this. In these circumstances, having regard to the decision in Tesco Stores, it is not now open to the Council to argue that 'this is what we would like the policy to mean'.
27. As regards the form of 'generic' development that has been, and is currently, typically brought forward in this area, I note the email of Mr Hard to Ms Harrison dated 9 April 2020, which states:
- "As you will be aware the Old Trafford area where the site lies has experienced a substantial number of higher density apartment development over the last 10 years and more. **In fact the predominant form of residential development has been high density apartments, many in developments of a high number of units. Indeed, the vast majority of new build apartment development in Trafford has been in the Old Trafford and inner urban area.** Therefore, the development proposed at the B&Q site is very much a generic form of development for the specified market location..."*  
(emphasis added).
28. In circumstances where high density, flatted development is the "*predominant form of residential development*" coming forward in this location, I do not understand on what basis the Council maintains that the Scheme comprises a 'non-generic', atypical form of development to which the Fourth Bullet of Policy L2:12 applies.

#### Trafford Economic Viability Study

29. Second, even in the event that the Council's approach in comparing current development proposals with historic ones were appropriate, I consider that Ms Harrison's position would

be unsound. In this regard I note that in the 20 April Email Ms Harrison claims that the developments which informed the policy wording were “*small terraced properties*”, on advice from her colleagues in strategic planning at the Council. However, this ignores the fact that the viability analysis which underpins Policy L2:12 (which was undertaken not by Council officers but instead by GVA Grimley) states expressly that it had regard to flatted development of the type now proposed by the Company. In this regard, the fourth bullet in Paragraph 3.18 of the Trafford Economic Viability Study (‘TEVS’)<sup>5</sup> states in terms:

*“The sample contains a substantial proportion of sites that include apartment development. Whilst it is understood that the delivery of flatted development has lessened at present, the model takes a ‘pure’ appraisal and thus does not take account of market demand elements. Under such conditions, this is representative of the development coming forward in Trafford and is representative of the site densities recorded in the Trafford SHLAA”.*

30. Further, as Mr Hard notes (in his 9 April email), given that the 100 or so sites assessed in the TEVS “*tended to be drawn from the SHLAA at the time*”, it is notable that

*“...one of the sites in the 2008 draft SHLAA – the latest version prior to the TEVS being produced – is LA70 (Old Trafford Cricket Ground)”.*

As Mr Hard observes:

*“This identified a potential capacity of 1,500 homes ... Whilst the B&Q site was occupied at the time (as was Kellogg’s)<sup>6</sup>, 1,500 home across the different parcels within LA70 would definitely have been high-density residential development.”*

31. I note that in the 20 April Email Ms Harrison does not engage with the points made by Mr Hard regarding the TEVS in his email of 9 April; she ignores those representations entirely. However, whilst Ms Harrison may seek to downplay this matter and rely upon representations from colleagues, her assertions are entirely unsubstantiated. Importantly, there is nothing in the TEVS to support them; indeed, the text of the TEVS is directly conflicting with her contention that ‘generic’ housing in this context should be understood as meaning small developments of terraced housing.

#### Concluding Remarks as to Viability Appraisal

32. For either one (or both) of these reasons summarised above, I consider that the position of the Council as regards its interpretation of Policy L2:12 is not tenable. In circumstances

<sup>5</sup> Dated May 2009. I have been provided with that document and also the 2011 Update, dated June 2011.

<sup>6</sup> I understand that both these areas of land comprised part of LA70 in the SHLAA.

where the Council is wrong to categorise the Scheme as being a development which falls within the Fourth Bullet of Policy L2:12, the following matters necessarily follow:

- First, the Scheme falls to be considered with reference to the First Bullet, being a development in a cold location;
- Second, given that market conditions are currently 'good', then affordable housing provision is fixed at 10%;
- Third, since the First Bullet does not provide for the submission of a Viability Appraisal and the Fourth Bullet (which does so refer) does not apply, then there is no requirement for the Company to provide a Viability Appraisal.

33. I note one further matter in this context, out of completeness. This concerns SPD1, and the reference at Paragraph 3.14 of that document to 'strategic locations'. In this regard, having summarised the effect of the Fourth Bullet in Policy 2:12, SPD1 asserts: *"This will apply in the case of most of the strategic locations"*.

34. It appears that the Council does not rely on this statement in SPD1 in support of its position regarding the need to provide a Viability Appraisal in the present context; it is certainly not referenced in the 20 April Email. My only observation here is that such approach on the part of the Council is sensible, since any attempt to base its position on this aspect of SPD1 would be unsound.

35. In this regard, I note that as a supplementary planning document, SPD1 was not subject to public examination and so was not considered by an independent inspector prior to its adoption in 2014. However, the document should have been prepared in accordance with the Town and Country Planning (Local Planning) (England) Regulations 2012. Regulation 8(3) of this instrument provides that:

*'Any policies contained in a supplementary planning document must not conflict with the adopted development plan'.*

36. In apparently seeking to ensure that all applications seeking planning permission in strategic locations be subject to a requirement to provide a Viability Appraisal, Paragraph 3.14 of SPD1 is clearly in conflict with the policy which it is intended to supplement. That policy states clearly that only 'non-generic' developments should be subject to the obligation to provide a Viability Appraisal; to the extent that the SPD1 says otherwise, it is in conflict with Policy L2:12.

37. Accordingly, the final sentence of Paragraph 3.14 of SPD1 can be disregarded.

### **Further Considerations**

38. The paragraphs above address the matter which is the primary focus of these instructions. However, before concluding I comment briefly on a two further matters which are apparent from the papers provided to me.

### **Compulsory Purchase**

39. Firstly, I note with some concern that the Council's misapplication of Policy L2:12 is occurring in circumstances where the Council appears to have an interest in frustrating development on the Site. I make this observation having regard to the fact that on 20 January 2020 the Council's Executive resolved to authorise the use of compulsory purchase powers in respect of the Site.

40. In the event that the Council wishes to compulsorily acquire the Site, it will have to demonstrate a compelling case in the public interest if it is to secure the necessary powers to do so. A very relevant consideration in that context, would be that of whether the Site is likely to come forward for development without the intervention of the Council and compulsorily acquisition. As such, in circumstances where the Company is actively promoting development on the Site, efforts by the Council to frustrate the promotion of that development (in this instance by refusing to validate its planning application) are a significant concern.

### **Kellogg's Application**

41. The second matter I note in light of the materials provided to me concerns a separate planning application on other land in the vicinity of the Site. In this regard, the former 'Kellogg's Site' is, like the Site, located adjacent to the Old Trafford cricket ground (albeit on the opposite side). The Council acquired an interest in the Kellogg's Site in April 2018, and is now part of a consortium seeking planning permission to bring forward development there. A planning application has since been submitted, ref 99105/FUL19 ('the Kellogg's Application'), seeking permission in the following terms:

*"Outline planning application (all matters reserved except for access) for the redevelopment of the site for residential dwellings (Use Class C3); office/ education*

*uses (Use Class B1a/D1); local centre uses (Use Classes A1-A4 and D1); hotel (C1) primary school (Use Class D1); energy centre and associated infrastructure and open space, with access from Talbot Road”.*

42. I have been provided with the Viability Appraisal which accompanied the Kellogg’s Application when submitted. I note in passing that the Appraisal states<sup>7</sup>

*“Under current market conditions we understand that a 10% provision of affordable housing would be considered to be policy compliant”,*

an approach which is entirely consistent with that adopted by the Company when submitting the Application for the Scheme

43. Further however, I am instructed that following the validation of Kellogg’s Application, that Viability Appraisal was withdrawn, with no replacement submitted and publicised until some time later. Given its apparent stance in respect of such appraisals, I would have expected that at this point, the Kellogg’s Application would have been ‘de-validated’. In this regard, I note that SPD1 states in terms at Paragraph 4.7 that:

*“Viability information must be received prior to validation of the planning application, and may not be accepted during the course of considering a planning application”*

44. In addition, I note also the Council’s treatment of the Company’s previous planning application submitted in respect of the Site. On that occasion, following the submission of the application on 27 June 2018, the Council validated it on 20 July. However, it then subsequently wrote to the Company on 6 August, pointing amongst other matters to the absence of a Viability Appraisal, and indicating that the Application was no longer regarded as valid.

45. In these circumstances, as noted above, I would have expected that the withdrawal of the Viability Appraisal in the case of the Kellogg’s Application would have resulted in its de-validation of. However, it did not. Indeed, in her email of 22 April 2020 Ms Harrison states in terms that:

*“I can confirm that the Kellogg’s application wasn’t invalidated when the applicant withdrew their VA...”.*

<sup>7</sup> See Page 4 of the Assessment

46. Again, this is a matter of concern, since it is apparent that in dealing with a planning application in which it has a vested interest, the Council has adopted a procedural approach which is not only contrary to its own policy, but which is preferential as compared to the approach which it adopted when processing the previous planning application submitted by the Company in respect of the Site.

#### **Concluding Remarks on Further Considerations**

47. In the event that the Council does seek to promote a compulsory purchase order in respect of the Site, both the concerns I have set out above can of course be raised in the context of the public inquiry held to consider objections to that order. Further, depending on how matters proceed going forward, it may be appropriate to consider public law remedies; I am happy to advise further in this regard as required. For present, I merely note these matters as being of concern.

#### **Closing Remarks - Moving Forward**

48. Returning to the question of the Council's refusal to validate the Application, it will be evident from my comments above that I do not consider that such refusal is justified.

49. In such circumstances, the statutory mechanism which enables a 'deadlock' of this type to be broken is set out in Article 12 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. That is, the Company may serve a 'notice' pursuant to Article 12(1).

I trust that this Opinion addresses the issue raised in my instructions. Should Instructing Solicitor wish to discuss any matter arising he should not hesitate to contact me in Chambers.

**Alexander Booth QC**

28 May 2020

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