DUNDAS & WILSON

Our Ref: RG/SJM/SCO350.0192
Your Ref: 13/01948/F

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BY FIRST CLASS POST AND EMAIL
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Dear Sirs,

Planning Application (Reference: 13/01948/F) (the Application) to vary conditions 34 and 39 of the Planning Permission (Reference: 13/00227/F) dated 1 November 2013 (the Section 73 Permission)

We act for Scottish Widows Unit Funds Limited and Scottish Widows plc.

We are instructed to object to the Application, and to put you on notice that any decision to determine and approve a grant of permission for the Application would be unlawful and any final decision subject to challenge by way of judicial review.

We would request that the Council refuse to consider the Application and invalidate it. If the Application is determined by the Council, the only lawful decision would be to refuse permission.

Our clients' primary objection to the Application is that:

1) the Application comprises development which is fundamentally and substantially different to that which the Council has previously considered, as the Application includes a significant increase in both the level of permitted retail use and overall footprint; and

2) it would therefore be unlawful to grant permission for the Application using the procedure available under section 73 of the Town and Country Planning Act 1990 (the **TCPA**). An application of this nature should be made by way of a conventional application.

If the Council were to consider and determine the Application in spite of this, the Council must refuse to grant permission for the Application because:

1) the applicant has failed to comply with the requirements of the National Planning Policy Framework, notably in respect of the sequential test and impact assessment; and

2) the Officer's Report therefore cannot be relied upon, and we do not consider that these issues can be adequately addressed within an Update Report in advance of Committee on 6 March 2014.

Our clients' planning consultants, Turley Associates, have already communicated with you by a letter delivered by e-mail dated 25 February 2014. We note that this is not referred to in the committee report and apparently not considered in its drafting. Turley Associates have subsequently provided a fuller objection dated 28 February 2014. We ask that their latest objection is placed before the Committee, and request that we are provided with the Update Report as soon as this is available.

Failure to Consult or Notify Scottish Widows

Before we address the substantive objections above, we wish to emphasise at the outset that our clients have serious concerns about the Council's failure to notify them (or ostensibly any other affected individuals) directly in advance of the consideration and determination of the Application.

Our clients were only made aware of the Application through their advisers, Turley Associates, on 18 February 2014 (and Turley Associates were only made aware of the Application through a discussion with the Council on a separate matter). Neither our clients nor their advisors were notified of the making of the Application in December 2013, shortly after the conclusion of the judicial proceedings relating to the original planning permission and at a time when there was a second claim for judicial review in relation to the earlier Section 73 Permission. We consider this is unacceptable.

In the light of our earlier requests in relation to the first Section 73 Application and the ongoing judicial proceedings (in both claims), we request again that the Council should keep our clients fully aware of any such developments, even if the applicants may choose not to. Our clients have clear substantive and procedural interests in all planning decisions relating to the development, and should not be prevented from providing the fullest possible information to the Council. They should therefore be notified in respect of all matters pertaining to the Application, or any other application in relation to Banbury Gateway.

In addition, we request that we, as legal advisers, and Turley Associates, as planning consultants, are directly notified of any intention to determine the Application at Committee on 6 March or on any deferred date, including being provided with a copy of any Officer's Report, or Updated Report and any decision notice. The same request applies to any further section 73 application that is made in relation to Banbury Gateway.

We also note that there were a number of people who had objected to the scheme in its first incarnation. Presumably they, like our client, have not been consulted on the revised scheme envisaged under the Application or presented with the chance to comment on this fundamentally different development. As a consequence, the Committee have not been provided with sufficient information to make a proper assessment of the retail impact of the development, in addition to the flaws identified below and in the letters from Turley Associates.

The Use of Section 73 of the Town and Country Planning Act 1990

The use of the procedure under section 73 of the TCPA is inappropriate for the Application. To grant permission for the Application by way of a variation of condition would be unlawful. It is important to note that the Application seeks to vary the Section 73 Permission, not the planning permission (ref: 11/01870/F) granted in December 2012 (the **Original Permission**) (as is stated at paragraph 1.4 of the Officer's Report).

Section 73 of the TCPA is designed only to allow conditions to be varied. Section 73 of the TCPA is not designed to allow permission to be varied so as to constitute the grant of permission for a fundamentally different/fundamentally altered development (see *Arrowcroft*, referred to below).

The effect of the Application would be to unlawfully grant permission for a fundamentally and substantially different development to that permitted under the detailed planning permission granted by both the Original Permission and the Section 73 Permission. It is important to note the fundamental alterations made to the Section 73 Permission by the Application (which Turley Associates have previously drawn your attention to), and which demonstrate why the Application should not be dealt with under section 73, namely that:

1) the Section 73 Permission which is to be varied comprised a total area of 26,507sqm (GIA). The Application proposes a total area of 27,286sqm (GIA). This would represent an increase in total area permitted under the application of 779sqm;

2) the Section 73 Permission comprised a total A1 use area of 25,846sqm (GIA). The Application proposes a total A1 use area of 27,006 sqm (GIA). This would represent an increase in the total amount of A1 use permitted under the Application of 1,160sqm (GIA);

3) the Section 73 Permission comprised a total A3 use area of 661 sqm (GIA). The Application proposes a total A3 use area of 280sqm. This represents a decrease of 381sqm; and

4) the Original Permission and the Section 73 Permission comprised an anchor store and a secondary store. The Application proposes two anchor stores and a secondary store.

The application form and Design & Access Statement which accompanied the application for the Original Permission specified (amongst other things) that the development would comprise 25,842sqm (GIA) of A1 use. This was the specific floorspace permitted by the Council, and (save for a 4sqm increase) is the scale of A1 use permitted by the Section 73 Permission.

The decision notice for the Section 73 Permission states that it grants "*planning permission for the development described in the above-mentioned application, the accompanying plans and drawings and any clarifying or amending information subject to the conditions set out in the attached schedule*". Therefore, permission under the Section 73 Permission was granted for the specific floor area and the specific level of A1 use sought by the applicant in that application.

The conditions attached to the Section 73 Permission require the development to be carried out in strict accordance with the plans and the Design & Access Statement. This is clearly to regulate the performance of the detailed planning permission which was sought. Indeed, the reasons on the decision notice state that this condition was applied to "*ensure that the development is carried out **only as approved** by the Local Planning Authority*" [emphasis added].

In considering the Application, the Council's power is limited to a variation of the conditions under the Section 73 Permission. The section does not allow the Council to re-write any planning permission so as to grant permission for a fundamentally and substantially different development.

The variation of the conditions sought by the Application must be properly viewed in the context of the Section 73 Permission, and must not be considered in isolation. Regard must always be had to the development which permission has been granted for and conditions must be consistent with the development permitted. The Council, when granting the Section 73 Permission in November 2013, would have been acting unlawfully if they were to impose conditions which were fundamentally and substantially inconsistent with what had actually been applied for. If, when considering the application for a specific amount of A1 use including one anchor store and one secondary store in November 2013, the Council had granted the permission subject to fundamentally inconsistent conditions (i.e. a completely different, substantially increased quantum of A1 use, two anchor stores and one secondary store) it would have been unlawful. The fact that the Application is now made subject to section 73 of the TCPA does not alter this: it remains unlawful for the Council to vary the conditions so as to be fundamentally inconsistent with the Section 73 Permission and so as to, in effect, re-write the Section 73 Permission and grant permission for a fundamentally and substantially different development.

We would draw your attention to the judgment of Sullivan J in *R v Coventry City Council Ex parte Arrowcroft Group plc CO/1063/2000; [2001] P.L.C.R. 7]*.. In particular, we would draw your attention to paragraphs (29) – (35) of that case. At Paragraph (33) it states..."*Thus the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application*".

Arrowcroft and the current 2010 DCLG Guidance on the use of Section 73 ("Greater flexibility for planning permissions" October 2010) make it clear that it is unlawful to grant permission where the proposed amendment would amount to a "*fundamental alteration*" to the proposal. The appropriate course of action would be to submit a new planning application. This has not been addressed within the Officer's Report, which is in itself a fundamental flaw.

Finally, we note that the Planning Statement which accompanies the Application states that the Application "*could be treated as a Section 73 application as opposed to a new application altogether, given that there was no change to the application site boundary*". This proposed test has no legal basis, and we do not consider that this is the correct approach.

Clearly, such fundamental and substantial differences cannot be approved lawfully using section 73 of the TCPA. We would expect the Council to be aware of the limitations of section 73 of the TCPA.

National Planning Policy Framework

The National Planning Policy Framework (NPPF) requires at paragraph 26 that where applications for retail, leisure and office development outside of town centres are being assessed, and the floorspace is 2500 sq m or more, an impact assessment should be carried out.

The effect of the Application is to grant a new planning permission for 27,286sqm (GIA) of development. Therefore, paragraph 26 of the NPPF is engaged. Given retail impact is the principal issue, the Council should have required this.

The Committee Report states that no further assessment is required as the increase in floorspace is only 779 sq m. This approach is incorrect and open to challenge.

Retail Impact Assessment

Clearly, to even contemplate an evaluation of the impacts of the Application, the Council needs to have a retail impact assessment from the applicant itself: one did not accompany the Application. It is for the applicant to demonstrate that the impact test has been satisfied through that process in accordance with Paragraph 26 NPPF.

The fact that the Council, in its Officer's Report, recognise that they could not evaluate the Application given the lack of this information yet still recommend approval (albeit subject to receipt of CBRE's analysis) is a clear indication of pre-determination. Members cannot be expected to approve the Application without an adequate understanding of the impacts.

As the Officer's Report identifies and as Turleys Associates set out in their correspondence to you, the Council has identified this as the "*principal issue*" in the determination of the Application. Therefore, it is an issue which both Council officers and Committee members must have fully grappled with and understood.

The limited review undertaken in the CBRE Critique simply does not go far enough. This is because it has evidently been conducted very late in the consideration of the application and without any underlying quantitative analysis from the applicant. Turley Associates letters deal with the estimated impacts of the proposed development on the town centre and conclude that these are undoubtedly greater than the permitted scheme.

Request for Information/Disclosure

We have two further concerns:

We note that the Applicant states at 5.2.2 of the Retail Planning Statement that it was "*agreed at the time a case would be made to justify any other large retailer to ensure that the Council has the opportunity to comment on the proposal and the retailer's business case*".

No reference was made to this agreement within any of the supporting documentation for the original application, and we request full disclosure as to the meeting/correspondence in which this agreement was made, the form that such agreement took, and whether there have been further discussions on this matter which have not been disclosed. If it is the Council's case that there was an agreement that a section 73 application would be made following first application date then this is clearly material to the outstanding judicial review proceedings.

In addition, we note:

1) the e-mail of 23 December 2013 from Mr Duxbury to the applicant's agents, in which reference was made to the use of a Section 73 application, and the Council's clear concerns about the extent of the changes; and

2) the email of 19 December 2013 from Sam Merry Taylor to the applicant's agents, in which it is confirmed that the Application requires "*re-writing some of the permission*" and that section 73 is not appropriate and that the applicant is "*required to submit a full application*".

Please explain when the Council was first notified that a further section 73 Application would be made, whether in a meeting or correspondence, and why this was not notified to Scottish Widows in light of the outstanding judicial proceedings. Please also provide evidence supporting the Council's decision to validate the Application under section 73 given these concerns, and on what basis this decision was made.

Section 106 Agreement

If the Council were to consider the Application, we would expect any section 106 agreement to include clear measures of protection for the vitality and viability of the town centre. This aspect of the judicial review of the original permission is still before the Court of Appeal.

We reiterate our request that the Council refuse to consider the Application and invalidate it. For the reasons above, if the Council do not take this step and do determine the Application then we request that they refuse it.

Please place a copy of this letter before the Planning Committee and ensure that it is dealt with by way of a written update to the Planning Committee.

This letter has been copied to Nigel Bell of the Council's legal department.

Yours faithfully,

[redacted]

Stephen McNaught
Partner, for and on behalf of Dundas & Wilson LLP

Enc.

cc: Nigel Bell, Cherwell District Council