

PLANNING DEVELOPMENT CONTROL COMMITTEE

28 JUNE 2004

PONDSIDE, UPHAM – LEGAL ADVICE

REPORT OF CITY SECRETARY AND SOLICITOR AND DIRECTOR OF DEVELOPMENT SERVICES

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RECENT REFERENCES:

- 1 PDC425 (Item 14) – Planning Development Control Committee 27 May 2004

EXECUTIVE SUMMARY:

Members considered an application at a meeting of the Committee on 27 May 2004 (W09323/02) for the erection of a replacement dwelling at Pondsides, Upham. Members resolved to defer consideration of the application for plans of the proposed landscaping to be obtained and for more accurate demarcation of the garden area highlighted for the location of the replacement dwelling to be obtained.

An updated landscaping plan has been obtained, and will be displayed at the meeting. In addition, the applicant has indicated the extent, which he considers to be the garden area for the replacement dwelling, and this is shown on the plan appended to this report.

The report also provides further legal comment on various issues, which have been raised by an objector.

RECOMMENDATIONS:

- 1 That planning permission be granted for the application, subject to the conditions in report PDC 425, and the additional conditions in Section 7 of this report.

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DETAIL:

1 Introduction

- 1.1 Planning Development Control Committee considered a report (PDC 425 item 14) on application W09323/02, in respect of Pondside, Upham. The application was to demolish the existing dwelling and erect a replacement dwelling, but the red line shown on the plan submitted with the application included the grounds of the existing dwelling, amounting to some 4 hectares (10 acres). Appendix 1 is an extract from PDC425, the officer report on the item.
- 1.2 One objection has been made by a neighbour, and similar concerns have been raised by the Parish Council. The objector spoke at the last meeting, and Members resolved to defer consideration pending receipt of plans for the landscaping, and a plan showing the proposed extent of the garden area for the replacement dwelling.
- 1.3 The landscaping plan will be displayed at the meeting. Appendix 2 to this report is a plan submitted by the Applicant showing the proposed extent of the garden area for the replacement dwelling.
- 1.4 In addition, this report also deals with legal issues, which were raised in consideration of this application.

2 Background

- 2.1 The existing dwelling was erected following a planning application for a smallholding, in the 1950's. It is understood that this smallholding was operated for a period, but in 1975, it was purchased by a Mr. Bright, who was retired and did not personally continue the smallholding business. However the objector states that at least since 1981 (when he purchased his own property), from time to time stock were grazed on the land surrounding the house, some years the land was fertilised, and the grass had been cut for a hay crop by a local farmer.
- 2.2 The applicant purchased the property in November 2002, following Mr. Bright's death. A similar arrangement was made with another local farmer in 2003 to cut the grass, but since then, the applicant has acquired the necessary machinery, and intends to continue to cut the grass himself in the future.
- 2.3 The precise arrangement between Mr. Bright, and the local farmer, who cut the hay for some 25 years before the applicant purchased the property, is unclear. The applicant has indicated that the farmer confirmed to him that no payments for this service were made or received by either party. However, the objector states that the farmer told him that payments were made to Mr. Bright for the hay crop, and in later years, payment in kind (rather than cash) was made. Without direct evidence from the farmer concerned, it is difficult to reach a conclusive view on the point, and it

cannot be demonstrated conclusively whether or not there were in fact two planning units during this period.

3 Application

- 3.1 Details of the application are set out in the previous report, Appendix 1. The application is for the demolition of the existing dwelling, and the erection of a new replacement dwelling. There is no reference in the application to a change of use.
- 3.2 The applicant has submitted a proposed landscaping scheme with the application, and this has been considered and assessed by the Council's Landscaping Team.
- 3.3 The application site is shown by the usual red line on the submitted plans. The red line has been drawn around the entire site owned by the applicant, and not just the site of the dwelling. Concern has been expressed that this means the application effectively includes a change of use to residential across the whole site.

4 Landscaping Plan

- 4.1 Landscaping is not formally part of the application, which merely relates to the demolition of the existing dwelling and the erection of new replacement dwelling. However, officers were recommending that if permission were to be granted, a condition be imposed requiring the submission and approval of a landscaping plan. The applicant has submitted a landscaping plan with the application, and this will be displayed at the meeting.
- 4.2 The submitted landscape plan indicates tree planting, hedgerow planting and areas of rough and mown grass. The southeastern end of the site, which meets the boundaries, is indicated as informal grass. To the east of this area, proposals indicate proposed tree planting. The area around the proposed replacement, dwelling which is indicated by the green line on the plan attached as Appendix 2, shows beech hedging, with some tree planting. The existing trees to the northeast of the proposed replacement dwelling are to be thinned and replanted. To the northeast boundary, there is some tree planting proposed and indigenous mix of planting. As indicated in PDC425 (Appendix 1), the Landscape Architect highlighted that there should be further tree planting to the southern boundary and that some of the species indicated were inappropriate. It is considered that this should be dealt with as a condition, and this was indicated as condition 3 of the original report.

5 Garden Area

- 5.1 Appendix 2 is an extract from a plan submitted by the applicant, showing the extent of the formal garden area proposed for the replacement dwelling. Although the OS plan for the area shows a boundary line around the existing dwelling, it appears that this line does not reflect any physical features, which are now present on the site. In any event, the OS plan will not definitively indicate the extent of any land uses.
- 5.2 This would be the extent to which the applicant intends to have normal domestic items. Outside that area, it is proposed that the land would comprise mown grass, tree planting, and informal grassed areas.
- 5.3 One of the recommended conditions would remove permitted development rights, which would otherwise allow the erection of outbuildings, etc., within the curtilage of the new dwelling. It is considered that the formal garden area shown on the

applicant's plan would equate to the curtilage of the dwelling, but in the planning context, the extent of the curtilage is only relevant to the issue of permitted development rights. The use of the grounds (e.g. as agriculture or residential amenity land) is a separate issue, which is dealt with in Section 6 below.

6 Legal Issues

6.1 The neighbour who has objected to the application has raised a number of legal issues. This section addresses these issues, and covers other issues which Members may be concerned about.

6.2 Neither the objector nor the Parish Council have an objection to the erection of the dwelling house itself. The neighbouring objector has confirmed his concerns relate to the use of the wider land surrounding the proposed replacement dwelling.

Extent of Red Line Around Current and Previous Applications

6.3 By convention, applicants show the site of the development for which permission is sought by reference to a plan, with the development site shown edged red, and any surrounding land under the control of the applicant shown edged blue.

6.4 In a previous application for an extension to the dwelling, the then applicant drew the red line closely around the dwelling and the immediately surrounding land. In this case, the red line takes in a much larger area, and covers the whole of the 4 hectare site. The applicant has indicated that he does not wish to vary the application to show a smaller area of land as the development site.

6.5 In this case, the applicant intends to carry out landscaping works (which extend beyond the land immediately surrounding the replacement dwelling). It is reasonable therefore to say that the development site is in fact the whole holding, and therefore the red line should be drawn around it. The fact that in the previous application, the red line was drawn more tightly may reflect simply the fact that this previous application was for an extension to the house, rather than works to the whole site. Alternatively, as the objector points out, it may add strength to the argument that at that time, the holding was in fact in two different units, one residential, one agricultural.

6.6 It has been argued that in the current application, the fact that the red line includes the whole site means that the application is to be read as a) an application for replacement dwelling and b) an implicit application for the use of the whole site for residential purposes.

6.7 There are no statutory provisions on the point, nor have any cases been found which deal with this issue, although the Inspector in the Arun case referred to below (Appendix 3) at paragraph 3 does suggest that for a replacement dwelling, the area of land covered by the consent is the extent of the lawful [residential] use. Section 75 of the 1990 Act states that where permission is granted for the erection of a building, and no purpose for which the building may be used is specified in the permission, the permission is to be construed as allowing the building to be used for the purpose for which it is designed. Other than this, however, there is no statutory authority on the point.

6.8 In the absence of a specific application for the change of use of land, or the inclusion in the application of works on land within the red line (over and above the new

dwelling), it is not clear whether any existing uses will be overridden if permission is granted. Given the type of development proposed, it would be possible for any existing agricultural use to continue (at least in part) after permission has been given, and therefore it is considered that the inclusion of the whole site within the red line would not mean that any permission which is granted would include an implied consent to a change of use to residential. It is accepted that the granting of planning permission for land will open a new chapter in the planning history of the site, and therefore the application should be read as including an implicit application for the use of the surrounding land as residential amenity land. However, for reasons set out later in this report, the extent of the red line is not a conclusive factor in determining this particular application.

- 6.9 One appeal case (*Arun*, 21 March 2001) has been identified which may assist in considering this application. A copy of the decision letter is attached as Appendix 3. The case concerned an enforcement notice, which *Arun* had issued, alleging a material change of use from agricultural land to domestic curtilage [corrected on appeal to “residential amenity land”].
- 6.10 The facts in *Arun* were similar to those in this case. In *Arun*, the use of grassed land (which had been previously cropped for hay and grazed) was alleged to have been changed to residential amenity land. The Inspector concluded that the fact that the surface of the land was indistinguishable from the lawful residential land did not imply a change of use. Furthermore, the planting of trees on the land did not mean the land was used as residential amenity land. The Council produced no evidence of domestic paraphernalia, paths, or other evidence of use as residential amenity land.
- 6.11 The Inspector concluded that the previous agricultural use had either ceased, or was at best marginal, given the small size, separation from other agricultural units, and occasional hay cropping. However, the Inspector did not consider that a change of use to residential amenity land had occurred. No material change of use had taken place, and therefore there had been no breach of planning control. The appeal therefore succeeded.
- 6.12 The circumstances in *Arun* appear similar to those in this case. Applying the principles of *Arun*, it might be said that the previous smallholding agricultural use diminished during Mr. Bright’s ownership, or indeed possibly ceased. However, it could equally be said that no change of use to residential amenity land had taken place. The result would be that unless and until the land became more “domesticated” and used in conjunction with the house, no change of use would occur, and the lawful use of that part of the land would remain agricultural. As the Inspector in *Arun* said, merely ceasing a use does not mean that a change of use has occurred.
- 6.13 If the application is construed as including an application for the change of use of the surrounding land to residential amenity land, that will need to be considered as part of the consideration of the planning issues. These are set out in the original report (Appendix 1), but further planning considerations are set out in Section 7 below.

Landscaping of agricultural land will involve a change of use.

- 6.14 The Inspector in *Arun* clearly took the view that planting trees would not in itself constitute a change of use of land from agricultural. Clearly, it is a matter of fact and degree as to whether landscaping will mean that the use of the land has changed. Installing flower beds, garden ponds, etc., and other “formal” landscaping works may

well mean that the use has changed, but equally lesser landscaping works would not constitute a change of use.

Existing Uses on the Site

- 6.15 The Objector has asked the Council to clarify the existing uses on the site. In the light of the *Arun* case and a reconsideration of the issues, it is more likely than not that the previous agricultural uses on the site have not been changed in planning terms (although, as per *Arun*, they may have ceased). Given the conflict of second hand evidence as to nature of the relationship between Mr. Bright and the local farmer, it is difficult to determine whether there were two planning units in separate occupations (one residential, one agricultural) or whether there was a single planning units which retained its mixed residential/agricultural use.
- 6.16 In any event, for the reasons set out in this report, it is considered that the principal issue is whether a change of use to residential amenity land (limited by suitable conditions) is acceptable.

Unacceptable loss of agricultural land

- 6.17 The objector considers that this application must be considered as an application to change the use of the surrounding land from agricultural to residential. Both he and the Parish Council feel that this is an unacceptable loss of agricultural land.
- 6.18 The application is only for operational development for a replacement dwelling. This point concerning loss of agricultural land only arises if a) the land was previously agricultural and b) the inclusion of the surrounding land within the red line means that the application must nevertheless be treated as an application for a change of use.

As indicated above, there is little statutory or judicial guidance on interpreting applications by reference to the red line. However, it does appear that the inclusion of the surrounding land within the red line will mean that the application should be treated as an application to use the surrounding land for residential amenity land.

As explained above, it is considered that the applicant could continue to use the land in the same way as he (and Mr. Bright before him) has done, without being vulnerable to enforcement action, as even if the previous agricultural use has ceased, mere cessation will not in itself constitute a change of use. Furthermore, in the absence of evidence of “domestic” occupation and use of this land, a change of use will not have occurred. In dealing with the application, and treating it as including an application to use the surrounding land for residential amenity, the ability of the Council to control the use and operations on this land and restrict such use and operations by condition should be taken into account. The extent to which the applicant could lawfully use the land without planning permission is a valid material consideration, which must be given appropriate weight.

Misrepresentation of the application omitting a change of use application.

- 6.19 This report makes it clear that Members should consider the application as including a change of use element.

Potential Further Residential Development within the Site

- 6.20 It may be thought that if this application is allowed, and if the effect of the grant of permission is to render the whole site to have a lawful residential use, the Council may be unable to refuse an application for residential development (e.g. construction of additional dwellings in the grounds).
- 6.21 The whole site remains subject to countryside policies, which will continue to apply. Replacement of existing dwellings is permitted, but new dwellings will only be allowed in exceptional circumstances. The fact that the whole site might have lawful residential use rights will not be sufficient to justify an exception to policy being made, and therefore any application for further residential development can be firmly resisted

7 Planning Assessment

- 7.1 In the light of the above, the application may be read as including an application for a change of use from agricultural to residential amenity land, in respect of the land outside the area which the applicant has indicated as forming the formal garden element.
- 7.2 It is helpful to consider the situation in the absence of a planning application. In the light of the *Arun* case, it is likely that the use which Mr. Bright and the applicant have made of this land would not have constituted a change of use, and therefore (as per *Arun*) the Council could not take enforcement action at the present time. Merely ceasing any previous agricultural use and planting trees will not in itself constitute a breach of planning control.
- 7.3 The applicant has indicated that he does not intend to use this wider land for any “domestic” purpose. Only the land immediately surrounding the replacement dwelling would be used as a formal garden with the usual domestic equipment installed.
- 7.4 If the application is granted, it may be arguable that the whole of the site would have a residential amenity use, by virtue of the fact that the red line included the whole site. It would be possible however to control the extent of this use by suitable conditions, such as a condition preventing the siting of domestic equipment and planting other than in accordance with the approved landscaping scheme.
- 7.5 The Applicant has chosen not to amend the red line. Subject to the extent of the landscaping works to be carried out, it is likely that the applicant could have submitted an application for the replacement dwelling (with a tighter red line on the plan) and then continued to use the remainder of the land as he has done to date, and carried out landscaping works. In the light of the *Arun* case, it is likely that this landscaping work could have been done without the need for planning permission. This needs to be taken into account in considering the actual application. Indeed, having an application covering the whole land gives the Council the opportunity to control the use of the wider land by conditions, and therefore control the situation to a greater extent than would have been the case if the application had been limited to the house and immediate garden only.
- 7.6 Given the fact that the principle of a replacement dwelling is acceptable in policy terms, permission could only be refused if material considerations indicate otherwise. The fact that the current activities on the land appear to be lawful (given the conclusions of the *Arun* case) would have to be taken into account. Officers are of

the view that with the imposition of suitable conditions, the application can be recommended for approval, even if the application is construed as including an application for the use of the surrounding land as residential amenity land.

- 7.7 Any refusal would have to be based on sound planning reasons, and the reasons for refusal would have to show how the use of the wider land for residential amenity land (compared to the existing de facto use, which could not be enforced against) was harmful in planning terms, and that it was not possible to overcome these planning objections by the use of suitable conditions or a Section 106 agreement.
- 7.8 Attention has been drawn to the Village Design statement and in particular to the points regarding building to plot area ratio. It is highlighted that a ten acre residential plot would be unusual. The highlighted text indicates that building to plot ratio size should be carefully considered in relation to that of neighbouring properties and any scene which results in a significantly different ratio should be very carefully scrutinised. Results, which are out of place with surrounding houses, may result in an undesirable visual impact and should be avoided. The purpose of this is to ensure that the proposals have sufficient space about them and that the buildings do not dominate the plots in which they sit. The proposal has also been considered against the relevant policies in the plan and officers do not consider that the proposal would result in an undesirable visual impact.
- 7.9 Also highlighted are comments at the bottom of page 4 under the heading 'settlement character'. This highlights that non-agricultural developments outside the existing settlements or on open fields within them which are not currently within the defined settlement should not be permitted. This supports Policy C9 of the WDLP and C12 of the WDLP review highlight that development, which is essential for agriculture, horticulture or forestry and for which a rural location is essential, will normally be permitted. However, Policy C19 refers specifically to planning applications for the replacement of dwellings in the countryside and allows for replacement on a one for one basis, subject to a number of criteria.
- 7.10 The Village Design Statement was adopted as supplementary Planning Guidance in June 1999. It is one of the material considerations.
- 7.11 In conclusion, officers consider that there are no sound planning reasons to resist the application, even if the application is construed as including an application to change the use of the surrounding land from agricultural to residential amenity land, provided relevant conditions are imposed.
- 7.12 If Members are minded to approve the application, it is recommended that the following additional conditions are included, as well as those recommended in the original report.
- 7.13 Notwithstanding condition 6, no structures, features or domestic paraphernalia, either temporary or permanent shall be placed or installed on the area hatched green on drawing no23108, received 8th June 2004.

Reason: To protect the character of the area.

Notwithstanding condition 3, no further planting shall be undertaken except as on the approved landscaping plan or any other landscaping plan approved by the Local Planning Authority.

Reason: To protect the character of the area.

OTHER CONSIDERATIONS:

8 RESOURCE IMPLICATIONS:

- 8.1 No implications beyond normal Development Control and Legal Team resources. If the application is refused unreasonably, the Council may be required to pay costs to the applicant.

BACKGROUND DOCUMENTS:

Letters from Objector and Applicant on Planning Files.

APPENDICES:

Appendix 1 – Extract from PDC 425 (item 14) 27 May 2004

Appendix 2 – Plan showing proposed garden area for replacement dwelling

Appendix 3 – copy of planning appeal – Arun District Council 20 March 2001