

HARTWELLS OF BATH

OPENING SUBMISSIONS ON BEHALF OF STANDARD LIFE ASSURANCE LIMITED RULE 6(6) PARTY

Introduction

1. These opening submissions outline the case for Standard Life Assurance Limited (“Standard Life”) against this proposed development. Standard Life is the owner of the neighbouring site the Maltings Industrial Estate (“the Maltings”).
2. This opening is structured as follows:
 - a. Relationship of sites and historical position
 - b. Overdevelopment of Hartwells site
 - c. Impact of overdevelopment on the Maltings
 - d. Planning harm
 - e. Management plan
3. Standard Life does not object in principle to any redevelopment of the Hartwells site, but we say that this particular proposal represents a poor design and overdevelopment of the site. Its objections in relation to the impact of the

scheme on the Maltings is a manifestation of the unsuitability of this particular scheme.

Relationship of sites and historical position

4. The Maltings is an active and successful mixed industrial estate directly adjacent to the South of the appeal site, and across which Hartwells benefit from a right of way providing access between the appeal site and Brassmill Lane. It is Strategic Industrial Estate¹.
5. The Maltings and the appeal site were historically a single site, with division taking place in the mid 90s. In 1994, a Deed of Grant was executed between Standard Life and the owners of the appeal site, amongst other things granting a right of way in favour of the Hartwells site across the Maltings. At the time of execution of the Deed, Hartwells was in use as a car garage, and not for residential or student accommodation purposes. The use of the right of way envisaged was therefore necessarily very different in character to what is now contemplated by the appeal scheme.
6. The right of way has historically been used for servicing of the Hartwells garage site by Hartwells traffic (i.e. under their direction and control), with virtually no use at weekends or at night on weekdays. Hartwells have held a key to the gate to the Maltings, to facilitate access out of hours when required.
7. The Maltings has been owned by Standard Life since 1994, is a prime industrial estate in high demand, fully let. It is protected under development plan policy as a Strategic Industrial Estate, and recent reports stress the importance of

¹ Mr Krassowski erroneously states that it is a Core Business Area (see paragraph 3.4).

protection at all costs of such sites in Bath, given their scarcity and important contribution for employment and local businesses in this area.²

Overdevelopment

8. In pre-application advice given by the Council, it was noted that the proposal constituted “significant overdevelopment of the site” because of harm to the character and appearance of the surrounding area. The Council also took exception to the servicing strategy, criticising the way that servicing of buildings was “scattered around the site and service / refuse collection vehicles would need to enter the most sensitive parts of the site and from the rear.”³ In particular, the Council noted correctly that “[A] service strategy that depends on access from the Maltings industrial estate and turning on the proposed cycleway appears to be fundamentally flawed.”⁴ [Underling added]
9. Hartwells were therefore very much on notice as to the problems with drawing access from the Maltings for the appeal site. Quite simply it is a poor design option which is fundamentally flawed.
10. Nevertheless the scheme submitted and validated continues to rely on the access route across the Maltings in order for access by larger servicing vehicles, as well as residential vehicles (cars) requiring access to Car Park 2 (n.b. Kenneth Brown’s proof para 5.93 states “car parking is peripheral to the scheme”, but says para 3.19(1) of Appendix 1 that the Maltings access route “allows a range of access options and car park choice depending on where is most convenient”).⁵

² See proof of Louise Bending at 4.6-4.8, and sections 5-6.

³ CD04, page 1.

⁴ CD04 – page 8.

⁵ CD12 (Planning Statement) at paragraph 5.76.

11. This need not be the case: a redevelopment scheme should be perfectly able to accommodate all of its access and servicing needs through its long Newbridge Road frontage, and not across third party (Maltings) land. The fact that the appeal scheme cannot ‘wash its own face’ in access terms, through direct connections to the highway network, is a strong indicator of design compromises that result from overdevelopment.
12. Standard Life submitted five letters of objection, raising concerns about impact of this proposed use of the access route and requesting an effective site management plan to be agreed and secured.⁶
13. In formal consultation, the Council’s highways officer also raised concerns with the access route through the Maltings, questioning the reasonableness of such a servicing route, recommending it be comprehensively reviewed before any planning decision is made, and also identifying the need for effective measures in place to manage the access route agreed between Standard Life and Hartwells, to ensure appropriate use of the right of way.⁷
14. The Council has a developed reason for refusal on the basis of overdevelopment, although that objection is broader in scope, Standard Life, has focused on the consequences of overdevelopment for the Maltings.

Impact on the Maltings

15. It is common ground that the access route is facilitated by a right of way across the Maltings, that this right is for all purposes and at all times, with or without vehicles, and also that if any use of the access were to exceed the terms of the Deed of Grant or cause unreasonable interference with the occupants of the

⁶ CD62-66.

⁷ CD31.xiii

Maltings, Standard Life could only seek to restrain such use by injunction.⁸ This is a costly cumbersome process and any remedy is discretionary. As matters stand that remedy could be pursued only in private law. The issue for this appeal is – regardless of whether or not future use of the access route would be in excess of the legal right – what the impact in planning terms would be, as a result of the change in character of that of use and whether that impact would be acceptable in planning terms, and whether that harm can be avoided.

16. In summary, the proposed scheme would change the character and nature of the use of the access route by: introducing frequent use by private vehicles of residents and third parties at all hours, HGV access out of hours, and emergency vehicle access at all times. Significantly, this traffic will be free flowing – and not at the direction of Hartwells. This was not the case previously, where traffic was under the control and direction of Hartwells, and the vast majority was outside of weekend, and weekday night time, hours.
17. The need for an unrestricted category of residents and emergency vehicles, as well as pedestrians, to have access 24 hours a day across the Maltings, has the likelihood to create serious security issues for the Maltings and its tenants, increased opportunities for criminal activity, and increased liability for breaches of health and safety requirements by way of the conflict between pedestrians and other third parties passing through a busy industrial estate which includes associated machinery and vehicles.
18. The use of the access route as the main point of servicing for the appeal site for larger refuse and delivery vehicles is likely to create conflict between such vehicles and the tenants of the Maltings, in particular but not only Maltings units 5 and 6 (closest to the entrance to the appeal site), who are entitled to unfettered access to their units.⁹

⁸ See paragraph 4 of Eversheds Sutherland Legal Note at Appendix 2 to Ian Monachino-Ayres' rebuttal proof.

⁹ JLL (Nicola Perry) letter at Appendix 5 to proof of Louise Bending.

19. Given the likely high demand for, and relatively short supply of, parking at the appeal site, combined with the new arrangements for free flowing access for residents across the Maltings, there is the potential for significant overspill parking, including into the Maltings. Needless to say, such would be an unacceptable impact on the Maltings, where the parking provision is an important part of the commercial offer to tenants and their customers. Whilst there is a provision of the Deed of Grant restricting parking by appeal site occupants on the Maltings, as we have said this is likely difficult to enforce, and there should not be a need to resort to private law remedies as a result of planning harm (it is no answer to say that a neighbour likely to be adversely affected by noise from a proposed development has a private law remedy in nuisance).
20. The Appellant has provided no assessment at all of the likely impacts caused to the employment uses of the Maltings by this change in character of use of the right of way. Indeed, little if anything at all is said about the proposed construction access requirements across the Maltings, given that it provides the main access route for large vehicles, such as are likely to be required for the construction phase.
21. The Appellant continues to pursue the current scheme but has failed to demonstrate that it could deliver a suitably robust and practically enforceable scheme which would protect the Maltings employment site. If such a thing is possible it requires carefully thought and consideration as part of the design of the scheme. Unfortunately, although clearly on notice about this issue the attitude of the Appellant until very recently has been simply dismissive.
22. Any such scheme for the proposed development would, amongst other measures, result in a clear need to upgrade and effectively manage the Brassmill Lane gate in order to reconcile the new types of users with the requirements of the Maltings. This is one of the main reasons why an agreement needs to be

reached between the parties, rather than simply a document that imposes requirements on users of the appeal site who require access across the Maltings.

23. Given that this and other necessary measures come about as a result of Hartwells' development proposals, it is only right that they be required to pay for all and any such improvements, and to indemnify Standard Life should consequences of the change to the use of the access route cause loss to Standard Life, and provide a robust and easily enforceable mechanism. To date the Appellant has come nowhere near.

Agent of Change

24. Beyond the issue of the access route, the further matter of concern to Standard Life is the potential for complaints by new residents at the appeal site in respect of the industrial activities taking place at the Maltings. This concern primarily centres around noise and the 'agent of change' principles with which the Inspector will no doubt be familiar and are set out at in the NPPF.¹⁰
25. The Maltings and its tenants should not have restrictions placed on it in terms of noise through complaints made by new residents. No proper assessment has been made about the possible impact on restrictions of the use of the Maltings (see e.g. *Cemex (UK Operations) Ltd v Richmondshire District & Anor* [2018] EWHC 3526 (Admin)). Indeed such noise assessment that has been produced by the

¹⁰ Paragraph 182 states that: 'Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.'

Appellants is limited in scope and does not clearly identify the various noise sources it is commenting upon.

26. Standard Life has particular concerns about this because, as was set out in its Statement of Case at paragraphs 26-30, the submitted noise assessment makes the incorrect assumption that noise sources from the Maltings will only issue during the working day, whereas in fact the Maltings' tenants have unrestricted 24/7 use of their units, and this flexibility is an important part of the commercial desirability of the Maltings.¹¹ Even to the extent not utilised by present Maltings tenants, this flexibility is part of the offer to prospective Maltings tenants. (See e.g. *Cemex*).
27. Failing to assess the effects on new residents outside of the working day means the noise assessment overlooks the impact on bedrooms in the development, expressly stating that "as the commercial noise only occurs during the working day, impact on potential sleep disturbance, i.e. in bedrooms, does not need to be considered" (see first full paragraph of s.5.2, and first bullet point on page 11, of the Noise Assessment (p.10-11 of CD23)).
28. This is significant because the conclusion reached in the Noise Assessment is that the Maltings industrial noise will cause a "significant adverse" noise impact on the proposed development (CD23, p.10, second last full paragraph under section 5.2; and see conclusion section 6, on p.14). The noise assessment therefore should go much further than it does in exploring how this can be addressed.
29. Furthermore, the noise assessment acknowledges that when windows in the proposed development are opened for ventilation, noise ingress levels will be exceeded. This is thought to be acceptable because the noise sources only occur

¹¹ CD23 (Noise Impact Assessment), page 10, paragraph 5.2

during the working day, but this is a misplaced assumption as previously noted.¹² It raises real issues about the suitability of the proposed design and layout¹³

30. Furthermore, the noise assessment contains out of date information, some dating from 2010, and the assessment noise measurement positions do not necessarily reflect those areas at highest risk of disturbing noise: there is no measurement position from close to the entrance between the Maltings and the appeal site.¹⁴
31. In its rebuttal¹⁵ the Appellant asserts that their hands are tied it can not require as a matter of human rights law its future occupants of the site not to make nuisance complaints. It would be open to Hartwells to grant Standard Life and its tenants at the Maltings an easement to create noise as is the case at present regardless of any complaints the new residents of the appeal site may make and further to require future occupants to enter into a binding undertaking not to complain. A precedent example of such a deed of easement and accompanying planning obligation requiring the extant noise environment to be brought to the attention of prospective residents, is annexed to these opening submissions (relating to a recent decision in Runnymede concerning extra care accommodation adjacent to the Thorpe Park amusement theme park).¹⁶

¹² CD23, page 12, para 5.2.

¹³ **'Significant observed adverse effect level'** is defined in the PPG on noise as '...the level of noise exposure above which significant adverse effects on health and quality-of-life occur'. The PPG on noise also states that above the significant observed adverse effect level, 'noise causes a material change in behaviour such as keeping windows closed for most of the time' and that 'the planning process should be used to avoid this effect occurring, by use of appropriate mitigation such as by altering the design and layout' of a proposed development.

¹⁴ See CD23 at figure 1 on page 3, and also page 7.

¹⁵ Rebuttal proof of Ian Monachino-Ayres, submitted on 9 February 2021, at paragraph 3.1.4 – third bullet on page 4.

¹⁶ See Deed of Easement at page 5-6, paragraphs 3.1-5, and Section 106 Agreement at page 12-13, paragraphs 4-9; relating to Runnymede BC planning application ref: 18/0703.

32. This is a necessary and proportionate requirement to restrict the risk of new residents' complaints restricting the operations of the Maltings. But it can only seek to mitigate and not avoid the risk. Obviously if no measures are taken even to mitigate the risk then the level of harm is commensurately higher.

Planning harm

33. As already noted, although there is a legal right of way, that is not the end of the matter it is actually part of the problem. The planning issue for this appeal is the impact in planning terms as a result of the change that would occur following development of the appeal site, whether that impact would be acceptable, and whether any mitigation of harm is sufficient.
34. The harm identified above is, in planning terms, a loss of the amenity value of the Maltings, prejudicially to Standard Life and its tenants as well as the threat to a scarce and valuable employment site. Protection of amenity is a central aspect of the purposes of the planning system, in the NPPF taking effect through the 'agent of change' principle encapsulated at paragraph 182.
35. There would be compromise to the amenity of the Maltings if the appeal was allowed with no plan in place to manage use of the access way. The further planning issue that arises from this loss of amenity value is the degradation and compromise of what is presently a very high quality industrial estate.¹⁷ This would be contrary to development plan policy that protects this industrial estate, as well as contrary to the needs of local businesses for high quality premises.¹⁸ The Maltings stands out as being of conspicuous utility in this regard given its relatively central location in the city, playing an important role in the city's employment base.

¹⁷ See JLL (Nicola Perry) letter at Appendix 5 to proof of Louise Bending.

¹⁸ See sections 5-6 of proof of Louise Bending.

36. The Appellant has taken the contradictory position that, on the one hand the issue of access via the Maltings is asserted to be “unfounded and unjustified”¹⁹ and not a planning issue that should be considered at this appeal²⁰, yet on the other hand it has entered into negotiations in good faith seeking agreement with Standard Life over an acceptable agreement controlling the access route, submitting two draft management plans to this inquiry.²¹ Whilst this is explained by the Appellant simply as ‘good neighbourliness’, that is a concept more akin to the law of nuisance, whereas planning demands more – a higher standard than simply avoiding unacceptable nuisance: something which would not be a nuisance would nonetheless be capable of being a reason for refusal as an unacceptable impact on amenity. Nonetheless, a requirement to be a good neighbour is very much a planning issue.
37. For the reasons identified above, the issue of impact of the changed access over the Maltings is clearly a planning issue. This much was recognised by the Council’s officers who prepared the committee report (see pages 19, and 29 where officers noted it was necessary to have an agreement secured in order to make the proposal acceptable²²), and had been identified at pre-application stage and repeatedly by highways officers as noted above.
38. Despite its protestations that this is not a matter that needs to be considered at this appeal, something which would be wrong in law, it has somewhat last minute made efforts to agree a suitable management plan to alleviate Standard Life’s concerns in advance of this inquiry. This is something which the Appellants should have of course sought to secure at the very earliest stages of the planning process.

¹⁹ Appellant statement of case, paragraph 5.4.

²⁰ Mark Krassowski proof at 8.11, Ian Monachino-Ayres main proof at 7.5.1

²¹ CD70, Appendix 1 to rebuttal proof of Ian Monachino-Ayres.

²² CD34.

Management plan

39. The rebuttal proof of Ian Monachino-Ayres appends the latest version, and no doubt the inquiry will be kept informed of further progress should it occur.
40. Nonetheless, the Appellant has failed to demonstrate that it can deliver a suitably robust and enforceable management plan which does not prejudice the Maltings. By way of non exhaustive summary the following necessary elements are missing:
 - a. An indemnity provision from Hartwells in relation to non-performance or breach of the management plan. This should not be a sticking point if it be the case that Hartwells are content to be bound by the management plan. The enforceability of the plan is essential to each and every term of it being effective, and therefore essential to the amelioration of potential harm.
 - b. An effective enforcement mechanism that is cheap quick and practicable including e.g. the ability to suspend the right of way in the event of non-compliance by Hartwells. Again, this should present no difficulties so long as Hartwells are serious about abiding by the management plan.
 - c. Control over construction traffic, ensuring agreement by Standard Life with such traffic movements to prevent conflict with other users of the Maltings.
 - d. A provision requiring that legitimate activities at the Maltings may continue without complaints from the Hartwells site. This is an entirely legitimate and achievable provision, which has been used at many sites for analogous situations.

- e. Satisfactory legal agreement with Standard Life as signatory – either through a section 106 agreement or other appropriate and binding legal document. The Eversheds Sutherland note provides an alternative means of completing a binding legal agreement between the parties, however the points made about the inappropriateness of using a section 106 agreement are incorrect insofar as they boil down (at paragraphs 20-25) to a disagreement with Standard Life about whether an agreement is necessary to make the development acceptable in planning terms. It plainly meets that requirement. (But in any event, compliance with CIL does not impact on the enforceability of a section 106 but merely whether an obligation can be taken into account as a reason for granting planning permission.²³)
- f. It should be recalled that the Council’s planning and highways officers considered such an agreement was indeed necessary in planning terms, and this follows naturally from what has already been noted above in these opening submissions.

Conclusion

- 41. In conclusion, the appeal proposals would change the nature of use of the access route across the Maltings, causing unacceptable harm to the operations and security of the Maltings. It threatens the operation of a rare and important employment site.
- 42. This harm arises from the over development and poor design of the proposal. It could be alleviated altogether by a different scheme which did not take access across the Maltings.

²³ R. (*Millgate Development Ltd*) v *Wokingham District Council* [2011] EWCA Civ 1062 [2012] J.P.L. 258

43. The problem has been made worse by the refusal of the Appellant to engage with these issues at an early enough stage in the planning process. The belated efforts as they stand are too little (and perhaps too late). In any event as matters stand the Appellant has failed to demonstrate that it can secure agreement for a suitably robust and satisfactory and enforceable management plan agreed between Hartwells and Standard life.
44. In the absence of such an agreement, the Inspector will be respectfully invited to dismiss the appeal.

GREGORY JONES QC
JONATHAN WELCH
Francis Taylor Building
16 February 2021