

**MARSHALL GROUP PROPERTIES LIMITED**

**WING DEVELOPMENT**

**ADVICE ON VIABILITY**

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**A D V I C E**

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1. My further advice is sought in relation to the viability appraisal of the Wing Development which forms part of the Cambridge East development allocated within the Cambridge East Area Action Plan (“the AAP”). I previously advised the Councils on the issue of allowable relocation costs as provided for by policy CE/33 of the AAP in my advice dated 20 January 2015. In this advice I address the following:
  - (a) Whether the costs of relocation should be net of any benefit to Marshalls in terms of the enhanced capital value arising from the provision of the required new build relocation facilities;
  - (b) Whether there is any realistic prospect of arguing that the not all of the relocation costs associated with the Engine Running Bay Facility are allowable having regard to the terms of policy CE/33;

- (c) The reasonableness of requiring a viability review mechanism and the risks associated with such a mechanism;
- (d) The most appropriate cascade mechanism to incorporate into the section 106 agreement;
- (e) The appropriateness of the proposed delivery mechanism and any risks associated with it;
- (f) The mechanisms proposed to address the delivery of the Engine Testing Facility and the scope for the Councils to review the viability of the scheme to take into account the actual costs and benefits of the relocation of that facility.

I will deal with each in turn.

#### Relocation costs

2. As I set out in my earlier advice, policy CE/33 when properly interpreted allows for the deduction of all the costs which the business needs to receive in order to facilitate the extent of relocation which the wider design process has shown to be appropriate. Those costs properly include the land/premises costs, the construction costs of new buildings and (potentially) removal costs. I also advised that costs which would have been incurred at some stage in the ordinary run of business irrespective of the development are not sensibly allowable.
3. Whilst I can see the initial attraction of seeking to argue that the relocating business should give credit to reflect the enhanced capital value benefit which

relocation will almost inevitably result in, I agree with the advices both Rhodri Price Lewis QC and David Forsdick QC that there is no sound or proper basis for requiring such credit to be given.

4. There is no policy support within the AAP for seeking a set-off of this kind. Rather, the policy treats the relocation costs as, essentially, infrastructure costs necessary to facilitate the development required by the policy. It recognises that, unless proper allowance is made for those costs, the required relocation will not take place. Whilst that begs the question of what “proper allowance” means, that is easily answered. It means ensuring that Marshalls are provided with sufficient incentive to relocate.
5. That is the context within which the set-off suggestion needs to be considered. When viewed in that light, there are obvious problems with it. Firstly, how and when is the set-off sum to be calculated? Secondly, what if the “benefit” i.e. the enhanced capital value is never realised (whether by sale or mortgage)? Thirdly, what if the “benefit” does not in fact materialise to the extent which is assumed? Fourthly, how is the opportunity cost of the land lost to the relocated facility factored in to the appraisal? It is not unfair to describe the “benefit” as *“possible, inchoate and potentially unrealisable”* as Mr Forsdick does.<sup>1</sup>
6. These problems are likely to make relocation of the facility less attractive in contrast to the underlying policy which has as its objective, seeking to make it an attractive option. Whilst that cannot of itself be determinative of what is or is not permissible under the policy it does indicate that a more straight forward

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<sup>1</sup> Advice paragraph 6

reading of the policy is required i.e. one which focuses on the costs rather than potential benefits.

7. For these reasons, even were it reasonable to have regard to the possible benefit (which I do not accept), the uncertainties which surround that benefit, coupled with the absence of any evidence that Marshalls would be interested in relocating the facility if the set-off approach was enforced, mean that it would not be entitled to any material weight in a decision on the application.

#### Allowable Costs

8. My reading of the "*Engine Running Bay Facility – Cost Input to Viability Appraisal*" dated February 2015 and prepared by Marshall Group Properties<sup>2</sup> is that the costs of relocation of this facility assume:
  - Business As Usual in terms of the number of hours of engine running per year;
  - A facility sized to ensure that the operation of the existing runway is not impaired (i.e. it is the smallest possible to avoid this impact);
  - Some rebalancing between military and civil sectors but with overall comparable levels of activity;
  - The operational requirement is for a like for like replacement of the existing facility.
9. I have seen no contrary evidence and, on this basis, there is no realistic scope to argue that what is proposed exceeds what would be required in *any*

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<sup>2</sup> With input from Mott Macdonald and AMEC

sensible relocation of the facility. It would not be realistic to expect Marshalls to dismantle and re-erect the existing buildings or to build something which a reasonably prudent man of business would not build in order to relocate. On the material before me, I can see no grounds for disallowing the reasonable costs of the proposed facility. What those costs may be or prove to be may be a matter in dispute but that is a separate issue and one for the costs' consultants.

10. I have no other comments on the costs of relocation.

#### Review Mechanism

11. In my earlier advice I indicated that it would essential to include a review mechanism in the section 106 agreement given the phased nature of the development and the potential opportunity to increase provision of affordable housing in later phases of the development to make up for any under-provision in the earlier phases due to up front infrastructure costs. However, at that time the likely phasing of the development and the relationship to infrastructure provision were not known, at least in any detail.
12. Matters have now moved on. Marshalls advance a number of grounds which they claim, taken together, would make it inappropriate to include any review mechanism in the section 106 agreement . In summary, these grounds are:
  - (a) The Marshall's viability appraisal assumes a shortfall of over £6 million as against the residual land value;

- (b) Given that the major infrastructure (save the Engine Testing Facility) is heavily rear end loaded, conventional review mechanisms would operate too late in the development process to deliver any meaningful benefit;
  - (c) The North Works relocation costs (which are the principal rear end loaded costs) will not be understood until the relocations are completed.
13. As I read the advice from Bespoke Property Consultants, whilst they recognise the risk that the early phases of the development may be delivered with non-policy compliant levels of affordable housing and the costs of relocation of the North Works may then result in even further reductions in the later stages of the development, they accept that reviews as against individual phases would not be workable<sup>3</sup> and that the omission of a review mechanism will give greater certainty to the developer which, in turn, will speed the delivery of the site. Further, they accept that there is no overall solution to the downside risk at this stage.
14. It seems to me that other than some form of clawback mechanism which operates late in the development and which requires an affordable housing commuted sum to be paid to the Councils to reflect any earlier under-provision of affordable housing, there is no obvious means of addressing the risk. I am not aware of any such mechanism finding support in relevant policy (whether national or local) or in any decision of the Secretary of State on any application or appeal although I am know that they have been used in

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<sup>3</sup> December 2015 Report para. 2.2 p.9

South Norfolk Council's administrative area.<sup>4</sup> The usual argument against provisions of this kind is that they materially affect the ability to secure funding for the development and thus delivery. It would be sensible for the Councils to seek Bespoke Property Consultants' views on whether such an arrangement would be workable here.

15. There is also Marshall's starting position in relation to the residual land value to consider. In substance, they claim that they are offering affordable housing at a level well above that which is presently viable. It would not, in my view, be reasonable to require a full viability review mechanism over and above that baseline position if it is correct or substantially correct. However, I note that Bespoke Property Consultants and Carter Jonas have not accepted that position. In these circumstances, the key issue is whether there is some middle course review option which can provide the Councils with some greater comfort that they are not losing out on a real opportunity to secure affordable housing at the policy maximum.
16. Marshalls are also offering a review mechanism which provides for a full re-run of viability in the event that certain development timescales are not met. That has merit and provides a safeguard in the event of delay. However, there is the potential to require Marshalls' suggested review mechanism to apply in the event of any delay in bringing forward the later phases of the development. Bespoke Property Consultants hint at that possibility,<sup>5</sup> but do

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<sup>4</sup> I have not had sight of the claw back clauses used but South Norfolk would no doubt provide them on request.

<sup>5</sup> Ibid

not expressly address the implications for this development. It is certainly an option the Councils should seek their further advice on.

17. Further, given the sensitivity of the appraisal to the costs of relocation of the Engine Testing Facility, there must be merit in at least considering whether there is scope for a review of viability once those costs are established i.e. following relocation (see below).

### Cascade

18. The Cascade mechanisms advanced by Mills & Reeve on behalf of Marshalls takes a standard approach. I agree with Bespoke Property Consultants that there is scope to argue that the Cascade should be more ambitious in its objectives in the event that a higher value affordable housing product (such as Starter Homes) is introduced into the mix. The viability appraisal makes no allowance for this and there is no obvious logic in restricting any review to increasing the percentage of affordable rented but within the overall percentage provision. Provided the residual land value remains at least that set out in the original appraisal, consideration should be given to whether the overall percentage as well as the split between tenure types should be revisited (albeit up to and not exceeding the policy requirement of 40%) . As presently instructed, I cannot see why that would be regarded as unreasonable.
19. The Cascade mechanism as presently drafted would require adaptation to allow for this.



### Delivery Mechanism

20. The commitment to delivery offered by Marshalls will provide some comfort to the Councils that there is an intent to deliver the development and at an early stage. However the only real benefit of the suggested provisions is the commitment to a full viability review in the event of the timescales not being met. The obligations to take certain steps within the specified timescales are in practice likely to be unenforceable as they are positive covenants and there may be a number of perfectly good reasons why such timescales are not met.
21. The full viability review is, however, a benefit but the obligation to undertake this must be expressed as a requirement and there must be a defined timescale in order for this benefit to be a meaningful one. As I have indicated above, there may be scope to require a full review in the event of any later prolonged delays in bringing forward the development. If this is workable, then there would be a need for appropriate trigger(s), an obligation to undertake the review and a timescale.

### Engine Testing Bay

22. I assume that the Engine Testing Bay is to be relocated prior to the occupation of any dwellings on the site. Given that this relocation is a key abnormal cost and one which has a significant bearing on the residual land value, there may be merit in seeking a full review of viability once that relocation is complete and the full costs are known. There are two matters which might weigh against that. Firstly, the fact that Marshalls claim that they are already be offering significantly more affordable housing than their viability

appraisal would support (see above). Secondly, a review of this kind would have to work both ways i.e. if the costs exceed that allowed for previously, there would be a commensurate reduction in affordable housing. If the Councils consider that the Marshalls costings are at the top end of the range of likely costs, then they may take the view that there is little risk of a review reaching a conclusion that the development is less viable than originally appraised.

23. As an alternative, there might also be merit in requiring the specification for the facility to be submitted to the Councils for approval to ensure that what is built reflects that which has been appraised in the viability appraisal.
24. For the reasons already outlined, it would not be appropriate to seek to regulate the use of the relocated facility. It is the costs of that facility and not its capital value which are relevant to the viability appraisal.
25. I have no strong views on whether to deal with the relocation of the Engine Testing Facility by condition or obligation. A condition has the potential disadvantage of early discharge on appeal but it with Government guidance which indicates that if a matter can be dealt with by condition as opposed to a planning obligation, then it should be. However, if the relocation is tied to viability review then there would be merit in dealing with this within a planning obligation.

26. The only other point I would add is that Marshalls' presently proposed condition is not adequate. It does not secure relocation; it simply limits the residential development until the Engine Testing Facility has ceased. On this basis they could simply decide no longer to do engine testing and close the facility. Whilst this may be an unlikely scenario, it needs to be guarded against.
27. I hope I have dealt with all of the matters raised in my instructions in sufficient detail. If there are any queries or other matters arising, please let me know.

SIMON BIRD QC  
16 February 2016



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LIMITED**

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