

LPA REF: 23/P/0664/OUT

APPEAL REF: APP/D0121/W/24/3343144

**TOWN & COUNTRY PLANNING ACT SECTION 78 APPEAL
LAND NORTH OF RECTORY FARM, CHESCOMBE ROAD, YATTON, BS49 4EE**

**PROOF OF EVIDENCE
RELATING
TO
THE AVAILABILITY OF LAND SUBJECT TO OPTION OR PROMOTION AGREEMENTS**

**PREPARED
BY
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25th July 2024

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1.0 INTRODUCTION

1.1 This Proof of Evidence has been provided on behalf of the Appellant, Persimmon Homes Severn Valley ("**the Applicant/the Appellant**"), for the proposed development of Land North of Rectory Farm, Chescombe Road, Yatton (the "**Appeal Site**").

1.2 In that respect, it is understood that the Applicant submitted a planning application (ref: 23/P/0664/OUT) ("**the Application**") to North Somerset Council (the "**Council**") described as:

"Outline planning application for the development of up to 190no. homes (including 50% affordable homes) to include flats and semi-detached, detached and terraced houses with a maximum height of 3 storeys at an average density of no more than 20 dwellings per net acre, 0.13ha of land reserved for Class E uses, allotments, car parking, earthworks to facilitate sustainable drainage systems, orchards, open space comprising circa 70% of the gross area including children's play with a minimum of 1no. LEAP and 2no. LAPS, bio-diversity net gain of a minimum of 20% in habitat units and 40% in hedgerow units, and all other ancillary infrastructure and enabling works with means of access from Shiners Elms for consideration. All other matters (means of access from Chescombe Road, internal access, layout, appearance and landscaping) reserved for subsequent approval.."
("the Development")

1.3 It is understood that the Application has not been determined by the Council, and as a consequence an Appeal has been lodged against that non-determination.

1.4 I have prepared this Proof of Evidence in order to provide guidance regarding the different contractual bases upon which developers and land promoters secure and promote land for development and as a result the implications this has on the availability of that land to third parties.

2.0 PERSONAL

- 2.1 This Proof of Evidence is provided by **Nigel L Jones BSc FRICS ACI Arb.**
- 2.2 I am a specialist development land consultant employed by Chesters Harcourt based in Yeovil, Somerset. My practice is a firm of Chartered Surveyors who provide advice on general commercial property matters, but also specialise in all aspects of residential development. We have five Chartered Surveyors providing advice on the disposal, acquisition, valuation and all related matters concerning development land on numerous sites throughout the UK.
- 2.3 I hold a Bachelor of Science Honours Degree gained at the University of Reading in 1977 at which time I was awarded the University Prize for Valuation. I am a Fellow of the Royal Institution of Chartered Surveyors and an Associate of the Chartered Institute of Arbitrators. I have been practising as a Chartered Surveyor for over 40 years and for the last 20 plus years have been specialising in development land matters.
- 2.4 I have been a long standing member of the RICS President's Panel of Arbitrators and Independent Experts and during the last twenty years have regularly received appointments on development land matters throughout the country. This is primarily on the valuation of development sites in connection with the exercise of Options but has also included disputes associated with the contractual mechanisms of various land agreements. I have also appeared in both County and High Court matters on development land disputes including professional negligence cases.
- 2.5 I was one of the instigators and subsequently a member of the Working Party who produced the RICS Guidance on the issue of viability in planning, in 2012 entitled – "Financial Viability in Planning" and its subsequent update in 2019.
- 2.6 I have appeared in various Planning Inquiries giving evidence relating to development land issues, and in particular was the primary witness on the theory of development land viability in one of the leading planning Appeals on viability, namely at The Manor, Shinfield, Reading, Appeal reference APP/X0360/A/12/2179141.

3.0 DEVELOPMENT AGREEMENTS

3.1 There are principally two main types of contracts which are relevant in this context, namely Option Agreements and Promotion Agreements. The mechanics of these types of contracts have particular relevance to the flood risk sequential test which I understand the Appellant has undertaken, where the reasonable availability of other sites is a critical factor.

Option agreements

3.2 Option Agreements are contracts between landowners and developers, which grant the developer an option to purchase the land in question once the conditions of the Option have been satisfied, typically meaning the grant of planning permission for development of the land (be that in Outline, Hybrid, Full or Reserved Matters). The costs of seeking planning permission are entirely at the developer's risk although if successful they are likely reimbursed to the developer.

3.3 Option agreements can be for any period agreed between the parties to that agreement, with the length of time being defined within the Option Agreement. This is often a substantial period of time, 10 – 20 years, as this gives the developer comfort that they will have time to promote the land through a local plan promotion and thereafter prepare, submit and secure planning permission. For obvious reasons, the developer will not invest time and resource in entering an agreement which is likely to terminate prior to the end of the promotion and planning process. Extensions are normally included within an agreement to extend the life of the option in the event of an undetermined planning application, appeal process, judicial review or prolonged valuation exercise.

3.4 To enter the Option Agreement, a premium will be paid by the developer to the landowner. The sum paid may be substantial and will depend on a variety of factors including the size of the site and the likelihood of a planning consent being granted.

3.5 The Price the developer has to pay to purchase the land once planning permission is secured is almost always based on the "open market" value of the land at the time planning permission is granted, less a developer discount to compensate for the developer risk in pursuing an application. The value is negotiated often using the RICS Red Book as the primary valuation

guidance. As referred to above, the developer is likely to be reimbursed their costs in pursuing the planning application should they be successful.

- 3.6 As protection to the landowner, Options typically have Minimum Prices, which are fixed values normally based on a sum per gross or net acre. The Price the developer pays to the landowner must at least match the Minimum Price..
- 3.7 Where the Minimum Price cannot be met, Options Agreements often include suspension clauses, where the Option is suspended for a period of time to allow for another valuation process to be undertaken or to allow the developer to re-negotiate the planning permission, in the hope that the Minimum Price can be met.
- 3.8 If at the valuation stage the landowner and the developer cannot agree on the Price, then the process can be referred to a third party to determine the Price. This is a lengthy process, which adds further delay to purchase of the site.
- 3.9 Once the Price is agreed or determined, the developer will have a fixed period in which to exercise the Option and acquire the property or walk away from the acquisition.

Promotion Agreements

- 3.10 In contrast to an option, land promoters secure land via Promotion Agreements, whereby the promoter will promote the land for development and seek to secure planning permission during the agreed Promotion Period at their cost and risk. On securing the planning permission, the land is offered for sale in the open market and offers are invited from developers. The promoters make their return from an agreed proportion of the land sale proceeds, often with their costs reimbursed.
- 3.11 The sales and marketing stage of the promotion process is not concluded immediately, and takes time to work through. For example, the Rectory Farm site at Yatton directly south of the Appeal Site secured Outline Planning Permission at appeal on the 12th May 2021. The sale to the developer, St. Modwen, completed on the 18th November 2022, i.e. some 18 months later.

3.12 Promotion agreements often include Minimum Price clauses, which if not met through the marketing exercise will suspend the sale and allow for re-marketing the property at some later date in the hope the market has improved in the interim.

Availability to Third Parties

3.13 In both Option and Promotion Agreements, clauses are often included which prohibit the sale of the land to competing parties, i.e. other developers/promoters, or the assignment of the Agreement to a third party. The land owner often goes through a prolonged selection processes before entering an Agreement so as to pick a party which they believe have the resources and expertise necessary for that project. As a consequence they are personal agreements and not intended to be tradeable assets.

3.14 Even if such a clause is not present in the Agreement, as developers make their profit through the eventual sale of built properties on the site and promoters make their profit through the sale of the land once planning permission has been granted, it is unlikely to make commercial sense for developers or promoters to negotiate with any third party to assign the Option/Promotion Agreement to allow them an early exit.

3.15 For Promotion Agreements, the only time that the land would reasonably become available to a developer would be during the marketing stage once the promoter has secured planning permission and is actively marketing the site with planning permission. Hence there is little scope for an interim acquisition by a developer. Developers have little interest in securing promotion agreements as they do not guarantee them the eventual land purchase following planning – as the landowner requires a sale to the highest bidding party in the open market.

3.16 Fundamentally, promoters and developers would not invest significant time and funds in securing Option/Promotion Agreements, promoting the site and securing planning permission, if there was a risk that they could lose control of the site before they are able to generate their profit through development or the sale of the land. It is therefore reasonable to assume that land in either a Promotion or Option agreement is not available to a third party.

3.17 In relation to the Appellant's flood risk sequential test, I understand that the Appellant has written to developers and promoters who have control of sites whose availability needs to be

tested, expressing their interest in those sites. For those sites under Promotion/Option Agreements, none of the developers and promoters have responded to the Appellant. This is entirely understandable given their contractual obligations almost definitely prevent it.

- 3.18 It is therefore reasonable to conclude that these sites are not available to the Appellant and that the Appellant has taken steps to determine that position.

Non-Competition Clauses

- 3.19 Within both Promotion and Option Agreements it is also standard practice for “non-competition clauses” to be included to prevent commercial conflicts. These will prohibit the developer/promoter from promoting any other site for development which may compete within a geographic area with the site in question for an allocation or planning permission. This can be done on settlement-wide basis (i.e. the developer/promoter cannot promote another site of a similar scale within the same settlement) or on a broader area around the site itself (e.g. the developer/promoter cannot promote another site of a similar scale within a 5 or 10 mile radius of the site). This provides useful protection to the landowner that the developer/promoter cannot prioritise another site which would delay or prevent their own land coming forward. If a developer/promoter were to promote another site which competed with the relevant site under Option/Promotion, they would be in breach of their contract with the landowner.

- 3.20 For the purposes of the Appellant’s flood risk sequential test, it is understood that it is highly likely that where alternative sites are located in settlements in which the Appellant has existing strategic assets, that the Appellant would be contractually unable to promote one of those sites of a similar scale. Therefore, those sites would be unavailable to the Appellant. Any approach to landowners even in a hypothetical, exploratory circumstance would be in breach of its other agreements and a waste of those landowner’s time and resources.

4.0 **STATEMENT OF TRUTH**

4.1 The evidence that I have prepared and provide for this appeal (PINS reference **APP/D0121/W/24/3343144**) in this Proof of Evidence is true and has been prepared and given in accordance with the guidance of my professional institution and I confirm that the opinions expressed are my true professional opinions.

A handwritten signature in black ink, appearing to read 'Nigel L Jones', with a stylized flourish at the end.

Signed.....

Nigel L Jones BSc FRICS ACI Arb

Dated.....25th July 2024