

## **PLANNING COMMITTEE**

**31 MARCH 2010**

### **CENTURY BUILDINGS SITE ROCHESTER – PLANNING POSITION**

Report from: Robin Cooper, Regeneration, Community and Culture

Author: Dave Harris, Development Manager and Angela Drum, Head of Legal

#### **Summary**

This report relates to the site known as Century Buildings, 22/26 Victoria Street, Rochester. As a result of court action by the owners of Restoration House, a Grade I Listed Building located adjacent to the site, the Local Planning Authority has agreed certain facts in relation to permissions benefiting this site and has agreed to take certain decisions regarding the future planning status of the site. This report seeks to set out the position relating to these issues. It also seeks to establish the Council's position in relation to other planning issues that have not been determined by the recent court action. The background to this matter is lengthy and complex but is summarised below.

#### **1. Budget and Policy Framework**

- 1.1 Planning Committee has the authority to authorise enforcement proceedings if they are necessary. It also has the authority to consider whether or not to make a revocation, modification or discontinuance order. However a decision to make a revocation, modification or discontinuance order must be made by Full Council (whereas a decision not to make such an order can be made by the Planning Committee).
- 1.2 Reason for urgency: the Council has agreed pursuant to the judicial review proceedings referred to below that a report on whether to make a modification order and a discontinuance order in respect of blocks at the Century Buildings site would be considered by the Planning Committee on 31 March 2010 and therefore the Committee is asked to consider this report at this meeting.

## **2. Background**

2.1 In December 2006 planning permission and conservation area consent were granted in relation to this site. These approvals are summarised below:

- Planning permission MC2003/2452: Part demolition of warehouse buildings; the conversion of "tower building" into one Class B1 office unit with 5 flats above; the conversion of one warehouse building into three 1-bedroomed mews cottages; the construction of 10 terraced houses; two blocks comprising 12 flats; one block comprising a Class B1 office unit at ground floor with 6 flats above; the formation of a new access via The Terrace and the provision of parking.
- Conservation Area Consent MC2003/2453: part demolition of warehouse buildings to facilitate the redevelopment of the site.

A further planning permission relating to this site was granted in October 2007:

- Planning permission MC2007/1529: Part demolition of existing building; construction of block comprising four 1-bedroomed flats and four 2-bedroomed flats with associated parking.

2.2 It should be noted that permission MC2007/1529 relates only to Block E, which is located on the eastern part of the site. In essence it provided an alternative scheme for Block E to that approved under planning permission MC2003/2452.

2.3 During the purported implementation of permission MC2003/2452 a historic wall was partially demolished by the then owner/developer. The demolition of this wall was unauthorised in planning terms. Since the demolition works the remainder of the wall has been grade II listed by the Secretary of State.

2.4 Following the partial demolition of the wall, discussions took place with English Heritage who initially advised that there was not a case for reinstating the wall. This was based on a number of considerations including the fact that materials from the demolished section of the wall were no longer available as they had been sent to a landfill facility and would be very difficult, if not impossible, to recover. Based partly on this advice, this Council took a decision that it would not be expedient to pursue enforcement action requiring the wall be to rebuilt.

2.5 Subsequent to this English Heritage changed its position and indicated that it now considered the wall should be reinstated. The owners of Restoration House asked the Council to consider taking enforcement proceedings to require the reinstatement of the wall based on English Heritage's change of view. They also asked the Council to consider

Revocation/Modification orders in relation to the planning permission for the development on this site.

- 2.6 The owners of Restoration House issued judicial review proceedings against the Council relating to these matters. The Judicial Review was heard on 15<sup>th</sup> March 2010. The agreements reached at this Judicial Review are set out later in this report. The owners of Restoration House also requested the Secretary of State to issue a Listed Building Enforcement Notice and a revocation/modification order for the planning permission for the development on this site. We are currently waiting to hear how the Secretary of State intends to proceed on these matters.
- 2.7 It should be noted that a company called Future Homes Limited carried out the development on this site. However this company was placed in administration in August 2008. The owners of Restoration House have subsequently purchased the site.

### **3. Options**

- 3.1 Planning Committee can decide whether or not to issue Enforcement/Listed Building Notices.
- 3.2 Planning Committee can consider whether or not to make a Modification or Discontinuance Order in respect of Block B and/or a Revocation Order in respect of Block D. If it considers that such an order should be made it must make a recommendation to Full Council, which has the power to decide that such an order should be made.
- 3.3 The remainder of the report sets the reasoning for the recommendations contained in the report.

### **4. Advice and analysis**

- 4.1 To inform members, the matters raised by the owners of Restoration House (the current landowners) are set out below, together (where relevant) with the agreed position reached between the current landowners and the Council.

#### **(1) A declaration that the Tudor Wall and walling within the former garden area are listed as curtilage structures.**

- 4.2 It has been agreed by the current landowners and the Council that the Wall which was subsequently listed by the Secretary of State on 23<sup>rd</sup> January 2008, the stretch of the Wall which was demolished in 2007/2008 and the pre-1948 walling within the former garden (including ragstone and flint walling) are and were listed as curtilage structures under section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 prior to the listing of the Wall.

- 4.3 This agreement has been reached on the evidence provided by historic documents showing that the area in which these walls were situated was, on the balance of probabilities, part of the curtilage of The Vines at the date The Vines was listed and so form part of the listed building as curtilage structures.

**(2) A declaration that the north-western part of the Century Buildings site was listed as forming the curtilage of the Vines**

- 4.4 The extent of the north-western part of the Century Buildings site that lies within the curtilage of The Vines for the purposes of section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and remains within that curtilage for those purposes has been agreed.
- 4.5 This agreement has been reached on the evidence provided by historic documents. However, it is only structures and objects within the curtilage which can form part of the Listing, the land itself is not Listed.

**(3) A declaration that planning permissions MC2003/2452 and MC2007/1529 have not been implemented**

- 4.6 The owners of Restoration Houses have questioned the conditions relating to permissions MC2003/2452 and MC2007/1529 and in particular whether non-compliance with the pre-commencement conditions means that the permissions have not been implemented.

In the assessment of this issue it is necessary to determine:

- (i) Whether there has been a breach of any of these conditions,
  - (ii) If there has, whether the effect of the breach of condition is such as to render the development as a whole unlawful (i.e. does the condition go to the heart of the development)
  - (iii) If the answers to (i) and (ii) are yes, whether there are any exceptions that apply to the general principle that work carried out in breach of such conditions cannot implement a planning permission
- 4.7 Case law suggests that if a condition does go to the heart of the permission, unless there are any exceptional circumstances, it is likely that the permission would be considered not to have been implemented (Whitley & Sons v Secretary of State for Wales [1992] 3 PLR 72 R; R (on the application of Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840; Bedford Borough Council v Secretary of State for Communities and Local Government and another [2008] EWHC 2304).
- 4.8 The pre-commencement conditions relating to permission MC2003/2452 are set out in full below:
- 3. Prior to the commencement of the development hereby permitted, details and/or samples of the: external bricks; roof

tiles and coverings; brickwork pointing, bonding and mortar mix; joinery for windows and external doors; weatherboarding; rainwater goods; balustrading and railings; any external soil and vent pipes; and any balanced flue outlets, shall be submitted to and approved in writing by the Local Planning Authority and the development shall be carried out in accordance with the approved details. Any details that are to be submitted in a drawn form pursuant to the requirement of this condition shall be drawn at a scale of not less than 1:5.

Reason 3. To safeguard the character and appearance of the premises and the area in which they lie.

5. No development shall take place until full details of both hard and soft landscape works have been submitted to and approved by the Local Planning Authority and these works shall be carried out as approved in writing. These details shall include existing and proposed ground levels, means of enclosure, hard surfacing materials and refuse or other storage units. Soft landscape works shall include planting plans, schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate and implementation programme.

Reason 5. To accord with the provisions of Section 197 of the Town and Country Planning Act 1990 and to ensure that the development does not prejudice the appearance or character of the site and the locality.

7. No development shall take place (except as may be agreed in writing by the Local Planning Authority) until the developer has secured the implementation of a programme of archaeological work in accordance with a written specification and time table which has been submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved specification.

Reason 7. To safeguard the archaeological interest in the site.

8. Prior to the commencement of the development hereby permitted an investigation shall be undertaken to determine the nature and extent of any contamination. The results of the investigation together with a risk assessment by a competent person and details of a scheme to contain, treat or remove any contamination as appropriate shall be submitted for the written approval of the Local Planning Authority. The approved scheme shall be fully implemented and a completion report issued by the competent person referred to above, stating how remediation has been completed and that the site is suitable for the permitted use, shall be provided to the Authority prior to the first occupation of the development hereby permitted.

Reason 8. To ensure that the development is undertaken in a manner which acknowledges interests of amenity and safety.

4.9 The pre-commencement conditions relating to permission MC2007/1529 are set out in full below:

2. The development hereby permitted by this planning permission shall not be commenced until an appropriate mechanism relating to the land has been made and lodged with the local planning authority and the local planning authority has subsequently approved the details of the mechanism. The said mechanism will secure the provision of all eight units as affordable housing units, an increase of two units over and above the six affordable units secured under planning reference MC2003/2452 within the development site and for the subsequent implementation of an agreed provision of affordable units within the site.

Reason 2. To ensure that a range of housing tenures are catered for in accordance with Policy HP7 of the Kent and Medway Structure Plan 2006 and Policy H3 of the Medway Local Plan 2003.

3. Prior to the commencement of work hereby permitted, details of the elements listed below shall be submitted to and approved in writing by the Local Planning Authority.

- A sample panel of brickwork showing pointing and bonding
- Written specification of the mortar mix
- Specification of external rainwater goods
- Drawings of not less than 1:20 in scale of window and external door designs including wall/window junctions
- Drawings of not less than 1:20 in scale of eaves, verges and parapets (including any soffits, fascias and barge boards)

All works shall be carried out in strict accordance with the approved details and shall be retained thereafter unless any variation are other first approved in writing by the Local Planning Authority.

Reason 3. To safeguard the character and appearance of the premises and the area in which they lie.

7. No development shall take place until the applicant, or their successors in title, has secured the implementation of a programme of archaeological work in accordance with a written specification and timetable which has been submitted to and approved by the Local Planning Authority.

Reason 7. To ensure that features of archaeological interest are properly examined and recorded.

- 4.10 It has been agreed between the current landowners and the Council that planning permissions MC2003/2452 and MC2007/1529 have not been implemented. The agreement reached in the judicial review proceedings does not specify whether breach of each and every one of these conditions would have resulted in non-implementation of the planning permission. The adjoining landowners' case at judicial review was that it would. Although it may be a moot point, as the Council has agreed that the permissions have not been implemented, it is the Council's view that works carried out in breach of some of the conditions (for example the landscaping condition) would have implemented the permission, as those conditions did not go to the heart of the permission. However, the Council does accept that the archaeological conditions did go to the heart of the permissions and so breach of them rendered the permissions unimplemented.

**(4) A declaration that demolition is not capable of being carried out pursuant to conservation area consent MC2003/2453 condition 2 until a planning permission is capable of being implemented and that demolition works to the Tudor Wall could not benefit from that consent in any event**

- 4.11 In the light of the matters referred to above, which are agreed between the current landowners and the Council, this matter does not arise and it is not necessary to consider it further.

**(5) A declaration that block B has been constructed otherwise than in accordance with approved details and the changes are so substantial that the Council cannot informally approve variations.**

- 4.12 Block B comprises a terrace of four 2 storey town houses with additional accommodation provided with the roofspace. Each accommodates three bedrooms. Construction of this block has been substantially completed.
- 4.13 Block B has not been constructed in accordance with the approved drawings. A number of amendments from the approved drawings have been carried out which include the following:
- The approved drawings show the height of the parapets on the flank elevations of Block B to be 8.3m above ground level. Measurements taken on site indicate that the height of the parapet above ground level is approximately 8.75m
  - Measurements on site show the distance between the flank wall of Block B and the rear boundary of the properties fronting East Row to be 3.75m. The approved drawings show this distance to be 4.5m.
  - Changes to fenestration on rear elevation
  - Replacement of balconies on front elevation with Juliette balconies
  - Changes to design of fenestration in front roof slope
  - Removal of canopies above first floor windows in front elevation
  - Minor changes to internal layout

- Some parapets and detailing above windows removed
- The provision of sun pipes in the rear roof slope

- 4.14 It has been agreed that Block B has been constructed otherwise than in accordance with the details approved in the planning permission and the changes are so substantial that the Council cannot informally approve variations.

**(6) A declaration that Block D cannot be constructed in the location approved under permission MC2003/2452**

- 4.15 Block D comprises a 4-storey building with parking provided at ground floor level and six 2-bedroomed flats on the floors above. This block has not been constructed. It is not possible to build Block D in the location originally approved as a result of the presence of the remaining listed Wall.
- 4.16 It has been agreed that Block D cannot be constructed in the location approved under permission MC2003/2452 without causing works to the remaining part of the listed Wall which would require listed building consent and a fresh grant of planning permission would be required if such works were to be avoided.
- 4.17 It should be noted that items 7, 8 and 9 below were not pursued by the owners of Restoration House, in the judicial review proceedings, after they acquired the Century Buildings site. However, notwithstanding this, the issues raised remain matters that are relevant to the planning of the site and so should be considered by the Local Planning Authority. The assessment of each is therefore set out below:

**(7) The Council should consider issuing a Listed Building Enforcement notice to require rebuilding a section of the demolished Tudor Wall**

- 4.18 During the implementation of planning permission MC2003/2452 a length of the Wall of approximately eight metres was demolished. This was unauthorised in planning terms. This Authority therefore considered the expediency of planning enforcement action to require the demolished part of the Wall to be reconstructed. In the assessment of this, the following matters were considered relevant:
- it would not be possible to rebuild the Wall using the original materials as the rubble from the demolished section of the Wall was sent to a landfill facility unconnected to the developer very soon after demolition occurred. It would be very difficult, if not impossible, to locate the materials disposed of.
  - the Council sought the view of English Heritage as to whether it would be desirable to require reinstatement of some or all of the demolished section of the Wall. The following comments were provided by English Heritage on a provisional basis:



*“..there must be questions about what would be a good use of public money to save a part of a compromised wall. Much as we would like to see the historic property boundaries that run with Restoration House retained (which would mean reinstatement in this case) I think the opportunity for this has been lost.*

*..the most impressive part of the wall has already been lost..*

*Reinstatement could recover the line and appearance of the wall and something of its relationship to the historic landholding of which it formed a part. The latter benefit would however be reduced should the wall be rebuilt ...with other buildings in very close proximity to it.”*

- in practical terms the Wall could not be rebuilt in its entirety without frustrating part of the scheme of development that has planning permission.
- Counsel’s opinion at that time, based upon the information known at that time, was that although the Council had a possible basis for enforcement action, the landowners would have strong grounds of appeal against an enforcement notice..

4.19 In March 2008 a decision was taken that in light of these considerations it would not be expedient to take planning enforcement action.

4.20 Since that date there has been a significant change in circumstances:

- English Heritage changed the views previously expressed and have been strongly of the view that this Council should use its enforcement powers to require the Wall to be reinstated.
- it has been demonstrated that the Wall was listed as a curtilage structure under section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 prior to the listing of the Wall on 23<sup>rd</sup> January 2008
- scientific dating techniques have been commissioned by this Council, the results of which provide a clearer indication of the date that the Wall was constructed.

4.21 In light of these changed circumstances, it is now necessary to reconsider whether it would be expedient to serve a planning enforcement notice and also whether it would be expedient to issue a listed building enforcement notice requiring the reinstatement of the Wall.

4.22 Under s172 of the Town & Country Planning Act 1990:

*The local planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them—*

- (a) that there has been a breach of planning control; and*

(b) *that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.*

4.23 Under s38 of the Planning (Listed Buildings and Conservation Areas) Act 1990

*Where it appears to the local planning authority—*

(a) *that any works have been or are being executed to a listed building in their area; and*

(b) *that the works are such as to involve a contravention of section 9(1) or (2),*

*they may, if they consider it expedient to do so having regard to the effect of the works on the character of the building as one of special architectural or historic interest, issue a notice under this section (in this Act referred to as a “listed building enforcement notice”).*

4.24 Section 9 refers to a contravention of s7 which is the requirement to obtain listed building consent for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest.

4.25 In deciding whether to issue a planning enforcement notice and/or a listed building enforcement notice, the main considerations are (i) whether there has been a breach of planning or Listed Building control and (ii) whether it is expedient to take action.

(i) Whether there has been a breach of Planning /Listed Building Control

It has been agreed that the Tudor Wall was listed as a curtilage structure at the date that part of the wall was demolished. As such there is no requirement for conservation area consent under s74 of the Planning (Listed Buildings and Conservation Areas) Act 1990. The required consent would be listed building consent if the partial demolition constituted *the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest*. It is considered that the removal of part of the wall would have required listed building consent as the works constituted the alteration of the wall in a manner which affected its character as a building of historic interest. This is particularly the case as the wall has now been proven to be of Tudor construction as a result of brick dating tests (there had been uncertainty on this matter, because earlier survey reports - with which English Heritage disagreed - had cast doubt on a Tudor dating).

(ii) Whether it is expedient to take Enforcement action

The issue of “expediency” renders enforcement action discretionary. The Council is not required to issue enforcement proceedings in

relation to every breach of planning control. It is for the Council to determine whether it is expedient to enforce against a breach of planning control in each case. A decision on whether or not it is expedient to issue an enforcement (or a listed building) notice can only be challenged in the courts if it is shown to be founded on an error of law, for example, failure to take into account a relevant consideration – R v Sevenoaks District Council, ex p Palley [1994] EGCS 148) - or if it is not fully justified and so could be seen to be arbitrary or capricious – Perry v Stanborough (Development) Ltd (1977) 244 EG 551.

- 4.26 In determining the issue of expediency, all relevant planning considerations should be taken in to account, including the provisions of the development plan, national policy guidance and government Circular advice.
- 4.27 For the purposes of Section 38 of the Planning and Compulsory Purchase Act 2004 the development plan relating to the site comprises the following:
- The Regional Spatial Strategy for the South East 2009
  - The Medway Local Plan 2003 (saved policies)
- 4.28 Policy BE6 of the Regional Spatial Strategy for the South East relates to the management of the historic environment. It requires that when developing and implementing plans and strategies, local authorities and other bodies will adopt policies and support proposals which protect, conserve and, where appropriate, enhance the historic environment and the contribution it makes to local and regional distinctiveness and sense of place. It also requires that the region's internationally and nationally designated historic assets should receive the highest level of protection.
- 4.29 Policy BNE16 of the Local Plan requires that the demolition of listed buildings will not be permitted unless it can be demonstrated that there are exceptional and overriding reasons for demolition, and that all possible methods of preserving the building have been investigated.
- 4.30 Policy BNE17 of the Local Plan relates to alterations to listed buildings and requires that such alterations will not be permitted if they are, *inter alia*, "detrimental to the architecture or historic character of the building".
- 4.31 Policy BNE18 of the Local Plan relates to the setting of listed buildings and requires that development which would adversely affect the setting of a listed building will not be permitted.
- 4.32 Government advice on listed buildings, including the demolition of listed buildings, is set out in PPG 15: Planning and the Historic Environment. This states that there should be a general presumption in favour of the preservation of listed buildings, except where a convincing case can be made out for alteration or demolition. While the

listing of a building should not be seen as a bar to all future change, the starting point for the exercise of listed building control is the statutory requirement on local planning authorities to 'have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'

- 4.33 PPG18: Enforcing Planning Control states that in considering any enforcement action, the decisive issue for the LPA should be whether the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest and that enforcement action should always be commensurate with the breach of planning control to which it relates. Whilst this specifically relates to enforcement notices, the service of a listed building notice must also be considered to be expedient and so the same issues will be relevant, in addition to the requirement to have regard to the effect of the works on the character of the building as one of special architectural or historic interest.
- 4.34 As set out above, in March 2008 a decision was taken by this Council that it would not be expedient to take planning enforcement action requiring the reinstatement of the Wall. This decision was based on information available at that time. Since then there has been a significant change in circumstances which requires this Council to reconsider its position. These circumstances relate to:
- (i) A change of view by English Heritage relating to the reinstatement of the Wall;
  - (ii) New evidence which demonstrates that the Wall is listed by virtue of being located within the historic curtilage of The Vines.
  - (iii) New evidence relating to the age of the Wall.
- 4.35 These issues are discussed below:

(i) The decision taken by this Council in March 2008 was based partially on the provisional view of English Heritage that there was not a case for requiring the reinstatement of the Wall. In various correspondence since March 2008 English Heritage has provided a revised view that "in order to sustain the significance of this part of Rochester's historic environment, we consider that the Tudor wall should be reinstated". It is now of the view that the Wall "is regionally highly unusual and is of very considerable importance in shedding light on the evolution of not only The Vines and Restoration House (which were united in the Tudor period) but also on the extraordinary designed landscape to the east of the houses." It has advised this Council as follows: "We consider that your Council should use its powers under the 1990 Act to remedy the partial demolition of the wall by enforcing its reinstatement to the extent that it survived at the beginning of 2008."

English Heritage is the Government's statutory adviser on the historic environment and as such its views in terms of the historic importance of

the Wall and its reinstatement must carry significant weight in the Council's assessment of this matter.

(ii) Since March 2008 evidence has been provided to this Council that seeks to demonstrate that the Wall was listed as a curtilage structure under section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 prior to the listing of the Wall on 23<sup>rd</sup> January 2008. Agreement has been reached that as a result of this evidence the Wall is curtilage listed. This means that at the time of the partial demolition of the Wall it was listed. This was not known at the time of the Council's decision in March 2008. In considering the expediency of taking enforcement action the provisions of the development plan, national policy guidance and government Circular advice insofar as they relate to listed buildings are therefore now material.

(iii) Since March 2008 there has been considerable doubt over the age of the Wall. Different dates for the Wall's construction have been provided by English Heritage and by archaeological surveys commissioned by the previous owners of the site. In order to provide a clearer indication of the age of the Wall brick dating tests were commissioned by this Council. The results of these tests have only recently been received and indicate the Wall to be of Tudor construction.

- 4.36 As set out above, development plan policy and Central Government advice clearly seek to provide protection to listed buildings and the demolition or alteration of such buildings is only considered acceptable in very exceptional circumstances. The view provided by English Heritage, the new evidence demonstrating that the Wall was listed at the time of its partial demolition and the new evidence relating to its age demonstrate that the Wall is of significant historic merit. It is considered that this new information is sufficient to outweigh the conclusion reached in March 2008 that it would not be expedient to take enforcement action to require the reinstatement of the Wall. It provides important new information on the historic importance of the Wall and a strong and compelling argument that it should be reinstated, particularly given the weight afforded to the protection of listed structures by the development plan and national policy guidance. It is considered that there is not a "convincing case" for allowing the Wall to remain partially constructed and not fully reinstated.
- 4.37 At the same time, Circular 10/97, para 10 states that Local Planning Authorities are expected to have regard to the guidance in PPG18 in deciding whether enforcement action is expedient to remedy a breach of planning control, *where earlier attempts to do so by informal negotiation have proved unsuccessful*.
- 4.38 It is therefore highly relevant that the current owners of the site have clearly indicated that they intend to fully reinstate the Wall. In light of this, the requirements of a planning enforcement notice and/or a listed building enforcement notice would correspond with the intentions of the

current owners. Officers consider that there would appear to be little value in taking formal enforcement action, at this stage, where the intention of the owners appears to be to reinstate the Wall .

- 4.39 Taking in to account all of the above circumstances, it is considered that it may be expedient to issue a listed building enforcement notice at some future date, but only if informal negotiation has proved to be unsuccessful. It is therefore recommended that the Council encourage the current owners to seek the appropriate permissions (if necessary) to rebuild the wall and to carry out the works as expeditiously as possible once such permissions are in place. As the Wall is listed, there is no time limit within which a listed building enforcement notice can be served. It is therefore recommended that the situation be reviewed in six months time.

**(8) The council should consider whether to issue a Listed Building Enforcement Notice requiring the restoration of the walling within the curtilage to its former state.**

- 4.40 The matters set out above in section 7 regarding the Council's powers to serve a listed building notice and expediency are also relevant to this decision.
- 4.41 During archaeological investigation works within the site, remnants of other historic walls were uncovered. Prior to being unearthed these remnants were located below ground. There is no evidence to suggest that these walls were demolished by the previous developer, Future Homes Limited.
- 4.42 It is not clear whether these walls were demolished or fell down due to age and disrepair. It is also not clear whether the walls were in this condition at the date of listing of The Vines (which was listed grade 11\* on 24 October 1950). If they were demolished, it is unclear when such works took place. In light of these considerations there is no evidence as to whether a breach of planning control has occurred in the recent past. In view of the limited information available, it is considered that at this time there is insufficient evidence to show that a breach has occurred and that a listed building enforcement notice could be issued. Furthermore, in the light of these factors it would not appear to be expedient to take enforcement action at this time.

**(9) The council should consider issuing an enforcement notice against the continuation of building works on the site whilst the planning permissions are incapable of implementation**

- 4.43 The matters set out above in section 7 regarding the Council's powers to serve an enforcement notice and expediency are also relevant to this decision.
- 4.44 The following advice as set out in PPG 18 is relevant in the consideration of the expediency of taking enforcement action:

“it will generally be regarded as "unreasonable" for the LPA to issue an enforcement notice, solely to remedy the absence of a valid planning permission, if it is concluded, on an enforcement appeal to the Secretary of State, that there is no significant planning objection to the breach of control alleged in the enforcement notice.”

- 4.45 There are no building works continuing on the site at the current time. However, the affect of the Council's agreement that the two permissions have not been implemented is that none of the building works on the site are authorised by planning permission and the Council should therefore also consider whether to take enforcement action for the breach of planning control relating to the construction of all or any of the blocks.
- 4.46 For the reasons set out previously in this report, Block B has not been constructed in accordance with planning permission MC2003/2452. The changes that have taken place from the approved drawings are so substantial that they require the benefit of a further planning application.
- 4.47 In determining the expediency of issuing an enforcement notice in relation to Block B, all relevant planning considerations should be taken in to account, including the provisions of the development plan, national policy guidance and government Circular advice. Government advice as set out in PPS1 “Delivering Sustainable Development” together with policies set out within the and development plan refer to the need for good design in new developments. Many of the changes to Block B have resulted in alterations to the design and appearance of the elevations. The most significant of these changes have been set out previously in this report. Although these have resulted in changes to the appearance of Block B they are considered acceptable in terms of their impact upon the appearance of the building.

Furthermore, when compared to the scheme permitted under planning reference MC2003/2452, these changes are not considered to be so significant that they have a materially different impact upon the character and appearance of the surrounding area nor the setting of nearby listed buildings.

As such, the elevational changes to Block B are considered to be acceptable in planning terms and not contrary to the requirements of Government advice or development plan policy. It is considered that it would be difficult to substantiate a planning objection to these elevational changes.

- 4.48 Consideration must also be given to the impact of the changes on the residential amenity of neighbouring occupiers. Policy BNE2 of the Local Plan in particular requires that all developments should “protect those amenities enjoyed by nearby and adjacent properties”.

- 4.49 In the consideration of this issue it should be noted that the parapets on the flank elevations of Block B are approximately 0.45m higher than as shown on the approved drawings. This block is also located 0.75m closer to the rear boundary of the properties fronting East Row than as shown on the approved drawings. However, it should be noted that the Century Buildings site is located at a significantly lower level than the properties fronting East Row. As a result of this difference in land levels it is not considered that the changes that have taken place will result in an unacceptable impact upon the residential amenity of occupiers of the properties fronting East Row. This block is not located closer to the residential properties to the west and north west of the site and as such the changes would not increase its impact upon those properties.
- 4.50 In light of these considerations, it is not considered expedient to pursue enforcement action in relation to the changes carried out to Block B. Furthermore, the current owners of the site have clearly indicated that they intend to demolish Block B and not replace it, and as discussed above, where the interests of the Council coincide with the intention of the landowner, any need to take enforcement action is further reduced.
- 4.51 Block D has not been built at this stage and as such there are no enforcement issues in terms of the construction of this block *per se*. For the reasons set out previously in this report, and as is the agreed position with the owners of the land, Block D cannot be constructed in the location approved under permission MC2003/2452. As such a new planning application would be required to enable it to be resited. The current owners of the site have clearly indicated that they do not intend to construct Block D.
- 4.52 Blocks B and D have been the most contentious elements of the development on this site. The Council is unaware of any significant variation between the development that has taken place on the remaining part of the site (ie that part of the site that does not contain Blocks B and D) and the approved drawings. In this respect this Council is unaware of any enforcement issues in terms of the construction of the remainder of the development on this site.
- 4.53 It is the Council's understanding that the current owners do not intend to develop the remainder of the site as set out under permission MC2003/2452. Their plans for an alternative form of development within this part of the site would therefore require the submission of a fresh planning application which would need to be considered on its own planning merits.
- 4.54 In light of this it is clear that the current owners do not intend to continue any works on site related to planning permission MC2003/2452. As such it would not be expedient to issue an enforcement notice against the continuation of building works on the site relating to this permission at this stage. However, this will require



careful monitoring and if it appears to the Council that building works are likely to be resumed a further decision would be necessary.

**(10) The Council should consider making a modification order and a discontinuance order**

- 4.55 It has been agreed that the Council will consider making a modification order and a discontinuance order in relation to Blocks B and D and the following part of this report sets out the matters to be considered in making such a decision.

The Legislative powers

- 4.56 Under s97 of the Town & Country Planning Act 1990, if it appears to the local planning authority that it is expedient to revoke or modify any permission to develop land granted on an application made under this Part, the authority may by order revoke or modify the permission to such extent as they consider expedient. In exercising their functions under subsection (1) the Council must have regard to the development plan and to any other material considerations. A power to modify may be exercised in relation to a planning permission for operational development, at any time before the operations have been completed. A revocation or modification of a permission for the carrying out of building or other operations shall not affect so much of those operations as have been previously carried out. As the Council has agreed that planning permissions MC2003/2452 and MC2007/1529 have not been implemented the power to modify or revoke those planning permissions is available.
- 4.57 There is a separate power under s102 of the 1990 Act (discontinuance) to require the removal of buildings or works, which can be invoked where the modification/revocation power is not available (e.g. where buildings are complete at the date of the order or where operations have already been undertaken). The Council has the power, where it appears to them to be expedient in the interests of the proper planning of the area having regard to the development plan and to any other material considerations, to require steps to be taken for the alteration or removal of the buildings or works.
- 4.58 Sections 97 and 102 of the Town and Country Planning Act 1990 are set out in full below:
- Section 97:
- 1) *If it appears to the local planning authority that it is expedient to revoke or modify any permission to develop land granted on an application made under this Part, the authority may by order revoke or modify the permission to such extent as they consider expedient.*

- (2) *In exercising their functions under subsection (1) the authority shall have regard to the development plan and to any other material considerations.*
- (3) *The power conferred by this section may be exercised—*
  - (a) *where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed;*
  - (b) *where the permission relates to a change of the use of any land, at any time before the change has taken place.*
- (4) *The revocation or modification of permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out.*
- (5) *References in this section to the local planning authority are to be construed in relation to development consisting of the winning and working of minerals as references to the mineral planning authority, . . .*
- (6) *Part II of Schedule 5 shall have effect for the purpose of making special provision with respect to the conditions that may be imposed by an order under this section which revokes or modifies permission for development—*
  - (a) *consisting of the winning and working of minerals; or*
  - (b) *involving the depositing of refuse or waste materials.*

## Section 102

- (1) *If, having regard to the development plan and to any other material considerations, it appears to a local planning authority that it is expedient in the interests of the proper planning of their area (including the interests of amenity)—*
  - (a) *that any use of land should be discontinued or that any conditions should be imposed on the continuance of a use of land; or*
  - (b) *that any buildings or works should be altered or removed, they may by order—*
    - (i) *require the discontinuance of that use, or*
    - (ii) *impose such conditions as may be specified in the order on the continuance of it, or*
    - (iii) *require such steps as may be so specified to be taken for the alteration or removal of the buildings or works,*

*as the case may be.*

- (2) *An order under this section may grant planning permission for any development of the land to which the order relates, subject to such conditions as may be specified in the order.*
  - (3) *Section 97 shall apply in relation to any planning permission granted by an order under this section as it applies in relation to planning permission granted by the local planning authority on an application made under this Part.*
  - (4) *The planning permission which may be granted by an order under this section includes planning permission, subject to such conditions as may be specified in the order, for development carried out before the date on which the order was submitted to the Secretary of State under section 103.*
  - (5) *Planning permission for such development may be granted so as to have effect from—*
    - (a) *the date on which the development was carried out; or*
    - (b) *if it was carried out in accordance with planning permission granted for a limited period, the end of that period.*
  - (6) *Where the requirements of an order under this section will involve the displacement of persons residing in any premises, it shall be the duty of the local planning authority, in so far as there is no other residential accommodation suitable to the reasonable requirements of those persons available on reasonable terms, to secure the provision of such accommodation in advance of the displacement.*
  - (7) *Subject to section 103(8), in the case of planning permission granted by an order under this section, the authority referred to in sections 91(1)(b) and 92(4) is the local planning authority making the order.*
  - (8) *The previous provisions of this section do not apply to the use of any land for development [consisting of the winning and working of minerals or involving the depositing of refuse or waste materials] except as provided in Schedule 9, and that Schedule shall have effect for the purpose of making provision as respects land which is or has been so used.*
- 4.59 It is clear therefore that, as with decisions on issuing a planning enforcement notice, a decision to make a modification order or a discontinuance order requires a decision on the *expediency* of taking such action. This approach was confirmed recently by the decision of the High Court (Ouseley J) in R (Usk Valley Conservation Group) v Brecon Beacons National Park Authority and Others [2010] EWHC 71 (Admin) (paragraphs 197-198):

“197. My conclusion is this. Section 102 involves a decision as to whether a discontinuance order is expedient in the interests of the proper planning of the area. In my view, the development plan and any other material considerations guide the decision on what the interests of the proper planning of the area are and the authority then has to decide whether it is expedient, in those interests, to take one or none of the decisions which the section provides for. The structure of the section is quite clear. The expedient decision may quite lawfully be a decision that no action should be taken, and the authority is not obliged by statute to take the decision that most perfectly achieves what it has determined are the interests of the proper planning of the area. It may be quite clear that the permission should not have been granted on the merits; or there may be a strong difference in political view to which an incoming administration wishes to give effect; or circumstances may have changed completely: each requires a decision on expediency.

198. An expedient decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s102. These advantages and disadvantages should not be confined to those which the subject of the notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency. At least, it is difficult to see that expediency could be tested without consideration of that factor.”

#### Request for consideration of a Modification Order and a Discontinuance Order

- 4.60 The landowners' grounds for asking the Council to consider the making of a modification/discontinuance order relate primarily to the impact that the development has on the setting of Restoration House, a grade I listed building. They consider that the committee report relating to grant of permission for the development did not address this issue. Furthermore, English Heritage was not consulted on the application. English Heritage has subsequently stated that if it had been consulted it would have raised strong objection to the application.

#### Expediency of making a Modification Order and a Discontinuance Order in relation to Blocks B and D.

- 4.61 It is accepted that mistakes were made in the assessment of planning application MC2003/2452. English Heritage should have been consulted but this was not carried out. Furthermore the impact of the development upon the neighbouring grade I listed building was not addressed in the committee report.
- 4.62 In relation to Block B it has been agreed between the Council and the landowners that this has currently been built without the benefit of planning permission. For Block B to be authorised by planning

permission MC2003/2452, the Block would have to be demolished, all the pre-commencement conditions would have to be satisfied and the block built again. Alternatively, Block B could become authorised if a new planning application were made and a new permission granted by the Council.

- 4.63 The main issue in assessing the expediency of making a Modification Order and Discontinuance Order in relation to Block B relates to its impact upon the setting of neighbouring listed buildings and in particular Restoration House. In this assessment all relevant planning considerations need to be taken in to account, including the provisions of the development plan, national policy guidance and government Circular advice. Those considerations relating to listed buildings, as set out previously in this report, are particularly relevant.

- 4.64 English Heritage's views on the impact of the development upon the setting of neighbouring listed buildings has been made very clear in correspondence to this Council:

"the development to the rear of 1 to 3 East Row has caused substantial harm to the setting of the listed buildings known as Vines Croft, Vines House and Restoration House. Had English Heritage been properly consulted over the application, we would have advised in the strongest terms against the granting of permission. In our view, the Council has failed in its duty to pay the necessary special regard to the desirability of preserving the setting of these listed buildings."

- 4.65 Furthermore, English Heritage has been unequivocal in its views on how this matter should be addressed:

"... we consider that the right thing for the Council to do, recognising the severely damaging effect of the western part of the development and the Council's mishandling of the original application in failing to consult English Heritage and others, would be to modify the planning permission such that the westernmost part of the development was no longer permitted; the harm to the setting of the listed buildings cannot be mitigated in any other way than the demolition of the currently incomplete buildings closest to the rear of Vines Court, Vines House and Restoration House. Modification of the permission is the first step towards this outcome."

- 4.66 As mentioned previously, as English Heritage is the Government's statutory adviser on the historic environment its views must carry weight in the Council's assessment of this matter.

- 4.67 Block B is located in very close proximity to neighbouring listed buildings, including Restoration House, a grade I listed building. The importance of such buildings is emphasised in paragraph 3.6 of PPG 15:

“Grades I and II\* identify the outstanding architectural or historic interest of a small proportion (about 6%) of all listed buildings. These buildings are of particularly great importance to the nation's built heritage: their significance will generally be beyond dispute.”

- 4.68 As well as its proximity to the building itself, Block B is also located immediately adjacent to the gardens of Restoration House. Paragraph 2.16 of PPG15 provides advice on the setting of listed buildings including their garden or grounds:

“Sections 16 and 66 of the Act require authorities considering applications for planning permission or listed building consent for works which affect a listed building to have special regard to certain matters, including the desirability of preserving the setting of the building. The setting is often an essential part of the building's character, especially if a garden or grounds have been laid out to complement its design or function.”

- 4.69 As a result of the height of Block B, its design and proximity to neighbouring listed buildings, and in particular Restoration House, it is accepted that it has a detrimental impact upon their settings, a view shared by English Heritage. This impact is contrary to the provisions of existing development plan policy and current government advice as set out in PPG15. In light of these considerations there would be a case for making a Modification/Discontinuance Order in relation to this block.
- 4.70 Block D has not as yet been constructed. However, it has been agreed between the Council and the landowners that Block D cannot be built in the position authorised by the current planning permission without a listed building consent in relation to any works to be undertaken to the listed Wall. Building Block D in a different position which would not require works to the listed wall would require a fresh planning consent. In these circumstances it is not possible for Block D to be constructed without a fresh application for either listed building consent or for a varied planning permission, at which stage the Council could fully consider whether, in the light of the development plan and other material considerations, to grant consent.
- 4.71 Although any application cannot be pre-judged, it is extremely unlikely that this Council would grant listed building consent for works to the listed Wall in order to facilitate the construction of Block D. In view of the historic importance of the wall as set out previously in this report, it is very likely that strong objection would be raised including from English Heritage. Furthermore, any such application would also be contrary to the recommendation set out above that it is considered expedient to issue a listed building enforcement notice requiring the Wall to be reinstated, but only if informal negotiation with the site owners to secure these works proves to be unsuccessful.
- 4.72 A fresh planning application to re-site Block D could also be problematic. Any reinstatement of the Wall would limit the

opportunities for re-siting Block D within the site. These opportunities could be further limited since archaeological investigations have indicated that the remains of additional walls and structures of historic interest could be located within this locality.

- 4.73 In light of these considerations there is significant doubt as to whether the construction of Block D in either of these scenarios would be appropriate in planning terms. Furthermore, it is evident that under existing circumstances Block D cannot be constructed in the location approved.
- 4.74 In the consideration of the request from the owners of Restoration House, their intentions as owners of the Century Buildings site are also relevant. As set out previously in this report, they intend to demolish Block B and not proceed with Block D. This being the case, the requirements of a modification order and discontinuance order issued by this Council would replicate the actions that the current site owners intend to carry out.

#### Compensation Issues

- 4.75 In the light of the *Usk Valley* decision (referred to above), the financial implications of the making of Modification Order or a Discontinuance Order can be a relevant consideration. The financial liability in relation to compensation could be high (see the exempt appendix), although this is not at this stage certain. Any dispute between the Council and landowners as to compensation would be referred to the Lands Tribunal.
- 4.76 Section 107 of the 1990 Act provides that where a planning permission is revoked or modified and if a person
- (a) has incurred expenditure in carrying out work which is rendered abortive by the revocation or modification; or
  - (b) has otherwise sustained loss or damage which is directly attributable to the revocation or modification,
- the local planning authority shall pay that person compensation in respect of that expenditure, loss or damage.
- 4.77 In relation to the first limb of compensation, Block D has not yet been constructed and so there would be no compensation payable in respect of abortive work. It has been agreed between the Council and the current landowner that Block B has not been constructed in accordance with the planning permission. That permission has not been lawfully implemented.
- 4.78 Included within the second limb of compensation is an entitlement to claim compensation for a depreciation in the value of his land caused by the revocation or modification. If the Council were to make a modification order removing Blocks B and D from the planning permission, and a discontinuance order requiring the

removal of any works which have been carried out for the construction of blocks B and D the basis of compensation would be the difference in the value of the land with planning permissions MC2003/2452 and MC2007/1529 in place in full and the value of the land with planning permissions MC2003/2452 and MC2007/1529 (excluding Block B and D) in place. In determining the depreciation the Act states that it must be assumed that planning permission would be granted for development within paras 1 or 2 of Schedule 3 to the Act.

- 4.79 A claim for compensation must be made within 12 months of the date of the making of a Modification or Revocation Order. Any question of disputed compensation can be referred to the Lands Tribunal for determination.
- 4.80 The potential financial implications of the making of a Modification/ Discontinuance Order in relation to each block is set out in the exempt appendix.
- 4.81 However, for the reasons set out in the Assessment section of this report, officer's recommendations on modification and discontinuance would, without taking the financial implications in to account, be that such orders should not be made. Compensation issues are, however, included within the report so that the Committee may take in to account all relevant matters in making its decision.

## **Assessment**

### **Block B**

- 4.82 For the reasons set out above there are strong reasons to show that the original planning permission MC2003/2452 should not have been granted due to the planning considerations relating to Block B. This stems from the fact that English Heritage was not consulted on planning application MC2003/2452 and that the committee report relating to this application did not address the issue of the impact of the development on the setting of adjoining listed buildings. This has resulted in a development that has a detrimental impact upon the setting of these buildings contrary to Central Government advice and development plan policy.
- 4.83 In reaching a decision on whether it is expedient to make a Modification or Discontinuance Order in respect of Block B, the Council needs to take into account planning policy and guidance and other material considerations, including whether or not the planning permission has been implemented lawfully, compensation issues and the intentions of the landowners. It is agreed with the landowners that the permission has not been implemented lawfully. The landowners have clearly indicated to this Council that they intend to demolish Block B (and do not intend to try to implement lawfully the planning permission). If in due course they do not demolish this block, the Council could consider whether to take



enforcement action requiring them to do so. In light of this it is clear that the requirements of a modification order and discontinuance order would merely replicate the actions that the current site owners intend to carry out, and that it is not necessary for the Council to make these orders in order to effect the demolition of this block. . As such it is considered that it would not be expedient to issue such orders at this time. However this should be reviewed if the landowners' intentions change.

#### Block D

- 4.84 For the reasons set out in the discussion above, there is a lesser case for a modification order in respect of Block D, due to the fact that Block D has not been implemented and cannot be built under planning permission MC2003/2452 without the grant of Listed Building Consent in relation to the Listed wall.
- 4.85 In addition, as above, in reaching a decision as to whether it would be expedient to issue a modification order the intentions of the owners of the site are also relevant. They have clearly indicated to the Council that they do not intend to proceed with Block D. In light of this it is clear that the requirements of a modification order would merely replicate the actions that the current site owners intend to carry out. Therefore there would appear to be little value in making a modification order where there is no intention on the part of the landowner to proceed with works, and it is agreed with the landowner that the current permission could not lawfully be implemented. As such it is considered that it would not be expedient to issue such orders at this time.

### **5. Consultation**

- 5.1 A copy of this report has been sent to English Heritage and the owners of Restoration House and any representations they make will be reported to Committee on the night

### **6. Financial and legal implications**

- 6.1 As set out in the report and the exempt appendix.

### **7. Recommendations**

For the reasons set out in the report:

- 7.1 Not to issue a Listed Building Enforcement Notice requiring the rebuilding of a section of the demolished Tudor Wall but the Development Manager to keep this under review.
- 7.2 Not to issue a Listed Building Enforcement Notice requiring the restoration of the walling within the curtilage to its former state.

- 7.3 Not to issue an Enforcement Notice against the continuation of building works on the site but the Development Manager to keep this under review.
- 7.4 Not to issue an Enforcement Notice against the development as built at this time but the Development Manager to keep this under review.
- 7.5 Not to make a Modification or Discontinuance Order in respect of Block B
- 7.6 Not to make a Modification Order in respect of Block D

**Lead officer contact**

Dave Harris, Development Manager, Gun Wharf, 331575,  
[dave.harris@medway.gov.uk](mailto:dave.harris@medway.gov.uk)

Angela Drum, Head of legal, Gun Wharf, 332022,  
[angela.drum@medway.gov.uk](mailto:angela.drum@medway.gov.uk)

**Background papers**

Planning application files MC2003/2452, MC2003/2453 and MC2007/1529