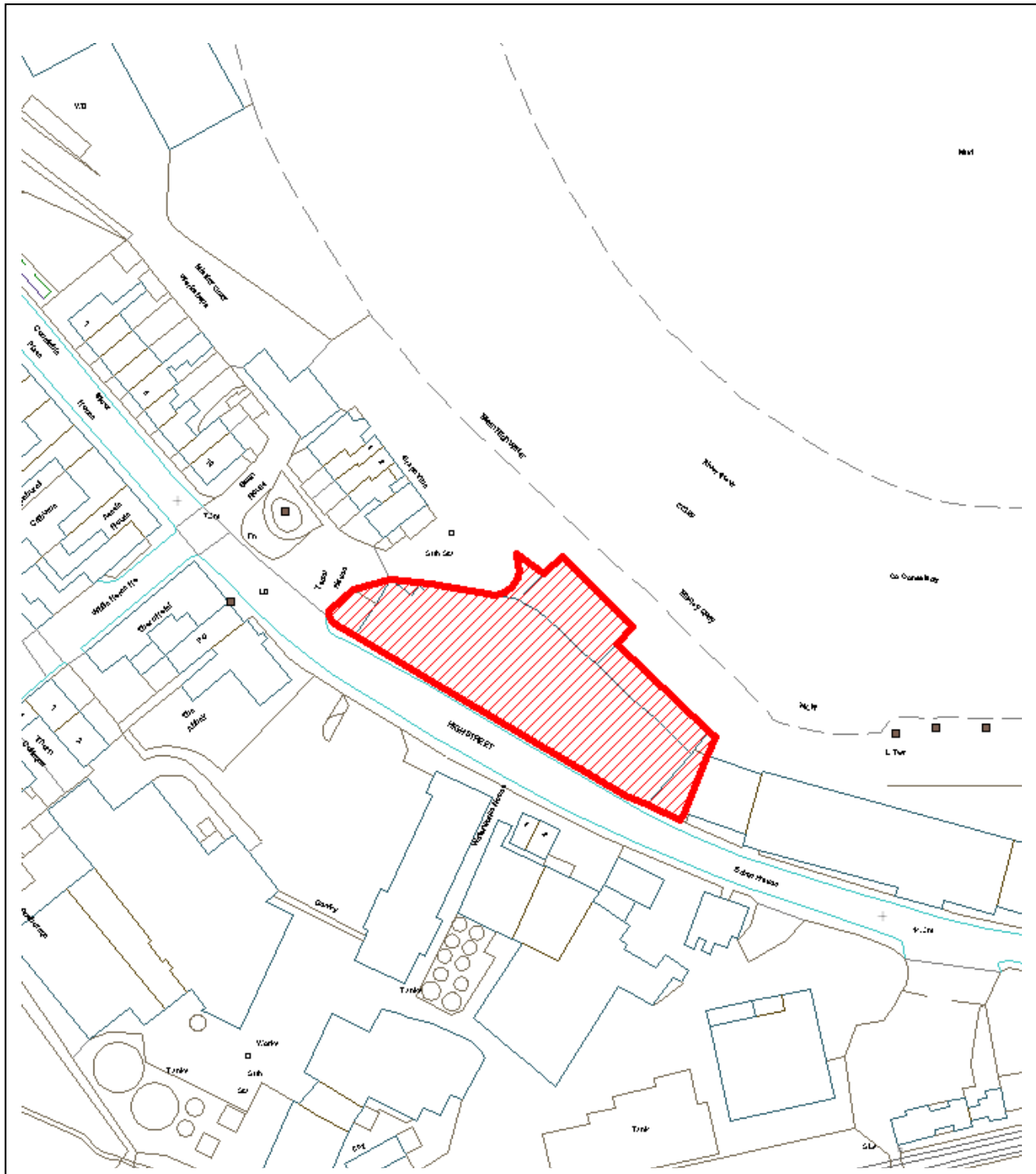


PLANNING COMMITTEE

4 March 2014

REPORT OF THE HEAD OF PLANNING

**A.2 CONSERVATION AREA CONSENT APPLICATION - 12/00428/CON - THORN QUAY WAREHOUSE, HIGH STREET, MISTLEY, MANNINGTREE, ESSEX, CO11 1HB**



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<b>Application:</b>	12/00428/CON	<b>Town / Parish:</b> Mistley Parish Council
<b>Applicant:</b>	Anglia Maltings (Holdings) Ltd and Gladedale Estates Ltd	
<b>Address:</b>	Thorn Quay Warehouse High Street Mistley CO11 1HB	
<b>Development:</b>	Demolition of existing warehouse and construction of a new building comprising 45 dwellings, quay level warehouse floorspace, office floorspace and car parking provision.	

## 1. Executive Summary

- 1.A This application was originally considered at the Planning Committee meeting on 8 October 2013, when Members resolved to authorise the grant of conservation area consent, subject to conditions as detailed in the recommendation below and approval of the associated planning application within six months. On 15 November 2013, the Council received by post a pre-action protocol claim letter (also received by e-mail the previous day) relating to a proposed claim for judicial review if the Council did not withdraw its resolutions of 8 October 2013 authorising the grant of Conservation Area Consent and the associated grant of planning permission. A summary of the grounds of challenge is set out in section 7 of this report. Members must therefore ensure that these matters and all other material planning considerations are taken into account when they make their decision on this proposal. The deadline for completion of the legal agreement in relation to the associated planning application has been reduced to three months as a draft is already under discussion between the parties. For ease of reference, the whole of Section 7 of this report is new and all other significant amendments and additions to the original report are shown in bold font. In this report, references to the FUL report are to the report relating to application 12/00427/FUL, references to the CON report are to this report relating to Conservation Area Consent application 12/00428/CON and (where the context so admits) references to the reports are to those reports.**
- 1.1 This application seeks Conservation Area Consent for the demolition of the existing Thorn Quay Warehouse which is an unlisted building located within the Mistley and Manningtree Conservation Area. There are a large number of listed buildings in close proximity including Nos. 1 and 2 Maltings; buildings adjacent to Swan Basin and to the west in the High Street; and the recently listed Quay Wall. It is also close to a number of undesignated assets that make positive contributions to the conservation area such as The Abbey.
- 1.2 The existing building has landmark quality and illustrates the development of Mistley reflecting the traditional functional character and former uses of the area. The revisions to the redevelopment proposal (assessed in **detail** under 12/00427/FUL also on this agenda for consideration) have reduced the level of harm that would be incurred to the significance of the Manningtree and Mistley Conservation Area and surrounding heritage assets by the loss of the Thorn Quay Warehouse.
- 1.3 The demolition of the existing building and its redevelopment proposed under 12/00427/FUL are therefore considered acceptable subject to conditions to ensure redevelopment of the site following demolition to prevent a long term cleared site which would result in substantial harm to the appearance of the conservation area.

1.4 **When determining the CON application, Members should take into account all planning considerations which are material to the CON application, including those set out in this report and the FUL report.**

Recommendation: That the Head of Planning be authorised to grant Conservation Area Consent for the development subject to:-

(a) Approval of associated planning application 12/00427/FUL within **three** months of the date of the Committee's resolution to approve.

(b) Conditions in accordance with those set out below (but with such amendments and additions, if any, to the detailed wording thereof as the Head of Planning (or the equivalent authorised officer) in their discretion considers appropriate)

Conditions:

1. Standard 3 year time limit for commencement.
2. Details of demolition method statement (to include dust and noise control measures; demolition parking, wheelwash and underbody cleaning, loading and turning facilities; and removal and disposal of contaminated material).
3. Demolition shall not commence unless and until a contract for the carrying out of the building works for the redevelopment of the site has been made, and planning permission has been granted for the redevelopment for which the contract provides, and a copy of that contract containing timescales for development has been supplied to the Local Planning Authority.
4. No demolition or preliminary groundworks shall occur until a programme of archaeological work has been submitted and approved.
5. No demolition work shall take place outside the hours of 09:00 to 18:00 Monday to Friday, and 09:00 to 13:00 Saturdays, and at no time on Sundays and public holidays.

(c) The Head of Planning be authorised to refuse Conservation Area Consent in the event that planning application 12/00427/FUL is not approved within **three** months of the Committee's resolution to approve, as the requirements necessary to make the development acceptable in planning terms have not been secured.

## 2. **Planning Policy**

### National Policy:

National Planning Policy Framework (2012)

- 2.1 The NPPF states Local Planning Authorities should set out in their Local Plan a positive strategy for the conservation and enjoyment of the historic environment and should recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance. Applicants should describe the significance of any heritage assets affected, including any contribution made by their setting. Where a site has the potential to include heritage assets with archaeological interest, developers should be required to submit an appropriate desk-based assessment and, where necessary, a field evaluation.
- 2.2 Local Planning Authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this assessment into account when considering the impact of a

proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal.

- 2.3 **Paragraph 134 states** "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use".
- 2.4 Local planning authorities should not permit loss of the whole or part of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred.

Local Plan Policy:

*Tendring District Local Plan (2007)*

EN17 - Conservation Areas

EN20 – Demolition within Conservation Areas

*Tendring District Local Plan Proposed Submission Draft (2012) as amended by the Tendring District Local Plan: Pre-Submission Focussed Changes (2014)*

PLA6 – The Historic Environment

PLA7 – Conservation Areas

Other guidance:

Manningtree and Mistley Conservation Area Management Plan (2010)

**3. Relevant Planning History**

13/00479/FUL	Removal of existing Quay edge safety fence and replacement with reclaimed nineteenth century hand forged wrought iron railings.	Refused	21.06.2013
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**4. Consultations**

- 4.1 English Heritage – On balance the latest revisions to the scale, massing and detailed design have satisfactorily addressed the significant concerns originally raised and we therefore consider the scheme to be acceptable. It is imperative that the loss of this highly prominent heritage asset should not occur until all reasonable steps have been taken to ensure the new development will proceed after demolition otherwise it would result in substantial harm to the conservation area. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset such as the conservation area this harm should be weighed against the public benefits of the proposal. Accept that options for retention and re-use of the building have been thoroughly assessed.
- 4.2 ECC Archaeology – The site comprises a series of 20<sup>th</sup> century buildings on the site of earlier structures associated with the 19<sup>th</sup> century malting industry. The archaeological assessment submitted acknowledges the potential for earlier below ground archaeological remains associated with post-medieval development of the site. Recommend a condition that no demolition or preliminary groundworks shall occur until a programme of archaeological work has been submitted and approved.

4.3 Mistley Parish Council – Make no comment on this application.

## 5. Representations

5.1 Two letters of support have been received and are summarised as follows:

- Development will add a great deal to the area, its residents, employment and businesses.
- Current building is increasingly dilapidated and poses a health risk.
- Council need to communicate locally on issues affecting Mistley (*this matter was passed on to our Planning Policy team as it concerned matters not directly related to this site*).

5.2 One letter of objection has been received and is summarised as follows:

- Inadequate parking provision in this congested area (*this relates to the redevelopment proposal and is assessed under the associated planning application 12/00427/FUL*).

5.3 Three letters of observation have been received and are summarised as follows (*with Officer response in brackets*):

- 20 mph speed limit or traffic calming will be needed on the High Street due to excessive speed of vehicles (*this relates to the redevelopment proposal and is assessed under the associated planning application 12/00427/FUL*).
- Plans don't show the quayside fence does this mean it is to be removed as this presents the perfect opportunity to remove this eyesore (*the quayside fence does not form part of this proposal and lies outside the application site*).
- Principle of redevelopment of scruffy buildings and provision of housing in sustainable area makes sense.
- Design is acceptable and will almost certainly enhance the area.
- A condition of development should prevent development of land to north of High Street and east of the Mistley Towers access road, this land should be landscaped (*this land lies outside the application site and is visually isolated from it. It would therefore be unreasonable in planning terms to control use of this land in relation to the proposal for demolition and redevelopment of the Thorn Quay Warehouse site*).
- Zebra crossing with island in front of Swan Basin should be provided to reduce traffic speed and improve pedestrian safety (*this relates to the redevelopment proposal and is assessed under the associated planning application 12/00427/FUL*).
- Old railways lines embedded in the quay should remain or be replaced as they are a significant part of Mistley heritage (*It is agreed that these features should be retained and a landscaping condition is recommended on the associated planning application 12/00427/FUL which would require details of all hard surfacing*).

5.4 **T W Logistics** are the Port Operators and they have submitted historic information and detailed objections to the proposal which are summarised below. The full content of these objections can be viewed on public access or via arrangement with the Case Officer prior to the meeting.

Original proposal:

- Non-compliance with NPPF and Local Plan policy for the conservation of the historic environment.
- Impact upon heritage assets has not been properly assessed.
- No consideration of historic port of Mistley and the uses which define Mistley's character.
- Loss of industrial/mercantile use would be damaging to value and significance of heritage assets and would harm the conservation area.
- English Heritage have failed to fully realise the significance of the historic working port and harbour as an essential element of significance and the relationship of the site to that.
- Proposal creates residential units within the heart of an industrial working port which will prevent safe and continuous working and threatens the essential character of the area.

- Design and Access Statement (DAS) and Heritage Impact Assessment (HIA) fail to recognise the existing buildings as non-designated heritage assets.
- This is a viable building, has never been marketed and was in active use until very recently.
- HIA states PPS5 is obsolete however this is the valid national guidance document to be afforded full weight in considering heritage policy matters.
- The historic setting of Mistley Towers, The Grapevine and The Swan Basin would be affected by the development.
- No reference is made to “History in the View” produced by English Heritage in 2011 which sets out a methodology to provide an objective assessment of impact in views where heritage assets are affected.
- No evidence provided that an industrial/mercantile use is not viable as the optimum use for the building.
- The setting of all heritage assets must be examined and the impact of the proposal measured for each and any cumulative affects.
- The Tendring District Council Landscape Character Appraisal identifies the importance of the port of Mistley to the character of the Stour Estuarine Landscape and the principal contributor to its historic significance and emphasises why the historic port should be protected from changes harmful to its viability and successful operation.
- There is no demonstrable public benefit to balance the harm caused by the proposal.
- Archaeological assessment is not comprehensive and expresses some elements of the history inaccurately.
- Thorn Quay Warehouse represents the only means of expanding and diversifying the port’s trade in additional premises, is located on the port estate and is directly accessible to port cargos. This site has been in continuous occupation for warehousing and mercantile activities since at least 1778.

Comments received **T W Logistics** after April 2013 amendment:

- Mistley Port have not been granted access to the Thorn Quay Warehouse to conduct a full survey following the one day survey undertaken in 2010. The potential for port use has not therefore been properly assessed.
- The one day survey was positive and recommended further survey work taking at least three days. However despite repeated requests further access has been denied and no proposals can be produced until it has been fully assessed.
- Wish to consider using the building for port related value added activities and storage but could not provide further detail without access for a full survey to quantify repair and refurbishment costs.
- Thorn Quay Warehouse has never been put on the market unlike no. 2 Maltings which is clearly incompatible with port uses. TWL have expressed an interest in buying the building at its industrial value.
- The warehouse has only been vacant recently with all floors in partial use in 2010 at the time of the survey.
- It is the applicant’s objective to pursue demolition and a valuation level reflective of non-industrial uses of the site. The initial survey was only permitted on the basis that the premises were rented but it was TWLs intention to acquire the building.
- Concerns regarding the type of port storage and cross contamination of food products are unfounded due to existing problems with bird fouling and the Thorn Quay Warehouse being remote from the food processing operation on the main EDME site. No 2 Maltings has also been offered and this lies within the centre of the food processing facilities.
- EDME also requested details of area splits for processing and storage (unable to confirm) and the time required to bring it into full utilisation (estimated 3 to 4 years). A full survey is required to quantify refurbishment costs.
- An option agreement to enable TWL to purchase the Thorn Quay Warehouse was offered in 1979 to acquire the site at open market value only if EDME intended to dispose of the building (right of first refusal option). Following the transfer of assets to AMH a new

option agreement was produced in February 1997 expiring in October 2000 to cover the remainder of the option period. The right was not exercised because EDME/AMH did not trigger the agreement provisions during the 21 year option agreement period 1979-2000.

- A detailed chronology of communications and meetings between the applicant and TWL between June 2006 and January 2011 is also provided relating to the site and disagreements between the two parties regarding the availability of the building for survey access, port use, and failure to respond to communications.

5.5 In response to these comments the amendments to the design and HIA have overcome English Heritage's original objections to the proposal and they accept that the HIA is now a more robust document which more thoroughly considers the heritage context of the Thorn Quay site and the significance of the warehouse itself. The majority of issues raised relate to the proposal for redevelopment and are therefore considered and assessed under 12/00427/FUL also on this agenda for consideration.

## **6. Assessment**

The main planning considerations are:

- Legislative requirements
- Policy
- Heritage impact
- Design
- Financial contributions
- Residential amenity

### **Proposal**

6.1 This application seeks Conservation Area Consent for the demolition of the existing Thorn Quay Warehouse which is an unlisted building located within the Mistleley and Manningtree Conservation Area. The associated planning application 12/00427/FUL for redevelopment following demolition is also on this agenda for consideration.

### **Site location**

6.2 The site is in a prominent riverside location between Mistleley Quay and the High Street, on the junction with Swan Corner. The building is vacant but was previously in employment use.

6.3 The site lies within the Manningtree and Mistleley Conservation Area with a large number of listed buildings in close proximity including Nos. 1 and 2 Maltings; buildings adjacent to Swan Basin and to the west in the High Street; and the recently listed Quay Wall. It is also close to a number of undesignated assets that make positive contributions to the conservation area such as The Abbey. In April 2012 an Article 4 Direction was served which includes part of the site and the adjacent quayside to remove permitted development rights for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

### **Legislative requirements**

6.4 A Conservation Area is an area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance. The application site lies within the Manningtree and Mistleley Conservation Area and is in close proximity to a large number of listed buildings.

- 6.5 Members are reminded that they have statutory duties to discharge in the consideration and determination of this application for Conservation Area Consent. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act imposes a statutory duty on the Local Planning Authority to have special regard to the desirability of preserving a listed building or its setting or any features of special architectural or historic interest. This would apply in respect of the setting of the neighbouring listed buildings. Section 72 imposes a statutory duty on the Local Planning Authority to pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area.

### **Policy**

- 6.6 The saved Tendring District Local Plan (2007) remains formally an adopted document of the Council, however since 27th March 2013 the Council is no longer giving significant weight to those sections of the 2007 plan which, in the Council's view, are considered to be out of date and no longer in accordance with the National Planning Policy Framework. Weight is being given to the 2012 draft Local Plan, depending on the number and nature of representations received during the public consultation.
- 6.7 Saved Policy EN20 (Demolition within Conservation Areas) states proposals must retain buildings that make a positive contribution to the character or appearance of a conservation area and demolition will only be permitted where: a) evidence demonstrates that the building is beyond economic repair (unless caused by deliberate neglect); or b) it is demonstrated viable alternative uses cannot be found; and c) redevelopment would preserve the area's character and produce substantial benefits that outweigh the loss of the building. Demolition will not be approved in the absence of detailed plans for the site's redevelopment and conditions or planning obligations will be imposed to ensure construction within a specified time period and/or satisfactory landscaping of the site.
- 6.8 Draft Policy PLA7 (Conservation Areas) states demolition will only be granted if it can be demonstrated that (i) removal of the structure would result in a material visual improvement to the appearance of the area, or (ii) the existing structure is beyond repair, incapable of beneficial use or is itself harmful to the character of the conservation area. This policy received 8 representations with some constructive comments that may result in some minor re-wording but none that bring into question the overall soundness of the policy and it is therefore being applied with confidence.
- 6.9 The Council has a statutory duty to **preserve** or enhance the historic environment and has developed a Conservation Area Management Plan (CAMP) for Mistle providing advice on how the character and appearance of the Conservation Area can be protected or enhanced. In particular, it encourages the redevelopment of buildings which have a negative affect on the character or appearance of the Conservation Area as and when they become ready for renewal, but it is accepted that there are mixed views on the industrial aesthetics of the existing warehouse. The Conservation Area Management Plan does not contain policies but it is recognised in development management terms as guidance.

### **Heritage impact**

- 6.10 The site lies within the Manningtree and Mistle Conservation Area with a large number of listed buildings in close proximity including the recently listed Quay Wall and the two neighbouring maltings buildings. It is also close to a number of undesignated assets that make positive contributions to the conservation area such as The Abbey. A Heritage Impact Assessment has been provided to justify the proposal. The Council is satisfied that the application satisfactorily assesses the significance of all affected heritage assets. The appropriate archaeological assessments have also been undertaken.



- 6.11 The Thorn Quay Building appears to date from 1953, and its construction appears to have retained little from the 1930s building which was destroyed in 1941. There are three main locations from which the site can be viewed which incorporate heritage assets: from the High Street, from the River Stour, and from the quay. The Thorn Quay building occupies a prominent position on the junction of High Street with the Swan Basin however when approached from the east and west it is screened by neighbouring buildings and the bends in the road and is not therefore prominent in longer views except from the river and quayside. This includes views of the Grade I listed Scheduled Ancient Monument Mistley Towers which will not be affected by the proposal.
- 6.12 There is little mention of the Thorn Quay Warehouse within the Manningtree and Mistley Conservation Area Review (2006) stating “Across the road, a considerable brick wall hides the unused maltings down by the quay”. The Manningtree and Mistley Conservation Area Management Plan (CAMP) 2010 identifies the existing building and surrounding quayside as an area in need of enhancement. The existing red brick wall fronting the High Street is identified as a positive feature. There are also three principle views in the immediate vicinity: from the Mistley Thorn Hotel across Thorn Quay to the Baltic Wharf; panoramic views from the quayside across the Stour estuary between Thorn Quay and No. 1 Maltings; and looking east along High Street past Thorn Quay and the maltings.
- 6.13 Saved Policy EN20 (Demolition within Conservation Areas) states proposals must retain buildings that make a positive contribution to the character or appearance of a conservation area and demolition will only be permitted where: a) evidence demonstrates that the building is beyond economic repair (unless caused by deliberate neglect); **or** b) it is demonstrated viable alternative uses cannot be found; and c) redevelopment would preserve the area’s character and produce substantial benefits that outweigh the loss of the building. Demolition will not be approved in the absence of detailed plans for the site’s redevelopment and conditions or planning obligations will be imposed to ensure construction within a specified time period and/or satisfactory landscaping of the site.
- 6.14 In response to EN20 a); although the applicant does not claim that the building is beyond economic repair, Officers accept that the form and condition of the building would require substantial investment and works to bring it up to current standards. The building also contains a very large silo which is part of the building fabric and cannot easily be removed. The building’s current condition is considered to relate to its age and restrictions in relation to modern working standards. It is not considered to be a result of deliberate neglect. On balance, given the works required to bring the building back into **commercial** use and the overall enhancement that the proposed redevelopment would make to the Manningtree and Mistley Conservation Area it is considered that criteria a) of EN20 should be given little weight.
- 6.15 As **detailed in paragraph 6.14 above** EN20 a) **is outweighed by other material planning considerations** so there is no requirement to also comply with EN20 b).
- 6.16 In response to EN20 c) the proposed redevelopment would preserve the area’s character as detailed within the associated planning application. As detailed at paragraphs 6.25-6.28 below the application has been accompanied by a viability assessment stating that only highway works can be provided and no other financial contributions or works are viable. The viability appraisal has been independently assessed and is deemed to be acceptable subject to a legal agreement to ensure that **a fair share of the profit from** any future increase in the predicted sale value of the development can be recouped and used for the contributions which should apply to the development. This is a reasonable reflection of the costs involved in developing a brownfield site in the current economic climate. The public benefits to result from the proposal are the provision of housing and a substantial visual improvement to the surrounding area. It is therefore considered that the proposed

demolition and redevelopment under the associated planning application 12/00427/FUL is acceptable and **on balance is** in accordance with saved Policy EN20.

- 6.17 Draft Policy PLA7 (Conservation Areas) states demolition will only be granted if it can be demonstrated that (i) removal of the structure would result in a material visual improvement to the appearance of the area, **or** (ii) the existing structure is beyond repair, incapable of beneficial use or is itself harmful to the character of the conservation area. This draft policy is more reflective of the provisions of the National Planning Policy Framework which states where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.
- 6.18 The applicants claim that the existing warehouse and its frontage wall make no more than a minor contribution to the conservation area relating only to its bulk and location on the quay. English Heritage disagree and believe the warehouse complex has landmark quality, individually and as part of a group, and illustrates the development of Mistley reflecting the traditional functional character and former uses of the area. The amendments to the design and scale of the proposal have now overcome English Heritage's original objections, provided conditions are imposed to prevent the loss of the existing building without the new development proceeding as a long term cleared site would result in substantial harm to the appearance of the conservation area.
- 6.19 It is therefore considered that the replacement of the existing building with the redevelopment proposed under 12/00427/FUL would result in a material visual improvement to the appearance of the area in accordance with draft Policy PLA7 (i). Furthermore it is accepted that the form and condition of the building would require substantial investment and works to bring it up to current standards. It is therefore considered that draft Policy PLA7 is fully complied with.
- 6.20 The redevelopment proposal has been designed to reflect the bulk of the existing Thorn Quay building, and follows the reduction in height and scale that the present building makes at the side of Swan Basin therefore preserving the setting and significance of the buildings facing the Swan Basin. Views of the quay from the Swan Basin and between No. 1 Maltings are also maintained, with the addition of small views through the openings into the communal gardens from the High Street.
- 6.21 The Mistley Quay Wall (also known as Thorn or Allen's Quay) was listed as Grade II in May 2013. The background to that listing decision refers to the current planning application but confirms there are no plans to alter the quay. The proposed building occupies the existing footprint and would preserve the setting of the recently listed quay wall.
- 6.22 The demolition of the existing building and its redevelopment proposed under 12/00427/FUL are therefore considered to comply with saved Policy EN20 and draft Policy PLA7 which are both consistent with the National Planning Policy Framework. The proposal would be acceptable in terms of impact upon both the character and appearance of the Manningtree and Mistley Conservation Area and the setting of neighbouring listed buildings and other important undesignated heritage assets such as The Abbey.
- 6.23 Justification for this demolition requires the proposed redevelopment to actually take place and therefore it is necessary to impose a condition requiring that no demolition can occur until a contract has been let for the carrying out of the building works for the redevelopment. This will ensure that redevelopment of the site is tied to, and would follow, demolition therefore preventing the creation of a long term cleared site which would be seriously detrimental to both the appearance of the Manningtree and Mistley Conservation Area and the setting of neighbouring listed buildings and the Quay Wall.

## **Design**

- 6.24 The proposal comprises demolition of a building which makes a positive contribution to the character and appearance of the Manningtree and Mistley Conservation Area by virtue of its landmark quality and reflection of the traditional functional character and former uses of Mistley. In accordance with the development plan, demolition should not therefore be approved in the absence of detailed plans for the sites redevelopment. The design of the proposed redevelopment is described and appraised in detail in the report for the associated planning application 12/00427/FUL and is deemed to be acceptable subject to conditions and a legal agreement.

## **Financial contributions**

- 6.25 This matter is relevant to consideration of this Conservation Area Consent application for demolition because the public benefits of the proposed redevelopment need to be considered with regard to the proposed demolition. The public benefits include the provision of housing and the improved appearance, but wider benefits to the local infrastructure are also relevant.
- 6.26 The application has been subject to numerous amendments to improve its design and reduce its scale and impact upon the Manningtree and Mistley Conservation Area. This has resulted in a reduction to 45 units accompanied by a viability assessment stating that only highway works can be provided and no other financial contributions or works are viable. The viability appraisal has been independently assessed and is deemed to be acceptable subject to a legal agreement to ensure that any future increase in the predicted sale value of the development can be recouped and used for the contributions which should apply to the development as detailed below.
- 6.27 In accordance with local plan policy and the development creating additional pressure on existing infrastructure the proposed development should provide: 1) a financial contribution of £63,356 towards additional secondary education places as requested by Essex County Council. 2) 25% affordable housing (contribution of £406,207.20 against the current sale value) in accordance with draft Policy PEO10 (Council Housing). 3) Public Open Space financial contribution of £75,203.00 (5 no. 1 beds at £845 each, 34 no. 2 beds at £1690 each, and 6 no. 3 beds at £2253 each) in accordance with saved Policy COM6 and draft Policy PEO22 as there is an identified deficit in both equipped play and formal open space in the Parish. 4) Highway works comprising two bus stops and shelter, level entry kerbing, posts and flags and accommodation works to the highway.
- 6.28 On balance, given the reductions in the scale of development in order to achieve a proposal which will preserve, if not enhance, the character and appearance of the Manningtree and Mistley Conservation Area, and the findings of the independent financial assessment, the proposal is considered acceptable subject to a legal agreement linked to 12/00427/FUL to ensure that **a fair share of the profit from** any future increase in the predicted sale value of the development can be recouped.

## **Residential amenity**

- 6.29 If consent is granted there are likely to be noise and dust issues resulting from the demolition activities and associated movements to and from the site. It would therefore be appropriate, given the close proximity of residential properties to the site, to restrict such activities to specified hours, days and in accordance with a control scheme for dust and noise and conditions have been recommended to secure this.

## **7. Proposed Claim for Judicial Review**

7.1 The pre-action claim letter was received through the post on 15 November 2013, following Members' resolution authorising the grant of planning permission for the proposal (and associated Conservation Area Consent) at Planning Committee on 8 October 2013. The claimant is TW Logistics Limited (TWL) who are the port operator. The challenge has five grounds which, are summarised below in normal text with underscore with extracts from the NPPF and Policy set out in italic text and the Council's response in bold.

7.2 Ground A. The Council acted unlawfully in ignoring a clear and concrete interest in TWL acquiring a heritage asset and positive contributor which would have conserved it. This ground refers to the case of Gibson v Waverley Borough Council [2012]. The Council's statement at paragraph 5.5 is also contested: 'There is no evidence to suggest that the building in its current form is realistically suitable for port use and it is currently not available for such uses, being in separate ownership.' TWL requested access to the building and confirmed their interest to the Council in acquiring the building.

7.3 The Council encouraged dialogue between the applicant and TWL who have been in discussion with each other over this building for a number of years. The Planning Committee were also informed of TWL's desire to survey and acquire the building at paragraph 5.4 of both committee reports for the committee meeting on 8 October 2013. Although the Council has encouraged re-use of the building for port-related activities in accordance with the character of Mistley, as discussed in the report above, there is no requirement in planning policy terms for the building to be marketed for alternative uses. Unlike the Gibson v Waverley case referred to above, Thorn Quay Warehouse (TQW) is not a listed building, nor is it a designated heritage asset. Therefore, the requirement to secure the optimum viable use does not apply. Hence the Gibson case is not comparable with this planning application. The statement at paragraph 5.5 relates to the fact that the form and condition of the building would require substantial investment and works to bring it up to current standards. It is also not being offered for sale/let and the fact that there is no requirement in planning policy terms for the building to be marketed for alternative uses is clearly explained as detailed in the report.

7.2 Ground B. The Council acted unlawfully in failing to apply paragraph 133 of the NPPF (relating to substantial harm to/total loss of a designated heritage asset).

7.3 The NPPF defines a designated heritage asset as:

*"Designated heritage asset: A World Heritage Site, Scheduled Monument, Listed Building, Protect Wreck Site, registered Park and Garden, Registered Battlefield or Conservation Area designated under the relevant legislation.*

**TQW is not a designated heritage asset. The Conservation Area is a designated heritage asset. Within the Conservation Area there are a number of listed buildings which are therefore also designated heritage assets.**

7.4 Paragraph 133 of the NPPF begins with the following paragraph:

*"133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss or all of the following apply.*

**Paragraph 133 then sets out 4 criteria.**

It is accepted by both the Council and English Heritage that the demolition of TQW would result in less than substantial harm to the significance of a designated heritage asset (the Conservation Area and the heritage assets within it). There are a large number of listed buildings (heritage assets) in close proximity to TQW including the recently listed Quay Wall, the two neighbouring maltings buildings, the Thorn Hotel, and buildings surrounding the Swan Basin. A Heritage Impact Assessment has been provided to justify the proposal. The Council is satisfied that the application satisfactorily assesses the significance of all affected heritage assets. The appropriate archaeological assessments have also been undertaken. In the light of the above, neither paragraph 133 of the NPPF nor any of its criteria requires the application to be refused.

**7.5 Paragraph 134 of the NPPF states:**

*134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.*

**7.6 This is correctly explained in section 2 of both the reports. As the proposal would lead to less than substantial harm to the significance of the Conservation Area (and the designated heritage assets within it) the harm should be weighed against the public benefits of the proposal (i.e. housing provision, visual improvement, and the planning obligation to ensure a fair share of any additional profit to be spent on education, affordable housing and public open space). The reference to securing optimum viable use within the meaning of this paragraph applies in relation to the designated heritage asset (the Conservation Area and its heritage assets) and not TQW. The proposal is therefore in full accordance with paragraph 134 of the NPPF.**

**7.7 Paragraph 135 of the NPPF states:**

*135. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset.*

**TQW is a building which positively contributes to the Conservation Area and is therefore a non-designated heritage asset within the meaning of paragraph 135 of the NPPF. Other non-designated heritage assets include The Abbey, detached office buildings on the EDME site fronting the High Street, and Mistle Quay Workshops within Swan Basin. The Council is satisfied that the application satisfactorily assesses the significance of all affected non-designated heritage assets. The proposal will result in a significant visual improvement to the surrounding area while maintaining key views. The proposal is not considered to result in any harm to, or loss of, other non-designated heritage assets and their significance will be preserved.**

**7.8 *Ground C. The Council failed to apply/properly apply Local Plan heritage policies EN17, EN20, PLA6 and PLA7. The CON report fails to mention policy EN17. The FUL report fails to mention policy EN17(e). Policy EN20 is not discussed in the FUL report and is applied improperly in the CON report as EN20(a) is not satisfied as TQW is not beyond economic repair. Policy PLA6 is not discussed in either report. Policy PLA7 has been misapplied due to TWL's outstanding objection to the policy and is non-compliant with the NPPF so should have been afforded no weight.***

- 7.9** Saved policy EN17 is listed in paragraph 2 of the CON report but is not referred to or set out in detail in that report because saved policy EN20 is the specific policy relating to demolition within Conservation Areas and is therefore the most relevant saved Local Plan policy. Saved policy EN17 states:

*“Development within a Conservation Area must preserve or enhance the character or appearance of the Conservation Area”*

and then goes on to state that development will be refused where one or more of 5 criteria apply, one of which is where *“It would involve the demolition of a building or structure positively contributing to the character or appearance of the area.”*

- 7.10** Saved Policy EN20 is summarised in paragraph 6.15 of the FUL report and states:

*“Proposals must retain buildings, structures and features that make a positive contribution to the character or appearance of a Conservation Area”*

and then goes on to state that demolition of such a building or structure will only be permitted if certain criteria and requirements are satisfied. The material considerations regarding the demolition of TQW are explained and rehearsed in the CON report. Criterion a) of saved policy EN20 requires *“supporting evidence with the application which demonstrates that the building is beyond economic repair (unless caused by the deliberate neglect of the owner)”*. Whilst this saved policy and its criteria are material considerations, they are outweighed by relevant provisions and policies (and material considerations weighing in their favour) in the NPPF and draft local plan. Para 6.14 of the CON report explains what weight should be given to criterion a) of policy EN20 and concludes that given the works required to bring the building back into commercial use; the overall enhancement that the proposed redevelopment would make to the Conservation Area; and the significant benefit of providing housing and potential planning gain through the legal agreement, EN20a should be given little weight. This is consistent with the fact that saved policy EN20 is dated and that draft policy PLA7 is more consistent with relevant provisions of the NPPF. The proposal is in full accordance with policy PLA7 as detailed at paragraphs 6.17-6.19 of the CON report.

- 7.11** Draft Policy PLA6 is listed in the policy section of both reports but not discussed in detail because it is the general historic environment policy with relatively little weight in the context of the proposed demolition and development by comparison with draft policy PLA7. The key points from PLA6 are referred to in the reports in the NPPF paragraphs (paragraphs 2.5-2.7 of FUL report and 2.1-2.2 of CON report) and in relation to the improved Heritage Impact Assessment and archaeological considerations (paragraph 6.39 of FUL report and 6.10 of CON report).

- 7.12** TWL have robustly objected to draft policy PLA7. These objections have not resulted in alterations to the policy under the 2014 Focussed Changes as Officers strongly reject the view that PLA7 does not comply with the NPPF. Officers are confident that there have been no representations of any significant weight which bring into question the overall soundness of PLA7, and it is being applied with confidence by the Council.

- 7.13** Ground D. The Council failed to pass on relevant information to English Heritage which led to them being misled. They were not informed of TWLs interest in acquiring the property or of any information concerning the potential for the reuse of the building.

- 7.14** This allegation is not relevant because, as explained above, there is no requirement to demonstrate that alternative uses of the building have been explored.

**Nonetheless, this and TWL's objections are and have been in the public domain and fully viewable in full by English Heritage. The applicant's Planning Statement also refers to the initial survey and discussions with TWL. The Council therefore strongly disputes that English Heritage has been misled as alleged or at all.**

- 7.15** Ground E. The Council failed to properly apply LMM1 (in not considering the potential for port uses of existing buildings before allowing any change of use) as required by the previous court case. TDC failed to consider LMM1 in relation to the CON application which was unlawful.
- 7.16** This issue is explored, discussed and explained extensively as set out in various parts of the FUL report, particularly paragraph 6.30. Paragraph 6.25 discusses the court judgments which confirm that under LMM1(iv) the Council is required to "have regard" to the potential for port use before permitting changes of use. This means that, in reaching their decision, Members must conscientiously consider this factor on the clear understanding that it is a factor relevant to the decision. The judgments are good authority that this obligation does not go further than "taking it into account". In evaluating the application, preparing this report and reaching their recommendation, officers have taken this factor into account, whilst assessing the poor form and condition of the existing building for modern standards, and the provision of office and portside warehouse accommodation within the redevelopment, and concluding that the principle of redeveloping the site for a mixed use development is acceptable. The CON application is solely for demolition of the existing building, with clear reference to consideration of the redevelopment proposal under the FUL application. Saved policy LMM1 relates to new development. Demolition of the existing building does not therefore fall to be assessed under this policy. Although LMM1 is considered to be consistent with the overall thrust of the National Planning Policy Framework in its aim to promote housing and employment opportunities whilst conserving and enhancing the natural and built environment, it is considered to be out of date in its less flexible approach to development and there is no equivalent policy in the draft local plan.
- 7.17** Ground F. The Council failed to take into account as a material consideration the public benefits of TQW's employment use.
- 7.18** Loss of employment land is listed as a main planning consideration and is discussed at paragraphs 6.24 to 6.36 of the FUL report. TQW is currently vacant and is stated not to have been used meaningfully for a significant number of years, due to the serious operational restraints of the current building with low ceiling heights, wall support obstructions, and problems with fork lift access and manoeuvrability between the ground and floor levels. The proposed redevelopment includes new employment in the office and warehouse, which will contribute towards local employment provision. This is not an allocated employment site and Officers are satisfied that due to the condition of the existing building; the provision of new office and warehouse accommodation; and the viability considerations, the principle of redeveloping the site for a mixed use development is acceptable and in accordance with the relevant policies of the saved and draft Local Plans and the NPPF.
- 7.19** All points of challenge are therefore strongly contested by Officers and the Planning Committee is recommended to reconsider the application afresh on its merits when reaching their decision. Members are reminded that all material planning considerations must be taken into account, including those in the CON report.

## **8. Conclusion**

- 8.1 The existing building has landmark quality and illustrates the development of Mistley reflecting the traditional functional character and former uses of the area. The revisions to the redevelopment proposal (assessed in full under 12/00427/FUL) have reduced the level of harm that would be incurred to the significance of the Manningtree and Mistley Conservation Area and surrounding heritage assets by the loss of the Thorn Quay Warehouse.
- 8.2 The demolition of the existing building and its redevelopment proposed under 12/00427/FUL are therefore considered acceptable in terms of impact upon both the character and appearance of the Manningtree and Mistley Conservation Area and the setting of neighbouring listed buildings and other important undesignated heritage assets, subject to conditions to ensure redevelopment of the site following demolition to prevent a long term cleared site which would result in substantial harm to the appearance of the conservation area. Additional conditions are imposed for archaeological monitoring and to control the method and times of demolition in the interests of highway safety and residential amenity.

Background Papers

None