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## Appeal Decision

Site visit made on 28 February 2017

by **D. M. Young BSc (Hons) MA MRTPI MIHE**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 27 April 2017

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**Appeal Ref: APP/V2255/W/16/3153116**

**Land at Moat Way, Queenborough, Kent.**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr D Wainwright (Alpha Barlow Ltd) against the decision of Swale Borough Council.
  - The application Ref 15/509964/FULL, dated 30 November 2015, was refused by notice dated 21 March 2016.
  - The development proposed is the construction of 12 family dwellings together with associated landscaping, parking and public open space.
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### Decision

1. The appeal is allowed and planning permission is granted for the construction of 12 family dwellings together with associated landscaping, parking and public open space at Land at Moat Way, Queenborough, Kent in accordance with the terms of the application, Ref 15/509964/FULL, dated 30 November 2015, subject to the conditions set out in the schedule to this decision.

### Preliminary Matters

2. The application was refused by the Council on 4 grounds relating to; flooding, overlooking, inadequate outdoor amenity space and highways. The reasons for refusal explicitly acknowledged the Council's inability to demonstrate a 5 year supply of housing thus the principle of development outside the settlement boundary was not a matter in dispute at that time.
3. The Council has cited policies from the emerging LP<sup>1</sup> which has been the subject of an Examination in Public with the Inspector's Interim Findings (LPIF) issued in early 2016. Main Modifications were issued for consultation and a review by the Local Plan (LP) Inspector concluded on 10 February 2017. Whilst the LP Inspector has not explicitly identified any changes to the proposed settlement boundaries, she did recommend that further housing sites should be allocated to meet the Council's objectively assessed need. As additional sites have now been proposed, the Council argues that it can demonstrate a 5 year supply of housing and that the principle of housing outside the settlement boundary is unacceptable.
4. The Council has confirmed that there are outstanding objections to Policies ST3 and DM18 of the emerging LP insofar as they relate to the appeal site. Consequently and notwithstanding that the plan is at a reasonably advanced stage, I have only attached limited weight to these policies, in accordance with

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<sup>1</sup> Emerging Draft Local Plan: Bearing Fruits 2013 (Publication draft December 2014)

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advice in the second bullet of paragraph 216 of the “*National Planning Policy Framework*” (the Framework).

5. To ensure the description of development reads correctly, I have amended it by inserting the word ‘with’ between ‘together’ and ‘associated’.

#### **Main Issues**

6. In light of the above, the main issues are:
- (a) Whether or not the Council can demonstrate a current five-year supply of housing;
  - (b) In light of (a) whether the principle of development outside the settlement boundary would be acceptable with regards to local and national policy regarding rural housing;
  - (c) The flooding implications of the proposal;
  - (d) The living conditions of neighbouring and future occupiers with particular regards to privacy and outdoor amenity space provision, and
  - (e) Highway safety

#### **Reasons**

##### *Housing supply*

7. The LPIF concludes that additional sites will be required to meet the Council objectively assessed housing needs (OAN). Accordingly, additional sites have been allocated through the main modifications procedure. On this basis the Council now takes the position that it can demonstrate a 5 year supply of housing.
8. Whilst I acknowledge the Council’s efforts to address its shortfall, at the time of writing there have been no Examination sessions dedicated to these sites and no indication these have, or will be, found acceptable by the LP Inspector.
9. I have noted the Council’s expectation that the LP Inspector will agree to the additional allocations. However, that optimistic view is unsupported by objective evidence and therefore I find it to be somewhat premature. I therefore conclude, on the evidence before me, that the Council has not demonstrated the existence of a 5 year supply of housing.

##### *Principle of development*

10. The appeal site lies adjacent but outside the defined built-up area as defined in the “*Swale Borough Local Plan 2008*” (the LP). Saved Policy H2 states that residential development in the countryside will only be permitted where it meets the exceptions listed in Policies E6 and RC3. The provision of 12 open market dwellings does not fall within any of the exempted categories and consequently there would be conflict with the Policy H2.
11. However, the LP is now time-expired and although this does not mean that these policies carry no weight, the Council cannot demonstrate a 5 year supply of housing. Consequently, those policies relating to the supply of housing should not be considered up to date for the purposes of the Framework. Although the underlying environmental aims of H2 are consistent with those of paragraph 17 of the Framework, as a whole it has the effect of constraining the supply of housing land. I consider therefore with regard to the Cheshire East

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judgement<sup>2</sup>, that it is a policy for the supply of housing and this limits the weight I can attach to it.

12. Policy ST3 of the emerging LP adopts a similar approach to restricting development outside settlement boundaries in order to safeguard the countryside. However, although the site is outside the proposed development boundary, the Council states that representations that may affect the eventual designation have been made and remain 'live'. Thus it cannot be assumed with any degree of certainty that the site will remain outside the built up area in the final version of the plan.
13. Although there would be conflict with Policies H2 of the LP and ST3 of the emerging LP, these conflicts carry limited weight for the reasons outlined above. It is therefore necessary to consider the proposal in light of the Framework, paragraph 14 of which sets out the presumption in favour of sustainable development, which should be seen as the '*golden thread*' running through both plan making and decision taking. The three dimensions to sustainable development are economic, social and environmental. It states that where the development plan is out-of-date (as is the case here), permission for development should be granted unless any adverse effects of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, or where specific policies indicate development should be restricted.
14. The scheme would undoubtedly make a significant contribution towards the Council's housing stock. These benefits are indisputable and would be consistent with the *social* dimension of sustainable development particularly '*boosting significantly the supply of housing*'. The development would also support the *economic* role through the purchase of materials and services in connection with the construction of the dwellings, an increase in local household expenditure as well as revenues to the Council from the New Homes Bonus. These benefits again weigh in favour of the scheme.
15. The Council accepts the site would be sustainably located with good access to public transport, shops and local services. In landscape terms, the scheme would incur the loss of an open parcel of scrubland. However, it is pertinent that the Council did not object to the application on these grounds originally. Although it now takes a different view, a landscape character appraisal for the area has not been submitted nor indeed any supporting information to substantiate its view in paragraph 41 of its Statement that there would be "*harm to the character and amenity of the rural landscape*".
16. The appeal site currently has no special designation and lacks distinctive features. Views of the development would be limited in the wider landscape and from most key receptor points it would be likely seen against the general townscape of Queenborough. According to the appellant the Council's own Landscape Capacity Study concluded that the site would be appropriate for a small scale housing development. Based on the foregoing, I find there would be moderate environmental harm arising from the visual impact of the development and this weighs against the proposal in the overall planning balance.

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<sup>2</sup> Richborough Estates Partnership LLP v Cheshire East, SSCLG [2016] EWCA Civ 168.

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### *Flooding*

17. Although protected by existing flood defences, the site is mostly within Flood Zone 3a according to Environment Agency Flood Zone Mapping. Having regard to the "Planning Practice Guidance" (PPG), dwellings located in Flood Zone 3a are classified as 'more vulnerable' and require a Sequential and Exception Test. The Council argue that the appellant has failed to undertake these tests and therefore it cannot be sure that there are not more preferable housing sites in the borough. Although Policies E1 and H2 of the LP have been cited in the first reason for refusal, these have limited relevance to the issue of flooding. I have therefore defaulted to the advice in paragraphs 100-104 of the Framework.
18. These seek to avoid inappropriate development in areas at risk of flooding by directing development away from areas of highest risk. Where development is necessary, it is to be made safe without increasing flood risk elsewhere. The PPG sets out the main steps to be followed. In effect, if there are better sites in terms of flood risk, or a proposed development cannot be made safe, it should not be permitted.
19. The appellant has provided a site-specific flood risk assessment (FRA) as required by paragraph 103 of the Framework. This concludes that subject to various measures being incorporated such as setting minimum floor levels for habitable rooms and the provision of sustainable drainage systems, the development would not be at actual risk of flooding. It is germane that the Environment Agency has not objected to the development given the FRA measures and the extent of flood defences already in place.
20. With regard to the absence of a Sequential Test in the FRA, the appellant makes the case that this was unnecessary because a comprehensive review of housing sites in the borough has already been carried out by the Council as part of its Strategic Housing and Land Availability Assessment and if there were more suitable housing sites in Flood Zones 1 and 2 these would already have been identified and brought forward to address the current shortfall in housing land supply. This is a compelling argument and one which the Council has failed to repudiate.
21. The PPG confirms that it is for local planning authorities (or by implication the decision maker) to consider the extent to which the Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. I have already found that a five-year supply of deliverable housing has not been demonstrated by the Council. There is therefore a manifest failure on the Council's part to identify sufficient sites which would act as a reasonably available alternative in areas with a lower probability of flooding to dwellings in Flood Zones 1 and 2. Accordingly, I find that the Sequential Test is satisfied and as such it is not possible to direct development to an area at lower risk of flooding at this time.
22. That being the case, the next stage is to apply the Exception Test. This comprises two parts, both of which must be passed. Firstly, the development must provide wider sustainability benefits to the community that outweigh flood risk. Secondly, it should be safe for its lifetime, without increasing flood risk elsewhere and where possible reducing flood risk overall.
23. The development would deliver significant sustainability benefits to the local community through the provision of 12 dwellings in an area of need. The first

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criterion is therefore satisfied. The area is protected by existing defences and therefore given that neither the Environment Agency nor the County Council's Flood Risk Officer objected to the development, I conclude that the dwellings would be safe from flooding and would not increase the risk of flooding to surrounding dwellings. The second part of the test is thereby satisfied and overall I conclude that the development would accord with advice on flood risk in the Framework.

#### *Living conditions*

24. Policy E1 of the LP states that development should not cause demonstrable harm to residential amenity. Although, the Council has referred to various 'normally required' privacy distances in its Officer Report, no specific policies or supplementary planning documents have been submitted.
25. Due to the site's open nature, the rear and side boundaries of neighbouring properties currently experience a largely unrestricted aspect over the site. This contributes to standards of privacy and outlook for neighbouring occupiers that are relatively high in the context of a built-up area. When I conducted my site visit, I observed that the surrounding estate is built to a fairly high density where the backs and fronts of some dwellings overlook the private amenity spaces of their neighbours. Consequently, it is almost inevitable that there will be a degree of visual intrusion and mutual overlooking between neighbouring occupiers.
26. In this context, I do not consider that the distance between the rear of Plot 6 and the garden of 9 Moat Way would result in an unacceptable loss of privacy to these occupiers. Moreover, I note the appellant's view that screening could be provided by the implementation of a landscaping scheme.
27. The Council's third reason for refusal relates to the inadequacy of the gardens to plots 3, 4, 5, 9 and 10. However, from the submitted plans these appear to be of a reasonable size bearing in mind these plots are all indicated to be 3-bedroom properties. I have not been provided with details of any local standards in relation to minimum garden sizes that might be breached if the appeal were allowed and it seems to me that potential occupiers would be able to exercise consumer choice in these matters.
28. I therefore conclude on the fourth main issue that the development would not cause demonstrable harm to the living conditions of neighbouring and future occupiers with particular regards to privacy and outdoor space provision. There would thus be no conflict with Policy E1 of the LP.

#### *Highway Safety*

29. There was no objection to the application from the Highway Authority. Despite that, the Council refused the application on the grounds that the width of the access road would be inadequate to accommodate the tracking of a refuge vehicle. However, the Officer Report concedes this minor matter could easily be resolved by the submission of a revised plan. Having viewed the swept paths provided in the Transport Statement I see no reason to disagree with that view and the required amendments can be secured by the Highway Authority as part of the road adoption process. There would thus be no harm to highway safety and the development would accord with Policies E1 and T3 of the LP.

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### Other Matters

30. Local residents have expressed a wide range of concerns including but not limited to the following; the loss of wildlife habitats, inadequate sewerage/drainage infrastructure and the loss of recreational land. However, it is evident from the Committee Report that these matters were addressed by the various Statutory Consultees. Whilst I understand the concerns of local residents, there is no compelling evidence before me which would lead me to conclude differently to the Council on these matters.
31. It has also been put to me that the appeal site has been designated as a protected green space within the emerging LP<sup>3</sup>, and should be retained and protected from development for the benefit of the wider community. However, the Council has not objected to the development on those grounds and at the time of writing this is only a proposed designation to which there are unresolved objections. Consequently, I cannot be sure that there is even a reasonable likelihood of the site being allocated as a green space. That being the case I this argument carries only limited weight in the overall planning balance.

### Conditions

32. Although the Council has suggested 14 planning conditions no reasons have been submitted to support these. I have therefore considered them against advice in the PPG. In some instances I have amended the conditions provided by the Council in the interests of brevity and to ensure compliance with the PPG.
33. I have imposed conditions specifying the approved plans and the time limit of the permission as these provide certainty. I have combined several conditions into a single one requiring the submission of a Construction Method Statement. This is necessary to protect the living conditions of local residents. I have imposed conditions relating to external materials and landscaping to ensure the satisfactory appearance of the development. A condition relating to parking is necessary to ensure the development does not give rise to overspill parking on the surrounding residential streets.
34. A condition restricting further openings to Plot 6 is unnecessary given that I have found that it would be acceptable in terms of its relationship to neighbouring dwellings. Finally, The Council has not provided any justification, policy or otherwise, for a condition requiring details of sustainable construction techniques which are usually secured via the Building Regulations. As such, whilst the objectives of such a condition may be laudable, advice in the PPG is clear that a condition must be justified by the nature or impact of the development being permitted. Moreover, the Written Ministerial Statement of 25 March 2015 (the WMS) sets out provision for applying optional Building Regulations (the new national technical standards) in respect of water efficiency and for tighter energy performance standards than those otherwise required by the Building Regulations. The WMS states that where there is an existing plan policy which references the Code for Sustainable Homes, authorities may continue to apply a requirement for a water efficiency standard equivalent to the new national technical standard, or in the case of energy, a standard consistent with the WMS policy, concerning energy performance. As

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<sup>3</sup> Main Modification 397 shows the site allocated as Local Green Space.

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the Council has not directed me to a relevant development plan policy I cannot be sure the condition would meet the advice in the WMS and the PPG. I have omitted it accordingly.

### **Overall Planning Balance and Conclusions**

35. The starting point in weighing the various factors is that the proposal would not conform to the development plan. However, the plan has time expired and the Council cannot demonstrate a 5-year supply of deliverable housing sites. Thus, the default position identified in the Framework prevails and if the development constitutes sustainable development there is a presumption in favour of the appeal scheme.
36. I have found the development to be acceptable with regards to flooding. Accordingly, there are no specific policies in the Framework that indicate the development should be restricted. I have also found the development to be acceptable with regards to living conditions and highway safety. However, the absence of harm in these areas is only neutral in the planning balance.
37. I have identified that the development would deliver significant *social* and *economic* benefits, of particular weight would be the delivery of 12 new homes in a borough which is, at this stage, unable to demonstrate a five-year housing land supply. It would also be sustainable in locational terms. Although there would be moderate harm to the character and appearance of the area, relative to the scale of the benefits arising, I find that this harm would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
38. I consider this to be a significant material consideration sufficient to outweigh the development plan conflict. There are no other factors which would justify withholding planning permission. For the reasons given above and taking into account all other matters raised, including those policies in the emerging LP, I conclude that the appeal should succeed.

*D. M. Young*

Inspector

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#### SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: TA879/01, TA879/20 rev E, TA879/21 Rev B, TA879/21 Rev B, TA879/23 Rev B, TA879/21 Rev D, TA879/25 Rev D, TA879/26 Rev D, TA879/27 Rev C, TA879/28 Rev C, TA879/29 Rev C, TA879/30 Rev C, TA879/31 Rev C and TA879/32 Rev C.
- 3) No development above slab level shall take place until details of the materials to be used in the construction of the external surfaces of the buildings hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 4) Notwithstanding the details shown on the approved plans, no dwelling shall be occupied until a hard and soft landscaping scheme has been submitted to and approved in writing by the Local Planning Authority including planting of trees, shrubs, herbaceous plants and areas to be grassed. All work shall be carried out in the first planting season after commencement of the development unless agreed otherwise in writing by the Local Planning Authority, and shall be maintained for a period of 5 years. Any trees and shrubs that die within 5 years shall be replaced with a like for like species.
- 5) The proposed development shall take place only in accordance with the mitigation measures included in Section 5.6 of the submitted Flood Risk Assessment (ref: 5001-UA008317-01-GDR-01, dated 21 October 2015).
- 6) The development shall commence until a Construction Method Statement has been submitted to and approved, in writing, by the Local Planning Authority for that particular phase. The statement shall include:
  - i) the proposed hours and days of working;
  - ii) methods and details of dust suppression during construction; and
  - iii) details of measures to prevent the deposit of mud and/or other debris on the public highway.
  - iv) Details of parking, turning, unloading areas for employees and contractors

The development shall be carried out in accordance with the statement so approved.
- 7) The parking areas shown on the approved plan shall be provided, surfaced and drained prior to first occupation of either dwelling and shall be retained thereafter.