
Appeal Decision

Site visit made on 15 January 2019

by **Jonathan Price BA(Hons) DMS DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 01 March 2019

Appeal Ref: APP/V2255/W/18/3207752

Former Doubleday Lodge, Glebe Lane, Sittingbourne, Kent ME10 4LZ

- 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 Stonechart Property Limited against the decision of Swale Borough Council.
 - The application Ref 18/500973/FULL, dated 15 February 2018, was refused by notice dated 25 July 2018.
 - The development proposed is demolition of former residential care home building and erection of 21 new dwellings, associated new access road, car parking and amenity areas.
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Decision

1. The appeal is allowed and planning permission is granted for demolition of former residential care home building and erection of 21 new dwellings, associated new access road, car parking and amenity areas on land at former Doubleday Lodge, Glebe Lane, Sittingbourne, Kent ME10 4LZ in accordance with the terms of the application Ref 18/500973/FULL, dated 15 February 2018, subject to the conditions set out in the attached Schedule.

Application for costs

2. An application for costs was made by Stonechart Property Limited against Swale Borough Council. That application is the subject of a separate Decision.

Background and Main Issue

3. The demolition of a former residential care home and the erection of 21 new dwellings proposed is identical to a scheme already approved on 30 June 2017 under Council reference 16/507706/FULL. The proposal is therefore for a development already benefitting from planning permission, which at the time of my visit appeared to be nearing completion.
4. The approved scheme had been subject to a financial viability report, agreed by the Council's assessor, showing it to be only marginally viable with a policy-compliant level of affordable housing and the financial contributions sought. The developer had nonetheless entered into a Section 106 planning obligation with the Council, to secure both the affordable housing and the financial contributions, on the basis that carrying out the development would still yield a modest profit.
5. However, unanticipated costs were subsequently incurred when starting development and undertaking the demolition, groundworks and necessary

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Appeal Decision APP/V2255/W/18/3207752

foundation design and asbestos removal. These actual construction costs are addressed in a further viability report which now demonstrates a negative value for the proposal. The Council had also independently assessed this second report and found a greater negative value to the scheme and so the viability evidence is not in dispute.

6. The appeal proposal is a means to seek a reduction in the development contributions required through the first permission and the related planning obligation. By means of a Unilateral Undertaking (UU) submitted with this appeal, the proposal continues to provide two affordable rented units and financial contributions towards Habitat Regulations mitigation, libraries and wheelie bins. I am satisfied that the UU meets the tests set out in Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 and repeated in paragraph 56 of the National Planning Policy Framework (the Framework)
7. The UU does not however include the further contributions towards health services, education and off-site open space previously agreed. Other than the two rented units secured, the remainder of dwellings will be available as affordable housing on a Shared Ownership basis as part of the arrangement provided for by Moat Housing Association. The proposal is thus entirely for affordable housing as this is defined in the Framework.
8. As a previously-approved scheme, the proposal is considered acceptable in principle and raises no material concerns in relation to the character and appearance of the area, the living conditions of current and future occupiers, highway safety, drainage or ecology. Therefore, the main issue remains as to whether or not, in the light of reduced contributions made towards supporting infrastructure, the planning balance remains in favour of the development.

Reasons

9. The development plan is the quite recently adopted Swale Borough Local Plan 2017 (LP). The supporting text in paragraph 5.5.14 onwards refers to the LP being based on a viability assessment which, until such time as a Community Infrastructure Levy is introduced, seeks contributions on developments of ten or more dwellings to help address any shortfall in the public funding of infrastructure. This viability evidence required the LP to reduce requirements in key areas such as affordable housing, where, for Sittingbourne, Policy DM8 seeks ten percent provision in schemes of eleven or more dwellings.
10. The supporting text in LP paragraph 5.5.17 indicates that the relatively low percentage requirement of affordable housing required by Policy DM8 means the expectation is that developments should normally be able to meet the remaining contributions sought by the Council. Where developer contributions may need to be reduced for viability reasons the supporting text states the Council will agree to this where the advantages of proceeding with the development would outweigh the disadvantages.
11. Although the shared-ownership units are not guaranteed through the UU, I have no reason to doubt that these will be made available on this basis and that the scheme is to be entirely for affordable housing. This would provide a substantial social benefit as, for viability reasons, a policy-compliant scheme would normally only be required to provide 10 per cent of affordable housing.

Appeal Decision REF/2220/19/260134

12. The fact the development has gone on to be nearly completed has in this case limited bearing on the viability case for a reduced level of contributions. The evidence before me is that the unanticipated construction costs, and the reduced ability to support the full level of contributions, were reported to the Council at an early stage of the scheme. Irrespective of the Council's eventual response to this, further financial risk might have been incurred if works had been brought to a halt.
13. The main parties have put forward competing arguments over the legitimacy of the health services, education and open space contributions sought and the degree of impact the proposal would have on the existing infrastructure in comparison with the previous residential care home. However, these arguments do not alter the viability position in relation to the scale of financial contributions required by the Council. The proposal has complied with LP Policy CP6 insofar as demonstrating to the Council's satisfaction a financial position, via an open book assessment, which shows the development's viability to be threatened by LP infrastructure contribution requirements.
14. I find no reason to conclude that the financial contributions sought towards health services, education and open space are not well-founded and reasonably necessary to off-set the additional pressure on services resulting from the development. There would be significant harm deriving from the failure of the development to provide for these contributions. However, the social benefits of 21 affordable dwellings would be substantial and, combined with the moderate local economic benefits derived from the construction and additional household spend and tax revenue, tip the balance in favour of a proposal with the reduced financial commitments provided by the UU.

Habitat Regulations Assessment (HRA)

15. The LP was the subject of an HRA which established the financial contributions necessary to mitigate the recreational impacts of housing developments within 6km of the Medway Estuary and Marshes and the Swale Special Protection Areas (SPAs). The SPAs are European protected sites safeguarded under EU and domestic nature conservation legislation.
16. The mitigation measures agreed do not avoid the requirement for a project level HRA. However, the tariff secured through the UU will contribute towards the works carried out by the North Kent Strategic Access Management and Monitoring Scheme and this allows me to reach the conclusion that the 21 dwellings proposed will not have an adverse effect on the integrity of the SPAs.

Conditions

17. The development is at an advanced stage and I am advised by the Council that a number of the conditions imposed upon the original planning permission have been discharged. I am applying the outstanding conditions requested by the Council and if in the interim further of these have in fact been discharged, that is a matter which can be addressed by the parties.
18. In the interests of certainty, conditions specify the plans approved and the details of those already discharged. In the interests of an acceptable living environment for residents, conditions remove permitted development rights for means of enclosure fronting a highway, restrict the times of demolition and

Appeal Decision REF/16/507706/FULL

construction and secure compliance with the submitted Code of Construction Practice and Site Waste Management Plan.

19. To ensure adequate on-site car parking, a condition is necessary to secure the areas provided for this. In the interests of delivering the agreed biodiversity enhancements, a condition requires implementation of these prior to occupation. In the interests of the appearance of the development, conditions secure implementation of hard and soft landscaping, with the protection/retention of certain trees and the future replanting of failures. Conditions are needed to secure an agreed sustainable drainage system for the development.

Conclusion

20. For the above reasons I conclude that the appeal should be allowed.

Jonathan Price

INSPECTOR

Schedule of Conditions

- 1) The development hereby approved shall be carried out in accordance with the following approved drawings: SL-001, 005 rev O; 006 rev. F; 007 rev. F; 008 rev, H; 009 rev. G; 010 rev. D (as approved under 16/507706/FULL), 7A - Visibility and Tracking (as approved under 16/507706/FULL) , U643TCP (as approved under 16/507706/FULL); U643TPP (as approved under 16/507706/FULL); 011 A.
- 2) The development shall be carried out in accordance with the details as agreed under discharge of condition application references 17/503513/SUB; 17/504681/SUB; and 17/506153/SUB.
- 3) Notwithstanding the provisions of Class A, Part 2, Schedule 2 to the Town and Country Planning (General Permitted Development) Order 2015 (as amended), no gates, fences, walls or other means of enclosure shall be erected or provided in advance of any wall or any dwelling fronting on a highway without the consent in writing of the local planning authority.
- 4) No demolition or construction work in connection with the development shall take place on any Sunday or Bank Holiday, nor on any other day except between the following times: Monday to Friday 0730 - 1900 hours, Saturdays 0730 - 1300 unless in association with an emergency or with the prior written approval of the local planning authority.
- 5) The development shall be carried out in accordance with the submitted Code of Construction Practice, Site Waste Management Plan and on site car parking plan (for contractor parking during construction) submitted on 7th February 2017 under planning application ref 16/507706/FULL. The construction of the development shall be carried out in accordance with BS5228 Noise Vibration and Control on Construction and Open Sites and the Control of dust from construction sites (BRE DTi Feb 2003) unless previously agreed in writing by the local planning authority.
- 6) The area shown on the submitted plan - namely Proposed Site Plan, no.005 Revision O as car parking and turning space shall be kept

Appeal Decision Ref: VZ200/17/10/2607/24

available for such use at all times and no permanent development, whether permitted by the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking or re-enacting that Order) or not, shall be carried out on the land so shown or in such a position as to preclude vehicular access thereto. In addition, the parking to the front of Blocks A and B shall be allocated so that each dwelling within these blocks has at least one of these parking spaces. Such land and access thereto shall be provided (and allocated where necessary) prior to the occupation of the dwellings hereby permitted.

- 7) The biodiversity enhancements as set out on page 31 and 32 of the submitted Preliminary Ecological Appraisal shall be implemented on site prior to the occupation of the 1st of the dwellings hereby approved.
- 8) All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with the programme agreed in writing with the local planning authority.
- 9) Upon completion of the approved landscaping scheme, any trees or shrubs that are removed, dying, being severely damaged or becoming seriously diseased within five years of planting shall be replaced with trees or shrubs of such size and species as may be agreed in writing with the local planning authority, and within whatever planting season is agreed.
- 10) No building hereby permitted shall be occupied until details of the implementation, maintenance and management of the sustainable drainage scheme (details of which were approved under discharge of condition application ref 17/504681/SUB) have been submitted to and approved in writing by the local planning authority. The scheme shall be implemented and thereafter managed and maintained in accordance with the approved details. Those details shall include a timetable for its implementation and a management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by any public body or statutory undertaker, or any other arrangements to secure the operation of the sustainable drainage system throughout its lifetime.
- 11) No infiltration of surface water drainage into the ground is permitted other than with the express written consent of the local planning authority; this may be given for those parts of the site where it has been demonstrated that there is no resultant unacceptable risk to controlled waters. The development shall be carried out in accordance with the approval details.
- 12) The trees shown on the plans hereby approved as "existing trees to be retained" shall be retained and maintained. Any trees removed, dying, being severely damaged or becoming seriously diseased within five years of the date of this permission shall be replaced with trees or shrubs of such size and species as may be agreed with the local planning authority.
- 13) All trees to be retained must be protected by barriers and ground protection at the recommended distances as specified in BS5837: 2012 'Trees in relation to design, demolition and Construction - Recommendations' before any equipment, machinery or materials are brought on to the site and shall be maintained until all equipment,

Appeal Decision APP/V2255/W/18/3207752

machinery and surplus materials have been removed from the site. Nothing shall be stored or placed, nor fires lit, within any of the area fenced in accordance with this condition and the ground levels within those areas shall not be altered, nor shall any excavation be made, without the written consent of the local planning authority.

---End of Conditions---



Costs Decision

Site visit made on 15 January 2019

by Jonathan Price BA(Hons) DMS DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 March 2019

Costs application in relation to Appeal Ref: APP/V2255/W/18/3207752 Former Doubleday Lodge, Glebe Lane, Sittingbourne, Kent ME10 4LZ

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Stonechart Property Limited for a full award of costs against Swale Borough Council.
 - The appeal was against the refusal of planning permission for demolition of former residential care home building and erection of 21 new dwellings, associated new access road, car parking and amenity areas.
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Decision

1. The application for an award of costs is refused.

Procedural Matter

2. The costs application refers initially to a partial award of costs but in conclusion refers to seeking a full amount. Based on the content of the application, I am considering this as one made for a full award of appeal costs.

Reasons

3. Advice over the award of planning appeal costs is set out in the Government's Planning Practice Guidance (PPG). It states the established premise that parties to an appeal normally meet their own costs. However, where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs. Unreasonable behaviour in this context may be procedural, relating to the appeal process, or substantive, relating to issues arising from the merits of the appeal.
4. The application is based on the Council having behaved unreasonably in a substantive sense. Paragraph 49 of the PPG provides examples of the types of behaviours that may give rise to a substantive award against a local planning authority. In this case the applicant is citing a failure of the Council to produce evidence to substantiate its reason for refusal on appeal.
5. The Council had independently assessed the viability case for the proposal and accepted its findings. Paragraph 57 of the National Planning Policy Framework states that the weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. In this case I consider the development plan and its evidence base were up to date.

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Costs Decision APP/V2255/W/18/3207752

The change in circumstances was the unanticipated construction costs for delivering the 21 dwellings, which was not in dispute.

6. It is quite apparent to me that when the planning application was determined the Council were made fully aware that a policy-compliant level of two affordable rented units could be secured through a planning obligation and that the remaining 19 units were likely to be made available on a shared ownership basis. There was nothing unreasonable in the Council then deciding the balance between the respective weights given to the advantages of a viable entirely-affordable housing scheme and the disadvantages of foregoing the contributions made towards education, health care and open space.
7. An officer-level recommendation would be a normal part of the planning decision-making process and the weight attached to the competing factors was then a matter for the Council to decide. In this respect I consider there was adequate evidence before the Council, through a quite detailed report, over both the affordable housing offer and the justification for and intended use of each of the contributions.
8. Ultimately, it was reasonable for the Council as decision-maker to decide the weight given to the various material considerations. The planning appeal provides the opportunity to contest the weight given to each of these. Although in this case the appeal was allowed, this does not necessarily lead to a conclusion that the Council behaved unreasonably. On the evidence before me, I conclude there to be no basis for a finding of unreasonable behaviour, as there had been no failure on the part of the Council to adequately substantiate the reason for refusal.

Conclusion

9. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has not been demonstrated. Consequently, the application for an award of costs is refused.

Jonathan Price

INSPECTOR