

EXTRA-ORDINARY PLANNING COMMITTEE – 29 AUGUST 2019**DEFERRED ITEM**

Report of the Head of Planning

DEFERRED ITEMS

Reports shown in previous Minutes as being deferred from that Meeting

Def Item 1 REFERENCE NO - 17/505711/HYBRID		
APPLICATION PROPOSAL		
<p>Hybrid planning application with outline planning permission (all matters reserved except for access) sought for up to 595 dwellings including affordable housing; a two-form entry primary school with associated outdoor space and vehicle parking; local facilities comprising a Class A1 retail store of up to 480 sq m GIA and up to 560sqm GIA of "flexible use" floorspace that can be used for one or more of the following uses - A1 (retail), A2 (financial and professional services), A3 (restaurants and cafes), D1 (non-residential institutions); a rugby clubhouse / community building of up to 375 sq m GIA, three standard RFU sports pitches and associated vehicle parking; a link road between Borden Lane and Chestnut Street / A249; allotments; and formal and informal open space incorporating SuDS, new planting / landscaping and ecological enhancement works.</p> <p>Full planning permission is sought for the erection of 80 dwellings including affordable housing, open space, associated access / roads, vehicle parking, associated services, infrastructure, landscaping and associated SuDS.</p> <p>For clarity - the total number of dwellings proposed across the site is up to 675.</p>		
ADDRESS Land At Wises Lane Borden Kent ME10 1GD		
RECOMMENDATION		
<p>An appeal has been submitted against non-determination of this application and it cannot now be formally determined by the Council. However Members need to determine whether the application would have been approved if it was still before them, or on what grounds they would have refused planning permission. This will then form the basis of the Council's case regarding the development for the purposes of the appeal.</p>		
SUMMARY OF REASONS FOR RECOMMENDATION		
As above		
REASON FOR REFERRAL TO COMMITTEE		
<p>This is a large scale planning application that is partly a departure from the development plan, and has generated substantial public interest. Members referred the application back to the Planning Committee following the meeting of the committee on 20th June 2019.</p>		
WARD Borden And Grove Park	PARISH/TOWN Borden	COUNCIL
		APPLICANT Quinn Estates Ltd & Mulberry Estates (Sittingbourne) Ltd AGENT Montagu Evans
DECISION DUE DATE 10/07/2019	PUBLICITY EXPIRY DATE 03/03/19	OFFICER SITE VISIT DATE

1.0 Background

- 1.01 At its meeting on 30 January 2019 the Planning Committee resolved to grant planning permission for the above planning application subject to:
- conditions (1) to (58) in the report;
 - additional conditions as outlined in the tabled papers - conditions (59) to (70);
 - amendments to conditions (53) and (54);
 - the resolution of outstanding matters relating to existing public rights of way;
 - no objections being received from Historic England;
 - the wording in paragraph 38 [should be condition (38)] changed from 'indigenous' species, to 'native' species;
 - confirmation from KCC of projects or management/maintenance proposals for the Borden Nature Reserve that would be affected by the increase in use to justify a financial contribution to such works – and agreement with the developer to contribute to this;
 - the expiry of the consultation/publicity period relating to the ecology addendum and badger survey, and subject to no objections being raised by KCC Ecology or Natural England; and
 - the completion of a S106 Agreement for the terms as set out in the report, and the Agreement to come back to the Planning Committee for the final decision.
- 1.02 A copy of the January committee report (including Appendixes 1-6) is attached as Appendix A. The tabled update papers to the committee meeting are attached as Appendix B, and the minutes of the meeting are attached as Appendix C.
- 1.03 In accordance with the resolution, the terms of the S106 agreement were reported back to the Planning Committee on 20th June 2019. This report also included a revised set of planning conditions. At this meeting, the Planning Committee voted against the officer recommendation to approve the S106 terms. An alternative motion was then tabled and passed that the whole application should come back for re-consideration by the Planning Committee.
- 1.04 A copy of this report is attached as Appendix D, the tabled updates are attached as Appendix E and the minutes of the meeting attached as Appendix F.
- 1.05 The applicant has now appealed to the Planning Inspectorate against non-determination of the application. The Secretary of State has also called in the appeal for his own determination (letter dated 13 August 2019). The reason he has given for this direction is that the appeal involves proposals for residential development of over 150 units or on sites of over 5 hectares, which would significantly impact on the Government's objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities.
- 1.06 This means that the Council cannot formally determine the application – it is now in the hands of the Secretary of State to make the decision.
- 1.07 The appeal will be heard by way of a Public Inquiry. This is the most formal appeal process and requires expert evidence to be presented by witnesses under cross examination, usually by a barrister. The Inspector will prepare a report and recommendation, which will be forwarded to the Secretary of State.
- 1.08 The purpose of this report is to advise the Planning Committee that it must now determine the following –

- a) Whether, if an appeal had not been made, the Planning Committee would have approved the application (either in accordance with my recommendation or for other reasons), or
- b) Whether, if an appeal had not been made the Planning Committee would have refused the application, and if so on what grounds.

1.09 If the Planning Committee resolves that it would have approved the application, then the Council would offer no grounds against the appeal during the Public Inquiry process. It would still need to participate in the Public Inquiry, in a much reduced way. This would be in order to inform the Inspector of the Council's consideration and putative decision, and to take part in the discussion about the terms of the planning conditions and section 106 agreement.

1.10 If the Planning Committee resolves that it would have refused the application, then the committee should set out their grounds of refusal in a clear and comprehensive manner, and these will form the reasons upon which the Council will seek to defend the appeal at the Public Inquiry.

2.0 Updated consultation responses

2.01 In my report to the Planning Committee on 30 January 2019, I recommended that delegated powers be given to grant planning permission for the development. This was made subject to the satisfactory completion of a number of points including the receipt of further comments from some outstanding consultees. Those additional responses are as follows -

2.02 KCC Rights of Way advise that they previously raised concerns regarding the site layout and future alignment of public rights of way that pass through the site. However as the majority of the application is in outline form only, the PROW officer advises that such concerns can be resolved through the use of planning conditions. I agree with that and the matter would be covered as part of proposed condition (62).

2.03 Historic England have provided comments specifically on the impact on the setting of specific listed buildings, namely the Church of St Peter and Paul (Grade I), Borden Hall, Hook Hole and Olestede (Grade II*). They advise that a low level of harm would arise from the development on the setting of these buildings, and that this would be minimised by landscaping proposed on the southern and western boundaries of the site, and by careful junction design (in relation to the access onto Chestnut Street). Historic England state that they have no concerns on heritage grounds provided that appropriate landscaping conditions to mitigate the visual impact of the development are included for in any approval. The matter would be covered as part of the proposed conditions.

2.04 Natural England and the KCC Ecologist do not raise any objections in relation to the content of the ecology addendum and badger survey, and do not alter their comments previously made (and included in the January committee report).

3.0 Further representations

3.01 Since this application was first reported to the Planning Committee on the 30th January 2019, a further 26 letters of objection have been received. A large number refer to ecology impacts, specifically in relation to badgers and to the Borden Nature Reserve. Some also raise concern relating to the terms of the S106 Agreement (as

reported in June). Such impacts / terms are considered in the January and June committee reports.

4.0 Update on Planning Policy Position

- 4.01 The Government published its Housing Delivery Test (HDT) on 19 February 2019. As a result of the new methodology to be applied under the HDT, the Council can no longer demonstrate a five year housing supply. This is a material change in the planning policy position compared to that reported to the Planning Committee on 30th January 2019.
- 4.02 Under Paragraph 11(d) of the National Planning Policy Framework, when policies which are most important for determining the application are out of date (which includes applications for housing where the Local Planning Authority cannot demonstrate a 5 year supply), planning permission should be granted unless:
- i) The application of policies in the NPPF that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
 - ii) Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the NPPF as a whole.
- 4.03 A large part of the application site is allocated for housing development under policy MU3 of the Local Plan. However, the application includes the development of additional land beyond the site allocation subject to policies ST3 (the Swale Settlement Strategy), Policy DM25 (Important Local Countryside Gap) and policy DM31 (agricultural land), all of which have the effect of restricting locations for new housing development. The application of paragraph 11(d) of the NPPF does not mean that these policies carry no weight, but a proposal would need to clearly fall under part ii) above to warrant refusal.
- 4.04 Members will note in the January committee report (Section 9) that I had identified conflict with policies ST3, DM25 and DM31 of the adopted Plan arising from the inclusion of land beyond the site allocation. However I advised that the identified harm was outweighed by the wider benefits of the scheme. My advice was written prior to publication of the Housing Delivery Test and subsequent confirmation that the Council does not have a five year housing supply.
- 4.05 Following such confirmation, the advice under paragraph 11(d) of the NPPF tilts the planning balance in favour of granting planning permission, unless any adverse impacts of doing so significantly and demonstrably outweigh the benefits. I have previously advised in the January report that the benefits of granting permission would outweigh the conflict with the above policies. Members should note that the requirement to apply this “tilted balance” under paragraph 11(d) of the NPPF now weighs more heavily in favour of granting permission.
- 4.06 Members should also note that any harm arising to habitats sites, Local Green Space, and heritage assets would be subject to the test under 11(d) (i) of the NPPF (the relevant policies in the NPPF that protect areas or assets of particular importance are defined in footnote 6). I set out in my January report (Appendix 6) that an Appropriate Assessment had been completed, and that impacts on the Swale and Medway Estuary and Marshes SPA and Ramsar sites would be mitigated through securing the appropriate SAMMS contribution via a S106 Agreement. The Appropriate Assessment has concluded that the project will not adversely affect the integrity of the habitats sites (which meets the test in NPPF para 177, as amended in February 2019). My January report also concluded that the loss of Local Green

Space was very limited, as was the harm identified to surrounding conservation areas and listed buildings (“less than substantial”). As such, I do not consider that such impacts provide a clear reason for refusing the application under paragraph 11(d)(i) of the NPPF.

5.0 DISCUSSION

- 5.01 I recommended to Members in January and again in June that planning permission should be granted for the development. I also consider that the lack of a five year housing supply adds further weight to the reasons in favour of granting planning permission, when added to my conclusions in the January committee report. Although an appeal has been submitted, it remains my view that the application should have been approved.
- 5.02 The previous committee resolution on 30 January 2019 to grant permission following a detailed debate is also a material consideration, which attracts considerable weight. The courts have stressed the importance of consistency in decision-making. The fact that this decision is mainly a question of planning judgement does not change the need for good reasons to be given if the committee decides to change its mind and to depart from an earlier relevant decision.
- 5.03 However, the Planning Committee is entitled to reach a different conclusion if it considers there are sound planning reasons for doing so. Members should however note that if the Council cannot substantiate its grounds of refusal at a Public Inquiry, then it places itself at significant risk of an adverse award of costs.
- 5.04 The National Planning Policy Guidance - “Appeals” document sets out the type of behaviour that may place a Local Planning Authority at risk of costs. This includes the following examples
- preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
 - failure to produce evidence to substantiate each reason for refusal on appeal
 - vague, generalised or inaccurate assertions about a proposal’s impact, which are unsupported by any objective analysis.
 - refusing planning permission on a planning ground capable of being dealt with by conditions.
 - acting contrary to, or not following, well-established case law.
 - not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.
- 5.05 Therefore the Planning Committee must carefully consider the substance and evidence it seeks to rely on for any reason advanced in defending this appeal. I have set out in the January committee report that there are some harmful impacts, but have explained why these are outweighed by other factors when considered against the Local Plan. I have also set out above how the NPPF test in the absence of a five year housing supply points towards the grant of permission.
- 5.06 Members may disagree with my assessment of harm, or assessment against planning policies, or they may disagree with the weight I have given to the benefits of the scheme. However, they must set out this out clearly and substantively, (with appropriate supporting evidence), in any reasons advanced for refusal, to justify their

decision and minimise the risk of costs, and must also ensure that this is tested against paragraph 11 (d) of the NPPF in the absence of a five year housing supply.

- 5.07 Alternatively, if the Planning Committee determines that it would not have refused planning permission, then the Council would offer no grounds to defend the appeal. This would also minimise the risk of an adverse award of costs.

6.0 Conclusion

- 6.01 Having considered the planning balance, my recommendation for this application was to grant planning permission, subject to the conditions as listed in the June committee report and completion of a S.106 agreement. The introduction of the housing delivery test since then means that the policies which are most important for determining the application are out-of-date, and the case in favour of granting permission has become stronger.
- 6.02 However if the Planning Committee considers that there are clear planning reasons why this application should have been refused, in that the adverse impacts would significantly and demonstrably outweigh the benefits, then these would form the putative reasons for refusal for the purposes of the appeal.

