



Appeal Decision

Site visit made on 9 May 2016

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

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

Decision date: 27th May 2016

Appeal Ref: APP/V2255/W/15/3139546
Land adjoining Driftwood, Imperial Drive, Warden Bay, Leysdown-on-Sea, Sheerness, Kent ME12 4SE.

- 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 Marlo Homes Ltd against the decision of Swale Borough Council.
 - The application Ref 15/500819/FULL, dated 23 January 2015, was refused by notice dated 21 October 2015.
 - The development proposed is a pair of semi-detached 2 bedroom houses together with a stepped terrace providing 3 no 3 bedroom houses together with all associated parking spaces.
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Decision

1. The appeal is allowed and planning permission is granted for a pair of semi-detached 2 bedroom houses together with a stepped terrace providing 3 no 3 bedroom houses together with all associated parking spaces at land adjoining Driftwood, Imperial Drive, Warden Bay, Leysdown-on-Sea, Sheerness, Kent ME12 4SE in accordance with the terms of the application, Ref 15/500819/FULL, dated 23 January 2015, subject to the conditions set out in the schedule to this condition.

Application for costs

2. An application for costs was made by Marlo Homes Ltd against Swale Borough Council. This application is the subject of a separate decision.

Main Issues

3. The main issues are the effect of the development on, firstly the character and appearance of the area and, secondly, the living conditions of neighbouring occupants with particular regards to overlooking.

Reasons

Character and appearance

4. The appeal site comprises a vacant plot of sloping land on the north side of Imperial Drive. It is located within the built-up area of Warden and is enclosed by residential development on three sides. The site is currently unfenced and covered in a thick brush. The site has a history of residential planning approvals and therefore the Council accepts that the principle of development is acceptable.

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5. The surrounding area comprises residential properties, with considerable variety in style, form, density and materials which is not in architectural terms particularly notable or sensitive. The Council's concern with the appeal scheme primarily relates to the terrace of three houses, the orientation of which it is argued, would disrupt the established settlement pattern in the area.
6. Whilst I accept, that dwellings in the immediate vicinity tend to face towards roads, I do not find this to a particularly strong characteristic of the wider area. The Seasalter Close development to the south contains examples of short terraces set at right-angles to the road. Whilst the development would undoubtedly change the appearance of the site, given the diversity of building styles in the area, this would not cause unacceptable harm.
7. Due to topography, the terrace would be set higher than the pair of semi-detached dwellings fronting Imperial Drive. However I do not find anything objectionable in this regard since the terrace would still be set well below dwellings to the north of the site which front onto Sea Approach.
8. I therefore conclude that the proposal would not harm the character and appearance of the area and would thereby accord with Policies E1 and E19 of the *Swale Borough Local Plan 2008* (the LP) which collectively require development to be of a high quality and appropriate in terms of scale, design and appearance to its surroundings.

Living conditions

9. Whilst the appellant has cited separation distances from the former *Kent Design Guide*, I have not been provided with a copy of this document and in any case it appears to have been superseded by the *Kent Design Guide 2005* (KDG). Although the KDG does not contain specific guidance on separation or privacy distances it does advocate a flexible approach to such matters provided developers put forward a good case. I requested a copy of the KDG for completeness and the Council has confirmed that it was adopted as Supplementary Planning Guidance in 2008. I attach full weight to it accordingly.
10. There would be more than adequate separation between plot 5 and those properties to the north known as The Digley, Woodstock and Seacrest. Moreover, plots 3-5 would be positioned broadside to these properties at a lower level. Finally, the only northwards facing windows to plot 5 would be fitted with obscure glass. Consequently there would be no significant loss of privacy to these occupiers.
11. On my site visit I viewed the appeal site from the rear ground floor window of the partially constructed dwelling to the rear of Seacrest referred to locally as White Caps. Although closer to the site than the aforementioned properties, it is pertinent that, according to the appellant's plan, White Caps would be sited closer to Seacrest than plot 5. It is unclear from the information before me why the Council considers the relationship between plot 5 and White Caps to be unacceptable when it has evidently approved a similar if not more intimate relationship in respect of Seacrest and White Caps. Irrespective of any inconsistency, as I have already noted, the topography is such that plot 5 would be set well below White Caps and the bulk of the dwelling would be offset from it. Additionally, there would be no habitable room windows facing north.

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12. The Council argue that views into the private amenity space of White Caps would be possible from the windows in the front elevation of plot 5. Whilst this might be theoretically possible, White Caps and most of its curtilage would be outside a 45 degree splay line drawn from the front bedroom window of plot 5 and thus only oblique views would be possible. In the event I am minded to allow the appeal a planning condition could be imposed to ensure no new openings are created in the northern elevation. On this basis, I am satisfied that the proposal would not impinge unacceptably on the living conditions of the future occupiers of White Caps.
13. Whilst I accept that there would be a change in outlook from those properties to the north of the appeal site, the topography and intervening distances would be sufficient to ensure that occupiers would not be subjected to unreasonable levels of enclosure or overbearing elements in their rearward views.
14. The first-floor bedroom windows in the rear elevation of plots 3-5 would be sited approximately 10 metres from the boundary with Driftwood to the west which is currently demarked by a line of mature vegetation. As the plan submitted by the appellant demonstrates, the sitting out area to Driftwood is some 22 metres from the rears of plots 3-5. Consequently, I find little evidence to support the view that the development would result in an unaccepted loss of privacy or overshadowing to the occupiers of Driftwood.
15. The Council's refusal reasoning clearly states that the development would result in harmful overlooking to the occupiers of adjacent dwellings (my emphasis). Despite this, the Council allege that the distance between windows in the rear elevation of plots 1 & 2 would overlook the gardens of plots 3, 4 and 5. In my view the distances between the plots would be within the range of what might be expected within new developments and not greatly different to that found elsewhere in the vicinity. It is also pertinent, that future occupiers of the development would be aware of the proximity of other dwellings when deciding whether to purchase. In these circumstances a more flexible approach is justified.
16. A degree of overlooking is almost inevitable in built-up areas. However, based on the evidence before me and taking account of site specific circumstances and the 'flexible approach' set out in the KDG, I conclude that there would be no unacceptable effect on the living conditions of neighbouring occupiers with particular regards to overlooking. Accordingly there would be no conflict with Policies E1 and E19 of the LP which seek to ensure development does not harm residential amenity.

Other Matters

17. The Council and local residents have referred to the loss of views and property values. However, the Planning Practice Guidance (PPG) is clear that planning operates in the public interest and not the protection of purely private interests. Consequently, these are not material considerations to which I can attach any significant weight.
18. The effect of the development on highway safety has also been raised by local residents. However, the Highway Authority has not objected to the development either in terms of safety of the access or parking provision. Whilst there was not an evident parking problem at the time of my mid-morning site visit, it is not unreasonable to assume that on-street parking can

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cause problems particularly in the busier summer months. Whilst on-street parking can be an inconvenience to local residents there is nothing before me to suggest there is a specific highway safety problem in the area. In any event, off-street parking would be provided to the required standard and therefore I have no reason to conclude that the development would have a significant adverse effect on highway safety.

19. Finally, noise and disturbance from the activities of future occupiers have been raised by local residents. However, this is a residential area and a certain amount of noise is therefore inevitable. There is nothing before me to suggest that future residents of the proposed development would generate unacceptable levels of noise.

Conditions

20. The Council has suggested a number of planning conditions which I have considered against the advice in the Planning Practice Guidance (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.
21. As well as the standard time limit condition, I have imposed a condition specifying the relevant drawings as this provides certainty. Those conditions suggested by the Council relating to external materials and landscaping are necessary to ensure the appearance of the building is compatible with its surroundings.
22. I do not consider a condition requiring the parking space to be reserved for parking at all times and the restriction of development in this area is necessary as this is captured by the approved plans condition. I have however imposed a condition to ensure the parking spaces are provided prior to first occupation to ensure the development does not exacerbate existing parking problems in the area. Restrictions on working hours during the construction period are required in the interests of residential amenity. I have amended the condition restricting new window openings to the side elevation of plot 5 to protect the privacy of occupiers to the north of the appeal site. A condition requiring a programme of archaeological works is necessary to safeguard any archaeological assets which may be present. Finally, I have imposed a condition to ensure measures are taken to prevent mud being deposited in the carriageway.
23. 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. I am not persuaded that the development would be unacceptable without such a condition and consequently the six tests set out in the Framework are not met.
24. The size of the dwellings and gardens would not preclude the storage of cycles and therefore a separate condition is unnecessary. No visibility splays are shown on the approved plans and as such, I am content that these would be secured by the plans condition.

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25. Paragraph 200 of the Framework states that planning conditions should not be used to restrict national permitted development rights unless there is clear justification for doing so. Similarly, the PPG advises that conditions restricting the future use of permitted development rights "*will rarely pass the test of necessity and should only be used in exceptional circumstances*". On the evidence before me, I am not persuaded that the Council has demonstrated that such circumstance apply in this instance. I have therefore omitted this condition accordingly.

Conclusion

26. For the reasons given above and having regard to all other matters raised, I consider 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 three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 12-57, 12-57-01, 12-57-02, 12-57-03, 12-57-05 and 12-57-06.
- 3) No development shall take place until details of the materials to be used in the construction of the external surfaces of the building 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) No development shall take place until a scheme of landscaping works has been submitted to and approved in writing by the local planning authority and these works shall be carried out as approved. 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 access, parking and turning areas shown on the approved plan shall be provided prior to first occupation of any dwelling and shall thereafter be retained.
- 6) Demolition or construction works shall not take place outside 08:00 hours to 18:00 hours Mondays to Fridays and 08:00hours to 13:00 hours on Saturdays nor at any time on Sundays or Bank Holidays.
- 7) No window shall be formed in the north elevation including roofslope of plot 5 without the prior written approval of the Local Planning Authority.
- 8) No development shall take place within the area edged in red on the approved location plan until a programme of archaeological work has been implemented in accordance with a written scheme of investigation which has been submitted to and approved in writing by the local planning authority.
- 9) Adequate precautions shall be taken during the period of demolition and construction to prevent the deposit of mud and/or other debris on the public highway.



Costs Decision

Site visit made on 9 May 2016

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

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

Decision date: 27th May 2016

**Costs application in relation to Appeal Ref: APP/V2255/W/15/3139546
Land adjoining Driftwood, Imperial Drive, Warden Bay, Leysdown-on-Sea,
Sheerness, Kent ME12 4SE.**

- 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 Marlo Homes Ltd for a full award of costs against Swale Borough Council.
 - The appeal was against the refusal of planning permission for a pair of semi-detached 2 bedroom houses together with a stepped terrace providing 3 no 3 bedroom houses together with all associated parking spaces.
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Decision

1. The application is allowed for a partial award of costs is in the terms set out below.

Reasons

2. The *Planning Practice Guidance* (PPG) advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.
 3. The PPG also advises that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing planning applications, or by unreasonably defending appeals. Examples of this include: a failure to produce evidence to substantiate each reason for refusal on appeal, the use of vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
 4. The appellants' claim is made on substantive grounds and asserts that the Council failed to base their decision on a proper objective analysis of the circumstances of the case.
 5. The application was refused by Members of the Council's Planning Committee contrary to the advice of its professional officers. Although the Council is perfectly entitled to disagree with the recommendations of its officers, there is a reasonable expectation that should this occur, it should have good reason, based on sound, substantive and defensible planning grounds.
 6. I recognise that the consideration of planning applications often involves matters of judgement which at times are finely balanced. In this appeal the
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representations of local residents on this proposal emphasise the concerns regarding the effect on the character and appearance of the area and living conditions. It was not, in my opinion, therefore unreasonable for the Local Planning Authority, where the issues are balanced, to give substantial weight to objections received from the Parish Council and local residents rather than to the recommendations of its officers to grant planning permission. I also note that prior to making their decision, the Committee visited the site in order to be able to assess the effects more fully.

7. As regards the Council's first reason for refusal, this involves a matter of judgement concerning the character and appearance of the area. In such cases an award of costs will rarely be justified provided that realistic and specific evidence is provided about the consequences of the proposed development. In this regard, I am satisfied that the Council provided appropriate evidence in its reason for refusal and written statement, which contained an assessment of the settlement pattern in the area local as well as the impact of the development upon it. Although I have found in the appellant's favour on the substantive merits, this does not make the Council's position unreasonable in respect of the first reason for refusal.
8. I am less satisfied however with the Council's evidence in relation to the second reason for refusal. The Planning Officer's Report to Committee contained a thorough assessment which concluded that *'the proposed dwellings would be located a sufficient distance from adjacent dwellings, and be oriented in such a way that they would not give rise to significant overlooking nor overshadowing'*. For the reasons detailed in my decision, I concur with that view.
9. Whilst I appreciate the Officer's Report did not specifically cover the relationship between White Gaps and the development, it is apparent from the Committee Minutes that this was discussed at the meeting itself. In this regard the Minutes show that the Committee was advised *'that due to the angle between the dwellings, overlooking was unlikely to occur'*. Members having visited the site should also have been aware of the difference in levels between the site and adjacent properties.
10. There is nothing of any substance in either the Minutes or the Council's Appeal Statement which demonstrates how the development would give rise to unacceptable harm to adjacent occupiers. It therefore seems to me that the second reason for refusal relies heavily on the extent of local opposition without the support of objective appraisal and substantial evidence.
11. Overall, I find that unreasonable behaviour has not been demonstrated in relation to the Council's first reason for refusal, relating to the character and appearance of the area. However I have found that the Council's second reason for refusal was unreasonable and relies on inaccurate assertions about the proposal's impact, which are unsupported by objective analysis or substantial evidence.
12. Based on the foregoing, the appellant has had to undertake this aspect of the work for the appeal which it should not have been reasonably necessary to do. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in the PPG, has been demonstrated. Given my findings, a partial award of costs is justified and to this extent, the application succeeds.

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Costs Order

13. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Swale Borough Council shall pay to Marlo Homes Ltd the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in relation to dealing with living conditions.
14. The appellant is now invited to submit to Swale Borough Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

D. M. Young

Inspector