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## Appeal Decision

Inquiry held on 17 and 18 October 2017

Site visit made on 17 October 2017

by **Helen Hockenhull BA(Hons) B.PI MRTPI**

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

Decision date: **23 November 2017**

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**Appeal Ref: APP/V2255/W/17/3170533**

**Land at Swale Way, East Hall Farm, East Hall Lane, Sittingbourne, Kent, ME10 3TJ**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
  - The appeal is made by Trenport Investments Limited against Swale Borough Council.
  - The application Ref 16/505280/OUT is dated 20 June 2016.
  - The development proposed is residential development (up to 33 dwellings) and open space; including associated access (vehicular, cycle and pedestrian), alterations to levels, surface water attenuation features (including swales), landscaping and related development.
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### Decision

1. The appeal is allowed and planning permission is granted for residential development (up to 33 dwellings) and open space; including associated access (vehicular, cycle and pedestrian), alterations to levels, surface water attenuation features (including swales), landscaping and related development on land at Swale Way, East Hall Farm, East Hall Lane, Sittingbourne, Kent ME10 3TJ in accordance with the terms of the application, Ref 16/505280/OUT, dated 20 June 2016, subject to the conditions in the attached Schedule.

### Application for costs

2. At the Inquiry an application for costs was made by both the appellant and the Council. These applications are the subject of separate Decisions.

### Procedural Matters

3. The appeal was made because of the Council's failure to determine the planning application within the prescribed period. The Council has advised that if it had determined the application they would have refused it on the grounds that the proposed development fails to make any contribution towards the provision of a Neighbourhood Centre use, specifically a convenience shop, to the detriment of the social well-being of the residents of Great Easthall estate and that the applicant has failed to adequately demonstrate that the provision of a convenience shop is not a viable proposition for the application site. The development would therefore be contrary to Policies C1 and SP1 of the adopted Local Plan 2008 and the Great Easthall Development Brief Review 2009. It would also conflict with paragraphs 7, 14, 69, and 70 of the National Planning

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Policy Framework (the Framework) and Policies CP5 and CP6 of the emerging Bearing Fruits 2031: Swale Borough Council Local Plan.

4. Since the commencement of the appeal process, the Bearing Fruits 2031 Local Plan was adopted on 26 July 2017, superseding the 2008 Local Plan. I therefore consider the proposed development against the policies in the newly adopted Local Plan.
5. After the submission of the Proofs of Evidence from both main parties, and following further advice from their retail consultants, the Council agreed at a meeting of the Planning Committee on 12 October 2017 that it would not defend its case at this appeal. I have therefore determined the appeal on the basis of the appellant's evidence and that of interested parties.
6. The appeal proposal is in outline with all matters reserved for later approval except for the matter of access. It was confirmed that the submitted parameters plan is for indicative purposes only and I have considered it accordingly.
7. A signed and completed planning obligation by way of an agreement made under section 106 of the Town and Country Planning Act 1990 (s106) was submitted at the Inquiry. The obligation related to the provision of affordable housing, financial contributions towards primary and secondary education, library facilities, healthcare, refuse and recycling facilities, the maintenance of open space and the Thames, Medway and Swale Estuaries Strategic Access Management and Monitoring Strategy.
8. The Inquiry sat over 2 days, 17 and 18 October 2017. I undertook an unaccompanied site visit before the start of the Inquiry and a further unaccompanied visit on 17 October when I viewed the site and walked to the nearest local convenience store in Murston. As requested by interested parties, I also visited The Meads residential estate in Sittingbourne to view the local centre.

#### **Main Issues**

9. Accordingly in light of all that I have read and heard, I consider that the main issues in this case are as follows:
  - whether the development of the site as a neighbourhood centre as envisaged in the Great Easthall Development Brief Review Oct 2009, specifically a convenience shop, would be a commercially viable proposition;
  - the effect of the proposal on the social well-being of the local community and the promotion of sustainable travel choices in line with national and local planning policies.

#### **Reasons**

##### *Policy Context*

10. The appeal site forms an area of vacant land of approximately 1.4 hectares located near the entrance to the Great Easthall residential estate. In the now superseded Swale Borough Local Plan 2008, the site was included in a Proposed Housing Site allocation. In the new Bearing Fruits 2031 Local Plan the site is unallocated, though lies within the built up area boundary of

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Sittingbourne. Local Plan Policy ST3 outlines the Swale Settlement Strategy with Sittingbourne being the primary urban focus for growth. The Policy permits development on previously developed land in the defined built up area boundaries and on sites allocated by the Local Plan. I am advised by the appellant that the appeal site is partly previously developed, the western part of the site formerly occupied by a dwelling, now demolished as part of the wider residential development.

11. As the appeal site is now unallocated, the appellant has put forward two potential approaches in terms of the decision making framework in this case. Either the development is considered to accord with the development plan, in particular the settlement strategy in Policy ST3 or alternatively, the development plan could be considered to be 'silent', as it provides no policy guidance for an unallocated site. However it seems to me that the Local Plan is not 'silent' in providing policy guidance for development in the urban area, that is the role of Policy ST3. Bearing in mind the sites context as part of the Great Easthall residential development, and the fact that it is partly previously developed, I consider the principle of development would accord with the overall settlement strategy of the development plan.
12. Policies CP5 and CP6 of the Local Plan are referenced in the Council's suggested reason for refusal. Policy CP5 relates to Health and Wellbeing and states the intention to bring forward accessible new community services and facilities, including health facilities and to safeguard existing community services and facilities where they are viable or can be made so. Policy CP6 states that the Council will work with developers and other public agencies to identify deficiencies in infrastructure and that development proposals will deliver timely infrastructure and safeguard existing community facilities and services again where they are viable or can be made so. Neither of the above policies or their supporting text refers to retail uses, though these uses are not expressly excluded. That being said in broad terms I consider that a retail use, specifically a convenience store, can provide a form of infrastructure contributing to the social well-being of a community. I shall conclude further on these policies when I have considered the issue of viability.
13. A further relevant material consideration in this case is the East Hall Farm Development Brief adopted in 2003 and reviewed in 2009 which sets out the overall framework for the future development of the Great Easthall estate. The original Brief allocated the majority of the appeal site for residential uses with shops to be provided at the southern edge of the site. Other community uses were to be provided to the south of the appeal site on the other side of the access road. The 2009 Review document however allocated the whole of the appeal site together with the land to the south for neighbourhood centre uses including a community hall (now completed) and a medical centre which I am advised is no longer going to be constructed. I am also informed that the primary school proposed is also not going to be pursued by the Education Authority, and the site reserved for this use now has planning permission for residential development.
14. The appellant has argued that the weight to be afforded to these briefs is affected by their age and the fact that, as explained above, neither the school nor medical centre are now taking place. Whilst I acknowledge this to be the case, I consider they remain material as they provide a vision and guidance for the development of the estate as a whole.

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### *Viability*

15. Since the preparation of the Development Brief for the Great Easthall estate in 2003 and the Review in 2009, there has been significant change in the retail sector. The recession has affected economic confidence, structural change has taken place with fewer large stores being built, and the increased use of the internet has altered the way people shop.
16. The appellant provided an assessment of the Viability of a Neighbourhood Centre as part of the consideration of the planning application. This document primarily gave consideration to the viability of a neighbourhood centre, with an anchor foodstore and supporting retail units, though it also made reference to the viability of a neighbourhood convenience store.
17. There are a number of factors which would affect the viability of a convenience store on the site. Whilst I acknowledge that the site is located at the entrance to the Great Easthall estate and would therefore be passed by residents as they enter or leave the residential area, I note that the estate is effectively located at the end of a cul de sac. This position would be rectified by the delivery of the Sittingbourne Northern Relief Road which would extend Swale Way to the A2. However the implementation of this road is uncertain. Whilst land for this purpose is safeguarded in the Local Plan, no funding for the scheme is currently identified. In these circumstances, the location of the site reduces the availability of passing trade.
18. The appellant's retail witness Mr Alsop advised at the Inquiry that in his experience the larger grocery retailers normally required a catchment of around 20-25,000 people to support a convenience store. In relation to the appeal site, the submitted Viability Assessment identifies an 800 metre catchment area, this distance being considered to be the maximum walking distance for residents. A population of just over 5,700 people is identified. The appellant confirmed that this figure takes account of the likely increased population from the currently undeveloped parts of the estate.
19. As the appeal site lies near the edge of the residential area, a significant part of the potential 800 metre catchment area encompasses the proposed employment area of Eurolink V to the east and the existing employment area to the north. This means that there is a lower resident population to support a convenience store than would be the case if the surrounding catchment was predominantly in residential use. Whilst I accept that employees in the employment areas may make use of a local convenience shop particularly at lunchtime, I have been presented with no evidence of how much expenditure this would bring. Whilst clearly there would be some, I have taken account of the fact that many employees may bring what they require from home and spend in their local areas. In any event there is always a potential risk that businesses may close so that this expenditure cannot be assured in the long term.
20. The submitted Viability Assessment also estimates convenience expenditure in the Great Easthall catchment<sup>1</sup> up to 2021. The analysis suggests a very slight increase in 'Top Up' spend, expenditure that would normally be associated with a small convenience store, of £77,000 over this period. As the projected

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<sup>1</sup> Great Easthall Assessment of Viability of Proposed Neighbourhood Centre, June 2016, Table 4 Page 41

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increase in expenditure is low, I consider that it would be unlikely to encourage a retail investment.

21. A further consideration is that the catchment area would overlap with that of the existing food store in Murston. There would therefore be competition for convenience goods spend. The Murston store is close to the primary school so that residents may well find it more convenient to shop there when they are dropping off and picking up children. It may also be equal or closer in walking distance for some residents living at the western edge of the estate. This would form a further factor affecting the potential viability.
22. I have had regard to the eight case studies of neighbourhood centre developments provided by the appellant. These relate to different scales of residential development, with different locations and contexts. The example in Abbotswood, Romsey is of a similar size to the Great Easthall estate, around 900 homes. However it is more accessible, located at a crossroads with good connectivity to both Romsey and surrounding villages. Whilst these other case studies are not completely comparable to the appeal site, and it is difficult to draw clear conclusions from them, they give an indication of the factors that a retail developer would consider before deciding to invest, namely good accessibility and the potential catchment area.
23. It is an accepted approach with regard to the assessment of site viability, that a marketing exercise should be undertaken to assess the likely interest for the use proposed. In the appeal case, it is significant that a neighbourhood centre on the appeal site was granted reserved matters permission in 2007. The developer at the time tried over a period of around 9 years to gain interest in the scheme but was unsuccessful and in 2015 went into liquidation.
24. The site was marketed in preparation for an auction in December 2015. The marketing information advertised the site as a commercial opportunity with a lapsed neighbourhood centre permission. Reference was made however to the fact that subject to planning permission, the site could be suitable for alternative residential or commercial development. I am advised that, apart from the appellant, there was little interest in the site at the auction.
25. There was some discussion at the Inquiry with regard to whether the site was marketed as a neighbourhood centre rather than as an opportunity for a stand-alone convenience store. However it appears to me that the marketing information recognised the potential for a range of opportunities for the site and was not exclusively for a neighbourhood centre proposal.
26. I have also paid particular regard to the outcome of the appellant's approaches to a number of retail operators to gauge their potential interest in the site. One of the larger grocery operators stated that they were not looking to open any new stores. Others provided feedback that they were not interested because of the sites location on the edge of the town, the demographics and the lack of custom in the catchment area, the sites cul de sac location and lack of proximity to an arterial road reducing the possibility of passing trade.
27. Unfortunately no response was received from smaller convenience store retailers. Interested parties have questioned whether this indicates a lack of interest or not. However the site has been ear marked for a neighbourhood centre with a convenience store for over 10 years. Retail operators would have

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been aware of the opportunity and I consider that if they had been interested they would have made an approach to the landowner at some stage.

28. No evidence has been provided with regard to independent retailers, though I accept this would be more difficult to achieve. The appellant brought my attention to the Association of Convenience Stores Local Shop Report 2017<sup>2</sup>. This indicates that 74% of convenience stores are run by independent retailers and nearly the same percentage are funding investment from their own reserves. I consider that such level of personal investment would be more likely where there is a clearly viable opportunity with the lowest level of risk.
29. The Local Shop Report also records the rise in Community Shops over the last 10 years. This option was suggested by the Council as a possible way forward, provided through an extension to the new community hall, funded by a financial contribution from the appellant. However I understand that this is no longer a viable option due to a covenant on the land preventing retail use which the landowner has refused to remove. In any event I am aware of a lack of community support for this proposal.
30. Interested parties suggested at the Inquiry that, if a small convenience store were to be built, an operator may come forward later. The store could even be designed so that if the opportunity was not taken up, then it could revert back to a residential dwelling. There would clearly be a level of risk for the appellant if this option were to be taken up, bearing in mind the current evidence of viability. In any case it is not my role to consider alternative proposals; rather I have to determine the acceptability of the scheme before me.
31. I acknowledge the communities desire to have more facilities in particular a local convenience store; however such a facility must be viable in order to succeed. The need for viability was clearly recognised in the Development Brief for the estate. I consider it is significant that the originally envisaged health centre and primary school to serve the community at Great Easthall are no longer taking place. Their presence would have contributed to the viability of a retail use.
32. In conclusion, taking account of all the above factors, I am satisfied having regard to the evidence in this case, that a neighbourhood centre use, in particular a local convenience store, would be unviable on this site.
33. Turning to Policies CP5 and CP6 of the Local Plan, whilst they both aim to provide community facilities and infrastructure, they recognise the need for such provision to be viable. Accordingly I conclude that the appeal scheme would not conflict with these policies.

*Social well-being and sustainable transport*

34. The Framework in Section 8 looks at promoting healthy communities. The document advises that planning policies and decisions should aim to achieve places which promote the opportunities for meetings between members of the community including through the provision of strong neighbourhood centres. Policies and decisions should also plan positively for the provision of community facilities such as local shops<sup>3</sup>. Whilst the community hall that has recently been completed provides a place for social interaction for the local community,

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<sup>2</sup> Sophie Lee CBRE Proof of Evidence Appendix 2

<sup>3</sup> NPPF paragraphs 69 and 70



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I acknowledge that a local convenience store would contribute to the establishment of a focal point and a sense of community.

35. However I must also have regard to paragraph 173 of the Framework which advises that in pursuing sustainable development careful attention should be given to viability and costs. Whilst further facilities for the community of Great Easthall would accord with the vision of the Development Brief they must be shown to be viable.
36. The putative reason for refusal argues that the development of the site for housing would lead to residents being more likely to travel by car to meet their day to day shopping needs to the detriment of promoting sustainable forms of travel. It appears to me that there are two issues here, firstly the accessibility to local facilities of the appeal site for future residents and secondly, if a convenience store is not built on the site, the impact that this would have on promoting sustainable means of travel for existing residents.
37. On my site visit I walked to the closest small convenience store in Murston, approximately one kilometre away. There are a number of possible pedestrian routes through the estate. My walk took approximately 12 minutes taking one route and around 13 minutes on the return journey taking a different route. I noted that whilst all routes were lit, the quality of the surface differed. Some routes may be less suitable for pushchairs or wheelchair users; however a number of alternatives would be available. Many of the pedestrian routes also provide off road cycle routes.
38. The appellant's Viability Assessment considered that a reasonable maximum walking distance for shopping was around 800 metres, about 10 minutes' walk. This figure is taken from the Department of Transport publication Manual for Streets.<sup>4</sup> The document also advises however that this distance is not an upper limit. Whilst the convenience store in Murston is at a slightly greater distance from the appeal site at around a kilometre, I consider that this is still a walkable distance for most residents.
39. There is a bus stop located on the site frontage on Great Easthall Way providing a half hourly service to Sittingbourne. This service runs through the Great Easthall estate and stops at the convenience store in Murston, with a travel time of around 5 minutes. I note that the bus service does not operate late in the evening or on Sundays. However it does provide a reasonable service for those who wish to undertake shopping trips during the week and on Saturdays.
40. In light of the above I consider that the appeal site is in an accessible location and provides a choice of travel options by walking, cycling and public transport.
41. I now turn to the matter of whether residents would be more likely to travel by car to meet their day to day shopping needs to the detriment of sustainable means of travel. I accept that the development of the site for a convenience store would have provided a more convenient shopping option for some residents encouraging them to walk or cycle instead of using the car. However I have already found that the site is in an accessible location and the residential estate as a whole has good off road pedestrian and cycle routes together with public transport providing a choice of alternative transport means

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<sup>4</sup> Manual for Streets Page 45 Paragraph 4.4.1

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to the car. Furthermore, as a convenience store does not currently exist on the site, the appeal proposal for up to 33 dwellings would have no effect on existing travel patterns.

42. Overall therefore, I conclude that the proposed development would not result in residents being more likely to travel by car and that the proposal would not conflict with the social and environmental objectives of sustainability.

#### **Other Matters**

43. Local residents have also expressed concern with regard to highway matters and the need for further local infrastructure such as schools and a health centre to serve additional residents.
44. Turning firstly to highway matters, the submitted Transport Statement considers the level of traffic that would have been generated by a neighbourhood centre compared to that of the proposed residential scheme. In so doing a significant allowance for linked trips is made. The conclusion is that the appeal proposal would generate an additional 25 two way movements in the morning peak and 32 in the evening peak. These net increases are small and would have little impact on the local highway network. The Highway Authority has raised no objection to the scheme and I am satisfied that a safe and suitable access can be provided to the site. I note that residents have expressed concern about existing on street car parking on the estate. I have no evidence before me to suggest that the submitted scheme would not provide adequate off road car parking for the proposed dwellings in line with the Council's guidance and standards.
45. With regard to the provision of a primary school and medical centre at Great Easthall, I have sympathy for resident's frustration that these have not been provided in line with the Development Brief. Such decisions have been made by the respective service providers. In order to mitigate the impact of additional residents should the appeal scheme proceed, financial contributions to support existing education and health facilities serving the estate are included in the section 106 agreement. I consider that the scheme would therefore be acceptable in this regard.
46. It is common ground between the parties that the Council can demonstrate a 5 year supply of deliverable housing land and therefore the relevant policies for the supply of housing are up to date<sup>5</sup>. The dwellings provided by the scheme would assist to boost the supply of housing in the borough in line with paragraph 47 of the Framework and contribute to delivering a wide choice of quality homes. It is proposed that four affordable dwellings would be provided as part of the development, meeting the Council's 10% policy requirement, which would contribute to the current shortfall in the borough.

#### **Planning Balance**

47. Paragraph 14 of the Framework states a presumption in favour of sustainable development which for decision taking means approving development proposals that accord with the development plan without delay and where the development plan is absent, silent or relevant policies are out of date, granting permission unless any adverse impacts of doing so would significantly or

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<sup>5</sup> NPPF paragraph 49.



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demonstrably outweigh the benefits, when assessed against the policies in the Framework when taken as a whole (the tilted balance).

48. In this case I have found that the development would accord with the overall settlement strategy of the development plan set out in Policy ST3. Furthermore I consider there is no conflict with Local Plan policies CP5 and CP6. Therefore the proposal would comply with the development plan and should be permitted unless there are any other material considerations which indicate otherwise<sup>6</sup>.
49. I empathise with the communities wish to see more facilities on Great Easthall estate, in particular a convenience store, as originally planned in the 2003 and 2009 (Review) Development Briefs. I acknowledge that such provision would to an extent promote the social well-being of the community. However the Briefs recognise that retail uses (and other uses) need to be commercially viable. Based on the evidence before me I have found that this would not be the case. Accordingly I find no conflict with these documents.
50. There are no environmental matters such as landscape, ecology, flooding, drainage, noise or air quality which weigh against the scheme. Furthermore I have found that the development would provide a safe and suitable access and that the site is in an accessible location. The development would also contribute to the supply of housing in the borough and provide a small number of affordable homes.
51. As I have identified no other material considerations which would indicate that the development should not be approved in accordance with the development plan, I conclude that the appeal should be allowed.
52. In light of the above it is not necessary for me to comment on the further considerations outlined in paragraph 14 of the Framework.

#### **Planning Obligation**

53. The s106 obligation secures the provision of affordable housing and financial contributions towards primary and secondary education, library facilities, healthcare, refuse and recycling facilities, the maintenance of open space and the Thames, Medway and Swale Estuaries Strategic Access Management and Monitoring Strategy.
54. The Council has provided a schedule setting out justification for each of the contributions sought in accordance with the policy tests set out in the Framework and the statutory test in regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010.
55. The provision of affordable housing is required to meet the requirements of Local Plan Policy DM8. Kent County Council has provided justification for the education contribution and has identified the recipient schemes at Murston Primary School and Westlands Secondary School. Similar justification has been provided for the library contribution to fund further book stocks for additional borrowers. These contributions are supported by Local Plan Policy CP6.
56. The contribution towards health care provision is needed to mitigate the additional pressure on local doctor's surgeries, in particular the Chestnut

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<sup>6</sup> S 38 (6) of the Planning and Compulsory Purchase Act 1990.

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Practice, as a result of an increase in patients. It is also necessary to meet the requirements of Local Plan Policies CP5 and CP6. The obligation on the developer to provide refuse and recycling facilities for the proposed dwellings is also necessary to ensure adequate provision is put in place in line with Local Plan Policy CP6 and the Council's Developer Contributions Supplementary Planning Document 2009.

57. With regard to open space the s106 agreement makes provision for either the management of on-site open space to be undertaken by the Council or alternatively by a Management Company. In the event that the Council is to take on this responsibility a financial contribution is required. This is supported by Local Plan Policy DM17.
58. I consider that the above contributions to education, libraries, health care, refuse and recycling and the maintenance of open space are directly related to the development, necessary to make the proposal acceptable in planning terms and reasonably related in scale and kind to the housing proposed. The Council's schedule also provides evidence that the number of contributions in relation to each of the above matters does not exceed four. I am satisfied that the above contributions meet the requirements of regulation 123 of the CIL Regulations. They therefore meet the statutory and policy tests and I have taken them into account in my decision.
59. Finally the s106 includes an obligation to contribute towards the Thames, Medway and Swale Estuaries Strategic Access Management and Monitoring Strategy. At the Inquiry the Council explained that this contribution would be used to fund the maintenance of the Special Protection Area (SPA), a matter which would not involve the provision of infrastructure as defined under regulation 123 of the CIL Regulations. Accordingly the pooling restrictions of regulation 123 would not apply. I find this contribution to be necessary in order to mitigate the potential effects of the proposal upon the SPA and to meet the policy test of paragraph 204 of the Framework. I therefore give weight to this in my decision.

#### Conditions

60. I have had regard to the draft conditions agreed by the Council and the appellant. These were discussed at the Inquiry. Where necessary I have amended the wording in the interests of consistency and precision.
61. Conditions 1 to 3 are the standard reserved matters conditions. Condition 4 defines the approved plans in particular the access proposals and the Development Parameters. These are necessary to ensure that a satisfactory access to the site is secured and that the development proceeds in accordance with an agreed broad framework for development.
62. Condition 5 is required to ensure that the reserved matters submission includes details in respect of levels having regard to the sloping nature of the site. In the interests of achieving good design and setting out broad principles for the scale of the development condition 6 is necessary.
63. In order to ensure a programme of archaeological investigation and recording Condition 7 is required. Conditions 8, 9, 10 and 11 are necessary to ensure that appropriate investigations with respect to on site contamination and gas emissions are undertaken and mitigation measures provided to safeguard the

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health of future residents. In the interests of preventing pollution and flooding and to ensure the site is appropriately drained, condition 12 is required.

64. Condition 13 requires the submission of a scheme of dust suppression whilst Conditions 14 and 15 control hours of working. These conditions are necessary to protect the living conditions of existing and future residents. In the interests of highway safety condition 16 is required to ensure the provision of car parking, loading/unloading facilities and manoeuvring space for construction vehicles. Condition 17 requires measures to be agreed to prevent the deposit of mud on the highway and is necessary to ensure highway safety and protect the environment.
65. Condition 18 requires the submission of details for the proposed estate roads and footways including verges, visibility splays, parking, gradients and drainage. I consider this to be necessary to ensure roads are constructed and laid out in a satisfactory manner. Condition 19 requires the submission of a further noise assessment to respond to the detailed layout submitted for approval at reserved matters stage. This is necessary in order to protect the living conditions of future residents.
66. The main parties also suggested a number of other conditions relating to hard and soft landscaping, external materials, measures to promote and encourage biodiversity, sustainable construction techniques including the provision of water conservation and recycling, renewable energy production and the provision of equipment to enable the provision of Broadband to the proposed dwellings. As the appeal scheme is in outline with all matters reserved with the exception of access, I do not consider that these conditions are necessary at this stage. I therefore do not impose them.

#### **Conclusion**

67. For the reasons given above and having regard to all other matters raised, I allow this appeal.

*Helen Hockenfull*

INSPECTOR



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**APPEARANCES**

**FOR THE LOCAL PLANNING AUTHORITY:**

Miss Megan Thomas of Counsel	Instructed by Swale Borough Council Legal Services Department
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She called

Mrs Emma Eisinger <sup>7</sup> BA (Hons) MRTPI	Senior Planning Officer Swale Borough Council
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**FOR THE APPELLANT:**

Mr Andrew Fraser-Urquhart of Queen’s Counsel

He called

Mr Malcolm Alsop BA (Hons) DipTP MRTPI FRGS	Director/Principal Alsop Verrill Planning
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Mr Richard Lewis MA(UD) BA MRTPI	Senior Associate Vincent and Goring
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**INTERESTED PERSONS:**

Trevor Grain	Resident
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Cllr Mike Baldock	Elected Member of the Council
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<sup>7</sup> Provided no oral evidence , appeared in regard to the planning obligation and conditions only

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DOCUMENTS SUBMITTED AT THE INQUIRY

1. Opening Statement on behalf of the appellant
2. Executed section 106 agreement dated 16 October 2017
3. Costs application with supporting emails submitted by the Council
4. Closing submissions of the appellant
5. Outline costs application from the appellant
6. The Council's response to the appellant's cost application

DOCUMENTS SUBMITTED AFTER THE INQUIRY

1. Amended list of conditions dated 19 October 2017.

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#### SCHEDULE OF CONDITIONS

- 1) Details of the appearance, landscaping, layout, and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.
- 2) Application for approval of the reserved matters shall be made to the local planning authority not later than 3 years from the date of this permission.
- 3) The development hereby permitted shall take place not later than 2 years from the date of approval of the last of the reserved matters to be approved.
- 4) The development hereby approved shall be carried out in accordance with the following approved drawings: Drawing No. ITL11359-SK-002 Rev A - Existing Roundabout Site Access Plan and Drawing No. 5127/006c - Development Parameters.
- 5) The details referred to in condition (1) shall include cross-sectional drawings through the site of the existing and proposed site levels. The development shall be completed strictly in accordance with the approved levels.
- 6) The layout for the reserved matters application pursuant to condition (1) shall include open space/open land and the connecting cycle/footway as shown within the application site on the Development Parameters plan 5127/006c. In addition, the maximum building height shall not exceed 3 storeys with maximum ridge height of 13 metres.
- 7) No demolition/development shall take place on areas not previously excavated for brickearth (as identified in green on the plan entitled "Figure 17" prepared by CgMs submitted on 18<sup>th</sup> November 2016 to accompany the document entitled - Cultural Heritage Desk Based Assessment (Cgms Consulting)) until a Written Scheme of Investigation shall have been submitted to and approved in writing by the local planning authority. The scheme shall include:
  - i) the programme and methodology of site investigation and recording;
  - ii) the programme for post investigation assessment;
  - iii) the provision to be made for analysis of the site investigation and recording;
  - iv) the provision to be made for publication and dissemination of the analysis and records of the site investigation;
  - v) the provision to be made for archive deposition of the analysis and records of the site investigation;
  - vi) the nomination of a competent person or persons/organization to undertake the works set out within the Written Scheme of Investigation.
- 8) If during development, contamination not previously identified is found to be present at the site, then no further development (unless otherwise agreed in writing with the local planning authority) shall be carried out until the developer has submitted and obtained written approval from the



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local planning authority of works to deal with this unsuspected contamination.

- 9) Upon completion of the works to remediate contaminated land under condition (8), and before any part or agreed phase of the development is occupied, a closure report shall be submitted to the local planning authority which shall include details of the remediation works undertaken, with quality assurance certificates to show that the works have been carried out in accordance with the approved methodology. Details of any post-remediation sampling and analysis to show the site has reached the required clean-up criteria shall be included in the closure report together with the necessary documentation detailing what waste materials have been removed from the site.
- 10) Prior to the commencement of development hereby approved, a detailed scheme for the investigation, recording and remediation of gas shall be submitted to the local planning authority for approval in writing. Such a scheme shall comprise:
  - i. a risk assessment including details of how on-site monitoring during the investigation took place. The investigation shall be carried out by a suitably qualified and accredited consultant/contractor in accordance with a methodology that complies with current best practice. The details of this consultant/contractor shall be provided.
  - ii. detailed proposals in line with current best practice for gas protection measures to be incorporated within the development.

The development shall be carried out in accordance with the approved details.

- 11) Prior to the first occupation of the dwellings hereby approved, a closure report to include full details of the gas protection works carried out at the site (as directed by condition 10), including relevant certification to demonstrate this, shall be submitted to the local planning authority for approval in writing.
- 12) Prior to the commencement of development hereby approved, full details of the method of disposal of foul and surface waters including discharge rates and attenuated volumes, shall be submitted to and approved in writing by the local planning authority. This shall include full details for the Sustainable Urban Drainage System and how it will be implemented, managed and maintained. The approved details shall be implemented before the first occupation of the development hereby permitted and managed and maintained in accordance with the approved details.
- 13) Prior to the commencement of development hereby approved, a programme for the suppression of dust during the construction of the development shall be submitted to and approved in writing by the local planning authority. The measures shall be employed throughout the period of construction.
- 14) No 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:-

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Monday to Friday 0730 – 1900 hours, Saturdays 0730 – 1300 hours unless in association with an emergency or with the prior written approval of the local planning authority.

- 15) No impact pile driving in connection with the construction of the development shall take place on the site on any Saturday, Sunday or Bank Holiday, nor any other day except between the following times:-  
Monday to Friday 0900 – 1700 hours unless with the written approval of the local planning authority.
- 16) During construction of the development space shall be provided on site, in a position previously approved in writing by the local planning authority to enable all employees and contractors vehicles to park, load and off load and turn within the site.
- 17) Measures that have first been approved in writing by the local planning authority shall be taken during the period of construction to prevent the deposit of mud and/or other debris on the public highway.
- 18) The proposed estate road, footways, footpaths, verges, junctions, street lighting, sewers, drains, retaining walls, service routes, surface water outfall, vehicle overhang margins, embankments, visibility splays, accesses, carriageway gradients, driveway gradients, car parking and street furniture, as appropriate, shall be constructed and laid out in accordance with details to be submitted and approved by the local planning authority in writing before their construction begins and in accordance with a schedule of house completions and/or an implementation programme for the approved works, also to be submitted to the local planning authority for approval in writing.
- 19) No development beyond the construction of foundations shall take place until a Noise Assessment, that specifically responds to the layout of the housing development pursuant to condition (1) above, and makes recommendations for appropriate mitigation measures, has been submitted to and approved in writing by the local planning authority. The approved measures shall be completed prior to the first occupation of the dwellings hereby approved and retained thereafter.



## Costs Decisions

Inquiry held on 17 and 18 October 2017

Site visit made on 18 October 2017

by **Helen Hockenhull BA(Hons) B.PI MRTPI**

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

**Decision date: 23 November 2017**

**Costs application in relation to Appeal Ref: APP/V2255/W/17/3170533  
Land at Swale Way, East Hall Farm, East Hall Lane, Sittingbourne, Kent  
ME10 3TJ**

### (Costs Application A)

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Trenport Investments Ltd for a full award of costs against Swale Borough Council.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of its decision within the prescribed period on an application for outline planning permission for residential development (up to 33 dwellings) and open space; including associated access (vehicular/cycle/pedestrian), alterations to levels, surface water attenuation features (including swales), landscaping and related development.

**Costs application in relation to Appeal Ref: APP/V2255/W/17/3170533  
Land at Swale Way, East Hall Farm, East Hall Lane, Sittingbourne, Kent  
ME10 3TJ**

### (Costs Application B)

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Swale Borough Council for a partial award of costs against Trenport Investments Limited.
- The inquiry was in connection with an appeal against the failure of the Council to issue a notice of its decision within the prescribed period on an application for outline planning permission for residential development (up to 33 dwellings) and open space; including associated access (vehicular/cycle/pedestrian), alterations to levels, surface water attenuation features (including swales), landscaping and related development.

### Decision

1. Costs applications A and B are both refused.

### Reasons

2. The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Claims can be procedural, relating to process; or substantive, relating to the issues arising from the merits of the appeal.

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3. Both the appellant and the Council made their applications for award of costs in writing. The Council's response was also put in writing whilst the appellant's response was given orally at the Inquiry.
4. Costs application A is made by the appellants on a substantive basis. It is submitted that the Council acted unreasonably for three reasons. The first reason relates to the Council preventing or delaying development that should clearly be permitted, having regard to its accordance with the development plan, national policy and other material considerations. The second reason is in regard to the failure to provide evidence to substantiate each reason for refusal on appeal. Finally the third reason relates to the Council providing vague, generalised or inaccurate assertions about the proposal's impact which are unsupported by any objective analysis. The appellant considers that the Council produced no evidence to contradict the case that any retail use would be unviable on the site. The Council's retail consultant made no suggestion that any form of retail was viable but stated the view that the appellant had not provided sufficient evidence from a range of retailers, having only presented a letter from one operator. Moreover the fact that the Council chose to withdraw its case supports the fact that there was no evidence to sustain their position.
5. Costs application B is made by the Council on a procedural basis as they consider that the appellant delayed in providing information relevant to the Council's purported reason for refusal. If this information had been provided earlier then the Council would not have had to prepare proofs of evidence and legal costs would have been reduced. A partial award of costs is therefore sought.

*Costs application A*

6. The original planning application was presented to the Council's Planning Committee on 8 December 2016 with an officer recommendation for approval. The Members disagreed with Officers and questioned the viability of a single convenience store in light of the evidence put before them.
7. In line with the Council's procedures, the decision was deferred at the December 2016 Committee. This enabled Officers to obtain further advice from the Council's retail consultant CBRE. This fed into the Officer report to the Committee on 2 March 2017 and led to a recommendation of refusal. The appellant decided to appeal against non-determination before the Committee meeting took place.
8. The Members were made aware of the Marketing Statement prepared by the appellant, the Viability Assessment and the correspondence from a grocery retailer. It was a matter of judgment for the Council whether or not it considered the evidence presented to it was sufficient to demonstrate lack of commercial interest in the site and a lack of viability. It was not unreasonable for the Members to want to be assured that a convenience store would not be viable bearing in mind the aspirations of the Development Brief for the estate and residents' concerns with regard to the lack of facilities.
9. I acknowledge that CBRE in their report to the Council did not conclude that a local convenience store was viable rather their view was that it had not been adequately demonstrated that such a store would not be viable. It is common practice for local planning authorities to request marketing exercises when a

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change of use of land is being proposed in order to demonstrate the lack of viability of the original use. The Council had before it a letter from just one retailer. CBRE concluded that this was insufficient and whilst it was clearly an indication, it did not necessarily show that all retailers would take the same view. It is also notable that CBRE recommended that alongside the main grocery retailers, that the appellant also explore the possibility of a local convenience store operated by an independent retailer. Having regard to the above advice, I do not consider that the Council acted unreasonably in being minded to refuse the application.

10. The appellant has also suggested that the Council's action in withdrawing its case two working days before the Inquiry provides further proof that it had no evidence to sustain its case. However the Council was not in a position to do this until after the exchange of proofs, having had sight of the additional evidence provided by the appellant.
11. In allowing this appeal, I have found that that the appeal proposal would accord with the development plan. Whilst the Council came to a different view, this was a matter of judgment based on the information available to it at that time. The Council had concerns that the lack of viability had not been adequately demonstrated and I consider that, whilst it subsequently withdrew its case, its proofs of evidence substantiated its position. I consider this was clear and not vague, and did not include generalised or inaccurate assertions about the proposal's impact. Furthermore at the time that the Council considered the planning application, the evidence from potential retailers was very limited. It was not clear at that time that the development was acceptable and therefore the Council did not prevent or delay a development that should have been permitted.
12. In conclusion I do not consider that the Council acted unreasonably with regard to this matter. The appeal would have proceeded in any event and therefore the appellant has not incurred unnecessary expense. An award of costs for costs application A is not justified.

*Costs application B*

13. Following the Planning Committee meeting on 2 March 2017 it was clear that the Council considered that the appellant had failed to adequately demonstrate that a convenience shop was not a viable proposition. Further evidence was requested in late April 2017. On the 10 May 2017 the appellant emailed the Council agreeing to provide the further information and advising that it would get back to the Council as soon as it could.
14. Appendix 6 of Mr Lewis's proof, illustrates that the last response from the larger grocery retailers was received by the appellant on 20 April 2017. No response had been received from the smaller retailers approached and so a chase up email was sent on 5 June 2017. I consider that it was reasonable for the appellant to want to wait to respond until it had gathered the full information requested by the Council. Even allowing some time for a reply to the June follow up email, a response to the Council would not have been possible until late June/early July. I consider it regrettable that the appellant did not provide the information at that time, though I accept that there was no requirement to do so.

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15. It is clearly good practice that parties try to reduce the areas of dispute between them in order to reduce the length of an inquiry, achieve a more efficient appeal process and reduce costs. An acknowledgment of this is made in Mr Lewis's email of 10 May 2017, providing evidence that the appellant was trying to work with the Council to achieve this.
16. The Council emailed the appellant on 27 July 2017 requesting a response by 16 August 2017. Mr Lewis did not reply until 5 September explaining that he had been on leave until 14 August 2017 and there were then difficulties in getting the team together in order for a response to be made. By the time Mr Lewis responded it was too late for any additional information to have been assessed by the Council and for its position to have been reviewed before the submission of the proofs of evidence. Even if the appellant had responded by 19 August 2017 as requested, it would still have been a very tight timetable for the Council to decide on the way forward and present a report to the Planning Committee seeking agreement not to defend the appeal before proofs had to be prepared.
17. In conclusion, having regard to the above, whilst I consider that the appellant had been tardy in not responding to the Council in a timely fashion, this did not amount to unreasonable behaviour. The Council's costs in respect to this appeal were therefore not unnecessarily incurred. Accordingly an award of costs for costs application B is refused.

*Helen Hockenfull*

INSPECTOR