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## Appeal Decision

Hearing held on 26 July 2016

Site visit made on 26 July 2016

**by Susan Ashworth BA (Hons) BPL MRTPI**

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

**Decision date: 16 August 2016**

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**Appeal Ref: APP/R0660/W/15/3141919**

**The Walled Garden, off Kings Lane, Welsh Row, Nantwich, Cheshire CW5 5DY**

- 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 consent, agreement or approval to details required by a condition of a planning permission.
  - The appeal is made by 4 Real Developments Ltd against Cheshire East Council.
  - The application Ref P08/0917, dated 11 August 2008, sought approval of details pursuant to condition No 1 of a planning permission Ref P06/0692 granted on 22 August 2006.
  - The development proposed is construction of 6 attached dwellinghouses and 2 apartments with restoration and design statement justifying the means by which the area it encloses will be developed.
  - The details for which approval is sought are: access, appearance, landscaping, layout and scale.
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### Decision

1. The appeal is dismissed and planning permission is refused.

### Application for Costs

2. An application for costs has been made by 4 Real Developments against Cheshire East Council. This application is the subject of a separate Decision.

### Background and Preliminary Matters

3. On 14 September 2001, outline planning permission<sup>1</sup> was granted for residential development on a substantial site which included the appeal site. That permission was later renewed<sup>2</sup>. I understand that the reserved matters relating to the bulk of the site were subsequently approved and I noted at my site visit that the development of several hundred homes has been built.
4. The appeal proposal relates to a walled garden situated within the outline application site boundary. The walled garden is a grade 11 listed building. The proposal seeks permission for the reserved matters for a terrace of six houses and two apartments. Those reserved matters are the access, appearance, landscaping, layout and scale of the development.

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<sup>1</sup> Application ref : P00/0757 Outline permission of residential development at Part of Kingsley Farm & Malbank School, Welsh Row, Nantwich

<sup>2</sup> Application Ref: P06/0692 variation of condition 2 of P00/0757 to extend the submission of reserved matters for a further two years approved August 22 2006.

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5. Minutes show that at a Committee meeting on 5 March 2009, the Council resolved to approve the reserved matters application subject to 'i) the completion of a Section 106 Agreement to secure the restoration and repair of the north, south and east walls together with those remaining sections of wall on the west side of the site; ii) the work commencing at the same time or prior to the commencement of construction of the dwellings and be completed prior to the occupation of the sixth dwelling; the Agreement ensuring that a fund is established to which residents at all units are required to contribute for the future maintenance of the walls, grounds and gardens in perpetuity'. However, no such agreement has been completed and the planning application has remained undetermined. The appeal is against its non-determination within a prescribed period. It appears that extensions of time were granted by the Council to the appellant in order to resolve the matter.
6. A planning application must be accompanied by a relevant certificate of ownership. The requirement for such a certificate is to ensure that owners of land are aware of development proposals which affect their property, allowing them to become engaged in the application process. Considering themselves to be the sole owners, the appellant submitted a Certificate A. Following land registry searches, it was found that although the appellant had registered title to the garden, the ownership of the walls was unclear. Nevertheless, the proposal has been widely publicised and, without prejudice to their assertion that Certificate A is correct, the appellant has taken all reasonable steps and published a notice of the appeal in the local press. On this basis I am therefore satisfied in this instance that no other party is unduly prejudiced by my determination of the appeal.
7. The issue in dispute between the main parties and set out in the Statement of Common Ground is in essence whether, in the absence of registered title to the walls, a legal agreement would be enforceable. However there is a considerable objection to the proposal from members of the public, including from the Nantwich Walled Garden Society. These objections are set out in writing and were expressed at the hearing. Moreover, as the matter relates to a listed building, s.16 (1) of Planning (Listed Building and Conservation Areas) Act (the Act) requires me as the decision-maker to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest it possesses. In addition, during the time that the proposal has been in abeyance, the boundary of the Nantwich Conservation Area has been amended so that the site is now within the Conservation Area rather than being adjacent to it. S.72 (1) of the Act requires that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area. For these reasons I included these issues on the agenda for the hearing.
8. The development plan is the basis on which an appeal decision is made, taking into account relevant material considerations. In the absence of a more recently adopted Local Plan, the policies of the Crewe and Nantwich Replacement Local Plan 2011 (the Local Plan) remain relevant to this appeal. However, the National Planning Policy Framework (the Framework), which was introduced in 2012, sets out the Government's planning policies and how these are expected to be applied. The Framework carries great weight in terms of the determination of the appeal.

## **Main Issues**

9. The main issues in this case are therefore:
- The effect of the proposal on the listed building, its setting and, linked to that, the effect of the proposal on the character and appearance of the Nantwich Conservation Area.
  - Whether the planning obligation sought is reasonable and necessary to make the development acceptable and if so, whether it would secure the necessary improvements.

## **Reasons**

### *Listed Building and Conservation Area*

10. The Framework sets out in chapter 12, policies for the conservation and enhancement of the historic environment and requires the identification and assessment of the significance of heritage assets; in this case the listed building and the conservation area.
11. The significance of the listed building is set out in the list description, updated in 2015 following the re-assessment of the site by Historic England (then English Heritage). That significance is derived from its historic interest: a walled garden built between 1622 and 1638 to enhance and extend the pre-existing gardens of Townsend House a late C16 dwelling, now demolished; its architectural interest: the care in construction including projecting plinths, ashlar dressing, decorative copings and the inclusion of 'bee boles'; its date, which substantially pre-dates the proliferation of detached walled gardens in the mid-C19; and its materials.
12. The conservation area in the immediate vicinity of the site is characterised by its historic and architectural interest. Along Welsh Row are residential properties of a variety of styles from different periods. They include a number of listed buildings. Those properties abutting the site have long and narrow gardens which are part of their context and setting. The walled garden makes a positive contribution to the character and appearance of the conservation area in terms of its history, the visual appearance of the walls and the open space it provides. It also acts as a visual buffer between the modern development to the north and the older properties on Welsh Row.
13. The proposal would introduce a terrace of six dwellings plus two apartments into the centre of the garden, with a car park to accommodate 12 vehicles to the western side, served off a newly created access formed by the demolition of a partly dilapidated section of the northern wall. The terrace has been designed as a one and a half storey development with a series of dormer windows. In addition it is proposed to landscape the gardens in a tudor style. The gardens would be for the communal use of the residents rather than being sub-divided into private spaces. A pedestrian access would be created by the demolition of a further section of the northern wall.
14. The 'Condition Appraisal' included with the appeal sets out the various defects in the wall and identifies areas where repair and/or rebuilding are necessary. On the basis of what I have seen and heard there is no reason why an appropriate scheme of restoration could not be achieved. However, the proposal would involve the removal of areas of historic fabric to form the

- vehicular and pedestrian access points and this loss of fabric would constitute, albeit limited, harm to the listed building itself.
15. The walls and the garden they enclose are intrinsically linked, both in visual terms and in terms of their historic function. The garden forms a setting for the listed walls and although presently overgrown, makes a positive contribution to the significance of the heritage asset. The proposed development, which would be L shaped, would have a total length of around 36m and would occupy over half of the length of the present garden. At such it would have a considerable impact on the spacial quality, historic function and appearance of the garden, particularly sited in a central position. Whilst the development has been designed to be lower and thereby less obtrusive than a two-storey development, the building and its impact on the space, would nevertheless be apparent from the adjacent public footpath. In addition, the introduction of a car park, which would also be of significant size, would have an urbanising impact that would detract from the tranquil character of the walled garden. Whilst it is proposed to landscape the remaining area in a tudor style, it seems to me that this space would be incidental to the residential development and would not adequately mitigate against the loss of the present garden and its significance.
  16. The Framework seeks at paragraph 137 to promote development within conservation areas and the setting of listed buildings that enhances or better reveals their significance. For the reasons set out the proposal would fail to achieve such benefits.
  17. I acknowledge that the site is within the area covered by the earlier outline application. However, the scale of development, and the justification for it, was not established at the outline stage but was rather was a matter for future consideration<sup>3</sup>. I understand that the scale of the development has been informed by financial constraints, particularly costs associated with the restoration of the walls. Financial information put forward in support of the planning application in is now out of date. Nevertheless, I note that the Council's review of it at the time concluded that the size of the development could be reduced and leave enough profit for the repairs to the walls to be carried out. I am not therefore persuaded that the development represents the minimum amount of development necessary as enabling development. Moreover, whilst I recognise the importance of putting the heritage asset to a viable use, for the reasons set out the proposal would not be consistent with its conservation.
  18. I have taken account of the comments of Historic England regarding the proposal although I note that they pre-date advice within the Framework. The listed building was re-assessed by Historic England very recently and, although the west wall was not included in the listing, it was confirmed that the south, east and north walls were to remain listed at grade II. This seems to me to reaffirm the importance of the building as a heritage asset.
  19. For the reasons set out above the proposal would be detrimental to the significance of the setting of the listed building and to the character and appearance of the conservation area. Consequently it would be contrary to Policies BE.7 and BE.9 of the Local Plan which amongst other things, seek to

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<sup>3</sup> Condition 12 of outline permission ref : P06/0692

- protect the character or appearance of a conservation area and ensure that the character and setting of a listed building is preserved.
20. In accordance with the approach of the Framework, the development would cause less than substantial harm to the significance of the heritage assets. However, less than substantial harm does not mean less than substantial objection and given the duty set out in the Act I give that harm considerable importance and weight. Paragraph 134 of the Framework states that in cases where a proposal would lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.
  21. The main public benefit of the proposal in this case is in the provision of eight additional units of residential accommodation with good access to local services. Whilst the appellant has drawn my attention to the fact that the Council cannot demonstrate a 5 year supply of housing land, it seems to me that the provision of eight units would make only a modest contribution to housing supply. I give this matter moderate weight as a positive benefit.
  22. The repair and restoration of the walls is a public benefit of the scheme. However, paragraph 130 of the Framework advises that where there is evidence of deliberate neglect of or damage to a heritage asset, the deteriorated state of the heritage asset should not be taken into account in any decision. Whilst there is no evidence of deliberate neglect, it was clear at my site visit that the garden has not been maintained over recent years and has become seriously overgrown. Given their deteriorating state it also seems that the walls have not been regularly maintained. This limits the weight I can give these matters as a public benefit of the scheme.
  23. Consequently the benefits of the scheme do not outweigh the harm to the heritage assets, harm to which I attach considerable weight in accordance with the duty in the Act.

#### *Planning Obligation*

24. In order to achieve the public benefits accruing from the restoration of the walls, the main parties agree that it is reasonable and necessary for there to be a mechanism in place to secure a satisfactory scheme of repair and future maintenance. Whilst the Council's resolution to approve the application was subject to the satisfactory completion of a legal agreement, there is no completed agreement, either a bi-lateral agreement or a unilateral undertaking, before me.
25. However, at the hearing it was agreed by the main parties that the restoration of the walls could be secured by a 'Grampian' condition. Such a condition would require the submission and agreement of a schedule of works to be carried out to the listed building prior to the commencement of the development. I have no reason to disagree with that approach.
26. In addition, the Council is seeking a planning obligation to secure funding for the future maintenance of walls. I agree that to secure the public benefits of the scheme accruing from the on-going maintenance of the walls, such an obligation is reasonable and necessary. However, the Council remains concerned that if the appellant has no legal interest in the walls, the planning obligation for future maintenance would be unenforceable. The appellants

argue that whilst they do not have full ownership title, for various reasons set out at the hearing, the wall is within their ownership.

27. It is not for me, under the provisions of a s78 appeal, to determine the ownership of the walls, and moreover, notwithstanding the appellants' views on the matter, there is no completed planning obligation before me for consideration. However, as I am dismissing the appeal for other reasons, this matter has not been determinative.

**Conclusion**

28. For the reasons set out above and taking into account all other matters raised, the appeal is dismissed and planning permission is refused.

*S Ashworth*

INSPECTOR

**APPEARANCES:**

For the appellant:

Celina Colquhoun of Counsel

Robert Holmes- Planning Law and Environment Advisory Service

Rachel Watkin of Counsel

Clifford Anderson – the Appellant

Kevin Neary – Building Surveyor

For the Council:

David Malcolm – Head of Planning, Cheshire East Council

Jaqueline Elliott - Solicitor, Cheshire East Council

Patricia Evans – Snr Planning Lawyer, Cheshire East Council

Ian Dale – Environmental Planning Manager, Cheshire East Council

Interested parties:

Dr Helen Cook – Local resident

Mr P. Harrington – Local resident

Dr J Cartlidge – Local resident

Mr & Mrs Lightbody- Local resident

Mrs P. Taylor – Local resident