

Appeal Decision

Hearing held on 12 October 2016

Site visit made on 13 October 2016

by Kenneth Stone BSc (Hons) DipTP MRTPI

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

Decision date: 16 November 2016

Appeal Ref: APP/E5330/W/16/3145602

The Huntsman Sports Club, Manor Way, Blackheath, Greenwich SE3 9AJ

- 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 planning permission.
 - The appeal is made by Derreb Limited against Royal Borough of Greenwich Council.
 - The application Ref 15/2819/F, is dated 9 September 2015.
 - The development proposed is described as 'residential development of 130 units comprising detached houses, terraced houses and apartments'.
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Decision

1. The appeal is dismissed and planning permission for residential development of 130 units comprising detached houses, terraced houses and apartments is refused.

Application for costs

2. At the Hearing an application for costs was made by Derreb Limited against the Royal Borough of Greenwich Council. This application is the subject of a separate Decision.

Procedural matters

3. The appeal results from the Council's failure to determine the application within the prescribed period of time. The Council's Planning Board considered a report at its meeting on 5 April 2016 and resolved to oppose the appeal on four putative reasons for refusal. All the reasons related to the viability assessment submitted with the proposal and raised concerns regarding the level of affordable housing provided for in the scheme. In all other respects it was considered that the scheme had overcome the reasons for previous applications being refused and dismissed at appeal.
 4. The application was supported by an Environmental Statement however given the baseline data was several years old a request under Regulation 22 of the Town and Country Planning (Environmental Impact assessment) Regulations 2011 (the Regulations) was issued by the Planning Inspectorate. Further Environmental Information was received in a report by Greengage dated August 2016. On this basis I am satisfied that the environmental information submitted with the appeal conforms with the Regulations and I have had
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regard to the Environmental Statement and the other relevant environmental information submitted with the appeal in my consideration of this appeal.

5. Prior to the hearing I was provided with an executed Unilateral Undertaking dated 26th September 2016 which superseded any previous Undertaking that had been provided. Towards the end of the hearing I was provide with a further executed agreement which was dated 11th October 2016 which was to supersede any previous Undertaking I had, including that dated 26th September 2016. I return to the obligation further in my reasoning below.

Main Issue

6. The main issue in this appeal is whether the proposal makes adequate provision for affordable housing, having regard to national and local policy.

Reasons

7. The appeal relates to an undeveloped area of land that was a former sports ground but has been unused for many years and is now overgrown. The site is approximately 2.2 hectares in area, rectangular in shape and generally flat. There are mature trees and shrubs close to the northern and eastern boundaries, but given its historical use little mature vegetation in the central parts of the site. The site abuts the Blackheath Park Conservation Area to the north and west, the rear gardens of properties fronting Weigal Road to the south and Moorhead Way to the east. Across Moorhead Way is a significant construction site encompassing phase 6 of the Berkley Homes redevelopment of the Ferrier Estate and Harrow Meadow, part of the wider Kidbrooke Village Masterplan.
8. The proposals seek consent for some 130 dwellings in a range of flats and houses on what is a greenfield site with no significant signs of historical development. The site was originally designated as Metropolitan Open Land (MOL), but that designation was changed with the adoption of the Council's Unitary Development Plan in 2006 (which has itself been subsequently superseded). The proposals have evolved over a number of years and applications, including following various appeal decisions, and the Council do not object to the principle of the redevelopment of the site or the detailed layout and form of the development. From everything I have read, heard and seen I see no reason to raise issue with those principal conclusions.
9. The Development Plan for the area comprises The London Plan, published March 2016 (LP) and The Royal Greenwich Local Plan: Core Strategy with Detailed Policies, adopted July 2014 (CS).The National Planning Policy Framework (the Framework) is a significant material consideration. In relation to the issues in this appeal, supplementary planning advice is provided in various documents and of particular note are the Kidbrooke Development Area Supplementary Planning Document (KDASPD) and the Mayors Housing Supplementary Planning Guidance (Housing SPG).
10. The London Plan policies 3.11 and 3.12 require, boroughs to, amongst other matters, identify targets for the level of affordable housing provision to meet the capitals needs and to negotiate the maximum reasonable amount in any scheme. The policies set out matters to which the boroughs should have regard in formulating the level and negotiating the provision of affordable

housing and this includes taking account of the individual circumstances of the site and the viability of the scheme.

11. Policy H3 in the CS requires that on developments of more than 10 homes or sites of 0.5 hectares or more at least 35% affordable housing should be provided. It goes on to state that the precise percentage, distribution and type of affordable housing will be determined by the particular circumstances and characteristics of the site and the development, including financial viability. Paragraph 4.1.13 explains that the Affordable Housing Viability Assessment in connection with the CS determined that a borough-wide site based policy should require at least 35% affordable housing and that there were circumstances where a higher provision could be delivered, up to 50%, and that on sites with low existing use values up to 60% may be deliverable.
12. The KDasPD provides advice on the level of affordable housing throughout the area, at paragraph 4.3 and this advises that a minimum of 43% affordable housing will be provided across the area, that a minimum of 50% affordable housing will be provided at greenfield locations and the percentage of affordable housing should be the same within each development site. These requirements are set out in recognition of the economics of housing provision and planning objectives.
13. It is clear from the Development Plan policies that there is a requirement to achieve the maximum amount of affordable housing on development sites and that regard will be had to viability. The CS policy provides a minimum amount of affordable housing, but again the plan is clear that there may be circumstances when higher levels of affordable housing will be required if viable. The KDasPD in the context of this site, a greenfield site, is clear that there is an expectation that such a site should seek to provide 50% affordable housing. On this basis, viability permitting, the development plan would seek the provision of 50% affordable housing resultant from this scheme.
14. The approach adopted and caveats related to affordability and viability are consistent with the advice in the Framework for authorities to deliver a wide choice of quality homes, including setting policies to meet affordable housing need. In adopted plans it is recognised that they have to have regard to the advice that careful attention is required in relation to viability and the need to ensure competitive returns to a willing land owner and willing developer.
15. The proposals as considered by the Council made provision for 26% affordable housing provision and, following the outcome of a previous appeal, the Council also required the developer to include provisions for review mechanisms at the time of implementation and completion of the development, with a cap on the maximum provision at 50%. These were provided for in the 26th September Unilateral Undertaking provided as part of this appeal. The appellant provided a three dragons viability toolkit assessment. Although this identified a significant negative residual land value when considered in the context of an alternative use value for the site, the 26% affordable housing provision was still offered. The Council were concerned with three specific aspects of the assessment; firstly, the appropriateness of the alternative use value being used; secondly, the costs identified within the abnormal or exceptional costs; and thirdly, the level of developer profit.
16. The appellant confirmed at the hearing that they owned the site and had purchased it in the 1990's at a time when it was allocated as Metropolitan Open

- Land. At that time they paid in the region of £150, 000 and this would have reflected the existing use as a sports field and its designation. Once the MOL designation changed and the site was identified within the Kidbrooke development area the value of the land would have substantially increased to reflect the development potential that would now be imbedded in the site.
17. The approach to valuation depends on various approaches adopted and in this regard the Council suggest that an existing Use value plus should be adopted. Whilst they were reticent to ascribe an existing use value to the site it was tentatively suggested this would be minimal given the existing state and use of the land but they did recognise there was a plus value that would need to be considered and in this regard suggested the £5.9m residual land value after land finance in the appellant's Three Dragons Model could be appropriate.
18. The appellant has sought to adopt a benchmark land value based on an alternative use value, which gives the site a value of £16.4m. The alternative use scheme is based on a retirement village scheme comprising of a care home and assisted/independent living elements. The scheme comprised of 93 age restricted independent living/extra care units, 74 age restricted living units and a 124 bed care home. I note in the Knight Frank letter of 10th November 2015, which sets out the advice on the alternative use scheme that there are a number of additional income streams and 'benefits' unique to this model. These include a more limited section 106 contribution i.e. no affordable housing if the scheme is designated as a C2 development (residential institution). It is also noted in this letter that the Royal London Borough of Greenwich, Community Infrastructure levy (CiL) charging schedule confirms that 'extra care' is exempt from Local Authority CiL. The scheme has been valued on this basis and therefore makes no provision for affordable housing or CiL payment.
19. The Council object to the use of the alternative use proposed as it is not compliant with policy and all advice suggests that any such assessment should be based on a fully policy compliant scheme to ensure a robust value is provided. The Council contend that the site should be used for 'housing' and that a C2 scheme would not fall within such a use. In this regard the site is located in an area identified for 'residential development in neighbourhood area' in the KDASPD, the addendum to the CS provides a list of site proposal schedules for housing brought forward from the UDP but which were retained in the CS and which includes site H6, the West Ferrier Precinct, where the existing use is identified as housing and open space and the proposal is for predominantly housing, ancillary community services and Wingfield primary school. The description directs towards the KDASPD. The Council are also concerned that the development would not be compliant with affordable housing requirements.
20. The appellant is of the view that the alternative scheme is for a form of 'housing' and therefore fits within the general description. In this regard it is noted that Specialist housing for older people is addressed in the Housing SPG and within which it is advised any net additional C2 and C3 units for older people can count towards London Plan housing supply targets.
21. The proposed alternative use is of a mix of different accommodation which includes age restricted accommodation, assisted living accommodation and a care home. Whilst each of these has different attributes they can, dependant on the nature of the use restrictions and activities, fall within different use

classes. It is not immediately obvious which each type would fall within. That being said the general use for the age restricted and assisted living would be some form of restricted housing and could reasonably be concluded to be housing within the broad phraseology of the site schedule. This is not quite so obvious in the context of the care home. The Kidbrooke Development Area is a strategic site to ensure the borough meets its housing targets and development that would undermine that potential contribution would conflict with policy in terms of H1 and section 3.3 of the CS which sets out the strategic locations. In this regard I conclude that the alternative use proposed would not be consistent with that general housing policy.

22. I am also concerned that the nature of the description of the alternative use proposed would make no provision for affordable housing, arguing that it would be for a C2 use and therefore not require contributions under CiL or affordable housing. However, this exemption only applies to 'extra care' and it would appear at least some of the age restricted housing may fall outside that description. Also the exemption from affordable housing may only be applicable to parts of the scheme. The scheme would therefore not appear policy compliant.
23. Whilst I appreciate that the appellant is concerned that these matters were not previously raised by the Council and that they were not raised at the subsequent appeals on previous decisions that does not undermine the validity of the concern or my obligation to fully and properly consider the issue. In those previous appeals this was not a matter directly raised with the Inspectors or to which they had to turn their attention to determine the appeals before them.
24. Turning next to the matters raised regarding exceptional costs. At the hearing the appellant produced a paper in which the majority of exceptional build costs were removed from the exceptional costs list and placed within the build costs. This in effect moved the cost from one location in the model to another location but in effect demonstrated that there was no significant effect on the overall costs. This position was accepted by the Council and in effect addressed that part of the model inputs.
25. Other exceptional costs included a number of court proceedings undertaken by the appellant to unencumber the land from various covenants, deal with trespass disputes, resolve access arrangements and other matters. Whilst a headline figure for the amount of costs that had been incurred in this regard was provided no detailed breakdown of the individual proceedings was provided. The purchase price of land or value would normally reflect the risk the developer was to take to address unresolved matters and would not normally therefore be identified as additional cost as this should already have been reflected in the value paid for the land. There are also a number of proceedings which would not directly have been necessary to ensure the implementation of this development but rather would have been for the land owner to address in the normal management of the land, no matter whether it was subject to development proposals or not, such as the matters related to trespass. Whilst I accept that there may be a small residual amount that could be added to the overall cost burden this would not substantially affect the total costs of the scheme and therefore the outcome for the provision of affordable housing.

26. Moving on to developer profit. The appellant has indicated that the level of developer profit in the model is set at the default value of 20%. This is a reflection of the level of risk that has arisen from this site and addresses a number of issues. The developer has been seeking to gain consent for a scheme on this site for some 8 or more years, that in itself is a reflection of the difficulties of the scheme and therefore the risk. The 20% developer profit in the model is a default value from 2014, since when there have been changes in the stamp duty provisions and the vote to leave the EU which have created further uncertainty in the market. Whilst this has not resulted in a reduction in price as yet it was contended that this had started to show in a slowdown in sales. The appellant contends that 20% was a general average that had been used in the Borough and was the level of profit on other larger sites; it was not unreasonable in these circumstances.
27. Whilst the Council acknowledged that developer profit between 17/18% and 20% and indeed in some instances higher were not unreasonable it was dependant on site circumstances. In this instance given that the site was a green field site with little historical development or ground contamination and the nature of the scheme was for houses and low rise flats the scheme itself was not inherently risky and therefore a lower profit level was reasonable. They suggested that there were schemes in the Borough presently that were being assessed on the basis of a lower than 20% profit level. I was not however provided with any detail of these schemes.
28. I have been provided with little detailed direct comparable sites and a number of the sites referred to including the Berkeley master plan development and the Gaelic Athletic Association development have significant differences from the scheme before me. In terms of the Berkeley scheme this was for a substantially larger mixed use development on land including previously developed land that would be undertaken over a significant period. The development financing of the scheme would be significantly different. In terms of the Gaelic Athletic Association scheme that included a substantial area of public accessible open space to be included.
29. I have no significant evidence either way as to lead me to a conclusion however the Council seemed to be suggesting that a profit level around 18% would not be unacceptable and acknowledged that 20% is not unreasonable in appropriate circumstances. Whilst I accept that the nature of the site constraints are not as significant as on a brownfield site there is competition from the adjoining sites where significant development is going ahead and this is likely to temper a developers response to risk in this regard I do not have strong evidence to conclude that a 20% profit level is inappropriate.
30. The appellant had provided a Unilateral Undertaking dated the 26th September in advance of the hearing and following a further exchange of correspondence there was a significant degree of agreement on the wording that had been agreed. One area however that arose was a change to the rental levels for the affordable rent properties where the appellant had increased these to target rents at 80% market value as opposed to the 65% negotiated by the Council and that was in the previous Undertaking. The Council were concerned that this impacted on the affordability of the units in the Borough.
31. Towards the end of the hearing the appellant produced a new Unilateral Undertaking signed and submitted it. This superseded that of the 26th

September and it was explained provided for 35% affordable housing, with the affordable rent being at target rent and that the review mechanism was removed. It was contended this was policy compliant and addressed the concerns of the Council as the appropriate level of affordable housing was being provided.

32. I have concluded above that the policy position seeks to secure the maximum level of affordable housing and that the CS seek a minimum of 35% but acknowledges that there are circumstances where higher levels would be appropriate. The KDASPD sets out in this location that as a Green field site this site should make provision for 50%. I therefore agree with the Council that this would not be policy compliant.
33. In such circumstances the LP suggests that 'Contingent obligations' should be considered. These are referenced in both policy 3.12 B and the Housing SPG. The necessity for a review both pre implementation and pre completion was addressed in the most recent appeal¹ on this site. Circumstances have not changed significantly and for the reasons given in that decision I accept that review mechanism is an important requirement to ensure that the maximum reasonable level of affordable housing provision is made. On the basis of the latest Undertaking, which provides the minimum level of affordable housing, the removal of the review mechanism and the lack of any detailed or robust justification for this position I conclude that the scheme has not demonstrated that it is providing an appropriate level of affordable housing in accordance with London Plan policy 3.12 and Core Strategy policy H3.
34. The late change in position by the appellant has not been justified by reference to any further viability testing or justification. The arbitrary alteration of the provision of affordable housing therefore shows no relationship to the viability assessment and is not based upon any rational assessment of viability. Otherwise to follow through the logic of the appellant's position they would make this provision and result in an even higher negative residual value outcome in their Three Dragons Model. When the Alternative Use is generating such a significant return, if it is believed this is a policy compliant scheme, then why would a rational developer not take that scheme forward?
35. To draw everything together and conclude on the viability of the provision of affordable housing, I am of the view that the AUV approach adopted has serious flaws and has not been fully justified; as such this undermines the conclusions of the viability assessment. This conclusion holds true even if I accept the abnormal costs and a developer profit of 20%. I also have further concerns raised by the change in the appellant's position late in the day to make provision for 35% affordable housing but with no review mechanism, before commencement or towards the end of the development. This has the potential of not achieving the maximum reasonable level of affordable housing which would conflict with the LP and the CS and would not meet the aspirations of the KDASPD. On this basis the appeal should not succeed.

Other matters

36. Concerns were raised by the Blackheath Cator Estate Residents' Association that the wall at the existing Manor Way entrance should be retained to preclude any motor vehicular access to the site. The development layout out

¹ APP/E5330/W/15/3006475

allows for pedestrian and cycle access at this point and the plans demonstrate a layout that does not facilitate vehicular access. Concerns were raised however, that the proposed arrangements would not be sufficiently robust and that vehicular access may still be gained by four by four vehicles etc. There is a suggested condition relating to the details of the layout of the access at this location, and with a slight tightening of the wording, I am satisfied that these concerns could adequately be addressed by an appropriately worded condition.

37. The occupant of 85 Blackheath Park was concerned that the issue of his property's inclusion in the Conservation Area had not been given sufficient weight in the consideration of the impact of the development on his property. The Conservation Area boundary was clarified and includes his property; the development abuts, but is not within the Conservation Area. The proposed development would sit close to the Berkeley Development, across Moorehead Way, and the area is subject to significant change. The proposal would alter the setting of the Conservation Area, a heritage asset, but would not affect its significance which derives from the estate layout and urban form of the housing. The Bungalow is a later addition and retains the mature treed gardens and space which contributes to the character of the area. The short distance to the surrounding houses within the Conservation Area is such that the proposed development has little difference in impact on the Conservation Area whether its boundary is at 85 Brooklands Park or beyond. This impact has previously been considered and I see no reason to conclude differently from previous decisions.
38. The concerns expressed about the massing and overlooking of the development in relation to the bungalow are also matters that would have been relevant and considered previously and are not dependant on the property being within or outside a Conservation Area. They relate to matters of residential amenity and these were fully considered by the Council and I see no reason to differ from its conclusions on these matters.
39. The appellant makes a reference to the lack of a 5 year housing land supply but does so in passing and provides little detail as to why this is so. On the basis of the information before me, the recently published London Plan, the Councils AMR and CS I see no justification to question that there is not a 5 year housing land supply.

Overall conclusions

40. I have concluded that the proposal would not make adequate provision for affordable housing and therefore the proposal would not fulfil the social role of sustainable development. Paragraph 8 of the Framework makes it clear that the roles of sustainable development should not be taken in isolation as they are mutually dependant. To achieve sustainable development economic, social and environmental gains should be sought jointly and simultaneously through the planning system. Paragraph 12 goes on to make it clear that the Framework does not change the statutory status of the development plan as the starting point for decision making. It advises that proposed development that conflicts with the development plan should be refused unless other material considerations indicate otherwise. The proposals conflict with the development plan and in particular policies 3.12 of the LP and H3 of the CS. Whilst there would be benefits that arise from the provision of housing these would not outweigh the dis-benefit arising from the lack of affordable housing.

41. For the reasons given above I conclude that the appeal should be dismissed.

Kenneth Stone

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Tony Collins	Collins and Coward Planning and Development Consultancy
Terence Macey	Derreb Limited
Derrick Macey	Derreb Limited
D. B. Ulyet	Synergy LLP
R. Sheldon	Knight Frank

FOR THE LOCAL PLANNING AUTHORITY:

Samantha Moreira	Senior Planning Officer Royal Borough of Greenwich Council
Chris Marsh	Christopher Marsh and Co. Limited
Edward Oteng	Development Manager (interim) Royal Borough of Greenwich Council.

INTERESTED PERSONS:

Roderick Armitage	Blackheath Cator Estate Residents Association
Paul Harpin	Local Resident
Margaret Holland	Local Resident
Christine Upward	Local Resident and on behalf of Blackheath Park Conservation Group
Christine May	Local Councillor for Middle Park and Sutcliffe Ward

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Larger scaled copy of the pages from the Three Dragons Model outputs provided by the appellant.
- 2 Paper by Synergy for Derreb entitled 'Feasibility Budget NR 6R1

- Revised /10/2016' submitted by the appellant.
- 3 Copy of e-mail response from Samantha Moreira (LPA) to Tony Collins (appellant) dated 11/10/16 referenced by appellant copy provided by Council.
- 4 Copy of page 16 from Council's AMR submitted by appellant.
- 5 A) Appeal decision APP/B1225/W/15/3049345 submitted by appellant.
B) Report on the examination of the Draft Birmingham City Council Community Infrastructure Levy Charging Schedule ref PINS/P4605/429/8 submitted by appellant.
- 6 Introductory remarks by Mr Collins on behalf of appellant
- 7 Copy of 'London Borough Development Viability Protocol' February 2016 Consultation Draft submitted by Council.
- 8 Extract from Mayor of London Housing SPG, pages 38 and 39, submitted by appellant.
- 9 Copy of Pages from the Planning Practice Guidance, Viability and decision making, submitted by the Council
- 10 Extract from Mayor of London Housing SPG, section 4.1 viability appraisals.
- 11 Paper identifying changes to the 20 June 2016 Unilateral Undertaking that were included in the 26 September 2016 Unilateral Undertaking but not referenced in correspondence submitted by Council.
- 12 Further Unilateral Undertaking dated 11th October 2016 and submitted at the hearing by the appellant. (the cover sheet is dated the 12th October but the operative agreement page is dated 11th October
- 13 Schedule of conditions with appellant's comments and comparisons submitted by appellant.

End