
Appeal Decision

Site visit made on 5 January 2017

by Jason Whitfield BA (Hons) DipTP MRTPI

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

Decision date: 6th February 2017

Appeal Ref: APP/F1040/W/16/3160135

Land Adjacent to The Mandarin Chinese Restaurant, Egginton Road, Hilton, Derby DE65 5FJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Mr J Lee against the decision of South Derbyshire District Council.
 - The application Ref 9/2016/0162, dated 18 February 2016, was refused by notice dated 20 July 2016.
 - The development proposed is outline application (all matters to be reserved) for the erection of up to 47 dwellings with associated access, public open space, sustainable drainage and landscaping.
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Decision

1. The appeal is allowed and outline planning permission is granted for the residential development of up to 34 dwellings with associated access, public open space, sustainable drainage and landscaping at Land Adjacent to The Mandarin Chinese Restaurant, Egginton Road, Hilton, Derby DE65 5FJ in accordance with the terms of the application, Ref 9/2016/0162, dated 18 February 2016, subject to the conditions set out in the Schedule to this decision.

Procedural Matters

2. The description in the heading above is taken from the original application form. It was agreed during the course of the application that the description of the proposal be amended with the number of dwellings reduced from up to 47 dwellings to up to 34 dwellings. The LPA's description on the decision notice reflects this. I have therefore dealt with the appeal on that basis and the revised description is reflected in the formal decision above.
3. The application was submitted in outline with all matters reserved for future consideration. The proposal was amended following submission to the Council but prior to its determination. The changes, as shown on amended plans which are for indicative purposes only, reduce the proposed number of dwellings from 47 to 34. I am satisfied that no party would be prejudiced by my consideration of the amended scheme. I have, therefore, determined the appeal on that basis.

Main Issues

4. The main issues are:
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- Whether the development would accord with development plan policies relating to the location of development in the District.
- The effect of the proposal on the character and appearance of the area.

Reasons

Location

5. Saved Policy H5 of the South Derbyshire District Council Local Plan 1998 (LP) states that new housing in Hilton will be restricted to that which can be accommodated within the village confines. The village confines are drawn around the northern part of Hilton.
6. Saved Policy H8 of the LP states that outside settlements, new housing development will be permitted provided that it is necessary for rural based activity, that a countryside location is necessary to the efficient operation of that activity, that the site is well related to existing farm buildings or other dwellings, and the dwelling is of a size commensurate with the functional requirement of the activity.
7. Saved Policy EV1 of the LP states that outside settlements, new development will not be permitted unless it is essential to a rural based activity, or it is unavoidable in the countryside and the character of the countryside, the landscape quality, wildlife and historic features are safeguarded and protected.
8. The appeal site is outside of the settlement boundary for Hilton and seeks consent for residential development which is not linked to any rural based activity. Moreover, the proposal would not be essential to a rural based activity nor is there any evidence that it would be unavoidable in the countryside. As a result, the appeal proposal would conflict with Policy H5, Policy H8 and Policy EV1 of the LP.
9. However, paragraph 14 of the National Planning Policy Framework (the Framework) states that at the heart of the Framework is a presumption in favour of sustainable development. For decision taking this means that where relevant policies are out-of-date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
10. Paragraph 49 of the Framework states that housing applications should be considered in the context of the presumption in favour of sustainable development and that relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.
11. It had been common ground between the main parties that the Council was able to demonstrate a five-year supply of deliverable housing sites and therefore relevant policies for the supply of housing were up-to-date and the presumption set out in paragraph 14 would not be engaged. However, the appellant has since referred to a recent appeal decision¹ at Jawbone Lane, Melbourne, Derbyshire in which the Inspector concluded that the Council had not demonstrated a five-year supply of deliverable housing sites. To that end,

¹ APP/F1040/W/16/3147682 – Jawbone Lane, Melbourne, Derbyshire DE73 8BW, Decision Date 6 December 2016

- the appellant is of the view that Policies H5, H8 and EV1 are no longer up-to-date for the purposes of paragraph 49 of the Framework and that the presumption set out in paragraph 14 of the Framework should be engaged.
12. The Council disagrees with the method used by the Inspector in the Jawbone Lane appeal for calculating the five-year supply, noting that the Inspector stated that a supply would be demonstrable from 2017-2022. It is therefore the Council's view that a five-year supply of deliverable housing sites can be demonstrated and therefore paragraph 49 would not apply.
 13. Notwithstanding the dispute between the parties over whether or not a five-year supply can be demonstrated, if I were to take the Council's view that it can be, it would nevertheless remain incumbent on me to apply paragraph 215 of the Framework which states that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. The closer the policies in the plan to the policies in the Framework, the greater the weight that may be given.
 14. I note that the LP is time expired, however, paragraph 211 of the Framework is clear that policies should not be considered out-of-date simply because they were adopted prior to the publication of the Framework. Nevertheless, the emerging South Derbyshire Pre-Submission Local Plan Part 2 2016 (LPP2) contains a revised settlement boundary for Hilton. The appeal site would lie outside of, but adjacent to the proposed revised settlement boundary. Although the relatively early stage of preparation means I can afford only limited weight to the policies of the LPP2, it nevertheless reflects the growth of Hilton since the LP. It is apparent that the extent of development within Hilton has resulted in much of the settlement expanding beyond the boundaries set under Policy H5. Indeed the appeal site lies adjacent to an allocated South Derbyshire Local Plan Part 1 2016 (LPP1) housing and employment site. Settlement boundaries would have been fixed, having regard to the need to accommodate development planned over the, now expired, LP period. Defined settlement boundaries have the effect of constraining development, including housing, within settlements. On that basis, with reference to paragraph 215 of the Framework, the settlement boundaries set out in Policy H5 of the LP are out of date.
 15. Furthermore, whilst I recognise that Policy H8 and EV1 of the LP seek to protect the character and appearance of the countryside, in my view they are significantly more restrictive than the more balanced approach set out in the Framework. The Framework does recognise the intrinsic character and beauty of the countryside and the need to protect and enhance valued landscapes. However, in contrast to Policy H8 and EV1 of the LP, it does accept that development maybe permitted unless adverse impacts in respect of those factors would significantly and demonstrably outweigh the benefits.
 16. As a result, having regard to Paragraph 215 of the Framework, I consider Policies H5, H8 and EV1 of the LP are not wholly consistent with the Framework and are, therefore, out-of-date. To that end, I afford those policies limited weight. In the finding that relevant policies are out-of-date, paragraph 14 of the Framework is engaged and the balancing exercise required will be returned to later in the decision.

Character and Appearance

17. The appeal site comprises the Mandarin Restaurant on Egginton Road, Hilton and the land surrounding it. The restaurant sits towards the front of the site on Egginton Road, with a large car parking area adjacent. To the rear, the land is predominately flat fields with existing hedgerows and trees. It contains a dilapidated set of brick buildings which were previously used as stables.
18. The site is bound by Egginton Road to the north-east, with a field separating the site from residential properties to the north-west. To the west and south lies a significant expanse of built form containing commercial and industrial uses. In my view, the appeal site and its surroundings are characterised by their transitional role between the open countryside to the south and Hilton to the north. To that end, the character of the area could reasonably be described as suburban.
19. Although the site could not be described as being within the urban area, it is in reasonable proximity to it with defensible boundaries in the form of Egginton Road and the former access road to the Business Park site. Whilst the pattern of built development in the area is more sparsely arranged than in the denser, urban area of Hilton, the appeal site nevertheless lies at the end of a ribbon of development along Hilton Road which includes residential properties. Moreover, it is surrounded largely by employment related uses, including a significant expanse of development containing commercial and industrial uses to the south and west.
20. However, the appeal proposal would introduce a significant level of built form into an area of predominately flat and open grassed land where presently little exists. The existence of dwellings and associated hard surfaced areas would be relatively apparent from several vantage points in the area, including the adjacent cycleway. As a result, it would result in a change to the character and appearance of the appeal site.
21. I conclude, therefore, that the proposal would result in harm to the character and appearance of the area. The proposal would conflict with Policy EV1 of the LP as well as Paragraphs 17 and 109 of the Framework insofar as they seek to protect the character of the countryside and landscapes. Nevertheless, for the reasons above, such harm would be minimal.

Planning Obligations

22. A signed and completed S106 agreement has been submitted. It would secure financial contributions from the appellant of £79,793.07 towards the provision of 7 primary places at Hilton Primary School, £103,057.02 towards the provision of 7 secondary places at John Port School and £55,883.70 towards the provision of 3 post-16 places at John Port School. In addition, it would secure financial contributions of £373 per person for play facilities at Hilton Village Recreation Ground, £220 per person for recreation outdoor facilities at either Mease Playing Fields or the bike pump track at Hilton Village Hall, and £122 per person towards either an extension to the scout hut at Peacroft Lane or Phase 2 extension works at Hilton Village.
23. In addition to financial contributions, the S106 agreement would also secure 30% on site affordable housing and the provision of on-site public open space.

24. Paragraph 204 of the Framework and Regulation 122 of the Community Infrastructure Levy Regulations require that planning obligations should only be sought, and weight attached to their provisions, where they are: necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development.
25. Paragraph 47 of the Framework makes clear that Councils should meet the full, objectively assessed need for affordable housing. Paragraph 50 sets out that this need should be met on site. Both parties agree that the 30% provision of affordable housing on-site is acceptable and on the basis of the evidence before me I have no reason to come to any alternative conclusion. Consequently, I consider that the proposed affordable housing scheme would be necessary, directly related, and fairly and reasonable related in scale and kind to the proposed development, in accordance with CIL Regulation 122, and paragraph 204 of the Framework.
26. With regard to the education contributions, the Council has indicated that the proposal would generate an increase in the number of pupils attending the identified schools. The evidence before me suggests that the primary school contribution would fund the development of additional external play spaces which are currently under pressure, whilst the secondary school and post-16 contributions would fund additional teaching accommodation which the school has identified in its long-term strategy and vision. Thus, I consider that the education contributions would be necessary, directly related, and fairly and reasonable related in scale and kind to the proposed development, in accordance with CIL Regulation 122, and paragraph 204 of the Framework.
27. The Council's S106 Agreements: A Guide for Developers SPD 2010 sets out the requirements and justification for contributions towards the provision and maintenance of on-site open space, off-site open space, outdoor facilities and built facilities. As a result, I consider that these contributions would accord with CIL Regulation 122, and paragraph 204 of the Framework.
28. From April 2015, CIL Regulation 123 (3) also restricts the use of pooled contributions. There is, however, no evidence before me that any of the obligations here raise any issue in respect of pooled contributions.

The Planning Balance

29. Paragraph 12 of the Framework is clear that the Framework does not change the statutory status of the development plan as the starting point for decision making. In this instance, I have found that the proposal would conflict with Policies H5, H8 and EV1 of the LP. Nevertheless, I consider those policies are out-of-date within the context of the Framework and have, therefore, considered the proposal in the context of the presumption in favour of sustainable development set out in the Framework and in Policy S2 of the LPP1.
30. Whilst the proposal would result in a change in the character of the appeal site, I have found that change would result in minimal harm to the character and appearance of the area. The weight applied to such harm is therefore limited.
31. In contrast the proposal would provide for significant on-site open space and would provide some ecological enhancements to the area. In addition, the

appeal site is close to Hilton which contains a good range of services, facilities and employment opportunities within reasonable proximity. There are good links to the centre of the village via the adjacent cycleway. It would therefore overall make a positive contribution to the environmental dimension of sustainable development.

32. Economically, the proposal would boost employment during the construction phase and increase spending in the local economy from future residents. Although the Council indicate it can demonstrate a five-year supply of housing land, the Framework nevertheless makes clear its intention to boost significantly the supply of housing. The proposal would make a considerable contribution towards boosting the supply of housing in the area. In addition, the proposal would make a provision of 30% of the dwellings delivered on the site to be affordable housing which would represent a significant benefit. To that end, the proposal would make a considerable contribution towards achieving the social and economic dimensions of sustainable development.
33. Whilst the proposal would secure contributions towards education and off-site recreation facilities, these would off-set the impact on those facilities from the additional demand arising from the proposed dwellings. They are, therefore, neutral factors in the balance, rather than benefits.
34. Nevertheless, taking all these matters into account and having regard to my conclusions on the main issues, I conclude that the adverse impacts of the proposal would not significantly and demonstrably outweigh the benefits. The proposal would, therefore, constitute sustainable development and would accord with the principles of the Framework, as well as Policy S2 of the LPP1.

Other Matters

35. It has been put to me that the proposal would put undue pressure on doctor's surgeries and other facilities which do not have sufficient capacity. However, I have not been given any detailed evidence which quantifies the extent of any local shortage or the need for any new facilities. Furthermore, as set out above the proposal would make a contribution towards education and recreational facilities to mitigate the additional demand arising from the appeal proposal.
36. I have had regard to the concerns of local residents regarding the increase in traffic arising from the development and the potential impact on the surrounding highway network. However, the indicative plans show that an access point could be accommodated with adequate visibility splays. Moreover, the indicative layout indicates that adequate parking could be accommodated on-site. Furthermore, there is no substantive evidence before me that the vehicular movements generated by the proposal would give rise to any particular harmful increase in traffic on Egginton Road or the surrounding network. I am satisfied, therefore, that the proposal would not give rise to severe impacts on highway safety.
37. Concerns have been raised about drainage and flood risk. However, representations from Derbyshire County Council's Flood Risk Management Team raise no objections and those of Severn Trent Water indicate that the proposals are acceptable if suitable schemes for foul and surface water are achieved by condition. There is no technical evidence before me to suggest

that such schemes would not be feasible and, consequently, I agree that this matter could be dealt with by way of condition.

38. I have had regard to the concerns raised in respect of the effect of the proposal on wildlife and ecology. However, the Habitat and Protected Species Survey submitted by the appellant makes recommendations to compensate for the loss of grassland habitat arising from the proposal and also to retain the ponds on the site. In addition, mitigation measures are recommended in respect of bats, badgers and birds. Conditions are recommended to secure such measures and I am therefore satisfied that the proposal would not unduly affect wildlife and ecology.

Conditions

39. In addition to the standard time limit conditions, I consider a condition requiring details of materials to be agreed necessary to protect the character and appearance of the area.
40. A condition in respect of parking spaces is necessary to ensure that the proposal makes adequate provision to prevent parking on the surrounding highway network. Furthermore, whilst access is a reserved matter, in order to ensure that access during construction does not have a harmful impact on highway safety on Egginton Road, a condition is necessary to require details of a temporary access to be submitted and agreed. For the same reasons, it is necessary to impose a condition which requires the existing access point to be closed to traffic before occupation of the proposed dwellings.
41. A condition requiring a construction management plan is necessary to mitigate harm to the living conditions of nearby residents and upon highway safety. I consider it necessary to impose a condition regarding surface and foul water drainage to ensure the site is appropriately drained and does not contribute towards the risk of flooding, as is accordance with the mitigation measures set out in the submitted flood risk assessment.
42. A condition requiring implementation of the mitigation measures and recommendations contained in the Phase 1 Habitat and Protected Species Survey is necessary to ensure all habitats and species are adequately protected. To ensure that all habitats on the site which are identified to be retained are protected from damage during the construction of the development, a condition requiring protective fencing to be installed is necessary.
43. Although no direct evidence of badgers has been recorded on site, they are known to be within the surrounding area. Therefore, conditions requiring a survey for the presence of badgers on or around the site, and for the installation of mitigation measures where appropriate are necessary to ensure the species is adequately protected. A condition is also necessary to ensure that measures to mitigate impacts on breeding birds are implemented and that habitat enhancement is carried out.
44. A condition requiring the submission of a landscape and ecology management plan is necessary to ensure that landscaped areas within the site are appropriately maintained and managed in the interests of ecology and the character of the area.

45. A condition relating to noise control between the proposed dwellings and the existing restaurant use is necessary to protect the living conditions of future residents, as is a condition relating to odour controls. A condition is also necessary to ensure that risks from potential land contamination to the future users of the site and surrounding land are minimised to acceptable levels.
46. Conditions in respect of boundary treatments, landscaping of the site and the site layout are not necessary as they fall within the definition of the matters reserved for subsequent approval. There is no evidence before me to suggest that the agreement of a lighting strategy is necessary. I have not, therefore, imposed a condition to that effect.

Conclusion

47. Whilst I have found that the proposal would not accord with Saved Policies H5, H8 and EV1 of the LP, for the reasons given above there are other material considerations, including the presumption in favour of sustainable development as set out in the Framework and Policy S2 of the LPP1 which would outweigh the conflict with those policies.
48. For the reasons given above and having considered all other matters raised, I therefore conclude that the appeal should be allowed.

Jason Whitfield

INSPECTOR

SCHEDULE

- 1) Details of the access, 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) No development shall commence until details, including samples, of the materials to be used in the construction of the external surfaces of the dwellings hereby permitted have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 5) No dwelling shall be occupied until spaces have been laid out within the site for vehicles to be parked and those spaces shall thereafter be kept available at all times for the parking of vehicles.
- 6) No development shall commence until a temporary access for construction vehicles has been provided in accordance with details to be first submitted to and agreed in writing by the Local Planning Authority. The access shall have a minimum width of 5.5m, minimum radii of 6m, be constructed to base level and be provided with visibility sightlines of 2.4m x 103m in each direction. The area forward of the sightlines shall be cleared and maintained clear of any obstruction exceeding 600mm in height relative to the nearside carriageway edge.
- 7) No dwelling hereby permitted shall be occupied until the existing vehicular access from the site onto Egginton Road has been permanently closed with a physical barrier in accordance with details to be first submitted to and agreed in writing by the Local Planning Authority.
- 8) No development shall commence until a Construction Management Plan (CMP) has been submitted to and agreed in writing by the Local Planning Authority. The CMP shall provide for the storage of plant and materials, site accommodation, loading and unloading of goods vehicles, parking and manoeuvring of site operatives and visitor's vehicles, routes for construction traffic, hours of operation, method of prevention of debris being carried onto the highway and any proposed temporary traffic signifying or restrictions. The CMP shall be implemented prior to the commencement of the development and thereafter shall be adhered to throughout the period of construction of the development hereby permitted.
- 9) No development shall commence until details of a scheme for the disposal of surface and foul water have been submitted to and agreed in writing by the Local Planning Authority. The scheme shall thereafter be implemented prior to first occupation of the dwellings hereby permitted in accordance with the agreed details.

- 10) All recommendations and mitigation measures detailed within Section 6 of the Phase 1 Habitat Follow up and Protected Species Survey dated 16 June 2016, including the provisions in respect of hedgerow planting, habitat retention, stripping works to the barn on site, the installation of bat boxes, external lighting, vegetation clearance and bird boxes, shall be implemented in accordance with a scheme to be first submitted to and agreed in writing by the local planning authority.
- 11) All habitats to be retained as identified in the Phase 1 Habitat Follow up and Protected Species Survey dated 16 June 2016 shall be protected by fencing. The location and type of the fencing shall be first submitted to and agreed in writing by the local planning authority. The fencing shall be erected in accordance with the agreed details before any equipment, machinery or materials are brought onto the site for the purposes of the development hereby permitted, and shall be maintained until all equipment, machinery and surplus materials have been removed from the site. Nothing shall be stored or placed within any fenced area, and the ground levels within those areas shall not be altered, nor shall any excavation be made.
- 12) No development shall take place until a survey for any recently excavated badger setts on the site or within 30m of the site boundary has been submitted to and agreed in writing by the Local Planning Authority. In the event that the survey identifies badger setts on the site or within 30m of the site boundary, no development shall take place until suitable mitigation measures have been fully implemented in accordance with details to be first submitted to and agreed in writing by the Local Planning Authority. The development hereby permitted shall thereafter be carried out in accordance with the agreed details.
- 13) No works which include the creation of trenches or culverts or the use of pipes shall commence until measures to protect badgers from being trapped in open excavations and/or pipes and culverts have been submitted to and agreed in writing by the Local Planning Authority. The measures shall be retained as such for the entire construction period of the development hereby permitted.
- 14) No development shall commence until an enhancement and mitigation strategy for birds has been submitted to and agreed in writing by the Local Planning Authority and thereafter implemented in accordance with the agreed details.
- 15) For any phase, no development or other operations shall take place until a landscape and ecological management plan (LEMP) for the phase has been submitted to and approved in writing by the Local Planning Authority. The LEMP shall include details of the features to be managed and created, details of the management and monitoring of all ecological and landscape areas within the site and details of the implementation of the LEMP. The approved LEMP shall be implemented and subsequently maintained in accordance with the agreed details.
- 16) Prior to the construction of any dwelling hereby permitted, a scheme of noise control in relation to the restaurant shall be submitted to and agreed in writing by the Local Planning Authority. Any mitigation measures identified should be implemented in accordance with the

agreed scheme prior to first occupation of any of the dwellings hereby permitted and maintained as such thereafter.

- 17) Prior to the construction of any dwelling hereby permitted, a scheme of odour control in relation to the restaurant shall be submitted to and agreed in writing by the Local Planning Authority. Any mitigation measures identified should be implemented in accordance with the agreed scheme prior to first occupation of any of the dwellings hereby permitted and maintained as such thereafter.
- 18) Any contamination that is found during the course of construction of the development hereby permitted that was not previously identified shall be reported immediately to the local planning authority. Development on the part of the site affected shall be suspended and a risk assessment carried out and submitted to and approved in writing by the local planning authority. Where unacceptable risks are found, remediation and verification schemes shall be submitted to and approved in writing by the local planning authority. These approved schemes shall be carried out before the development is resumed or continued.
- 19) The development hereby permitted shall not be occupied until the mitigation measures detailed within the submitted Flood Risk Assessment dated February 2016 (FRA), including the raising of floor levels and emergency access and egress have been fully implemented in accordance with the FRA. The measures shall be retained thereafter.

-----END OF SCHEDULE-----