

Appeal Decision

Hearing held on 8 February 2017

Site visit made on 9 February 2017

by A Jordan BA Hons MRTPI

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

Decision date: 11 April 2017

Appeal Ref: APP/F2605/W/16/3156227

Land at Westfield Road, Dereham, NR19 1JB

- 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 Trustees of the G R Scott Will Trust against the decision of Breckland District Council.
 - The application Ref 3PL/2015/0846/O, dated 9 July 2015, was refused by notice dated 12 February 2016.
 - The development proposed is residential development of up to 100 dwellings including details of access.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The application is made in outline form with all matters other than access reserved for later approval. The submitted details of site layout are therefore indicative only.
3. The scheme is accompanied by a unilateral undertaking which seeks to ensure the provision of affordable housing and open space. A S106 Agreement has also been submitted to secure an education contribution, a library contribution, and a contribution towards the upgrading of the nearby Footpath 11. Although not stated in the reasons for refusal, the effect of the proposal on highway safety was a source of concern for some local residents.

Main Issues

4. Accordingly, the main issues for the appeal are:
 - The effect of the proposal on the supply of employment land in the district;
 - The effect of the proposal on highway safety;
 - Whether the proposal makes an adequate contribution to the provision of affordable housing, and
 - Whether the proposal is justified on the basis of the overall contribution it would make to the supply of housing.
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Reasons

Employment Land

5. Policy D4 of the *Adopted Core Strategy and Development Control Policies Development Plan Document* (DCPDP) designates the appeal site for employment use. The policy predates the *National Planning Policy Framework* (the Framework) as it was adopted in January 2012. Paragraph 215 of the Framework directs that due weight should be given to development plan policies according to their degree of consistency with the Framework. Although the policy accords with guidance in paragraph 21 which directs that plans should identify sites to meet the needs of inward investment over the plan period, paragraph 22 of the Framework states that the long term protection of sites for employment should be avoided where there is no reasonable prospect of the site being used for that purpose.
6. The appeal site is a flat piece of field adjacent to an existing industrial estate, which also adjoins housing and a day centre. The site was first designated for employment use in 1991. The parties agree that the site hasn't been actively marketed for employment use. Furthermore, although I was advised at the hearing that a potential commercial operator had been interested in taking the site forward, I was provided with no substantive evidence to demonstrate this by the Council.
7. The *Breckland Economic Growth Study 2013*¹ identifies the site as one of 36 sites across the district allocated for employment use. The site performs poorly in a comparative assessment and is described as having limited prospects of delivering any form of employment use due to the costs involved, although these are not specified. The report also notes that the proximity of residential development will limit the site's appeal to some industrial occupiers. I noted during my site visit that residential occupiers sit in close proximity on 2 sides, and I concur that this would be likely to limit the potential use of the site to B1 type uses.
8. Furthermore, I note that the site is not serviced, and that access to it, which for employment use is most likely to be sought from Rashes Green Road, would be across land in the control of the Council. These factors go some way to explaining why, despite the fact that the site makes up around half of the land allocated for employment in Dereham, there has been limited prospect of development to date. I am advised that the report predates decisions in relation to strategic highways provision in the district and so may not reflect more recent changes in market demand. Nevertheless, I have been provided with no substantive evidence that this factor alone is likely to be sufficient to overcome the site's other shortcomings.
9. The parties agree that office development on the site would not be viable. In relation to development for B1 industrial use, the Council have questioned some of the assumptions made in the appellant's viability assessment but appear to agree that development of the site would be viable in only a limited range of circumstances. These include freehold sale to an owner/occupier purchaser of B1 industrial units, where a reduced profit level of 10% was acceptable to the vendor. Development was also found to be profitable in the case of serviced plots for freehold sale, where an increased site area over that

¹ Nathaniel Lichfield and Partners for Breckland Council November 2013

proposed by the appellant was taken into account². Based on the information before me I do not consider that the Council's assessment undermines the appellant's view that the site would only be viable in a limited range of circumstances which would mostly involve significant capital investment from a developer. In this respect the site is unlikely to be an attractive prospect for employment development and so currently makes a very limited contribution to employment land provision in the district.

10. Taking into account the long term vacancy of the site, and the absence of any convincing evidence that there is a realistic prospect of it coming forward for employment use, I see no benefit in its long term protection, and whilst the loss of the site would conflict with Policy D4 of the DCPDP I do not consider that the loss of the site from employment use would lead to material harm. The proposal would therefore not conflict with guidance contained within the Framework which directs that where there is no reasonable prospect of land being used for an allocated employment use alternative proposals should be treated on their own merits.

Highway Safety

11. The effect of the proposal on highway safety is a matter of considerable concern for local residents. Westfield Road is a relatively narrow road, which becomes single track when cars are parked along one side. The proposed access would emerge onto Westfield Road within a short distance of the egress from and access to Toftwood Junior School. The road also serves The Fred Nicholson School, which provides for those with special needs. Toftwood Infant School is served by School Lane which meets Westfield Road to the south of the site.
12. In support of the application the appellant has submitted a traffic survey³ which was undertaken on the 7th of July 2014. Contrary to the views of some residents this would appear to have been undertaken within term-time. This surveyed existing traffic levels at the proposed access point on Westfield Road, the junction of A1075 Shipdham Road, Westfield Road, Rash's Green, South Green junction and the A1075 Shipdham Road/School Lane junction. It also used TRICS data modelling of the likely travel patterns of future residents to estimate the traffic likely to arise from the development. With this information it predicted the likely impact of predicted traffic from the development on the nearest junctions and concluded that taking into account existing patterns of traffic, likely increases were unlikely to be significantly harmful. The assessment also included a review of accident data in the vicinity. On this basis Norfolk County Council Highways, had no objection to the scheme, subject to the implementation of measures for traffic calming.
13. Taking into account the proportionately low numbers of additional vehicles using the nearby junctions, which is estimated at around 44 car based movements during peak hours, I concur that the increase in traffic likely to be associated with the development using nearby junctions would not be significant and is therefore unlikely to be harmful to highway safety.

² This omits land set aside for Sustainable Urban Drainage where the Council consider the land requirement to be overestimated.

³ Transport Assessment ref 131329 January 2015 by Rossi Long Consulting

14. With regard to the position of the access in relation to the existing school and the likely increase in vehicles using Westfield Road, I recognise that existing congestion is a concern for residents. I made 3 visits to Westfield Road. The first visit was in the early evening. During this time the road was very quiet with limited through traffic and no notable on street parking. The second visit was at 8.30-8.45am on a school day. The road was considerably busier. There was a great deal of on-street parking, which reduced the carriageway to a single lane and precluded vehicles from passing. The road also had high levels of pedestrian traffic and I noted taxis entering the Fred Nicholson School. Similar levels of traffic were noted during the site inspection on the 9th of February.
15. I therefore have no reason to dispute the claims of local residents that the congestion witnessed was a daily occurrence, or that it also occurred later in the day during school pick up times. However, I also noted during the site visit that levels of traffic on the road returned to very low levels once school drop offs had been completed. It is therefore clear that the patterns of traffic witnessed are similar to that commonly experienced around many schools, with any effects from increased traffic only likely to be felt for limited periods during the day. Taking into account the already congested conditions, and the relatively slow speed of traffic at these times, I am not persuaded that traffic from the proposed development would make a significant difference to existing conditions, or that it would lead to residents experiencing congestion for longer periods.
16. Therefore on the second matter I conclude that the proposal would not be harmful to highway safety, or lead to significant additional inconvenience to road users over that which they already experience. I therefore find no conflict with policy in the Framework, which seeks to secure safe and secure access for all people and advises that development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

Affordable Housing Provision

17. Policy DC4 of the DCPDP sets out principles for affordable housing provision in the district. It requires that 40% of the total number of housing units on new residential development sites be provided and maintained as affordable housing. It requires that the contribution will be provided as built units on the site and that the mix, size, type and tenure of affordable homes meets local housing needs and shall comprise a mix of social rented and intermediate housing. Although the policy predates the Framework, it reflects the guidance in paragraph 50 which directs that where affordable housing is needed local authorities should set policies for meeting this need on site, unless provision of broadly equivalent value can be robustly justified. The Framework also advises that such policies should be sufficiently flexible to take account of changing market conditions over time.
18. The proposal would provide for up to 100 dwellings. The application is supported by a legal agreement which seeks to secure 40% of those dwellings as Affordable Housing. I was advised at the hearing that the parties had failed to reach agreement in relation to the proposed mix of housing, the option to seek additional subsidy, and arrangements for alternative provision. As a

result a bilateral agreement had not been possible, and the appellant had submitted a unilateral undertaking.

19. The obligation as submitted forms part of the appellant's proposed scheme. In coming to a view I must therefore determine whether the obligation satisfactorily addresses matters which might otherwise have led to permission being refused. Whilst I could decide that an obligation is unnecessary, and need not apply in order for the development to be acceptable, it is not within my remit to remove or "disapply" parts of the obligation, or to otherwise alter or amend the agreement before me. The need for affordable housing, and the amount required within the scheme, is not a matter of dispute between the parties.
20. I have considered whether the use of a planning condition requiring affordable housing would be appropriate in this case. *Planning Practice Guidance* advises that a negatively worded condition limiting the development that can take place until a planning obligation has been entered into is unlikely to be appropriate in the majority of cases. It also advises that in exceptional circumstances a negatively worded condition requiring a planning obligation may be appropriate in the case of more complex and strategically important development where there is clear evidence that the delivery of the development would otherwise be at serious risk. I have no reason to consider that this would be the case for the proposal before me. Neither has it been suggested that a condition would obviate the need for an obligation at a later stage. I have therefore come to the view that an obligation is necessary in this case to secure the affordable housing which both parties agree is necessary.
21. The Council considers the submitted undertaking to be unacceptable in a number of respects. One of these is the need for a cascade clause – Clause 1.6. The cascade clause stipulates that if within 2 months of the date of commencement the owner has not disposed of the affordable housing to a provider for a sum not less than the design and build costs, or there is a change in any legislation concerning affordable housing, then the owner can negotiate a revised affordable housing scheme. If within a further 2 months the affordable housing in the revised scheme is not acquired by a provider, the owner can sell the affordable housing free of restriction, and provide the Council with a commuted sum. This sum shall be determined by the owner and shall comprise the value of the dwelling, less the build cost.
22. I accept the appellant's view that in some instances cascade clauses may be appropriate. However, in this case the clause contained in the agreement is unnecessarily restrictive. It requires an as yet unknown provider to be able to complete the acquisition of the affordable housing within a 2 month period from the commencement of development of the site. This appears to me to be an unreasonably short period, even bearing in mind that the agreement also requires that either the registered provider or details of how the affordable housing will be secured are to be provided before the development is commenced as part of the "affordable housing scheme". Providers may need to change during the course of the scheme, or the affordable housing may be provided by more than one body.
23. I note that Clause 1.2 may provide some impetus for the owner to provide the affordable housing. However, it provides limited protection in the case of a future developer intent on avoiding on site provision, who could nonetheless,

commence development on site with relatively limited works and then fail to secure a provider within the constrained time period specified. Furthermore the undertaking is imprecise in relation to what "a change in any legislation concerning affordable housing" might entail, which could include relatively minor changes. Finally, in the event that off-site provision is required, it is not clear from the definition of "Commuted Sum" that this would ensure that a financial contribution of a broadly equivalent value to on-site provision would be achieved.

24. These matters lead me to the view that clause 1.6 is flawed and its existence within the S106 undermines my confidence in the undertaking as an appropriate means of delivering the agreed amount of affordable housing. In this regard it would not contribute to the provision of acceptable affordable housing provision within the site, as specified in policy DC4 of the DCDPD.
25. A number of other aspects of the undertaking were discussed at the hearing, including the inclusion of "Starter Homes" within the definition of affordable housing, the need for a clause relating to the use of public subsidy and the definition of Intermediate Housing and Intermediate Rented Housing. As my concern in relation to the cascade clause is in itself sufficient to undermine my confidence in the adequacy of the agreement and is determinative, I have not considered these other matters in further detail.
26. On the third matter I therefore conclude that the proposal would fail to make acceptable provision for affordable housing and so would conflict with policy DC4 of the DCPDP. Although this predates the Framework, it nonetheless reflects guidance within it which seeks to ensure that where affordable housing is needed, it is provided. I therefore attribute substantial weight to the policy and the failure to comply with it carries substantial weight against the proposal.

Contribution to Housing Supply

27. The parties dispute whether a 5 year Housing Land Supply can be demonstrated in the District. Although the parties agreed that there was no 5 year supply at the time the application was refused, the Council now consider that the recently issued *Statement of Five Year Housing Land Supply* (30.9.2016) indicates that a supply of more than 5 years can now be demonstrated.
28. I was provided at the hearing with 4 alternative figures for housing supply. These were based on whether RSS⁴ or SHMA⁵ figures were used to assess the OAN (Objectively Assessed Need), and whether a Sedgfield or Liverpool methodology was used to deal with historic undersupply. The Council's best case scenario, was a supply of 5.6 years.
29. I bear in mind that S78 appeals are not normally the most appropriate vehicle for determining strategic housing land supply issues and that such matters would be more appropriately dealt with during the examination of the emerging local plan. I take into account that the RSS based target now significantly predates the emerging OAN approach advocated by the Council, and that the OAN approach has been accepted by other Inspectors. I am also mindful that the emerging plan is still at a very early stage, and to reach a conclusion on whether Liverpool or Sedgfield is most appropriate in this case would require

⁴ Regional Spatial Strategy

⁵ Strategic Housing Market Assessment.

me to make early assumptions in relation to the timescale for the longer term delivery of Strategic Urban Allocations, which I am reluctant to do.

30. However, I heard no convincing evidence that the provision predicted to arise in years 4 and 5 would be forthcoming from the larger strategic allocations, particularly sites with and without permission at Attleborough and land north of Thetford. Therefore, although I note that there appears to have been a recent upturn in permissions in the District, based on the evidence before me in relation to this appeal, even if I were to accept that an OAN approach and a Liverpool methodology were appropriate, I cannot confidently conclude that a 5 year supply of housing land has been demonstrated by the Council at this time. In this context, the contribution the proposal would make to housing supply must carry substantial weight.

Other Matters

31. The effect of the proposal on the living conditions of the occupiers of 49 Westfield Road was discussed at the hearing. I have also considered the effects of the proposal on No 55 Westfield Road and other residential occupiers nearby. The proposal is in outline form and so the exact position of the access route within the site has not been determined. I noted on site the position of windows on the side elevation of No 49, and that the introduction of traffic along the proposed access route would represent a significant increase in activity in their vicinity. Nevertheless, I am satisfied that the space available within the plots of 51-53 Westfield Road is sufficient to accommodate the access and any landscape or soundproofing measures necessary to protect adjoining properties. As the layout has yet to be determined I also have no reason to assume that an appropriate scheme, which takes account of the living conditions of nearby residential occupiers could not be secured on site. This matter does not therefore weigh against the proposal in the planning balance.
32. Residents have referred to pressure on local services, with health services being a matter of particular concern. NHS England has stated that the 3 local GP services are oversubscribed and require capital investment to provide additional floorspace to support the population growth that would arise as a result of this development. Although NHS England have sought a financial contribution of £31,520 towards capital investment in 3 local surgeries, the Council have advised that this contribution cannot be sought via a S106, as it would not meet the tests set out in guidance. It would therefore appear that the proposal would be likely to lead to additional pressure on local services, without a means for this impact to be mitigated. I have some sympathy for residents' concerns in relation to existing pressure on GP services. However, whilst the NHS has identified concerns regarding capacity, I have not been provided with any information as to the effect this may have on local services. In the absence of quantifiable harm, I am unable to attribute any more than limited weight to the harm that may arise.
33. The submitted unilateral undertaking also seeks to provide for open space as part of the development. I am satisfied that this represents a necessary part of the development, and that the agreement would provide appropriate

provision for it if properly executed⁶. This matter is therefore a neutral factor in the planning balance.

34. The application is also supported by a S106 agreement, which is also signed by Norfolk County Council, and which would provide for financial contributions in relation to a range of matters if properly executed⁷. The parties agree that an education contribution and a library contribution are both necessary, although the appellant disputes the repayment clause, in particular the length of time in which the Council would have to repay any unused monies, which would amount to 5 years from the date of final occupation. In coming to a view I take into account that the development may take some time to complete and that this repayment period would allow the Local Authority the opportunity to respond to increases in local demand which arise in the early years of the completed development, which I do not consider to be unreasonable and I consider these parts of the obligation to be necessary.
35. With regard to the contribution towards green infrastructure which relate to the upgrading of Footpath 11, I noted on site that the appeal site was used as an informal through route, which the Council did not wish to formally establish, primarily due to the Council's control of land at Rashes Green Road. During the site visit I saw that Footpath 11 was also used as a through route. However, due to the relative distance from the appeal site, it does not provide a direct alternative to the informal route already in evidence. Furthermore, the works proposed would not, in my view, be essential in order for the footpath to remain in use, and so any additional use which might arise as a result of the proposal would not necessitate the contribution. I am therefore of the view that the provisions of the agreement in relation to green infrastructure are not necessary and need not apply in order for the development to be acceptable in planning terms.
36. During the hearing my attention was drawn to concerns in relation to the potential for archaeology on site. The application is accompanied by a desktop study⁸ which shows no archaeological constraints. In the absence of any convincing evidence to the contrary I see no reason to dispute this view. I also have no firm basis for concluding that the site is a habitat for protected species. Furthermore, I am satisfied that subject to the imposition of appropriate conditions, concerns in relation to flooding and potential contamination on site need not preclude the site's development. None of these matters weigh against the proposal in the planning balance.
37. Finally, residents have also drawn my attention to other applications in the area which seek to provide residential development. I cannot at this point be sure that these other schemes are likely to come to fruition, or that if they do, how the potential effect of such development on the highways network and local services will be mitigated. I am therefore unable to attribute any weight to the potential cumulative effects of these developments in these regards. Furthermore, as I do not consider housing land supply to be determinative in

⁶ The Unilateral Undertaking and S106 refer to a green line around Nos 51 and 53 Westfield Road. This is not marked on the submitted plans. However, I have assumed that this matter could be expedited if necessary and do not consider it determinative in this case.

⁷ The Unilateral Undertaking and S106 refer to a green line around Nos 51 and 53 Westfield Road. This is not marked on the submitted plans. However, I have assumed that this matter could be expedited if necessary and do not consider it determinative in this case.

⁸ Report by Archaeological Risk Management July 2014.

this case, the potential for other residential development coming forward does not weigh against this proposal in the planning balance.

Planning Balance and Conclusion

38. The proposal would not lead to harm in relation to the provision of employment land. Neither would it significantly worsen existing highways conditions along Westfield Road or the surrounding area. It would also not be likely to harm the amenity of adjoining residential occupiers. It would also make a substantial contribution to the provision of housing in the district.
39. However, the proposal would fail to make appropriate provision for affordable housing. The Framework is clear that where the need for affordable housing has been demonstrated, this need should be met on site, unless a financial contribution of a broadly equivalent value can be robustly justified. The need for affordable housing on site and the appropriateness of the site for its delivery is not disputed. The failure to adequately secure it is therefore contrary to policy DC4 of the DCPDP and is a matter to which I attribute substantial and greater weight. It therefore follows that the proposal would fail to comply with the Development Plan (DCPDP) when taken as a whole.
40. Having regard to paragraph 49 of the Framework, it is not clear that there are any policies for the supply of housing which are relevant in this case. However, even if there were, and the tilted balance set out in the 4th bullet point of paragraph 14 of the Framework were to apply (because relevant policies are out of date), the adverse effects of failing to make adequate provision for affordable housing would significantly and demonstrably outweigh the benefit the proposal would bring to wider housing supply. There are no other material considerations that would outweigh the conflict with the development plan. The proposal must therefore be considered to fail to comply with the presumption in favour of sustainable development and the appeal is dismissed.

Anne Jordan

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Sam Kingston	Roche Surveyors for the Appellant
Robert McGeady	Ashtons Legal for the Appellant
Jenny Page BA(Hons) BTP Dip (Urban Design) MRTPI	Beacon Planning for the Appellant
Mark Robinson MRICS	Robinson Layer for the Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Simon Wood BTP BA(Hons) MRTPI	Urban Vision for Breckland Council
Melissa Kurihara MRTPI	Urban Vision for Breckland Council
Ralph Burton	Strategic Property Breckland Council
Sarah Robinson	Breckland Council
Linda Warner	Inward & Economic Development, Breckland Council
James Heaton	Housing Enabling Officer Breckland Council
Nicki Patton	West Norfolk Council
Zoey Tebutt	Norfolk County Council
Laura Waters	Norfolk County Council

INTERSTED PARTIES

Cllr Harry Clarke	Local Resident and Breckland Council
Cllr Philip Duigan	Local Resident and Breckland Council
Antony Needham	Town Clerk – Dereham Town Council
Lucy Walmer	Breckland Council
Catherine Rix	Capita
Mrs Gibbs	Local Resident
Mr and Mrs Lovelock	Local Residents
Mrs Alison Harris	Local Resident
Mrs Reeder	Local Resident

Mr Mantle	Local Resident
Colin Chapman	Local Resident
Robin Chapman	Local Resident
Bernard and Marilyn Simpson	Local Resident
Sue Haney	Local Resident
T Morley	Local Resident
D Lavalier	Local Resident
P Bayhrs	Local Resident
William Casper	Local Resident
K and J Green	Local Resident
Y Reeve	Local Resident
Kirsty Heath	Local Resident

Documents Submitted at the Hearing

- Appeal Notification Letter and List of Interested Parties
- Copy of comments from Norfolk County Council Highways Officer
- Details of Appellant's Representatives
- Draft Infrastructure Delivery Plan Local Plans Committee - Dec 2016
- Breckland Local Plan Preferred Site Options and Settlement Boundaries 2016
- Copy of comments from Environmental Protection Officer
- Copy of comments from Councillor Kate Millbank