
Appeal Decision

Site visit made on 31 July 2017

by Peter Rose BA MRTPI DMS MCMI

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

Decision date: 6th September 2017

Appeal Ref: APP/M1595/W/17/3172125

Land adjoining Thatched Cottage, Baker Street, Orsett, RM16 3LJ

- 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 approval to reserved matters required by a condition of a planning permission.
 - The appeal is made by Robert Lockwood against Thurrock Borough Council.
 - The application Ref: 16/00391/REM, is dated 14 June 2016. It states: '*All reserved matters relating to previous outline approval to be applied for. Scheme consisting of 8 No. 4 bedroom detached properties with attached garages and 1 No. 4 bedroom property with attached car port and detached single garage*'. It seeks approval pursuant to Conditions 1 and 2 attached to outline planning permission Ref: 14/00912/OUT dated 25 March 2015.
 - The original development proposed is '*outline application for 14 dwellings with garages (all matters reserved)*'.
 - The reserved matters for which approval is sought are: access, appearance, landscaping, layout and scale.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Robert Lockwood against Thurrock Borough Council. This application is the subject of a separate Decision.

Procedural matter

3. Condition 2 attached to outline permission Ref: 14/00912/OUT requires reserved matters to be submitted within one year from the date of the permission. That permission is dated 25 March 2015 but the application for reserved matters is dated 14 June 2016. The appellant has since confirmed, however, that the date shown on the application is incorrect, and has submitted documentary evidence to demonstrate a submission date of 18 March 2016¹. This correction is not disputed by the Council.

Main issues

4. The main issue is whether the application for reserved matters constitutes a submission consistent with the terms of the original outline permission, or whether it is a materially different proposal.

¹ See letter from agent dated 15 March 2017 and accompanying documents

5. If consistent, a further subsequent main issue is then the acceptability or otherwise of the submitted details.

Reasons

Background

6. The appeal site comprises some 0.75 hectares of land located adjacent to the junction of Baker Street and Stanford Road. The site is accessed from Long Lane and appears to accommodate a variety of mainly non-residential uses. The land is set below the levels of Baker Street and Stanford Road, and relatively isolated residential properties lie to the north and west.
7. The site is located within the Green Belt as defined by the *Thurrock Local Development Framework Core Strategy and Policies for Management of Development*, adopted January 2011.
8. On 25 March 2015, the Council granted an outline permission for development of the appeal site for *'14 dwellings with garages (all matters reserved)'*². The permission is subject to 9 conditions and is accompanied by a unilateral undertaking dated 25 March 2015 (the undertaking).
9. On 18 March 2016, an application for approval of reserved matters was submitted pursuant to the outline permission but described as a *'scheme consisting of 8 No. 4 bedroom detached properties with attached garages and 1 No. 4 bedroom property with attached car port and detached single garage'*³.
10. The appellant has identified various factors which have contributed to the revised description of the proposal, including the subsequent discovery of a gas main running across the site. The appellant advises this would have prevented 3-4 dwellings being constructed in the positions previously shown illustratively in the outline application. The appellant also considers the reserved matters to involve a superior character and appearance of development than previously indicated⁴.
11. By email dated 9 September 2016, and following several months of detailed negotiations, the Council advised the appellant that it was unable to determine the application as submitted. The Council advised that *'the description of the outline planning consent ... refers to 14 dwellings with garages. The current application seeks approval of reserved matters for only 9 dwellings. This is not within the ambit of the outline consent ...'*.
12. Meanwhile, an application for *'Modification or discharge of planning obligations'* under section 106A of the Town and Country Planning Act 1990 (the Act) was submitted dated 27 July 2016 (the application to discharge). This application has yet to be determined. The authority's position is that *'this has not been signed off, as the Council is awaiting the appeal decision'*⁵.

The outline planning permission

13. The outline application appears to have been accompanied by illustrative indications of development only and contained little definitive detail. The

² Permission Ref: 14/00912/OUT dated 25 March 2015

³ Application Ref: 16/00391/REM but incorrectly dated 14 June 2016

⁴ See application to discharge undertaking dated 27 July 2016 (Ref: 16/01075/DVOB)

⁵ See email of 31 July 2017

subsequent permission shows that all reserved matters remain to be approved, none of the conditions serve to expressly define the substantive form or content of the expected development, and the authority's stated '*Reasons for Granting Consent*' offer little site-specific background.

14. The only formally defining feature is the description, and on the face of matters, I agree there is a marked contrast between a development described as 14 dwellings and a subsequent scheme relating to 9 dwellings.
15. I have had careful regard to the various citations of authority helpfully provided by the parties⁶. Whilst the two descriptions are materially different, I find the absence of any defining conditions attached to the outline permission renders it, effectively, a rather general outline permission with all matters reserved. As a matter of construction of the permission itself and read as a whole, I find little reason to suggest that details for a lesser development of 9 dwellings, although not consistent with the precise wording of the outline description, would not fall within the ambit of such a substantively unfettered outline permission for 14 dwellings.
16. In relation to the outline planning permission itself, I therefore find the terms of the submitted reserved matters to be compatible and that, subject to the undertaking, the submission could be considered and determined on that basis.

The undertaking

17. The undertaking is expressly stated to be a deed made pursuant to section 106 of the Act⁷, and contains planning obligations to that effect.
18. The undertaking refers specifically to application Ref: 14/00912/FUL (sic) as the '*Application*,' and expressly defines the '*Development*' as '*erection of fourteen semi detached properties with garages*'.
19. Section 106(1) of the Act defines the general purposes of such an undertaking to include restricting the development or use of the land in any specified way, and requiring the land to be used in any specified way⁸. To this end, the undertaking covenants, amongst other details, to transfer '*the freehold of five of the residential units within the Development to a registered provider of Affordable Housing*'⁹. More specifically, those dwellings are referred to as the '*Affordable Housing Units*' and are defined as '*five of the semi-detached properties in the Development*'¹⁰.
20. The question before this appeal in the first instance is whether the proposed details fall within the ambit of the approved outline scheme. Notwithstanding the relatively unfettered character of the outline permission itself, that permission was only granted on the basis of, and in conjunction with, a unilateral undertaking requiring affordable housing and on such terms are as set out in the submitted deed¹¹.

⁶ These include: *I'm Your Man Limited v Secretary of State for the Environment*, 1998 WL 1042297; *Winchester City Council v Secretary of State for Communities and Local Government* [2015] JPL 1184; *R. (on the application of Kemball) v Secretary of State for Communities and Local Government* 2015 WL 5949348; and *R. v Ashford Borough Council ex parte Shepway District Council* [1999] P.L.C.R., Part 1

⁷ Section 2

⁸ Sections 106(1)(a) and (c)

⁹ Schedule 2

¹⁰ Section 1

¹¹ See Committee minutes of 8 January 2015

21. The submitted reserved matters do not provide for 5 semi-detached houses and there are no proposals accompanying the application for any affordable housing. As a matter of fact and degree, my judgement is that a development of 9 detached dwellings devoid of affordable housing is simply not compatible with a scheme requiring, through statutory deed, 5 semi-detached dwellings to be provided as affordable dwellings. Irrespective of the policy and other justification for the subsequent submission, it is materially different in its planning character from the terms of the undertaking.
22. There is an application before the authority to discharge the undertaking but that submission has not been decided and its determination does not form part of this appeal. Whatever the merits or otherwise of the application to discharge and of the revised proposal for 9 dwellings, the statutory constraints of the undertaking, by virtue of section 106, remain in place as defining and accompanying features of the original outline scheme.
23. The application to discharge will address various matters referred to in the evidence submitted. The Council suggests the original outline proposal satisfied the very special circumstances of a Green Belt location by reason of both its scale of development and provision of affordable housing. The appellant refers to Council policy not requiring affordable housing for developments of 9 units, and to changes in national policy and to accompanying case law since the original decision. To proceed with the submitted reserved matters in the absence of a discharge of the undertaking would effectively prejudice consideration by all parties of these and of all other relevant underlying matters. I do not therefore accept that the undertaking is no longer relevant, but find it remains intrinsically linked to the outline permission and its granting.
24. Policies and considerations of merit only engage and become relevant to the appeal application if this submission is consistent with the outline and, absent a discharged undertaking, I find the scheme does not clear that first hurdle. The authority may or may not consider that a 9 dwelling development absent any affordable housing to be acceptable, but that is not what is anticipated by the extant undertaking and, on that basis, not what I consider to be represented by the construction of that original outline scheme read in its entirety.

Summary of findings

25. I do not consider that the stated terms of the outline planning permission can be considered separately from the terms of the obligation. The statutory purposes of the obligation are to restrict the use of land, and with a not dissimilar effect to a planning condition. The planning permission has to be read in the context of, and in conjunction with, the planning obligation.
26. Considering both matters conjunctively and in the round, I therefore conclude, as a matter of fact and degree, that the submitted reserved matters are materially different from the terms of the approved outline scheme and cannot be considered as compatible with that original approval.

Other matters

27. Informal advice was given by the authority's officers regarding the possible compatibility of the two descriptions and the appellant proceeded on that

basis¹². The possible issue of estoppel has been raised, and I have again had regard to cited authorities¹³. I consider the advice given to have been informal in its nature and effectively without prejudice to formal Council decisions. I do not find this to be relevant to my decision which should instead be based upon an objective assessment of the relevant planning merits.

Conclusion

28. For the above reasons, the appeal is dismissed.

Peter Rose

INSPECTOR

¹² See, for example, email dated 19 January 2016

¹³ Principally *R. v East Sussex County Council (Appellants) Ex Parte Reprotech (Pebsham) Ltd. (Respondents) and One Other Action* [2002] UKHL 8