



Appeal Decision

Hearing held on 14 November 2017

Site visit made on 13 November 2017

by Tom Gilbert-Wooldridge BA (Hons) MTP MRTPI IHBC

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

Decision date: 21st December 2017

Appeal Ref: APP/N1730/W/17/3179748

**Land to rear of Hatchwood Cottage, Farnham Road, Odiham, Hook
RG29 1AB**

- 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 under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr N Craker of Vanderbilt Homes against Hart District Council.
 - The application Ref 17/00542/AMCON is dated 6 March 2017.
 - The application sought planning permission for development of up to 35 dwellings (including affordable units), new access from Farnham Road and other ancillary works without complying with conditions attached to planning permission Ref 15/00829/OUT, dated 3 August 2015.
 - The conditions in dispute are Nos 21, 23 and 26 which state that:
(21) No development shall take place on site until either the Local Education Authority has confirmed that there is capacity at Robert Mays School to accommodate the future occupiers of the development, or until a scheme to assist in the increase of the capacity of Robert Mays School has been submitted to and approved in writing by the Local Planning Authority.
(23) No development shall take place on site until details of a scheme for part provision of the Fleet Leisure Centre have been submitted to and approved in writing by the Local Planning Authority.
(26) No development shall take place on site until details of a scheme to ensure that the proposal benefits from sustainable transport initiatives have been submitted to and approved in writing by the Local Planning Authority. The scheme shall include phasing provisions for both on and off site facilities and development shall take place in accordance with those provisions.
 - The reasons given for the conditions are:
(21) To ensure that the development does not prematurely have adverse impacts on school places in the locality.
(23) To prevent the development having an adverse effect on leisure facilities.
(26) To ensure that the proposed residents benefit from sustainable transport networks, giving priority to pedestrian and cycle networks and have access to high quality public transport facilities.
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Decision

1. The appeal is dismissed insofar as it relates to the removal of Condition 21 set out in planning permission Ref 15/00829/OUT granted on 3 August 2015. The appeal is allowed in part and planning permission is granted for development of up to 35 dwellings (including affordable units), new access from Farnham Road and other ancillary works at Land to rear of Hatchwood Cottage, Farnham Road, Odiham, Hook RG29 1AB in accordance with the application Ref

17/00542/AMCON dated 6 March 2017 without complying with Conditions 23 and 26 set out in planning permission Ref 15/00829/OUT granted on 3 August 2015, but subject to the conditions set out in the attached schedule.

Procedural Matters

2. There was some uncertainty as to whether the Council issued a decision on the planning application before the case deadline and the submission of an appeal. The appeal was submitted on 10 July 2017. The officer's delegated report has a date printed of 1 August 2017, although apparently it was written some time before that date. No decision notice has been provided. As a consequence, it was agreed by the main parties at the hearing that the appeal should progress as a non-determination of a planning application.
3. The three disputed conditions are all pre-commencement conditions. An application under Section 73 of the Town and Country Planning Act 1990 (TCPA) was made on 6 March 2017 to carry out development without complying with conditions 21, 23 and 25 of planning permission ref 15/00829/OUT. It was confirmed at the hearing that development commenced on site on 6 February 2017. Therefore, a breach of conditions occurred before the application was made. As a result, I have dealt with this appeal under Section 73A of the TCPA which allows for planning permission to be granted for development carried out without complying with conditions subject to which planning permission was previously granted.
4. I visited the appeal site on the day before the hearing to familiarise myself with the site and its surroundings, including the Robert Mays School and Fleet Leisure Centre. As the appeal related to the provision of infrastructure via planning conditions, it was agreed at the hearing that there was no need for me to return to the site after the end of discussions, either accompanied or unaccompanied.

Background and Main Issue

5. Outline planning permission ref 15/00829/OUT was granted on 3 August 2015 for the development of up to 35 dwellings, including access details, at land to the rear of Hatchwood Cottage on Farnham Road in Odiham ('the appeal site'). The reserved matters application covering the remaining reserved matters was approved on 26 January 2017, while various applications to discharge conditions relating to the outline permission have been approved.
6. Conditions 21, 23 and 26 deal with matters relating to education, leisure and transport and required discharging before development commenced. Their full wording and reasons given are shown in the banner heading above.
7. Condition 23 requires details of a scheme for part provision of the Fleet Leisure Centre. However, the Council confirmed that the leisure centre has been constructed and it would not be possible to request a scheme for any other leisure project given the specific wording of the condition. Therefore, the Council did not contest the condition at the hearing and was content for its removal. I agree that the condition is not necessary and so have allowed the appeal insofar as it relates to this condition and granted a new permission without this condition.
8. Condition 26 requires details of a scheme to ensure that the proposal benefits from sustainable transport initiatives. However, the Council confirmed that this

condition would not be contested following consultations between their Transport Department and the County Council's Highways Department. The Council was content for its removal. As it has not been demonstrated why this condition is necessary, relevant or reasonable, I have allowed the appeal insofar as it relates to this condition and granted a new permission without this condition.

9. Both the Council and the County Council's Children Services Department (CSD) maintain that Condition 21 relating to education is necessary, reasonable and relevant to the development to be permitted, while the appellant takes the contrary view.
10. Therefore, the main issue is whether Condition 21 is necessary, relevant and reasonable in all other respects in the interests of securing improvements to education facilities.

Reasons

11. Paragraph 203 of the National Planning Policy Framework (NPPF) states that local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of planning conditions or obligations. Paragraph 206 of the NPPF sets out six tests that planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
12. Condition 21 is a negatively worded condition requiring one of either of two elements to be met before development commences. The first element is for the local education authority (LEA) to confirm that there is capacity at the catchment secondary school (Robert Mays). The second element is for a scheme to assist in the increase of the capacity of Robert Mays School to be submitted to and approved in writing by the local planning authority.
13. There was no dispute between the main parties that Robert Mays School is currently close to capacity. There was also no dispute at that the development at the appeal site would generate 7 secondary age children based on the County Council's calculations. The County Council's CSD sought a contribution towards education facilities as part of the determination of the original outline planning application. As part of its representations on this appeal, the required contribution is £209,979 to address the impact of the development on the provision of education facilities.
14. Work has commenced at Robert Mays School to expand its capacity by 150 places (one form of entry) under a £7.6 million scheme funded through development contributions and central government resources. Funding was approved in January 2016 and planning permission was granted in October 2016. The work is expected to be completed by September 2019. The County Council's CSD confirmed that the expansion takes account of existing demographic changes and population growth as a result of new development, including the appeal site.
15. The appellant argued that as the expansion scheme is already underway that Condition 21 is no longer necessary or relevant to the development permitted. The appellant also argued that occupation of the appeal site development would occur over time and would not be completed until around 2019 when the

expansions works are due to complete. However, the expansion plans take account of the appeal site development, and the County Council's CSD confirmed that the contribution required from the appeal site development forms part of the £7.6 million scheme. Without it, the scheme would either need to be reduced in scope or alternative resources would need to be found. Therefore, the condition is necessary and relevant to the development to be permitted. Without it, the development would not be acceptable.

16. Paragraph 009 of the Planning Practice Guidance (PPG) section on the use of conditions states that negatively worded conditions prohibiting development until a specified action has been taken should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission¹. The outline planning permission required development to commence within 3 years from the date of the permission or before the expiration of 2 years from the date of the approval of the reserved matters application, whichever is the sooner. I consider that the two elements of Condition 21 were possible of being performed within this time-limit as it allowed sufficient time for discussions with the LEA or for a scheme to be submitted and agreed. The condition is therefore reasonable in this respect.
17. Paragraph 010 of the PPG conditions section states that a negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases². Such a condition 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. Paragraph 010 of the PPG also advises that ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency.
18. It is not clear why a planning obligation was not sought for education contributions. Paragraph 4.6.1 of the Hart District Local Plan (Replacement) 1996-2006 ('the Local Plan') states that the Council may seek to negotiate planning obligations with developers to secure off-site infrastructure where they are necessary to make a development acceptable in line with Government advice. This is supported by the Council's Community Infrastructure Policy 2014 which sets out the Council's approach to planning obligations.
19. The pooling restrictions of Regulation 123 of the Community Infrastructure Levy Regulations 2010 (as amended) may be preventing the ability of the Council to secure any further planning obligations for the current expansion of Robert Mays School. Nevertheless, entering into a planning obligation or other agreement prior to granting planning permission at the appeal site would have given greater certainty for all parties.
20. Although reference to "a scheme" in Condition 21 allows for flexibility and not necessarily a planning obligation that might fall foul of the pooling restrictions, it seems likely to me that some form of legal agreement would be necessary to properly secure the required contribution. For example, reference to a legal

¹ Planning Practice Guidance ID 21a-009-20140306

² Planning Practice Guidance ID 21a-010-20140306

agreement under Section 111 of the Local Government Act 1972 was mentioned at the hearing. In the absence of a legal agreement, there would be insufficient certainty and transparency that any financial contribution would be spent for its intended purpose.

21. In assessing this appeal, I have had regard to the Skelmersdale judgment³ in the Court of Appeal which the main parties have been given the opportunity to comment on. The judgment confirms that the interpretation of a condition is based on “what a reasonable reader would understand the words to mean when reading the conditions in the context of other conditions and of the consent as a whole”. In particular, the judgment found that the phrase “submits a scheme which commits to retaining their presence as a retailer” was interpreted as requiring a legally-binding obligation and so did not require an implementation clause.
22. Condition 21 is phrased in a similar manner to the disputed condition in the Skelmersdale judgment and page 27 of the committee report relating to the original outline application states that a legal agreement would be required to address this condition. Therefore, the wording of Condition 21 is adequately precise and in my view requires a legal agreement. It would be enforceable and effective. I note that the Skelmersdale judgment considered that a condition could be waived or varied should circumstances change, such as through a Section 73 application under the TCPA. However, as stated above, I do not consider that circumstances have changed sufficiently in the case of this appeal to the extent that Condition 21 is no longer necessary or relevant.
23. In light of the Skelmersdale judgement, the advice in Paragraph 010 of the PPG is therefore engaged. It has not been demonstrated that the appeal site development is complex or strategically important and I have little evidence that the deliverability of the development would be at risk. The condition therefore fails the advice in the PPG in terms of requiring a planning obligation or other legal agreement and so fails the test of reasonableness.
24. In conclusion, while Condition 21 is not reasonable in light of the advice in the PPG relating to the use of negatively worded conditions to secure a planning obligation or other agreement, it is necessary and relevant to planning and the development permitted in the interests of securing improvements to education facilities. Without it, there would be unacceptable impacts in terms of the provision of educational facilities. Therefore, the removal of Condition 21 would conflict with Policy URB20 of the Local Plan. This policy seeks to permit proposals which provide local services and community facilities such as schools provided that other policies and development control criteria are met.
25. I am unable to redraft the condition due to its defects in seeking a planning obligation or other agreement against PPG advice. As such, Condition 21 must remain and it is for the appellant and the Council to address how it can be resolved. Consequently, I will allow the appeal insofar as it omits Conditions 23 and 26 from the new permission, but will retain Condition 21.

Other Matters

26. I note the concerns of interested parties that the developer is seeking to avoid making contributions to the local community and that there are traffic safety

³ R (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC [2016] EWCA Civ 1260

issues along Farnham Road and pressures on local infrastructure beyond education. However, Conditions 23 and 26 are no longer considered to be necessary, relevant or reasonable as stated above in the background section, and so I have not considered these matters further.

27. I note the appellant's frustration at the apparent lack of communication from the Council regarding how they should address the requirements of Conditions 21, 23 and 26. However, this does not affect my findings with regards to the necessity of Condition 21 and the need for it to remain.

Conditions

28. By allowing this appeal, an entirely new planning permission is created. Any conditions attached to the original permission will not automatically be carried over to the new permission. The guidance in the PPG⁴ makes clear that decision notices for the grant of planning permission under Section 73 or Section 73A of the Town and Country Planning Act 1990 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged.
29. In the Statement of Common Ground, the main parties confirm that many of the conditions attached to the original outline permission have been discharged, and at the hearing it confirmed that the condition relating to lighting has also been discharged. These discharged conditions typically required details to be submitted and approved in writing before development commenced or dwellings occupied. However, a number of these conditions require the approved details to be implemented and retained. The development is under construction but not yet completed or occupied, so it seems apparent that a number of these conditions are still necessary and relevant for the reasons accompanying these conditions in the original permission. This would allow the Council to enforce the implementation and retention of conditions where necessary.
30. Given that all of the pre-commencement conditions other than Conditions 21, 23 and 26 have already been discharged, I have changed the wording of conditions to reflect that details have already been approved and in some cases should be implemented before the first occupation of the development. I have also amended the wording of Condition 21 on education (now numbered as Condition 19 in the attached schedule) to a pre-occupancy condition. This provides the appellant with some time to address this condition before the first occupation of any dwelling.

Conclusion

31. For the above reasons, and having had regard to all other matters raised, I conclude that the appeal should be allowed in part insofar that Conditions 23 and 26 of planning permission Ref 15/00829/OUT are not restated, but dismissed insofar as it relates to the removal of Condition 21 of the same permission.

Tom Gilbert-Wooldridge

INSPECTOR

⁴ Planning Practice Guidance ID 21a-031-20140306

APPEARANCES

FOR THE APPELLANT:

Kevin Scott	Kevin Scott Consultancy
Kay Collins	Kevin Scott Consultancy
Nathan Craker	Vanderbilt Homes

FOR THE LOCAL PLANNING AUTHORITY:

Brian O'Donovan	Hart District Council
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INTERESTED PERSONS WHO SPOKE AT THE HEARING:

Mark Saunders	Hampshire County Council
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DOCUMENTS SUBMITTED AT THE HEARING

1. Signed and dated Statement of Common Ground between appellant and local planning authority, submitted by both main parties.
2. Proposed revised wording for Condition 21, submitted by the appellant.

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall be carried out in accordance with the details approved under the reserved matters application ref 16/00606/REM.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plan: ITB9365-GA-004A.
- 3) The external surfaces for the development hereby permitted, including elevation materials, roof tiles, windows, doors and rainwater goods, shall only be carried out in accordance with approved details under application ref 15/00829/CON.
- 4) Hard and soft landscaping works shall be fully carried out in accordance with the approved details under application ref 16/01817/CON including the approved timetable, and to a reasonable standard in accordance with the relevant provisions of appropriate British Standards or other recognised codes of good practice. The Council shall be notified in writing of the completion of the scheme or any agreed phase of such scheme.

Any trees or plants which, within a period of five years after approved completion, are removed, die or become, in the opinion of the local planning authority, seriously damaged or defective, shall be replaced as soon as is reasonably practicable with others of similar species, size and number as originally approved, unless the Council gives its written consent to any variation.
- 5) The existing and proposed ground levels, proposed finished floor levels, levels of any paths, drives, garages and parking areas and the height of any retaining walls within the site shall be completed and retained in accordance with the details approved under application ref 16/01817/CON.
- 6) The width, alignment, gradient and type of construction proposed for the roads, footways and accesses, including all relevant horizontal cross sections and longitudinal sections showing the existing and proposed levels, together street lighting and the method of disposing of surface water and a programme for the making up of the roads and footways shall be completed in accordance with the details approved under application ref 16/01817/CON.
- 7) No dwelling shall be occupied until all proposed vehicular accesses, driveways, parking and turning areas and cycle parking serving that dwelling have been constructed in accordance with the approved details under application ref 16/01817/CON.
- 8) The development hereby permitted, including any works of demolition, shall be in accordance with the Construction Method Statement approved in writing by the local planning authority under application ref 16/01817/CON. The approved Statement shall be adhered to throughout the construction period.
- 9) No dwelling shall be occupied until the surface water drainage strategy has been implemented in accordance with a scheme agreed in writing by the Local Planning Authority under application ref 16/01817/CON.
- 10) No dwelling shall be occupied until the approved details under application ref 16/01817/CON relating to foul water infrastructure capacity both on

and off the site to serve the development, comprising a detailed drainage strategy setting out how the drainage network capacity constraint will be managed, have been completed and in operation.

- 11) The trees, hedges, hedgerows and shrubs shall be retained and protected in accordance with the approved details under application ref 16/01817/CON for the duration of works on the site and for at least five years following occupation of the approved development, unless otherwise agreed by the Local Planning Authority. Any such vegetation immediately adjoining the site shall be protected on the site in a similar manner for the duration of works on the site.

Any such vegetation removed without the Local Planning Authority's consent, or which die or become, in the Authority's opinion, seriously damaged or otherwise defective during such period shall be replaced and/or shall receive remedial action as required by the Authority. Such works shall be implemented as soon as is reasonably practicable and, in any case, replacement planting shall be implemented by not later than the end of the following planting season, with planting of such size and species and in such number and positions as may be agreed with the Authority in writing.

- 12) The development hereby permitted shall be in accordance with the approved scheme of supervision for the arboricultural protection measures under application ref 16/01817/CON.
- 13) The installation of outdoor lighting, including street lighting and any car parking area lighting, shall be in accordance with the approved lighting design scheme under application ref 17/1063/CON and retained thereafter.
- 14) No dwelling shall be occupied until the detailed scheme of noise mitigation measures approved under application ref 15/00829/CON has been implemented. The scheme shall be retained thereafter.
- 15) Unless otherwise agreed by the Local Planning Authority, development other than that required to be carried out as part of an approved scheme of remediation must not commence until parts A to D of this condition have been complied with. If unexpected contamination is found after development has begun, development must be halted on that part of the site affected by the unexpected contamination to the extent specified by the Local Planning Authority in writing until part D has been complied with in relation to that contamination.

A. Site Characterisation

An investigation and risk assessment, in addition to any assessment provided with the planning application, must be completed in accordance with a scheme to assess the nature and extent of any contamination on the site, whether or not it originates on the site. The contents of the scheme are subject to the approval in writing of the Local Planning Authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the Local Planning Authority. The report of the findings must include:

- (i) a survey of the extent, scale and nature of contamination;

(ii) an assessment of the potential risks to:

human health,

property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes,

adjoining land,

groundwaters and surface waters,

ecological systems,

archeological sites and ancient monuments;

(iii) an appraisal of remedial options, and proposal of the preferred option(s).

This must be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11'.

B. Submission of Remediation Scheme

A detailed remediation scheme to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment must be prepared, and is subject to the approval in writing of the Local Planning Authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The scheme must ensure that

the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

C. Implementation of Approved Remediation Scheme

The approved remediation scheme must be carried out in accordance with its terms prior to the commencement of development other than that required to carry out remediation, unless otherwise agreed in writing by the Local Planning Authority. The Local Planning Authority must be given two weeks written notification of commencement of the remediation scheme works.

Following completion of measures identified in the approved remediation scheme, a verification report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the Local Planning Authority.

D. Reporting of Unexpected Contamination

In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the Local Planning Authority. An investigation and risk assessment must be undertaken in accordance with the requirements of part A, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of part B, which is subject to the approval in writing of the Local Planning Authority.

Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the Local Planning Authority in accordance with part C.

- 16) The development shall take place in accordance with the approved programme of archaeological assessment and mitigation of impact and the approved Written Scheme of Investigation under application ref 16/02691/CON.
- 17) The development shall take place in accordance with the approved ecological management plan under application ref 16/01817/CON including proposals for the recommendations set out in the ecological reports: Extended Phase 1 Habitat Survey Reference J005500 and Bat Activity Survey and Reptile Presence/ Absence Survey J005568 dated October 2014.
- 18) The development shall take place in accordance with the approved scheme for the provision of affordable housing under application ref 16/01817/CON.
- 19) No dwelling shall be occupied until either the Local Education Authority has confirmed that there is capacity at Robert Mays School to accommodate the future occupiers of the development, or until a scheme to assist in the increase of the capacity of Robert Mays School has been submitted to and approved in writing by the Local Planning Authority.
- 20) The development shall take place in accordance with the approved scheme for the provision of play equipment and open space on the site under application ref 16/01817/CON.
- 21) No dwelling shall be occupied until the highway works (highways improvements through an entry/gateway treatment scheme on Farnham Road to assist in reducing vehicle speeds) shown in principle on drawing ITB9365-GA-004 A have been completed in accordance with those plans.
- 22) Before completion of the development the improvements to the public right of way shown in principle on drawing 1326/C01G and ITB9365-GA-006 B shall be completed in accordance with those plans.
- 23) No development or demolition work or delivery of materials shall take place at the site except between 07:30 hours to 18:00 hours weekdays or 08:00 to 13:00 hours Saturdays. No development or demolition work or deliveries of materials shall take place on Sundays or Public Holidays.