



Appeal Decision

Site visit made on 10 June 2019

by David Wyborn BSc(Hons), MPhil, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 July 2019

Appeal Ref: APP/K1128/W/19/3225569

Rivermaid Boatyard, Embankment Road, Kingsbridge TQ7 1JZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by H2Land against the decision of South Hams District Council.
 - The application Ref 3469/18/VAR, dated 18 October 2018, was refused by notice dated 19 March 2019.
 - The application sought planning permission for demolition of existing boathouse and construction of 4no. three-storey dwellings to include 8 new car parking spaces and ferry waiting area, new pedestrian footpath to roadside without complying with a condition attached to planning permission Ref 4140/16/FUL, dated 19 September 2018.
 - The condition in dispute is No 2 which states that: The development hereby approved shall in all respects accord strictly with drawing number(s) 813c 12 Rev A, Site Location Plan; 813c 09 Rev A, Site Plan Layout; 813c 04 Rev A, North and South Elevations; 813c 08 Rev A, Roof Plan; 813c 01, Ground Floor Plan; 813c 03 Rev A, West and East Elevations; 813c 02, First and Second Floor Plans received by the Local Planning Authority on 5th January 2017.
 - The reason given for the condition is: To ensure that the proposed development is carried out in accordance with the drawings forming part of the application to which this approval relates.
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Decision

1. The appeal is allowed and planning permission is granted for the demolition of existing boathouse and construction of 4no. three-storey dwellings to include 8 new car parking spaces and ferry waiting area, new pedestrian footpath to roadside, at Rivermaid Boatyard, Embankment Road, Kingsbridge TQ7 1JZ in accordance with the application Ref 3469/18/VAR dated 18 October 2018, without compliance with condition No 2 previously imposed on planning permission Ref 4140/16/FUL dated 19 September 2018 and subject to the conditions set out in the attached schedule.

Application for costs

2. An application for costs was made by H2Land against South Hams District Council. A separate application for costs was made by South Hams District Council against H2Land. These applications are the subject of separate Decisions.

Preliminary Matters

3. Since the application was determined, the Council has adopted the Plymouth and South West Devon Joint Local Plan 2014-2034 (the Local Plan). The reason

for refusal references the policies of the then emerging Local Plan as they were at that time and the appellant has been able to make an assessment of the scheme against the emerging policies in the appeal statement. I am satisfied that no party has been prejudiced by the consideration of the appeal proposal against the policies of the now adopted Local Plan.

4. The application seeks to vary condition 2 of the original permission. This would allow alternative plans to accommodate reasonably minor changes to the scheme. Planning permission was refused for two reasons. The Council has confirmed that the plans are acceptable in relation to the provision of the quayside public footpath and do not wish to pursue the related reason for refusal. I have found no reason to disagree and I will deal with the appeal accordingly.
5. The other reason for refusal referenced a lack of planning contributions for open space, sport and recreation, and education. The appellant has submitted, on a without prejudice basis, a signed and dated Unilateral Undertaking (UU) to address these matters. The Council responded to an earlier draft UU and made suggested revisions. I have not been presented with a clear reason why the UU would not meet with the Council's requirements and address the other reason for refusal in this respect.
6. Planning obligations, in accordance with Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (the Regulations), are required to meet all of the three tests. These are also set out in paragraph 56 of the National Planning Policy Framework (the Framework). The tests are that an obligation must be 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. I need to assess the UU against these tests, notwithstanding that the UU addresses the remaining reason for refusal and the Council have no issue with the replacement plans.

Main Issue

7. In the light of the above, the main issue is whether the obligations in respect of open space, sport and recreation, and education meet the 3 tests in the Regulations and are justified.

Reasons

Open space, sport and recreation obligation

8. The 4 town houses would only have balconies and no other outdoor amenity space. The scheme would be likely to increase the number of residents in the area and, therefore, place additional recreational demands on existing facilities.
9. Policy DEV4 of the Local Plan concerns playing pitches and, in relation to smaller development sites, a planning obligation will be sought to mitigate for the impact of new residents through new and improved provision of playing pitches in an appropriate location. While the appellant disputes the information, the Council explain that Kingsbridge Recreation Ground has a number of different sporting facilities including tennis courts, a football pitch, a bowling green and general recreational land. It is argued that it is, therefore, appropriate that a contribution should be put towards the improvement of facilities at this site.

10. The supporting text to Policy DEV4 explains that the need to protect, enhance and deliver new facilities is based on up to date assessment work including in Playing Pitch Plans. Policy DEV4 forms part of the recently adopted Local Plan and the requirement for the protection and improvement of the stock and capacity of playing pitch facilities is a part of the Local Plan strategy concerning sport and recreation.
11. There is also support for the provision of infrastructure to mitigate the general impacts of development from Policies DEV27, DEV30 and DEL1 of the Local Plan. In particular, Policy DEV27 seeks to improve the quality and quantity of green and play spaces and indicates that this can be delivered through on-site provision or by financial contributions to off-site provision, where appropriate.
12. The evidence does not provide clear details of the improvements to the facilities that are planned to take place at Kingsbridge Recreation Ground and whether they would relate to playing pitches as required by Policy DEV4 of the Local Plan. However, the requirement for the provision of sports pitches in the policy does not identify the provision must be on a specific site. The information indicates that the Council does not operate a charging Schedule in terms of the Community Infrastructure Levy and, therefore, would be limited by the pooling restrictions from setting a tariff approach to a pooled funding pot for projects.
13. I have no robust evidence to believe that the contribution would exceed the pooling restrictions or that the scheme would not be viable with the contribution. The appellant highlights inconsistencies in the approach to seeking contributions and lack of clarity on how the figures have been calculated. Furthermore, it is argued that the contribution is a tariff, although, I note that a contribution was not sought on the residential development on the other side of the road and the Council say that they do consider each proposal on its merits. I have limited evidence on this matter and therefore I have evaluated whether there is a justification for an obligation based on the circumstances of this case.
14. I have noted there are two earlier permissions for, it is argued, very similar development on the site which do not require contributions. It is said that it was a mistake that these approvals do not have obligations attached to them. While these could be a fallback position, in my view, I do not have clear and convincing evidence on this matter and the likely implementation of these permissions. As this appeal proposal seeks a replacement to application 4140/16/FUL, which does have obligations attached and is said to be a new host permission which was to avail the developer of lower s106 obligations, I attribute the earlier permissions limited weight in my overall analysis.
15. I afford the South Hams Open Space, Sport and Recreation Supplementary Planning Document (June 2006) and the South Hams Planning Obligations Supplementary Planning Document (December 2008) limited weight because of their age and also that it does not appear that they are referenced in the Local Plan. However, given the requirement set out in Policy DEV4 of the Local Plan, which is supported by other policies regarding the general provision of infrastructure related to new development, I consider that a contribution to playing pitches is required to mitigate the impacts from the additional residents.

16. The submitted UU details a contribution to public open space which may be considered broader than a contribution solely to providing playing pitches. Given that playing pitches would fall within the wider definition of open space, and there is also support from Policy DEV27 of the Local Plan to deliver green and play spaces through contributions, I do not consider that the UU is ineffective in meeting the policy requirements in this case.
17. Taking all these matters into account, I conclude that the obligation is necessary to make the development acceptable in planning terms, especially having regard to the requirements of Policy DEV4 of the Local Plan. Furthermore, the contribution would be directly related to the development because the provision of specified recreational facilities cannot be provided on site, and I have no reason to dispute that the contribution would not be fairly and reasonably related in scale and kind to the development.
18. It therefore follows that the open space, sport and recreation obligation meets the 3 tests in the Regulations, complies with the advice in paragraph 56 of the Framework and accords with policies DEV4, DEV27, DEV30 and DEL1 of the Local Plan which seek, amongst other things, to mitigate the impact of new residents through new and improved provision of playing pitches.
19. Policy DEV3 of the Local Plan, which is referenced in the reason for refusal, supports opportunities for sport, physical activity and active leisure. The policy is not directly relevant to any requirement for an obligation and therefore I have not needed to consider this policy further.

Education obligation

20. The UU related to the application 4140/16/FUL detailed an education contribution towards furniture and equipment relating to Phase 1 of the additional teaching provision at Kingsbridge Academy. With the present proposal, the submissions from the County Council as Education Authority are that the scheme would generate an additional 1 primary school pupil and 0.60 secondary school pupils. A contribution is sought in respect of the secondary school element.
21. The Council say that a contribution is only sought when required and when a school is at capacity. However, I have little evidence of whether the local schools are at capacity or specific details of any additional building or other works that would be required to accommodate additional pupils. Consequently, I cannot be satisfied that the additional pupils resulting from the development could not already be accommodated within the schools such that there would be an impact that would be required to be mitigated. In these circumstances, I do not have the evidence to satisfy me that an education contribution would be necessary to make the development acceptable.
22. Policy DEV30 of the Local Plan sets out the general approach that new homes should contribute to the delivery of sustainable communities with an appropriate range of community infrastructure, including schools. Policy DEL1 of the Local Plan seeks planning obligations to mitigate the impact of development on infrastructure. However, with the lack of detailed and specific information on the education matters that would require to be mitigated I am not satisfied that there is a conflict with these policies.

23. In the light of the above and based on the limited evidence before me, I conclude that it has not been demonstrated that the education contribution is necessary to make the development acceptable in planning terms or directly related to the development. The obligation in this respect does not meet the tests in the Regulations or the requirements of paragraph 56 of the Framework. Such an obligation would not be required to meet with the requirements of Policies DEV30 and DEL1 of the Local Plan. As a consequence, I attach no weight to this element of the UU.

Other Matters

24. The appellant makes reference to the Written Ministerial Statement on 28 November 2014 and related judgements¹. In respect of the issues in this appeal, the advice would not preclude the seeking of contributions other than for affordable housing. The advice is now encapsulated by paragraph 63 of the Framework. No affordable housing contribution is sought in relation to the scheme and therefore this is not an issue requiring further consideration.
25. I have noted the comments from local residents, including concerns with the right of way, the character and appearance of the development, the width of the footpath, second homes and transport and walking issues. The Council has not raised objections on these grounds and this proposal is a variation to an approved scheme. I have found no reason to disagree with the conclusions of the Council in these respects.

Conditions

26. The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have limited information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.
27. As a section 73 application cannot be used to vary the time limit for implementation, this condition must remain unchanged from the original permission and therefore I have set out the condition accordingly.
28. As the works are taking place it is not straight forward to attach pre-commencement conditions. I have amended those pre-commencement conditions attached to application 4140/16/FUL where it has been possible, but have retained conditions 7, 11 and 14 as pre-commencement conditions as these details need to be agreed prior to work taking place pursuant to this permission. In the case of the Construction Management Plan it is necessary in the interests of public safety and convenience to have the details agreed from the outset. Condition 11 is necessary for lighting to be provided to safeguard the public throughout the construction works and condition 14 is necessary as a pre-commencement condition to deal with all contamination matters at each stage of the development.

¹ Written Statement made by: The Minister of State for Housing and Planning (Brandon Lewis) on 28 Nov 2014 and Court of Appeal Judgement R. (on the application of West Berkshire DC) v SoS for Communities and Local Government [2016] EWCA civ 441.

29. A condition specifying the approved plans, as amended by this proposal, is necessary in the interests of certainty. Conditions 4 and 8 are necessary to ensure that there is adequate drainage on the site in the interests of run-off and reducing flood risk.
30. Conditions 5, 6, 8, 9 and 10 are necessary to ensure that the footways and access around the building are safe in the interests of users of the site and highway. Following construction works, it is appropriate to limit lighting in the interests of the visual amenities of this area and therefore condition 12 is necessary.
31. Given the previous use of the site, it is necessary to address any contamination matters and therefore conditions 3, 14 and 15 are required. With the site adjoining the estuary, it is necessary for contact details of action to be taken in the event of a flood to be publicised on site (condition 13).

Conclusion

32. Having regard to the above, and taking all other matters into account, I conclude that the appeal should be allowed.

David Wyborn

INSPECTOR

Schedule of Conditions
Appeal Ref: APP/K1128/W/19/3225569
Rivermaid Boatyard, Embankment Road, Kingsbridge TQ7 1JZ

- 1) The development hereby permitted shall be begun before 19 September 2021.
- 2) The development hereby permitted shall in all respects accord strictly with drawing numbers: 813c 12 REV A site location plan; 813c 09 REV G site layout plan; 813c 08 REV F roof plan; 813c 01 REV C ground floor plan; 813c 03 REV F east and west elevations; 813c 02 REV D first and second floor plans; 813c 04 REV G north and south elevations; 813c 022 REV A Bin store details, received 23rd October 2019
- 3) If, during the development works, contamination not previously identified is found to be present at the site then no further development (unless otherwise agreed in writing with the Local Planning Authority) shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, an investigation and risk assessment and, where necessary, a remediation strategy and verification plan detailing how this unsuspected contamination shall be dealt with. Following completion of measures identified in the approved remediation strategy and verification plan, and prior to occupation of any part of the permitted development, a verification report demonstrating completion of the works set out in the approved remediation strategy and the effectiveness of the remediation shall be submitted to and approved, in writing, by the local planning authority.
- 4) Percolation tests and a drainage scheme shall be submitted to the Local Planning Authority for approval. Prior to the first occupation of any of the units, the approved drainage scheme shall be installed in strict accordance with the approved plans, maintained and retained in accordance with the agreed details for the life of the development.
- 5) Prior to occupation, plans shall be submitted to and approved by the Local Planning Authority, providing steps on the southern side of the development allowing for access to the roadside footpath. The steps shall be constructed in accordance with the agreed details prior to occupation of any of the units hereby permitted.
- 6) Any works which may impact on Public Footpath No.15 should be submitted to and approved by the Local Planning Authority prior to those works taking place. The works shall then be carried out in accordance with those agreed details.
- 7) Prior to work taking place on any part of the site pursuant to this approval the Local Planning Authority shall have received and approved a Construction Management Plan (CMP) and thereafter works shall take place in accordance with the approved details. The CMP shall include:
 - (a) the timetable of the works;
 - (b) daily hours of construction;
 - (c) any road closure;

- (d) hours during which delivery and construction traffic will travel to and from the site, with such vehicular movements being restricted to between 8.00 a.m. and 6.00 p.m. Mondays to Fridays inclusive, 9.00a.m. to 1.00 p.m. Saturdays and no such movements taking place on Sundays or Bank holidays;
 - (e) the number and sizes of vehicles visiting the site in connection with the development and the frequency of their visits;
 - (f) the compound/location where all building materials, finished or unfinished products, parts, crates, packing materials and waste will be stored during the demolition and construction phases;
 - (g) areas on site where delivery vehicles and construction traffic will load or unload building materials, finished or unfinished products, parts, crates, packing materials and waste with confirmation that no construction traffic or delivery vehicles will park on the County Highway for loading or unloading purposes unless prior written agreement has been given by the Local Planning Authority;
 - (h) hours during which no construction traffic will be present on the site;
 - (i) the means of enclosure of the site during construction works;
 - (j) the details to promote car sharing amongst construction staff in order to limit construction staff vehicles parking off site;
 - (k) details of wheel washing facilities and obligations;
 - (l) the proposed route of all construction traffic exceeding 7.5 tonnes;
 - (m) details of the amount and location of construction worker parking;
 - (n) photographic evidence of the condition of adjacent public highway prior to commencement of any work.
- 8) The proposed footway, street lighting, drains, surface water outfall and visibility splays shall be constructed and laid out in accordance with details to be approved by the Local Planning Authority in writing. For this purpose, plans and sections indicating as appropriate the design, layout, levels, gradients, materials and method of construction shall be submitted to the Local Planning Authority. The works shall be completed in accordance with the approved details prior to first occupation of any part of the development and thereafter retained.
- 9) The footway works shall be completed prior to the occupation of any part of the proposed development.
- 10) Prior to works to the footways and steps on the south and north of the scheme taking place, details shall be submitted to and approved by the Local Planning Authority. The works shall then be carried out in accordance with the agreed details, prior to the first occupation of any part of the development.
- 11) Prior to work taking place on any part of the site pursuant to this approval, details of the lighting to be used during the construction period shall be submitted to and approved by the Local Planning Authority. The

construction lighting shall then be installed in accordance with those agreed details and be retained during the build period.

- 12) Notwithstanding the details provided, and with the exception of the lighting to be agreed and implemented under condition 13, after the first occupation of any part of the development hereby permitted, there shall be no external lighting to the site.
- 13) No part of the development shall be occupied until signs and appropriate lighting of the signs are installed in the car park serving the development, in accordance with details which shall have previously been agreed in writing by the Local Planning Authority. The signs shall advise that the car park is at risk from flooding, shall include the Environment Agency's Floodline telephone number and quick dial code and, shall include a plan to show a place where all vehicles can be moved to. The signs must be retained, maintained and appropriately lit during the life of the development.
- 14) Prior to work taking place on any part of the site pursuant to this approval, the following components of a scheme to deal with the risks associated with contamination of the site shall be submitted to and approved, in writing, by the Local Planning Authority. That scheme shall include all of the following elements unless specifically excluded, in writing, by the Local Planning Authority.
 1. A site investigation scheme, based on the preliminary contaminated land assessment to provide information for an assessment of the risk to all receptors that may be affected, including those off site.
 2. The site investigation results and the detailed risk assessment (1) and, based on these, an options appraisal and remediation strategy giving full details of the remediation measures required and how they are to be undertaken.
 3. A verification plan providing details of the data that will be collected in order to demonstrate that the works set out in (2) are complete and identifying any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action. Any changes to these agreed elements require the written consent of the Local Planning Authority. The scheme shall be implemented as approved.
- 15) Prior to occupation of any part of the permitted development, a verification report demonstrating completion of the works set out in the approved remediation strategy and the effectiveness of the remediation shall be submitted to and approved, in writing, by the Local Planning Authority. The report shall include results of sampling and monitoring carried out to demonstrate that the site remediation criteria have been met. It shall also include, where relevant, a plan (a "long-term monitoring and maintenance plan") for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action and for the reporting of this to the Local Planning Authority.

End of Schedule