



Appeal Decision

Site visit made on 13 August 2019

by Kate Mansell BA (Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 October 2019

Appeal Ref: APP/T3275/W/19/3225518

Land to rear of 135 Warwick Road, Kenilworth CV8 1HY

- 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 Trengarren Limited against the decision of Warwick District Council.
 - The application Ref W/18/2199, dated 16 November 2018, was refused by notice dated 28 February 2019.
 - The application sought planning permission for a variation of condition no. 1 (approved plans) of planning permission W/17/1094 (Variation of condition 1 of planning permission W15/0620 to allow changes to the design of the houses and apartments, the bin store location, garages and the parking layout.) to allow changes to the design of the car port, re-location of the bin store and construction of a new single garage in the south east corner without complying with conditions 1 and 3 attached to planning permission Ref W/18/1048, dated 27 July 2018.
 - The conditions in dispute are Nos 1 and 3 which state that:
Condition 1 - The development hereby permitted shall be carried out strictly in accordance with the details shown on the following approved drawings, except as required by condition 3:-
T373-002 Rev A and T373-004, and specification contained therein, submitted on 7 June 2017; and
T373-001 Rev P, T373-003 Rev E and T373-110 Rev B and specification contained therein, submitted on 25 May 2018.
Condition 3 - Prior to the first occupation of the development hereby permitted, and notwithstanding the details shown on drg. no. T373-001 Rev P received by the Local Planning Authority on 25th May 2018, a further site layout plan shall be submitted to and approved in writing by the Local Planning Authority. The site layout plan shall show, in a precise and unambiguous way, the extent of demolition of No.135 Warwick Road required to achieve the approved access arrangements into the site. The plan shall also show the vehicle access to be widened to 5m as per the recommendations of the County Highways Authority and as per the original reserved matters approval under W/15/0620 as well as the provision of a 2m wide pedestrian footway to the southern side of the vehicle access. The improvement works to the access shall thereafter be carried out in accordance with the approved details and prior to the first occupation of the development hereby permitted and shall thereafter be retained in this manner in perpetuity.
 - The reasons given for the conditions are:
Condition 1 - For the avoidance of doubt and to secure a satisfactory form of development in accordance with Policies BE1 and BE3 of the Warwick District Local Plan 2011-2029.
Condition 3 -In the interests of vehicle and pedestrian safety in accordance with Policy TR1 of the Warwick District Local Plan 2011-2029.
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Decision

1. The appeal is allowed and planning permission is granted for the variation of conditions 1 and 3 of planning permission W/18/1048 (Variation of condition no. 1 (approved plans) of planning permission W/17/1094 (Variation of condition 1 of planning permission W/15/0620 to allow changes to the design of the houses and apartments, the bin store location, garages and the parking layout) to allow changes to the design of the car port, re-location of the bin store and construction of a new single garage in the south east corner) to allow amendments to be made to the vehicle and pedestrian access arrangements together with the addition of 2.1m high close board fencing along the southern side of the access drive at 135 Warwick Road, Kenilworth CV8 1HY in accordance with the application Ref W/18/2199 dated 16 November 2018 without compliance with Conditions 1 and 3 previously imposed on planning permission Ref W/18/1048, dated 27 July 2018, and subject to amended Conditions 1 and 3 and the conditions set out in the attached schedule.

Procedural Matters

2. The application was amended in the period that it was being considered by the Council, principally in response to consultation comments received from the Highway Authority. The Council determined the application on the basis of the amended drawings and so have I.
3. Notwithstanding the description of development on the application form, set out in the banner heading above, in allowing the appeal, for clarity, in the decision above I have used the description set out on the decision notice and the appeal form, as this is more precise.

Background

4. This appeal follows the Council's decision to refuse an application submitted under section 73 of the Town and Country Planning Act 1990 (TCPA). The Planning Practice Guidance confirms that an application can be made under Section 73 (S73) to vary or remove conditions associated with a planning permission¹.
5. The appeal site has a lengthy planning history. Outline planning consent was originally granted in 2012 for 9 apartments and 3 houses. It included the demolition of 135 Warwick Road to facilitate a 5m wide adoptable road, as well as a 2m wide pavement on one side and a 0.9m pavement on the other. A reserved matters application for the detailed layout, scale, appearance and landscaping of the site was approved in 2015².
6. There have since been a number of planning applications on the site. In 2016, a S73 application was submitted to vary the approved plans of the 2015 reserved matters. It sought to retain part of No 135 and reduce the width of the access road to 4.5m for part of its length (29m). It was refused by the Council and subsequently dismissed on appeal³.
7. A further S73 application to vary the approved plans of the reserved matters approval, to allow minor design changes, was granted in September 2017. The

¹ PPG Paragraph: 013 Reference ID: 17a-013-20140306 (Revision date 06 03 2014)

² Council refs: W/11/1618 and W/15/0620

³ Council Ref: W/16/1788 and appeal ref: APP/T3275/W/17/3179904

Planning Practice Guidance (PPG) advises that where an application under S73 is granted, the effect is the issue of a new planning permission. It sits alongside the original permission, which remains intact and unamended⁴.

8. This new permission was subject to a further S73 application in 2018⁵, to facilitate more minor design changes. It was granted in July 2018 subject to conditions. These included an approved plans condition (No 1) and a condition (No 3) requiring the submission of a plan to set out the extent of demolition required to No 135 to facilitate the access road, as well as a plan showing the vehicle access to be widened to 5m as per the original reserved matters approval, to include the provision of a 2m pedestrian footway on the southern side of the access.
9. This appeal follows the Council's decision to refuse a further application submitted under S73 to vary Conditions 1 and 3 of the above permission (the disputed conditions)⁶. The proposal effectively seeks the removal of Conditions 1 and 3 to be replaced with conditions specifying the plans that reflect an amended access design.

Main Issue

10. In light of the above, the main issue is the effect of the proposed variation of Conditions 1 and 3 on highway and pedestrian safety.

Reasons

11. Warwick Road is a busy main route (A452) into Kenilworth. Whilst mainly residential in character, it is interspersed with small-scale commercial uses, including food and drink premises and a petrol station commensurate with it being a primary route to and from the town centre.
12. The appeal site is a new residential development on land to the rear of 135 Warwick Road. At the time of my site visit, no alterations had been made to No 135 but in all other respects, the development appeared substantially complete and partially occupied.
13. The site access is situated between the flank elevation of No 135 on the south side and a new four-storey building of 8 apartments on the site of No 131 to the north. Whilst I recognise its proximity to a bus stop on Warwick Road, the position of the entrance between two buildings is unchanged as a result of this appeal proposal. The access is also used by the residents of six properties fronting Warwick Road, to reach the rear of their houses.
14. The proposed variation of Conditions 1 and 3 would result in No 135 being reduced in width by approximately 0.9 metres. A 2.1m fence would also be sited along its side/rear boundary. The principle of demolishing No 135 has been established in previous permissions. Furthermore, the fence would be positioned within the site and screen the area to the rear of No 135. The Council raise no objection to these aspects of the proposal and from my observations on site, I have no reason to disagree.
15. However, the proposal would also result in the width of the access road being reduced from the 5m originally approved to 4.2 metres at its narrowest point.

⁴ PPG Paragraph: 015 Reference ID: 17a-015-20140306 (Revision date 06 03 2014)

⁵ Council refs: W/17/1094 and W/18/1048

⁶ Council ref: W/18/2199

This would be for a short length, set within the site, between the new flank elevation of No 135 and the new apartment block to the north. For the most part, it would be between 4.3 metres and up to 4.7 metres in width. It would also include a 0.2-metre wide overhang margin along its southern side.

16. I appreciate the appellant's contention that the new apartment scheme on the site of No 131 features an access road of 4m in width with a 0.9m footway. However, from the site plan before me relating to that consent, the access road was excluded from the red line boundary and it affords negligible weight in my decision.
17. Nonetheless, I have had regard to the guidance within Manual for Streets (MfS)⁷, which illustrates what various carriageway widths can accommodate. Whilst not necessarily a recommendation, nor can it account for individual driver behaviour, it does show that a carriageway of 4.1m can accommodate two car widths. At a minimum of 4.2m, the access road would therefore be capable of accommodating more than one lane of traffic, enabling two cars to pass at the same time.
18. MfS does acknowledge that carriageway widths should be appropriate for the particular context and uses of the street, considering such factors as the volume of vehicular traffic and pedestrian activity and the traffic composition. The Access Appraisal (AA) submitted with the planning application⁸ used a Trip Rate Information Computer System (TRICS) Assessment to determine the potential vehicular, pedestrian and cycle traffic generated by the appeal site and the adjacent apartment block, based on a total of 20 dwellings.
19. I accept that TRICS is a computer model, but it is, nonetheless, widely used. Furthermore, the County Highway Authority raised no objection to its findings, that the trips that would be likely to be generated would be relatively low in peak hours. Even taking into account the existing residents who would also use the access road, it is unlikely that they would all be using it at the same time. In the absence of any other evidence such as detailed traffic counts, I therefore have no reason to disagree that the number of vehicles, pedestrian and cycle trips generated by the modest number of residential units would be relatively low. It would, consequently, be a lightly trafficked carriageway.
20. Within this context, even if cars were to meet along the access road, the swept path analysis within the AA demonstrates that two large cars of approximately 2m in width could navigate along it. I appreciate that third party representations suggest that larger vehicles using the road are wider. However, their given widths (notwithstanding wing mirrors) are also less than 2m. In any event, the access road would also include a 0.2-metre wide overhang margin along its southern side.
21. The appellant's swept path analysis also demonstrates that the access road would be sufficiently wide for a large refuse truck used by the Council, from which it is reasonable to assume that a larger emergency vehicle could also be accommodated. The cul-de-sac at the end of the site would facilitate a suitable turning area for these and other vehicles, including those delivering to the site.

⁷ Manual for Streets, published by Department of Transport and Department for Communities and Local Government (2007)

⁸ Access Appraisal prepared by hub Transport Planning Ltd dated January 2019

Such vehicles would also be unlikely to be a daily occurrence, resulting in only occasional interaction along the access road.

22. I acknowledge third-party representations that existing residents have, on occasion, had to reverse onto the public highway. However, that is on the basis of the current arrangement and also whilst construction works have been on-going.
23. Furthermore, from my observations, the access directly off the main road would be wide and the Council accept that it would maintain a minimum width of at least 5m for the first 7.5m, when measured from the near edge of the carriageway on Warwick Road. The access road is also straight. This would provide good visibility along it just as vehicles turn off the main road into the site. Coupled with the fact that traffic speeds would be low, I consider that vehicles and other road users, including cyclists, would therefore be able to successfully navigate the access road at the width proposed.
24. Turning to pedestrians, I appreciate that the appeal proposal reconfigures the footway from that previously approved. However, unlike the earlier scheme dismissed at appeal, in which the Inspector refers to a 'lack of pavement or any means to prioritise pedestrians above vehicles', there would, in this case, be a dedicated footway. It would be a 1.5m wide pavement on the northern side of the access drive, for approximately 33 metres in length, then continuing along the southern side to provide access to the dwellings at the rear of the site.
25. The County Highway Authority accept that a 1.5m footway would be in accordance with the Department for Transport's Inclusive Mobility Guidance. Within MfS, the guidance also illustrates the width for a single wheelchair user to be 0.9m, 1.2m for a parent with child and 1.5m for two adults including one with a children's buggy. The footway would therefore accommodate a range of users. On my site visit, I also observed that the footway that has already been constructed was raised from the road by a small kerb upstand. This would be sufficient to differentiate it from the carriageway.
26. I appreciate that the footway would not be continuous on both sides. Consequently, pedestrians walking to the houses to the rear of the site would need to cross from the north side of the access road to the south once within the site. This would also widen out to 1.5m for much of its length.
27. I have had regard to the appellant's evidence in relation to pedestrian movement, which is based upon the modal split of journeys from the 2011 Census Journey to Work data for the Warwick District zone within which the site is located. Within it, pedestrian trips are estimated at one movement every 20 minutes in either direction during each of the peak hours.
28. Although of some age, I have nothing before me to indicate that this data is no longer of relevance. Even if the modal split of journeys had changed with a higher proportion of pedestrian users, combined with the relatively low levels of vehicular traffic along the access road, the opportunity for conflict between pedestrians and vehicles whilst crossing the access road would still be limited.
29. Taking all these matters into account, on the evidence before me, I consider that the variation of Conditions 1 and 3, by their removal and replacement with conditions specifying the plans that reflect the proposed amended access design, would provide satisfactory arrangements for vehicles, pedestrians and

other road users including cyclists. Additionally, the Council's Highway Authority raised no objection to the proposal.

30. I therefore conclude that the proposed variation of Conditions 1 and 3 would not have a materially harmful effect on highway or pedestrian safety. I therefore find no conflict with Policies TR1 or BE1 of the Warwick District Local Plan 2011-2029 (Adopted September 2017). These policies seek to ensure that development is well-designed having regard to, amongst other matters, accessibility and circulation networks, as well as providing safe, suitable and attractive routes for users, including pedestrians, cyclists and vehicles, in the interests of highway safety. I also find no conflict with Policy KP8 of the Kenilworth Neighbourhood Plan 2017-2029, which relates principally to the accommodation of additional traffic on the existing road infrastructure as well as the need to give priority to pedestrians and cyclists and to improve safety. Nor would it conflict with the objectives of the National Planning Policy Framework (the Framework) in respect of highway safety.

Other Matters

31. The Council have provided a map of the Kenilworth Conservation Area (CA). Its boundary lies to the north of the appeal site, to include part of Clarendon Road. In accordance with the statutory duty set out in Section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990, I have paid special attention to the desirability of preserving or enhancing the character and appearance of the CA. However, the appeal scheme would not alter the original scale and nature of the proposal. It would therefore have no perceivable effect upon the character or appearance of the CA, which would be preserved.
32. Several interested party representations have queried the compliance of the scheme with conditions that have been imposed by previous planning permissions. In this regard, any outstanding conditions on the site are a matter for the Council to enforce. Indeed, an enforcement notice served on the appellant by the Council in respect of Condition 3 is the subject of a separate appeal that has yet to be determined⁹.
33. Furthermore, whether or not the access road is adopted is a matter for the appellant. My role is confined to a consideration of the planning merits of the proposal.
34. Third parties have also raised issues in relation to other aspects of the development, including parking provision/arrangements, as well as the proximity of buildings. However, the PPG clarifies that in dealing with an application under section 73, only the disputed conditions that are the subject of the application can be considered¹⁰. It is not a complete re-consideration of the proposal.
35. In respect of bin storage, the PPG also advises that new conditions can only be imposed, as long as they do not materially alter the development that was subject to the original permission and are conditions which could have been attached to the earlier planning permission¹¹. In this case, a condition in respect of a bin storage area is attached to this decision, compliance with which will be a matter for the Council to enforce.

⁹ Appeal Ref: APP/T3725/C/19/3232609

¹⁰ PPG Ref: Paragraph: 031 Reference ID: 21a-031-20180615 (Revision date 15 06 18)

¹¹ PPG Ref: Paragraph 040 Reference ID: 21a-040-20190723 (Revision date 23 07 2019)

36. I also note that concerns have been raised about the 2-metre fence in respect of rights of access. This is a civil matter that does not alter the planning merits of the proposal. It is not a reason to withhold planning permission in the absence of any significant planning harm.

Conditions

Disputed conditions

37. For precision and clarity, I will therefore delete the disputed Conditions 1 and 3 and substitute them for varied wording to incorporate the correct plan references that relate to the amended access design, along with the dates they were received by the Council.

Other conditions

38. The PPG advises that to assist with clarity, decision notices for the grant of planning permission under section 73 should repeat the relevant conditions from the original planning permission, unless they have been discharged¹².
39. Condition 2 of W/18/1048 required the development to be carried out in accordance with the details of materials, discharged on 30 November 2016 in pursuance of Condition 2 of W/15/0620. Having regard to the tests set out at Paragraph 55 of the Framework, from my observations on site and the Council's officer report, the development is substantially complete, and the condition is no longer necessary.
40. I have repeated the non-disputed conditions relating to the provision of parking and turning space, as well as the bin storage area. These would be reasonable and necessary in the interests of highway and pedestrian safety and in the interests of amenity respectively. With regard to the latter, however, I consider that any change to the bin stores being available for use at all times would need to be considered through the planning process, rather than by agreement in writing. For precision, I have therefore omitted such reference within the condition. On the basis that the proposal is now occupied, I have repeated the Council's suggestion within its Committee Report of 26 February 2019, upon which the appellant had the opportunity to comment, that the details be provided within 3 months of the date of this permission.
41. I have also repeated the conditions originally imposed on W/18/1048 removing certain permitted development rights across the site, to protect the living conditions of nearby occupiers. I am satisfied, having regard to the guidance within the PPG¹³, that they are sufficiently clear as to which rights have been limited or withdrawn. They are therefore reasonable and necessary.

Conclusion

42. For the above reasons, I therefore allow the appeal, subject to the amended and non-disputed conditions set out in the formal decision.

Kate Mansell

INSPECTOR

¹² Paragraph: 015 Reference ID: 17a-015-20140306 (Revision date 06 03 2014)

¹³ PPG Ref: Paragraph: 017 Reference ID: 21a-017-20190723 (Revision date 23 07 19)

Schedule of conditions

- 1) The development hereby permitted shall be carried out strictly in accordance with the details shown on the following approved drawings:

T373-002 Rev A and T373-004, and specification contained therein, submitted on 7 June 2017;

T373-003 Rev E and T373-110 Rev B and specification contained therein, submitted on 25 May 2018;

T373-250 Rev.D and 002 Rev.A 'Proposed Access Road (Improved Scheme)' and specification contained therein, submitted on 31 January 2019; and

T373-251 and specification contained therein, submitted on 4 February 2019.
- 2) Any repairs and new areas of masonry to the flank elevation of No 135 Warwick Road shall match the existing masonry to that property in colour, bonding, size, shape and texture.
- 3) Within three months of the date of this permission, the access arrangements for vehicular and pedestrian access to the site shall be delivered strictly in accordance with approved drawings T373-250 Rev.D and 002 Rev.A 'Proposed Access Road (Improved Scheme)'. The improvement works to the access shall thereafter be retained in this manner in perpetuity.
- 4) Within three months of the date of this permission, the appropriate space shall be provided within the site for the parking and turning of vehicles in accordance with submitted plan number T373-250 Rev D.
- 5) Within three months of the date of this permission, the bin storage area shall be laid out and provided in accordance with submitted drawing T373-250 Rev D. Thereafter the bin store shall remain available for use at all times.
- 6) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no roof extension or addition shall be erected or constructed to, any of the dwellings hereby approved within Block C as identified on the proposed site plan.
- 7) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that order with or without modification) the window(s) to be formed at first floor level in the north-west & south-east facing elevations of Block C and in the east facing elevation of Block B hereby permitted shall only be glazed or re-glazed with obscure glass and any opening part of any window shall be at least 1.7m above the floor of any room in which the window is installed.
- 8) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that order with or without modification) no windows or openings, including dormer windows (apart from any shown on the approved drawings) shall be formed to any of the dwellings hereby approved and if any additional windows are subsequently approved they shall only be glazed or re-glazed in accordance with such approved details and any opening part of any window shall be at least 1.7m above the floor of any room in which the window is installed.

- 9) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that order with or without modification) no windows or openings (apart from any shown on the approved drawings) shall be formed at first or second floor level in the south facing elevation of Blocks A & B or at first floor level in the north-west and south-east facing elevations of Block C hereby approved and if any additional windows are subsequently approved they shall only be glazed or re-glazed in accordance with such approved details and any opening part of any window shall be at least 1.7m above the floor of any room in which the window is installed.

End of Schedule