



## Appeal Decision

Inquiry Held on 24, 25 and 26 September 2019

Site visit made on 26 September 2019

**by R J Jackson BA MPhil DMS MRTPI MCMi**

an Inspector appointed by the Secretary of State

**Decision date: 21<sup>st</sup> October 2019**

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**Appeal Ref: APP/Q3115/W/19/3228431**

**Land at The Elms, Upper High Street, Thame OX9 2DN**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Ms J Bowater, Rectory Homes Limited and FirstPort Retirement Property Services Limited against the decision of South Oxfordshire District Council.
  - The application Ref P18/S3596/FUL, dated 24 October 2018, was refused by notice dated 28 February 2019.
  - The development proposed is the erection of a 'Housing with Care' development (Use Class C2) and a communal residents centre; the creation of new public open space; the provision of new pedestrian/cycle links from Upper High Street to Elms Road and Elms Park; repairs and alterations to the boundary walls and entrance of Elms House; and associated infrastructure works and landscaping.
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### Decision

1. The appeal is dismissed.

### Procedural matters

2. The Council refused the appeal application for five reasons. The third of these related to objections to the internal design where the Council was concerned that the proposal would not give rise to appropriate living conditions for the proposed occupiers. During the appeal process, the appellants submitted revised plans making various changes, and there was some limited publicity as to these changes. As these changes would only affect those living within the site, if permitted and completed, I accepted them as an amendment to the appeal proposal. Upon that acceptance the Council withdrew that third reason for refusal. I will therefore not discuss this matter further.
3. The fourth and fifth reasons for refusal concerned the lack of completed Planning Obligations pursuant to Section 106 of the Town and Country Planning Act 1990 (as amended) in respect of affordable housing, infrastructure necessary to meet the needs of the development and for improvement works to the adjoining Elms Park.
4. The appellants submitted two Planning Obligations both dated 13 September 2019, one by unilateral undertaking providing for a financial contribution to off-site affordable housing, and one by agreement, dealing with how the development would be used and other infrastructure matters including the works to Elms Park. The Council indicated that these Obligations overcame its

objections for the infrastructure necessary to meet the needs of the development and for the improvement works to Elms Park, but not in respect of affordable housing. I will discuss these matters below.

5. It transpired that the north point on the appeal application drawings was incorrectly located, being around 7.4 degrees to the east of grid north. An amended site plan was submitted showing the correct north point which it was agreed could be used as reference for all other drawings. As the relationship to adjoining buildings was correct and nobody would be affected by the amendment, I accepted this drawing as an amendment to the proposal.
6. On 9 October 2019, following the closing of the Inquiry, the Secretary of State issued a direction under Section 21A of the Planning and Compulsory Purchase Act 2004 (as amended) (the P&CA) directing the Council not to take any step in connection with the adoption of the emerging South Oxfordshire Local Plan 2034. The effect of this direction is that the emerging plan is of no effect. At the Inquiry all parties agreed that this emerging plan was due very little weight, and while referred to in the evidence did not materially affect the decision. In light of this, I have concluded that there is no need to revert to the parties in respect of any implications of the Secretary of State's direction as this would not affect my decision.
7. Both main parties have also referred me to an appeal decision<sup>1</sup> issued following the close of the Inquiry at Lower Shiplake elsewhere in South Oxfordshire for Class C2 development (the Lower Shiplake decision). I have taken that into account in my decision insofar as it is relevant to this appeal.

### **Background and Main Issues**

8. The appeal site is an allocated site in the made Thame Neighbourhood Plan (the TNP). Planning permission was granted<sup>2</sup> on 5 August 2015 for "the erection of 37 dwellings and creation of new public open space, provision of new vehicular access from Elms Road and a new pedestrian/cycle link on to Upper High Street with associated infrastructure works and landscaping". It is agreed between the appellants and the Council that this planning permission has been implemented, and I saw an access to Elms Road on the southern part of the appeal site. The overall built forms of the approved scheme and the appeal proposal are very similar.
9. Listed building consent was also approved<sup>3</sup> on the same date for various works to The Elms, a Grade II listed building immediately to the north of the appeal site. A second listed building consent was approved<sup>4</sup> on 28 February 2019 for similar works. Works were being undertaken to this building at the time of my site visit.
10. On 6 August 2015 outline planning permission was granted<sup>5</sup> for "landscaping and improvement works to Elms Park including the provision of new paths and relocation and/or replacement of the multi-use games area". An application for approval of reserved matters was approved<sup>6</sup> on 17 November 2016 pursuant to this outline planning permission. However, this was not implemented and this

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<sup>1</sup> APP/Q3115/W/19/3220425

<sup>2</sup> Council Reference: P14/S2176/FUL

<sup>3</sup> Council Reference: P14/S2395/LB

<sup>4</sup> Council Reference: P18/S3597/LB

<sup>5</sup> Council Reference: P14/S2310/O

<sup>6</sup> Council Reference: P16/S1965/RM

has now lapsed. A second outline application for planning permission for similar works was recently submitted to the Council and, at the time of the Inquiry, was undetermined.

11. There was some discussion at the Inquiry as to the nature of the proposal. The appellants and the Council are agreed that the proposal would fall within Class C2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO) on the basis that it would constitute a use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses) but then disputed matters that flow from this. In order to conclude on some of the other disputed issues in the appeal it makes sense to deal with this matter first.
12. In light of this the main issues are:
  - how the appeal proposal should be considered;
  - the relationship to the development plan, with specific reference to:
    - the site specific policy in the Thame Neighbourhood Plan;
    - the provision in the type and size of accommodation proposed;
  - the effect on heritage assets, in particular on the setting of The Elms as a listed building and on the Thame Conservation Area;
  - whether the proposal would make appropriate provision for affordable housing;
  - whether the proposal would make appropriate provision for infrastructure and other related facilities and for any necessary improvement works to Elms Park;
  - the weight to be given to the, agreed to be, extant planning permission on site; and
  - whether there are any other material considerations, including the benefits of the proposal, which would indicate that the proposals should be determined otherwise than in accordance with the terms of the development plan.

## **Reasons**

### *How the appeal proposal should be considered*

13. The two main parties agreed that the use should be considered to fall within Class C2 of the UCO. The main difference was how the individual units for those living on site should be considered. The Council was of the view that they should be considered as dwellings ancillary to the overall use of the site as a C2 use, but the appellants considered that they would be "C2 units"<sup>7</sup>, on the basis that the definition of Class C2 excludes "use within class C3 (dwelling house)" and through the operation of the Planning Obligation.
14. The Planning Practice Guidance (the PPG) states<sup>8</sup>: "Not all uses of land or buildings fit within the use classes order. ... Where land or buildings are being

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<sup>7</sup> Mr Sitch under cross-examination

<sup>8</sup> Reference ID: 13-010-20140306

- used for different uses which fall into more than one class, then the overall use of the land or buildings is regarded as a mixed use, which will normally be sui generis. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary. For example, in a factory with an office and a staff canteen, the office and staff canteen would normally be regarded as ancillary to the factory.” It therefore follows, in the case of the cited factory, the “office” and the “staff canteen” are still an “office” and a “staff canteen” respectively but are ancillary to the factory and are not classified separately under the UCO.
15. There is no statutory definition of a dwelling in planning legislation, but the Courts have accepted<sup>9</sup> that the distinctive characteristic of a dwellinghouse is its ability to afford to those who use it the facilities required for day-to-day private domestic existence. In this case each of the units has all the necessary said facilities, that is kitchens, washing facilities, bedrooms and living areas.
  16. The appellants also sought to show that even though each unit had all the facilities required for day-to-day private domestic existence that did not necessarily mean that each was a dwelling, setting out the counter example of an apart-hotel unit. However, that unit is not used on a permanent basis as the primary place of residence, which would be the case here, and that to my mind makes a material difference.
  17. It is next necessary to deal with the point made by the appellants that the UCO positively excludes a “use within class C3 (dwelling house)”. A use that is ancillary does not represent a primary use and the UCO deals with primary uses. Thus, each of these units/dwellings would not fall within Class C3 and the exclusion in the UCO does not affect my conclusions.
  18. One of the Planning Obligations deals with how the occupiers may utilise the site and ensures both an age restriction and a requirement for Personal Care but refers to each unit as a “Dwelling”. This term is specifically defined as a “building designed for residential occupation as extra care Dwellings”. This, therefore it seems to me, reinforces my conclusion rather than go against it.
  19. I have taken into account the Inspector’s conclusions in the Lower Shiplake decision in this regard. Here the Inspector concluded that although each unit had “the form, function and facilities one would associate with a dwelling” he concluded that the development as a whole was “more than the provision of individual units it is the collection of a number of units the occupation of which is restricted and which the occupants have access to communal facilities and which require occupants to have a level of care need; hence the C2 classification”.
  20. I do not have full details of that proposal and I note the Inspector in the Lower Shiplake decision noted “[p]arts of the development could not be implemented independently, the communal facilities and extra care is an integral component of the development”. I acknowledge the occupancy restriction and the communal facilities here proposed. However, I can see nothing in the communal facilities here which means that those living in the units require use of those communal facilities or that those running the facility need to use that building. I note, for example, that there is no on-site office for care staff or those who might manage the site. The care staff could readily arrive on site,

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<sup>9</sup> *Gravesham BC v SSE and O’Brien*, [1983] JPL 306

visit the occupants and leave with no interaction with the communal accommodation. It is also a separate building which mean that the facilities there could readily be used by those living off-site. There is no restricted access to the communal accommodation building and it could be readily accessed from what would be public open space. From the evidence in front of me I conclude that there are differences between the Lower Shiplake scheme and that in front of me.

21. I therefore conclude that, while ancillary to the overall C2 use of the appeal site, each accommodation unit represents a dwelling.

*The relationship of the development plan*

22. As set out above, the appeal site is subject to a site specific policy, Policy HA4, in the TNP. It is not for me to go behind that policy in determining this appeal. This is entitled "The Elms – Allocation for no more than 45 residential dwellings". The policy positively allocates the site for residential development and a minimum of 1.0 ha of landscaped publicly accessible open space. The policy indicates "the number of dwellings will be determined through a detailed design proposal and in any case will provide no more than 45 dwellings"<sup>10</sup>. The policy also indicates that "the proposals must preserve and enhance the Thame Conservation Area and the setting of adjacent listed buildings and structures". The proposal would provide for 1.2 ha of landscaped publicly accessible open space.
23. I will deal with the question of the consistency of this policy with the National Planning Policy Framework (the Framework) and with the effect on heritage assets below, but *prima facie*, by providing for 78 dwellings the proposal is contrary to the terms of Policy HA4 in that it exceeds the number of dwellings permitted by the policy to a significantly material extent.
24. Policy H9 of the TNP indicates that on schemes of more than six dwellings, a mix of dwelling types and sizes to meet the needs of current and future residents in Thame will be sought. It continues that large areas of uniform type and size will not be acceptable. Policy H10 of the TNP also requires on schemes with a net gain of six or more homes, developers are required to submit a Thame-Specific Affordable Housing and Dwellings Mix Strategy with any planning application. The policy continues "[t]his Strategy must clearly set out identified housing needs within Thame and demonstrate how the proposed development addresses those needs".
25. There is no policy, supplementary planning or practice document that explains what a Thame-Specific Affordable Housing and Dwellings Mix Strategy consists of or how such a Strategy should be drawn up. The appellants' approach was principally predicated on the need for extra care accommodation in the local area which I will discuss below. The Council accepted that the site was suitable for the use proposed. However, the Thame Town Council (the TTC) was concerned that the proposal would result in a concentration of both a particular use in an area and units of a certain size, since 63% of the units proposed would have two bedrooms.
26. The proposal would be contrary to Policy H9 of the TNP in that it would represent a uniform type of housing, for older persons, on a site. However, any

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<sup>10</sup> The policy then goes on to deal with the situation if fewer than 45 dwelling are provided, but this is not material to this appeal.

scheme needs to be considered in its context, and I was directed to no evidence that the proposal would give rise to an unacceptable concentration of dwellings by size, or for older persons or care accommodation in the wider area, either in the immediate vicinity or in Thame as a whole. If anything, the evidence on housing need for older persons leads to a contrary conclusion. Given the lack of guidance on the topic of how the Thame-Specific Affordable Housing and Dwellings Mix Strategy should be considered, I therefore conclude that the proposal would be "Thame appropriate" and thus comply with Policy H10 of the TNP.

27. Policy CSH4 of the South Oxfordshire Core Strategy (the SOCS) also requires a mix of dwelling types and sizes to meet the needs of current and future households on all new residential developments. This requires at least 10% of market housing on sites of 10 dwellings or more should be designed to meet current Lifetime Homes standards, as should all ground-floor affordable housing properties. The policy also seeks a proportion of dwellings for those with additional special needs as part of the overall affordable housing percentage, and states that specialist accommodation for older people will be permitted at other suitable locations.
28. For the same reasons as in relation to the TNP, I am satisfied that the mix of accommodation provided would meet the needs of current and future households in the area. All the dwellings would be constructed to Lifetime Homes standards, although there would be no affordable housing on site. I concur with the Council that the proposal would represent a suitable location for specialist accommodation for older people.
29. For the reasons given above, the proposal would therefore be contrary to Policies HA4 and H9 of the TNP but would comply with Policy H10 of the TNP and Policy CSH4 of the SOCS. I will consider the proposal against other development plan policies applicable to the other main issues in the relevant sections of this decision below.

#### *The effect on heritage assets*

30. As noted above, The Elms is a Grade II listed building. It was constructed in the early nineteenth century and lies immediately to the north of the appeal site. The heritage experts agreed that it was a "villa", being a detached house of this date, in its own grounds, on the fringe of a town, often with wings and outbuildings (here The Barn to the northwest which is listed in its own right but not affected by the proposed development). In this case the setting of the main house was made up of two substantive elements, the immediate area around the house up to the ha-ha<sup>11</sup> and the parkland area beyond. The parkland area makes up the appeal site.
31. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (as amended) (the Listed Buildings Act) requires that when considering whether to grant planning permission for development which affects the setting of a listed building special attention shall be given to the desirability of preserving its setting.
32. The site lies in the Thame Conservation Area (the TCA). The TCA covers the main area of the town centre extending, predominantly, on either side of the

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<sup>11</sup> A ditch with wall on inner side below ground level, to form a delineation without interrupting the view.



- continuous High Street, Upper High Street and Park Street through the town. The Thame Conservation Area Character Appraisal (the CACA) was adopted by the Council in 2006. In 2006 what is now the southeastern part of the TCA including the appeal site did not form part of the TCA. However, the CACA considered this area on the basis that the TCA should then be extended to include this area; this subsequently occurred.
33. Section 72(1) of the Listed Buildings Act requires that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of a conservation area in considering whether to grant planning permission.
  34. Paragraph 193 of the Framework indicates that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be).
  35. The main parties agreed that the appeal proposal would represent less than substantial harm to the significance of both the setting of The Elms and the TCA as designated heritage assets. The dispute was as to the degree of harm within that categorisation. The PPG states<sup>12</sup> "within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated." This would seem to indicate that it is appropriate to consider the extent of this harm within the analysis.
  36. The difference between the two parties was predominantly due to the consideration of the baseline. The appellants considered that this should be as if the extant and permitted scheme had been constructed while the Council took the view that this was the site in its current condition.
  37. It seems to me that unless and until a scheme has been built out that the baseline must be against the current condition of the site. This is because unless and until that development has taken place it can only be considered to be a potential development. I will discuss the weight to be given to the permitted scheme as a 'fall-back' later.
  38. Taking the current situation as the baseline, the proposal would significantly adversely affect the significance of the setting of The Elms in that it would introduce large and massive buildings into the parkland. The parkland, as noted above, is an important element of the significance of the setting of The Elms as a villa. Notwithstanding that the area immediately to the southwest of the ha-ha would be kept free from built development, the overall integrity of the wider parkland would be harmed. However, the remaining open areas would allow the remnant of the parkland to still be read as such.
  39. Set against this harm is the heritage benefit of allowing the rear elevation of The Elms and the remnant of the parkland to be appreciated by the public walking in and cycling through the open space and by those living in the proposed development. The rear elevation of The Elms is a well-considered elevation, but the building has been considerably altered, particularly on the western side. While it is an exemplar of a villa it cannot be considered to be of the highest quality of its genre, if nothing else from the extent of the changes since it was originally designed. Similarly, the built development would harm the nature of the parkland as such. I therefore can only give the heritage

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<sup>12</sup> Reference ID: 18a-018-20190723

benefits of the proposed development limited weight. Overall, I consider that while there would be less than substantial harm to the significance of the setting of the Elms this harm would be towards the top of this category.

40. Looking at the TCA the effects should be considered against the effect on the whole of the conservation area. As the CACA makes clear "The extensive grounds of The Elms and the adjoining recreation ground/playing field form a very important green space within the town. The grounds of The Elms, whilst not publicly accessible, make a strong contribution to the conservation area in views from the playing fields behind John Hampden School and from Elms Road. They also form a vital part of the setting of The Elms itself. They also separate Park St. and Nelson St. from the modern housing on Elms Road and Broadwater Avenue and so not only create an important part of the character of this part of the conservation area but also maintain its historic integrity as a one-time fringe of the town. Bringing these two areas into the conservation area will formally acknowledge the role they play and help focus attention on the historic character of the area should development around or on them ever be proposed".
41. By reducing the open area between the historic town and the more modern development on Elms Road and Broadwater Avenue, the proposals would harmfully reduce the significance of the TCA since it would remove the legibility of this site as an historic edge to the town. Set against this would be the heritage benefit of opening this area up to the public. However, this would only be marginal, as this area can already be readily seen from Elms Park. The appellants emphasised the view that the proposal would enhance the TCA due to the quality of the design. I do not accept this; however good the design may be, it would still cause harm to the legibility of the earlier town edge and would join up built development in Park Street to the north with the modern housing to the south. Because this harm should be considered in the light of the whole of the TCA I agree this would result in less than substantial harm to the significance of the TCA and this would be at the lower end of this category.
42. While giving great weight to the conservation of these heritage assets, where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, paragraph 196 of the Framework indicates that this harm should be weighed against the public benefits of the proposal including, where appropriate, securing the optimal viable use of the heritage asset. I will do that in the planning balance below.
43. By causing harm to the setting of The Elms and thus its significance and to the TCA the Council indicates that it considers that the proposal would be contrary to various policies of the development plan. Policy CSEN1 of the SOCS deals with landscape and requires that the district's key features will be protected against inappropriate development and where possible enhanced. Due to the amount of built development in this open area the proposal would be contrary to this policy.
44. The harm to heritage assets means that the proposal would be contrary to Policies CSEN3 and CSQ3 of the SOCS which require, respectively, that designated heritage assets will be conserved and enhanced for their historic significance and their important contribution to local distinctiveness, character and sense of place, and should respond positively to and respect the character



of the site and its surroundings, particularly the historic significance and heritage values of the historic environment.

45. Similarly, the proposal would be contrary to Policies G2, C9, D1, CON5 and CON7 of the South Oxfordshire Local Plan 2011 (the SOLP) which require that settlements and environmental resources are protected from adverse developments, state that development which would cause the loss of landscape features will not be permitted, protect and reinforce local distinctiveness, state that development which will adversely affect the setting of a listed building will be refused, and that planning permission will not be granted for development which would harm the character or appearance of a conservation area.
46. In light of my conclusions on the effects on heritage assets the proposal would also be contrary to Policy HA4 of the TNP in that it would not preserve and enhance the TCA and the setting of the adjacent listed building. It would also be contrary to Policies ESDQ16 and ESDQ20 of the TNP which require development proposals to maintain or enhance the strengths of the specific character of the site, and that listed buildings and their settings and conservation areas and their settings should be conserved and enhanced.
47. In all cases I will consider whether these policies are consistent with the Framework below.

#### *Affordable housing*

48. Policy CSH3 of the SOCS states that 40% affordable housing will be sought on all sites where there is a net gain of three or more dwellings subject to viability. The policy sets out the tenure mix, how "part unit" figures will be dealt with, and states that with the exception of part units, affordable housing should be provided on-site and mixed with the market housing and designed to certain standards.
49. The appellants also referred to Policy CSH4 which I have set out above. The supporting text to this policy includes a section on specialist accommodation for older people. The two paragraphs<sup>13</sup> that make up this section set out the Council's preference for extra care housing or schemes with extra care provision, and that, where appropriate, specialist accommodation for the elderly should be provided on a mixed-tenure basis. The second to these paragraphs continues "where any scheme providing specialist accommodation for the elderly (with or without care) includes an affordable housing component, this can count towards the overall 40% affordable housing requirement if part of a wider development". This scheme would not be mixed tenure.
50. Policy H8 of the TNP also indicates that where there is a net gain of three or more dwellings affordable housing should be provided in accordance with Policy CSH3 of the SOCS. Policy H8 also indicates that affordable homes should be well integrated with market housing and meet the specific needs identified for Thame.
51. The appellants were of the view that the proposal did not justify the provision of affordable housing either on-site or through a financial contribution. This was on the basis that the proposals did not include dwellings (I have dealt with this argument above) and, separately, it would be contrary to the provisions of

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<sup>13</sup> Paragraphs 7.41. and 7.42..

paragraph 64 of the Framework. The Planning Obligation for a financial contribution for affordable housing was submitted, predominantly, to off-set the non-provision of affordable housing from the permitted scheme for the planning balance. This would only provide a financial contribution that would represent 40% of the 37 dwellings in the permitted scheme (the equivalent of 14.8 dwellings); 40% of 78 dwellings in the appeal proposal would be 31.2 dwellings.

52. The appellants consider that it is clear from the way that the policy was operated in the past that the intention when the policy was originally adopted that Class C2 accommodation was not to provide affordable housing. However, it seems to me that whether or not the original intention was for this to occur the policy should be given its objective meaning. Both policies (CSH3 in the SOCS and H8 of the TNP) clearly state that when there is a net gain of three or more dwellings affordable housing will be sought. For the reasons given above, I have concluded that dwellings would be delivered and therefore as a matter of interpretation affordable housing should be sought.
53. I appreciate that the Inspector in the Lower Shiplake decision came to a different conclusion. This was partially based on the proposition that the 40% figure in the Local Plan was based on a consideration of the viability of conventional housing and that there had been no analysis at the plan making stage as to whether that percentage figure was appropriate for different provision models, such as extra care. However, the appellants made no case based on viability, which would have been the simple answer to this proposition, and I must therefore conclude that they do not consider that this is the correct approach.
54. Paragraph 64 of the Framework states that for major development involving the provision of housing, at least 10% of the homes are to be available for affordable housing ownership, unless this would exceed the level of affordable housing required in the area (it would not), or significantly prejudice the ability to meet the identified affordable housing needs of specific groups. Exemptions to this 10% requirement are made for four categories of proposed development including specialist accommodation for a group of people with specific needs (such as purpose-built accommodation for the elderly or students).
55. To deal firstly with the argument relating to the supporting text to Policy CSH4 it seems to me that this is to make clear that older persons affordable housing can count towards an overall provision rather than a proportion of the elderly persons housing having to be affordable. In other words, on a scheme with a mixture of older persons and 'conventional' housing, if the older persons housing was all affordable then this would count towards the total provision of affordable housing on the site, rather than the older persons and conventional housing having to be considered separately. There is nothing inconsistent with this and my interpretation of Policy CSH3.
56. Turning to paragraph 64 of the Framework, it appears that the exceptions to the 10% affordable home ownership need to be explicitly stated must mean that each of the four exceptions could otherwise form part of the affordable housing requirement. While the proposal has been designed as an extra care scheme, none of the internal design features are so specialist so as to mean that they meet the specific needs of the older person population rather than that of the wider population. The restrictions on the nature of the use in the

Planning Obligation do not affect this. Furthermore, this text also makes clear that in a scheme consisting only of specialist accommodation affordable housing there is not requirement for 10% of this to be for affordable home ownership.

57. While it would be appropriate to take the Planning Obligation into account on the basis that it would meet the three tests set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) (the CIL Regulations) and paragraph 56 of the Framework, this would not provide the full quantum of affordable housing required to make the scheme policy compliant.
58. Furthermore, there was no evidence, for example from a Registered Provider, to say that the proper proportion of older persons affordable housing could not be managed on site. This means that the criticism of the proposal by the TTC that it would not provide a mixed tenure scheme contrary to the ethos of the TNP and Policy H9 of that plan was appropriate and should be given substantial weight. Paragraph 62 of the Framework makes it clear that an off-site financial contribution in lieu of on-site provision should not be utilised unless it is robustly justified and I consider that has not been done here.
59. Overall, the failure to provide the proper contribution to affordable housing and not robustly justify a financial contribution instead of on-site provision means that the proposal would be contrary to Policy CSH3 of the SOCS and Policy H8 of the TNP. It would also be contrary to paragraphs 62 and 64 of the Framework. Taken together, this harm should be given very substantial weight.

#### *Infrastructure and other works*

60. The Council has adopted a Community Infrastructure Levy (CIL) Charging Schedule. This schedule sets a nil CIL rate for "Residential – retirement housing including extra care incorporating independent living (C3)". Policy CSI1 of the SOCS states that new development must be served and supported by appropriate on- and off-site infrastructure and services, and Policy D10 of the SOLP requires developments to make adequate provision for management of waste within new developments. Policy CLW4 of the TNP states that financial contributions will be required from developers of new housing sites to fund additional healthcare services.
61. As well as restrictions on the occupation of the proposal the Planning Obligation makes provision for contributions towards increasing primary medical care capacity, recycling/refuse collection, street naming, public art, bus stop and public transport, and for the provision of a travel plan. It also makes provision for the delivery, management and maintenance of the open space on site and for a contribution towards improvements to the Elms Park recreation area, and for a monitoring fee.
62. For each of these contributions and other matters I am satisfied that they would meet the three tests set out in Regulation 122 of the CIL Regulations and paragraph 56 of the Framework and would therefore comply with Policy CSI1 of the SOCS, Policy D10 of the SOLP and Policy CLW4 of the TNP as set out above.

*The extant planning permission*

63. To judge the materiality of a fall-back position it is necessary to consider firstly, the nature and content of the alternative uses or operations so that a proper comparison can be made. Secondly, is a consideration of the likelihood of the alternative use of operations being carried out. Finally, it is necessary to consider, if there is a greater than a theoretical possibility that the development might take place, the weight that should be placed on that possibility.
64. In this case the alternative scheme is straightforward to identify; it is the permitted scheme which the appellants emphasised, in the event of this appeal being dismissed, it was their intention to build out.
65. In support of the application the then applicants submitted a Marketing Overview Report which indicated that the permitted scheme was "commercially unattractive". The Statement of Common Ground indicated that it "remains a deliverable scheme". As a result of my questioning the appellants withdrew the Marketing Overview Report and submitted a Statutory Declaration from the directors of one of the appellant companies which indicated "the site, with the existing planning permission, remains viable ... to develop and [the company] will do so". It continues that this appellant company "is fully committed to building the extant scheme if the C2 Appeal is dismissed".
66. In light of this, and in the absence of any contrary evidence, I consider that there is a greater than theoretical possibility that this permitted scheme would be constructed in the event that this appeal is dismissed. I give this substantial weight.
67. If completed the built form of the proposal would be very similar to the permitted scheme. The effects of the built form of the two proposals on the setting of The Elms and thus its significance and on the character and appearance of the TCA would thus be very similar. The appellants accepted that there would be greater activity on site through the increased resident population and by those employed at the site. However, in my view this change would only be very limited, particularly as part of the site would become publicly accessible open space which would attract visitors whether used for the permitted or appeal scheme. Consequently, any additional harm would be very limited.

*Other material considerations*

Development Plan Consistency with the Framework

68. The appellants argued that the development plan was out-of-date. Principally this was due to the view that the development plan does not provide for the objectively assessed needs for housing in the area and that various policies were not consistent with the Framework. This led to the contention that the so called 'tilted balance' set out in paragraph 11 d) of the Framework should apply on the basis that the policies most important for determining the application are out-of-date given, on the appellants' view, that the public benefits of the proposal outweigh the heritage harms.
69. Paragraph 213 of the Framework makes clear that existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of the Framework in February 2019. Due weight should be

- given to these policies according to the degree of consistency with the Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).
70. I have set out above a number of development plan policies which are material to the determination of this appeal. These, it seems to me, are the most important for determining this appeal. It is next necessary to examine each of them in relation to the Framework to determine consistency and whether they are out-of-date. I will do this in the order that they appear in this decision, where I have found that the proposal would be contrary to its terms. Where I have found the proposal accords with a policy such an exercise is unnecessary.
71. However, it is first appropriate to look at the more general contention that by not setting out to deliver the objectively assessed housing need for the area the development plan should be considered out-of-date with the implication that the individual policies are also to be considered out-of-date. Given the location of the appeal site this is not a case where there is a general presumption against the proposal in the development plan that may or may not be affected by housing need or supply. Consequently, the policies relating to housing need and supply are not the most important for determining the application.
72. In any event, notwithstanding the overall context of when the plan was prepared it still may well be that the plan or an individual policy remains effective in delivering its original objectives. If that is the case then that plan or policy may still be up-to-date provided it is consistent with the Framework. It is therefore necessary to look at each policy in turn rather than an overall approach.
73. Policy HA4 of the TNP was agreed as being broadly consistent with the Framework subject to it being read with the supporting text which requires that the precise number of dwellings is determined through a detailed design proposal to enable full consideration of the heritage issues, public benefits and other material planning matters. Given that the plan should be read as a whole including the supporting text, I concur with this analysis.
74. I consider that Policy CSH4 of the SOCS remains broadly consistent with the Framework as the Framework confirms in paragraph 61 that the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies.
75. Policy CSEN3 of the SOCS deals with historic environment. The appellants' criticism, which also applies to Policies CON5 and CON7 of the SOLP, is that the policy does not include some sort of balancing mechanism equivalent to that set out, in this case where less than substantial harm is caused, in paragraph 196 of the Framework.
76. It seems to me that the Framework differentiates between the positive strategy (and I would emphasise the word "strategy") for the conservation and enjoyment of the historic environment in plans, set out in paragraphs 20 and 185, and those parts that deal with considering potential impacts on heritage assets in paragraphs 189 to 202. In my view the three policies are strategic policies which, in overall intent, are consistent with the Framework. That Policies CON5 and CON7 of the SOLP are written in negative terms rather than positive as required by paragraphs 15 and 16 of the Framework, does not

change their intent. Notwithstanding that Policy ESDQ20 of the TNP relates to a neighbourhood plan, there is nothing which means that this cannot also be considered a strategic policy which would then be consistent with the Framework for the same reason.

77. However, this does not mean that the balancing exercise should not be undertaken; it is just that these plans do not include this element within them and to that extent these plans are inconsistent with the Framework rather than the identified policies being inconsistent. I note that paragraph 11 d) of the Framework refers to "policies" not the development plan and that is different from paragraph 11 c). Furthermore, just because there is an omission in part of the development plan does not mean that the most important policies taken as a whole are out-of-date.
78. The main parties agreed that Policy CSQ3 of the SOCS dealing with design and Policies G2, C9 and D1 of the SOLP dealing with the protection and enhancement of the environment, landscape features and good design and local distinctiveness, along with Policy ESDQ16 of the TNP dealing with how development relates to its site and surroundings, are consistent with the Framework and I have no reason to disagree.
79. Looked at as a whole, notwithstanding the omission in the development plan relating to the balancing of heritage harm with public benefits, I consider the most important policies of the development plan remain up-to-date and the normal balance should apply.

#### Public benefits

80. The heritage benefits I have outlined above form part of the public benefits of the proposal.
81. The appellants emphasised the public benefit of the provision of C2 accommodation. This was supported by uncontested evidence that the area of population growth in South Oxfordshire in the next few years was where the household headship was of 65 years of age and over. This need was seen as particularly acute for those seeking to purchase supported accommodation, since provision in recent years had been predominantly in the rental sector. I give this benefit very significant weight.
82. However, this also has to be considered in the context of the site specific policy. This requires, through the operation of Policy H8 of the TNP and Policy CSH3 of the SOCS, on-site affordable housing which would be missing from the appeal scheme. I have given the harm caused by the lack of on-site affordable housing very substantial weight.
83. It was for this reason that the appellants submitted the Planning Obligation to deliver a financial contribution towards off-site affordable housing. I do not consider that in this context such an obligation would relate to the development being permitted since it relates to something being "lost" from another scheme. It therefore would not comply with Regulation 122 of the CIL Regulations or paragraph 56 of the Framework. Consequently, I will not take it into account and can give it no weight. This means that the very substantial weight I have given to the harm from the failure to deliver affordable housing does not change.



84. The delivery, management and maintenance of the public open space, including management of trees, is a public benefit as is the contribution to the improvements to the Elms Park recreation ground. In light of the policy presumption relating to these improvement works and the previous planning permission I consider that it is likely that these off-site works will proceed and can be taken into account. However, these works are required to make the scheme policy compliant and I therefore consider them to be of only limited positive weight in the final balance.
85. As part of the appeal scheme the proposal would deliver cross-scheme cycling and pedestrian links between Elms Road, Upper High Street and the Elms Park recreation ground. These links are set out in the supporting text to Policy HA4 of the TNP and are therefore required to make the scheme policy compliant. I therefore consider them to be a neutral consideration.
86. During construction and in operation the proposed development would provide employment. The use of the proposal would add to economic activity in the area. I give the construction employment limited positive weight as this would be temporary in duration. I give the permanent employment moderate positive weight as this only involves a limited number of jobs, but I give the additional economic activity significant positive weight.
87. The appellants consider that the reduction in traffic generation, when compared with the permitted scheme, should be seen as a benefit. I disagree on the basis that the two are separate schemes with their own separate planning balances and each scheme needs to be considered on its individual merits. As the proposal would satisfy the relevant highway policies, including the provision of a Travel Plan, I consider that this would be a neutral consideration. This matter is, however, part of the consideration of the fall-back.
88. The appellants have referred to the ecological enhancements through bird and bat boxes and woodland belt strengthening. These are required to make the scheme policy compliant and I give them limited positive weight.
89. As the scheme is for older people to buy it is highly likely that they would be existing homeowners seeking to downsize. The appellants therefore consider that by releasing family housing to others that this would be a significant benefit. I agree with this.
90. Finally, the appellants consider that the proposal would result in a number of likely health and well-being benefits since the care packages would ensure that the residents would be looked after, allowing them to stay at home for longer than if they were in conventional housing and thus less likely to rely on the NHS. This will principally be a private benefit to the individuals and would be of little public benefit and thus should be given limited positive planning weight.

### **Other matters**

91. The TTC raised concerns about surface water flooding on the basis that the Environment Agency has recently updated its relevant maps and the proposal was not assessed against this. The appellants advised that any minor differences between the current and previous versions were down to presentational differences between the two base maps rather than any other fundamental changes to the data. In light of this the assessment of surface water flood risk does not change and I am satisfied, subject to appropriate

planning conditions, that this would not be an impediment to the granting of permission.

### **Planning Balance**

92. The starting point for determination is section 38(6) of the P&CA. This requires the determination to be in accordance with the development plan unless other material considerations indicate otherwise.
93. Taken as a whole the proposal would be contrary to the development plan in that it would materially exceed the maximum number of dwellings set out in the site specific policy in the TNP. It would cause harm to the setting of The Elms and to the TCA, which are both designated heritage assets, contrary to the relevant policies in the SOLP, the SOCS and TNP; special attention and great weight should be given to these harms. It would also fail to provide affordable housing, in particular on-site, to deliver a mixed community, in line with the policies of the SOCS, the TNP and the Framework. While there would be compliance with other policies, I consider that these are the most important policies for the determination of this appeal. These policies are all up-to-date.
94. As explored above, the proposal would result in less than substantial harm to, and thus the significance of, both the setting of The Elms and to the TCA. These should be balanced in line with paragraph 196 of the Framework with the public benefits of the proposed development. In this regard I consider that the public benefits identified above would balance those heritage harms. This is in line with Policy HA4 of the TNP which allows for a balance to be undertaken as to the overall planning conclusion, but this would not mean that there was compliance with that policy overall due to the number of dwellings being proposed.
95. By failing to provide affordable housing on the appeal site, the proposal would result in very substantial harm. The need for owner occupied elderly persons extra care accommodation in the area does not outweigh this harm.
96. I have given substantial weight to the fall-back position as a material consideration in this appeal, but this does not change my final conclusion. The heritage effects would be very similar to the appeal proposal, and the increase in the number of dwellings and other benefits associated with the appeal proposal but not the permitted scheme, would not outweigh the harm from the non-provision of affordable housing on site and the overall non-compliance with the site specific policy in the TNP.

### **Conclusion**

97. For the reasons given above, and taking into account all other matters raised, I conclude the appeal should be dismissed.

*RJ Jackson*

INSPECTOR

## APPEARANCES

### FOR THE LOCAL PLANNING AUTHORITY:

Mr Robin Green	Counsel, Instructed by the Solicitor to the Council
He called	
Dr Valerie Scott MA PhD	Director and Head of Conservation, BEAMS
Mr Simon Chambers	Director, LPC (Trull) Ltd
BSc (Hons) MA MRTPI	

Ms Tracy Smith MRTPI, Principal Appeals Officer, South Oxfordshire District Council, also took part in the round-table sessions on planning conditions and the planning obligations.

### FOR THE APPELLANTS:

Mr Christopher Boyle	Queen's Counsel, Instructed by Mr Mark Sitch, Barton Willmore LLP
He called	
Dr Chris Miele BA (Hons) MA PhD MRTPI IHBC	Senior Partner, Montagu Evans
Mr James Donagh BA (Hons) MCD MIED	Director, Barton Willmore LLP
Mr Mark Sitch BSc (Hons) DipTP MRTPI	Senior Partner, Barton Willmore LLP

Ms Jolande Bowater MRTPI, and Mr David Ullathorne, both Directors of Rectory Homes Limited, also took part in the round-table sessions on planning conditions and the planning obligations.

### INTERESTED PERSONS:

Mr Graeme Markland	Thame Neighbourhood Plan Continuity Officer
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**INQUIRY DOCUMENTS**

ID1	Appellants' written response to Inspector's Pre-Inquiry note	
ID2	Appellants' Note on Extra-Care Housing	
ID3	Updated Core Document List	
ID4	Additional Core Documents:	
	B48	Consultation response – Oxfordshire Clinical Commissioning Group
	E8	Email chain between Appellants and Oxfordshire Clinical Commissioning Group
	M8	Opinion from Richard Phillips QC dated 1 November 2016
	M9	Opinion from Morag Ellis QC dated 13 June 2017
	M10	Opinion from Jeremy Cahill QC dated 20 December 2017
	M11	Opinion from Jeremy Cahill QC dated 27 June 2018
M12	Opinion from Robin Green, of Counsel, dated 21 August 2018	
ID5	Appeal decision APP/D4635/W/16/3150728 – Tettenhall College, Wood Road, Wolverhampton	
ID6	RTPI Good Practice Note 8: Extra Care Housing	
ID7	Housing Learning & Improvement Network – Viewpoint No 20 – Planning Use Classes and Extra Care Housing	
ID8	Opening Statement on behalf of South Oxfordshire District Council	
ID9	Letter handed in by Mr R Clanfield	
ID10	Email Note and drawing showing Environment Agency Surface Water Flood Risk Assessment Maps	
ID11	Note on north point discrepancy and revised Site Plan drawing P.504.110 Rev D	
ID12	Council's written response to Inspector's Pre-Inquiry note	
ID13	Appeal decision APP/X5210/W/18/3198746 – Gondar Gardens Reservoir, Gondar Gardens, London	
ID14	Email dated 11 July 2019 on behalf of Appellants to Council relating to marketing evidence	
ID15	Statutory Declaration of S P Vickers and D Ullathorne dated 25 September 2019	
ID16	High Court Judgement: Leelamb Homes Limited v SoSCLG & Maldon District Council [2009] EWHC 1926 (Admin)	
ID17	Compliance Statement pursuant to Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) submitted by the Council along with associated appendices	
ID18	First draft Planning Conditions in event appeal is allowed	

ID19	Final draft Planning Conditions in event appeal is allowed together with schedule of drawings
ID20	Letter on behalf of Appellants confirming agreement to pre-commencement conditions.
ID21	Updated Statement of Common Ground dated 23 September 2019 (Core Document E3)
ID22	Closing Submissions on behalf of South Oxfordshire District Council
ID23	Court of Appeal Judgement: The Queen on application of Cherkley Campaign Limited v Mole Valley District Council & Longshot Cherkley Court Limited [2014] EWCA 567
ID24	Supreme Court Judgement: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13
ID25	Supreme Court Judgement: R (N) v Lewisham London Borough Council [2014] UKSC 62
ID26	High Court Judgement: Phides Estates (Overseas) Limited v SoSCLG, Shepway District Council & David Plumstead [2015] EWHC 827 (Admin)
ID27	High Court Judgement – M J Harris & Another v Berkeley (Strategic Land) Ltd & Another [2014] EWHC 3355 (Ch)
ID28	Court of Appeal Judgement – Moore v SoSE & New Forest District Council [1998] 77 P & CR 114
ID29	High Court Judgement: JJ Gallagher Ltd & Others v Cherwell District Council & Others [2016] EWHC 290 (Admin)
ID30	High Court Judgement: Gravesham Borough Council v SoSE & Another [1983] P & CR 142
ID31	High Court Judgement: Cherwell District Council v SoSCLG & Gladman Developments Limited [2016] EWHC 2925 (Admin)
ID32	High Court Judgement: Barchester Healthcare Limited v SoSCLG [2010] EWHC 2784 (Admin)
ID33	High Court Judgement: Peel Investments (North) Limited v SoSHCLG & Salford City Council [2019] EWHC 2143 (Admin)
ID34	Closing Submissions on behalf of the Appellants