



Appeal Decision

Site visit made on 5 February 2020

by John Felgate BA(Hons) MA MRTPI

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

Decision date: 18th February 2020

Appeal Ref: APP/P4605/W/19/3235238

Land adjacent to Western Business Park, Great Western Close, Birmingham B18 4QF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Rochda Limited against the decision of Birmingham City Council.
 - The application Ref 2018/06134/PA, dated 23 July 2018, was refused by notice dated 14 February 2019.
 - The development proposed is described in the application form as: *"Redevelopment of the existing vacant site for residential accommodation consisting of a wide range of high quality apartments with onsite car and cycle parking located below ground"*.
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Decision

1. The appeal is dismissed.

Costs Application

2. An application for costs has been made by the appellants against the Council. That application is the subject of a separate Decision.

Preliminary Matters

3. The appeal proposal is for outline planning permission, including access, layout and scale, with appearance and landscaping reserved for future approval.
4. In the application, as originally submitted, the proposed development is described as above. The accompanying plans showed a scheme of 296 apartments, in six blocks ranging from three to seven storeys, with 178 car parking spaces, plus two areas identified as 'potential space for additional parking'. The plans also indicated the inclusion of a nursery, a gymnasium, and a concierge's office, within proposed Block B.
5. With their appeal submission, the appellants have submitted new plans. These show an alternative scheme for 288 units and 274 parking spaces, in a similar layout, but with fewer storeys in some of the apartment blocks. The amended plans also omit the nursery, gym and concierge. The appellants ask that the description of the development be amended to reflect the contents of these amended plans.
6. However, in the interests of fairness, my decision must be based on essentially the same development that was before the Council. I have therefore focussed my consideration primarily on the proposals as set out in the original application and plans. Nevertheless, I acknowledge that the amended details are aimed at overcoming issues raised in the refusal reasons, and where I consider that they may be relevant to my decision, I have had regard to them.

Main Issues

7. Having regard to the Council's reasons for refusing permission, and the other submissions before me, the main issues in the appeal are as follows:
- whether the appeal site currently comprises 'open space', and if so, whether its loss would accord with relevant planning policies relating to such land;
 - whether the proposed development would provide sufficient on-site public open space for recreation and play, and if not, whether a contribution to off-site provision would be needed;
 - whether the development would achieve a satisfactory standard of design and layout;
 - the effects of the development on ecology and biodiversity;
 - the effects on protected trees;
 - whether the development would provide an acceptable mix of dwelling types and sizes;
 - whether the lack of provision for affordable housing has been adequately justified;
 - whether the inclusion of the proposed gym and nursery would accord with relevant policies for the location of such facilities;
 - whether the development would make adequate provision with regard to sustainable construction and energy usage;
 - and whether the development would make adequate provision for surface water drainage.

Reasons

Loss of existing open space

8. Policy TP9 of the Birmingham Development Plan (the BDP)¹ seeks, amongst other things, to protect existing open spaces. Paragraph 6.57 of the BDP defines 'open space' as including all open land of recreational or public value which primarily consists of natural elements such as trees, grass or water. The appeal site consists mainly of woodland and regenerating scrub, together with some areas of grass and standing water. To my mind these are natural elements, within the terms of the definition. Although the site's value to the public is limited by its lack of access and relative lack of visibility, the presence of such a sizeable area of natural vegetation, within a large and dense urban area, has some value as a green lung, albeit that its role in this respect is purely passive. I therefore consider that the site falls within the types of open land to which the policy is intended to apply.
9. Policy TP9 itself states that permission for development on open spaces will not normally be granted. However, certain exceptions are provided for. One of these relates to situations where the existing open space is under-used, due to inherent problems such as poor surveillance, physical quality or layout, which cannot otherwise be realistically dealt with. Again, in my view, this exception is relevant to the appeal site, as all of these circumstances apply. Despite being surrounded by development, the site's poor surveillance has contributed to the evident problems of widespread fly-tipping and anti-social behaviour,

¹ The Birmingham Development Plan, adopted in January 2017

which in turn have contributed to the significant deterioration and degradation of its physical condition. As a result, the site in its current condition is not only under-used, but unusable. There is no evidence that the Council or any other body has any alternative plans to bring the site into use, or to restore it to an acceptable condition. Consequently, in the absence of some form of new development, the existing situation seems likely to continue.

10. In these circumstances, Policy TP9 allows for partial development, provided this is allied to other measures resulting in significant improvements to the quality and recreational value of the remainder. The appeal proposals, in either the original scheme or the later amended version, would leave around half the site undeveloped, and in the context of the size of the site and the scale of the existing problems, this balance of land uses seems reasonable. On the submitted plans, the remaining open areas are shown as woodland, scrub, marshland and water areas, and although the detailed treatment of these areas remains to be defined, I see no reason why they should not continue to qualify as open space within the BDP's definition. Nor does there appear to be any reason to doubt that a satisfactory restoration scheme could be secured through reserved matters and other conditions. The proposed development would therefore fall within the allowable exception for partial development, resulting in significant improvements to the existing open space.
11. The development would thus provide for the retention and enhancement of a substantial part of the existing urban open space, and potentially achieve a significant gain in this respect. I therefore conclude that the proposed scheme would accord with the relevant provisions of Policy TP9 relating to the protection of existing open space.

Provision of new public open space

12. In addition to protecting existing open spaces of all kinds, BDP Policy TP9 also seeks to ensure that new residential developments have adequate access to public open space which is suitable for recreation and children's play. In this context, the policy makes a clear distinction between these two separate requirements. Further details are set out in the relevant Supplementary Planning Document (SPD)². Normally, the preference is for on-site provision, although in appropriate cases, a contribution may be made instead to the provision or improvement of off-site facilities. None of these requirements appears to me at all unusual or controversial, and there is no suggestion that any are inconsistent with relevant national policies.
13. In the present case, the Council suggests that full on-site provision would amount to 1.4 ha, whereas the appellants argue for 0.6 ha. Neither calculation has been fully explained, but it seems likely that an SPD-compliant provision would lie somewhere within this range. It is not disputed that the parts of the site to be left undeveloped would exceed this, amounting to in excess of 1.8 ha in either the original or amended schemes. However, it is also agreed that this includes significant areas of moderate ecological and biodiversity value, which would need to be managed mainly for ecological purposes.
14. I agree that ecological management need not necessarily mean excluding all public access or passive recreational uses, and it may well be possible for some areas to serve a dual purpose. It therefore seems likely that part of the

² 'Public Open Space in New Residential Development' SPD, July 2007

- requirement for usable open space, and play space, could be met on-site. But the appeal scheme as currently presented lacks any detail as to how this balance would be struck. From the evidence before me, it is by no means clear that the whole of the SPD requirement could be met on site, after making proper allowance for the needs for ecological safeguarding and enhancement. The development is therefore likely to be dependent, at least to some extent, on the quality and proximity of off-site provision.
15. As the crow flies, the appeal site is not very far from a number of existing public open spaces, including All Saints Park, Musgrave Park and Bacchus Road Park. But in reality the distances are significantly further, because all access into or out of the appeal site is only from its western end. All of these existing open spaces also involve crossing busy urban roads. Consequently whilst the existing facilities would be capable of playing some role in meeting the needs of future occupiers, that role would to some extent be limited, because of the lack of easy and convenient access.
 16. Although the sizes of many of the apartments in the proposed scheme are geared towards single people and couples, the mix also includes a significant number of 2 and 3-bedroomed units, and it seems likely that many of these would be occupied by households with children. I therefore see no grounds for omitting the children's play element of the Policy TP9 requirement.
 17. It therefore follows that, even though it may be possible for some usable public open space to be provided on site, and despite the existence of other existing facilities in the area, the requirements of Policy TP9 would not be met in the appeal scheme, as currently proposed. It seems likely, within the terms of that policy, that this deficiency could be overcome by a financial contribution, towards further off-site provision or enhancements, but in this case no such contribution has been agreed, and no legal obligation has been entered into. In the circumstances, these matters cannot be overcome by conditions.
 18. I conclude, based on the evidence before me, that the development now proposed would fail to provide adequately for the needs of future occupiers in terms of public open space. In this respect the development would conflict with the relevant requirements of Policy TP9 relating to new public open space within housing developments.

Design and layout

19. BDP Policy PG3 requires all developments to be of high design quality, creating a strong, positive sense of place and local distinctiveness, with safe environments that promote social interaction and natural surveillance. Similar aims are embodied in Policy TP27, which emphasises amongst other things the role of good design and place-making in creating sustainable residential environments.
20. The proposed development would comprise six apartment blocks, arranged in linear fashion on an east-west alignment, generally along the site's northern boundary. As proposed in the application plans, these blocks would range from 3 storeys in the combined Block A and B, to 5 storeys in Block C, and 7 storeys in Blocks D – G. The surrounding development in Handsworth New Road, Willes Road and Berry Drive, is mainly 2-storey housing, with modern industrial units adjacent to the site itself in Great Western Close.

21. The 5- and 7-storey blocks now proposed would be considerably taller than any of this nearby development, and Blocks D, F and G in particular would be much more massive structures. However, the appeal site is set at a lower level than the surrounding streets, and visually isolated from them by road and railway embankments and changes of level, and by the woodland belts lining the site's own boundaries. The site therefore effectively forms a self-contained landscape compartment, shared only with the industrial units, and clearly separated from the domestic scale of the Victorian terraced streets and other existing housing. In this context, I consider the proposed range of building heights, and the scale and massing of the proposed blocks, as shown in the original plans, are acceptable in principle.
22. However, the matters before me for determination also include layout, and in this respect I have significant concerns. In both the original and the amended plans, the linear arrangement of proposed Blocks A/B, C, D, E and F has the potential to create a strong and coherent streetscape, fronting onto Great Western Close, and running its full length. Yet this potential is greatly diminished by taking up most of the ground floor of Blocks D, F and G with car parking, together with other utilitarian items such as cycle and refuse storage compounds, stairwells and lift shafts. Instead of an active and attractive street scene, in my view this would be more likely to give the development's main spine the appearance of an extended service yard.
23. In addition, it seems to me that the potential of the linear street arrangement is further undermined by the proposed siting and orientation of Block G, in a manner that would create no sense of enclosure to the street, and where the building would have no logical or discernible relationship to the remainder of the layout. This failure to complete the street scene with a strong visual feature, weakens the composition as a whole, and risks wasting the opportunity to enhance the townscape.
24. The revised plans submitted at the appeal stage would do nothing to rectify these aspects of the scheme. Indeed the ambience of the street frontage would be further reduced, by the omission of some of the previously proposed landscaping bays, and by the extension of the car parking areas.
25. Overall therefore, the development as now proposed would fail to create a positive sense of place, or a residential environment of high quality. As such, the proposed design and layout are unacceptable, and in these respects the scheme conflicts with the relevant provisions of BDP Policies PG3 and TP27.

Ecology and biodiversity

26. In the BDP, Policy TP8 seeks to support the maintenance, restoration and enhancement of sites of biodiversity importance. Development likely to harm such sites is only to be permitted where the benefits outweigh the need for safeguarding, and where the damage is minimised. In this context, the Council's refusal notice also cites Policy TP7, which relates to green infrastructure networks, but in subsequent submissions the Council's case does not appear to rely on this policy. I consider TP8 to be the more relevant here.
27. In the light of the further information submitted by the appellants, including a Biodiversity Impact Assessment (BIA), the Council now agrees that, with adequate mitigation measures, including the use of green roofs, the proposed scheme would be capable of producing a net gain in ecology and biodiversity.

Green roofs were not specifically proposed in the original application scheme, but their impact was tested in the BIA, based on details contained the subsequent revised plans. I see no reason why a similar design could not be incorporated into the original scheme.

28. I am satisfied that green roofs, and all other necessary mitigation measures, including a Landscape Ecological Management Plan and a Construction Ecological Management Plan, could be secured by conditions. On this basis, I consider that the development could be carried out without unacceptable impacts on ecology or biodiversity, and in compliance with Policy TP8.

Trees

29. BDP Policy TP7 seeks, amongst other things, to conserve and enhance the city's trees and woodland resources. On the appeal site, the woodland belt which runs along three sides of the site is subject to an 'Area' Tree Preservation Order (TPO).
30. In the appeal scheme, in either its original or amended versions, the great majority of the TPO trees would be preserved. However, Blocks A/B and C would encroach significantly into the TPO area. In the original scheme, a number of the better trees in this area would be lost. Although the repositioning of Block A/B in the amended proposals would potentially allow some of these to be retained, the siting of both blocks A/B and C would still be very close to the tree canopies, leading to likely problems of overshadowing and consequent pressure for their later removal.
31. In addition, I saw on my visit that the land on which the trees in this part of the site are growing forms part of a substantial raised mound. From the cross-sections provided with the amended scheme, it is clear that ground levels in this area would have to be altered. Although the information supplied is not particularly detailed, it seems to me that any removal or reduction of the existing earth bank would be likely to have an adverse effect on the future health of any retained trees in this part of the site.
32. I appreciate the appellants' desire for a relatively open style of landscaping at the entrance to the site, to give the development a visual presence onto Handsworth New Road, and to create a well-tended appearance. But to my mind there is no apparent reason why this should not also allow for the retention of the better trees, particularly on or close to the roadside itself.
33. I acknowledge that the proposals would include substantial new planting, which in purely numerical terms could significantly exceed the numbers to be removed. But the trees in this north-western corner of the site play an important role in the existing street scene, and for that reason, it seems to me that the retention of most of the better ones in this group is a reasonable requirement. The present appeal proposals appear to me to fail in this regard.
34. The likely loss of protected trees in this important part of the site would detract from the area's character, and would represent a further missed opportunity to capitalise on the site's potential to create a high-quality development. In these respects, the adverse effects on existing trees result in a clear conflict with Policy TP7.

Housing mix

35. As well as the matters already discussed above, BDP Policy TP27 also seeks to ensure that housing developments offer a wide choice of housing sizes and types, to support the creation of balanced communities. Alongside this, Policy TP30 requires schemes to offer a range of dwellings to meet local needs. In this context, account is to be taken of relevant evidence, including housing market assessments, demographic factors, and the characteristics of the site itself and its locality.
36. The appeal scheme proposes around 60% one-bedroom units, with 36.5% two-bedroom, and only 3.5% three-bedroom. The Council would prefer to see a greater proportion of larger units, of three and four bedrooms, and with some being provided as houses rather than all flats.
37. I accept that the Council's position broadly follows from the findings of the 'Housing Targets 2011-31 Technical Paper', which the Council refers to as its Strategic Market Housing Assessment. But that study was published in 2013, and therefore can no longer be regarded as up to date. Although reference is also made to the document '2018 KS401', which provides interim estimates of the housing stock in 2018, this does not appear to be accompanied by any new or updated analysis of needs. It is not clear whether any other sources have been drawn on, but none is identified in the Council's statement. Consequently, on the evidence before me now, I am not persuaded that the case for resisting the appeal proposal on these grounds is well-founded.
38. In addition, it is evident that the appeal site has a number of significant physical constraints. Its long, narrow shape, its limited access, the disposition of the existing woodland and wetland areas, and the relationships to the adjoining industrial development, railway embankments, and the sheer face of the southern boundary, all combine to impose serious challenges in the design and implementation of any development. Given these difficulties, it seems unlikely that a scheme of houses, with fewer storeys and the resulting requirement for individual gardens, would be able to make the most efficient use of the land.
39. Moreover, whilst the Council refers to an excess of flats in the Soho & Jewellery Quarter Ward, I saw on my visit that this encompasses a large and diverse area. In the parts of that Ward nearest to the appeal site, mainly comprising the suburbs of Winson Green and Handsworth, it was evident that the predominant housing type is 2-storey terraces. In this context, in an inner-city area well served by the Midland Metro light railway and bus services, I see no reason why the introduction of a flatted scheme with mainly smaller units, should not be considered to contribute positively to local housing provision.
40. In the circumstances, I consider that the range of dwelling types and sizes proposed in the appeal scheme would meet the aims of Policies TP27 and TP30 with regard to meeting housing needs and fostering a healthy social balance.

Affordable housing

41. BDP Policy TP31 normally seeks 35% affordable housing in all schemes of over 15 units. However, the policy acknowledges that this may not always be feasible, due to abnormal costs or other factors, and in such cases provision is made for viability testing, using a recognised methodology.

42. In the present case, the appellants' financial viability appraisal appears to show that, even if the cost of the site acquisition is effectively discounted to zero, and without any affordable element at all, the developer's profit generated would only be in the region of 9.54% of GDV. This would be less than half the rate of return normally required for commercial funding. In part, this is due to a range of abnormal costs, including site clearance, decontamination, specialist waste services, the removal of old foundations and bases, and the resultant need for piling. In total these additional costs are estimated at just over £2.2m. These costings are described in the report as conservative, and I have no reason to disagree with that view. If this assessment as a whole is accepted, it follows that the inclusion of any affordable housing must further reduce the scheme's profitability, and thus also its prospects of being implemented.
43. Although the Council suggests that some aspects of the report's methodology are disputed, it does not appear to have identified which ones, or why. According to the case officer's report, the Council's view is based on an independent assessment, but no details of that assessment are before me. I appreciate that in any viability exercise of this nature, the final outcome will often be quite sensitive to small variations in the assumptions, but that does not mean that the evidence which is before me can simply be set aside. In the absence of any evidence to the contrary, I have no basis on which to question the appellants' figures.
44. Subsequently to the Council's refusal of permission, the appellants have expressed willingness to offer 10% of the proposed units as affordable housing. But since no legal obligation has been entered into, this offer carries little weight. In the circumstances, I have relied on the other evidence before me.
45. In the light of the evidence available, I conclude that the lack of affordable housing has been adequately justified. Consequently, I find no conflict with Policy TP31.

Gym and nursery

46. In the BDP, Policy TP21 seeks to maintain the vitality and viability of the city's existing city, district and local centres, which are the preferred locations for retailing, offices, leisure and community facilities. Outside of the identified centres, main town centre uses are not to be permitted, except where they accord with national policies, and impact assessments are required for any over 2,500 sq m. 'Main town centre uses' are defined in the National Planning Policy Framework (NPPF), and these include leisure, although not children's nurseries.
47. The appeal site is outside any of the identified district or local centres, and no sequential testing has been carried out to establish whether alternative premises are available in any of these. The proposed gymnasium, as a leisure use, falls within one of the 'main town centre uses' that Policy TP21 presumes against in out-of-centre locations such as the appeal site. To this extent, the gym would conflict with Policy TP21 and the NPPF. As far as the nursery is concerned, although not subject to the same policy presumption, the appeal site is not amongst the preferred locations for this type of facility. The inclusion of the nursery therefore adds some further weight to the conflict with Policy TP21.

48. On the other hand, it is clear that in this case the gym and nursery would not be primary uses, but rather they would be minor supporting elements in a much larger development, and clearly secondary to the main residential use. As such, it seems clear that their main role in the scheme is primarily to provide services of benefit to the new residential occupiers, offsetting the site's perceived disadvantages, and thus to help to ensure the success of the development as a whole. Given the scheme's potential role in regenerating the area, this would be a significant in my view. In addition, although the appellants' stated intention is to offer these services initially only to residents of the development itself, if they were to be made more widely available, it is likely that this would be seen as a benefit to other local residents, particularly in view of the site's proximity to the Metro station and adjacent primary school, with the potential for linked trips.
49. Furthermore, whilst there would be some possibility of the gym and nursery drawing trade away from any similar facilities located in nearby local and district centres, there is no evidence of any such existing facilities that would be put at risk. And given the small size of the facilities now proposed, realistically, their effect on established centres is unlikely to be significant. In this context, it is notable that both of the proposed new facilities would be well below the threshold for impact assessment.
50. Having regard to all of the above, I conclude that in the circumstances of this particular proposal, the conflict with Policy TP21 is clearly outweighed by the benefits of including these leisure and community facilities as part of the overall development.

Sustainable construction and energy

51. BDP Policies TP3 and TP4 require new developments to maximise energy efficiency and low-carbon energy. Whilst the appellants refer to the possible use of roof-mounted solar panels, linked to 'Tesla walls' in the undercroft areas, there is little further detail of these or any other measures.
52. I accept that construction and energy details are not reserved matters, but that does not prevent relevant details of those matters from being sought and controlled by condition. There is therefore no apparent reason why further details, and additional measures if necessary, could not be secured in that way in the present case. Such conditions could also require consideration to be given to combined heat and power technology, if justified.
53. I appreciate that the Council would have preferred to see more details of the development's technical design, and its energy and emissions savings, included now, and indeed that approach might well be appropriate in some cases. But in the present appeal, given the outline nature of the scheme, the evident constraints of the site, and the sheer number of other aspects yet to be resolved, it seems to me more sensible to leave these detailed matters to a later stage.
54. I therefore find no reason, subject to suitable conditions, why the development should not be capable of achieving acceptable standards of energy efficiency and carbon reduction, in compliance with Policies TP3 and TP4.

Surface water drainage

55. BDP Policy TP6 primarily requires developments not to exacerbate existing flooding, and to manage exceedance flows so that the surface water discharge rate is limited to the equivalent greenfield run-off rate, for a 1-in-100 return period plus climate change allowance. In addition, Policy PG3 also requires schemes to take opportunities to incorporate sustainable urban drainage, as an integral element of the design.
56. In response to the appellants' drainage strategy, the Lead Local Flood Authority (LLFA) has raised a number of detailed queries. Subsequently an email from the appellants' drainage consultant, dated 6 August 2019, has answered some of these questions, including the proposed point of connection to the public system, and the feasibility of a gravity-based solution. The email acknowledges that some matters remain outstanding, including details of the attenuation ponds, finished site levels, existing exceedance routes, and future operation and maintenance arrangements. To my mind these are matters normally capable of being dealt with under planning conditions.
57. Although the LLFA has not withdrawn its earlier objection to the development, the Authority does not appear to question the feasibility in principle of achieving the required discharge rate, or of the development being able to manage surface water flows satisfactorily without exacerbating any existing flood risks in the area.
58. In the light of the evidence available, it seems likely that, if outline permission were to be granted, an acceptable detailed scheme of surface water drainage could be agreed, at the stage where reserved matters and other details were to be considered. I therefore see no reason why these matters could not be left to conditions. In the circumstances, I find no conflict with either of Policies TP6 or PG3 with regard to drainage matters.

Other Matters

59. The site is previously developed land, in a highly sustainable location, where NPPF policies give strong encouragement to urban regeneration, particularly through housing development, including higher densities. These policies weigh in favour of the appeal scheme. The scheme would also benefit the local economy.

Conclusions

60. Despite some positive features, the appeal proposals fall short in three respects. Firstly, the layout would fail to create a high quality environment for future occupiers. Secondly, given the need for ecological management, it is not clear how far provision could be made on-site for usable public open space and play space, or how any residual requirement would be met, either through financial contributions or in any other way. And thirdly, the development as currently proposed would have an unacceptable impact on protected trees. In all these respects, the scheme would conflict with development plan policies.
61. Although the scheme's benefits carry weight, they do not outweigh this conflict. The appeal is therefore dismissed.

J Felgate

INSPECTOR