The Planning Inspectorate

Appeal Decision

Site visit made on 24 September 2019

by Christopher Butler BA(Hons) PG Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2020

Appeal Ref: APP/N1540/W/19/3229035
Wych Elm House, Harlow CM20 1QR

- 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 Prisma Property Developments (Harlow) Limited against the decision of Harlow District Council.
- The application Ref HW/FUL/18/00269, dated 8 June 2018, was refused by notice dated 26 March 2019.
- The development proposed is the demolition of existing buildings and the erection of a 2-10 storey building comprising 102 no. residential units (Class C3), and 780 sq. m of ground floor commercial floorspace (Classes A1, A2, A3), together with associated works and public realm improvements.

Decision

1. The appeal is allowed and planning permission is granted for the demolition of existing buildings and the erection of a 2-10 storey building comprising 102 no. residential units (Class C3), and 780 sq. m of ground floor commercial floorspace (Classes A1, A2, A3), together with associated works and public realm improvements at Wych Elm House, Harlow CM20 1QR in accordance with the terms of the application, Ref HW/FUL/18/00269, dated 8 June 2018, subject to the conditions set out in the attached Schedule.

Application for Costs

2. An application for costs was made by Prisma Property Developments (Harlow) Limited against Harlow District Council. This application is the subject of a separate Decision.

Preliminary Matters

3. A Section 106 agreement (Unilateral Undertaking) (S.106) under the Town and Country Planning Act 1990 (as amended) that is signed and dated 8 October 2019 has been submitted as part of the appeal. I have taken this document into account.

Main Issue

4. The main issue is whether the development without any affordable housing provision is reasonable given the viability of the proposed scheme, in light of development plan policies, the National Planning Policy Framework (the Framework), and other related guidance.

Reasons

5. The Adopted Replacement Harlow Local Plan (adopted July 2006) (ARHLP), set out the policies and proposals for development and land use for the period up to 2011. Whilst the Plan is time expired, it is still the adopted plan and contains saved policies, which the Council use to determine planning applications within its jurisdiction. However, there is a legal requirement to review local plans every 5 years and paragraph 33 of the Framework states that policies in local plans and spatial development strategies should be reviewed to assess whether they need updating at least once every 5 years, and should then be updated as necessary. Such reviews are required to enable development plans to take into account changing circumstances affecting the area, or any relevant changes in national policy.

6. Policy H5 of the ARHLP states that the Council will negotiate the provision of intermediate and/or social rented housing, based on the prevailing housing needs assessment. It goes on to say that negotiations will take into account the economics of provision and site suitability and that there is a presumption that provision will be made on site. However, it also states, in exceptional circumstances and by mutual agreement between the developer and the Council a financial or other contribution may be agreed.

7. Clearly Policy H5 of the ARHLP is dated and I have no significant evidence before me that the ARHLP has been reviewed taking into account any changing circumstances affecting the area, or any relevant changes in national policy. Policy H5 of the ARHLP is not wholly consistent with the Framework, although the provision of affordable homes is still a key component of the Framework. As such, I afford Policy H5 of the ARHLP moderate weight.

8. The Affordable Housing Supplementary Planning Document (SPD), adopted March 2007 states that it *"…will be monitored and reviewed on a regular basis to make sure that it continues to meet the identified housing needs in Harlow."* It also makes reference to a number of Planning Policy Statements and other documents that are no longer in place, including Circular 05/2005 and a structure plan. Again, there is no evidence before me that this SPD has been reviewed taking into account any changing circumstances affecting the area, or any relevant changes in national policy. As such I afford the SPD limited weight.

9. In addition to the above, the Council is in the course of preparing a new Local Plan, the Emerging Harlow Local Development Plan Pre-Submission Publication (ELP), the examination of which has commenced. Policy H8 of the ELP, which states major residential development must provide at least 30% affordable housing. However, this emerging Policy also states that a reduction of this percentage will require an independent viability assessment. The appellant, referring to the Council's draft schedule of modifications to the ELP, advises the text of this policy has been softened from *"Major residential developments must provide…"* to *"In developments of more than 10 dwellings it will be expected that at least 30% of affordable housing is provided."* They also highlight that this modification states a *"reduction of this percentage may be permitted for viability reasons"*.

10. The Council has confirmed that it has received 8 objections to Policy H8 of the ELP. However, no information or evidence as to the extent of these unresolved objections has been provided. Furthermore, the examination is ongoing and there is no conclusion as to the ELP soundness. Bearing in mind all of the above and considering the stage the ELP has reached, I afford limited weight to the ELP and its policies. Irrespective of the weight to be applied to the above mentioned policies, both ARHLP Policy H5 and ELP Policy H8 make reasonable provision for the flexible application of the Council's affordable housing policy.

11. In regard to the Framework, Paragraph 64 is relevant and states that where a major residential development is proposed there should be a minimum of 10% on-site affordable housing expected. There are some exemptions, but none of these would be met by the proposed development. However, as worded in the Framework, this is an expectation and not a minimum requirement.

12. No affordable housing is proposed as part of the appeal development on the basis of the scheme's viability. The appellant, in support of this has submitted a viability assessment, which the Council have had independently assessed. Having regard to the Framework it is legitimate to consider viability and I attach considerable weight to this matter given the Government's objective to significantly boost the supply of homes.

13. The appellant clarified various matters related to the viability assessment raised by the Council's independent advisors. As a result, with regard to the appellant's viability assessment, the Council's Development Management Committee report advised: *"…that the proposed scheme was financially unviable with the payment of the required contributions and affordable housing…"*

14. Robust viability evidence was provided by the appellant as part of the original planning application and tested by the Council. This viability evidence demonstrated that the development would not be deliverable with affordable housing provision. No substantive evidence has been provided by the Council in response to the appeal that counters the appellant's viability assessment or the advice provided to the Council by its own independent advisors. In the absence of such evidence, I do not disagree that the proposed scheme would be financially unviable with the inclusion of affordable housing.

15. I recognise that adopted policy seeks affordable housing within the Borough. I also acknowledge the expectation at Paragraph 64 of the Framework in regard to the provision of on-site affordable housing. However, whilst the provision of no affordable housing conflicts with the Development Plan (DP) and does not accord with the expectation set out in Paragraph 64 of the Framework, I give substantial weight to the mixed use development proposed and the provision of 102 residential flats. Additionally, given the particular circumstances of this proposal, dismissing the development on this basis and on the basis of conflict with paragraph 64 of the Framework would go against the Government's objective of significantly boosting the supply of homes. Considering all the above, the identified conflict with paragraph 64 of the Framework is therefore not a determinative issue in this appeal.

16. I also give substantial weight to the submitted S.106 that ensures other contributions towards education, healthcare and public realm improvements are secured, despite the development not being able to contribute to affordable housing.

17. Furthermore, the proposal would provide 102 flats as part of a mixed use scheme, in a sustainable part of Harlow, which is defined in the ARHLP as an edge-of-town centre location.

18. Considering all the above, the provision of no affordable housing as part of the appeal development is justified following robust assessments of viability. Whilst there is conflict with the DP in this regard, Policy H5 of the ARHLP is only afforded moderate weight as it is not wholly consistent with national policy, especially on the basis of viability. Limited weight is only afforded to Policy H8 of the ELP, due to the stage the ELP has reached in the examination process and the fact that there are outstanding objections to this emerging Policy. Furthermore, only limited weight is afforded to the SPD in the absence of any evidence that it has been reviewed to take account of any changing circumstances affecting the area, or any relevant changes in national policy. Given the viability evidence, the provisions within the Framework in that regard and the significantly wider benefits offered by the development, most notably in regard to housing delivery, with the development yielding 102 residential units boosting the supply of homes in accordance with the Government's objective, those benefits outweigh the policy conflict and associated harm.

Other Matters

19. The Council has drawn my attention to a subsequent application made by the appellant for a mixed use development, which includes 122 residential units, where they advise affordable housing and other contributions are being offered as part of that development. However, no specific details of this subsequent application, the affordable housing or other contributions have been provided with this appeal. I also note that the Council states that these contributions being offered in that subsequent application have been offered by the appellant despite that development being more unviable than the refused scheme. As such I give limited weight in regard to this matter.

20. Concerns regarding potential impact of the proposal on the adjacent veterinary practice, which runs a 24 hour emergency service, are noted. These concerns arise in part from the fact that animals are held on the premises overnight and noise from these animals may give rise to complaints from residents in the proposed development, especially at night, or in summer and fine weather when windows would be potentially open. Other concerns relate to traffic, congestion, parking and the development having an overbearing impact on the adjoining veterinary practice due to the loss of sunlight and daylight, as well as impact on the privacy of nurses who reside in the veterinary practice's flat.

21. No evidence has been provided that demonstrates an overbearing impact or loss of sunlight and/or daylight on the adjoining veterinary practice, including in regard to the nurses flat. Indeed, the Council has not raised concerns against the development in this regards. I am satisfied that the design of the development, when combined with the orientation of the site and the way the sun rises and falls, is such that an overbearing impact or unacceptable loss of sunlight and/or daylight would not occur to the adjoining veterinary premises or the nurses flat associated with it.

22. Furthermore, in terms of loss of privacy to the nurses who reside in the flat linked to the vets, no information has been provided as to the nature of this property. However, regardless of whether the nurses occupy this flat permanently as a dwelling or whether they occupy it on a shift basis when caring for animals held on the premises overnight or in cases of emergency, it is clear to me that the design of the development is such that no unacceptable level of loss of privacy, or amenity generally, would result on the occupants of the nurses flat.

23. In terms of concerns about complaints caused by noise and disturbance arising from the 24 hour emergency service operated by the veterinary practice, including the fact that they hold animals on the premises overnight, I note that the appellant submitted an Acoustic Assessment (AA) with their application. The AA was considered by the Council's Environmental Health Officer who raised no objections in principle to the development in the light of the AA. Furthermore, the Officer's Report to the Council's Development Management Committee considered internal noise levels within the development and noted that the submitted AA concludes internal noise levels would be acceptable, subject to mitigation. There is no evidence before me that would lead me to a different conclusion.

24. Turning to the concerns related to traffic, congestion and parking, I note that the Highway Authority were consulted and raise no objection to the development in regard to traffic and highway safety, subject to the imposition of appropriate conditions. I also note that the Council Officers in the report to the Council's Development Management Committee considered the development to be sustainably located with good connectivity to a range of facilities and amenities, which would reduce the need to travel by car, and as such the level of parking provision was considered by them to be appropriate. Again, there is no evidence before me that would lead me to disagree with the professional assessments provided by the Highway Authority or Council's Officers in this regard.

Planning Obligation

25. The submitted S.106 covers a range of matters, including contributions to primary school education and healthcare provision. It also undertakes to submit a public realm plan, a waste management scheme and a viability review of the financial viability of the development, if the development is not commenced within two years of the date of the planning permission.

26. All of the above matters, covered in the S.106, were sought by the Council and are directly related to the proposal and are necessary to make the development acceptable in planning terms. Therefore, I consider that these Planning Obligations meet the requirements in paragraph 56 of the Framework and the tests in Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended). I have therefore taken account of them in my decision.

Condition Reasons

27. I have considered the conditions put forward by the Council against the requirements of the Planning Practice Guidance (PPG) and the Framework. The conditions I have included from the recommended list have been subject to

some alterations to improve clarity and ensure consistency with the Framework and PPG.

28. I have attached the standard time limit condition, and a plans condition as this provides certainty and is in the interests of proper planning. I have also added a condition concerning materials, which is required in the interests of ensuring the development is appropriate to the area in terms of its character and appearance. Furthermore, there is a need to impose a condition which limits the hours of demolition and construction, in the interests of the amenities of nearby occupiers.

29. As recommended by the Council, I have included a condition requiring a Construction Method Statement (CMS). This condition will help to ensure that the process of the construction of this scheme will have minimal impact on the site and its surrounding area. Additionally, due to the proximity of the development to trees, there is a need to ensure they are appropriately protected for the duration of the development and as such it is appropriate to impose a condition requiring an Arboricultural Method Statement (AMS). Both the CMS and AMS are required to be submitted prior to the commencement of development, which given what is required in a CMS and AMS and the need for those provisions to be in place prior to any demolition works taking place, is considered reasonable.

30. The Council has also sought a condition regarding hard and soft landscaping. However, I note that the red line of the application site is drawn tightly around the site and excludes the adjoining landscaping areas. Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability.

31. The land upon which the landscaping is to be undertaken is within the ownership of the Council. Whilst I acknowledge that it may be possible to use a negatively worded condition (a Grampian condition), I note that the S.106 submitted with this proposal requires Public Realm improvements. These are to be shown on a Public Realm Action Plan (PRAP) that is required to be submitted to and agreed with the Council. The S.106 specifies that the PRAP shall include a detailed landscaping plan that accommodates the proposals set out on drawing Number 1004-100 Revision E, as well as a landscape management plan to demonstrate the long-term maintenance of the public area. As such the imposition of a landscaping condition is not necessary in this instance as landscaping and its maintenance is being secured through another mechanism.

32. In the same vein, the Council is seeking to secure footway improvements, as shown in principle on drawing no.1004-100 Rev E. These include the full reconstruction of the existing footway across the site frontage on Wych Elm and are required to include dropped kerb crossings with tactile paving, as necessary, across the accesses. These works lie outside of the area identified in the S.106 as Public Realm and therefore are not secured as part of that deed. The footway improvements are required in the interests of highway and pedestrian safety and as such it is reasonable to impose a negatively worded condition.

33. I have included a condition requiring details of surface water drainage and a separate condition related to the management and maintenance of it. These conditions require the drainage to be implemented and retained, as well as appropriately managed and maintained.

34. The Council seeks to limit the use of the commercial units within the development to uses falling within Classes A1, A2 and A3, as defined by the Use Classes Order. Bearing in mind the proximity of residential uses above these commercial units it is appropriate to impose such a condition to ensure the uses are compatible with the residential development above.

35. In addition to the above, a pharmacy is currently located on site and the Council consider this to be a key facility, referencing policy CP6 of the ARHLP as their justification. However, this policy seeks to preserve existing community facilities, which the plan indicates are uses such as community halls, community centres, doctors surgeries, Etc., and not 'key facilities'. In the absence of any evidence that justifies the imposition of this condition, I do not consider the condition to be necessary or reasonable.

36. A condition seeking an amended parking scheme is required to ensure the development provides appropriate access, parking and turning facilities. Furthermore, a condition requiring a Travel Plan for future occupiers is appropriate. These are in the interests of addressing the need for adequate and well managed parking provision, together with promoting sustainable forms of travel.

37. Finally, there is also a condition required in relation to deliveries to and from the site, how waste will be managed on site and collected and general servicing arrangements. This is imposed to ensure that these service arrangements are adequate and suitably provided in accessible locations.

Conclusion

38. For the reasons given above, the appeal should be allowed subject to the conditions in the attached schedule.

Christopher Butler

INSPECTOR

Schedule of Conditions

1. The development hereby permitted shall begin not later than 3 years from the date of this decision.
2. The development hereby permitted shall be carried out in accordance with the following approved plans:

   - Location Plan received 12.06.2018;
   - 1004-100 Rev E (Proposed Masterplan) received 19.03.2019;
   - 1004-200 Rev D (Proposed Ground Floor Plan) received 19.03.2019;
   - 1004-201 Rev A (Proposed First Floor Plan) received 11.03.2019;
   - 1004-202 Rev B (Proposed Second Floor Layout) received 11.03.2019;
   - 1004-203 Rev A (Proposed Third Floor Plan) received 11.03.2019;
   - 1004-204 Rev A (Proposed Fourth Floor Plan) received 11.03.2019;
   - 1004-205 Rev A (Proposed Fifth Floor Plan) received 11.03.2019;
   - 1004-206 Rev A (Proposed Sixth Floor Plan) received 11.03.2019;
   - 1004-207 Rev A (Proposed Seventh Floor Plan) received 11.03.2019;
   - 1004-208 Rev A (Proposed Eight Floor Plan) received 11.03.2019;
   - 1004-209 Rev A (Proposed Ninth Floor Plan) received 11.03.2019;
   - 1004-210 (Proposed Roof Plan) received 12.06.2018;
   - 1004-300 Rev B (Proposed North Elevation) received 11.03.2019;
   - 1004-301 Rev A (Proposed South Elevation) received 11.03.2019;
   - 1004-302 Rev A (Proposed East Elevation) received 11.03.2019;
   - 1004-303 Rev A (Proposed West Elevation) received 11.03.2019;
   - 1004-304 Rev A (Proposed South Courtyard Elevation) received 11.03.2019;
   - 1004-305 (Proposed North Courtyard Elevation) received 12.06.2018;
   - 1004-400 Rev A (Proposed Building Section) received 11.03.2019;
   - 27610_01_P (Topographical Survey) received 12.06.2018;
   - 43209-3 (Tree Protection Plan) received 17.10.2018; and
   - Accommodation Schedule Rev A (received 12.06.2018).

3. Prior to any construction works above ground level samples of all external facing materials, shall have been submitted to and approved by the local planning authority in writing. The relevant works shall be carried out in accordance with the approved sample details.

4. No development shall take place, including any works of demolition, until a Construction Method Statement has been submitted to, and approved in writing by the local planning authority. The Statement shall provide for:

   - Safe access into the site;
   - The parking of vehicles of site operatives and visitors;
   - Loading and unloading of plant and materials;
   - Storage of plant and materials used in constructing the development;
   - Wheel and underbody washing facilities;
   - Measures to minimise the risk of offsite flooding caused by surface water run-off and groundwater during demolition and construction;
   - Measures to control noise emissions during demolition and construction; and
   - Measures to control the emission of dust and dirt during construction.

   The approved Construction Method Statement shall be adhered to throughout the construction period for the development.

5. Demolition and/or construction works shall take place only between 8am and 7pm on Mondays to Friday, and between 8am and 1pm on Saturdays and shall not take place at any time on Sundays or on Bank or Public Holidays.

6. No development shall take place on site, including site clearance, tree works, demolition or any other works, until an Arboricultural Method Statement (AMS) has been submitted to and approved in writing by the Local Planning Authority. The AMS shall be in accordance with current BS5837 recommendations and include:

   - Details relevant to the safe retention and protection of trees;
   - A detailed Tree Protection Plan showing the positions and dimensions of protective fencing to safeguard all retained vegetation;
   - Details such as level changes, demolition and construction techniques, location of services and drainage, design detail of structures, foundations and the control of potentially damaging operations such as burning, storage and handling of materials and access and parking of vehicles during construction;
   - Details of supervision at key stages of development; and
   - A detailed list of tree works including access facilitation works required to provide the necessary clearance for construction works.

   The development shall be carried out in accordance with the approved details.

7. No development shall take place until a scheme of footway improvements, as shown in principle on drawing no.1004-100 Rev E, have been submitted to and approved in writing by the Local Planning Authority. The scheme of footway improvements shall include full details of the reconstruction of the existing footway across the site frontage on Wych Elm, including dropped kerb crossings with tactile paving as necessary across the accesses. The scheme of footway improvements approved pursuant to this condition shall be implemented in full prior to first occupation of the development and thereafter maintained.

8. Prior to first occupation of the development, a Residential Travel Plan shall be submitted to and approved in writing by the Local Planning Authority, in consultation with Essex County Council. The Residential Travel Plan shall be actively implemented as approved for a minimum period from first occupation of the development until 1 year after final occupation.

9. No works shall take place until a detailed Surface Water Drainage Scheme for the site, based on sustainable drainage principles and an assessment of the hydrological and hydro geological context of the development, has been submitted to and approved in writing by the Local Planning Authority. The scheme should include but not be limited to:

    - Limiting discharge rates to 4l/s for all storm events up to an including the 1 in 100 year rate plus 40% allowance for climate change;
    - Provide sufficient storage to ensure no off site flooding as a result of the development during all storm events up to and including the 1 in 100 year plus 40% climate change event;
    - Final modelling and calculations for all areas of the drainage system;
    - The appropriate level of treatment for all runoff leaving the site, in line with the CIRIA SuDS Manual C753;
    - Detailed engineering drawings of each component of the drainage scheme;
    - A final drainage plan which details exceedance and conveyance routes, FFL and ground levels, and location and sizing of any drainage features;
    - A written report summarising the final strategy and highlighting any minor changes to the approved strategy; and
    - Confirmation that the surface water network upgrades have been completed.

    The scheme shall subsequently be implemented prior to first occupation of the development and thereafter retained.

10. No works shall take place until a Maintenance Plan for the Surface Water Drainage Scheme has been submitted to and approved in writing by the Local Planning Authority. The Maintenance Plan shall identify who is responsible for the maintenance of the different elements of the surface water drainage system and maintenance activities/frequencies. The Maintenance Plan shall require yearly logs of maintenance to be carried out. The maintenance logs shall be available for inspection upon request by the Local Planning Authority. The maintenance plan shall be adhered to in accordance with the approved details.

11. Prior to the occupation of any unit for Use Class A3 (Restaurants and Cafes), equipment to control the emission of fumes and smell from the premises, including all flues and ducting, shall be installed in accordance with a scheme to be first submitted to and approved in writing by the local planning authority. The scheme shall include details of the siting, design and technical specification of fume extraction and ventilation systems together with details of any external flue(s) or ducting, specification of filtration, deodorising systems (where applicable), noise output and termination points. All equipment installed as part of the approved scheme shall thereafter be operated and maintained in accordance with that approval and retained for so long as the use continues.

12. Notwithstanding the provisions of Article 3 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 ground floor Retail Units hereby approved (as shown on plan 1004-100 Rev E) shall be used for A1, A2 or A3 purposes only.

13. Prior to the commencement of any works above ground level, a Waste, Delivery and Servicing Scheme, including elevational drawings of any bin stores associated with the refuse holding area on Wych Elm, shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall be implemented in accordance with the approved details.

14. Notwithstanding the approved plans, prior to the commencement of development details of an amended parking scheme, including provision for parking of bicycles, within the site shall be submitted to and approved in writing by the Local Planning Authority. The scheme shall include appropriate pedestrian and disabled access to and from the parking spaces. Prior to first occupation of the development, the parking scheme approved pursuant to this condition shall be provided, hard surfaced, sealed and marked out, in accordance with the details approved under this condition. The approved parking scheme shall be retained in perpetuity for their intended purpose.