



Appeal Decision

Site visit made on 15 December 2020

by S Leonard BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 February 2021

Appeal Ref: APP/M1710/W/20/3258862

Alton Magistrates Court, 25 Normandy Street, Alton GU34 1DQ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with a condition subject to which a previous planning permission was granted.
- The appeal is made by Mr S Paull (McCarthy and Stone Retirement Lifestyles Ltd) against the decision of East Hampshire District Council.
- The application Ref 56420/002, dated 17 July 2020, was refused by notice dated 27 August 2020.
- The application sought planning permission for retirement living apartments with communal facilities and car parking following demolition of existing buildings without complying with a condition attached to planning permission Ref 56420/001, dated 13 July 2020.
- The condition in dispute is No.7, which states that: *"the development hereby permitted shall not be first occupied until space for vehicle parking has been provided in accordance with the approved plans. The vehicle parking shall include the provision of 4 spaces for the charging of electric vehicles. The vehicle parking shall be retained for this purpose thereafter."*
- The reason given for the condition is: *"To ensure adequate on-site car parking provision for the approved development."*

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by East Hampshire District Council against Mr S Paull (McCarthy and Stone Retirement Lifestyles Ltd). This application is the subject of a separate Decision.

Background and Main Issues

3. The appeal site is located on the north-eastern edge of Alton town centre, in a mixed commercial and residential area, within the Alton Conservation Area (ACA). It has frontages onto Normandy Street, Knox Terrace and Orchard Lane, and Nether Street runs through the site. It is currently vacant, having formerly been occupied by Alton Magistrates Court and Alton Police Station, together with an adjacent car park. At the time of my site inspection, hoardings were in situ around the site perimeter, and building demolition works were underway.
4. The appellant seeks to alter condition No.7 of permission Ref 56420/001 (the original planning permission) to increase the provision of car parking spaces

with electrical charging points from 4 to 6. The appellant's reason for applying for the variation of condition is to future-proof the development by providing additional charging points.

5. The Council has raised no objection to the parking proposal, stating that it is positively encouraged. On the basis of the evidence before me, and guidance in Paragraph 110e) of the *National Planning Policy Framework 2019*, which advises that applications for development should be "designed to enable charging of plug-in and other ultra-low emission vehicles in safe, accessible and convenient locations", I find no reason to disagree.
6. The details of the 4 approved electric vehicle charging points are not shown on the approved plans, and they were not required to be provided as part of condition No.7, which stipulated that they should be included within the approved vehicle parking. On the basis of the evidence before me, including the approved drawing Ref 010 rev P5 titled 'proposed site layout – lower ground floor plan', I find that the proposal could easily be accommodated within the approved parking layout, and that it would result in a very minor alteration to the approved scheme.
7. Also, having regard to the statutory duty under Section 72 (1) of the *Planning (Listed Buildings and Conservation Areas) Act 1990*, I find that the proposal would not harm the character and appearance of the ACA.
8. The Council's reason for refusal relates to the failure of the appellant to enter into a legal undertaking on the same terms as that attached to the original planning permission in respect of a contribution towards the provision of off-site affordable housing. The Council considers that this matter falls outside the scope of the section 73 application.
9. Having regard to the above, I therefore consider that the main issues in respect of this appeal are:
 - Whether the proposed change to the previously agreed affordable housing contribution falls within the scope of the section 73 application; and, in the event that I find it does,
 - Whether the development makes sufficient provision for affordable housing.

Reasons

Scope of the application

10. The information before me is that the original planning permission is subject to a Section 106 Agreement requiring a financial contribution towards the off-site provision of affordable housing of around £576,000, and that the legal agreement does not include a clause stating that this would apply to all subsequent planning permissions.
11. During the course of the determination of the section 73 application, the Council sought a Deed of Variation (DOV) to the Section 106 Agreement, in order to secure the previously agreed off-site affordable housing contribution, having regard to the advice in Paragraph 015 of the *Planning Practice*

*Guidance*¹ (PPG), that approving the application would amount to a new planning permission.

12. This matter was addressed by the appellant by the submission of a Financial Viability Appraisal (the FVA) to the Council, which concluded that, following a review of the proposed development, there was now no financial headroom available for planning obligations.
13. The Council did not undertake a review of the FVA prior to determining the application, considering that the section 73 application was not the correct process by which the proposed change to the affordable housing contribution should be assessed. The Council's view is that the matter should be dealt with by means of a formal request for a DOV or a new planning application for the development, which would enable the matter to be considered in a more open and transparent manner, having regard to public awareness of the proposal.
14. The section 73 application form and the appellant's accompanying letter supporting the application only refer to the proposal to increase the number of electric vehicle charging points. No mention is made of a proposed change to the approved affordable housing contribution. The covering letter also confirmed that the application included all of the relevant information.
15. The viability of the scheme to provide the required affordable housing contribution is not directly related to the application proposal, and I find that it was not necessary for the Council to assess the submitted FVA in order to make an informed decision in relation to the proposed variation of condition No.7.
16. As such, I find that the Council were entitled to consider that the affordable housing issue fell outside the scope of the application made under section 73 of the *Town and Country Planning Act 1990*, which requires that the Council "shall consider only the question of the conditions subject to which planning permission should be granted".
17. Furthermore, an application under section 73 may not be used to obtain a permission that would require a variation to the terms of the "operative" part of the planning permission. With this in mind, since the approved off-site affordable housing contribution comprises a significant element of the approved scheme, should the Council have granted the section 73 application without this contribution, this would have fundamentally altered the original planning proposal for which permission has been granted.
18. Prior to the determination of the section 73 planning application, the appellant submitted a new planning application, Ref 56420/003, for the development. I have been provided with information from both parties in respect of on-going discussions regarding the affordable housing contribution in relation to that application, which remains undetermined at the time of the writing of this decision.
19. Following on from these negotiations, the appellant has submitted a completed Section 106 Unilateral Undertaking with its final comments in respect of the current appeal. This proposes to secure an affordable housing contribution of

¹ Reference ID: 17a-015-20140306

£350,000. The Council has not agreed to this Planning Obligation within the context of the appeal, as the revised contribution has not yet been formally approved under the duplicate planning application process.

20. The appeal process should not be used to evolve a scheme, and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought. If an applicant thinks that amending their application proposals will overcome the local planning authority's reasons for refusal they should normally make a fresh planning application. Progressing an application through the appeal process could also deprive interested parties of a formal consultation process.
21. The submitted Planning Obligation proposes a large reduction in the affordable housing contribution that was agreed in respect of the original planning permission, thereby significantly altering the terms of the approved development. The proposed reduction in the affordable housing contribution did not form part of the description of development of the section 73 application. I find that, in the interests of natural justice and to prevent interested third parties from being deprived of the opportunity to be consulted on the change and thereby prejudiced by the appeal process, it is not appropriate for me to consider the merits or otherwise of the revised affordable housing contribution proposal through this appeal process. I have therefore determined the appeal on the basis of the information submitted with the section 73 application.
22. This approach is supported by paragraph 031 of the PPG² which states that: "In deciding an application under section 73, the local planning authority must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application. A local planning authority decision to refuse an application under section 73 can be appealed to the Secretary of State, who will also only consider the condition/s in question".
23. For the above reasons, I conclude that the proposal to alter the financial contribution towards the off-site provision of affordable housing agreed under the original planning permission, falls outside the scope of the section 73 application. In the absence of a completed Planning Obligation to secure the same amount of off-site affordable housing contribution as was agreed in respect of the original planning permission, the appeal cannot succeed.
24. Given my conclusion on the first main issue, there is no need for me to consider whether or not the development makes sufficient provision for affordable housing, as this would not alter the outcome of the appeal.

Other Matters

25. I acknowledge that the impact of Covid-19 and the current economic climate is likely to have affected the viability of the approved development. However, I must determine this appeal having regard to the details of the section 73 application, and the principles of natural justice.

² Paragraph:031 Reference ID 21a-031-20180615

Conclusion

26. For the reasons given above, I conclude that the appeal should be dismissed, and the condition retained in its present form.

S Leonard

INSPECTOR