



Appeal Decision

Site visit made on 26 January 2021

by Sarah Manchester BSc MSc PhD MEnvSc

an Inspector appointed by the Secretary of State

Decision date: 3rd June 2021

Appeal Ref: APP/C4235/W/20/3259867

Land rear of 178 to 184 Lowndes Lane, Offerton, Stockport SK2 6DB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr P Duffy (Beluga Consultants Ltd) against the decision of Stockport Metropolitan Borough Council.
 - The application Ref DC/077242, dated 30 June 2020, was refused by notice dated 25 August 2020.
 - The application sought planning permission for the erection of five houses without complying with a condition attached to planning permission Ref DC/073258, dated 30 October 2019.
 - The condition in dispute is No 17 which states that: *Prior to first occupation of any dwelling hereby approved, a scheme for the provision and maintenance of a formal recreation and children's play space and facilities, including a timetable for implementation, shall be submitted to and approved in writing by the local planning authority. The approved scheme shall be implemented in full.*
 - The reason given for the condition is: *To ensure adequate formal recreation and children's play space and facilities are provided to meet the needs of the residents of the development hereby approved, in accordance with Policy SIE2 of the Stockport Core Strategy DPD and the National Planning Policy Framework.*
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Decision

1. The appeal is allowed and planning permission is granted for the erection of five houses without complying with a condition attached to planning permission Ref DC/073258, dated 30 October 2019 at land rear of 178 to 184 Lowndes Lane, Offerton, Stockport SK2 6DB in accordance with the application ref DC/077242 dated 30 June 2020, without compliance with Condition No 17 previously imposed on planning permission Ref DC/073258 dated 30 October 2019 and subject to the conditions set out in the attached Schedule.

Application for costs

2. An application for costs was made by Mr P Duffy against Stockport Metropolitan Borough Council. This application is the subject of a separate Decision.

Background and Procedural Matters

3. The application subject of the appeal is made under Section 73 of the Planning Act to vary or remove a condition. In its decision notice, the Council refers to a minor material amendment planning application pursuant to Section 96a of the Act. Although the appellant initially considered that the Council had failed to determine the Section 73 application, the refusal clearly relates to the removal

of a condition. The appellant now considers that the application was determined. Accordingly, I have proceeded on this basis.

4. Planning permission Ref DC/073258 for the erection of 5 dwellings was granted in October 2019. The permission has been implemented but the development is not complete. The appeal seeks permission to carry out the development without complying with condition No 17. This requires a scheme for the provision and maintenance of formal recreation and children's play open space.

Main Issue

5. The main issue is whether condition No 17 meets the tests set out in Paragraph 55 of the National Planning Policy Framework (the Framework), and in particular whether it is precise and reasonable in all other respects.

Reasons

6. Policy SIE-2 of Stockport Metropolitan Borough Council Core Strategy DPD Adopted March 2011 requires development to provide open space to meet the needs of its users/ occupants. For small residential developments such as this, financial contributions are sought towards the provision of open space and children's play in accessible locations where it would directly benefit future occupiers.
7. The Framework recognises that access to a network of open spaces and opportunities for sport and physical activity is important for the health and well-being of communities. Planning policies and decisions are required to support healthy lifestyles including through the provision of safe and accessible green infrastructure and sports facilities, and to plan positively for the provision of community facilities and open space. Therefore, DPD Policy SIE-2 is broadly consistent with the social objectives of the Framework.
8. Guidance on the implementation of the policy is provided in the Council's Open Space Provision and Commuted Payments Supplementary Planning Document Adopted September 2019 (the SPD). This sets out, among other things, that applicants will be informed of the requirements for open space provision and their responsibilities in this regard; the contribution should be notified to the applicant and it will be secured through a planning obligation (S106); and the decision notice will only be issued once the S106 is complete.
9. When the original application was made, the scheme was exempt from the payment of an open space contribution. The restriction on the pooling of contributions was removed by the amended Community Infrastructure Levy (CIL) Regulations on 1 September 2019. Consequently, due to delays in its processing, by the time the application was considered, a contribution was required.
10. The officer report for the original application did not include an assessment of the open space requirement for the scheme nor did it refer to the emerging SPD, which was adopted shortly afterwards. However, it did advise that if the Council was minded to grant permission then a commuted sum contribution would be required either through a S106 or appropriately worded condition.
11. I have been provided with email correspondence between the parties during the period between the planning committee and the grant of planning permission. The Council explained that the open space contribution would be

addressed by condition, as had been discussed. It provided a hyperlink to its planning advice and the SPD which sets out how contributions are calculated. It shared the draft conditions and it stated that the commuted sum payment required to satisfy condition No 17 would be £29,920.

12. Thus, the applicant for the original application, who is the appellant, was informed of the requirement for open space provision and he was notified of the contribution before the permission was granted. He was provided with the opportunity to comment on the need for the contribution, the amount, and the proposed condition which deviated from the approach set out in the SPD.
13. The question of whether or not an identical condition No 17 meets the tests for conditions set out in the Framework was recently considered on appeal¹. In that case (the Longford case), the Inspector concluded that the condition was vague in what the appellant must do to meet its requirements and that, given the conflict with the approach set out in the SPD, there was reasonable doubt as to how they should proceed. While the appellant in this case was aware before the permission was granted that a contribution was required, nevertheless the condition is not precise in relation to what it requires.
14. Although the new dwellings will have private gardens, this would not prevent future occupiers from using accessible public open space. In this regard, there is evidence of both a quantitative and qualitative shortfall of open space provision in the area. The contribution would be used to improve and maintain existing facilities. This is reasonable where opportunities to create new sites are limited and where contributions can be used to fund laying out of new facilities or improvements at existing sites.
15. The site-specific justification for the open space contribution was not set out in detail before the permission was granted. However, taking account of the demand arising from the development, and the deficiencies in the existing provision in locations accessible to future occupiers, an open space contribution is relevant to the development and it is necessary. I acknowledge that the Inspector in the Longford case found the condition was not relevant to the development or necessary, but no evidence had been provided to that appeal to justify the contribution.
16. The parties agree that condition No 17 is relevant to planning and that it is capable of being enforced, notwithstanding that the Council has indicated that it would need to carefully consider whether or not to take enforcement action. However, the condition is not precise, it is contrary to the approach set out in the SPD and it is not the correct approach to secure a contribution. Therefore, even if it is enforceable, the Planning Practice Guidance (the PPG) is clear that a condition that fails to meet even one of the tests should not be used, even if the applicant agrees with it.
17. Section 73 of the Act sets out that if local planning authorities decide that permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant permission accordingly. Conversely, if they decide that permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

¹ APP/C4235/W/20/3245868

18. The Council refused the application subject of the appeal because the appellant was not willing to enter into a S106 and, in the absence of a contribution to open space, the proposal would not meet the needs of future occupiers and it would conflict with the development plan. Nevertheless, with reference to Section 73, in refusing the application the Council appears to have implicitly confirmed that permission should be granted subject to the same conditions as the original permission. However, on the basis that condition No 17 is not precise or reasonable, I find that permission should not be granted subject to the same condition.
19. The correct approach, in accordance with the SPD, would be for the parties to enter into a S106 before permission is granted. However, the PPG advises that, where the 6 tests will be met, it may be possible to use a negatively worded condition to limit development authorised by the permission until a planning obligation has been entered into requiring the payment of a financial contribution. This type of condition is likely to only exceptionally be appropriate where there is clear evidence that the development would otherwise be at serious risk. Nevertheless, it is appropriate for me to consider whether condition No 17 could be modified and replaced with a negatively worded planning condition requiring that a planning obligation be entered into.
20. The commuted sum contribution to open space has been calculated using a standard formula based on the capacity of the development and therefore the likely number of occupiers. There is evidence in relation to the extent of local deficiencies in open space, the additional demand that would be placed on open space and how and where the contribution would be spent. On this basis, I am satisfied the contribution sought would be directly related to the development and fairly and reasonably related in scale and kind to the development. Therefore, a S106 seeking to provide the necessary contribution would comply with the tests for planning obligations set out in the Framework and Regulation 122 of the CIL Regulations.
21. The PPG advises that ensuring planning obligations are entered into prior to the grant of planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. The appellant considers that he no longer has an interest in the land, it would be unreasonable to expect the new landowner to enter into a S106 as there would be no certainty about what was being agreed. However, taking into account the circumstances of this case, including that the appellant understood that the contribution was required before the permission was granted, a condition requiring a S106 and commuted sum in accordance with the DPD and the SPD would provide the certainty that the existing condition does not.
22. The development has been substantially constructed and the exceptional circumstances envisaged by the PPG do not appear to apply. However, the appellant agreed to the negatively-worded and restrictive condition No 17 in order to meet contractual obligations to secure the development site by a certain date. Thus, while the development is not a complex scheme, there were circumstances that appear to have justified addressing the matter by condition rather than delaying the decision until a S106 had been entered into.
23. The Inspector in the Longford case did not consider that a modified negatively worded condition was appropriate, but that scheme differs from this one. In that case, there had been no discussions between the parties about the open

space requirement. No justification for the contribution was provided. There was no evidence that entering into a S106 before permission was granted would have put the development at risk through up-front costs or delays.

24. In this case, I have found that the appeal proposal would conflict with DPD Policy SIE-2. However, condition No 17 is not precise or reasonable and it should not be imposed. Therefore, in accordance with the provisions of Section 73 and the PPG, I will replace the condition subject of the appeal with a modified condition that meets the tests.
25. For the avoidance of doubt, planning permission granted under Section 73 takes effect as a new, independent permission to carry out the same development as previously permitted subject to new or amended conditions. The new permission sits alongside the original permission, which remains intact and unamended. It is then open to the applicant to decide whether to implement the new permission or the one originally granted.

Conditions

26. The PPG sets out that decision notices for the grant of planning permission under Section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged.
27. I have deleted the disputed condition No 17 and replaced it with a modified condition requiring a S106 requiring a commuted sum be entered into. This is because the contribution to the provision of open space is necessary to ensure that adequate formal recreation and children's play space and facilities are provided to meet the needs of future occupiers of the development in accordance with DPD Policy SIE-2 and the SPD.
28. The Council has provided information about the status of the other conditions imposed on the original planning permission and accordingly I have imposed all those that I consider remain relevant, with minor drafting modifications where necessary. In the event that some have subsequently been discharged, this is a matter that can be addressed by the parties.

Conclusion

29. For the reasons set out above, I conclude that the appeal should be allowed and planning permission granted, with condition No 17 varied, and subject to the conditions set out in the Schedule below.

Sarah Manchester BSc MSc PhD MEnvSc

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall be carried out in accordance with the following drawings and documents: Drawing No. 656-p00; Drawing No. 656-p01 Revision b; Drawing No. 656-p02; Drawing No. 656-p03; Drawing No. 656-p04 Revision a; Drawing No. 656-p05 Revision a; Drawing No. 656-p06; Drawing No. 656-p07; Drawing No. 656-p08; Drawing No. 6000.01 Rev A; Preliminary Ecological Appraisal dated April 2019; Tree Survey Report Revision A, Revised April 2019.
- 2) The development hereby permitted shall be implemented in full accordance with the materials of external construction approved by permission Ref DC/076389.
- 3) The development hereby permitted shall not be occupied until the screen and boundary walls, fences or other means of enclosure approved by permission Ref DC/076389 have been erected in accordance with the approved details.
- 4) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting that Order) no development falling within Classes A to F and H of Part 1 of Schedule 2 of the Order shall be carried out.
- 5) No retained tree shall be cut down, uprooted, destroyed, pruned, cut or damaged in any manner without the prior written approval of the local planning authority, with the exception of those indicated otherwise on the approved plan. If any retained tree, hedgerow, woody plant or shrubbery is cut down, uprooted or destroyed or dies within 5 years of the development commencing, it shall be replaced within the next planting season with trees of such size and species as may be approved in writing by the local planning authority.
- 6) No development shall take place until all existing trees on the site except those shown to be removed on the approved plans, have been fenced off in accordance with BS 5837:2012 "Trees in relation to construction - Recommendations". The fencing shall be retained during the period of construction and no work, excavation, tipping or stacking of materials shall take place within any such fence during the construction period.
- 7) The development hereby permitted shall not be occupied until the tree planting details approved by application ref: DC/076389 have been implemented in full.
- 8) The development hereby permitted shall be implemented in full accordance with the landscaping details approved by application ref: DC/076389.
- 9) The approved landscaping scheme shall be carried out within 6 months of the date of first occupation of the development hereby permitted. Any trees, plants or grassed areas which die, are removed or become seriously damaged or diseased within 5 years from the date of planting shall be replaced in the next planting season with others of similar size, species and

quality unless the local planning authority gives written approval to any variation.

- 10) The construction of the development hereby permitted shall be carried out in full accordance with the Construction Management Plan approved by permission Ref DC/076389.
- 11) Notwithstanding the provisions of The Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking and re-enacting that Order) no gate or other means of obstruction shall be erected across the access or access drive that will serve the approved development at any time.
- 12) No part of the development shall be occupied until the access, access drive and parking area have been constructed in accordance with the details approved by permission Ref DC/076389 and are available for use. The access drive and parking area shall be retained thereafter and shall remain available for use and shall be managed and maintained in accordance with the approved details. No structure, object, plant or tree exceeding 600mm in height shall subsequently be erected or allowed to grow to a height in excess of 600mm within the pedestrian visibility splays.
- 13) The development hereby permitted shall not be occupied until the pedestrian crossings approved by permission Ref DC/076389 have been provided in accordance with the approved drawing and are available for use.
- 14) No dwelling shall be occupied until the car parking facilities for that dwelling have been provided in accordance with the approved drawings, hard surfaced (in block paving), drained (to a soakaway / SuDS system) and are available for use. The car parking facilities shall thereafter be kept clear and remain available for parking of vehicles for the development.
- 15) No dwelling shall be occupied until the electric vehicle charging point for that dwelling has been provided in accordance with the details approved by permission Ref DC/076389 and is available for use. The charging points shall thereafter be retained (unless they are replaced with an upgraded charging point which shall thereafter be retained).
- 16) No dwelling shall be occupied until the shed for that dwelling has been provided in accordance with the details approved by permission Ref DC/076389. The sheds shall be retained and remain available for use for the storage of cycles at all times thereafter.
- 17) No dwelling shall be occupied until all those with an interest in the land comprising the development hereby permitted have entered into a planning obligation with the local planning authority under Section 106 of the Town and Country Planning Act 1990. The obligation shall require the payment of a financial contribution towards the provision and maintenance of formal recreation and children's play space facilities calculated in accordance with Stockport Metropolitan Borough Council's Open Space Provision and Commuted Payments Supplementary Planning Document Adopted September 2019.

- 18) The development shall not be occupied until the remediation scheme (approved by permission Ref DC/076389 pursuant to original condition No 19) has been carried out. Within 6 months of completion of remediation measures, a validation report assessing the effectiveness of the remediation carried shall be submitted to and approved in writing by the local planning authority. The report shall specify any further remediation measures necessary and indicate how and when these measures will be undertaken.
- 19) Foul and surface water shall be drained on separate systems.
- 20) The development hereby permitted shall be carried out in accordance with the precautionary and mitigation measures set out in paragraphs 4.3.3 and 4.34 of the approved ecological report. All boundary fences / walls shall retain gaps measuring 13cm x 13cm at their base.
- 21) There shall be no tree felling, vegetation clearance works, or other works that may affect nesting birds between March and August inclusive, unless the absence of nesting birds has been confirmed by survey or inspection carried out by a suitably qualified ecologist, the results of which shall have been submitted to and approved in writing by the local planning authority.
- 22) The development hereby permitted shall be constructed in full accordance with the recommendations set out in Dunelm Ecology letter dated 17 January 2020 approved by permission Ref DC/076389.
- 23) The development hereby permitted shall be implemented and maintained in full accordance with the surface water drainage details approved by permission Ref DC/076389.
- 24) Notwithstanding the provision of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting that Order) no additional windows, doors or openings of any kind shall be inserted in the north and south elevations of the approved dwellings.

End of Schedule