
Appeal Decision

Site visit made on 1 June 2021

by S Leonard BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 July 2021

Appeal Ref: APP/L3815/W/20/3265498

Black Boy Court, Main Road, Fishbourne PO18 8XX

- 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 Greetland Ltd against the decision of Chichester District Council.
 - The application Ref FB/20/01980/FUL, dated 5 August 2020, was refused by notice dated 6 October 2020.
 - The development proposed is extension and conversion of roof space over carport to create single dwelling house.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. An amendment to drawing no. DPA-04 was submitted as part of this appeal, which did not form part of the planning application determined by the Council. The plan shows the introduction of barn hips to the proposed roof. In all other respects, the proposal would remain unaltered. This comprises a minor amendment to the refused plans, and, having regard to the Wheatcroft principles¹, I consider that the proposed change would not fundamentally alter the nature of the development previously consulted upon and determined by the Council. As such, I am satisfied that my consideration of this amended plan would not deprive those who should have been consulted on the change, the opportunity of such consultation. The Council has taken this plan into account in its comments on the appellant's statement, and I shall also, therefore, determine the appeal on the basis of the amended drawing no. DPA-04B.
3. The Council's second reason for refusal incorrectly refers to the Pagham Harbour SPA. Following confirmation of this by the Council to the appellant, both parties have proceeded on the basis of the correct SPA, which is the Chichester and Langstone Harbour Special Protection Area (the SPA). As such, Policy 50, rather than Policy 51, of the *Chichester Local Plan: Key Policies 2014- 2029* (2015) (the Local Plan) is relevant to the second reason for refusal. I have dealt with the appeal accordingly.
4. Following the submission of a Unilateral Undertaking (UU) under Section 106 of the Act, by the appellant to the Council, which is signed and dated 14 December 2020, the Council has confirmed that the second reason for refusal, relating to the impact of the proposal on the SPA arising from recreational disturbance impacts, has been satisfactorily addressed and that

¹ Bernard Wheatcroft Ltd v SSE [JPL, 1982, P37].

this reason for refusal has been withdrawn. This is a matter to which I later return.

Main Issues

5. The main issues are:

- The effect of the proposal on the integrity of the SPA and the Solent Maritime SAC (the European sites); and
- The effect of the proposal on the character and appearance of the area.

Reasons

SPA – recreational activity

6. The appeal scheme results in an additional one-bedroom dwelling within the 5.6km 'Zone of Influence' of the SPA. It has been identified that current levels of recreational activity are having a significant adverse effect on certain bird species for which the SPA is designated. This net increase in residential development has a potential impact upon the SPA arising from possible disturbance to the birds due to increased recreational activity, such as walking, dog walking, boating and other water sports, around the shorelines of the harbours.
7. As such, without mitigation, the appeal scheme presents a likely significant effect upon the integrity of the SPA, particularly when the impacts are considered in combination with other residential developments located within the 5.6km Buffer Zone to the SPA. Therefore, as the decision maker, it is necessary for me to undertake an Appropriate Assessment under the *Conservation of Habitats and Species Regulations 2017* (the Habitats Regulations 2017), in relation to the effect of the development on the integrity of the SPA. I have undertaken this on a proportionate basis with regard to the evidence submitted by both main parties and the consultation response from Natural England in respect of the planning application.
8. There is no dispute between the Council and the appellant that a financial contribution is required towards the Solent Disturbance Mitigation project to reduce the impacts of recreational activity as a result of the proposal to increase the number of units on site, in accordance with Local Plan Policy 50 and the Council's *Recreational Disturbance of Birds in Special Protection Areas* (2019) guidance document which supports this policy.
9. This payment would contribute towards a package of wardening, education, green infrastructure improvements and monitoring measures as part of Strategic Access Management and Monitoring (SAMM) to off-set the effects of increased population on the SPA, as part of the Bird Aware Solent scheme, delivered by the Solent Recreation Mitigation Partnership.
10. As this payment would contribute to agreed projects that would address the effects of the proposed development on the SPA in terms of recreational pressure, and is in accordance with a strategic solution that is supported by Natural England (NE), I am satisfied that the submitted S106 planning obligation would enable the delivery of mitigation sufficient to address the level of harm likely to be caused by the proposed development and would be pursuant to the Council's adopted strategy. Therefore, subject to the proposed

mitigation the proposal would not result in a significant harmful effect on the integrity of the SPA, having regard to recreational impacts. Accordingly, I find no conflict with Local Plan Policy 50 in this respect.

European sites - nitrates

11. The appeal scheme comprises new residential development with additional occupiers which would generate additional wastewater. It would be connected to the Apuldrum Wastewater Treatment Works (AWTW), so that treated effluent would discharge into the Solent Maritime Special Area of Conservation (the SAC) and the SPA.
12. NE has advised that a net increase in housing development within the Solent catchment area is likely to have significant effects on internationally designated European sites due to the prospect of increased levels of nitrogen and phosphorus entering the water from waste water from residential development, resulting in eutrophication affecting the nutrient water quality of the SAC estuary, mudflats and sandflats and sandbanks, and resulting thick mats of algae which can cause important habitat and bird feeding grounds to be unavailable for use, thereby affecting the status and distribution of key bird species against the stated conservation objectives of the Solent European sites.
13. As such, without mitigation, the appeal scheme presents a likely significant effect upon the integrity of these sites, particularly when the impacts are considered in combination with other residential developments in the Solent area. Therefore, it is necessary for me, as the competent authority, to undertake an Appropriate Assessment under the *Conservation of Habitats and Species Regulations 2017* (the Habitats Regulations 2017), of the implications for the sites in view of their conservation objectives. I have undertaken this on a proportionate basis with regard to the evidence submitted by both main parties and the consultation response from Natural England in respect of the planning application.
14. The appellant has not submitted a nitrogen budget calculation to confirm the expected level of nitrogen surplus arising from the development, but there is no disagreement between the main parties that mitigation would be required to ensure the development is nutrient neutral so that it would not add to the existing nutrient impacts, and to ensure the integrity of the European sites in respect of additional nutrient input.
15. The appellant has not put forward any specific scheme of mitigation, such as off-setting existing agricultural land, and the Council has confirmed that it has not yet developed a strategic mitigation scheme in respect of this matter.
16. The appellant proposes to deal with this matter by means of a Grampian condition, which would require that the mitigation is calculated, and details provided and agreed, at condition discharge stage. It is considered that such a mechanism for this is likely to include payment of a tariff, to be secured by a legal agreement, confirmed through condition discharge process.
17. However, as the competent authority, I need to be satisfied that any mitigation scheme for neutralising nitrogen is certain at the time of Appropriate Assessment, so that no reasonable scientific doubt remains as to the effects of the development on the international sites.

18. The appellant has drawn my attention to Government support for unlocking housebuilding in South Hampshire, and that any successful scheme could potentially be rolled out to other areas. However, as it stands, the Council has not identified any specific mitigation measures, and there is no cogent evidence before me to suggest that this matter would be resolved within the standard time limit applied to a planning permission for the appeal scheme.
19. Also, there is no guarantee that a solution would be achieved within this timescale by alternative measures, such upgrading the AWTW, or by bespoke measures within the appellant's control such as the removal of farmland.
20. As such, in the absence of certainty in respect of the mitigation details at the Appropriate Assessment stage, there remains a risk that the appellant may not be able to implement appropriate mitigation measures, and that the proposed Grampian condition may not be capable of being discharged.
21. Notwithstanding that some other Council's faced with the same issue have adopted the use of Grampian conditions in respect of other residential developments, I find that, as matters stand, there are no detailed mitigation proposals in place as part of this appeal to directly address the likely significant effects upon the European designated sites, and the full details and implications of any such proposals remain unknown.
22. Moreover, the Planning Practice Guidance (PPG) advises that a negatively worded condition limiting development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. There is no legally binding agreement before me. As such, and given the failure of the appeal proposal in this regard, allowing it would be contrary to the Habitats Regulations and the precautionary principle embedded within the Habitats Directive. Based on the information before me I cannot be certain that there would be no adverse effect on the integrity of the designated European site.
23. Although the PPG advises that a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk, this would only apply in exceptional circumstances. For example, this may apply in the case of a particularly complex scheme, which I do not consider the appeal proposal to be. In coming to this view, I have had regard to the Council's 5 year housing land supply situation, which is a matter to which I later return.
24. I have also had regard to the appeal decision² provided by the Council in which a similar approach was adopted by the appeal Inspector. Whilst that appeal related to a greater proposed increase in residential occupants, I nonetheless find that the same principles apply to the current appeal, having regard to nutrient impacts.
25. For the reasons outlined above, the proposed development would be likely to have adverse effects on the integrity of the SPA, either alone or in combination

² APP/L3815/W/20/3255355

with other plans and projects, due to the identified impacts, and the lack of appropriately secured mitigation, in relation to nutrients.

26. Accordingly, I conclude that the appeal scheme, in the absence of any satisfactory mitigation and the necessary mechanism for achieving it, would not accord with advice in Paragraphs 170(a) and (d), 175(a) and 180 of the *National Planning Policy Framework 2019* (the Framework), which indicates that development should protect sites of biodiversity value, minimise impacts and be adequately mitigated, and ensure that it is appropriate for its location taking into account the likely effects of pollution on the natural environment.
27. Furthermore, in so far as it is a material consideration in the determination of this appeal, the proposal would also not comply with Criteria 12 of the Council's *Interim Position Statement for Housing Development* (2020) (the IPS), which requires development proposals for new housing to demonstrate how they achieve nitrate neutrality in accordance with NE's latest guidance.

Character and appearance

28. The appeal site lies within a gated residential development on the south side of Main Road within open countryside outside the designated settlement boundary and within the Chichester Harbour Area of Outstanding Natural Beauty (the AONB). The site also lies within the Fishbourne Conservation Area.
29. The application property comprises an open-fronted carport building accommodating 6 vehicle parking spaces, with uncovered parking to the side. It is accessed from Main Road and forms part of a modern, enclosed and gated, private residential development of flats and houses. The development lies to the rear and side of a two-storey Grade II listed dwelling, known as Blackboy House, which fronts Main Road.
30. The appeal property lies adjacent to the southern edge of the development and comprises one of three, similarly-sized, single storey, carport/garage/store buildings serving the residential units, which are sited around the periphery of the development and are in-ward facing, thereby contributing to the courtyard style arrangement of buildings around a hard-surfaced central area, and the enclosed nature of the development. There are residential properties to both sides of the development and open countryside to the rear.
31. The proposal would provide a one-bedroomed dwelling within a raised, cropped gable-ended roof. The existing parking below would remain, and the dwelling would be accessed via a covered staircase on the side of the building. The eaves and ridge heights would be raised and the new roof would have an asymmetrical form with roof lights serving the inward-facing, deeper, roof slope and the main fenestration located on the raised rear wall facing outwards towards the open countryside.
32. Whilst altering and enlarging the existing building, the resulting structure would remain in keeping with the Black Boy Court development as a whole. The proposed materials would reflect those of the existing and neighbouring buildings within the development. The building footprint and orientation would remain unaltered, maintaining the private courtyard arrangement of buildings on the site. The cropped gable ended roof form, notwithstanding the higher eaves height facing away from the site, would be reflective of the existing building roof form and that of other buildings within the development.

33. The building height would be comparable with the heights of other buildings within the development which include single storey, one and half, and two storey buildings. Also, the extended building would retain a subservient appearance in relation to the higher dwellings within the development, having regard to the retention of the functional car port element at ground floor level, and the lower eaves height and minimal amount of first floor fenestration on all but the rear elevation.
34. I have had regard to the great weight to be given to conserving and enhancing landscape and scenic beauty in Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues in accordance with Paragraph 172 of the Framework. The Council is concerned that, as a result of the increased building bulk and mass, the building would be very prominent within wider views of the site, including from the open countryside to the south, and that it would appear hard and enclosing, and would have an overly domesticated appearance which would harm the surrounding rural area.
35. Whilst the appeal scheme would result in an increase in building size, and would have a domestic appearance as a result of the proposed first floor rear fenestration, I am not persuaded, on the basis of my site inspection and the evidence before me, that this would be materially harmful to the character of this part of the AONB. The appellant has drawn my attention to the key characteristics of the SC3 Chichester Harbour and Pagham Harbour Character Area (South Coast Plain) within which the appeal site is located in accordance with the *Chichester Harbour Conservancy Chichester Harbour AONB Landscape Character Assessment* (2019). The Council has not contested the appellant's reference to this document, nor the stated key characteristics of the area. As such, and in the absence of a detailed character assessment by the Council as part of this appeal, I find this to be a useful tool to inform my decision.
36. The proposal sits within existing built-up residential development comprising one and half and two storey dwellings, and this has become an established part of the character of this part of the AONB. There is also neighbouring residential development within close proximity, along Main Road and Old Park Lane. The proposal would not extend built development any further southwards, and would not encroach onto the open farmland to the south of the site, nor harm any tree belts within this area. The resulting height of development would be in keeping with neighbouring residential properties, which include residential properties in Old Park Lane which are located further south within the open countryside than the appeal property.
37. The Council has not specifically identified any public viewpoints from where the proposal would be visually prominent. I saw during my site inspection that it would not be clearly visible within the street scene due to its set back position at the rear of the site. Whilst views to the proposal would be afforded from private land immediately south of the site, this impact is not considered to be materially harmful having regard to the context of the extended building within a complex of buildings which include dwellings of a similar height, including immediately to the east. Furthermore, on the basis of my site visit, and the evidence provided by the appellant, I am satisfied that the proposal would not be visually prominent in medium to long term views within the AONB due to intervening built development and landscaping.

38. As such, I am satisfied that the proposal would not harm the distinguishing character of this part of the AONB which comprises built residential development on the northern edge of Character Area SC3. The appeal scheme would result in a relatively small upward expansion of the built environment of the Black Boy Court development in comparison to the overall size of the development and surrounding built development as a whole. It would not appear significantly visually intrusive or incongruous within wider views within the AONB given its location within existing built residential development, and it would not extend beyond the existing enclosed nature of the site.
39. For the above reasons, I conclude that the proposal would not demonstrably harm the character and appearance of the area. As such, it would accord with the design and landscape protection aims of Local Plan Policies 33, 43, 45 and 48, which amongst other things, require new residential development to provide a high quality living environment in keeping with the character of the surrounding area and its setting in the landscape, be well-related to an existing group of buildings, and to conserve and enhance the natural beauty and locally distinctive features of the AONB.
40. For similar reasons, the proposal would also accord with the objectives of Chapters 12 and 15 of the Framework, which seek to achieve well-designed places and conserve and enhance the natural environment.

Other Matters

41. Notwithstanding that the Council has not raised an objection on these grounds, under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, (the Act), I am, as the decision maker, required to consider the effects of the development on the heritage assets of the Fishbourne Conservation Area (FCA), within which the site lies, and the Grade II listed Black Boy House, which lies to the north of the appeal site, adjacent to the entrance to Black Boy Court.
42. Having regard to my conclusion in respect of the second main issue, the proposal would not harm the character and appearance of the FCA. Whilst enlarging the existing building, the detailed design would be acceptable and the role of the building as part of a modern housing enclave within the conservation area would remain. There would be no significant encroachment of new built development into the open fields beyond the existing boundary of modern residential development within the FCA. As such, the proposal would not harm the significance and setting of the FCA.
43. Due to the separation distance between the appeal site and Black Boy House, and the intervening built development, and having regard to my conclusions above in respect of the subservient design of the proposal in relation to the larger dwellings within and adjacent to the gated development, the appeal scheme would not harm the significance and setting of the listed building.

Planning Balance

44. Having regard to the location of the appeal site, the Council's view is that it is not considered to be a sustainable location, being positioned outside of a defined settlement boundary and therefore contrary to Local Plan Policies 1, 2 and 45, which reflect the Framework presumption in favour of sustainable development (1) direct new residential development to within the designated

- settlement boundaries (2) and require new development in the countryside to meet essential small scale and local need which cannot be met within or immediately adjacent to the existing settlement (45).
45. The Council has confirmed that it cannot demonstrate a 5 year supply of deliverable housing sites as required by the Framework. It has confirmed that it can only demonstrate a 4.3 year supply of housing land. As such, there is an undisputed undersupply of deliverable housing sites within the Borough, and the relevant policies for the supply of housing should not be considered up-to-date.
46. Paragraph 11 of the Framework should therefore be applied, and permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole, unless the application of policies in the Framework that protect areas or assets of particular importance, including habitats sites and AONBs, provides a clear reason for refusing the development proposed.
47. Having regard to Paragraph 11 d) i. of the Framework, I have found no harm arising from the proposal in respect of its impact on the AONB. However, in the absence of appropriate secured mitigation for likely significant adverse effects on the integrity of the European sites, Paragraph 175 (a) of the Framework provides a clear reason for refusal. Moreover, given the consequent adverse effect on the integrity of the habitats site, Paragraph 177 of the Framework indicates that the presumption in favour of sustainable development does not apply. As such, the 'tilted balance', and advice to grant planning permission set out in Paragraph 11 of the Framework does not apply.
48. Paragraph 8 of the Framework defines the three dimensions of sustainable development as performing economic, social and environmental objectives. With this in mind, there would be benefits arising from the proposal. An additional dwelling would make a very modest contribution towards addressing the housing supply deficit, and it could be built-out relatively quickly, having regard to Paragraph 68 of the Framework. It would deliver economic benefits during the construction period. Additional expenditure by new residents would help support the services in nearby settlements.
49. The dwelling could incorporate sustainable aspects, and the appellants have confirmed that the proposal would include net biodiversity gains. However, as the appeal scheme is only for one dwelling, these benefits would be modest.
50. Council states that the proposal would conflict with the first criterion of the IPS, which was adopted by the Council, following public consultation, to manage housing delivery whilst the Council cannot demonstrate a 5 year supply of housing, and requires the site boundary, in whole or in part, to be contiguous with an identified settlement boundary. As the site is located around 350m from the closest settlement boundary, the Council considers it to lie in an unsustainable countryside location.
51. The appeal site lies within an existing built development of residential properties which is bounded by further residential built development. It benefits from easy accessibility to public transport networks, including bus stops serving destinations including Chichester, Portsmouth and Havant, which are located in close proximity along Main Road, and Fishbourne railway station

which lies on the Southern network line. There are also facilities and services within Fishbourne and Bosham which are capable of being accessed from the site by means of walking or cycling. As such, I find that the proposed dwelling would not be in an isolated location, having regard to Paragraphs 78 and 79 of the Framework. In the planning balance, I consider that the issue of the conflict with Local Plan policies in relation to the new house being outside of a settlement boundary, as an issue where any harm does not significantly or demonstrably outweigh the benefits of the proposal.

52. Whilst I have found no policy conflict in relation to the impact of the proposal on the character and appearance of the area, I have found conflict with Local Plan and Framework policies that seek to protect the integrity of the European sites. This is a matter of overriding concern and I attach significant weight to it in my decision.
53. I acknowledge that the Framework, including paragraphs 117, 118, 122 and 123, encourages the effective and efficient use of land in meeting the need for homes, and that the proposal by providing an additional dwelling above an existing carport, would accord with these principles. However, these policy stances are not unqualified, and would not address or outweigh the aforementioned harm that I have identified in respect of the European sites.

Conclusion

54. Whilst I have found the appeal scheme to be acceptable having regard to the second main issue, I cannot allow the appeal in the absence of a favourable Appropriate Assessment.
55. For the above reasons, I conclude that the appeal should be dismissed.

S Leonard

INSPECTOR