
Appeal Decision

Site visit made on 28 September 2021

by S Leonard BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 November 2021

Appeal Ref: APP/B1740/W/21/3275076

**Land to the rear of The White Horse, Keyhaven Road, Milford-On-Sea
SO41 0QY**

- 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 Bayview Developments Ltd against the decision of New Forest District Council.
 - The application Ref 20/11324, dated 11 November 2020, was refused by notice dated 26 January 2021.
 - The development proposed is redevelopment of brownfield land for the erection of 4 dwellinghouses with associated access, parking and landscaping.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. Since the refusal of the planning application and the submission of this appeal, a revised version of the *National Planning Policy Framework* (the Framework) was published on 20 July 2021. The main parties have had the opportunity to provide comments, and I have considered the appeal on the basis of the revised Framework.
3. The Council's second reason for refusal relates to insufficient information to adequately demonstrate that the proposal would not adversely affect protected species, biodiversity interests and ecology, and to demonstrate that the development would achieve a net gain for biodiversity.
4. Following the submission of a Phase 2 Reptile Survey and Mitigation Report as part of the condition discharge process in respect of planning approval 19/10998 (the extant permission), which relates to a scheme for 3 dwellings on the appeal site, the Council is satisfied that this matter can be dealt with by means of a condition. As such, it does not wish to pursue the second reason for refusal. On the basis of the information before me, and my site visit, I have no reason to disagree with this. I have dealt with the appeal accordingly.
5. Since the submission of this appeal, the appellant has submitted a formally completed unilateral undertaking (UU), pursuant to section 106 of the Town and Country Planning Act 1990, signed and dated 2 September 2021, in respect of mitigating the impact of the development on European Protected Sites (EPS). I return to this matter below.

Main Issues

6. The main issues are:

- The effect of the proposal on the character and appearance of the area; and
- The effect of the proposal on the integrity of European Protected Sites (EPS).

Reasons

Character and appearance

7. The appeal site comprises an area of vacant land to the rear of the White Horse Inn on the south side of Keyhaven Road. It lies within a built-up area comprising a mix of residential and commercial development, located in the eastern part of the settlement of Milford-On-Sea. The site is set back behind the public house beer garden and car park. I saw, during my site visit, that former hardsurfacing and scrub vegetation have been cleared, and that preparatory works have been carried out in readiness for residential redevelopment.
8. Having regard to the evidence before me, including my observations of the site and the appellant's discharge of conditions attached to the extant permission, I consider that the previously approved scheme has a real prospect of taking place in the alternative, should this appeal be dismissed. This comprises a fallback position which is an important material consideration that carries weight for the purpose of my decision. I have also had regard to an earlier refused scheme for four dwellings on the site.¹
9. The area is characterised by a mix of building ages, designs, heights and materials, and a variety of development layouts and densities. These include terraces of single storey industrial units positioned behind a commercial garage to the east of the site, a cul-de-sac of modern, two-storey detached houses which abuts the south and west site boundaries, a more recent housing development of traditionally-designed two storey dwellings to the northwest of the site, accessed via a new access road from Keyhaven Road, known as Sturt Pond Close, a three-storey building to the southeast of the site, and more tight-knit, older terraced houses directly fronting onto Keyhaven Road. The latter, together with part of the Sturt Pond Close development and the two-storey public house building, lie within the Milford-On-Sea Conservation Area (MOSCA) north of the appeal site.
10. The proposal would adopt a very similar design and layout to those of the extant permission, including contemporary buildings with timber boarded walls under metal clad pitched roofs, within which the first-floor accommodation would be sited, vehicular access from Keyhaven Road, and two 4-bedroom detached dwellings fronting the access road in the northern part of the site.
11. The key differences between the appeal scheme and the extant permission relate to the replacement of a detached 4-bedroom dwelling at the southern end of the site with a semi-detached pair of 3 bedroomed dwellings. This would result in the building footprint in this part of the site extending further east and west, and the replacement of part of a previously approved area of communal

¹ 18/11614

- landscaping adjacent to the western boundary with an additional parking space.
12. The changes to the approved scheme would result in reduced space between the southernmost building and the side and rear site boundaries, with the building sited approximately 2m closer to the east and west boundaries. However, whilst resulting in a more confined building position, I am not persuaded that this layout would be materially harmful to the character and appearance of the area. Sufficient space would remain around the building to provide a soft landscaped setting to both of the proposed semi-detached dwellings, including the incorporation of soft landscaped areas which were previously approved within the garden of plot 3 and within a communal area of open space adjacent to the western site boundary.
 13. The proposed side garden to plot 3 would enable a sufficiently spacious arrangement between the front of houses 1 and 2 and the side wall of house 3. There would be room to provide ample-sized rear soft landscaped gardens to the houses on plots 3 and 4, introduce new tree and/or hedge planting to provide a soft-landscaped buffer along the western site boundary and include communal open space adjacent to the boundary with 37 Glebe Close. The introduction of an additional parking space in lieu of some soft landscaping under the previous approval would not result in a significantly enlarged area of hardstanding compared to the approved scheme, and sufficient space would remain adjacent to the western boundary for new landscaped planting to soften the visual impact of the parking area.
 14. Notwithstanding the close proximity of neighbouring buildings at 37 Glebe Close and 7 Laundry Lane to the west and east site boundaries, the proposed building layout and introduction of new soft landscaping would result in a development with a sufficiently verdant setting that would provide a visual break between new and existing buildings.
 15. Moreover, the appeal scheme would not appear unduly cramped or intensive having regard to the prevailing character of the area, which comprises a variety of built development and dwelling layouts. Whilst there are spacious plots within the locality, there are also dwellings with comparable plot and rear garden sizes to those of the appeal scheme. In particular, the proposal would not be perceived as significantly less spacious in layout terms than some of the existing dwellings nearby in Glebe Close and Sturt Pond Close.
 16. In addition, I find that, in wider views towards the site from the public realm in Keyhaven Road, the proposal would result in an enhancement over the former stark and open site which was dominated by hard-surfacing and scrub planting.
 17. I have noted the Council's concerns about the potential amount of activity associated with the 4 proposed dwellings, resulting in more use of the car parking areas than would be the case with the approved 3 dwellings. However, even if this should be the case, this factor in itself would not result in material harm to the character and appearance of the area.
 18. Accordingly, I find that the appeal scheme would assimilate into the surrounding built development without resulting in demonstrable harm to the character and appearance of the area. As such, the proposal would accord with Policies STR1 and ENV3 of the *New Forest District Council Local Plan 2016-2036 Part One: Planning Strategy* (2020) (the LLP1) and the *Milford-On-*

Sea Village Design Statement Supplementary Planning Guidance (2002), in so far as these policies and guidance seek to ensure that new development is in harmony with its setting, delivers a high quality design that contributes positively to local distinctiveness, and enhances the character and identity of the locality, taking a context and landscape-led approach to the siting and design of development.

19. For similar reasons, the development accords with guidance in Chapter 12 of the Framework which requires well-designed places.

European Protected Sites

20. The appeal site lies within the zones of influence of the New Forest and Solent Coast EPS, which include a mix of habitat types and species and associated conservation objectives.
21. The appeal scheme is not directly connected with, or necessary to, site management for nature conservation and it has been identified that a net increase in residential development and an associated increase in population has a potential three-fold impact upon the EPS arising from associated recreational disturbance, traffic-related nitrogen air pollution, and the generation of additional wastewater.
22. As the decision maker, it is necessary for me to undertake an Appropriate Assessment (AA) 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 EPS. I have undertaken this on a proportionate basis with regard to the evidence submitted by both main parties, including the Council's AAs and the views of the Statutory Nature Conservation Body (SNCB) in respect of the Council's adopted mitigation strategies.
23. An AA concludes that the proposal would result in effects on the EPS unless appropriate mitigation were secured. The main parties are agreed on mechanisms to secure mitigation measures. These comprise a Grampian condition in respect of wastewater impacts, and contributions secured via a legal agreement in respect of recreation disturbance and air pollution impacts. I will deal with both these mechanisms separately.

Wastewater

24. The appeal scheme comprises new residential development with additional occupiers, which would generate additional wastewater. The evidence before me is that drainage and wastewater discharge from residential and visitor accommodation development is contributing, in combination with other sources, to elevated levels of nitrogen in the Solent Coast EPS. This nutrient enriched water discharge is contributing to the growth of weed mats that can smother estuarine wading bird habitats and restrict the growth, distribution and variety of food available for wading birds, against the stated conservation objectives of the Solent Coast EPS.
25. As such, without mitigation the appeal scheme represents a likely significant effect upon the integrity of these sites, particularly when the impacts are considered in combination with other residential developments within the Solent area.

26. 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 EPS respect of additional nutrient input.
27. The Council has confirmed that it is developing a New Forest Nutrient Mitigation Strategy, which could include measures such as acquiring and retiring agricultural land, new woodland planting, wetland efficiency measures and water efficiency measures in Council housing stock. However, at present there is no adopted mitigation strategy.
28. In the meantime, the Council's interim approach is to either require applicants to produce a site-specific mitigation scheme that achieves nutrient neutrality or better, or to use a Grampian condition to ensure the provision of an avoidance and mitigation scheme prior to occupation of the proposed development. This approach accords with the Council's Interim Nitrogen Mitigation Solution 2019.
29. The appellant has not put forward any specific scheme of mitigation, and has confirmed agreement to the Council's proposed Grampian condition, which would require that the mitigation is calculated, and details provided, at condition discharge stage, and that the approved measures would be secured, prior to the occupation of the approved dwellings.
30. However, whilst the main parties are in agreement to this approach, as the competent authority, I need to be satisfied that any mitigation scheme for neutralising nitrogen is certain at the time of AA, so that no reasonable scientific doubt remains as to the effects of the development on the EPS.
31. 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. In the absence of certainty in respect of the mitigation details at the AA stage, there remains a risk that the appellant may not be able to implement appropriate mitigation measures, and that the Grampian condition may not be capable of being discharged.
32. As such, notwithstanding Natural England's agreement to the Council's approach, 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 EPS, and the full details and implications of any such proposals remain unknown.
33. Ensuring that a 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. 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.
34. 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.

35. I acknowledge that the need to mitigate against the adverse effect of nutrients may provide a challenge to the delivery of housing in the area. However, in the context of a general need to comply with the Habitats Regulations, there is nothing uniquely exceptional in this. Exceptional circumstances which might justify use of such a condition do not therefore exist.
36. Furthermore, the SNCB would also expect that the discharge of any such Grampian condition would need to be subject to a further AA, including full details of the development and mitigation nitrogen budgets, upon which further consultation with the SNCB would be expected. I cannot predetermine the outcome of any future AA. Thus, the effectiveness of any measures put forward are uncertain and would need to be thoroughly tested as part of an AA.
37. 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 EPS.
38. In view of my reasons above, I conclude that the appeal scheme, due to the additional generation of nutrients, and in the absence of any satisfactory mitigation, and the necessary mechanism for achieving it, would have an adverse effect upon the integrity of the Solent Coast EPS, either alone or in combination with other plans and projects. The proposal would therefore conflict with LPP1 Policy ENV1, which only permits development that will not result in adverse effects on the integrity of any of the relevant International Nature Conservation sites.
39. It would also be contrary to advice in paragraph 180(a) of the Framework, which indicates that planning permission should be refused if significant harm to biodiversity cannot be avoided, mitigated, or as a last resort, compensated for.

Recreational Disturbance and Air Pollution

40. The appellant's submitted signed UU provides for Habitats Mitigation Contributions in respect of Access, Management and Monitoring, Bird Aware Solent, Infrastructure, and Air Quality Monitoring, as defined within the UU.
41. This accords with the Council's approach to mitigation contained within LLP1 Policy ENV1, Policy DM2 of the *New Forest District Local Plan Part 2: Sites and Development Management* (2014) (LLP2), and the *Mitigation Strategy for European Sites Supplementary Planning Document* (2014) (the MESSPD), in respect of measures sufficient to avoid an adverse impact to the integrity of the EPS and their relevant features, having regard to recreational disturbance and air quality effects.
42. Moreover, Natural England has confirmed that, provided mitigation is secured in accordance with the Council's mitigation strategy, that an AA can conclude that there will not be an adverse effect on the integrity of the EPS, and that it would not require to be consulted under Regulation 63 of the Habitats Regulations.

43. The main parties have not provided confirmation that the Council is satisfied that the completed UU satisfactorily addresses the Council's third and fourth reasons for refusal. I also note that, on 5 May 2021, since the refusal of the planning application and the submission of this appeal, the MSESSPD has been replaced by an updated Supplementary Planning Document relating to mitigation for recreational impacts on New Forest European Sites.
44. Were I minded to allow the appeal, as the competent authority, it would be necessary to seek the Council's views on the completed UU, and if subsequently required, further comments from the appellant and Natural England. However, given my above conclusions in respect of wastewater impacts, there is no requirement to consider the UU further, since my conclusions in respect of recreational disturbance and air pollution mitigation would not alter the outcome of the appeal.

Other Matters

45. 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 nearby designated heritage assets. These comprise the Grade II listed White Horse Inn, which fronts onto Keyhaven Road, and the MOSCA to the north of the site, whose boundary crosses the rear of the public house site and includes part of the appeal site access road.
46. The Council has not found any harm to the setting and any features of special architectural or historic interest of the listed building, nor to the character and appearance of the MOSCA, as a result of the proposed development. Neither do I, on the basis of the evidence before me and my site inspection.
47. The White Horse Inn is identified as an important building within the MOSCA by the Council, and it makes a positive contribution to the Keyhaven Road street scene. Openness around the building is identified, in the Council's MOSCA Appraisal, as making a contribution to the setting of the listed building, noting that there is evidence that, historically, the land to the rear included open garden land and small outbuildings. However, I saw that the public house is currently closed, and that there is evidence of neglect to the rear of the building, in addition to fencing and hardsurfacing that do not make a positive contribution to its setting and this part of the MOSCA.
48. Having regard to my findings in respect of the first main issue, noting that the proposed detailed design, siting and scale of the new dwellings would reflect to some degree any outbuildings that previously existed to the rear of the listed building, and having regard to the partial screening of neighbouring industrial buildings which would be afforded by the appeal scheme, I find that the proposal would not harm the significance and setting of the listed building and the MOSCA.

Planning Balance and Conclusion

49. The Council has confirmed that it is unable to demonstrate a five-year supply of deliverable housing sites. Whilst I have no cogent evidence before me that the five-year supply is acute, the Council anticipates that even an imminent update will confirm that the housing land supply position will remain below the required 5 years.

50. Paragraph 11 of the Framework applies, which states that relevant policies for the supply of housing should not be considered up to date where a five-year housing land supply cannot be demonstrated. Paragraph 11 states that where relevant policies are out of date, permission should be granted unless the application of policies in the Framework that protect areas or assets of particular importance, provides a clear reason for refusing the development proposed.
51. Footnote 7 of the same paragraph confirms that such policies include those in the Framework relating to habitats sites, such as the New Forest and Solent Coast EPS, and Paragraph 182 confirms that the presumption in favour of sustainable development does not apply where the project is likely to have a significant effect on a habitats site, unless an appropriate assessment has concluded that the project will not adversely affect the integrity of the habitats site.
52. The proposal would comprise an effective use of a brownfield site for the delivery of 4 dwellings in a sustainable location, with social and economic benefits associated with the construction and future occupation of the houses, and it would not harm the character and appearance of the area. However, having regard to my conclusion in respect of the second main issue, in the absence of evidence to conclude that the proposal would not harm the integrity of the EPS, the adverse affects of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework taken as a whole, and Paragraph 11 does not, indicate that the appeal should be allowed.
53. For the above reason, I conclude that the appeal should be dismissed.

S Leonard

INSPECTOR