



Appeal Decision

Site visit made on 26 October 2021

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 November 2021

Appeal Ref: APP/X1118/W/21/3272335

Land at Barton Cross, Instow, Devon EX39 4JQ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by NDCI Ltd against North Devon Council.
 - The application Ref 66623, is dated 10 May 2019.
 - The development proposed is the erection of 5 dwellings, access, open space and associated works.
-

Decision

1. The appeal is allowed, and planning permission is granted for the erection of 5 dwellings, access, open space and associated works at Land at Barton Cross, Instow, Devon EX39 4JQ in accordance with the terms of the application, Ref 66623, dated 10 May 2019, subject to the conditions in the attached schedule.

Application for costs

2. An application for costs was made by NDCI Ltd against North Devon Council. This application is the subject of a separate Decision.

Procedural Matters

3. In my heading above I have taken the date of the application from the planning application form provided, notwithstanding that the application was converted from a reserved matters application made in April 2019.
4. The Government published its revised National Planning Policy Framework (the Framework) on 20 July 2021. The main parties have had the opportunity to refer to it as part of the appeal process.
5. The appellants have provided a signed Unilateral Undertaking (UU) under section 106 of the Town and Country Planning Act 1990 dated 13 October 2021. This includes obligations to provide financial contributions towards education, public open space enhancement and mitigation of the likely recreational impacts upon the Braunton Burrows Special Area of Conservation. It also provides for a management company to be set up regarding the site. I shall consider the planning obligations later in this decision.

Background and Main Issues

6. The appeal relates to a failure case whereby the Council did not give notice of its decision within the prescribed period. The Council subsequently indicated in their

statement of case¹ that had they been in a position to determine the application, it would have been granted subject to conditions. It follows that there is little substantive dispute between the main parties as to the planning merits of the proposal.

7. Nevertheless, I am required to make my own assessment on the merits of the case, particularly so where there are statutory requirements involved. In this case there are two notable relevant statutory duties. Firstly, in relation to the setting of listed buildings under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and secondly, Appropriate Assessment under Regulation 63 of the Conservation of Habitats and Species Regulations 2017 in relation to a habitats site. I have based the main issues in this case on these statutory provisions.
8. Therefore, the main issues are the effect of the proposal on (1) the character and appearance of the area having particular regard to the setting of the Grade I listed Church of St John the Baptist, and (2) the Branton Burrows Special Area of Conservation (SAC).

Reasons

Character and appearance

9. Instow is a linear settlement that overlooks the Taw-Torridge estuary and spans both sides of the main road, Anstey Way. The topography, proximity of the sea and nearby agricultural land contribute to the scenic setting of the settlement. The Grade I listed Church of St John the Baptist is set inland, on a prominent elevated position relative to most of the town. It possesses high significance as a designated heritage asset due to a combination of historic, aesthetic and cultural factors. An important component of its significance is its setting within the wider landscape, as its tower can be seen from various points within and around the estuary. This is confirmed in the submitted Heritage Statement².
10. The appeal site is sloping agricultural land at the northern edge of the town. As such, it has an open rural appearance. Nevertheless, its position close to existing built up parts of the town to the south and west, and adjacent to the main road near its intersection with Rectory Lane and Marine Parade results in a transitional semi-rural character.
11. The Church lies on higher ground to the east of the appeal site, further along Rectory Lane. Although the surrounding topography inhibits many contiguous views of the appeal site and Church, the northern part of the site can be seen in the foreground in some views of the Church tower. The vantage point at the end of Marine Parade near its junction with Anstey Way is identified in the Heritage Statement³. Accordingly, the open and verdant nature of the appeal site makes a modest but positive contribution towards the surroundings in which the Church is experienced, chiefly by allowing views of the tower to be appreciated.
12. As mentioned above, I have a statutory duty to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses. Given their expertise, I have paid close attention to the comments from Historic England⁴. The more detailed

¹ Paragraph 6.1

² Section 5.3, Revised and Updated Heritage Statement prepared by Savills, April 2017

³ Paragraph 5.4.7

⁴ Dated 8.5.19, 16.1.20, 20.10.20 & 15.7.21 detailed in Council's Application Report, Appendix PJR2, Council's Statement of Case

comments relate to an earlier design rather than the revised scheme now before me. Nevertheless, they highlight certain relevant factors for my consideration. These include protecting the primacy of the Church in the landscape, avoiding an overtly sub-urban design for the proposed dwellings and the sensitive treatment of the access from Rectory Lane.

13. The appeal site is an allocated site for approximately 5 dwellings in policy INS01 of the North Devon and Torridge Local Plan 2011-2031, October 2018 (LP). Accordingly, the proposal must strike a difficult balance between achieving a design that makes a positive locally distinctive contribution towards the housing stock of the town yet avoiding a level of prominence that could compete with the primacy of the Church. It is relevant to my determination that outline permission⁵ was given in 2018 for 5 detached dwellings arranged in a crescent layout with access onto Rectory Lane.
14. The proposal would introduce five dwellings in a relatively tight courtyard arrangement towards the southern part of the site. The layout avoids new built form from obstructing views towards the Church tower from the end of Marine Parade, as is denoted by the key view lines shown on the proposed site layout plan⁶. Furthermore, the landscaping scheme provides for a notable area of land to be planted as meadow in front of the dwellings which would retain an overall impression of verdancy and openness in the views to the Church.
15. Although the form and appearance of the buildings would be obviously contemporary, the proposed layout is reminiscent of the way traditional rural buildings might be grouped. Relative to the approved outline layout, the tighter configuration proposed would result in the built form reflecting some of the qualities of vernacular buildings and appearing less sub-urban, whilst also minimising their distribution across the site.
16. Each dwelling would incorporate a principal area of fenestration which together with the clean lines employed would make for an interesting collection of buildings at the entrance to the town. However, when internally lit these would inevitably draw attention to the structures and the Council's Heritage and Conservation Officer has reservations regarding the overhanging glazed gable proposed for Plot 2⁷. Nevertheless, the prevalent use of natural stone, timber and zinc cladding would provide darker, muted finishes which would be visually recessive to counterbalance the impact. Moreover, if a more sensitive colour than bright white for the proposed render was utilised then this would allow for a more subtle overall effect. This is illustrated in some of the visualisation material provided⁸.
17. Additionally, the proposed landscaping scheme⁹ shows a dry stone faced bank and native species hedgerow along the access with Rectory Lane, with similar hedgerows lining both sides of the access road between meadow grass areas. This would lessen the physical presence of the access road in views across the site by allowing natural features to take precedence.
18. Taking these factors together, the proposed design would add interest without appearing sub-urban or being unduly prominent in views towards the Church. Nevertheless, the presence of additional domestic built form at the appeal site

⁵ Reference 58608, page 3, Council's Application Report, Appendix PJR2, Council's Statement of Case

⁶ Drawing number 1840 0100 Revision H

⁷ Dated 9.7.21, detailed in Council's Application Report, Appendix PJR2, Council's Statement of Case

⁸ Drawing 1840 0620 Revision A, Proposed visualisations_view from Anstey Way

⁹ Drawings 1840 0904 Revision F & 1840 0905 Revision D

would reduce the rural spaciousness within the setting of the Church. In this respect, notwithstanding the steps taken to minimise the impact, there would be less than substantial harm to the surroundings within which the Church is experienced. My view on this is reinforced by the similar conclusions¹⁰ of the parties.

19. Paragraph 202 of the Framework advises that in such circumstances the harm should be weighed against the public benefits of the proposal. Although less than substantial, mindful of the statutory duty and Grade I status of the Church, the harm to the significance of the designated heritage asset attracts great weight. Policies ST15 and DM07 of the LP also indicate that great weight should be given to the conservation of heritage assets. Policy DM07 further states that where there is unavoidable harm to heritage assets and their settings, proposals will only be supported where the harm is minimised as far as possible, and an acceptable balance between harm and benefit can be achieved in line with the national policy tests.
20. The development would make more efficient use of the land and provide five additional dwellings thereby contributing to the overall housing supply in a reasonably accessible location. Moreover, it would be an important public benefit that the proposal would contribute towards meeting assessed housing needs in a manner consistent with the spatial strategy adopted for Instow. Furthermore, in terms of the likely impact on the setting of the Church, the tighter layout in the proposal would be preferential to that approved in the outline consent previously granted. These factors attract very significant weight.
21. Additionally, as the Biodiversity Net Gain Assessment¹¹ provided demonstrates there would be some biodiversity gain because of the proposal. In addition, there would be economic benefits arising from the construction of the development as well as the activities of future occupants. Provision is also made in the UU for a contribution towards the enhancement of off-site public open space, the likely benefit of which would be felt wider than the proposed occupants of the dwellings. These factors attract moderate weight in favour of the proposal.
22. Therefore, in this instance, I am satisfied that cumulatively the public benefits of the proposal would outweigh the great weight given to the less than substantial harm to the setting of the Church. Furthermore, the evidence indicates that the harm has been minimised to achieve an acceptable balance.
23. Accordingly, I find that overall, the proposal would fulfil the design principles set out in policy DM04 of the LP necessary for good design, and the justified less than substantial harm to the setting of the Church would be minimised in accordance with policy DM07 of the LP.

SAC

24. The site lies within an identified zone of influence due to its proximity to the SAC, a habitat recognised under the Conservation of Habitats and Species Regulations 2017 (the Regulations) as being of international importance for its species rich dunes grassland habitat.

¹⁰ Paragraph 6.1.8 of Appellants' Heritage Statement and page 33, Council's Application Report, Appendix PJR2, Council's Statement of Case

¹¹ Prepared by Greenecology, dated 30.1.20

25. Natural England¹² refer to evidence that shows that the habitat at the SAC would be vulnerable to recreational impacts arising from residential and tourist development within that zone. This is reinforced by the findings of the assessment¹³ of the potential recreational impacts arising from non plan-led development in the surrounding area. It found that some negative recreational impacts were evident and arose mostly from trampling and dog fouling which led to habitat degradation, increased eutrophication and risks to the grazing regime at the dunes.
26. Recent caselaw¹⁴ requires the decision maker, when considering the effect that a proposal may have on European Sites, to consider mitigation within an Appropriate Assessment. In the absence of mitigation measures and using a precautionary approach, given the proximity of the site to the SAC, it is reasonable to suppose that future residents of the development would potentially visit the Site for recreational purposes and dog-walking. Intensification of such activity would be likely to contribute towards the negative effects identified. I am required to consider the effect of the proposal both individually and in combination with other projects. As such, there is a risk of a significant effect on the internationally important interest features of the SAC.
27. Policy ST14 of the LP states that the quality of northern Devon's natural environment will be protected and enhanced by, amongst other things, ensuring that development contributes to protecting the hierarchy of designated sites in accordance with their status. Furthermore, policy DM08 refers specifically to European sites such as the SAC. Consistent with the Regulations, it stipulates that development will only be supported where any necessary mitigation is included such that, in combination with other plans or projects, there will be no adverse effects on the integrity of European Nature Conservation Sites.
28. A strategic mitigation strategy¹⁵ for the SAC has been prepared which contains a costed implementation plan to counter the impact of development in the area. It includes actions to inform visitors about responsible dog walking and specific on-site management measures in relation to routes and parking. It also gives an indication of the overall cost of the measures and suggests that a proportionate contribution would equate to about £190 per dwelling¹⁶. It further suggests that this could be secured by a legal agreement.
29. The appellants have submitted a UU that would provide a financial contribution of £950 towards the mitigation measures at the SAC. This would be provided prior to the commencement of construction of the development which would allow a reasonable time for some of the actions listed in the strategy to be carried out before the dwellings were occupied. Hence, it would generally accord with the strategic approach advocated.
30. Based on the evidence before me, I am satisfied that the obligation would be necessary to make the development acceptable in planning terms, is directly related to the development and would be fairly and reasonably related in scale and kind to the development. Therefore, it meets the 3 tests in Regulation 122(2) of

¹² Dated 27.11.19, detailed in Council's Application Report, Appendix PJR2, Council's Statement of Case

¹³ Prepared by Footprint Ecology, dated March 2019.

¹⁴ People over Wind and Sweetman v Coillte Teoranta ECLI:EU:C:2018:244

¹⁵ Braunton Burrows SAC: Mitigation Strategy for future plan-led and non plan-led development, prepared by Footprint Ecology, dated 7.2.19.

¹⁶ Paragraph 5.7

the Community Infrastructure Levy Regulations 2010 (as amended) (the CIL Regulations).

31. In response to consultation under Regulation 63 of the Regulations, Natural England have confirmed that the mitigation measures proposed in this case would be sufficient to avoid an adverse impact to the integrity of the SAC and would be appropriately secured by a legal agreement, which given their specialist knowledge, attracts considerable weight. I concur with that view and am therefore satisfied that the mitigation measures identified are sufficient to avoid the likely impact of the development on the SAC and can be secured. I am not aware of any other developments that would, when taken in combination with the appeal proposal, lead me to a different view.
32. I therefore find on the evidence before me that the proposed development would not adversely affect the integrity of the SAC and would avoid conflict with policies ST14 or DM08 of the LP.

Other Matters

33. Policy INS01 of the LP allocated the appeal site for approximately 5 dwellings with an emphasis on providing a mix of housing types, tenures and sizes to reflect local needs. Representations highlighted that the proposals did not include affordable housing, nor were they specifically aimed at elderly people or first time buyers and could be used as second homes. Nevertheless, the Council is satisfied that the mix of 3 and 4 bedroom market units would provide an appropriate mix for Instow and I have not seen detailed evidence to suggest otherwise. Furthermore, it is not shown that the development would trigger the policy threshold in the LP whereby provision of affordable housing is required.
34. The proposed dwellings are located on the part of the site at lowest risk of flooding in line with the sequential approach in the Framework. A drainage strategy has been provided¹⁷ and the proposed site layout includes an attenuation swale and tank which forms part of the strategy to restrict the speed of surface water flow from the site. A package treatment plant would provide for foul water drainage. Furthermore, the UU includes measures for the management of surface water drainage on site to be overseen by a management company in perpetuity. On this basis, the Council raise no objections and I have not seen technical evidence that would suggest that the approach would be inadequate.
35. The combination of the proposed separation distances, topography and orientation of the dwellings would maintain a reasonable relationship with existing dwellings nearby. As such, I am satisfied that the proposal would not result in an unacceptable reduction in privacy or other notable harm to the living conditions of nearby residents.
36. Paragraph 111 of the Framework states that development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety or the residual cumulative impacts on the road network would be severe. The access onto Rectory Lane shows adequate visibility. Suitable areas for parking and turning are shown, as is a footpath route onto Anstey Way. Although some concerns have been expressed regarding the access and traffic, considerable weight is given to the comments of the Highway Authority¹⁸ given

¹⁷ Technical Design Note prepared by Hydrock dated 21.2.19

¹⁸ Dated 13.7.21, detailed in Council's Application Report, Appendix PJR2, Council's Statement of Case

their specialist knowledge. They raised no objection to the proposal, and I have not seen substantive evidence that undermines their finding.

37. The application is made in full and must be considered on its own merits. Although the previous outline permission is material to my consideration, the proposal is not bound by the layout or conditions imposed upon it. I have indicated in my decision where I have had particular regard to it.

Planning obligations

38. The appellants have provided a UU containing a number of obligations in addition to the SAC mitigation measures already referred to. Policy DM10 of the LP requires new development to make provision for public open space, recreation, sport facilities and green infrastructure to meet the needs of its intended occupants in accordance with the quantitative and accessibility standards summarised in the development plan. Where it is not possible to fully provide these on site, contributions towards off-site provision may be acceptable. The Council's Open Space Officer has provided a calculation of necessary off-site provision based on these standards that equates to £15,725. The UU provides for this amount towards the provision or enhancement of off-site public open space including the enhancement of the North Devon Cricket Club, sand dune fencing, the enhancement of Instow Parish Hall, information/interpretation boards and new seating.
39. Policy ST23 of the LP expects development to provide or contribute towards the timely provision of infrastructure made necessary by the impact of the development. Devon County Council Children's Services have estimated the likely number of school age children the development would yield, and based on the information before me, I have no reason to doubt their methodology. They state that the local primary school lacks capacity to cater for the additional pupils arising from the development, and whilst there would be secondary school capacity, Bideford College is some distance away. Hence, there would be additional costs associated with transporting pupils from the development. On this basis, financial contributions of £20,540 towards primary school provision and £2059 towards secondary school transport are requested. Obligations for these financial contributions are contained within the UU.
40. The clauses in the UU relating to the management and delivery of the open space and surface water drainage on site are necessary and proportionate to ensure that the development will function well over its lifetime. This would assist in meeting the requirements of paragraph 130 of the Framework as well as development plan policies relating to drainage, landscaping and design.
41. On the evidence provided, I am reasonably satisfied that the obligations meet the statutory tests in the CIL Regulations.

Planning Balance

42. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise¹⁹. It will be seen from my reasoning above that I have found that the proposal would be consistent with the development plan. It follows that the development should be approved.

¹⁹ Section 38(6) Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.

Conditions

43. The Council have suggested 16 conditions. A condition relating to the commencement of development is necessary, as is reference to the approved plans in the interests of certainty.
44. To ensure the quality of the proposal it is necessary to agree the external finish of the materials to be used, particularly in relation to the colour of render. The wording suggested by the Council is somewhat generic and does not entirely correlate with the degree of detail provided by the appellant. As such I have adjusted the wording. For similar reasons, a condition is imposed to require the implementation of the landscaping scheme.
45. Given the separation distances that would be retained between the proposals and windows in existing properties, I do not consider that it would be necessary to impose a condition to require obscure glazing in WC or landing windows to make the proposal acceptable in planning terms, as is suggested. Furthermore, paragraph 56 of the Framework stipulates that planning conditions should be kept to a minimum and therefore, I have not imposed it.
46. To protect and enhance biodiversity a landscape and ecological management plan (LEMP) should be agreed and implemented, and the biodiversity net gains shown on the plans should be carried out and retained. However, it is not necessary to include a lengthy list of the requirements to be included in the LEMP as part of the wording of the condition. Neither is it explained why such a condition would need to be prior to commencement of development rather than prior to first occupation. Planning Practice Guidance states that pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission. I have amalgamated and revised the wording of the suggested conditions accordingly.
47. A further condition is imposed to require the submission and agreement of an ecologically sensitive lighting scheme.
48. In the interests of highway safety, there is a need to secure the proposed vehicular access, parking and turning prior to the first occupation of the development and their retention thereafter. The ungated pedestrian access should be secured to ensure that walking to and from the properties would be convenient.
49. A condition to require a construction environmental management plan to be agreed prior to the commencement of development was suggested on the basis of the safe operation of the highway and to protect the living conditions of nearby residents. There is little evidence to suggest that a development proposal of the relatively modest scale proposed would result in material highway safety concerns during construction and in any event, a separate condition has been suggested to impose a limit on construction hours to safeguard nearby residents from unreasonable disturbance. In addition to safeguards in other environmental legislation, the latter would be sufficient to protect the living conditions of nearby residents and it would be disproportionate to require a further construction management plan.
50. The Council's Environmental Health Manager has recommended the use of a condition²⁰ in relation to land contamination. However, given the agricultural use of

²⁰ Dated 8.5.19, 18.11.19, 15.1.20, 6.10.20, 7.7.21 detailed in Council's Application Report, Appendix PJR2, Council's Statement of Case & Paragraph 6.4 Council's Statement of Case

the land, it is not immediately clear whether there is a particular basis to warrant such a condition. Nevertheless, cognisant of the persistency of the advice and the proposed residential use of the land, as a precautionary measure to protect human health I have imposed a condition. In order to be effective this requires an assessment to be undertaken prior to the commencement of development.

51.Paragraph 54 of the Framework states that planning conditions should not be used to restrict national permitted development rights unless there is clear justification to do so. The Council have suggested two such conditions to limit the permitted development rights normally afforded to householders. However, the reasoning provided generally refers to the character and appearance of the area, highway safety and potential for overlooking. These generic concerns fall short of a specific clear justification. Consequently, I have not imposed them.

Conclusion

52.Accordingly, for the reasons given above I conclude that the appeal should be allowed, and planning permission granted.

Helen O'Connor

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 :
 - 1840 0100 Revision H Proposed site layout
 - 1840 0101 Revision E Proposed block plan
 - 1840 0230 Revision B Plot 1: Plans
 - 1840 0231 Revision B Plot 5: Plans
 - 1840 0232 Revision B Plots 2-4: Plans
 - 1840 0422 Revision E Existing and Proposed site sections- A
 - 1840 0423 Revision E Existing and Proposed site sections- B
 - 1840 0431 Revision A External Visualisation and Material Palette
 - 1840 0440 Revision A Plot 1: Elevations
 - 1840 0441 Revision A Plot 5: Elevations
 - 1840 0442 Revision B Plots 2-4: Elevations
 - 1840 0801 Revision D Proposed shadow path analysis
 - 1840 0900 Revision C Site location plan
 - 1840 0904 Revision F Proposed hard landscape strategy
 - 1840 0905 Revision D Proposed soft landscaping plan
- 3) Prior to their application samples of the materials to be used in the construction of the external surfaces of the development hereby permitted shall be submitted to and approved in writing by the local planning authority. This shall detail the colour of the render to be used. Development shall be carried out in accordance with the approved samples.
- 4) All planting, seeding or turfing comprised in the approved details of landscaping shall be carried out in the first planting and seeding seasons following the occupation of the first dwelling or the completion of the development, whichever is the sooner; and any trees or plants which within a period of 5 years from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.
- 5) Prior to the first occupation of any of the dwellings a detailed landscape and ecological management plan (LEMP) shall be submitted to and approved in writing by the local planning authority and these works shall be carried out as approved. The biodiversity net gains as indicated on the approved plans, including the provision of a bat and bird box on each building shall be provided prior to first occupation and retained thereafter.
- 6) Prior to the first occupation of any of the dwellings, a lighting scheme shall be submitted to and agreed in writing by the local planning authority. Thereafter, the development shall be carried out in accordance with the agreed scheme and no other external lighting shall be erected.
- 7) Prior to the first occupation of any of the dwellings, the ungated pedestrian access and path, vehicular access, visibility splay, parking, turning facilities and areas of hardstanding shown on Proposed site layout drawing 1840 0100 Revision H shall be provided, and thereafter retained for those purposes.

- 8) During the construction phase no machinery shall be operated, no process shall be carried out and no deliveries taken at or dispatched from the site outside the following times:
 - (a) Monday - Friday 08.00 - 18.00
 - (b) Saturday 08.00 - 13.00
 - (c) nor at any time on Sunday, Bank or Public holidays.
- 9) No development shall commence until an assessment of the risks posed by any contamination, carried out in accordance with British Standard BS 10175: Investigation of potentially contaminated sites - Code of Practice and the Environment Agency's Model Procedures for the Management of Land Contamination (CLR 11) (or equivalent British Standard and Model Procedures if replaced), shall have been submitted to and approved in writing by the local planning authority. If any contamination is found, a report specifying the measures to be taken, including the timescale, to remediate the site to render it suitable for the approved development shall be submitted to and approved in writing by the local planning authority. The site shall be remediated in accordance with the approved measures and timescale and a verification report shall be submitted to and approved in writing by the local planning authority. If, during the course of development, any contamination is found which has not been previously identified, work shall be suspended and additional measures for its remediation shall be submitted to and approved in writing by the local planning authority. The remediation of the site shall incorporate the approved additional measures and a verification report for all the remediation works shall be submitted to the local planning authority within 14 days of the report being completed and approved in writing by the local planning authority.