



Appeal Decision

Site visit made on 15 February 2022

by D Szymanski BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th March 2022

Appeal Ref: APP/V2255/W/21/3277228

32 Linden Drive & 67 Queensway, Sheerness ME12 1LG

- 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 outline planning permission.
 - The appeal is made by Mr M Barber against Swale Borough Council.
 - The application Ref 21/500413/OUT, is dated 24 January 2021.
 - The development proposed is described as Three number one bedroom dwellings with the dormers to the front elevation, with all living accommodation to first floors and above.
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Decision

1. The appeal is dismissed, and planning permission is refused.

Procedural Matters

2. In the banner heading above I have amended the address from that in the planning application form to refer to both properties that form the appeal site. This is consistent with the appeal form and appeal statement.
3. The application is made in outline with all matters reserved for future consideration. The plans show the appearance, scale and layout of the dwellings. Paragraph ID: 21b-021-20190723 of the Planning Practice Guidance (the PPG) advises where details are submitted as part of an outline application, they must be treated as forming part of the development, unless the applicant has made it clear the details are submitted for illustration purposes only.
4. The appellant advises the plans are illustrative and the Council has stated it treated the plans as illustrative. Therefore, I have considered the appeal on the basis the application is made in outline with all matters reserved. I have treated the submitted site, elevation, and floor plans as illustrative only. In light of the clarification provided I have treated the reference to dormers in the description of development as an error, as this detail is not before me.
5. The appeal has been submitted due to the failure of the Council to give notice of its decision within the prescribed time period. The Council has subsequently advised it would have refused the application for the following reasons, which I have had regard to in setting out the main issues:

The proposal fails to demonstrate how a scheme can be designed to mitigate flooding impacts in an area defined as Flood Zone 3. In the absence of

evidence to the contrary, would give rise to significant and unacceptable risk to human life in the event of flood. The proposal would therefore be contrary to...

The proposed development will create potential for recreational disturbance to the Swale Special Protection Area. The application submission does not include an appropriate financial contribution to the Thames, Medway and Swale Strategic Access Management and Monitoring Strategy (SAMMS), or the means of securing such a contribution, and therefore fails to provide adequate mitigation against that potential harm. The development would therefore affect the integrity of this designated European site, and would be contrary to...

The proposal is considered to represent overdevelopment of the plot, by virtue of the likely height, scale, and design of the dwellings to accommodate three floors, the limited size of the site and the resultant likely cramped nature of the plots with small rear gardens, and the likely need to use obscure glazed windows on the rear elevations of the dwellings to protect neighbouring amenities. This would result in a development that would be out of character with the relatively spacious layout of dwellings in the surrounding area and which display a repetitive character of two-storey dwellings with consistent rooflines. Furthermore, the widespread use of obscure glazing on the rear elevations would fail to provide an acceptable degree of residential amenity which future occupiers would expect to enjoy. As such, the development would cause harm to the character and appearance of the surrounding area, would fail to represent good design, and would fail to provide sufficient amenity standards for future residents, contrary to...

6. While the site is referred to as being within the Zone of Influence (ZoI) of the Swale Special Protection Area (Swale SPA) in the Council's committee report, I am subsequently informed, it lies within the 6km ZoI of the Swale SPA, Medway Estuary and Marshes SPA and the Outer Thames Estuary SPA (the SPAs). I have sought the views of the Council and the appellant in this regard. The Bird Wise North Kent Mitigation Strategy (2018) (the MS) explains the features of interest and the likely significant effects (LSEs) from development within the ZoIs of either of the SPAs is similar. It deals with mitigation for designated sites collectively via one single tariff. I have considered the appeal on the basis it is within the ZoI of all three SPAs which is reflected in the main issues below. The appellant would not be prejudiced by this approach.
7. The Flood Risk Assessment (FRA) accompanying the application makes reference to the sequential test, as the appeal site lies within Flood Zone 3. However, it does not set out a view on whether the sequential test is required. Therefore, I have sought the views of the Council and the appellant in respect of this matter, which is considered below.
8. The revised National Planning Policy Framework (2021) (the Framework) was published on 20 July 2021, and the 2021 Housing Delivery Test (HDT) results were published on 14 January 2022. The Council and the Appellant were given the opportunity to comment upon the implications of these for their cases, which I have taken into account in determining this appeal.

Main Issues

9. The main issues are:
 - the effect of the proposed development upon the SPAs;

- whether or not the proposed development represents an acceptable form of development having regard to policies concerned with flood risk;
- the effect of the proposed development upon the character and appearance of the area; and,
- the effect of the proposed development upon the living conditions of the future occupiers of the appeal site and neighbouring occupiers, with particular reference to outlook and privacy.

Reasons

The SPAs

10. The Conservation of Habitats and Species Regulations 2017 (the Regulations) requires where a plan or project is likely to result in a significant effect on a European site (in this case the SPAs), a competent authority is required to make an Appropriate Assessment of the implications of that project on the integrity of the European site in view of its conservation objectives. Any LSEs arising from a development need to be considered alone and in combination with other development in the area, adopting the precautionary principle.
11. The SPAs provide important habitats for species of wintering, migratory and breeding waders, terns, and waterfowl which are rare or vulnerable. The conservation objectives of the SPAs are to maintain or restore their integrity by maintaining or restoring the extent, distribution, structure, function and supporting processes of the habitats of the qualifying features, the population of the qualifying features, and their distribution within the site.
12. The development would increase the number of households and occupiers within the ZoIs of the SPAs. The MS explains surveys, studies and reports have identified additional dwellings within the ZoIs would have LSEs on the SPAs through increased visitors resulting in disturbance to birds, from recreational activities such as dog walking, cycling, and jogging. Therefore, the effects of this proposal alone and in combination with other development would have LSEs on the SPAs, which the appellant does not dispute.
13. The North Kent Strategic Access Management and Monitoring Strategy (SAMMS) sets out mitigation measures funded by financial contributions at the set per dwelling tariff. These include funding rangers, education, communication, site specific access and infrastructure enhancements and monitoring. Natural England (NE) as the Statutory Nature Conservation Body, has endorsed the SAMMS and are one of the partnership organisations on the Scheme Project Board. NE has confirmed it is satisfied that subject to a financial contribution being secured this would mitigate the effects on the SPAs, avoiding an adverse impact to the integrity of the SPAs and their features. I am satisfied that subject to a payment being received via a planning obligation or other means to secure the monies against this particular appeal scheme, the measures would adequately overcome any adverse effects on the SPAs.
14. While the appellant has agreed to pay the necessary tariff, as the competent authority in determining this appeal, I do not have a planning obligation before me securing a financial contribution to SAMMS, or other alternative measures to mitigate the impact of this proposal. Therefore, the appeal scheme makes no provision to mitigate the impacts and thus maintain or restore the integrity of the SPAs. Applying the precautionary principle, in the absence of

appropriate mitigation, the appeal scheme would have LSEs on the integrity of the SPAs due to increased recreational disturbance and would fail to adhere to the conservation objectives. Imperative reasons of overriding public interest do not exist and there are no other considerations that clearly outweigh the harm to the SPAs.

15. For the reasons set out above, the development conflicts with Policies ST1, DM14 and DM28 of the Swale Borough Local Plan (2017) (the LP). Amongst other things these require development accords with adopted Supplementary Planning Documents and Guidance, avoids significant harm to and adequately mitigates the effects upon biodiversity, and proposals that adversely affect the integrity of SPAs will only be permitted in exceptional circumstances where there are imperative reasons of overriding public interest and damage can be fully compensated. The development would also conflict with paragraphs 8, 174, 175 and 180 of the Framework, which require development shall protect and enhance the natural environment and sites of biodiversity value, improve biodiversity, and where significant harm to biodiversity cannot be adequately mitigated, permission should be refused.

Flood Risk

16. The appeal site lies within Flood Zone 3 and is at high risk from tidal and fluvial flooding. Paragraph 159 of the Framework states that inappropriate development in areas at risk of flooding should be avoided by directing it away from areas at highest risk. Paragraph 161 requires the application of a sequential approach to the location of development to avoid, where possible, flood risk to people and property. The proposed development would result in further dwellings and occupiers at the appeal site, resulting in an increase in risk of flooding to people and property.
17. Paragraph 162 of the Framework states development should not be permitted if there are reasonably available sites appropriate for the development in areas with a lower risk of flooding, and the sequential approach should be used in areas at risk from any source of flooding. Paragraph 7-033-20140306 of the PPG also advises the sequential approach to locating development should be applied. If it is not possible for a development to be located in areas with a lower risk, the exception test may have to be applied (paragraph 163).
18. The FRA identifies future flood depths of up to 1.2m may be experienced at the site and the sequential test may be required. However, no sequential test has been provided to me. The appellant suggests the entirety of the settlement is within a flood zone. However, the appellant has not set out the extent of each flood zone or provided a robust explanation of the appropriate area over which the sequential test should be applied. Therefore, the evidence does not demonstrate there are no other appropriate sites reasonably available in areas with a lower flood risk. Consequently, the sequential test is not satisfied.
19. Matters such as the exception test, flood resilience, the design and layout of the dwellings, the drainage strategy, and rainwater harvesting, are matters to be dealt with if the sequential test has been satisfied. The suggested measures do not overcome the need to carry out a sequential test.
20. For the reasons set out above the proposed development is not compliant with policies for flood risk. It conflicts with Policies DM14 and DM21 LP which require inappropriate development is avoided in areas at risk of flooding and

development accords with national planning policy and the planning practice guidance. The development also conflicts with paragraphs 161 and 162 of the Framework, the relevant provisions of which I have referred to above.

Character and appearance

21. The appeal site comprises two corner plots forming the front and rear garden areas of Nos 32 Linden Drive and 67 Queensway located on the corner of the junction of the two roads. The host dwellings and those nearby are characterised primarily by two storey gable and hipped gable roof houses in groups of 2 – 5 dwellings. While there are some differences in combinations of front elevation materials, the similar heights, scales, roof pitches, architectural design and window positions means there is a strong degree of uniformity and rhythm in the vicinity of the appeal site. Given the host dwellings are in keeping with the design of those nearby and given their verdant corner plots, the appeal site is in keeping with the character and appearance of the area.
22. As the appeal scheme is in outline with all matters reserved, notwithstanding the indicative plot arrangement, scale and designs on the plans, these matters are not before me. From what I saw, the front and rear plot configuration of dwellings in the area varied significantly including some small front and rear of plot spaces, particularly to the south on Linden Drive. The size of the appeal site would appear to provide scope for a suitable layout, not out of keeping with plot arrangements nearby. Reserved matters submissions could secure a more sensitive scale, height, layout, and appearance of development. Therefore, it is not demonstrated that there is an inherent reason why, reserved matters submissions could not secure a sensitively designed scheme in keeping with the character and appearance of the area.
23. For the reasons set out above, subject to the imposition of suitably worded reserved matters planning conditions, I see no reason why the development could not be designed to be in keeping with the character and appearance of the area. At this stage, on this basis it would not conflict with Policy CP3 and DM14 of the LP. Amongst other things these require homes are of a high quality design appropriate and sympathetic to their surroundings, reflect the positive characteristics and features of the site and locality, and be at densities determined by the context and the defining characteristics of the area. It would also not conflict with paragraph 130 of the Framework insofar as this seeks that development is sympathetic to local character including the surrounding built environment.

Living conditions

24. I note the Council's concerns in respect of the internal layout, use of obscure glazing, and the potential for overlooking onto neighbouring properties. However, the detailed layout and design of the dwellings is also a matter to be the subject of future consideration under reserved matters submissions. Given the site size and layout of neighbouring properties, I am not persuaded it would not be possible to design an internal configuration for the proposed 1 bedroom dwellings that would ensure adequate living conditions for future occupiers of the dwellings, and neighbouring occupiers, in respect of matters such as outlook and privacy.
25. Subject to the imposition of suitably worded reserve matter planning conditions, I see no inherent reason why the proposed development could not

provide satisfactory living conditions for the future occupiers of the proposed dwellings, and neighbouring occupiers, with particular reference to privacy and outlook. On this basis, the development would not conflict with Policies CP3, DP4 and DM14 of the LP which requires that homes are of a high quality, comfortable, and do not result in harmful effects on amenity. It would also not conflict with the aims of paragraph 130f) of the Framework which seeks that development provides a high standard of amenity for existing and future users.

Other Matters

26. I have been provided with few details of the other planning decisions¹ listed by the appellant. For example, I have not been provided with sufficient details to identify the exact location of all developments, their design, the nature, and magnitude of the flood risk, whether those developments undertook and satisfied the sequential test, whether those decisions pre-date the requirement for the sequential test and the current development plan, and the full range of planning considerations before the Council in relation to those proposals.
27. Therefore, while noting the appellant's suggestion of inconsistency, I simply cannot make any reasoned comparison between those developments and the appeal proposal, which I have considered on its own merits and impacts. Furthermore, it is not clear whether those schemes pre-date the adoption of the MS, and how mitigation for the relevant SPAs was addressed. In the case of the appeal scheme, the failure to provide mitigation alone results in the scheme being unacceptable.
28. The appellant has stated some dissatisfaction with the Council's handling of the application. However, my consideration of the development is confined to the planning merits only. Any concerns over the Council's handling of the application, are a matter that should be pursued with the Council.

Planning Balance

29. The proposed development is in an area at risk of flooding and the sequential test has not been satisfied, and it would result in harm to the integrity of the SPAs. In accordance with paragraph 11d)i) of the Framework, the application of policies that protect areas or assets of particular importance provide a clear reason for refusing permission, for which Framework policies have not been met. Therefore, the tilted balance does not apply.
30. The proposal would result in a modest economic benefit during construction, and once complete a small on-going spend in the local economy. The Council's HDT result shows a measurement of 78% against its delivery requirements over the last 3 years and I am informed that it cannot demonstrate a deliverable housing land supply of 5 years. The precise shortfall is not before me. However, even if it were acute, the contribution of three dwellings would be a modest benefit. The provision of home offices would be a small benefit. Overall, the benefits of the proposed development attract limited weight in favour of the scheme.
31. The absence of conflict with policies in respect of the detailed design, materials and layout, the character and appearance of the area and the provision of satisfactory living conditions for future and neighbouring occupiers, would be

¹ APP/V2255/A/12/2176368, 61 Cecil Avenue, 15/510315/Full, 16/505154/Full, 19/506168/Full, 16/507820/Full, 18/504243/Out, SW/09/0950.

neutral matters in the planning balance. Compliance with policies in respect of matters such as resource and energy efficiency, accessibility of services and facilities, car and cycle parking provision, highway safety and electric vehicle charging points, would also be neutral matters.

32. However, the proposed development would adversely affect the integrity of the SPAs and it conflicts with the policies of the development plan and the Framework in respect of flood risk as it has not satisfied the sequential test. These are matters that attract significant weight against the scheme. Therefore, the policy compliance and the benefits of the proposal are significantly outweighed by the harm. Therefore, planning permission should be refused.

Conclusion

33. The proposed development is contrary to the development plan and the National Planning Policy Framework read as a whole. There are no material considerations advanced that indicate the decision should be made other than in accordance with the development plan and the Framework. Therefore, for the reasons given, the appeal should not succeed, and planning permission is refused.

Dan Szymanski

INSPECTOR