



Appeal Decision

Site visit made on 21 April 2022

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 May 2022

Appeal Ref: APP/H2265/W/21/3282136

37 Avebury Avenue, Tonbridge TN9 1TL

- 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 Mr B Hurworth against Tonbridge & Malling Borough Council.
 - The application, Ref TM/21/01678/FL, is dated 11 June 2021.
 - The development proposed is to demolish existing commercial building and build six new one bedroom flats.
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Decision

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

Preliminary Matters

2. The Council has indicated that if it had determined the application it would have refused planning permission. I have taken account of the Council's views and those of other interested parties in framing what I consider to be the main determining issues in this case.
3. The appeal is accompanied by an amended Flood Risk Assessment and drawing¹. As the Council and Environment Agency have had the opportunity to comment on this amended information, I consider that they nor any other interested party would be prejudiced by the inclusion of the additional information as part of the appeal and I have taken it into account in reaching my decision.

Main Issues

4. The main issues are considered to be:
 - The effect on the character and appearance of the area
 - The effect on the living conditions of future and neighbouring occupants, with regard to privacy and outlook
 - The need to provide public open space
 - Whether the risk of flooding can be satisfactorily addressed.

Reasons

Character and appearance

¹ KRS Environmental Flood Risk Assessment KRS.0515.002.R.001.B dated August 2021 and drawing 20089BH-PP-P-(03)01 Rev

5. The character of Avebury Avenue changes along its length from predominantly commercial premises at its eastern end where it joins the High Street, through to a mix of commercial and residential properties at its western end, where it joins Barden Road. Recent development in the vicinity of the appeal site consists of 3 and 4 storey residential apartments fronting Avebury Avenue, with older 2 storey semi-detached houses to the side and rear. The overall impression is one of higher density development on the edge of the town centre giving way to more small scale domestic buildings further away.
6. The existing building is utilitarian in appearance but does at least present some variation in its front elevation with part rendered first floor, contrast brick surrounds to the openings, and symmetrically placed, subdivided windows. In contrast the proposed building would be an unimaginative flat roofed box, with plain brick elevations unrelieved by any architectural detailing other than minimal stretcher and header courses above and below the windows. Notwithstanding the wide range of styles and materials in the area, it would fail to relate to any of the surrounding buildings either in form or appearance. The asymmetrically placed windows in the front and rear elevations would also give it an unbalanced appearance. The design of the building and its lack of visual interest are not minor matters that could be overcome by condition.
7. Although the scale of the building at 3 storeys would not be out of place in this location, being midway in height between the neighbouring buildings which flank the site, I conclude that its poor design would detract from the character and appearance of the area. The proposal would consequently conflict with Policy CP24 of the Tonbridge and Malling Borough Council Core Strategy 2007 (the 'Core Strategy'), which requires new development to be well designed and to respect the site and its surroundings.

Living conditions

8. The proposed building would be adjacent to a pair of dwellings at 39 and 41 Avebury Avenue, which are contained within what appears to be an older building that has been converted to residential use. It has a small, enclosed garden area at the rear. The proposed building would increase the height of the flank wall immediately alongside this garden area from 2 to 3 storeys and would increase the number of windows looking directly into the space, including those from habitable bedrooms. I consider the combination of increased building bulk and overlooking from new windows would have an overbearing effect on and cause a loss of privacy to this garden area, which is the only private amenity space available to the dwellings. A reciprocal effect on the privacy of future occupants of the appeal scheme would not however result as they could address that through normal screening of windows, such as blinds or curtains.
9. The Council also raises criticism at potential overlooking and loss of privacy between the proposed building and the semi-detached houses at the rear of the site. However, the existing building already has large windows in its rear elevation, as does the block of flats immediately alongside. There is therefore already a degree of mutual intervisibility between these buildings and the rear windows and gardens of houses in Barden Road. While the proposed development would increase the number of windows in the rear elevation by adding another floor, I do not consider that the change in the relation between

the building and those to the rear to be so different as to result in a harmful loss of privacy or loss of outlook.

10. I conclude that the proposed development would harm the living conditions of neighbouring occupants, but not future occupants, to the extent that it would appear overbearing and give rise to a loss of privacy to the rear garden area of the occupants of 39 and 41 Avebury Avenue. For this reason, the proposal would conflict with Policy CP24 of the Core Strategy, which requires good design that amongst other criteria, respects its surroundings.

Open space

11. Policy OS3 of the Managing Development and the Environment Development Plan Document 2010 requires all residential development of 5 units or more to provide open space. Where it is impractical to do on site, the policy requires off-site provision or a financial contribution towards it.
12. The development does not provide any significant amount of open space on site, nor would it have any balconies or outdoor private garden space, making the need for access to public open space all the more important. The appellant and Council have agreed in principle to address this issue through a financial contribution towards off-site open space provision in accordance with Policy OS3. However, no legal undertaking has been submitted with the appeal to secure such a contribution, the appellant suggesting that such a requirement could be secured by condition instead.
13. Advice in the Planning Practice Guidance is clear that conditions should not be used to require the payment of money². I have considered whether a negatively worded condition could be used to prevent development taking place until such an undertaking had been completed but consider it would not be appropriate in this case because it would not be sufficiently precise or transparent.
14. I am satisfied that there would be a need for the development to contribute towards the provision of off-site open space, but in the absence of a completed legal undertaking securing an appropriate contribution it would fail to do so. I conclude that as a result the development would conflict with Policy CP25 of the Core Strategy and Policy OS3 of the Managing Development and the Environment Development Plan 2010, which require necessary infrastructure to be secured as part of new development, including open space.

Flood risk

15. The site lies within Flood Zone 3 as defined on the Environment Agency's flood map for planning. It does also fall within an area benefiting from flood defences. Flood defences reduce the risk of flooding but cannot completely remove that risk as they may be over topped or breached during a flood event.
16. The National Planning Policy Framework (the 'Framework') says that inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk. Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere. To implement this approach, the Framework requires a sequential test aimed at steering new development to

² PPG paragraph 21a-005-20190723

areas with the lowest risk of flooding. If it is not possible for development to be located in areas with a lower risk of flooding, then an exception test may be required.

17. The site lies within the built up area of Tonbridge, one of the areas to which new development is directed as part of the spatial strategy of the Core Strategy. Supporting text to Policy CP10 of the Core Strategy recognises that some redevelopment sites (including windfalls) within the built up areas, including the central area of Tonbridge, are within areas which are at medium to high risk of flooding. In these locations the Core Strategy says that the aim should be to minimise and manage flood risk in the detailed design of such developments.
18. As a windfall site within the central area of Tonbridge, the approach set out in the supporting text to Policy CP10 is applicable to the appeal site. It implicitly accepts that developing such sites is preferable to developing alternative sites, for example outside the built up areas, which while they may be at lower risk of flooding are less preferable because of other planning considerations. This is consistent with the advice in the Planning Practice Guidance which says that where development is needed in areas liable to flood to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives for development³. I consider redevelopment of the site therefore meets the sequential test.
19. Residential development is defined as more vulnerable in the flood risk vulnerability classification in Annex 3 of the Framework. An exception test is required where that development lies in Flood Zone 3, as is the case with the appeal site.
20. There are two parts to the exception test. The first part is that the development should provide wider sustainability benefits to the community that outweigh the flood risk. The second part is that the development should be safe for its lifetime without increasing flood risk elsewhere and, where possible, reducing flood risk overall.
21. The provision of additional residential units would be of public benefit in helping to meet housing demand, which is sufficient to meet the first part of the exception test.
22. The development has been designed with an elevated finished ground floor to raise it above the potential flood level, with an additional allowance for climate change. Access and egress to the site could be affected during a flood event, but I accept the conclusion of the Flood Risk Assessment that given the fluvial nature of the flood risk and the existing flood defences, the onset of flooding would be gradual and adequate warning would be available to allow occupants to safely evacuate the building to nearby higher ground. Such a risk would be no different to that applying to other flatted schemes which have recently been built in the immediate area. As such I consider the development would be safe for its lifetime.
23. So far as increasing flood risk elsewhere is concerned, the development would replace an existing building on the site which is of at least the same footprint as that proposed. The proposed building would not therefore displace any more

³ Paragraph:033 Reference ID: 7-033-20140306

flood water than the existing building, nor would it disrupt the flow of flood water to any greater extent. I acknowledge that it would not reduce flood risk overall but that is an aspiration of the policy rather than a requirement. There is no suggestion in the submitted evidence that flooding from other sources, including surface water, needs to be addressed. Consequently, the development would not increase the risk of flooding elsewhere and would meet the second part of the exception test.

24. I conclude that the development would meet both the sequential and exception tests, and the risk of flooding would therefore be satisfactorily addressed. As a result, the development would not conflict with Policy CP10 of the Core Strategy, which seeks to minimise flood risk to new development and neighbouring land.

Conclusion

25. I have found that the proposed development would harm the character and appearance of the area, would harm the living conditions of neighbouring occupants at 39 and 41 Avebury Avenue, and would fail to contribute towards the provision of off-site open space. I have also found that it would not harm the living conditions of future or other neighbouring occupants, and the risk of flooding can be satisfactorily addressed. Since these latter issues are neutral considerations in my decision, I conclude that the development would conflict with the development plan when taken as a whole.
26. Although the appellant has not sought to argue the point, the Council acknowledges that it cannot demonstrate an adequate housing land supply. In such circumstances paragraph 11 of the Framework says that permission should be granted unless policies in the Framework that protect areas or assets of particular importance provide a clear reason for refusal, or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits.
27. In this case the provision of 6 additional dwellings would be of benefit in increasing the housing stock in Tonbridge. However, I consider the harm that would be caused by this particular scheme would significantly and demonstrably outweigh that benefit, such as to make the development unacceptable.
28. Consequently, I conclude that the appeal should be dismissed and planning permission should be refused.

Guy Davies

INSPECTOR