



Appeal Decision

Site visit made on 1 December 2021

by S Edwards BA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 August 2022

Appeal Ref: APP/Z1775/W/21/3271870

32-60 Middle Street, Southsea, Portsmouth PO5 4BP

- 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 PVD1 Ltd against Portsmouth City Council.
 - The application Ref 18/01967/OUT, is dated 21 November 2018.
 - The development proposed is "outline application for the demolition of existing buildings and the construction of a building of six to eleven storeys, to provide 163 flats, and three commercial units ((Use Classes A1 (Retail) and/or A2 (Financial & Professional Services) and/or A3 (Café/Restaurant) and/or B1(a) (Offices) and/or D1 (Non-Residential Institution)) to include provision of basement car park (Scale and Access to be determined)).
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Decision

1. The appeal is dismissed, and planning permission for "outline application for the demolition of existing buildings and the construction of a building of six to eleven storeys, to provide 163 flats, and three commercial units ((Use Classes A1 (Retail) and/or A2 (Financial & Professional Services) and/or A3 (Café/Restaurant) and/or B1(a) (Offices) and/or D1 (Non-Residential Institution)) to include provision of basement car park (Scale and Access to be determined)" is refused.

Preliminary Matters

2. Since the planning application was first submitted, the National Planning Policy Framework (the Framework) has been revised. Policies within the Framework are material considerations, which should be taken into account for the purposes of decision-making from the date of its publication. The parties have had the opportunity to comment on this matter as part of the appeal process, and I have had regard to the updated Framework for the determination of this appeal.
3. The description of the proposal has been amended in subsequent documents. I have adopted the description included within the appeal form, which reflects more accurately and precisely the amended scheme as considered by the Council.
4. The application was submitted in outline. The application form indicates that approval is only sought for access and scale. Appearance, landscaping and layout are reserved for subsequent determination. In respect of the reserved matters, I have treated the submitted plans only insofar as they show how the site might be developed.

Background and Main Issue

5. The appeal is against the Council's failure to give notice, within the prescribed timescales, of a decision on an application for planning permission. However, the Council has confirmed that, had it been in a position to determine the application, the Planning Committee would have endorsed the Case Officer's recommendation and that planning permission would have been conditionally granted, subject to the satisfactory conclusion of an Appropriate Assessment for mitigation of the effects of the development on Special Protection Areas (SPAs).
6. This is also subject to the satisfactory completion of a Legal Agreement, which shall include mitigation measures towards SPAs, a financial contribution towards public open space, a viability review mechanism and the implementation and monitoring of a Travel Plan, as well as a Section 106 administration fee of £620 per obligation.
7. The main issues are therefore:
 - Whether the proposal would make adequate provision for infrastructure needs arising from the development; and
 - The effect of the proposal on designated sites;

Reasons

Infrastructure needs

8. The appellant and the Council have agreed the principle of a number of obligations, which would ordinarily be secured through the completion of a Section 106 Legal Agreement. However, I have not been provided with a certified copy of an executed Legal Agreement, notably due to the Council's freehold interests in the site.
9. As detailed within the draft Unilateral Undertaking submitted by the appellant, there would be a requirement to prepare a Travel Plan and a financial contribution of £5,500 towards the monitoring of the Travel Plan. In the event that an Approved Viability Assessment concludes that there is a surplus and payment can be supported, there would also be financial contributions towards Public Open Space (capped at a maximum of £36,352) and Affordable Housing. Measures to mitigate the effects of the development on the SPAs are discussed in the following section.
10. In respect of the financial contribution towards public open space in particular, limited information has been presented on what it would be spent, or how the requested amount has been calculated. The Council's submissions refer to Victoria Park and/or possible nearby Children's Play Areas but in the absence of further information justifying the contribution sought, I cannot be certain that the contribution would be directly related to the development and fairly and reasonably related in scale and kind to the development. This obligation does not therefore meet the tests set out in Regulation 122 of the Community Infrastructure Levy Regulations.
11. The national Planning Practice Guidance¹ (the PPG) advises that a negatively worded condition limited the development that can take place until a planning

¹ Paragraph: 010 Reference ID: 21a-010-20190723.

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. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency.

12. The PPG adds that however, in exceptional circumstances, a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate. Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted to ensure that the test of necessity is met and in the interests of transparency.
13. Whilst I understand that there are some land ownership issues affecting the proposal, this is not a particularly complex scheme and limited evidence has been presented to show that the delivery of the development would otherwise be at serious risk. Furthermore, and although a draft UU has been submitted by the appellant, it remains unclear whether, having regard to the available information, the terms have been agreed with the Council. There are no exceptional circumstances to justify the imposition of a condition requiring a planning obligation in this instance, which would fail the necessity test set out by the Framework.

Designated sites

14. The appeal site lies with relative proximity to the coastal Solent SPAs and Ramsar sites², which are recognised under the Habitats Regulations as being of international importance for supporting significant numbers of overwintering bird species. It is agreed by the main parties that the appeal scheme would have a likely significant effect on the integrity of these designated sites (either individually or in combination with other plans or projects), by reason of additional recreational pressures resulting from the development, unless suitable mitigation is provided.
15. As detailed within the Solent Recreation Mitigation Strategy (SRMS), residential development proposals are required to make a financial contribution towards mitigation measures, which are normally secured through the completion of a planning obligation.
16. Natural England has also raised concerns in respect of the high levels of nitrogen and phosphorous which have been found within the Solent catchment, notably as a result of increased amounts of wastewater from additional dwellings. Impacts on water quality can result in eutrophication, which can threaten the aquatic ecosystem and thus compromise the integrity of the designated sites.

² Portsmouth Harbour Special Protection Area/Ramsar Site, Chichester and Langstone Harbours Special Protection Area/Ramsar Site, Solent and Isle of Wight Lagoons Special Area of Conservation, Solent Maritime Special Area of Conservation.

17. As noted above, no planning obligation has however been submitted as part of the appeal to address the potential adverse effects of the development on the SPAs. In that regard, my attention has been drawn to an appeal decision³ related to the redevelopment of the adjacent site. However, and although I do not have the full details of this particular scheme, I understand that a UU had been submitted by the appellant, which restricts the occupation of the development until the relevant nitrate mitigation has been secured in perpetuity. It would also secure the payment of a financial contribution towards the SRMS to mitigate the effects arising from recreational disturbance. For these reasons, the circumstances of this particular scheme do not represent a direct parallel to the proposal before me.
18. In the absence of appropriately secured mitigation measures, likely significant adverse effects on the integrity of these designated sites (either individually or in combination with other plans or projects) cannot be excluded. Subsequently, I am not satisfied that the proposal would comply with paragraphs 180-182 of the Framework and the Habitats Regulations.

Planning Balance and Conclusion

19. The Council is presently unable to demonstrate a five-year supply of deliverable housing sites. The appellant's submissions suggest that the Council only has 4.7 years of housing land supply. The extent of the shortfall is therefore relatively limited. Nevertheless, paragraph 11d) of the Framework indicates that in such circumstances, the policies which are most important for determining the application are out-of-date, and planning 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.
20. However, for the reasons detailed above, likely significant effects on protected sites cannot be excluded. In the absence of appropriately secured mitigation measures, I cannot be certain that the appeal scheme would not adversely affect the integrity of the habitats site. Therefore, and in accordance with paragraph 182 of the Framework, the presumption in favour of sustainable development does not apply in this instance.
21. The appeal scheme would make an important contribution to housing supply and choice whilst supporting the local economy, within an accessible area which the Council seeks to regenerate. However, the benefits associated with the proposal would be outweighed by the absence of suitable mechanism in respect of contributions towards the travel plan and its monitoring, affordable housing, as well as mitigation measures to protect the integrity of the SPAs. Consequently, the appeal scheme would not accord with the development plan as a whole.
22. For the foregoing reasons, and having regard to all other matters raised, I conclude that the appeal fails.

S Edwards

INSPECTOR

³ APP/Z1775/W/20/3265574.