

Appeal Decision

Site visit made on 13 October 2022

by L Page BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 November 2022

Appeal Ref: APP/X1165/W/22/3291368

Land at Kingsland, Marldon Road, Torquay TQ2 7JH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Woodford Group Developments Limited and Tilia Homes against the decision of Torbay Council.
 - The application Ref P/2019/0710, dated 5 April 2019, was refused by notice dated 4 November 2021.
 - The development proposed is outline planning application for the demolition of existing structures and redevelopment to provide up to 90 dwellings, up to 1,858 sq.m. gross B1 employment, open space, landscaping, associated infrastructure, and access (means of access to be considered in detail).
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The appellants confirm that the application was originally submitted in the names of Woodford Developments and Kier Living (South West) Ltd. The first applicant is now Woodford Group Developments Limited, and Kier Living was sold recently and is now Tilia Homes. This has been reflected in the banner heading of the decision.
3. The application was submitted in outline with all matters reserved apart from access. The quantum of development is clear from the description of development and all those matters reserved have been treated indicatively under the appeal.
4. A Section 106 Agreement (the S106) was submitted during the course of the appeal, and this was accepted as a potentially legally binding document. The S106 addresses the Council's fourth reason for refusal relating to affordable housing contributions and so it has been dealt with under other matters and not as a main issue.
5. The appellants submitted late evidence supplementing their initial appeal statement in relation to housing supply. This late evidence appears to be a relevant material consideration that could not have been submitted when the appeal was originally made.

6. Furthermore, it was submitted before the appeal start letter was issued, and so the Council and other interested parties will have had an opportunity to comment on the late evidence under normal appeal procedures. Therefore, it has been accepted on this basis.
7. A Screening Direction issued by the Planning Inspectorate under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations) established that the development is not EIA development. I see no reason to disagree with this finding and the appeal has been considered accordingly.
8. The site is within the zone of influence of South Hams Special Area of Conservation (SAC). Consequently, the proposal has been considered in the context of statutory duties set out within the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations) and any implications are dealt with under other matters.

Main Issues

9. The main issues are:
 - (a) the effect of the proposal on flood risk;
 - (b) whether the loss of employment land would be acceptable; and
 - (c) whether the proposal would be in an acceptable location.

Reasons

Flood Risk

10. The site is located in Torbay and designated as being within a Critical Drainage Area (CDA) by the Environment Agency. Policy ER1 of the Torbay Local Plan 2015 (LP) is clear that as a consequence of this designation all developments require a basic Flood Risk Assessment (FRA). A detailed FRA will be required for proposals with a site area of 1 hectare or greater within Flood Zone 1, including where they impact on catchments draining into Flood Zones 2 and 3, and for all new development within Flood Zones 2 and 3. Accordingly, irrespective of the outline nature of the proposal, it is captured by the requirement to provide a detailed FRA. This is in order to demonstrate that subsequent development is safe for its lifetime and does not increase the risk of flooding elsewhere.
11. Policy ER1 of the LP goes on to state that proposals should have regard to the Council's local flood risk management strategy and comply with the requirements of any subsequent action plan. It further states that the Council will produce a Supplementary Planning Document (SPD) setting out detailed guidance on the use and application of SUDS. The Council has submitted the SUDS Design Guide Version 1.0 as part of the appeal. Whilst I note the guidance is not identified as SPD, it still provides important information on surface water drainage systems and is helpful in applying Policy ER1 of the LP and I give it significant weight in framing my assessment.

12. In this context, the proposal is not supported by a detailed FRA and the evidence submitted in support of the basic FRA is limited to a series of preliminary investigative works including trials pits, infiltration testing, soakaway placement and associated hydraulic calculations¹, and does not provide details of a complete surface water drainage system. Furthermore, it would appear the preliminary details that have been provided do not comply with 4.1 of the SUDS Design Guide Version 1.0², which among other things requires the location of trial pits to mirror the location of soakaway features and be subjected to three tests at each location.
13. Whilst these preliminary details and the basic FRA are intended by the appellants to underpin the full details of a complete surface water drainage system at reserved matters, for the reasons given in relation to Policy ER1 of the LP and the CDA, such an approach is not appropriate in this case. Further evidence is required in the form of a detailed FRA in accordance with the SUDS Design Guide Version 1.0, which among other things should include the full details of a complete surface water drainage system with hydraulic modelling demonstrating that it is compliant with the 1 in 100 year storm event plus climate change.
14. For example, as the Council's drainage engineer states, it should include infiltration testing in accordance with BRE365 and at the location of each soakaway, it should also provide, even on an indicative basis, the evidence that is missing under the proposal in this case, including manhole cover levels, invert levels, pipe diameters, pipe gradients, pipe numbering used in the hydraulic modelling and details of the impermeable areas discharging to each pipe length. Without this evidence it cannot be demonstrated that the proposal would be safe for its lifetime and not increase flood risk elsewhere.
15. The appellants suggest that it is not possible to provide more detail at this stage because of interdependencies with other aspects of the proposal that are submitted in outline. However, while I note this, it is still necessary for an outline application to demonstrate that it can be delivered in compliance with the development plan. More details, even if assessed indicatively, are necessary for a scheme of this scale in such a location. If such an approach is not possible it may question whether an outline approach is appropriate. Nonetheless, it is clear that more details need to be provided at this stage in order to sufficiently address flood risk. This is irrespective of a Section 104 Agreement, which would be a subsequent process and not a substitute for evidence addressing the planning merits of the case.
16. In considering the above, I am mindful of Paragraph 55 of the National Planning Policy Framework (the Framework), and the appellants' contention that a planning condition would address the Council's concerns. However, it is clear that because of Policy ER1 of the LP, the CDA designation, the scale of development and the limited details available, I am unable to be confident that a planning condition would be effective in making the development acceptable in terms of flood risk.

¹ which the appellants argue is based on a 1 in 100 storm event plus climate change.

² or requirements of BRE365 referenced therein

17. The appellants cite an example of another application³, contending that the Council allowed intrusive ground testing to be undertaken at the reserved matters stage in a similar manner to what is being proposed in this case. It is important to note that I do not have the full details in front of me to make a definitive judgement about the application's relevance.
18. However, from the limited details that are available it is unclear whether the outline element of that proposal may have been outside the CDA and therefore it may be that the requirements were considered in a different context. Consequently, it does not appear that the application is directly comparable to the proposal in this case, and I have given it limited weight in my assessment.
19. The appellants also cite an example of another appeal⁴, contending that the inspector approved the proposal subject to a planning condition requiring a detailed surface water drainage scheme. However, whilst I do not have the full details in front of me, it does not appear that the proposal was within the CDA or that it is directly comparable to the proposal in this case. Consequently, I have given it limited weight in my assessment.
20. Overall, there are insufficient details submitted to conclude the proposal is acceptable in relation to flood risk. Accordingly, there is conflict with Policies ER1 and ER2 of the LP. Among other things, these policies require sufficient details of surface water drainage within CDA designations. Due to its statutory nature, harm derived from conflict with the development plan on this issue should carry significant weight in the planning balance.

Loss of Employment Land

21. The site is located within a series of allocations comprising various spatial scales under Policies SS1⁵, SS2⁶ and SDT3⁷ of the LP. Even the most granular allocation and spatial scale provided under Policy SDT3 of the LP is not prescriptive in terms of how development should be spatially distributed, something identified by the appellants. Policies within the Torquay Neighbourhood Plan 2019 (NP), such as Policy TH6, are also consistent in this respect, and generally there is a policy expectation across the development plan that the delivery of these allocations should be led by more detailed masterplans.
22. In this context, the Torquay Gateway Masterplan was adopted as an SPD in December 2015 and takes in the site as part of the Edginswell Valley area of the wider Torquay Gateway allocation. It is consistent with the policy expectation of the LP and NP and given the status of an SPD and the consultation underpinning its adoption it should hold considerable importance when applying development plan policy and delivering the strategic allocation.

³ P/2020/1298

⁴ APP/X1165/W/20/3245011

⁵ Strategic Delivery Areas

⁶ Future Growth Areas

⁷ Torquay Gateway

23. The wording and supporting text of the aforementioned LP policies clearly envisage that such masterplans would come forward separately, whilst Policy TS2 of the NP and its supporting text clearly states that masterplans were prepared during the parallel-process of preparing the LP and the NP. Consequently, despite the appellants' contentions, I have no concerns about the timeframe associated with the preparation or adoption of the Torquay Gateway Masterplan SPD.
24. The Torquay Gateway Masterplan SPD identifies the site as employment land configured in a mix of B1⁸, B2 and B8. The proposal would deliver housing in place of the B2 and B8 employment land and so would conflict Torquay Gateway Masterplan SPD. This would lead to the loss of the bulk of employment land within the Edginswell Valley area of the wider Torquay Gateway and would undermine the balance of provision and strategic delivery of the allocation.
25. In considering the above, whilst the appellants may be correct in making the point that the LP and NP policies are not prescriptive in how development should be spatially distributed, it is clear that the policies need to be applied in the context of the Torquay Gateway Masterplan SPD, which is critical in delivering an integrated and well balanced strategic allocation.
26. The delivery of B1/E employment land would be in accordance with the Torquay Gateway Masterplan SPD but would not offset the loss of B2 and B8 employment land for housing land. This is because the loss of B2 and B8 employment land would represent a significant proportion of the overall amount of employment land within the Edginswell Valley area of the wider Torquay Gateway.
27. Furthermore, Torbay Development Agency has submitted evidence demonstrating that there is more demand for industrial development than office development. Whilst the appellants dispute this evidence, and irrespective of the weight to be given to the Torbay Economic Strategy 2022 to 2030, there is no countervailing demand analysis that would lead me to a different conclusion.
28. As such, whilst the appellants argue that the employment density benefits of office development would outstrip industrial development, even accepting this, I would attribute it limited weight in the context of limited demand. The proposal would not therefore comprise new development that contributes to the strategic employment land needs of Torquay.
29. The appellants contend that the Council has identified nearly two and a half times as much employment land than is needed, and that this is set out within the LP. There is no countervailing supply analysis from the Council that would lead me to a different conclusion.
30. Whilst the loss of employment land in broad terms might be mitigated by the availability of employment land elsewhere across the development plan as a whole, I would still have concerns about the loss of employment land in this particular location, and how such a loss would undermine the strategic allocation and balanced delivery of a significant amount of development.

⁸ now falling under Class E following amendments to the use classes order

31. Similarly, whilst there is a shortfall in housing land supply more broadly across the development plan areas as a whole, and the proposal would contribute to meeting this shortfall, both in terms of market and affordable housing, I would still have concerns about the balance of employment and housing land in this particular location.
32. Altogether, the proposal would result in an imbalance between employment land and housing land, and I am mindful of the consultation response from Torquay Neighbourhood Plan Forum, which reinforces this view insofar as the development of the allocation should come forward holistically and not in an ad hoc piecemeal fashion.
33. The appellants point out that the consultation response by Torquay Neighbourhood Plan Forum states that the masterplan requires updating to conform with the NP. For clarity, when read in the context of the consultation response as a whole, it is clear this statement is made in reference to the importance of demonstrating that the proposal could integrate with the wider allocation. It is not indicating that the spatial distribution of development within the Torquay Gateway Masterplan SPD is somehow inconsistent with the LP or NP.
34. For example, the proposed loss of employment land that would result from the proposal has not been accounted for elsewhere within the allocation by way of an update to the Torquay Gateway Masterplan SPD. In the absence of evidence demonstrating that the balance of demand for local land uses has changed⁹, any change in the balance of land uses within the allocation would require such an update. Therefore, it has not been demonstrated that the proposal would give rise to an integrated or well balanced approach to the delivery of the allocation.
35. The appellants argue that the NP examiner's report provides a material consideration to disregard the masterplan. Notwithstanding the fact I do not have the NP examiner's report in front of me, the appellants suggest Policies J1 and J2 of the submission version of the NP were determined to be highly restrictive policies that failed to have regard to Policy SDT3 of the LP, which did not impose restrictions on the spatial distribution of uses.
36. Whilst there is some flexibility in the broad terms of the LP allocation policies, which Policies J1 and J2 of the submission version of the NP did not embody, there is no evidence that the NP examiner's report directly considered the implications of the Torquay Gateway Masterplan SPD, or that there is some sort of inherent conflict in masterplanning the spatial distribution of uses to inform the application of development plan policies.
37. Indeed, the policy expectation within the development plan as a whole is that the allocation policies would be subject to a masterplan, which would naturally provide more detail on the spatial distribution of uses therein. Altogether, I maintain the view that the Torquay Gateway Masterplan SPD should hold considerable importance when applying development plan policy and delivering the strategic allocation.

⁹ or any other evidence of a similar nature indicating that the context within which the Torquay Gateway Masterplan SPD was originally prepared has changed significantly.

38. I acknowledge the appellants' points about consultation and other engagement during the preparation of the Torquay Gateway Masterplan SPD and the LP, including the absence of the site in the SHLAA process, among other things. However, it is not for me to revisit the preparation of these documents. Ultimately, they have been adopted and I have given them due weight.
39. Overall, the loss of employment land would not accord with the Torquay Gateway Masterplan SPD and would harm the delivery of the wider allocation. Therefore, it would not accord with Policies SS1, SS2, SS4, SS5 and SDT3 of the LP or Policies TJ1, TS2 and TH6 of the NP.
40. Among other things, these policies show broad locations in which the Council, community and landowners will work together, through neighbourhood planning and/or masterplanning, to identify in more detail the sites, scale of growth, infrastructure (including green infrastructure) and delivery mechanisms required to help deliver the LP. Due to its statutory nature, harm derived from conflict with the development plan on this issue should carry significant weight in the planning balance.
41. Policy SS3 of the LP was cited by the Council in their reason for refusal, but it principally embodies the Framework's Paragraph 11(d) tests, which I address later.

Location

42. The Council's evidence would suggest the site is on the limits of acceptable access to services, with a potential overreliance on private vehicle. However, among other things, I agree with the appellants in that the sustainable walking distances quoted in the Council's officer report are not referenced in the development plan or couched in any specific guidance. Indeed, it would appear that the most recent consultee response received in relation to accessibility raised no objection to the proposal.
43. The Council indicate that the distances have been taken from a neighbouring local planning authority, but it is not clear what context the neighbouring local planning authority adopted these distances or what specific guidance it was derived from. Consequently, and altogether, I give these distances limited weight in my assessment, and whilst the proposal may be on the limits of acceptable access to services I am not persuaded that the distances involved would necessarily be harmful overall in this particular case.
44. Notwithstanding, the site is located within the Torquay Gateway allocation under Policy SDT3 of the LP, where the spatial distribution of development is established by the Torquay Gateway Masterplan SPD. In this context, the land immediately north east of Moles Lane and adjacent to the site is allocated as a new growth area for housing that would come forward with a local centre and primary school. Therefore, even if the site was beyond the limits of acceptable access to services, and that this was deemed unacceptable despite improvements to walking, cycling and bus stop provision, the outlook would be one of acceptable access to services, albeit this would be dependent on delivery and phasing.

45. There are no persuasive arguments presented by the Council or other interested parties that the development horizon and delivery of the growth area and local centre would render the proposal premature or that it could not come forward in advance. Indeed, I have given considerable weight to the Torquay Gateway Masterplan SPD where the local centre is identified as the first phase of development within a wider phasing plan that supports the structured delivery of the Torquay Gateway allocation.
46. Whilst I note a planning application has not yet been forthcoming, it appears on the basis of the evidence before me that Cavanna Homes is actively working with the Council to bring the allocation forward. Altogether, this gives me further confidence that the proposal is in an acceptable location and not premature.
47. The scale of improvements to walking, cycling and bus stop provision are more geared towards mitigating the delivery of the proposal rather than being of a scale that would provide benefits for the wider area. As such, these aspects hold neutral weight in my assessment.
48. There is a degree of crossover in some of the parties' arguments when dealing with the main issues. For clarity, I have dealt with the balance of land uses within the wider allocation, and status of the Torquay Gateway Masterplan SPD under the main issue relating to the loss of employment land. This main issue has dealt principally with whether the location for housing is acceptable in relation to access to services.
49. Overall, the proposal would be in an acceptable location in relation to access to services, and insofar as they relate to this main issue, would comply with Policies SS1, SS2 and SS11 of the LP or Policies TS1, TS2, TH6, TTR1, TTR2 and THW3 of the NP. Among other things, these policies seek to assess whether people would have access to local services to meet their day-to-day needs. The proposal would comply with the development plan on this main issue, and compliance equates to neutral weight in the planning balance.
50. The Council cite Policy TH3 of the NP in their reason for refusal. However, this relates to the provision of affordable housing and community facilities, and it is not necessary to engage it under this main issue. Similarly, the Council cite Policies SS4 and SS5 of the LP and Policy TJ1 of the NP in their reason for refusal, which are addressed under the main issue dealing with loss of employment land.
51. Policy SS3 of the LP was cited by the Council in their reason for refusal, but it principally embodies the Framework's Paragraph 11(d) tests, which I address later.

Other Matters

52. The site is within the zone of influence of South Hams SAC but as I am dismissing the appeal for other reasons it is not necessary for me to make a finding on the likely significant effects under the Habitats Regulations.
53. I note the emerging options within the Regulation 18 Report entitled Housing Update: Growth Options Consultation for the Local Plan Review referenced by the appellant. However, the Local Plan Review is at a very early stage in the preparation process where there remains uncertainty that it will be submitted for examination in the same form. As such, I have given it limited weight in my decision.
54. The S106 secures planning obligations for access and footway improvements, education, health, waste, transport, sports, and recreation contributions, among other things. These would provide mitigation towards additional infrastructure demands and be neutral in the planning balance and therefore it is not necessary to make a definitive finding on them.
55. The S106 also secures planning obligations for affordable housing, and these are not disputed. This would provide a benefit to be weighed in the planning balance and due to the shortfall in housing land supply would carry significant weight.
56. Whilst acknowledging the Council's comments and the appellants' response in relation to possible alternative proposals, it would not be appropriate for me to speculate on the acceptability of these because, in the first instance, it would be a matter for the Council to consider under a separate application in the event one was forthcoming.
57. The appellants contend the Council supported the principle of housing on the site through meetings before the application was determined and that they have worked positively over the course of several years. However, any advice given by officers would have been without prejudice to the Council's ultimate decision and I give these factors limited weight under the appeal.

Planning Balance

58. There is conflict with the development plan in relation to flood risk and loss of employment land. Whilst I have found the proposal would be in an acceptable location, this is a neutral matter and there would be conflict with the development plan as a whole.
59. There is a shortfall in housing land supply, which is not disputed. Accordingly, whilst I have already considered these matters insofar as they relate to the loss of employment land, the shortfall would trigger Paragraph 11(d) of the Framework because the policies most important for determination are out of date.
60. Whilst I accept additional market and affordable housing may carry significant weight¹⁰ in favour of the proposal and whilst being mindful of other potential benefits¹¹, flood risk represents a clear reason for refusing the development proposed in accordance with Paragraph 11(d)(i) of the Framework and Footnote 7 therein.

¹⁰ in accordance with the appeal decision cited by the appellant APP/X1165/W/20/3245011

¹¹ including possible economic benefits derived from construction, among others.

61. Whilst the Council has not explicitly engaged Paragraph 11 (d)(i) and Footnote 7, something affirmed by the appellants, it is implicit in the Council's conclusions on flood risk that such provisions would be engaged in the planning balance.
62. As a result of this assessment, it is not necessary to consider Paragraph 11(d)(ii) of the Framework, and the presumption in favour of sustainable development does not therefore apply in this case.
63. Overall, the proposal would conflict with the development plan as a whole and there are no material considerations indicating that a decision should be taken otherwise than in accordance with it.

Conclusion

64. For the reasons given, the appeal is dismissed.

Liam Page

INSPECTOR