



Appeal Decision

Site visit made on 3 January 2023

by K Townend BSc MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 08 March 2023

Appeal Ref: APP/R0660/W/22/3306116

Wood Farm, Lodge Lane, Hatherton, Cheshire CW5 7LD

- 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 and Mrs Clapp against Cheshire East Council.
 - The application Ref 21/5617N, is dated 3 November 2021.
 - The development proposed is demolition of existing dwelling house and outbuildings to enable site reconfiguration and erection of replacement dwelling.
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Decision

1. The appeal is dismissed and planning permission for the demolition of existing dwelling house and outbuildings, to enable site reconfiguration, and the erection of a replacement dwelling is refused.

Preliminary Matters

2. The appeal is submitted against the failure of the Council to determine the planning application within the statutory timescale and agreed extension of time. The Council have advised that, had it been able to do so, it would have refused planning permission for the two reasons set out in its statement. I have had regard to this in so far as it provides clarity.
3. As part of the appeal, the appellants have submitted amended plans (P-100 rev C, P-110 rev D, P-111 rev C, P-112 rev D and P-210 rev D) and a Bat Emergence Survey (Rachel Hacking Ecology, dated May/ June 2022). In summary, the amended plans show a slight reposition and an increase in the footprint of, and the addition of a pitched roof above, the proposed detached outbuilding/ store. The amendments are to provide space for a replacement bat roost as identified as mitigation required within the Bat Emergence Survey.
4. Annexe M of the Procedural Guide – Planning Appeals – England advises that if an applicant thinks that amending their application proposals would overcome the Council's reasons for refusal, they should normally make a fresh planning application. The appeal process should not be used to evolve a scheme. In considering whether to accept the amended plans and additional information, I have had regard to the 'Wheatcroft Principles'¹. If I were to accept the amended plans and additional information, would my doing so deprive those who should have been consulted over the change in the development the opportunity of such consultation.

¹ [1] Bernard Wheatcroft Ltd v Secretary of State for the Environment [JPL, 1982, P37]

5. The Council, and their Ecology specialist, commented on the amended plans and additional information in its response to the appeal. However, the amended plans and additional information result in a material change to the nature of the proposal over what was considered at the planning application stage. Neither the amended plans nor the additional information has been part of the public and statutory consultation process.
6. The appellants have made me aware of a new planning application for the same development being considered in this appeal². The appellants assert that, as the changes are included in that application, the interested parties have had an opportunity to comment.
7. In this case, the interested parties are not aware that this appeal includes the changes and would therefore be prejudiced. Consequently, I have not accepted the amended plans nor the Bat Emergence Survey for the purposes of this appeal. In the interests of natural justice, I have determined the appeal on the basis of the plans submitted to the Council. Moreover, the consideration of any alternative scheme is a future matter for the main parties to consider separate from this appeal.
8. The Cheshire East Local Plan Site Allocations and Development Policies Document (SADPD) was adopted by the Council on 14 December 2022. This appeal was received before the adoption of the SADPD and as such the policy, at that time was emerging policy. However, both main parties have referred to it in their evidence and the appellants have acknowledged the adoption of the SADPD. I have therefore given full weight to the SADPD in my decision.
9. The appeal site is located within the Wybunbury Combined Parishes Neighbourhood Plan (NP) area. The Neighbourhood Plan was made on 6 April 2020. In accordance with paragraph 30 of the National Planning Policy Framework (the Framework), I have therefore had regard to the neighbourhood plan in this appeal decision.

Main Issues

10. The main issues are the effect of the proposed development on:
 - The character and appearance of the area;
 - The setting of heritage assets; and
 - Biodiversity, in particular bats.

Reasons

Character and appearance

11. The appeal site lies within the open countryside and consists of the donor property, its garden and other land within the appellants' ownership. The existing dwelling has been extended over time and the appellants have submitted the planning history to evidence this. However, the dwelling retains a rural appearance and currently provides a positive contribution to the character and appearance of the area.
12. The appeal proposal is to replace the existing dwelling with a new dwelling of contemporary design, orientated to face the adjacent woodland and

² Council reference 22/4599N

substantially different in terms of layout, appearance, height, footprint, floorspace and massing. Thus, the scale and design would not reflect the rural appearance of the existing dwelling.

13. Policy RUR13 of the SADPD allows for replacement dwellings in areas defined as open countryside, where the new building is not materially larger than the buildings they replace. In considering whether a replacement is materially larger the policy provides the factors which will be taken into account; an indicative threshold of 10% increase in size; and accepts that outbuildings in the curtilage can be included in the assessment.
14. The appeal proposal would be more than 10% larger than the existing dwelling and outbuildings due to the increase in height, footprint and floorspace. It would also extend noticeably beyond the footprint of the existing dwelling. The proposal would, therefore, be materially larger than the buildings it proposes to replace and would be harmful to the character and appearance of the area.
15. The proposed footprint of the replacement dwelling would also extend beyond the land currently used as garden associated with the existing dwelling. The appellants contend that the two parcels of land to the side and rear of the property are part of the domestic curtilage. However, the evidence before me shows the two parcels as grass, albeit mowed, and are fenced off from the land immediately around the dwelling with post and rail fencing. As such, these two parcels of land have the appearance of paddocks rather than part of any of the domestic gardens associated with the property.
16. The appellants have commented that the curtilage has been reduced, to remove the two paddocks. However, this appears to only be in relation to the application for the certificate of lawfulness for the outbuilding³. The red edge of the appeal site, and the curtilage of the proposed dwelling, would still include the two paddocks.
17. The Council did not include Policy RUR12 of the SADPD in their suggested reasons for refusal but have referred to it in their evidence. The encroachment into this land results in the change of use of land to domestic land, which does not meet any of the exceptions set out within Policy RUR12. The encroachment of the existing domestic arrangement into the countryside would alter the character of the land from paddocks to land with built development and formal gardens, with associated ornamental planting and other domestic paraphernalia. This would harm the character and appearance of the area and result in further loss of the open appearance of the existing site.
18. SADPD Policy RUR13 also requires the replacement dwelling to not have a materially greater impact on the rural character of the countryside by virtue of prominence, scale, bulk or visual intrusion. The existing dwelling is set back from Lodge Lane along a tree-lined driveway. It fronts Lodge Lane and is clearly visible from the road and the footpath which runs around the edge of the site. The proposed replacement dwelling would also be visible from Lodge Lane and prominent in views from the adjacent footpath. Due to the layout and appearance and the increased height, footprint, floorspace and massing the replacement dwelling would be more prominent and, therefore, have a materially greater impact on the rural character of the countryside.

³ Council reference 22/3419N

19. The appellants have referred to an appeal⁴ on the land between Wood Farm and Lodge Lane which they consider would change the context of the appeal site and which, they consider, allowed dwellings of a contemporary design. The appeal granted outline consent for three 5-bed houses, and the design of these dwellings is reserved for later approval. As such I cannot be certain that the design of that appeal scheme would not change.
20. I acknowledged that the construction of three dwellings on the land between Wood Farm and Lodge Lane would add three further houses to the immediate area and this would change the views of the current appeal site from Lodge Lane. However, they would not change the views from the footpath. In any event, I have dealt with the current appeal on the basis of the evidence before me.
21. The appellants have also referenced the submitted Landscape and Visual Impact Assessment (LVIA) which demonstrated that the site is able to accommodate the development without undue harm to landscape character or visual amenity. However, the LVIA is predicated on the replacement dwelling being an improvement on the existing dwelling. I have already concluded that the massing and appearance of the replacement dwelling is harmful. For this reason, I find harm to the character which goes beyond the landscape harm assessed within the LVIA.
22. The appellants contend that there is a potential fallback position of constructing a large outbuilding to provide a swimming pool, gym and other facilities which shows an intention to improve the facilities at the property. The appellants assert that this fallback should be taken into account in considering the size of the replacement dwelling, and whether it is materially larger than the existing. I have had regard to the cited caselaw⁵.
23. Since the submission of the appeal the Council have not granted consent for the Lawful Development Certificate for the erection of the same outbuilding. Considered under Schedule 2, Part 1, Class E of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended. From the evidence, it would appear that the certificate was not granted on the grounds that the size of the proposed outbuilding, and the size and scale of the facilities within, are not reasonably required for purposes incidental to the enjoyment of the dwellinghouse. Moreover, no justification was provided to show that the facilities were required.
24. The appellants have drawn my attention to a new certificate application submitted for a similar, albeit slightly smaller, outbuilding⁶. The Council are yet to determine this application, or the further amended scheme for the replacement dwelling. Nevertheless, neither of these proposals are before me, and the lawful development certificate is outside of my jurisdiction in this s78 appeal. Accordingly, the current position is that the lawful development certificate has not been granted. This leads me to conclude that, currently, the development of the outbuilding could not be delivered, and there is no "real prospect" of the fallback position advanced being implemented. I have therefore given this little weight in coming to my conclusions.

⁴ APP/R0660/W/19/3221564

⁵ Mansell v Tonbridge and Malling BC & others [2017] EWCA Civ 1314

⁶ Council reference 22/4747N

25. For the reasons given above I conclude that the proposed development would be harmful to the character and appearance of the area. The appeal scheme is therefore contrary to Policies PG6, SD1, SD2, SE1, SE4 and SE7 of the Cheshire East Council Local Plan Strategy, 2017 (LP) and Policies GEN1, ENV3, RUR12 and RUR13 of the SADPD. These policies, taken together, seek to ensure that replacement dwellings are not materially larger than the building they replace and have no materially greater impact on the rural character of the countryside; are of an appropriate scale, height, layout and massing to respect and enhance the countryside; seek to resist extensions of residential gardens; and protect and enhance the natural and built environment.
26. Furthermore, the appeal proposal would be contrary to Policies H4 and E5 of the NP, which require new development to respect and enhance the countryside; respond and integrate with local surroundings; respond positively to local character and maintain local vernacular and sense of place, amongst other things. Moreover, the development would also be contrary to Section 12 of the Framework and the aims of achieving well-designed places through good design which is sympathetic to local character.

Effect on heritage assets

27. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Act'), requires the decision maker, in considering whether to grant planning permission for development which affects a listed building or its setting, to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest. The designated heritage asset in this case is Hatherton Lodge, a Grade II Listed Building.
28. The setting in which Hatherton Lodge is currently experienced is contained. This contained setting, along with the distances between the appeal site and the listed building and the intervening landscaping, limit the opportunity for views of the appeal site and the listed building together. As such, the proposal would preserve the way the setting of the listed building is experienced and therefore preserve the significance of the listed building. I am also mindful of the nearby appeal decision⁷, for the field between Wood Farm and Hatherton Lodge, in which the Inspector found that there would be no harm to the setting of the listed building. The current proposal is further from the listed building than that appeal scheme.
29. Therefore, I find no harm to the setting of the designated heritage asset and that the appeal proposal would therefore preserve the setting of the listed building. I have had regard to the Act as detailed above.
30. I acknowledge that there is a disagreement between the main parties as to whether the existing dwelling is a non-designated heritage asset or not. The site is shown on the tithe map and the appellants accept that it is likely that it dates back to the 19th century. The appellants contend that, due to the modernisation works carried out to the building it is not worthy of retention. However, even with the evidence provided in the appellants' statement and the additional photographs submitted, the evidence before me on this point is inconclusive.

⁷ APP/R0660/W/19/3221564

31. The Framework requires the significance of any heritage asset to be described, proportionally, to enable the impact of the proposal to be understood. As such, on the basis of the evidence before me, I am unable to conclude that the existing dwelling is not a non-designated heritage asset, and that the total loss of the property would not impact on the historic significance of it.
32. For the reasons given above, I have found no harm to the setting and significance of the listed building. However, there is insufficient evidence to show that the existing dwelling is not a non-designated heritage asset, and that the proposal would not result in harm to the significance of it. As such the proposal would be contrary to Policies SD1, SE1 and SE7 of the LP or Policies HER1 or HER4 of the SADPD, which, amongst other matters, seek to ensure development protects and enhances the historic environment.
33. The proposal would also be contrary to the advice in Section 16 of the Framework which requires the significance of any heritage assets affected to be described any assets to be lost to be recorded; sets out the desirability of sustaining and enhancing heritage assets; and requires a balanced judgement to be had when considering the loss of non-designated heritage assets.

Biodiversity

34. All species of bats are protected under the Conservation of Habitats and Species Regulations 2017 (as amended) (the Habitats Regulations), and the Wildlife and Countryside Act 1981, and are therefore European Protected Species (EPS). The regulations impose a duty to consider whether there is a reasonable likelihood of EPS being present and affected. Circular 06/2005⁸ advises that the presence of a protected species is a material consideration when a development proposal is being considered, which would be likely to result in harm to the species or its habitat.
35. The Extended Phase 1 Habitats Survey, submitted with the planning application, recorded bat and bird activity on the site. The Bat Emergence Survey submitted recorded evidence of a bat roost within the loft of the existing dwelling. I have not accepted the revised plans nor the Bat Emergence Survey. However, even without this additional evidence, there is a likelihood of protected species being present at the appeal site.
36. Impact on the existing bat roost would be unavoidable due to the proposal including the demolition of the existing dwelling. The Council's reason for refusal notes that the existing roost is of substantial nature conservation value. The Council's Ecologist has advised that the roost should be retained in-situ or incorporated into the new dwelling. Both parties agree that an EPS licence would be required. Decisions about whether a licence can be granted are the responsibility of Natural England and are under a separate process.
37. Nevertheless, there is a duty under Regulation 9(3) of the Habitats Regulations, and paragraph 116 of Circular 06/2005, that, when effects on EPS are being considered, decision makers should have regard to the tests set in the Habitat Regulations that are used when licences are being determined. This includes the three derogation tests.

⁸ Biodiversity and Geological Conservation – Statutory Obligations and their impact within the Planning System, 2005

38. However, as I have found the proposal to be unacceptable for other reasons, it is not necessary for me to undertake the three derogation tests, nor consider this matter further. Moreover, on the basis that the scheme, as submitted to the Council, does not include the Bat Emergence Survey nor the replacement bat roost, the proposal would result in significant harm to biodiversity.
39. For the reasons given above, I cannot be satisfied that the development proposals would not lead to an offence under the Habitats Regulations. As such, the proposal would not protect and safeguard biodiversity, having particular regard to bats.
40. The appeal scheme is therefore contrary to Policies SD1, SE3 and SE4 of the LP, Policy ENV2 of the SADPD and Policy E3 of the NP which, taken together, aim to protect and enhance the natural environment and ecological qualities of an area; deliver overall net gain; requires the submission of sufficient ecological information; and requires the benefits of a development, which is likely to have a significant adverse impact on priority species, to outweigh the impact. It would also be at odds with the Framework, which sets out that if significant harm to biodiversity resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.

Other Matters

41. The main parties agree that the proposal would not adversely impact on trees or the living conditions of neighbouring occupiers. Furthermore, the potential for archaeology and the provision of drainage can be dealt with through appropriately worded conditions. However, these matters are neutral in the consideration of the appeal.
42. I recognise the appeal proposal would have economic benefit during the construction work and through the payment of Community Infrastructure Levy. However, these benefits would be limited as the proposal does not result in any additional housing. I also recognise the environmental benefit of a more energy efficient dwelling. However, the proposal is not the only design solution to achieving this, or to address the existing layout and internal disjointed relationship the appellants suggest. Moreover, these benefits do not outweigh the policy conflicts I have identified.

Conclusion

43. In conclusion I have found that the proposed replacement dwelling would be harmful to the character and appearance of the area and, in the absence of sufficient information, would impact on the significance of a non-designated heritage asset. Furthermore, the appeal proposal would not protect and safeguard biodiversity. The proposal therefore conflicts with the development plan, including the made NP, and the Framework, taken as a whole. There are no other material considerations that would indicate that the proposed development should be determined other than in accordance with the development plan. Therefore, I conclude that the appeal should be dismissed.

K Townend

INSPECTOR