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## Appeal Decision

Site visit made on 17 August 2023

**by Stephen Normington BSc DipTP MRICS MRTPI FIQ FIHE**

**an Inspector appointed by the Secretary of State**

**Decision date: 3 October 2023**

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**Appeal Ref: APP/E2340/W/23/3314458**

**Land to the west of Brookside Garage, Dean Street, Trawden**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with a condition subject to which a previous planning permission was granted.
  - The appeal is made by Mr Pin Zhao, Trawden Water Ltd against the decision of Pendle Borough Council.
  - The application Ref 22/0242/VAR, dated 8 April 2022, was refused by notice dated 15 September 2022.
  - The application sought planning permission for the demolition of outbuildings/sheds and erection of 20 No. 3 & 4 bed properties comprising 3 terraced, 14 semi-detached and 3 detached dwellinghouses with associated parking and vehicular access from Dean Street and Skipton Road without complying with a condition attached to planning permission Ref 20/0865/FUL, dated 26 October 2021.
  - The condition in dispute is No. 18 which states that: No part of the development shall commence unless and until a Planning Obligation pursuant to section 106 of the Town & Country Planning Act, 1990 (or any subsequent provision equivalent to that section) has been made with the Local Planning Authority. The said obligation shall provide for four affordable dwellings, an education contribution for three secondary school places and an off-site open space contribution.
  - The reason given for the condition is: To contribute towards the identified need for affordable housing provision in the area, to offset the impact of the development in education services and to ensure adequate public open space provision.
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### Decision

1. The appeal is allowed and planning permission is granted for the demolition of outbuildings/sheds and erection of 20 No. 3 & 4 bed properties comprising 3 terraced, 14 semi-detached and 3 detached dwellinghouses with associated parking and vehicular access from Dean Street and Skipton Road at Land to the west of Brookside Garage, Dean Street, Trawden in accordance with the application Ref 22/0242/VAR, without compliance with condition No 18 previously imposed on planning permission Ref 20/0865/FUL dated 26 October 2021, subject to the conditions set out in the attached schedule.

### Application for costs

2. An application for costs was made by Mr Pin Zhao, Trawden Water Ltd against Pendle Borough Council. This application is the subject of a separate Decision.

## **Main Issue**

3. Government guidance is clear that under Section 73 I must consider only the condition in question, it is not a complete re-consideration of the original permission. The matter in dispute relates to the provision of four affordable dwellings. The Appellant does not dispute other aspects of condition No. 18 which relate to an education contribution and an off-site open space contribution.
4. Consequently, the main issue is whether the condition is reasonable or necessary in the interests of the provision of affordable housing.

## **Reasons**

5. The appeal relates to the site of an approved housing development for 20 houses at Dean Street, Trawden. In support of the application to vary the condition the Appellant submitted a viability appraisal which concluded that the cost of delivering the affordable housing provision would result in the development not being viable. This was, in part due, to the constraints of developing this steeply sloping site, increases in infrastructure cost, build costs and borrowing rates since the original application was determined. These factors indicate a consequently low profit margin before the cost of affordable housing provision of 6.43%. The Appellant contends that, on the basis of the conclusions of the viability appraisal, the requirement for any affordable housing would result in the development not being financially viable.
6. Paragraph 58 of the National Planning Policy Framework (the Framework) provides the basis for the submission of viability appraisals to demonstrate whether developer required contributions would result in a development not being viable. Furthermore, the Planning Practice Guidance (PPG) recognises that 15-20% of gross development value (GDV) may be considered a suitable return (profit) to developers.
7. Policy LIV4 of the Local Plan for Pendle Core Strategy 2011 – 2030 (2015) (Local Plan) sets out the basis for the provision of affordable housing in development proposals. Amongst other things, the policy identifies that 'where the relevant target cannot be met a financial viability assessment should be provided to allow the Council to negotiate with the applicant and adjust the amount of affordable housing accordingly'.
8. The submitted viability assessment was assessed by a property services company on behalf of the Council who found that 'its conclusion is reasonable'. Furthermore, the evidence submitted in this case also suggests that the Council's consultants also found that if there was a subsequent increase in property prices then the scheme would still remain unviable.
9. The Council's Officer Report to The Colne and District Committee (Planning Committee) concluded that 'it has been robustly demonstrated that the affordable housing requirement would jeopardise the viability of the development'. No other contrary technical evidence has been provided by the Council to suggest that the Appellant's financial viability assessment may be incorrect.
10. I am satisfied that the viability evidence provided by the Appellant is robust and follows a recognised format provided by the Royal Institution of Chartered Surveyors 'Assessing Viability in Planning under the NPPF 2019'. Taking the

above factors into account, it is clear that the affordable housing requirement, as set out in Condition No. 18, would render the scheme unviable. Therefore, the removal of the affordable housing element from the condition would cause no inherent conflict or inconsistency with the 'operative part of the original planning permission' and would not conflict with the provisions of Policy LIV4 of the Local Plan.

### **Planning Obligation**

11. A completed and signed Unilateral Undertaking (UU) is submitted as part of the appeal, dated 28 July 2023. The terms set out in the UU secure the planning obligations that are relevant to the development as amended, including a financial contribution to open space provision and education contribution. The Council has been given the opportunity to comment on the UU but has not provided a formal response within the timeframe offered.
12. I am satisfied that the UU is necessary to make the development acceptable, is directly related to the development and is fairly and reasonably related in scale and kind to the development. Therefore, it would accord with the three tests set out in paragraph 57 of the Framework and Regulation 122(2) of the Community Infrastructure Regulations 2010. I have therefore taken it into account in my consideration of this appeal.

### **Other matters**

13. I have taken into account the concerns of Trawden Forest Parish Council submitted to the Council in response to the planning application consultation. In particular, that the developer should have known the viability of the proposal when the original application was made and the pressing need for affordable housing in the village. Whilst I have some sympathy with these concerns, it is clear that in recent years, since the original application was submitted, there has been a significant increase in build and other costs. The viability evidence presented in this appeal is compelling and demonstrates that the delivery of the scheme, and the contribution that this would make to market housing provision in the borough, can only be achieved without the affordable housing requirement.

### **Conditions**

14. As this appeal relates to an application under Section 73, I am only considering the disputed condition. The advice contained within the PPG makes it clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission. In allowing this appeal, I have considered the conditions imposed on the 2021 (Ref: 20/0865/FUL) planning permission.
15. I have no information before me whether any of the original planning conditions have been discharged or the extent to which development may be proceeding, or indeed whether any conditions are being breached. Therefore, I shall impose all those that I consider remain relevant and meet the advice contained within paragraph 56 of the Framework and the guidance contained in the section on 'Use of Planning Conditions' in the PPG. In the event that some have been discharged, that is a matter which can be addressed by the parties.
16. Planning permission cannot be granted in this case to extend the time limit within which the development must be started. Consequently, I have imposed

a condition requiring the development to commence within 3 years of the date of the original permission (Condition No. 1). I have imposed a condition (No. 2) relating to the approved plans in the interests of certainty.

17. In order to protect the character and appearance of the Trawden Forest Conservation Area and the surrounding area, I have imposed conditions requiring the provision of samples of external materials, details of doors, windows, finishes and reveals and details of landscaping (Nos. 3, 4 and 14). In the interests of ecological enhancement and to ensure that protected species are not harmed, a condition is necessary requiring the development to proceed in accordance with the Phase 1 Habitat and Bat Survey and providing for the submission of details of ecological enhancement (No. 5).
18. To protect the living conditions of nearby residents and in the interests of highway safety, conditions are necessary requiring the submission and implementation of a construction method statement and the provision of obscure glazing to identified windows (Nos. 6 and 16).
19. Also, in the interests of highway safety, conditions are necessary requiring details of the site access and off-site highway works, details of the management and maintenance of the estate roads, the submission of engineering design details, provisions to ensure that the estate roads are constructed to at least base course level and car parking provision prior to first occupation of any dwelling (Nos. 7, 8, 9, 10, 11 and 23).
20. To encourage sustainable transport, conditions are necessary requiring the provision of cycle storage facilities for each dwelling and the provision of electric vehicle charging points (Nos. 12 and 13). In order to ensure that the development can be safely occupied and to protect the environment, a condition is necessary requiring the investigation and remediation of any contamination that may be encountered during the construction of the development (No. 15).
21. Paragraph 54 of the Framework states that planning conditions should not be used to restrict national Permitted Development rights unless there is clear justification to do so. However, in the interests of conserving the character and appearance of the conservation area I consider that condition No. 17 is reasonable and necessary.
22. Notwithstanding the provisions of the UU submitted by the Appellant in this appeal, I have reimposed the relevant parts of condition No. 18 in order to mitigate the impact of the proposed development on educational services and to ensure adequate public space provision. Finally, conditions are necessary to ensure that the development is not at risk from flooding and does not cause either increased flood risk on site or to adjacent land (conditions Nos. 19, 20, 21 and 22).

## **Conclusion**

23. For the above reasons, taking into account the development plan as a whole, based on the evidence before me and all other matters raised, I conclude that the appeal should be allowed.

*Stephen Normington*

INSPECTOR

### **SCHEDULE OF CONDITIONS**

- 1) The proposed development hereby permitted shall be begun before the expiration of three years from 26 October 2021.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: NN751-PL-101, NN751-PL-201 Rev D, NN751-PL-202, NN751-PL-203 Rev B, NN751-PL-204 Rev B, NN751-PL-205 Rev B, NN751-PL-206, NN751-PL-207 Rev A, NN751-PL-208, NN751-PL-209 Rev A, NN751-PL-210 Rev C, NN751-PL-211 Rev C, NN751-PL-212 Rev A, NN751-PL-213 Rev D, NN751-PL-214 Rev A, NN751-PL-215 Rev A, NN751-PL-216, NN751-PL-218 Rev A, NN751-PL-219 Rev A, NN751-PL-220 Rev A, NN751-PL-221 Rev A, NN751-PL-223, NN751-PL-224.
- 3) Prior to the commencement of above ground works involved in the erection of the external walls of the development hereby approved samples of the materials of the external walls, retaining walls and roofs of the development shall have been submitted to and approved in writing by the Local Planning Authority. The development shall thereafter be carried out in strict accordance with the approved details.
- 4) Notwithstanding any indication on the submitted plans and application forms, UPVC fenestration materials shall not be used. Prior to the installation of windows and doors, details of the materials, finishes and design and reveals of the windows and doors shall have been submitted to and approved in writing by the Local Planning Authority. The windows and doors shall be installed and thereafter at all times be maintained in accordance with the approved details.
- 5) The development shall be carried out in strict accordance with the recommendations of the submitted Extended Phase 1 Habitat Survey & Daytime Bat Survey dated June 2021. Prior to the occupation of the first dwelling a scheme of ecological enhancement shall have been submitted to and approved in writing by the Local Planning Authority and the development shall thereafter be carried out in strict accordance with the approved scheme.
- 6) No development shall take place, including any works of demolition, until a construction method statement has been submitted to and approved in writing by the Local Planning Authority. The approved statement shall be adhered to throughout the construction period. It shall provide for:
  - i) The parking of vehicles of site operatives and visitors;
  - ii) The loading and unloading of plant and materials;
  - iii) The storage of plant and materials used in constructing the development;
  - iv) The erection and maintenance of security hoarding;
  - v) Wheel washing facilities;
  - vi) Measures to control the emission of dust and dirt during construction;
  - vii) A scheme for recycling/disposing of waste resulting from demolition and construction works;
  - viii) Details of working hours;

- ix) Routing of delivery vehicles to/from site.
- 7) Within 3 months of commencement a scheme for the site access and off-site highway works shall be submitted to and approved by the Local Planning Authority. The works shall include the following and be implemented prior to the first occupation of any dwelling.
  - a. Skipton Road vehicular crossing to plots b. Upgrade to bus stops on Skipton Road (references NB 2500LAA00178 & SB 2500LAA16002).
- 8) Within 3 months of commencement, details of the proposed arrangements for future management and maintenance of the estate road within the development shall be submitted to and approved by the Local Planning Authority. The streets shall thereafter be maintained in accordance with the approved management and maintenance details until such time as an agreement has been entered into with the Highway Authority or a private management and maintenance company has been established.
- 9) Within 3 months of commencement full engineering, drainage, street lighting and constructional details to adoptable standards (LCC specification) of the internal estate roads shall have been submitted to and approved in writing by the Local Planning Authority. The development shall, thereafter, be constructed in accordance with the approved details, unless otherwise agreed in writing with the Local Planning Authority.
- 10) The internal estate roads shall be constructed in accordance with the approved engineering details and to at least base course level prior to first occupation of any dwelling, unless otherwise agreed in writing with the Local Planning Authority.
- 11) Prior to the occupation of each dwelling the driveways and parking areas serving that dwelling shall be constructed in a bound porous material and made available for use and thereafter maintained for that purpose for as long as the development is occupied.
- 12) Prior to the occupation of each dwelling the dwelling shall have a secure cycle storage provided at a ratio of 2 cycle spaces per dwelling.
- 13) Prior to the occupation of each dwelling the dwelling shall have an electric vehicle charging point installed. Charge points must have a minimum power rating output of 7kW, be fitted with a universal socket that can charge all types of electric vehicle currently.
- 14) Within three months of the commencement of the development a detailed landscaping scheme shall have been submitted to and approved in writing by the Local Planning Authority. The scheme shall include the following:
  - a. the exact location and species of all existing trees and other planting to be retained;
  - b. all proposals for new planting and turfing indicating the location, arrangement, species, sizes, specifications, numbers and planting densities;
  - c. an outline specification for ground preparation;
  - d. all proposed boundary treatments with supporting elevations and construction details;

- e. all proposed hard landscape elements and pavings, including layout, materials and colours;
- f. the proposed arrangements and specifications for initial establishment maintenance and long-term maintenance of all planted and/or turfed areas.

The approved scheme shall be implemented in its entirety within the first planting season following the commencement of the use of the development. Any tree or other planting that is lost, felled, removed, uprooted, dead, dying or diseased, or is substantially damaged within a period of five years thereafter shall be replaced with a specimen of similar species and size, during the first available planting season following the date of loss or damage.

- 15) The development shall not be commenced unless and until a method statement which sets out in detail the method, standards and timing for the investigation and subsequent remediation of any contamination which may be present on site has been submitted to and approved in writing by the Local Planning Authority. The method statement shall detail how:
- a) an investigation and assessment to identify the types, nature and extent of land contamination affecting the application site together with the risks to receptors and potential for migration within and beyond the site will be carried out by an appropriately qualified geotechnical professional (in accordance with a methodology for investigations and assessments which shall comply with BS 10175:2001) will be carried out and the method of reporting this to the Local Planning Authority; and
  - b) a comprehensive remediation scheme which shall include an implementation timetable, details of future monitoring and a verification methodology (which shall include a sampling and analysis programme to confirm the adequacy of land decontamination) will be submitted to and approved in writing by the Local Planning Authority.

All agreed remediation measures shall thereafter be carried out in accordance with the approved implementation timetable under the supervision of a geotechnical professional and shall be completed in full accordance with the agreed measures and timings, unless otherwise agreed in writing by the Local Planning Authority.

In addition, prior to commencing construction of any building, the developer shall first submit to, and obtain written approval from the Local Planning Authority, a report to confirm that all the agreed remediation measures have been carried out fully in accordance with the agreed details, providing results of the verification programme of post-remediation sampling and monitoring and including future monitoring proposals for the site.

- 16) The first floor front (west) elevation window of plots 2 and the southmost first floor front (west) elevation window of plot 3 shall at all times be fitted with obscure glazing to at least level 4 or above, unless otherwise agreed in writing by the Local Planning Authority. Any replacement glazing shall be of an equal degree or above. The windows shall be hung in such a way as to prevent the effect of the obscure glazing being negated by way of opening.

- 17) Notwithstanding the provisions of Article 3 and part 1 of the second Schedule of the Town & Country Planning (General Permitted Development) Order 2015 (or any Order revoking and re-enacting that Order with or without modification), no development as specified in Classes A, B, C, D, E, F & G of Part 1 of Schedule 2 of that Order shall be carried out without express planning permission first being obtained from the Local Planning Authority.
- 18) No part of the development shall commence unless and until a Planning Obligation pursuant to section 106 of the Town & Country Planning Act, 1990 (or any subsequent provision equivalent to that section) has been made with the Local Planning Authority. The said obligation shall provide for an education contribution for three secondary school places and an off-site open space contribution.
- 19) The development permitted by this planning permission shall be carried out in accordance with the principles set out within the submitted drainage strategy (July 2021, ref: 20207873, BDI Structural Solutions).  
The measures shall be fully implemented prior to first occupation of any dwelling and in accordance with the timing / phasing arrangements embodied within the scheme, or within any other period as may subsequently be agreed, in writing, by the local planning authority.
- 20) No development shall commence in any phase until a detailed, final surface water sustainable drainage strategy for the site has been submitted to, and approved in writing by, the Local Planning Authority. The detailed sustainable drainage strategy shall be based upon the site-specific flood risk assessment and indicative sustainable drainage strategy submitted and sustainable drainage principles and requirements set out in the National Planning Policy Framework, Planning Practice Guidance and Defra Technical Standards for Sustainable Drainage Systems and no surface water shall be allowed to discharge to the public foul sewer(s), directly or indirectly. Those details shall include, as a minimum:
  - a) Sustainable drainage calculations for peak flow control and volume control (1 in 1, 1 in 30 and 1 in 100 + 40% climate change), with allowance for urban creep.
  - b) Final sustainable drainage plans appropriately labelled to include, as a minimum:
    - i. Plan identifying areas contributing to the drainage network, including surface water flows from outside the curtilage as necessary;
    - ii. Sustainable drainage system layout showing all pipe and structure references, dimensions, design levels;
    - iii. Details of all sustainable drainage components, including landscape drawings showing topography and slope gradient as appropriate;
    - iv. Flood water exceedance routes in accordance with Defra Technical Standards for Sustainable Drainage Systems;
    - v. Finished Floor Levels (FFL) in AOD with adjacent ground levels for all sides of each plot to confirm minimum 150mm+ difference for FFL;

- vi. Details of proposals to collect and mitigate surface water runoff from the development boundary;
- vii. Measures taken to manage the quality of the surface water runoff to prevent pollution, protect groundwater and surface waters, and deliver suitably clean water to sustainable drainage components;
- c) Evidence of an assessment of the site conditions to include site investigation and test results to confirm infiltrations rates and groundwater levels in accordance with industry guidance.

The sustainable drainage strategy shall be implemented in accordance with the approved details.

- 21) No development shall commence until details of how surface water and pollution prevention will be managed during each construction phase have been submitted to and approved in writing by the Local Planning Authority.

Those details shall include for each phase, as a minimum:

- a) Measures taken to ensure surface water flows are retained on-site during construction phase(s) and, if surface water flows are to be discharged they are done so at a restricted rate to be agreed with the Lancashire County Council LLFA.
- b) Measures taken to prevent siltation and pollutants from the site into any receiving groundwater and/or surface waters, including watercourses, with reference to published guidance.

The development shall be constructed in accordance with the approved details.

- 22) No building on any phase (or within an agreed implementation schedule) of the development hereby permitted shall be occupied until a Verification Report and Operation and Maintenance Plan for the lifetime of the development, pertaining to the surface water drainage system and prepared by a suitably competent person, has been submitted to and approved in writing by the Local Planning Authority.

The Verification Report must demonstrate that the sustainable drainage system has been constructed as per the agreed scheme (or detail any minor variations), and contain information and evidence (including photographs) of details and locations(including national grid reference) of inlets, outlets and control structures; landscape plans; full as built drawings; information pertinent to the installation of those items identified on the critical drainage assets drawing; and, the submission of a final 'operation and maintenance manual' for the sustainable drainage scheme as constructed.

Details of appropriate operational, maintenance and access requirements for each sustainable drainage component are to be provided, with reference to published guidance, through an appropriate Operation and Maintenance Plan for the lifetime of the development as constructed. This shall include arrangements for adoption by an appropriate public body or statutory undertaker, and/or management and maintenance by a Management Company and any means of access for maintenance and easements, where applicable. Thereafter the drainage system shall be

retained, managed and maintained in accordance with the approved details.

- 23) Prior to the commencement of work on each plot the road to that plot shall have been constructed to at least base course level.