



Appeal Decision

Site visit made on 7 August 2023

by R Bartlett PGDip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24th November 2023

Appeal Ref: APP/U2615/W/22/3312859

Dovedale (Land rear of), Butt Lane, Burgh Castle, Norfolk NR31 9PU

- 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 Dovedale Homes (Norfolk) Limited against the decision of Great Yarmouth Borough Council.
 - The application Ref 06/21/0968/F, dated 18 November 2021, was refused by notice dated 19 July 2022.
 - The application sought outline planning permission for 7 two-storey dwellings with garaging and access road without complying with a condition attached to planning permission Ref 06/18/0545/O, dated 24 December 2020.
 - The condition in dispute is No.11, which states that: The visibility splay shall be provided in accordance with the dimensions set out on the approved prior to the development first being occupied; details of the construction of the access way to serve the development shall be submitted to and agreed in writing prior to the development commencing and shall incorporate no dig methods in order to protect the roots of the protected trees and the means of protection of the trees during the construction of the development -; the access way shall then be completed in accordance with the agreed details prior to the first dwelling being occupied or other such time as may be agreed in writing by the local planning authority.
 - The reason given for the condition is: Because the details have not been agreed and in order to minimise the impact upon the trees subject to a Tree Preservation Order.
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Decision

1. The appeal is allowed and outline planning permission is granted for 7 two-storey dwellings with garaging and access road, at Dovedale (Land rear of), Butt Lane, Burgh Castle, Norfolk NR31 9PU in accordance with application, Ref 06/21/0968/F, dated 18 November 2021, without complying with condition 11 imposed on planning permission 06/18/0645/O dated 24 December 2020, and subject to the conditions set out in the attached schedule.

Procedural Matters

2. Due to inconsistencies between the tree numbers referred to for removal in the Council's report and in the Arboricultural Impact Assessment (AIA) dated 12 June 2020, which was submitted with the appeal, clarification was sought from the main parties. Whilst the Council advised the discrepancy was due to a drafting error in its report, the appellant has confirmed that a revised AIA, dated 25th June 2020, was submitted to the Council during the course of the application. The appellant has provided a copy of the revised AIA, and having cross referenced this with the Council's reports relating to both the original outline planning application (ref 06/18/0545/O) and the section 73 application

(ref 06/21/0968/F), it is clear that the Council had regard to this in reaching its decisions.

3. Condition 3 of the original outline planning permission requires the development to be carried out in accordance with the revised redline site plan 2295.18.18.2E. As there is no drawing number 2295.18.18.2E, I have dealt with the appeal on the basis that the approved drawing was in fact drawing number 2295.18.2E.
4. Since the original permission was granted, a new Habitats Regulations Assessment Strategy Document, the Norfolk Green Infrastructure and Recreational Impact Avoidance and Mitigation Strategy (GIRAMS) (March 2021), has been adopted by the Council. I have therefore had regard to this in reaching my decision.
5. The appellant states that as written, condition 11 makes it impossible to implement the planning permission and claims that the visibility splays and access construction requirements of the local highway authority cannot be achieved by using a non-dig construction to protect the trees to be retained. The following variation to the wording of the condition is sought: *"The visibility splay shall be provided in accordance with the dimensions set out on the approved drawing 2295.18.2E prior to the development first being occupied. Details of the construction of the access way to serve the development shall be submitted to and agreed in writing prior to the development commencing. Such details shall be in accordance with highway authority requirements."*

Main Issues

6. The main issues are i) the effect that varying condition 11 would have on trees to be retained, including those protected by a Tree Preservation Order (TPO); and ii) the effect of granting a new planning permission on designated habitat sites.

Reasons

Effect on trees

7. The submitted plans and revised AIA show six existing trees in the front garden of Dovedale. These are identified on the plans as T21 to T26. The three Pine Trees identified as T23, T24 and T26, are subject to a TPO. The trees are located outside of the red line application boundary but according to the appellant's agent are within the same ownership and control as the appeal site. At the time of my visit tree T21 had been removed. The remaining five trees, which are set back from the highway and do not obstruct visibility along Butt Lane, are in good health and are stated in the AIA to have a life expectancy of over 20 years. There is also a mature tree immediately adjacent to the site, on the boundary of Dovedale and Cedarwood, which is in third party ownership. These frontage trees make a positive contribution to the character and appearance of the area.
8. Paragraph 56 of the National Planning Policy Framework (The Framework) is clear that conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

9. The reason for the condition in dispute is to minimise the impact upon trees. In the absence of a solution to protect the mature frontage trees where possible, the proposal would be contrary to the development plan and planning permission would be refused. As such, I consider that a condition to secure tree protection measures would meet the tests of being necessary and relevant to the development to be permitted.
10. Having regard to the planning permission as a whole, it would appear that the disputed condition, despite being poorly constructed, is seeking i) to ensure compliance with the approved drawing; ii) written agreement as to how the new access can be constructed without causing harm to the adjacent trees shown to be retained; and iii) protection of trees during the construction phase. However, in addition to containing errors, omissions, and duplication of other conditions, it attempts to cover multiple separate issues that need to be addressed at different stages of the development process.
11. The first part of the condition, "*The visibility splay shall be provided in accordance with the dimensions set out on the approved prior to the development first being occupied*", fails the test of being precise or enforceable as neither the dimensions of the required visibility splays nor an approved drawing number identifying these is specified.
12. The middle part of the condition, "*details of the construction of the access way to serve the development shall be submitted to and agreed in writing prior to the development commencing and shall incorporate no dig methods in order to protect the roots of the protected trees*", is also unprecise as it fails to specify who the information will be submitted to and agreed by. As worded and reasoned, it also implies that all of the trees that are subject to a TPO, are to be protected. This is unreasonable, given that the revised AIA and the approved drawing number 2295.18.2E, clearly show that trees T24, T25 and T26 would need to be removed to facilitate the approved access and would be replaced elsewhere within the site.
13. Although the Council's reports on both the original, and the variation of condition applications, suggest that all of the protected trees would be retained, the approved means of access, together with the approved drawing and supporting documents, demonstrate that the Council has granted planning permission for a development that includes the removal of two of the three TPO trees. Any tree protection condition should therefore only have sought details of measures to protect the root protection areas of the existing trees shown to be retained on the approved drawings and documents (T22 and T23), and any trees affected that are outside of the appellant's ownership or control.
14. The third part of the condition requires details of "*the means of protection of the trees during the construction of the development*". Whilst this is reasonable, given the positive contribution the frontage trees make to the character and appearance of the area, it is unclear which trees are intended to be protected by the condition. Moreover, there is no implementation clause for the tree protection measures, with the condition only requiring the access way to be completed in accordance with the approved details.
15. The variation proposed by the appellant would still require the details of the construction of the access to be agreed in writing by the local planning authority prior to the development commencing. In considering whether or not the submitted details were adequate to discharge the condition, the Council

could still have regard to the effect of the construction details on the adjacent trees, given that this was the primary reason for the condition.

16. The appellant considers that it would not be possible to construct the approved new access to the satisfaction of the local highway authority by incorporating non-dig methods. My attention has been drawn to Highway Authority correspondence regarding this matter, dated 30 October 2019. However, as this correspondence relates to a previous scheme for 30 dwellings and not to the 7 dwellings approved, I afford it very little weight. Moreover, I have also been provided with a letter from the Highway Authority, dated 25 February 2022, which confirms that the location of the trees and their root protection areas will have no impact on the provision of the required visibility splays, that previous correspondence related only to the provision of an adopted road, which is not required for the 7 dwellings now proposed, and that there are no objections to the use of no-dig construction methods on a shared private drive.
17. The requirement to incorporate no-dig areas of construction, was based upon the professional advice of the appellant's own AIA, which was submitted to inform and support their application, and to demonstrate how the development could be made acceptable by retaining and protecting some of the mature trees on the site frontage. This included a method statement that set out how the trees to be retained would be protected during construction with the use of no dig surfaces, temporary ground protection and protective barriers.
18. Whilst I have had regard to the drawings and information submitted by the appellant with the appeal, including correspondence from Ashtons Legal dated 8 September 2021 and from GH Bullard & Associates LLP Civil and Traffic Engineering Consultants, I am not convinced that the planning permission could not be implemented without causing harm to the few mature trees shown to be retained. I understand that a true no-dig construction would involve raising the existing ground levels and I note the potential implications of this. However, the Council has indicated it is willing to consider alternative options, such as hand digging in the root protection areas. The Local Planning and Highway Authorities are satisfied that an access, of suitable construction and standard to serve the approved development, could be achieved with adequate visibility splays, without the need to remove the trees shown to be retained on the approved drawing.
19. The no dig requirement does not apply to the whole of the new access road, and it is my view that the extent and method of no dig construction (e.g. no mechanical digging as suggested by the Council) is flexible and could be negotiated between the main parties at the discharge of condition stage. It is likely that such a decision would need to be informed by further investigative works to identify the precise depth and path of the roots of the trees to be retained. As tree T21 no longer exists, and the removal of trees T24, T25 and T26 has been approved, it is likely that the root protection area could be reduced from that previously identified in the AIA.
20. Notwithstanding the fact that approval has been granted for a means of access with a 6.0m radii, based upon the evidence before me, there is no reason why this could not be amended to a 4.5m wide access served by a dropped kerb within the same position. This would further assist in protecting the trees to be retained.

21. Butt Lane is a relatively straight, flat, residential road with a 30mph speed limit and houses set back behind front gardens bound by low walls and fences. The trees in question are also set back from the highway and it was demonstrated in the original application, that adequate visibility splays, based upon speed survey results, could be achieved in both directions.
22. It has not been demonstrated that the condition in dispute results in a situation whereby it is impossible for the planning permission to be implemented, that the required visibility splays cannot be achieved without the removal of the trees T22 or T23, shown retained on the approved plan, or that highway safety would be compromised. I have not been provided with any evidence such as root growth exploration, to demonstrate that a suitable access gradient cannot be achieved without causing harm to the trees to be retained.
23. I therefore conclude that the condition in dispute remains necessary to minimise the effect of the new access road on the existing mature trees that are shown to be retained on the approved drawing and in the revised AIA which informed the decision. However, I have deleted it and replaced it with new conditions to reflect my findings above. In the absence of such a condition, the proposal would be contrary to policies A2 and E4 of the Great Yarmouth Local Plan Part 2 (December 2021) and policies CS9 and CS11 of the Great Yarmouth Local Plan Core Strategy 2013-2030 (December 2015), which seek amongst other things to ensure existing trees are retained and incorporated into new developments. This is consistent with paragraph 131 of the Framework.

Designated Sites

24. The following European protected sites are located within 11km of the appeal site:- Breydon Water SPA and Ramsar site, Broadland SPA and Ramsar site, The Broads SAC and Great Yarmouth North Denes SPA.
25. The qualifying features of the sites identified above are Bewick's Swan (Non-breeding), Pied Avocet (Non-breeding), European Golden Plover (Non-breeding), Northern Lapwing (Non-breeding), Ruff (Non-breeding), Common Tern (Breeding), Great Bittern (Breeding), Whooper Swan (Non-breeding), Eurasian Wigeon (Non-breeding), Gadwall (Non-breeding), Northern Shoveler (Non-breeding), Eurasian Marsh Harrier (Breeding), Hen Harrier (Non-breeding), Little Tern (Breeding), Calcium-rich nutrient-poor lakes, lochs and pools, naturally nutrient-rich lakes or lochs which are often dominated by pondweed, purple moor-grass meadows, very wet mires often identified by an unstable `quaking` surface, calcium-rich fen dominated by great fen sedge (saw sedge), calcium-rich springwater-fed fens, alder woodland on floodplains, Desmoulin's Whorl Snail, Otter, Fen Orchid and Little Whorlpool Ram's-horn Snail.
26. The Conservation of Habitats and Species Regulations 2017 (as amended) requires the decision maker to undertake an Appropriate Assessment. Having regard to the scale of the development, and its distance beyond the boundaries of the protected areas, there would be no direct significant effects upon their qualifying features. However, given their proximity to the appeal site, the development of 7 dwellings, in combination with other developments in the area, would be likely to have an indirect effect on the integrity of these sites, as a result of increased recreational pressure on them.

27. The Council, in conjunction with other local authorities in Norfolk and Natural England, has produced and adopted a strategy that seeks to address the in-combination effects of recreational pressure on designated habitats sites by securing proportionate financial developer contributions to fund the necessary measures to manage and protect these sites. A Unilateral Undertaking (UU) has been submitted by the appellant, which I am satisfied would secure the financial contributions necessary.
28. Whilst the Council had suggested that the payment should be made prior to the commencement of the development, I consider that this would be unreasonable given that there would be no increased recreational pressure until the dwellings were built and occupied. Moreover, in this particular case, an initial payment has already been made to the Council in respect of the original planning application, and the UU is only required to secure the outstanding amount that is now required due to a subsequent change in policy.
29. Natural England, the statutory nature conservation body, has been consulted and has confirmed that the financial contribution made by the appellant towards the delivery of mitigation measures on the integrity of affected European Sites is commensurate with the agreed strategy.
30. I therefore conclude that the proposed development would not adversely affect the integrity of any designated habitats sites and as such would accord with Policies CS9 and CS11 of the Great Yarmouth Local Plan Core Strategy 2013-2030 (December 2015), which seek to conserve and enhance the natural environment. The proposal would also accord with the Framework and the Habitats Regulations.

Conditions

31. The Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. As the development has not yet commenced, I have re-imposed all of the conditions that I consider remain relevant. In the event that some of these have in fact already been discharged, that is a matter which can be addressed by the parties.
32. As the time limit for the submission of reserved matters applications and for implementing the development cannot be varied by a S73 application, I have amended these to reflect the timescales of the original permission. I have also amended the approved drawing number, which was previously subject to a typographical error. These conditions are necessary to provide certainty.
33. I have reimposed the condition relating to archaeology to ensure any heritage findings are appropriately investigated and recorded. I have reimposed the foul and surface water drainage conditions to ensure the development is satisfactorily drained and to minimise the risk of flooding. However, I have merged these two drainage conditions into one in the interests of conciseness. Conditions to deal with any unexpected contamination and to control the hours of construction are necessary to prevent harm to the local environment and to nearby residents. As landscaping details will be agreed and conditioned at the reserved matters stage, I have not reimposed the previous conditions 9 and 10. Details of the replacement trees to be planted can also form part of the landscaping reserved matter. Access construction details remain necessary in

the interests of highway safety. Conditions relating to biodiversity enhancement and protection remain relevant to protect and enhance the natural environment.

34. I have deleted the condition in dispute and replaced it with two new conditions that deal with visibility splays and tree protection measures separately. These remain necessary in the interests of highway safety and to ensure the trees shown to be retained are protected. However, the wording has been amended to reflect the approved access details, as shown on the approved drawing, and the fact that the removal of trees T24, T25 and T26 has clearly been approved.

Conclusion

35. For the reasons given above I conclude that the appeal should succeed.

R Bartlett

INSPECTOR

Schedule of Conditions

- 1) Details of the appearance, landscaping, layout, and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.
- 2) Application for the approval of reserved matters shall be made to the local planning authority no later than 24 December 2023 and the development shall commence no later than 2 years from the date of approval of the last of the reserved matters to be approved.
- 3) The development hereby permitted shall be carried out in accordance with the following approved plans: Drawing number 2295.18.2E in so far as it relates to the application site boundary and means of access.
- 4) No development shall take place until an archaeological written scheme of investigation has been submitted to and approved in writing by the local planning authority. The scheme shall include an assessment of significance and research questions; and 1) The programme and methodology of site investigation and recording; 2) The programme for post investigation assessment; 3) Provision to be made for analysis of the site investigation and recording; 4) Provision to be made for publication and dissemination of the analysis and records of the site investigation; 5) Provision to be made for archive deposition of the analysis and records of the site investigation; and 6) Nomination of a competent person or persons/organisation to undertake the works set out within the written scheme of investigation. The development shall be undertaken in accordance with the approved written scheme of investigation and shall not be occupied until the site investigation and post investigation assessment has been completed in accordance with the approved written scheme of investigation and provision made for the analysis, publication and dissemination of results and archive deposition has been secured.
- 5) No development shall take place until foul and surface water drainage details have been submitted to and approved in writing by the local planning authority. No dwellings shall be occupied until the foul and surface water drainage works have been carried out in accordance with the approved details.
- 6) In the event that contamination not previously identified is found at any time when carrying out the approved development, it must be reported in writing immediately to the local planning authority. All development shall cease and shall not recommence until: 1) a report has been submitted to and agreed in writing by the local planning authority, which includes results of an investigation and risk assessment together with a proposed remediation scheme to deal with the risk identified; and 2) the agreed remediation scheme has been carried out and a validation report demonstrating its effectiveness has been submitted to and approved in writing by the local planning authority.
- 7) Construction work generating noise that is audible at the boundary of the nearest noise sensitive property shall not take place on the site outside of the following hours: 08:00 to 18:00 Monday to Friday and 08:30 to 13:30 on Saturdays. No work shall take place on the site on Sundays or Bank or Public Holidays.

- 8) Prior to the first occupation of the development hereby approved the visibility splays shall be provided in accordance with approved drawing number 2295.18.2E and shall thereafter be retained at all times.
- 9) No site clearance, preparatory work or development shall take place until a scheme for the protection of trees T22 and T23, shown to be retained on approved drawing number 2295.18.2E and in the Arboricultural Impact Assessment (25 June 2020), and trees on third party land, has been submitted to and approved in writing by the local planning authority. The scheme shall demonstrate how the development, including the new access road, utilities and services, shall be constructed/provided without causing harm to the trees to be retained or on adjoining land, including to their root systems and canopies. The scheme shall include details of any works required to the trees. The scheme for the protection of the retained trees shall be carried out as approved. If any retained tree is cut down, uprooted or destroyed or dies another tree shall be planted at the same place and that tree shall be of such size and species and shall be planted, in accordance with details that shall first be approved in writing by the local planning authority.
- 10) Prior to the first occupation of the development hereby approved the vehicular access road and vehicular access crossing over the footway shall be constructed in accordance with a detailed scheme to be submitted to and approved in writing by the local planning authority. The scheme shall include details to ensure that surface water from the site does not run on to the public highway.
- 11) No development shall take place until a biodiversity enhancement plan has been submitted to and approved in writing by the local planning authority, detailing the enhancement measures for biodiversity on site. The biodiversity enhancement plan should include all recommendations within the Preliminary Ecological Appraisal Report (Greenlight Ecology, 2018). The development shall be carried out strictly in accordance with the approved biodiversity enhancement plan and the measures identified within it shall be retained thereafter.
- 12) The development hereby approved shall be carried out in accordance with the recommendations included in the Preliminary Ecological Appraisal, by Greenlight Ecology, dated 2018 and the following working practices shall be adhered to:
 - No piles of loose sand or other granular materials into which amphibians or reptiles could bury themselves shall be left around the site. All such materials shall be delivered in bags and kept on pallets or hardstanding until required for use.
 - Any waste generated from the construction of the development, shall be placed straight into skips or rubble sacks, or immediately removed and not left lying around the site.
 - No bonfires shall be made or lit on site as amphibians, hedgehogs and reptiles often use piles of timber as a place of refuge.
 - All trenches shall be left covered at night or a shallow ramp placed in them overnight. They must be checked in the morning before they are filled in.
 - Any site clearance, including the removal of scrub, hedgerows, trees and piles of compost or building material, shall be undertaken by hand or light machinery outside the hibernating season, which for amphibians typically lasts from October to February.

- Site lighting schemes for the new development shall be unobtrusive, hooded/shielded and directional away from features that may be used by roosting, commuting and foraging bats, such as hedgerows and trees.
- Connectivity shall be maintained between gardens by installing wildlife-friendly fencing, with gaps or tunnels in the bottom panels/gravel boards.