



Appeal Decision

Site visit made on 8 May 2024

by K Townend BSc MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 June 2024

Appeal Ref: APP/J1860/W/23/3331962

Land north of Picken End, Hanley Swan.

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) 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 Ian O’Gorman of Lockley Homes against Malvern Hills District Council.
 - The application Ref is 21/01717/FUL.
 - The development proposed is erection of 6no dwellings, new access arrangements and associated works.
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Decision

1. The appeal is dismissed and planning permission for the erection of 6no dwellings, new access arrangements and associated works is refused.

Preliminary Matters

2. The appeal is submitted against the failure of the Council to determine the planning application within the statutory timescale. The Council has advised in the submitted Statement of Case that the site includes a badger sett and that the proposed layout may not be appropriate to enable the sett to be retained. I have had regard to this in so far as it provides clarity on what grounds the Council would have refused planning permission on, had it been able to do so.
3. While the South Worcestershire Development Plan Review (SWDPR) has been submitted to the Secretary of State for independent examination the Council advises that limited weight should be afforded to the review policies. The main parties do not rely on any SWDPR policies within their submissions. Therefore, I have determined the appeal having regard to the adopted development plan which consists of the South Worcestershire Development Plan, adopted 2016.

Main Issue

4. Given the evidence in the Council’s Statement of Case, the main issue is the effect of the proposed development on biodiversity, in particular badgers.

Reasons

5. The appeal site is a parcel of land situated between houses on Winnington Gardens, houses on Picken End, a public right of way, agricultural fields, and a farm with large polytunnels. The site is accessed off Winnington Gardens and through the recently built development on Apple Tree Gardens.
6. The appeal scheme is for six dwellings and an area of public open space between the proposed houses and the polytunnels and farm. The site is relatively flat and enclosed on the boundaries with post and rail fences,

- residential boundaries, trees, and hedges. Within the appeal site and along one boundary there is evidence of holes created by wildlife.
7. Badgers are protected under the Protection of Badgers Act 1992 which makes it illegal to kill, injure, or take badgers, or to interfere with a badger sett. The intention of this legislation is to prevent persecution of badgers. The legislation allows for a licence to be granted for interference with a badger sett for the purposes of development, where there is suitable justification.
 8. Badgers are not a rare or endangered species, nonetheless, they are a protected species. With any development the objective should be to avoid adverse impacts on badgers. If there are unavoidable impacts, then mitigation should be designed to reduce those. If, following this, there are still unacceptable impacts on the species, then compensation measures would need to be designed to offset them. In determining planning applications and appeals, it is necessary to consider whether there are any satisfactory alternatives to the proposed scheme which would have less of an effect on the protected species.
 9. Circular 06/2005¹ advises that the presence of a protected species is a material consideration when a development is being considered, which would be likely to result in harm to the species or its habitat. The Circular states that *"it is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision."* Ecological mitigation should only be employed where it is not possible to avoid the impact. Furthermore, mitigation measures should be specific to an identified harm.
 10. The Phase 1 Preliminary Ecological Appraisal² (PEA), submitted with the planning application, recorded no evidence of badgers and, therefore, advised no further surveys were required. The holes within and near the appeal site were noted as old fox and rabbit burrows.
 11. However, the Council Ecologist at the time of their visit, recorded evidence of a badger sett. The Ecologist noted that the proposed development would be close to the badger sett and a badger licence would be likely to be required due to the potential to disturb the sett and the possible loss or damage of the sett.
 12. However, notwithstanding the comments from the Council Ecologist and the photographs from the neighbours, I cannot be certain, based on the evidence before me, that the holes on site are a badger sett. Moreover, even if they were a badger sett, I cannot be certain of the extent of the population, the size of the sett and how much of an effect the development would have on badgers. Without fully understanding the baseline of the ecological potential, with regard to badgers, it is not possible to know whether there is an impact on the protected species, whether there is an opportunity to avoid the impact through redesigning the proposed housing scheme, or what mitigation could be used.
 13. The finer details of the mitigation strategy could be secured by condition, once the baseline and presence, or otherwise, of badgers has been established. It is

¹ Biodiversity and Geological Conservation – Statutory Obligations and their impact within the Planning System, 2005

² Phase 1 Preliminary Ecological Appraisal, reference Hanley0621_PEA, dated June 2021

not appropriate to condition the requirements for a survey to establish the baseline and it is not appropriate, given the uncertainty, to require mitigation for badgers. Given the advice in Circular 06/2005, without a full badger survey I cannot be sure that any harmful effects arising from the appeal scheme could be adequately avoided or mitigated.

14. For the above reasons, I am not satisfied that sufficient evidence has been provided in order to ascertain the effects of the proposed development on badgers or that mitigation measures can be secured by a condition. Therefore, I conclude that the appeal fails to demonstrate that it would not adversely affect biodiversity, in particular badgers. Consequently, the development would be contrary to policy SWDP 22 of the South Worcestershire Development Plan, adopted 2016. This policy seeks to ensure that development enhances biodiversity and conserves on-site biodiversity corridors and networks. For the same reasons, the scheme would fail to comply with the advice in the National Planning Policy Framework (the Framework) in regard to conserving and enhancing biodiversity.

Other Matters

15. The Council has considered the layout, scale and appearance of the proposal and have not raised any objections on these matters. The development would follow the character and layout of the recently built houses on Apple Tree Gardens and appear as a continuation of that development. Furthermore, the site would be enclosed by the public right of way and agricultural fields beyond. In that regard the appeal before me is materially different to the appeal off Picken End³ referred to by interested parties.
16. I walked the public right of way during my visit and observed that views of the Malvern Hills would be retained between and around the proposed houses. This would be similar to the existing views where the hills are observed with houses in the foreground. Moreover, the site is not within an Area of Outstanding Natural Beauty, albeit that it is currently an open and green field. I, therefore, find that the development would not result in harm to the character and appearance of the area.
17. The Council Heritage Officer has confirmed that the site retains evidence of ridge and furrow. However, they have not objected to the development and have recommended conditions to secure a programme of archaeological work, including recording of any findings. Having visited the site, I see no reason to disagree with the Council on this matter.
18. The Council has not raised any concerns relating to the effects of the development on neighbouring residential occupiers. However, the neighbours are concerned about the effect of light pollution. Given that the appeal scheme would extend the existing housing development I find that the lighting of development would not cause unacceptable levels of light pollution to neighbouring properties.
19. Concerns have also been raised regarding highway and pedestrian safety in the wider village, especially around the narrow sections of Picken End where there is no pavement. The scale of the scheme would not significantly increase the number of vehicle movements, including during the construction of the

³ Council planning reference 16/00020/OUT, appeal reference APP/J1860/W/16/3160660

development. Although there is a section of Picken End with no pedestrian footpath or street lighting this is the situation as existing and already serves a number of houses. There are verges which pedestrians could use to step off the carriageway when necessary. Furthermore, the highway authority has not raised concerns regarding the above issues, the signed S106 Legal Agreement secures the provision of signage to notify drivers of pedestrians in the road and secures dropped crossing points to provide enhancements to pedestrian safety beyond the appeal site. Having visited the site at the end of the school day, I see no reason to disagree with the Council on this matter.

20. I have no substantive evidence before me to suggest that the proposal would exacerbate any existing flooding issues or that suitable drainage and water provision would not be possible. I also have no substantive evidence that the doctors, dentists, and electricity provider cannot cope with the limited additional housing proposed within this appeal. I note the concerns raised regarding the capacity of the local schools. However, given the scale of the development the demand for school places would not justify refusal of the scheme. Precautionary measures for newts and other protected species are recommended in the PEA for during the construction of the development. Moreover, the development would include an area of public open space which would provide suitable mitigation, subject to conditions as recommended by the Council.
21. Overall, I acknowledge the concerns raised by local residents. However, based on the evidence before me and my own observations at the site visit, I find no reason to disagree with the Council's conclusions on the above matters.

Planning Balance

22. Policies SWDP 2 and SWDP 22 are the most relevant in considering the proposal. As far as the policies seek to limit development in the countryside in order to enhance the open countryside, they are broadly in accordance with the Framework which seeks to ensure that development contributes to and enhances the natural and local environment, by recognising the intrinsic character and beauty of the countryside. Moreover, the adopted policies are broadly consistent with the Framework as a whole and specifically paragraph 83 in seeking to ensure sustainable development in rural areas by locating housing where it would enhance or maintain the vitality of rural communities.
23. The appeal conflicts with Policy SWDP 2 of the SWDP as the site is beyond the development boundary. Furthermore, as detailed above the proposal conflicts with Policy SWDP 22. I have given the conflict with these policies significant weight in this appeal. Consequently, the development would conflict with the development plans as a whole.
24. Both main parties agree that the Council cannot currently demonstrate a five-year housing land supply. The adoption of the SWDP and the letter from the Council referred to by the local residents is now superseded by the more recent housing land supply data produced by the Council. As the Council's emerging Local Plan is now at Regulation 19 Stage, the latest revisions to the Framework require a four-year housing land supply. However, given the current housing land supply, of 3.31 years as detailed in the main parties' evidence, I find that the Council would not be able to demonstrate a four-year housing land supply. Paragraph 11d) of the Framework therefore applies.

25. The Hanley Castle Neighbourhood Plan was made more than five years ago and, therefore, when considered against paragraph 14 of the Framework, the neighbourhood plan does not outweigh the 11d) presumption.
26. The proposal would accord with paragraphs 60 and 83 of the Framework which seek to boost the supply of housing and support the rural economy. It also has the opportunity of providing a mix of size, type, and tenure of housing. The signed Section 106 Legal Agreement secures one of the properties on site as a discounted market sales unit and secures a financial contribution towards off-site affordable housing. The provision of affordable housing carries moderate weight. However, as a development of six dwellings, and given the extent of the shortfall in housing supply, the appeal before me would only provide a limited benefit and I, therefore, afford limited weight to the contribution the development would make to addressing the housing shortfall.
27. There would also be economic benefits both during and post construction and environmental benefits from the area of open space. There would not be any harm to the character and appearance of the area. However, these benefits are also limited in their weight in favour of the development.
28. On the other side of the balance, the proposal would result in environmental harm from the potential adverse effect on badgers. This is a significant matter which is afforded significant weight.
29. The environmental harm would, in my judgement, significantly and demonstrably outweigh the benefits that would arise from the development. As a result, the presumption in favour does not apply.

Conclusion

30. The proposal conflicts with the development plan as a whole and the material considerations do not indicate that the appeal should be decided other than in accordance with it. Consequently, the appeal should be dismissed.

K Townsend

INSPECTOR