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# Appeal Decision

Site visit made on 18 September 2024

**by R Major BSc (Hons) MSc MRTPI**

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

**Decision date: 8<sup>th</sup> October 2024**

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**Appeal Ref: APP/A1530/W/23/3332210**

**Mercers Place, Halstead Road, Eight Ash Green, Essex CO3 0JU**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
  - The appeal is made by Mr Brian Griffiths on behalf of BG Designs against the decision of Colchester City Council.
  - The application Ref is 222922.
  - The development proposed is minor fenestration changes to front elevation and internal layout changes to ground floor & 1st floor plans.
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. The planning application form details the appellant's name as Mr Ben Griffiths of BG Designs. However, the appellant has confirmed that this was an error, and their name was corrected to Mr Brian Griffiths during the planning application process. The Council's decision notice and the appeal form both therefore reference Mr Brian Griffiths as the appellant. I am therefore satisfied that the appellant is Mr Brian Griffiths on behalf of BG Designs and have therefore referred to them as such within the above banner heading.
3. The description of the proposal within the above banner heading is taken from the planning application form. The Council's decision notice and the appeal form both refer to the description of development as "*Change of use of the day care centre to assisted living accommodation together with minor fenestration changes to front elevation and internal layout changes to ground floor and first floor to facilitate the change of use.*" I consider this to be a more accurate description of the appeal proposal and have thus determined the appeal based on this description.
4. Subsequent to the Council issuing its decision the revised National Planning Policy Framework (the Framework) was published on 19 December 2023 and updated on 20 December 2023. Both parties, within their respective submissions, had an opportunity to comment on the revised Framework. Where reference is made to the Framework in this decision, the paragraph numbers are those that appear in the 20 December 2023 version.
5. On 30 July 2024 the Government published a consultation on proposed reforms to the Framework and other changes to the planning system. Whilst a direction of travel has been outlined within the Written Ministerial Statement, which is a material consideration of very significant weight, the weight I give to the changes

in the draft Framework is limited given that no final document has been published and it is subject to potential change in the future.

6. In any event, the policies that are material to this decision are not subject to any fundamental changes, and I am satisfied that this has not prejudiced any party. Consequently, in reaching my decision I have therefore had regard to the Framework published in December 2023.
7. The Council's second reason for refusal on the decision notice refers to private amenity space for both existing and future users. This reason for refusal references conflict with Policy DM17 of the Colchester Borough Local Plan 2017 – 2033 Section 2 (2022) (LP2). However, within their Statement of Case the Council has confirmed that the wrong policy has been quoted and the relevant policy is DM19. The appellant has had an opportunity to comment on this matter during the appeal procedure and therefore neither party would be prejudiced by my consideration of the appeal proposal against LP2 Policy DM19.

## **Main Issues**

8. The main issues are:
  - the effect of the proposed development on the integrity of Essex Coast Habitats Sites;
  - whether the proposed development would result in an unacceptable loss of an existing community facility;
  - whether the proposed development would provide appropriate living conditions for future occupiers of the appeal scheme and existing occupiers of the neighbouring development, with particular regard to outdoor amenity space; and
  - whether a planning obligation is necessary in respect of matters relating to community, and sport and recreation, facilities;

## **Reasons**

### *Integrity of European Sites*

9. The appeal site falls within the Zone of Influence (ZoI) of the following European Sites within the Essex coast - *Colne Estuary Special Protection Area (SPA) and Ramsar; Blackwater Estuary SPA and Ramsar; Dengie SPA and Ramsar; Stour and Orwell Estuaries SPA and Ramsar; Essex Estuaries Special Area of Conservation (SAC)*. These sites are primarily designated to protect internationally important breeding and non-breeding birds, and their coastal habitats.
10. The qualifying species and features for the Essex coast habitats are: Colne Estuary: *dark-bellied brent goose, common pochard, hen harrier, common redshank, little tern, and its waterbird assemblage*. Blackwater Estuary: *dark-bellied brent goose, common pochard, hen harrier, ringed plover, grey plover, dunlin, black-tailed godwit, little tern, and waterbird assemblage*. Dengie: *dark-bellied brent goose, grey plover, hen harrier, knot, and waterbird assemblage*. Stour and Orwell Estuaries: *dark-bellied brent goose, northern pintail, pied avocet, grey plover, red knot, dunlin, black-tailed godwit, common redshank, and waterbird assemblage*. Essex Estuary: *sandbanks, mudflats and sandflats*,

*salicornia, glasswort, spartina and cord-grass swards, Atlantic salt meadows, Mediterranean and thermos-Atlantic halophilous scrubs, and Mediterranean saltmarsh scrub.*

11. The Essex Coast Recreational disturbance Avoidance and Mitigation Strategy SPD (2020) (RAMS SPD) provides a mechanism for the competent authority to comply with their responsibilities to protect habitats and species in accordance with the Conservation of Habitats and Species Regulations 2017, as amended (the Regulations).
12. As the competent decision-making authority under the Regulations, it is my duty to undertake an appropriate assessment to determine with certainty whether appropriate measures could be put in place to avoid or mitigate any likely significant adverse effects, with the aim being to maintain or restore, at favourable conservation status, the natural habitats and species of the European Sites.
13. In this regard, it is likely the occupants of the proposed development would visit these European Sites, resulting in increased recreational activity that could disturb the protected habitats and birds within the sites. Therefore, the development, alone and in combination with other development, would be likely to have a significant adverse effect on the integrity and conservation objectives of the protected sites.
14. The RAMS SPD applies a tariff-based contribution to all residential development within the ZoI to mitigate 'in-combination' recreational effects of development on the integrity of the European Sites, including a range of habitat-based measures such as education, communication and monitoring. These mitigation measures have been endorsed by Natural England within the RAMS SPD.
15. The RAMS SPD confirms that this tariff is index linked and is applicable to new development within use class C2. There appears to be no dispute between the parties that the proposal would fall within the scope of development subject to the RAMS contribution.
16. The RAMS SPD suggests that a planning obligation will generally be used to secure the required contribution, via either a Unilateral Undertaking or a Section 106 Agreement, but for schemes under 10 dwellings a UU can be used. I have however not been provided with a signed UU which makes provision for the required contribution to be secured, paid and spent accordingly.
17. As part of their Final Comments submission the appellant has nevertheless confirmed that a RAMS payment of £655.44 has been made and a copy of a receipt for this value has been appended with this submission. However, there is very limited information included on this receipt, including details of who this payment was made to and/or received by.
18. Whilst I acknowledge the receipt does include the word RAMS, it is not clear exactly what this payment was for, nor is there anything on this receipt that specifically relates it to the appeal site or the proposed development. Furthermore, I note the RAMS SPD details that the contribution is index linked and there is no evidence before me to demonstrate that the fee referenced on this receipt is the correct amount.
19. Moreover, even if I was to accept that this receipted payment was the correct amount to meet the requirements of the RAMS SPD for the appeal scheme, there

is no obligation before me that requires the Council to spend this money as envisaged by the RAMS SPD, or within a specified timetable.

20. In view of all the above, whilst I have some sympathy with the appellant on this matter, in the absence of a signed planning obligation which secures the required RAMS contribution for the proposed development at this site, I cannot be certain, as required by the Regulations, that the payment that is shown on the submitted receipt would effectively mitigate the recreational impacts of the proposed development on the nature conservation interest of the European Sites and avoid adverse effects to their integrity.
21. As a result, and in accordance with the precautionary principle and my duty under the Regulations, I conclude that an adverse effect on the integrity of the European Habitat Sites cannot be ruled out. No alternative solutions, imperative reasons of overriding public interest, or other compensatory measures have been presented. The appeal proposal would therefore conflict with Policy SP 2 of the Colchester Borough Council Local Plan 2017-2033 (2022) (LP1) which requires contributions to be secured from development towards mitigation measures in accordance with the RAMS.
22. It would also conflict with paragraphs 180 (a) and 186 (a) of the Framework, which require decisions to protect sites of biodiversity value in a manner consistent with their statutory status, and if significant harm to biodiversity cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.

#### *Community facility*

23. The appeal relates to a converted two-storey barn that was formerly used as a day care centre. The appeal building shares a site with a bungalow known as Mercers Place, which is a property containing supported living accommodation. The submitted plans show that the appeal building and the bungalow currently share a car parking area, accessed directly off Halstead Road and I observed on site that as a result of the shared facilities, and their close proximity, there is a clear interrelationship between these buildings on this site.
24. The appeal proposal seeks to convert the former day care centre building into supported living accommodation, providing 4no. 1 x bedroom apartments, two at ground floor level and two at first floor level. The plans also show that an office, with a bed and en-suite, would be provided at first floor level. It is proposed that access and car parking would continue to be provided via the existing arrangement and shared with the adjacent bungalow, and residents would also share outdoor amenity areas with the residents of the adjacent property. As such, the intention is for the proposed supported living accommodation within the appeal building, and the existing supported living accommodation within the bungalow, to operate as a single site.
25. The Council's first reason for refusal asserts that the proposed development would result in the loss of an existing community facility (day care centre) without complying with the requirements of Policy DM2 of the LP2.
26. The appellant firstly contends that the provisions of LP2 Policy DM2 are not directly relevant to the appeal scheme as the former use of the building as a day centre for adults was private and not accessible to the general public and wider community. The appellant goes on to state that the day care facility would have

been used by a very small percentage of the local community and is therefore not a key facility.

27. I am however not persuaded by the appellant's arguments in respect of this matter, as a building or site does not have to be in public ownership to be of benefit to the community, and the amount of people within the community that can or would use a building is also not a determining factor as to whether it benefits the community.
28. As such, the evidence before me is that the appeal building was last used as a day care centre and whilst I acknowledge that the number of people within the community that used the facility may have been very low, it was nevertheless frequented by members of the community. Consequently, I find that LP2 Policy DM2 is relevant in the determination of this appeal.
29. The appellant has also argued that the proposed use of the building would continue to provide care for people with a disability as its primary function, albeit as accommodation rather than as a day centre. Whilst I acknowledge the point raised, I find that there would be a clear distinction between the proposed use as supported living accommodation under use class C2, in comparison to the building's former use as a day centre facility under use class F2 (formerly D1). As such I do not find that the proposed supported living accommodation represents an alternative, equivalent community facility.
30. Turning to the specifics of Policy DM2 within LP2, it seeks to retain all existing community facilities and services where they meet an identified local need. The policy goes on to state that proposals that would result in the loss of a building last used for the provision of facilities, services, leisure or cultural activities will only be supported where i) an alternative, equivalent community facility to meet local needs is provided; or ii) it has been proven that it would not be economically viable to retain the community use; and (in both cases) iii) the facility could not be provided or operated by either the current occupier or an alternative occupier, and it has been marketed to the satisfaction of the Local Planning Authority in order to confirm there is no interest and the building is generally redundant.
31. The proposal does not seek to provide an alternative, equivalent community facility to meet local needs as required by criterion (i).
32. In respect of criterion (ii), the Council states that it understands the use of the building as a day care centre ceased in June 2022 and this is not disputed. Furthermore, the appellant states that Essex County Council (ECC) are moving away from the model of day centres for adults with learning disabilities and believe individuals should be able to access the same facilities as everyone else as opposed to being segregated and isolated into specific learning disability facilities. This statement does not appear to be contested by the Council.
33. Accordingly, it is claimed that the aforementioned approach by ECC resulted in the closure of the day centre and the decision to no longer fund its use has meant that it can't be sustained in a cost-effective manner.
34. Given the above, along with my observations on site that the appeal building had clearly not been used as a day care centre for a considerable period of time, I have no reason to doubt the appellant's claim that it was and is no longer economically viable to retain or re-open the building as a day care centre. In

terms of other potential community uses within the appeal building, this is discussed below.

35. With regard to criterion (iii), this in itself has two requirements. The second requirement is that the facility must be marketed to confirm that there is no interest and that the site is redundant. The appellant has admittedly not marketed the property and thus the proposal would not adhere to this criterion and consequently fails to comply with Policy DM2 when read as a whole.
36. Nevertheless, Section 38(6) of the Planning and Compulsory Purchase Act 2004 and Section 70(2) of the Town and Country Planning Act 1990, along with paragraph 2 of the Framework, state that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.
37. With this in mind, a case has been put forward that it would be wholly unreasonable to market this specific building for an alternative community use, and/or for different users, due to the specialist nature of the accommodation provided within the wider site, and to which the appeal building has a spatial relationship.
38. In this regard, I find that the appeal building and the supported living accommodation within the adjacent bungalow share a very close interrelationship. The buildings are located physically very close to each other and share existing facilities (access and parking), which would make any potential subdivision of the site difficult.
39. The window positions in the appeal building also currently overlook outdoor amenity areas used by occupiers of the adjacent supported living accommodation. Therefore, use of the appeal building by alternative users, or other community uses, could result in some loss of privacy for occupiers of the adjacent supported living accommodation, thus harming their living conditions.
40. Furthermore, there would be potential for noise and disturbance arising from a separate community use, and again this has the potential to be harmful given the sensitivity of the use / occupiers within the adjacent supported living accommodation.
41. Consequently, I find that in this specific case there are material considerations which justify not marketing the appeal building out as an alternative community use to other potential users, given the close relationship the appeal building shares with the adjacent supported living accommodation.
42. For the reasons given earlier, particularly the close interrelationship the building shares with the adjacent supported living accommodation building, as well as funding issues, I consider it unlikely that this building could be brought back into a community use that could successfully co-exist with this adjacent use, either by the current owner or an alternative owner.
43. As such, in the particular circumstances of this case, while the proposal would result in the loss of an existing community facility which LP2 Policy DM2 seeks to retain, given the building is not currently in use as a community facility, and in my opinion is not likely to be brought back into community use given the site-specific constraints unique to this site, I find the harm arising from the loss of this community facility, and the conflict with the policy to be limited.



### *Living conditions*

44. In the interest of clarity, the submitted evidence details that the adjacent bungalow contains 4no. assisted living units (C2 use) and this was consistent with my observation on site. I have therefore considered the appeal on that basis.
45. The submission details how residents of the proposed supported living accommodation within the appeal building would utilise the outdoor amenity space that currently serves the residents occupying the supported living accommodation next door. Both buildings, along with this outdoor amenity space, are included within the site edged red and thus the intention would be for existing and potential future residents to share the outdoor amenity space.
46. LP2 Policy DM19 sets out the requirements for private amenity space within residential development. This policy states that a minimum of 25m<sup>2</sup> per flat should be provided communally and I find that this requirement is broadly applicable to the appeal proposal which seeks to create 4no. 1-bedroom apartments, albeit in C2 use.
47. In accordance with this policy the appeal site should therefore provide 100m<sup>2</sup> of outdoor amenity space for future residents of the appeal proposal, as well as 100m<sup>2</sup> of amenity space for existing residents of the 4no. units within the adjacent bungalow. Consequently, a total of 200m<sup>2</sup> of shared outdoor amenity space should be provided for existing and proposed future residents of the appeal site as a whole.
48. I observed during my visit that the outdoor amenity space provides a good mixture of grassed and paved areas around the existing bungalow. These areas were flat, well-maintained and included various items of outdoor furniture for existing and proposed future residents to use, enjoy and socialise.
49. Neither party has provided a calculation of the amount of outdoor amenity space that currently exists on the site. Nevertheless, even in the event that the area of outdoor amenity space that I observed was below 200m<sup>2</sup>, I find that what exists on site would be of sufficient high standard to meet the needs of both existing and proposed future occupiers of this site.
50. Consequently, I conclude that appropriate living conditions, by way of sufficient outdoor amenity space, would be provided for future occupiers of the appeal scheme and existing occupiers of the neighbouring development. I therefore find no conflict with LP2 Policy DM19 where it requires all new residential development to provide easy access to secure and usable private communal amenity space of a high standard.

### *Planning Obligation*

51. Policy SP6 of LP1 requires all development to be supported by the provision of the infrastructure, services and facilities that are identified to serve the needs arising from the development. Policy DM2 of the LP2 states that new development should provide or contribute towards the provision of community facilities, to meet the needs of new and expanded communities and mitigate impacts on existing communities, which will be secured by Section 106 contributions or CIL / equivalent infrastructure levy.
52. The Council's reason for refusal on this issue states that the application fails to include a legally binding mechanism to secure planning obligations in respect of

- i) Sport and Recreation; and ii) Community facilities, and in the absence of such an obligation the proposal is contrary to the aforementioned policies, as well as guidance within Supplementary Planning Documents (SPDs)<sup>1</sup>.
53. The appellant contends that these requirements are not relevant to the appeal scheme and thus such contributions are not required. However, as detailed earlier the appellant's submission details how there has been a move away from the model of day centres for adults with learning disabilities and how individuals should be able to access the same facilities as everyone else, as opposed to being segregated and isolated into specific learning disability facilities.
54. In view of this submission by the appellant, given that residents of the appeal proposal would, by their own admission, use the same facilities as everyone else, it is reasonable to conclude that a contribution towards the provision of such facilities is broadly relevant to proposals for this type of C2 use.
55. Nevertheless, it is still for me to determine whether a planning obligation is necessary and whether the contributions requested by the Council meet the tests for planning obligations outlined in paragraph 57 of the Framework and Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (CIL Regulations).
56. In this regard, the Council submissions state that developer contributions are required to mitigate the impact of the additional residential accommodation on community, park and recreation facilities. However, the Council's submissions fail to detail the monetary value of the contributions they are seeking, or provide information as to which projects or facilities any such contributions would be directed.
57. I acknowledge that the Council has submitted copies of the SPDs referred to in the reason for refusal as part of the appeal documents. However, no commentary or explanation has been provided on the specific sections of these SPDs that are relevant to support the Council's request for financial contributions in relation to i) Sport and Recreation; and ii) Community facilities. As such, the Council have provided insufficient details in respect of the requested contributions.
58. Accordingly, I have not been provided with the relevant information and evidence to demonstrate that the requirement for financial contributions towards the provision of i) Sport and Recreation; and ii) Community facilities are necessary; directly related to the development; and reasonable, having regard to the statutory tests in the CIL Regulations and the Framework. In these circumstances, and on the evidence before me, the absence of a planning obligation to secure these contributions does not therefore weigh against the development.
59. In view of the above, I conclude that there is insufficient evidence that the appeal proposal would conflict with Policy SP6 of the LP1 and Policy DM2 of the LP2, where they together seek to ensure that new development contribute towards the provision of services and facilities to meet the needs of new and expanded communities arising from the development.

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<sup>1</sup> *Provision of Community Facilities SPD (Adopted 2009, Updated 2013); and Provision of Open Space, Sport and Recreational Facilities (adopted 2006).*



## **Other Matters**

60. On the opposite side of the road, and largely screened from public view by a large boundary hedge, is a C16, grade II listed building, Brick Stables House. The appeal building is situated further away from the listed building than the adjacent bungalow. Consequently, the proposed change of use of the appeal building to supported living accommodation, and the minor window alterations on the elevation facing away from the listed building, would preserve its setting, to the desirability of the preservation of which the Act requires that special regard be had.

## **Planning Balance and Conclusion**

61. I have found that appropriate living conditions would be provided for existing and future occupiers. The lack of a planning obligation in respect of i) Sport and Recreation; and ii) Community facilities, for the reasons above, does not count against the proposal.
62. The appeal proposal would result in the loss of a community facility, albeit for the very particular reasons connected to the particular layout of this site, the magnitude of harm from the loss, and the conflict with policy, would be limited. Moreover, there are clear social and economic benefits arising from the use of the appeal building, empty since June 2022, as supported living accommodation. These include providing specialist accommodation for people in need of care; the relationship the proposed use, and future residents, would have with the existing adjacent supported living accommodation; being able to share staff, travelling expenses for occupiers when they leave the site; maintenance costs; health care workers being able to access multiple patients in one visit; and creating a larger community which would likely improve social interaction for both existing and future residents on the site. I attribute significant weight to these benefits. These material considerations, taken together, outweigh the limited harm from the loss of a community facility, and the conflict with policy.
63. Notwithstanding this, for the reasons given above, I cannot be satisfied that the proposed development would not cause harm to the integrity of designated habitats sites, which is a decisive matter. It brings the proposal into conflict with the development plan as a whole, and there are no other material considerations, including the provisions of the Framework, to suggest the decision should be made other than in accordance with the development plan. Therefore, for this reason, the appeal is dismissed.

*R Major*

INSPECTOR