

Appeal Decisions

Site visit made on 4 September 2024

by Jennifer Wallace BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23rd October 2024

Appeal A Ref: APP/A1910/W/24/3342617

Land to the Rear of 49-53 High Street, Northchurch, HP4 3QH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mr Nick Herbert of Queenswood Homes against the decision of Dacorum Borough Council.
- The application Ref 22/02419/DRC sought approval of details pursuant to condition Nos 6 and 11 of a planning permission Ref 20/02653/ROC, granted on 22 October 2020.
- The application was refused by notice dated 18 October 2023.
- The development proposed is Details as required by conditions 6 (Phase One Report) and 11 (Construction Management Plan) attached to planning permission 20/02653/ROC (Variation of condition 2 (approved plans) attached to planning permission 4/03109/17/MFA - Proposed demolition of all existing buildings, improvements to existing access, construction of four 3-bed and six 2-bed cottages with associated car parking and access road with waste and cycle storage).
- The details for which approval is sought are:

6. No development, shall take place until a Phase I Report to assess the actual or potential contamination at the site has been submitted to and approved in writing by the local planning authority. If actual or potential contamination and/or ground gas risks are identified, further investigation shall be carried out and a Phase II report shall be submitted to and approved in writing by the local planning authority prior to the commencement of the development. If the Phase II report establishes that remediation or protection measures are necessary, a Remediation Statement shall be submitted to and approved in writing by the Local Planning Authority.

For the purposes of this condition:

A Phase I Report consists of a desk study, site walkover, conceptual model and a preliminary risk assessment. The desk study comprises a search of available information and historical maps which can be used to identify the likelihood of contamination. A simple walkover survey of the site is conducted to identify pollution linkages not obvious from desk studies. Using the information gathered, a 'conceptual model' of the site is constructed and a preliminary risk assessment is carried out.

A Phase II Report consists of an intrusive site investigation and risk assessment. The report should make recommendations for further investigation and assessment where required.

A Remediation Statement details actions to be carried out and timescales so that contamination no longer presents a risk to site users, property, the environment or ecological systems.

11. Construction of the development hereby approved shall not commence until a Construction Management Plan has been submitted to and approved in writing by the local planning authority. The plan should consider all phases of the development including demolition, excavation and construction of all elements of the proposals. Thereafter the construction of the development shall only be carried out in accordance with the approved Plan. The Construction Traffic Management Plan shall include details of:

- a. Construction vehicle numbers, type, routing;*
- b. Traffic management requirements;*
- c. Construction and storage compounds (including areas designated for car parking);*
- d. Siting and details of wheel washing facilities;*
- e. Cleaning of site entrances, site tracks and the adjacent public highway;*
- f. Timing of construction activities to avoid school pick up/drop off times;*
- g. Provision of sufficient on-site parking prior to commencement of construction activities;*
- h. Post construction restoration/reinstatement of the working areas and temporary access to the public highway.*

- The reasons given for the conditions are:

6. To ensure that the issue of contamination is adequately addressed and to ensure a satisfactory development, in accordance with Policy CS32 of the Dacorum Core Strategy (2013).

11. In order to protect highway safety and the amenity of other users of the public highway and rights of way.

Appeal B Ref: APP/A1910/W/24/3342616

Land Rear of 49-53 High Street, Northchurch HP4 3QH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mr Herbert of QH (London Colney Ltd) against the decision of Dacorum Borough Council.
- The application Ref 22/02203/DRC sought approval of details pursuant to condition No 9 of a planning permission Ref 20/02653/ROC, granted on 22 October 2022.
- The application was refused by notice dated 18 October 2023.
- The development proposed is details as required by condition 9 (Drainage) attached to planning permission 20/02653/ROC (Variation of condition 2 (approved plans) attached to planning permission 4/03109/17/MFA - Proposed demolition of all existing buildings, improvements to existing access, construction of four 3-bed and six 2-bed cottages with associated car parking and access road with waste and cycle storage).
- The details for which approval is sought are: 9. *No development shall take place until the final design of the drainage scheme is completed and sent to the LPA for approval. The scheme shall also include;*
 - 1. Confirmation of proposed drainage scheme based on either infiltration or discharge in surface water sewer.*
 - 2. Infiltration tests should be conducted to BRE Digest 365 Standards where infiltration is proposed.*

3. Implementing the appropriate drainage strategy using appropriate above ground SuDS measures where possible.

4. Detailed engineered drawings of the proposed SuDS features including their, location, size, volume, depth and any inlet and outlet features including any connecting pipe runs and all corresponding calculations/modelling to ensure the scheme caters for all rainfall events up to and including the 1 in 100 year + 40% allowance climate change event. The plan should show any pipe 'node numbers' that have been referred to in network calculations and it should also show invert and cover levels of manholes.

5. Final detailed management plan to include arrangements for adoption and any other arrangements to secure the operation of the scheme throughout its lifetime.

- The reason given for the condition is: *To reduce the risk of flooding to the proposed development and future occupants, in accordance with Policy CS31 of the Dacorum Core Strategy (2013).*
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Decision

1. Appeal A is dismissed insofar as it relates to Condition 6.
2. Appeal A is allowed insofar as it relates to the details reserved by condition 11 attached to planning permission Ref. 20/02653/ROC (demolition of all existing buildings, improvements to existing access, construction of four 3-bed and six 2-bed cottages with associated car parking and access road with waste and cycle storage) at Land Rear of 49-53 High Street, Northchurch, Hertfordshire HP4 3QH granted on 22 October 2020 are granted, in accordance with application 22/02419/DRC, and Construction Management Plan Incorporating Delivery and Servicing Management Plan except insofar as this relates to site remediation.
3. Appeal B is dismissed.

Preliminary Matters

4. At my site visit, it was clear that the development had commenced. Ten dwellings have been constructed and it appeared that these were occupied. The conditions the subject of this appeal required the submission and approval of details before the development was begun.
5. The appellant's case raises concerns about the validity of the conditions the subject of both appeals. These concerns include whether the conditions were pre-commencement conditions and their enforceability. However, this appeal is against the refusal to grant approval of the details of the conditions. It is not within the remit of this appeal to consider the validity of the conditions.
6. The Lead Local Flood Authority, in their representation to Appeal B, refer to a subsequent application¹ to vary condition 9. Neither of the main parties have referred to this application and I am not aware of its outcome. In any event, I must deal with the appeal on the basis on which it was made.

¹ 23/03051/ROC

Background and Main Issues

7. Planning permission was granted in October 2020 for ten dwellings. This was subject to a number of conditions, including those the subject of the two appeals before me. All three conditions were worded so as to be pre-commencement conditions.
8. Evidence demonstrating harm to the Chiltern Beechwoods Special Area of Conservation (SAC) was published in March 2022. The Chiltern Beechwoods Special Area of Conservation: Mitigation Strategy for Ashridge Commons and Woods Site of Special Scientific Interest (V1 dated 15 November 2022) (Mitigation Strategy) confirms that applications will be subject to screening at the earliest stage in the planning process for their potential to impact upon the SAC. Where planning permission was granted before 14 March 2022, the Mitigation Strategy sets out that applications for the discharge of conditions will be subject to screening if this has not been carried out at an earlier stage.
9. The Council's reason for refusal is common to both Appeal A and Appeal B. Accordingly, whether an Appropriate Assessment (AA) pursuant to the Conservation of Habitats and Species Regulations 2017 (Habitats Regulations) is necessary in order to agree the conditions attached to the planning permission and, if it is necessary, the effect of the proposal on the SAC with particular regard to recreational disturbance is a main issue for both appeals.
10. In relation to Appeal B, there is an objection from the Lead Local Flood Authority to the submitted details. As such, whether the details of the surface water drainage scheme would be acceptable is also a main issue.

Reasons

Is an AA Necessary and the Effect of the Development on the SAC

11. The appellant has referred to a previous appeal² on this site which related to the discharge of conditions. Since that decision was taken, the Court of Appeal has issued its ruling in the Fry case³. This has confirmed that an AA may be undertaken when a pre-commencement condition is to be discharged and that the assessment has to be of the whole development whose implementation would be authorised by that decision.
12. The screening of applications for the discharge of conditions for the purposes of the Habitats Regulations requires the relevant conditions to be assessed to establish if they go to the 'heart of the permission'. This requires an assessment as to whether each condition is an implementing one and if the details are fundamental to the acceptability of the development.

Appeal A: Condition 6

13. The appeal site was, at least in part, in use as a garage at the time of the original grant of planning permission. It is typically the case that such sites are likely to be contaminated, but not to the extent that it would be

² APP/A1910/W/23/3329143 allowed 13 March 2024

³ CG Fry & Son Ltd v Secretary of State for Levelling up, Housing and Communities [2024] EWCA Civ 730.

impossible for it to be remediated for residential use. Ensuring that proper consideration has been given to and the mitigation of any contamination is fundamental to the acceptability of this site. This is because it would ensure that there would not be an unacceptable effect on future occupiers of the site.

14. A balance has to be struck between having sufficient information to grant planning permission and not placing undue burdens on applicants at an early stage in the development process. To adopt the appellant's approach – that if it was so significant the issue should have been addressed prior to the grant of permission, would mean that no condition could ever go to the heart of the permission. That is not a reasonable interpretation.
15. Condition 6 does not operate in isolation. It must also be read alongside condition 7. This approach has been endorsed by the Court of Appeal⁴ which held that two conditions could be read together to provide a sensible meaning. The Court of Appeal⁵ has also noted that 'the discharge of pre-commencement conditions is an imperative step before lawful implementation can take place'. Combining conditions 6 and 7 into one condition would mean that it would not be possible to discharge the pre-commencement condition as further verification would be required which could only be ascertained once the development was underway.
16. The appellant has sought to rely on the comments of the environmental health officer (EHO) as reported in a previous application⁶ for the discharge of this condition. That application initially sought to discharge condition 6 but it was subsequently withdrawn from the application. The comments of the EHO were therefore not considered in the officer report. Furthermore, it is not within the gift of the EHO to determine what is or is not required to discharge a planning condition. That is a matter for the Local Planning Authority and there is no evidence before me of further correspondence with the Council's planning officers on this specific point prior to the application that led to this appeal.
17. I therefore conclude that condition 6 is an implementing condition which fundamental to the acceptability of the development. As such, an AA would be necessary before the details in it could be agreed.

Appeal B: Condition 9

18. It is reasonable to assume that the Council and its consultees have sufficient knowledge and understanding of their area, and, in this instance, the operation of drainage systems, to know when it would be necessary to seek additional information in advance of planning permission being granted, and when that detail could be secured by condition.
19. The site is in an area at medium risk of surface water flooding. Paragraph 173 of the National Planning Policy Framework (the Framework) confirms that flood risk should not be increased elsewhere. This is an important consideration as it has the potential to affect not only the proposed

⁴ FSS v Arun DC & Brown [2006] EWCA Civ 1172

⁵ CG Fry & Son Ltd v Secretary of State for Levelling up, Housing and Communities [2024] EWCA Civ 730.

⁶ 22/01691/DRC

development, but the safety of surrounding properties and their occupiers. This is not a peripheral matter in the planning process.

20. It is not uncommon for overarching drainage strategies to form part of application documentation, with specific detail secured by condition. As referred to above, conditions should be considered in their entirety.
21. I am therefore satisfied that condition 9 is an implementing condition and that it too is fundamental to the acceptability of the development.

Appeal A: Condition 11

22. The construction management plan required by condition 11 sought to mitigate short-term effects of the construction process through control of works. I do not agree that the appellant's correspondence with the Council demonstrates the Council considered this issue did not go to the heart of the permission. The correspondence does not explicitly say this and it forms the Council's reason for refusal.
23. As pre-commencement condition, no.11 would be an implementing condition. However, it is not fundamental to the acceptability of the development, but rather ensures that the short term disruption caused during the construction phase of the scheme is mitigated. Consequently, an AA is not required with respect to condition 11.
24. There is no dispute as to the content of the construction management plan. I have no reason to disagree with this, save for the reference to carrying out the development in accordance with the requirements of the contamination surveys as that is the subject of a separate condition. Subject to this caveat, there is no reason condition 11 could not be approved.

Chiltern Beechwoods SAC

25. The SAC represents the most extensive area of native beech woodland in England. The SAC extends for 1,276.5ha and is made up of nine separate sites across the Chilterns, each of which is a separate Site of Special Scientific Interest (SSSI). The qualifying features for which the SAC is designated are its beech forests on neutral to rich soils, dry grasslands and scrublands on chalk or limestone (albeit this has a restricted distribution through the SAC) and populations of stag beetle.
26. This proposal has the potential to affect the Ashridge Commons and Woods SSSI component of the SAC. The SAC and its qualifying features are at risk from recreational disturbance which can give rise to a range of effects including damage from vegetation wear, soil compaction, erosion, removal of deadwood, vandalism, contamination from dog fouling, litter and invasive species, increased fire incidence, harvesting, damage to visitor infrastructure, challenges to achieving grazing and changes to public perception. Growth within 12.6km of the SAC will likely result in an increase in visitors and use of the site. The proposed development would, in combination with other residential development, have a likely significant effect on the integrity of the SAC as a result of the increased population and associated activity which would give rise to the above effects. In these circumstances, the Conservation of Habitats and Species Regulations 2017

(as amended) (habitats regulations) require me to undertake an Appropriate Assessment (AA) of the implications of the proposed development for the SAC in view of its conservation objectives before deciding to grant permission.

27. Strategic mitigation measures to address these effects are set out in the 'Chilterns Beechwoods Special Area of Conservation Mitigation Strategy for Ashridge Commons and Woods Site of Special Scientific Interest' (mitigation strategy) and comprises two separate elements. Strategic Access Management and Monitoring (SAMMS) involves access management and engagement work wholly within the boundary of the SAC which is achieved via a per dwelling tariff based contribution. Suitable Alternative Natural Greenspace (SANG) involves the provision of alternative recreation opportunities away from the SAC. The mitigation strategy sets out development must be within the catchment of the SANG in order to be able to contribute to it.
28. Natural England, in its role as the Statutory Nature Conservation Body, has objected to both proposals. This is on the basis that there would be an adverse effect on the integrity of the SAC and there is no mitigation in place either via the Council's SAMMS and SANG schemes, or provided by the developer.
29. The appeal site is not within the catchment of the Council's Strategic SANG sites at Bunkers Park and Chipperfield Common. No alternative provision has been proposed. Nor is there any mechanism before me to secure the SAMMS contribution. There is no evidence before me to allow me to demonstrate that there are not alternative solutions to deliver new housing that would have a lesser effect on the features of the sites in question, that there are imperative reasons of overriding public interest to permit what is proposed or that there would be compensatory measures that would offset the harm.
30. I therefore cannot conclude that the proposed development would not have an adverse effect on the integrity of the SAC. Consequently, the proposed development would be contrary to Dacorum Core Strategy 2006-2031 (adopted 25 September 2013) (CS) Policy CS26, the Habitats Regulations and, insofar as it relates to habitats sites, Section 15 of the Framework which, taken together, require all impacts on habitats sites to be mitigated for.

Appeal B: Surface Water Drainage Scheme

31. The lead local flood authority (LLFA) have clear reservations about the suitability of the proposed surface water drainage scheme. Concern has been expressed with regard to the calculations used to design the scheme. There is only very limited evidence before me to rebut these concerns, and does not address of the comments made by the LLFA. It is not clear to me how access to maintain the drainage system can be ensured given the extent which is located within the private amenity spaces of a number of the dwellings.
32. The site also lies within a source protection zone. No measures are proposed to mitigate the effects of any pollutants that could enter the

system. While the site is a low traffic road with low risk of pollution occurring, that does not mean there would be no risk. There would therefore be the risk of harm to the source protection zone.

33. As a result, I cannot be certain that the surface water drainage scheme would ensure that flood risk would not be increased elsewhere. I therefore cannot be satisfied that the surface water drainage scheme would operate effectively. This would be contrary to the provisions of the Framework at section 14.

Other Matters

34. The access to the site lies within the Northfield Conservation Area (CA). Its significance is derived from its historic and architectural significance as the core of a historic village. Only the access to the site lies within the CA and none of the condition details before me would pertain to it. There would be no effect to the setting of the CA from the condition details before me.

Conclusion

35. For the reasons given above Appeal A should be allowed in part and dismissed in part, and Appeal B should be dismissed.

Jennifer Wallace

INSPECTOR