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## Appeal Decision

Site visit made on 14 March 2017

**by Jason Whitfield BA (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 6<sup>th</sup> April 2017**

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**Appeal Ref: APP/P1560/W/16/3160793**

**Land to the East of Tye Road, Elmstead Market, Essex**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
  - The appeal is made by Mr J. Hills, Hills Residential Ltd against the decision of Tendring District Council.
  - The application Ref 16/00219/OUT, dated 12 February 2016, was refused by notice dated 27 July 2016.
  - The development proposed is residential development of up to 32 dwellings, land for a community facility and associated car parking and infrastructure.
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### Decision

1. The appeal is allowed and outline planning permission is granted for residential development of up to 32 dwellings, land for a community facility and associated car parking and infrastructure at Land to the East of Tye Road, Elmstead Market, Essex in accordance with the terms of the application, Ref 16/00219/OUT, dated 12 February 2016, subject to the conditions set out in the Schedule to this decision.

### Procedural Matters

2. The application was submitted in outline with all matters reserved for future consideration. The proposal was accompanied by an indicative masterplan (15/26/02). An amended masterplan (15/26/02 Rev C) was submitted to the Council prior to their determination of the application, as was an access option plan and illustrative house types. Those plans were submitted for indicative purposes only. That was the basis on which the Council determined the application and I have therefore dealt with the appeal on that basis.
  3. A plan (S161/216 Rev A) has been submitted with the appeal which shows an amended footpath link from the appeal site to Colchester Road. In addition, revised Arboricultural Impact Assessment, Supplemental Ecology Report and Impact Assessment of Development and Hedgerow Loss reports have all been submitted to accompany the amended footpath link.
  4. The Council argues that the revised plans and reports represent a material change to the proposal and, having regard to the 'Wheatcroft Principles' arising from the case of *Bernard Wheatcroft Ltd v SSE [JPL, 1982, P37]*, should not be taken into account.
  5. However, as the application was submitted in outline with all matters reserved for future consideration, the revised details are indicative only and do not therefore materially alter the proposed development. Rather they seek to
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demonstrate how a pedestrian link could be provided without the loss of the trees and hedgerow on the eastern side of Tye Road. Indeed, as the appellant points out there may be other options available for pedestrian links from the appeal site which could be dealt with as part of a future reserved matters application. As such, I am satisfied that the development is not so changed that to consider the revised plans and documents would be to deprive those who should have been consulted on the revisions of the opportunity. I have, therefore, taken them into account in my decision.

### **Main Issue**

6. The main issue is the effect of the proposal on the character and appearance of the area.

### **Reasons**

7. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the appeal is determined in accordance with the statutory development plan unless material considerations indicate otherwise. The development plan in this instance comprises the saved policies of the Tendring District Local Plan 2007 (LP).
8. LP Policy QL1 sets out the spatial strategy for development in the District. It states that development will be concentrated within settlement development boundaries and that, outside of these, only development which is consistent with countryside policies will be permitted. The appeal site lies outside of the settlement development boundary for Elmstead Market. There is no suggestion the proposal would be consistent with the countryside policies of the LP. Consequently, the proposal would conflict with Policy QL1 of the LP.
9. Nevertheless, Paragraph 49 of the National Planning Policy Framework (the Framework) states that relevant policies for the supply of housing should not be considered up-to-date if a Council cannot demonstrate a 5 year supply of deliverable housing sites.
10. Saved Policy QL1 seeks to control the location of housing and is, therefore, a relevant policy for the supply of housing. It is common ground between the main parties that the Council is unable to demonstrate a 5 year supply of deliverable housing sites. I have no reason to conclude otherwise. Consequently, LP Policy QL1 should not be considered up-to-date and I therefore afford it limited weight.
11. The proposal would also lie outside of the settlement boundary within the emerging Tendring District Local Plan 2013-2033 and Beyond Preferred Options Consultation Document (Draft LP). The document is currently at an early stage of preparation, however, and the Council suggests its policies should therefore be afforded limited weight. I see no reason to disagree.
12. The appeal site is adjoined on three sides by agricultural fields which form part of the wide expanse of open countryside that encompasses the settlement of Elmstead Market. To the west is Tye Road, with agricultural fields beyond. This part of Tye Road comprises a relatively narrow, rural highway without footpaths and enclosed by hedges and vegetation either side. As a result, the general character of the area around the site is distinctly rural. Nevertheless, given the close proximity to the built-up area of the settlement, the fields

surrounding Tye Road are very much seen in the context of the built development of Elmstead Market.

13. The site is a large, broadly flat, arable field which is free from built form and is bound by a continuous mixed native hedgerow with mature trees. A section of highway verge extending along the eastern side of Tye Road to the junction with Colchester Road has also been incorporated into the site. It includes an established hedgerow which the Council indicates contains sufficient species and features to be regarded as 'important' in accordance with the *Hedgerow Regulations 1997*. In addition, several trees in the southern section of the hedgerow are included under a Tree Preservation Order. As such, the appeal site and the hedgerow make a positive contribution to the character of Tye Road and the wider countryside.
14. LP Policy EN1 states that the quality of the district's landscape and its local character will be protected, and where possible, enhanced. Any development which would significantly harm landscape character or quality will not be permitted.
15. The proposal would result in the loss of a pleasant, agricultural field and the incursion of a significant expanse of built form into an undeveloped area of open countryside. Views of the site would materially change to be urban in appearance and the development would, given the location of the site, appear notably detached from the built-up area of the settlement. The proposal would, as a result, be harmful to the intrinsic rural character of the area.
16. In order to ensure that adequate footpath links to the services and facilities within the village would be accessible by future residents, the indicative proposals show a footpath link along the eastern side of Tye Road to the junction with Colchester Road. This would require the removal of a large degree of the important trees and hedgerow which have been identified. I agree that the loss of the trees and hedgerow here would have a harmful effect on the rural character of the area.
17. Consequently, taking all of this into account, I find that the proposal would not protect the landscape or the local character of the area.
18. Nevertheless, the appellant has provided an alternative option which would provide a footpath link on the western side of Tye Road without affecting the hedgerow on the eastern side. A semi-mature hedge is situated on the western highway verge which is dominated by hawthorn with blackthorn, dog rose and the occasional self-set young oak. There are several gaps, mostly filled with brambles, and a field entrance dividing the hedge into two sections. The evidence indicates that the hedge does not appear to be managed and, based on my own observations, I agree it makes little contribution to the character of the area.
19. The provision of a footpath on the western side of Tye Road would result in the loss of the hedgerow. However, given its relatively low quality, I am satisfied that its loss would not unduly harm the character or appearance of the area. What is more, the availability of alternative footpath links would reduce the extent of the harm that would arise from the loss of the trees and hedgerow on the eastern side of Tye Road. I am satisfied that it has been demonstrated that adequate footpath links to the village could be provided and that such

details could be suitably dealt with as part of a future reserved matters application.

20. In addition, the appeal site lies adjacent to a parcel of land to the north of Meadow Close which was granted planning permission for 20 dwellings<sup>1</sup> in April 2016. That land adjoins the built-up area of the settlement. I have no reason to believe that would not come forward for development in the future and therefore the harm resulting from the detachment of the appeal site from the built-up area would likely be reduced in the future.
21. Moreover, the appeal site is relatively well contained with a defensible boundary of Tye Road to the west and, whilst layout is a reserved matter, the indicative plan shows that the appeal site could accommodate a development of 32 dwellings with a relatively low density of around 14 dwellings per hectare. In addition, the development would be viewed in the context of the built-up area to the east. It would, in my view, provide a gentle transition from the urban to the rural. As a result, I find that the degree of harm arising from the failure to protect the landscape and the local character of the area would be limited.
22. Nevertheless, I conclude, for the reasons above, that the proposal would have a harmful effect on the character and appearance of the area. Though the degree of harm would be limited, the proposal would conflict with Saved LP Policies EN1 and QL1. The proposal would also conflict with Paragraph 17 of the Framework insofar as it states that it is a core planning principle to recognise the intrinsic character and beauty of the countryside, as well as Paragraph 58 of the Framework which states that decisions should respond to local character. It would also conflict with Paragraph 61 of the Framework which states that decisions should address the integration of new development into the natural environment.

### **Unilateral Undertaking**

23. A signed and completed S106 agreement has been submitted which would secure financial contributions towards primary school accommodation. In addition, the agreement would also secure 25% on site affordable housing and the provision of on-site public open space.
24. Paragraph 204 of the Framework and Regulation 122 of the Community Infrastructure Levy Regulations (CIL) require that planning obligations should only be sought, and weight attached to their provisions, where they are: necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development.
25. Paragraph 47 of the Framework makes clear that Councils should meet the full, objectively assessed need for affordable housing. Paragraph 50 sets out that this need should be met on site. LP Policy HG4 requires up to 40% of dwellings on sites of 15 or more dwellings to be affordable. The Council points to its own evidence base in the preparation of the Draft LP which indicates that 40% would render residential development in the District unviable. Both parties therefore agree that the 25% provision of affordable housing on-site is acceptable and on the basis of the evidence before me I have no reason to

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<sup>1</sup> 14/01238/OUT

come to any alternative conclusion. Consequently, whilst there would be some conflict with LP Policy HG4, I consider that the proposed affordable housing scheme would be necessary, directly related, and fairly and reasonable related in scale and kind to the proposed development, in accordance with CIL Regulation 122, and Paragraph 204 of the Framework.

26. With regard to the education contribution, the Council has indicated that the proposal would generate an increase in the number of pupils attending local schools with a need for up to 2.8 Early Years and Childcare (EYC) places, 9.6 primary school places and 6.4 secondary school places. The Council indicates that there are sufficient EYC places to accommodate the development and as CIL Regulation 123 (3) restricts the use of pooled contributions it has not sought a contribution towards Secondary Education.
27. However, primary school places are forecasted to be at a deficit by the school year 2019/2020. As such, the education contribution included in the S106 would contribute towards facilities required as a result of the demand generated by the development. Thus, I consider that the education contribution would be necessary, directly related, and fairly and reasonable related in scale and kind to the proposed development, in accordance with CIL Regulation 122, and Paragraph 204 of the Framework.
28. LP Policy COM6 states that proposals for residential development on a site of 1.5ha or more should provide at least 10% of the gross site area as public open space. The Council's evidence indicates that there is a deficiency of 4.51 ha of equipped play/formal open space in Elmstead and that the proposal would generate additional pressure on existing facilities. I have no reason to disagree. As a result, I consider that the contribution would accord with LP Policy COM6, CIL Regulation 122, and paragraph 204 of the Framework.

### **Planning Balance**

29. Paragraph 12 of the Framework is clear regarding the statutory status of the development plan as the starting point for decision-making. Proposed development which conflicts with an up-to-date Local Plan should be refused unless material considerations indicate otherwise.
30. Paragraph 14 of the Framework sets out the presumption in favour of sustainable development as where the development plan is absent, silent, or, as in this case, relevant policies are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the Framework taken as a whole. Paragraph 7 of the Framework sets out the three mutually dependable dimensions to sustainable development which are the environmental role, the social role and the economic role.
31. I have found that the proposal would have a harmful effect on the character and appearance of the area, in conflict with LP Policies QL1 and ENV1 as well as Paragraphs 17, 58 and 61 of the Framework.
32. However, that harm would be limited in its extent. Moreover, LP Policy QL1 is out-of-date and I therefore afford the conflict with it limited weight. Furthermore, the parties agree that, subject to the provision of a future footpath link, the appeal site is within close proximity to local services and facilities in Elmstead Market. There is also a bus stop close to the site on

Colchester Road which offers public transport links to services in Clacton-on-Sea and Colchester. As such the proposal would contribute towards the environmental role of sustainability by maximising opportunities for sustainable transport and supporting sustainable patterns of development, in line with Paragraphs 29 and 30 of the Framework.

33. In terms of the social role, the Council is unable to demonstrate a 5 year supply of housing land. The Council's statement indicates there is a current shortfall of around 469 homes. The proposal would provide for 32 dwellings. This would make an important contribution to boosting the supply of housing in the District in line with Paragraph 47 of the Framework and is a matter which I afford significant weight.
34. The proposal would also deliver around 8 new affordable homes. The appellant's evidence indicates that there is an overwhelming need for affordable housing in the District and that the current rate of delivery does not meet that need. I have no reason to come to an alternative view. As such, the delivery of affordable housing as part of the scheme would be a benefit of significant weight, in line with Paragraph 47 of the Framework.
35. The proposal would contribute towards the economic role of sustainability though job creation during the construction phase, as well as additional spending in the local area through future economically active residents.
36. As a result, having assessed the proposal against the policies in the Framework as a whole, the adverse impacts arising from the development would not significantly and demonstrably outweigh the benefits of the scheme.
37. I conclude, therefore, that the proposed development would constitute sustainable development for which there is a presumption in favour of as set out in Paragraph 14 of the Framework and that planning permission should be granted.

### **Other Matters**

38. I have considered the comments of Elmstead Parish Council in respect of the effect of the proposal on village facilities and the need for new homes in Elmstead Market. There is, however, no substantive evidence before me that existing facilities within the village would be unable to sustain further development. Moreover, whilst I recognise the number of recently approved dwellings in or close to the settlement, the Framework is clear that it is important to boost the supply of housing in the area, particularly in the context of the Council's lack of 5 year housing land supply.
39. I recognise the concerns regarding inter connectivity between the appeal site and the adjacent land, however, access is reserved for future consideration. Furthermore, there is no substantive evidence before me that the proposal would give rise to additional levels of traffic that would have a harmful effect on highway or pedestrian safety.
40. The owner of the adjoining land has advised that the proposed footpath link would encroach onto land within their ownership and that consent to use the land would not be agreed to. The appellant indicates in contrast that the land falls within the boundary of the highway. In any event, any legal rights which may exist in those respects are a separate matter. As such, they are a consideration to which I can afford no more than very little weight.

## **Conditions**

41. In addition to the standard time limit conditions, I consider a condition restricting the number of dwellings to not more than 32 dwellings in line with the terms of the application necessary to protect the character and appearance of the area. A condition relating to the relevant location plan is necessary to provide certainty over the extent of the appeal site. It is not necessary to require compliance with other plans as these are indicative only.
42. To safeguard the ecological value of the site, a condition for a mitigation scheme is necessary. A condition requiring a Construction Method Statement is also necessary to protect the living conditions of nearby residents. To prevent flooding, a condition for a surface water drainage scheme is necessary. A scheme for foul drainage is also necessary to protect the living conditions of future residents and to prevent pollution. Conditions are necessary to ensure that risks from potential land contamination to the future users of the site and surrounding land are minimised to acceptable levels.
43. The Council has suggested conditions relating to finishing materials, hard and soft landscaping works, walls and fences. However, such issues relate to matters which are reserved for future consideration and do not form part of this scheme. I have also considered all other conditions suggested which relate to car parking, access arrangements, visibility splays, vehicle turning facilities, refuse collection points, carriageway and footway arrangements, residential travel information packs and garages and cycling storage. However, access is a reserved matter and it would not be necessary to impose those conditions on an outline permission. I find therefore that such conditions would not be necessary or reasonable.

## **Conclusion**

44. Whilst the proposal would conflict with LP Policies QL1 and EN1, I have found that the proposal would constitute sustainable development for which planning permission should be granted. That is a material consideration which outweighs the conflict with the development plan in this instance.
45. For the reasons given above, I conclude that the appeal should be allowed.

*Jason Whitfield*

**INPSECTOR**

## **SCHEDULE**

- 1) Details of the access, 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 approval of the reserved matters shall be made to the local planning authority not later than 3 years from the date of this permission.
- 3) The development hereby permitted shall take place not later than 2 years from the date of approval of the last of the reserved matters to be approved.
- 4) The maximum number of dwellings to be contained in the development hereby permitted shall not exceed 32 (thirty-two).
- 5) The development hereby permitted shall be carried out in accordance with the following approved plans: 15/26/01 Location Plan.
- 6) No development hereby permitted shall take place until an Ecological Mitigation Scheme, including timescales, has been submitted to, and approved in writing by, the local planning authority. The scheme shall be constructed and completed in accordance with the approved Ecological Mitigation Scheme and in accordance with the agreed timescale.
- 7) No development shall take place until a Construction Method Statement has been submitted to and approved in writing by the local planning authority. The statement shall include:
  - i) Wheel cleaning facilities
  - ii) Details of the loading and unloading of plant and materials
  - iii) Hours of construction
  - iv) A strategy for dust suppression
  - v) The means of recycling materials
  - vi) The provision of parking facilities for contractors during all stages of the development
  - vii) The provision of a means of storage and/or delivery for all plant, site huts, site facilities and materials.The development shall be carried out in accordance with the approved statement.
- 8) No development shall take place until a detailed surface water drainage scheme for the site, based on sustainable drainage principles and an assessment of the hydrological and hydro geological context of the development has been submitted to and approved in writing by the local planning authority. The scheme shall include a Maintenance Plan detailing the maintenance arrangements for the surface water drainage system, including the recording of yearly maintenance logs which are to be available for inspection upon the request of the local planning authority. The scheme shall subsequently be implemented prior to first occupation in accordance with the timing/phasing arrangements embodied within the scheme.



- 9) No development shall commence until a foul water drainage strategy has been submitted to and approved in writing by the local planning authority. No dwellings shall be occupied until the works have been carried out in accordance with the approved strategy.
- 10) No development shall commence until an assessment of the risks posed by any contamination shall have been submitted to and approved in writing by the local planning authority. This assessment must be undertaken by a suitably qualified contaminated land practitioner, in accordance with British Standard BS 10175: Investigation of potentially contaminated sites - Code of Practice and the Environment Agency's Model Procedures for the Management of Land Contamination (CLR 11) (or equivalent British Standard and Model Procedures if replaced), and shall assess any contamination on the site, whether or not it originates on the site. The assessment shall include:
  - i) a survey of the extent, scale and nature of contamination;
  - ii) the potential risks to:
    - human health;
    - property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes;
    - adjoining land;
    - ground waters and surface waters;
    - ecological systems; and
    - archaeological sites and ancient monuments.
- 11) No development shall take place where (following the risk assessment) land affected by contamination is found which poses risks identified as unacceptable in the risk assessment, until a detailed remediation scheme shall have been submitted to and approved in writing by the local planning authority. The scheme shall include an appraisal of remediation options, identification of the preferred option(s), the proposed remediation objectives and remediation criteria, and a description and programme of the works to be undertaken including the verification plan. The remediation scheme shall be sufficiently detailed and thorough to ensure that upon completion the site will not qualify as contaminated land under Part IIA of the Environmental Protection Act 1990 in relation to its intended use. The approved remediation scheme shall be carried out, and upon completion a verification report by a suitably qualified contaminated land practitioner shall be submitted to and approved in writing by the local planning authority, before the development is commenced.
- 12) Any contamination that is found during the course of construction of the approved development that was not previously identified shall be reported immediately to the local planning authority. Development on the part of the site affected shall be suspended and a risk assessment carried out and submitted to and approved in writing by the local planning authority. Where unacceptable risks are found remediation and verification schemes shall be submitted to and approved in writing by the local planning authority. These approved schemes shall be carried out before the development is resumed or continued.

-----END OF SCHEDULE-----