
Appeal Decision

Site visit made on 8 August 2018

by Timothy C King BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 November 2018

Appeal Ref: APP/Q1445/W/17/3182804

Land to the east of The Vale, Brighton BN2 7AB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Boran Investments against the decision of Brighton & Hove City Council.
 - The application Ref BH2015/01890, dated 27 May 2015, was refused by notice dated 28 February 2017.
 - The development proposed is erection of 6no three bedroom dwellings (C3), detached garages and 2no detached single storey outbuildings.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of 6no three bedroom dwellings (C3), detached garages and 2no single storey detached single storey outbuildings at land to the east of The Vale, Brighton BN2 7AB, in accordance with the terms of the application Ref BH2015/01890, dated 27 May 2015, subject to the conditions set out in the attached Schedule.

Preliminary Matters

2. Following the issuing of the revised National Planning Policy Framework (the Framework) in July 2018 the main parties were asked whether they wished to make any additional comments on the appeal in light of this. Whilst the Council had no observations to make the appellant put forward further representations and I have had regard to these.
3. During the appeal process I received a copy of a s106 Agreement, dated 6 August 2018, made between Brighton & Hove City Council and the appellant, Boran Investments Ltd, in respect of financial contributions towards Affordable Housing and also Sustainable Transport initiatives in the locality. This directly relates to two of the reasons for refusal cited by the Council in its decision notice and I will discuss the implications under the relevant headings of the main issues.

Main Issues

4. These are as follows:
 - 1) The effects of the proposal on the ecology and biodiversity of the area;
 - 2) whether the proposal should provide for a contribution towards affordable housing; and

- 3) whether the proposal should provide for a contribution towards sustainable transport infrastructure in the immediate vicinity.

Reasons

Background

5. The proposal involves the erection of three sets of semi-detached dwellings along with garages and outbuildings on open land off the east side of The Vale. Slightly set back from what appears as an unadopted road the dwellings would sit opposite a series of existing dwellings on the developed west side.
6. Both main parties in their final comments make reference to a successful appeal relating to a substantial area of land immediately to the east, the expanse of which is in stark contrast to the narrow, rather linear form of the current appeal site. Together, these two sites form part of an Urban Fringe site, identified as 'Site 42' in the Council's Urban Fringe Assessments. These are areas of land that lie between the defined built-up urban boundary and that of the South Downs National Park.
7. In April 2018, subsequent to the Council's decision on the site the subject of the current appeal, planning permission was granted at appeal for a total of 45 new dwellings on this adjoining piece of land, known as land south of Ovingdean Road. In granting planning permission the Inspector acknowledged the benefits that the proposed housing would bring, but she also found that the proposal would give rise to some harm to the ecology and biodiversity of the site. Nonetheless, she was satisfied that, having regard to the proposed mitigation strategies, the degree of harm would be limited.

Ecology and biodiversity

8. The Ecology Partnership, specialist consultants commissioned by the appellant, initially surveyed the site in 2015, identifying the habitats present. The objection raised by the Council in this regard at the application stage was that the various reports accompanying the application had not been prepared in accordance with recognised technical guidance and, as such, were considered insufficient to assess the impacts of the proposed development and to inform appropriate mitigation, compensation and enhancement. In the circumstances, the Council required further information on habitats likely to be impacted on, reptiles, invertebrates, notable plants and on the cumulative effects with other developments.
9. In June 2017, just prior to the appeal being lodged, an updated Ecological Impact Assessment was produced with reference to the proposal's likely impacts on on-site habitats, protected species known to be present at the site and local cumulative impacts taking into account the extant planning permission for the adjoining site. The Council still raised concerns on this issue, and stated a requirement that appropriate surveys be carried out taking into account all factors, particularly with the proposed housing development on the adjoining site being allowed.
10. Subsequently, a letter dated 20th July 2018 has been submitted by the Ecology Partnership which represents the final update. The study finds that grassland within the site is considered to be relatively species-poor and that the majority of the species present at the site are primarily those associated with poorly managed grassland and disturbed ground. As regards the presence of

- protected species, both faunal and floral, there is some evidence of pipistrelles, serotines and slow worms with a badger sett also having been identified, estimated to be distanced between 20m and 25m from the site boundary.
11. The site, due to its relatively small size, was found not to have the significant value of the more expansive adjacent piece of land as it does not appear to support habitats for the variety of species found thereon. Accordingly, there largely appears to be confinement and combination impacts would not be of significance.
 12. The trees at the site are already protected by a group Tree Preservation Order. The proposed development would maintain all mature trees and the hawthorn habitat with new trees planted along its common boundary with the adjoining site. This would ensure that the ecological functionality of the land would be retained. Drawing no 02 Rev D indicates that root systems would be protected in accordance with recognised requirements. New mixed hedge growth would take place with existing rough grass re-seeded with grass/wild flower mix to provide habitats for wildlife and insects.
 13. Policy CP10 of the Brighton and Hove City Plan Part One, (CPP1) amongst other things, serves to conserve existing biodiversity, protecting it from the negative indirect effects of development. To help achieve this, particularly in instances of proposals for development, up-to-date information about the biodiversity which may be affected is required. In this connection paragraph 170 of the Framework says that planning decisions should contribute to and enhance the natural and local environment by, amongst other things, minimising impacts on and providing net gains for biodiversity.
 14. Policy QD18 of the Brighton and Hove Local Plan 2005 (LP) states that where a proposal could directly or indirectly affect a species of animal or plant, or its habitat protected under national legislation, measures will be required to avoid any harmful impact of a proposed development on such species and their habitats. It confirms that permission will not be granted for any development that would be liable to cause demonstrable harm to such species and their habitats.
 15. The Framework continues in this vein with its paragraph 175 indicating that if a proposed development would result in the loss or deterioration of irreplaceable habitats or give rise to significant harm to biodiversity and cannot be adequately mitigated then planning permission should be refused. Given the findings of the latest survey combined with the extent of the mitigation measures to be undertaken on the adjacent site such scenarios do not arise.
 16. In the circumstances I am satisfied that the information currently held is sufficient to allow for a condition requiring that, prior to the commencement of development, an ecological mitigation strategy, based on the most up-to-date information at that time, be carried out in accordance with relevant Best Practice Guidance. The Council has suggested such a condition be imposed in the event that the appeal is allowed and planning permission is granted for the development. The appellant is agreeable to this approach. The mitigation strategy would be submitted to the Council for subsequent written approval and, if acceptable, would then be implemented, accordingly.
 17. Such an approach would satisfy the requirements of CPP1 Policy CP10 and LP Policy QD18, the objectives of the Council's Supplementary Planning Document

‘Nature Conservation and Development’, and also advice in paragraphs 170 and 175 of the Framework. In the circumstances, I conclude that the proposal, with adequate safeguards employed, would not be harmful to the local ecology or biodiversity.

Affordable housing contribution

18. Policy CP20 of CPP1, adopted in March 2016, requires the provision of affordable housing on all sites of between 5 and 9 (net) dwellings, and a target of 20% affordable housing should be provided as an equivalent financial contribution. The Council has indicated that, in this particular instance, the contribution would total £223,250 towards the provision of affordable housing elsewhere. This would be paid in two equal instalments.
19. The policy also states that this target may be applied more flexibly where the Council considers this to be justified with consideration given to the accessibility of the site, the costs relating to the development (and, in particular, financial viability), whether affordable housing would prejudice the realisation of other planning objectives, and the need to achieve a successful housing development.
20. The Court of Appeal’s judgement of May 2016 reinstated, and gave legal effect to, the Written Ministerial Statement (WMS) of November 2014 which states that affordable housing and tariff style planning obligations should not be sought from developments of 10 units or less. At this point the government’s Planning Practice Guidance (PPG) was updated, accordingly. The intention of this is to prevent a disproportionate burden on small scale developments.
21. In the circumstances the PPG post-dates the adoption of CPP1 and is a weighty material consideration. Nonetheless, the WMS does not reduce the weight that should be given to the statutory development plan. The primacy of the development plan therefore remains in that planning applications must be decided in accordance with the development plan unless material considerations indicate otherwise. The WMS therefore represents a consideration which has to be balanced against the plan and the evidence base supporting the Council’s application of the policy.
22. The Council considers that Policy CP20, and its requirements, should hold good because there are sufficient local circumstances to justify an appropriate exception to the government’s approach. These circumstances include the significant need for affordable housing over the plan period to 2030, a constrained housing land supply, and that the delivery from smaller development sites has been a fairly constant source of supply whereas larger schemes are impacted by economic trends and housing market fluctuations.
23. The WMS is clearly a material planning consideration to which I attach considerable weight as it represents the clearest and most up-to-date expression of national policy. Nonetheless, taking everything into account, and in using discretion in applying where the balance should lie, I conclude that the provision of affordable housing is necessary to make the proposal acceptable, is directly related to the development, and is fairly and reasonably related in scale and kind to the development. Consequently, it would satisfy the tests of Regulation 122 of the Community Infrastructure Levy Regulations 2010 and paragraphs 55 and 56 of the Framework.

24. The completion of the s106 Agreement means there is a clear mechanism to secure much needed affordable housing in accordance with CPP1 Policy CP20.

Sustainable transport contribution

25. The S106 agreement also makes provision for a sustainable transport infrastructure contribution. The requirement for contributions towards off-site sustainable transport infrastructure improvements is set out within the Council's adopted Developer Contributions Technical Guidance. The quantum of proposed residential development equates here to a figure of £9,000. This is required to provide an accessibility kerb, hardstanding and bus stop cage road markings at the nearby eastbound bus stop on Ovingdean Road, with similar markings also to be provided at the 'Ovingdean Road' bus stop on Falmer Road.
26. Such infrastructure contributions are supported by CPP1 Policies CP7 and CP9 which seek, through the provision of infrastructure contributions, to provide measures that will help to manage and improve mobility and lead to a transfer of people onto sustainable forms of transport to reduce the impact of traffic and congestion and increase physical activity. The proposed development would be in line with this and would also accord with the tests set out in Regulation 122 of the Community Infrastructure Regulations 2010 and paragraphs 55 and 56 of the Framework.

Other considerations

27. I have had due regard to the representations received from interested parties raising objections to the proposed development; both at the application stage and also during the appeal process. One objector has referred to The Vale as being a designated 'Greenway', which is protected by LP Policy QD19. This policy has, in fact, been superseded with the adoption of the City Plan Part One document in March 2016, which is concerned with the wider issue of Biodiversity.
28. I also note that local objectors submitted an independent landscape assessment in 2015, compiled by 'Landvision Landscape Assessment'. I have had regard to this but, given that the Council considered at the application stage that the landscape and visual impacts of the proposal are acceptable and, more recently, with the planning permission granted on the adjoining site, there has been a significant material change in circumstances. Given this, I am satisfied that the proposal would not be harmful to the landscape. Neither do I consider that, in light of the extant permission, the proposal would constitute an overdevelopment of the site. Reference is made to a Council study whereby a limitation of 45 dwellings already granted on the adjoining piece of land would apply as a total across the two sites. However, this is not adopted policy.
29. Concerns have been raised that, although planning permission was refused in 1999 for three bungalows at the site, objectors do not feel that the then reasons for refusal have been addressed with the current proposal. I have not been provided with papers relating to this previous application but it is important to note that since this time the local development plan has changed with the adoption of the Brighton and Hove Local Plan in 2005 and the City Plan Part One in 2016. Further the government's National Planning Policy Framework, first published in 2012, was revised and reissued in 2018.

30. There are also concerns raised regarding highway safety. The local highway authority, having assessed the proposal with respect to the proposed dwellings' access points and additional traffic generated does not, though, consider that this would give rise to an increased highway risk. I have not been provided with any updated assessment on the proposal subsequent to planning permission being granted for the adjacent development, but I have had regard to the appeal decision letter for the proposal whereby the appointed Inspector noted that the highway authority was satisfied that, subject to proposed improvements, the development would not have an adverse effect on highway safety. Neither do I have any reason to believe that the road system could not accommodate the construction traffic.
31. It has been suggested that the proposed outbuildings could be converted for use as additional dwellings. Should this occur then a material change of use would have taken place. In the absence of any planning permission for such the Council holds enforcement powers to regularise the planning position. Nonetheless, I will impose a condition requiring that the outbuildings shall only be used for purposes incidental to their respective main dwellings.
32. Representations have been made relating to potential flooding, rain-water run-off and possible problems with sewage. I note that the Council did not raise objections in this regard, but these are also engineering related matters and are mainly controllable under current Building Regulations.

Conclusions and Conditions

33. I have concluded that the proposal is acceptable on all three main issues and, although having given due regard to the various points raised in respect of the considered impacts, none of these, even when taken together, outweigh the planning merits of the proposal.
34. For the above reasons, and having had regard to all matters raised, the appeal succeeds. In terms of conditions I have had regard to the advice within the PPG. Some pre-commencement conditions, suggested by the Council and agreed by the appellant, are imposed as they strike at the heart of the planning permission, are necessary to ensure a satisfactory standard of development, but insufficient details have yet to be provided. These include the required ecological mitigation strategy, details relating to a comprehensive landscaping scheme and also samples of building materials which will all need to be approved by the Council.
35. I have imposed a condition requiring that the development be implemented in accordance with the approved plans and, in the interests of sustainable transport, that details be submitted relating to cycle storage facilities for subsequent written approval. As mentioned, a condition is also imposed relating to the use of the outbuildings.
36. The Council has suggested imposing conditions relating to both energy and water efficiency standards and also one to ensure compliance with the Building Regulations Optional Requirement for accessible and adaptable dwellings. However, these are matters controllable under the current Building Regulations, and it is not necessary for such requirements to also be imposed by way of planning conditions.

37. Finally, the PPG says that conditions restricting the future use of permitted development (PD) rights will rarely pass the test of necessity and should only be used in exceptional circumstances. It comments that blanket removal of freedoms to carry out small scale domestic alterations that would otherwise not require an application for planning permission are unlikely to meet the tests of reasonableness and necessity. However, in this particular instance I find that, due to the shallow depth of the site transferring itself to the arrangement of the various curtilages, and the potential for clutter from additional outbuildings erected, the entitlement should be removed. This does not mean that any such development proposed would be unacceptable, but that planning permission would be required in this regard, allowing the Council to retain control in order to assess any future proposals' merits and impacts.

Timothy C King

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall begin not later than 3 years from the date of this permission.
- 2) The development hereby approved shall be carried out in accordance with the following plans: Drawings Nos 01 Rev B, 02 Rev D, 04 Rev D, 05 Rev C, 06 Rev C, 07 Rev C, 08 Rev B, 09 Rev C, 12 Rev B, LLD783/01 and LLD783/02.
- 3) No development shall take place until samples of the external materials to be used for the construction of the dwellings and associated buildings hereby permitted have been submitted to and approved in writing by the local planning authority. The development shall be carried out in accordance with the approved details.
- 4) No development shall take place until details of both hard and soft landscape works, including hard-surfacing materials and boundary treatments, have been submitted to and approved in writing by the local planning authority. Details of soft landscape works shall include planting plans; written specifications (including cultivation and other operations associated with plant and grass establishment); schedule of plants, noting species, plant sizes and proposed numbers/densities where appropriate; and details of the existing trees to be retained, including their spread, girth and species. Development shall be carried out in accordance with the approved details prior to first occupation of any dwelling, or otherwise in accordance with a programme agreed with the local planning authority. Any trees or plants which, within a period of 5 years from the completion of the development, die, are removed, become seriously damaged or diseased, shall be replaced in the next planting season with others of similar size and species.
- 5) Prior to the commencement of the development an ecological mitigation strategy, informed by up-to-date ecological surveys carried out in accordance with relevant Best Practice Guidance, shall be submitted to and approved in writing by the local planning authority. The approved strategy shall thereafter be carried out in full.
- 6) No occupation of the dwellings hereby approved shall take place until full details of cycle storage facilities have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with these details.
- 7) The outbuildings hereby approved shall only be used for purposes incidental to their respective main dwellings.
- 8) Notwithstanding the provisions of Article 3 of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) (or any order revoking, re-enacting or modifying that Order), no extensions or alterations to the dwellings hereby approved, which would otherwise be permitted by Schedule 2, Part 1, Classes A, B, C, D and E of that Order, shall be carried out.