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## Appeal Decision

Site visit made on 6 February 2018

**by Darren Hendley BA(Hons) MA MRTPI**

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

**Decision date: 10<sup>th</sup> April 2018**

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**Appeal Ref: APP/R1038/W/17/3187999**

**Land between Main Road and Burnside Avenue, Shirland, Alfreton, Derbyshire DE55 6BB**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Mr Sean Ingle, Wheeldon Brothers Limited against the decision of North East Derbyshire District Council.
  - The application Ref 17/00340/OL, dated 20 March 2017, was refused by notice dated 9 August 2017.
  - The application sought planning permission for the resubmission of outline application (10/01052/OL) (details of access submitted) for the erection of 107 dwellings without complying with a condition attached to planning permission Ref: 12/00273/OL, dated 11 November 2013.
  - The condition in dispute is No 4 which states that: *The details to be submitted for approval in writing by the Local Planning Authority as part of the reserved matters shall include a scheme for the provision of a minimum of 40% of the total number of dwellings as affordable housing (including a timetable for their provision). This affordable housing shall be in accordance with local affordable housing needs at the time the reserved matters application is submitted. The affordable housing shall be provided in full in accordance with the approved scheme and timetable and shall meet the definition of affordable housing as set out in the National Planning Policy Framework or any future guidance that replaces it. The scheme shall include: i) the numbers, type, tenure and location on the site of the affordable housing provision to be made which shall consist of not less than 40% of the housing units hereby approved; ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing; iii) the arrangements for the transfer of the affordable housing to an affordable housing provider (or the management of the affordable housing if no affordable housing provider is involved); iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.*
  - The reason given for the condition is: *In the interests of delivering affordable housing in accordance with Policy H7 of the North East Derbyshire Local Plan.*
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### Decision

1. The appeal is allowed and planning permission is granted for the resubmission of outline application (10/01052/OL) (details of access submitted) for the erection of 107 dwellings at Land between Main Road and Burnside Avenue, Shirland, Alfreton, Derbyshire DE55 6BB in accordance with the application Ref

17/00340/OL dated 20 March 2017, without compliance with condition number 4 previously imposed on planning permission Ref 12/00273/OL dated 11 November 2013, and subject to the plan numbered SHI/PL/01 dated 20/10/16 and the conditions in the attached schedule.

### **Application for costs**

2. An application for costs was made by Wheeldon Brothers Limited against North East Derbyshire District Council. This application is the subject of a separate Decision.

### **Procedural Matter**

3. The name of the appellant as set out on the planning appeal form differs from the planning application form, which stated a company name. I am, however, satisfied that the named appellant has the authority from the company in order for the appeal to proceed.

### **Background**

4. The appeal concerns a site which has received outline planning permission for a housing development (Council ref: 12/00273/OL), as a resubmission of an earlier approval (ref: 10/01052/OL). The permission included condition 4 which provided for a minimum of 40% of the total units of the development to be affordable housing, amongst other matters. The appellant has contended that this level of affordable housing is not viable and would make the proposal undeliverable, based on development appraisal evidence submitted with the planning application. Following a review of this evidence by the District Valuer, the appellant accepted 21.74% of the total units to be affordable housing.

### **Main Issue**

5. I consider the main issue is whether condition 4 is reasonable and necessary in the interests of whether or not the proposal would make adequate provision for affordable housing.

### **Reasons**

6. There is no dispute between the parties that there is a need for affordable housing to be provided in the District, which is demonstrated by the need which is set out in the North Derbyshire and Bassetlaw Strategic Housing Market Assessment (2013). However, paragraph 173 of the National Planning Policy Framework (Framework) is clear that in order to ensure viability, the costs of any requirements likely to be applied to the development, including affordable housing should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable. The Planning Practice Guidance (PPG) provides similar advice and in relation to conditions which may impact on the deliverability of a development.
7. To that end, the Council's Affordable Housing Supplementary Planning Document (2008) (AH SPD), and Developer Contributions Supplementary Planning Document (2007) (DC SPD), provides guidance on assessing viability, which has regard to both the economics of developing a site and the associated abnormal costs, and that the expected costs should be reflected in the price paid for the land.

8. The review carried out by the District Valuer broadly follows the approach in the AH and DC SPDs in respect of assessing viability. It has regard to measures associated with previous mining activities as abnormal costs, which I consider is reasonable, as is the proposed level of developer profit. I find, therefore, no reason to disagree with its conclusions over the amount of affordable housing that could be provided, whilst ensuring the proposal is deliverable.
9. That condition 4 on planning permission ref: 12/00273/OL has already been discharged does not imply the current level of affordable housing is viable, given the findings of the review of the District Valuer. Similarly, whilst the Council consider that the approved details, which concern shared ownership, may generate a higher return, the District Valuer's review is, in part, based on affordable rented units. In this regard, the Council would still maintain control over the tenure, through the discharge of condition 4, as now proposed, which would concern the full details of the affordable housing scheme.
10. The viability of a site also needs to be assessed with regard to the particular circumstances concerning the costs and value that relate to that site. The Council has referred to the Woolpack Public House site providing 40% of its units as affordable housing, although I have no evidence of the costs and value associated with that site, including associated costs with conversion, notwithstanding that it is a significantly smaller development which lessens its comparisons to the appeal site. As such, I attach limited weight to a comparison with affordable housing that has been brought forward on other sites. I recognise that Members of the Planning Committee will have detailed local knowledge, but assessing viability is dependent on evidence and so I attach significant weight to the review of the District Valuer.
11. The amount of the affordable housing that was proposed to be provided was a justification for the existing planning permission, as the site lies outside development limits. In determining this appeal, though, I have to consider the tests for conditions that are set out in the Framework. The Framework also seeks to deliver a wide choice of quality homes and this would be achieved, with the amount of affordable housing now proposed and so that the site can be delivered.
12. The PPG advises that only in exceptional circumstances should a planning condition be used to secure matters, such as affordable housing, that are normally subject of a planning obligation. In this case, I am however mindful that the existing outline permission dealt with affordable housing by the condition, and that would remain in place regardless of my decision. Moreover, the wording of the proposed condition sets out the scheme in sufficient detail, including the mechanism by which the housing will be secured as affordable. I consider the proposed condition would accord with the PPG as it would meet the test of necessity and is in the interests of transparency.
13. Therefore, I conclude the proposal would make adequate provision for affordable housing, on the basis of 21.74% of the total units. In its current form, condition 4 is not reasonable or necessary, and the alteration of the amount of affordable housing to be provided under the condition would comply with the tests for planning conditions set out in paragraph 206 of the Framework and the related advice in the PPG concerning the application of these tests.

14. The proposal would comply with 'Saved' Policies GS1 and H7 of the North East Derbyshire District Council, North East Derbyshire Local Plan (2005) as far as they concern the need to maintain or improve the quality of life of communities, and the provision of affordable housing. Although the appellant and the Council are in agreement that the site lies outside the development limits, and these policies seek to direct, or concern, development within such limits, the proposal would provide needed affordable housing in proximity to the limits and it would comply with guidance on the provision of affordable housing as set out in the Framework, as well as with regard to the use of conditions.
15. The proposal would not strictly comply with the Council's AH SPD, as it would provide less than the 40% of total units of affordable housing, notwithstanding the AH SPD does permit a consideration of the economics of developing a site and the associated abnormal costs. In this case, this is a material consideration that warrants taking a decision that does not fully comply with the AH SPD.
16. I attach limited weight to targets for the provision of affordable housing under the Council's emerging North East Derbyshire Local Plan, which is also proposed to be subject to the consideration of viability, as it is yet to be submitted for examination and, therefore, related policies have the potential to be altered prior to adoption.

#### **Other matters**

17. Matters have been raised in relation to whether the site is suitable in principle for the proposal; the potential availability of other sites; highways safety, and the effects on trees and biodiversity, amongst other environmental considerations. However, the PPG advises that what is to be considered must only be that which is subject of the disputed condition, and not a complete reconsideration of the planning application. Therefore, I have restricted my considerations to affordable housing, and I attach limited weight to these other matters.
18. The proposal would also accord with the social role of sustainable development under the Framework, including with the amount of affordable housing now proposed, as it would be supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations. It would also not result in conflict with the economic or environmental roles. The proposal would, therefore, comply with the three dimensions of sustainable development, under the Framework. As a whole, it would comply with the Framework.

#### *Planning Obligation*

19. A Section 106 Agreement under S106 of the Town and Country Planning Act 1990 has been submitted relating to the provision of highways and recreation contributions, a maintenance contribution for an on-site play area, and associated matters. The Section 106 Agreement binds the owner to covenants with the Council. The Community Infrastructure Levy (CIL) Regulations require that any planning obligation providing for contributions, such as those set out above, must be 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. The same tests are applied under

paragraph 204 of the Framework. CIL places limitations on the pooling of contributions. The District Valuer's review also includes Section 106 Agreement contributions in the costs, in coming to its conclusions on viability and the associated level of affordable housing provision.

20. A highways contribution of £30,000 would be secured relating to bus stops within the vicinity of the site and improvements to pedestrian infrastructure in respect of the provision of tactile paving for footways and crossings. Such a contribution would mitigate the impact of the proposal with regard to encouraging the use of public transport and with regard to pedestrian safety. Such matters specifically relate to, and seek, to address impacts from this proposal. Therefore, I consider it is reasonable for a contribution to be made to cover these costs, as it would be directly related to the development. I am satisfied this meets the tests of CIL.
21. A recreation contribution of £95,000 would be secured to enhance the play area adjacent and/or provide indoor facilities within Shirland Village Hall. As this would seek to mitigate recreation impacts that would arise from the proposal and for a named project, I am satisfied this meets the tests of CIL.
22. The maintenance payment of £24,000 would relate to a 10 year period for a proposed on site play area. This would clearly be directly related to the development. This would also meet the tests of CIL.
23. I am satisfied that the provisions of the submitted Section 106 Agreement would meet the 3 tests set out in Regulation 122 of the CIL Regulations 2010 and the tests in the Framework.

### **Conditions**

24. The guidance in the PPG makes it clear that a decision notice for the grant of planning permission under section 73 should also repeat the relevant conditions from the existing planning permission, unless they have already been discharged.
25. The reserved matters pursuant to the existing planning permission have been submitted and approved. Hence, in following the advice in the PPG, conditions are not required where they relate to the submission of the reserved matters, and in having regard to the comments made on the conditions by the Council and the appellant. I have imposed a condition concerning the implementation of the reserved matters (1).
26. There is agreement between the Council and the appellant that on site works have commenced. In light of this, I consider that a period of 6 months is sufficient in order for details that need to be agreed with the Council to be submitted. The purpose, therefore, of these conditions (2 to 14) is to require the appellant to comply with a strict timetable for dealing with the outstanding matters which need to be addressed in order to make the development acceptable. The conditions are drafted in this form because it is not possible to use negatively worded conditions precedent to secure the subsequent approval and implementation of the outstanding detailed matters where development has commenced.
27. I have imposed conditions in the interests of the adequate provision for affordable housing (2); and to protect the character and appearance of the

- area (3, 4 and 20), ecological interests (6,7,16 and 21) and the living conditions of local residents during the construction phase (8 and 23).
28. I have also imposed conditions in the interests of highway safety (9, 17,18,19, 24, 25 and 26); to provide adequate drainage and minimising flood risk (10 and 22); to provide satisfactory ground conditions in the interests of public health (13,14 and 15); and so that the proposal is acceptable in respect of noise for future occupiers (11).
29. The appellant has questioned whether conditions concerning public art (5) and employment recruitment (12) are necessary or relevant with regard to advice in the PPG concerning that no payment of money or other consideration can be positively required when granting planning permission. However, neither of these conditions requires the payments of monies, and both are reasonable and necessary in the interests of character and appearance (5) and with regard to economic considerations (12). Moreover, as I have set out above, the PPG advises that permission under section 73 should also repeat the relevant conditions from the existing planning permission, unless they have already been discharged. Nor was their removal sought under the planning application submission to the Council which relates to this appeal.
30. The Council has made me aware that applications to discharge conditions on the existing planning permission have been submitted to it. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.
31. Where I have altered the wording of conditions put forward by the Council and the appellant, I have done so in the interests of precision.

### **Conclusion**

32. The proposal would not have an unacceptable and harmful effect on the adequate provision for affordable housing. I have considered all matters that have been raised but none would demonstrate that condition 4 is reasonable and necessary. Accordingly, I conclude the appeal should be allowed and condition 4 should be removed, subject to the imposition of the new condition, and the remaining conditions in the attached schedule.

*Darren Hendley*

INSPECTOR



## **SCHEDULE OF CONDITIONS**

- 1) 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.
- 2) Within 6 months from the date of this decision notice, a scheme for the provision of a minimum of 21.74% (or 20 units of a 92 dwelling scheme) of the total number of dwellings as affordable housing (including a timetable for their provision) shall be submitted for the written approval of the Local Planning Authority. This affordable housing provision shall be in accordance with local affordable housing needs at the time the scheme is submitted.

The affordable housing shall be provided in full in accordance with the approved scheme and timetable and shall meet the definition of affordable housing as set out in the National Planning Policy Framework or any future guidance that replaces it. The scheme shall include:

- i) the numbers, type, tenure and location on the site of the affordable housing provision to be made which shall consist of not less than 21.74% (or 20 units of a 92 dwelling scheme) of the housing units hereby approved;
  - ii) the timing of the construction of the affordable housing and its phasing in relation to the occupancy of the market housing;
  - iii) the arrangements for the transfer of the affordable housing to an affordable housing provider (or the management of the affordable housing if no affordable housing provider is involved);
  - iv) the arrangements to ensure that such provision is affordable for both first and subsequent occupiers of the affordable housing; and
  - v) the occupancy criteria to be used for determining the identity of occupiers of the affordable housing and the means by which such occupancy criteria shall be enforced.
- 3) Within 6 months from the date of this decision notice, precise specifications or samples of the walling and roofing materials to be used shall be submitted for the written approval of the Local Planning Authority. The development hereby permitted shall then be carried out in accordance with the approved details.
  - 4) Within 6 months from the date of this decision notice, details of the existing ground levels, proposed finished floor levels of the dwellings and the proposed finished ground levels of the site, shall be submitted for the written approval of the Local Planning Authority. The development hereby permitted shall then be carried out in accordance with the approved details.
  - 5) Within 6 months from the date of this decision notice, a scheme for the provision of public art on the site including a timetable for implementation of the scheme shall be submitted for the written approval of the Local Planning Authority. The public art shall thereafter be completed in full in accordance with the approved scheme and timetable and shall be retained as such thereafter.

- 6) Within 6 months from the date of this decision notice, a mitigation strategy for amphibians shall be submitted for the written approval of the Local Planning Authority. The strategy shall include provision of enhanced receptor sites for individuals that need to be translocated. Any amphibians found at the site as a result of the development will need to be handled in accordance with the mitigation strategy.
- 7) Within 6 months from the date of this decision notice, details of the proposed construction and elevation of the estate road (including a section at scale of 1:20) for the section that passes through the wildlife area shall be submitted for the written approval of the Local Planning Authority, including timescales for its implementation, and thereafter constructed and maintained in accordance with the details as approved.
- 8) Within 6 months from the date of this decision notice, a scheme shall be submitted for the written approval of the Local Planning Authority for the site accommodation/storage of plant and materials/parking and manoeuvring of site operatives' and visitors' vehicles, loading/unloading and manoeuvring of goods vehicles, including wheel washing facilities, and include timescales for its implementation. Thereafter, the scheme shall be implemented in accordance with the approved details, and retained as such for the duration of the works.
- 9) Within 6 months from the date of this decision notice, details of a temporary access for construction purposes shall be submitted for the written approval of the Local Planning Authority, and include timescales for its implementation, and thereafter constructed in accordance with the details as approved. The access shall be retained in accordance with the approved scheme throughout the construction period free from any impediment to its designated use.
- 10) Within 6 months from the date of this decision notice, a scheme for the disposal of highway surface water via a positive gravity-fed system, discharging to an outfall in a public sewer, highway drain or watercourse including a timetable for implementation, shall be submitted for the written approval of the Local Planning Authority. The scheme shall thereafter be implemented in full accordance with the approved details and timetable.
- 11) Within 6 months from the date of this decision notice, a scheme of sound insulation works shall be submitted for the written approval of the Local Planning Authority. The scheme of works shall be designed following the completion of an acoustic report undertaken by a competent person and submitted to and approved by the Local Planning Authority. The works specified in the scheme shall be based on the findings of the report and shall include an assessment of noise exposure categories and industrial noise. The scheme shall take account of the need to provide adequate ventilation to habitable rooms, which may be mechanical or passive means and shall be designed to achieve the following criteria with ventilation operating:

Room	dBLAeq	Time
Bedrooms	30dBLAeq(15 minutes)	2300hrs-0700hrs
Living rooms	35dBLAeq(15 minutes)	0700hrs-2300hrs
All habitable rooms	45dBLAmax	At all times



Gardens/ 50dBLAeq (1 hour) 0700hrs-2300hrs  
outside amenity space

Prior to the occupation of any dwelling hereby approved the scheme shall be implemented and validated by a competent person and a validation report submitted to and approved in writing by the local planning authority.

- 12) Within 6 months from the date of this decision notice, a scheme for the recruitment of employees for both the construction periods and post occupation of the development hereby approved, including a timetable for their implementation, shall be submitted for the written approval of the Local Planning Authority. Thereafter the scheme shall be operated as part of the development in accordance with the approved details.

- 13) Within 6 months from the date of this decision notice, intrusive site investigation works shall be undertaken to establish the exact situation regarding coal mining legacy issues on the site.

In the event that the site investigation works confirm the need for remedial works to treat the areas of shallow mine workings and/or surface coal mining to ensure the safety and stability of the proposed development, the remedial works identified by the site investigation shall be undertaken in accordance with an agreed scheme and timetable that has been submitted and approved in writing by the Local Planning Authority.

- 14) Within 6 months from the date of this decision notice, a site investigation strategy as identified in the Desk Study report ref DBY00177S11/V1.0 submitted with the application above shall be undertaken by a competent person in accordance with the current UK requirements for sampling and analysis.

Where site investigation identifies unacceptable levels of contamination, a detailed remediation scheme to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment shall be submitted to and approved in writing by the local planning authority. The submitted scheme shall have regard to CR11 and other relevant current guidance. The approved scheme shall include all works to be undertaken, proposed remediation objectives and remediation criteria and site management procedures. The scheme shall ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

The developer shall give at least 14 days' notice to the Local Planning Authority (Environmental Health Division) prior to commencing works in connection with the remediation scheme.

- 15) None of the dwellings hereby approved shall be occupied until:
- a) The approved remediation works required by the intrusive site investigation have been carried out in full in compliance with the approved methodology and best practice. If during the works new areas of contamination are discovered, which have not previously been

identified, then the additional contamination shall be re-evaluated through the process described in condition 13.

b) Upon completion of the remediation works required a validation report prepared by a competent person shall be submitted to and approved in writing by the local planning authority. The validation report shall include details of the remediation works and Quality Assurance/Quality Control results to show that the works have been carried out in full and in accordance with the approved methodology. Details of any validation sampling and analysis to show the site has achieved the approved remediation standard, together with the necessary waste management documentation shall be included.

- 16) Prior to the occupation of any dwelling hereby approved an Ecological Management Plan shall be submitted to and approved in writing by the Local Planning Authority, and include timescales for its implementation. The plan shall provide details of how the positive nature conservation management of all retained and created habitats will be funded and implemented. The wildlife areas and open space shall then be managed in accordance with the plan as approved, and thereafter maintained.
- 17) Prior to the occupation of any dwelling hereby approved all existing vehicular and pedestrian accesses to the existing highway network made redundant as a result of the development shall be permanently closed with a physical barrier and the existing vehicle crossover reinstated as footway/verge in accordance with detailed designs first submitted to and approved in writing by the Local Planning Authority.
- 18) Prior to the occupation of any dwelling hereby approved space shall be provided within the site for the parking and manoeuvring of vehicles associated with that dwelling, laid out in accordance with a scheme which has previously been submitted and approved in writing by the Local Planning Authority. The space shall be retained throughout the life of the development free from any impediment to its designated use.
- 19) Prior to the occupation of any dwelling hereby approved, the access driveways/parking spaces to serve that dwelling shall be no steeper than 1 in 14 for the first 5.0m from the nearside highway boundary and 1 in 10 thereafter.
- 20) All planting, seeding or turfing in the approved scheme of landscaping shall be carried out in the first planting and seeding season following the occupation of the buildings or the completion of the development, whichever is the sooner. Any trees or plants which within a period of 5 years from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.
- 21) No site clearance works including removal of trees, hedgerows or other vegetation, shall take place during the bird breeding season (March to August) unless a scheme has been submitted for approval in writing by the Local Planning Authority including the submission of detailed surveys and method statements. The works shall be undertaken in accordance with the details that have been approved by the Local Planning Authority.
- 22) The development hereby permitted by this planning permission shall only be carried out in accordance with the approved Flood Risk Assessment

(FRA) (ref DBY00177FR1) and the following mitigation measures detailed within section 6.2 of the FRA shall be implemented in full as part of the scheme:

1. Provision of a 10m stand off from the new properties to the two ditches.
  2. Floor levels being set a minimum of 600mm above existing levels or 1 in 100 year water levels.
  3. Floor levels to be set at least 150mm above external levels.
  4. External levels are to fall generally away from buildings.
  5. Levels should not be raised within 8m of the ditches.
- 23) Construction works on site and deliveries to the site shall be undertaken only between the hours of 7.30am to 6pm Monday to Friday and 7.30am to 12pm on Saturday. There shall be no work of any kind undertaken on site or deliveries to the site undertaken on Sundays or Public Holidays.
- 24) Throughout the construction period of development vehicle wheel cleaning facilities shall be provided and retained within the site. All construction vehicles shall have their wheels cleaned before leaving the site in order to prevent the deposition of mud and other extraneous material on the public highway.
- 25) Private driveways/parking spaces off the proposed access road shall not be taken into use until 2m x 2m x 45° pedestrian intervisibility splays have been provided on either side of the accesses at the back of the footway/margin, the splay area being permanently clear of any object greater than 1m in height relative to footway level.
- 26) The Travel Plan (Revision B) shall be implemented in accordance with the approved details prior to the occupation of any dwelling hereby approved and shall thereafter be maintained.