



Appeal Decision

Hearing held on 26 February 2014

Site visit made on 26 February 2014

by Keith Manning BSc (Hons) BTP MRTPI

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

Decision date: 24 April 2014

Appeal Ref: APP/B2002/A/13/2208801

Land off Park Street, Cleethorpes DN32 7NU

- 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 John E Haith Limited against the decision of North East Lincolnshire Council.
 - The application Ref DC/729/12/SSU, dated 28 September 2012, was refused by notice dated 25 July 2013.
 - The development proposed is the redevelopment of land for up to 14 residential dwellings (C3) including demolition, the necessary earthworks, construction of access and circulation and drainage solutions.
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Procedural Matters

1. It was confirmed at the Hearing that the appellant was Mr Haith's company, i.e. John E Haith Limited, as per the application.
2. The application is in outline with all matters except access reserved for subsequent approval.
3. The Hearing took place prior to the formal introduction of the Planning Practice Guidance for England with effect from 6 March 2014. Given the potential relevance of some of the guidance, notably on flooding, viability and the use of planning conditions, in its final form to the main issues in this case, I allowed the parties an opportunity for further, written, comment. I have taken the comments received into account alongside the cases put at the hearing.
4. A comprehensive Statement of Common Ground (SoCG) was submitted.

Decision

5. The appeal is allowed and planning permission is granted for the redevelopment of land for up to 14 residential dwellings (C3) including demolition, the necessary earthworks, construction of access and circulation and drainage solutions at Land off Park Street, Cleethorpes DN32 7NU in accordance with the terms of the application, Ref DC/729/12/SSU, dated 28 September 2012, subject to the conditions set out in the Annex hereto:

Application for costs

6. At the Hearing an application for costs was made by John E Haith Limited against North East Lincolnshire Council. This application is the subject of a separate Decision.

Main Issues

7. I consider the main issues to be as follows:-

- Whether an education contribution is appropriately required;
- Whether the appeal site is viable and deliverable; and
- Whether the sustainability benefits of the proposed development outweigh flood risk.

Reasons

8. The appeal site is a factory which is contiguous with mainly Victorian terraced housing in an extensive residential area situated on land now categorised as being within Flood Zone 3a. Although the area is protected by concrete sea defences and there are no known records of flooding, a tidal surge sufficient to overtop the defences remains a possibility in the next 100 years. This would cause floodwater depths of up to one metre. The East Marsh Terraces Transformational Housing Area lies just across Park Street and the parties are agreed that for all practical purposes the regeneration imperative encompasses the factory, which is redundant and decaying. It is also common ground that in conventional terms of residual land value, the scheme at issue is unviable, albeit it currently imposes an ongoing cost on the appellant company owing to the need to maintain it in a secure condition.
9. The illustrative proposal for the site envisages a reduction of building mass and footprint but up to 14 dwellings constructed to be flood resilient by virtue, amongst other measures, of being elevated above a ground level void. In this respect the proposed dwellings would differ from the vast majority of houses in the area which have in the past been constructed more conventionally.

Policy Background

10. The site has no specific allocation within the North East Lincolnshire Local Plan 2003 ('the Local plan') but is within a development area and a number of saved policies are agreed by the parties to be relevant. These include GEN1, which lists criteria for the control of development control within the defined development areas. Amongst other things these require appropriate provision for services and due recognition of flood risk. In principle there is no inconsistency with the intentions of the National Planning Policy Framework ('the Framework') in those respects. The Council has adopted Supplementary Planning Guidance Note No. 4 *Developer Contributions to Education Facilities*. This expands upon GEN1 in respect of services and requires pro rata financial contributions to primary school facilities from housing sites of 10 or more dwellings where there are insufficient spaces in existing schools.

Housing Land Availability

11. The Council accepts that it currently cannot demonstrate a five year supply of deliverable housing sites, the current supply being calculated as 3.9 years, and on that basis paragraph 14 of the Framework, the presumption in favour of sustainable development would be engaged. In that sense, housing land supply is not in itself an issue, but the Council considers that the proposed development is neither deliverable nor sustainable because it is unviable and

makes no provision for mitigating its potential impact in respect of primary education.

Education

12. Notwithstanding the erroneous description on the Council's decision notice, the terms of the application are that the site should be developed for up to 14 dwellings, a figure that falls just below the threshold at which the Council would require an element of affordable housing but, if the number exceeded 9 the Council's SPG would require, pursuant to the intentions of local plan policy GEN1, proportionate contributions to primary education. The Council presented cogent evidence, which was not countered or disputed, that the nearby Queen Mary Infant and William Barcroft Junior Schools were, respectively, oversubscribed and imminently oversubscribed.
13. The Council is currently unable to require, as a matter of policy, mitigating contributions from residential developments of less than 10 units but intends, I was told, to address that difficulty in due course. Be that as it may, statutorily due weight may only be accorded to extant policy and guidance and there would be no conflict with policy and guidance as such if the conflict was not triggered by a breach of its terms, notwithstanding the materiality of impact on education in principle.
14. While that is the formal position in terms of local policy, it is clear that undue and unmitigated pressure on primary schools would result from a series of developments below the policy threshold. Therefore, whilst the difference between the impact of schemes at the margins of the relevant threshold might appear slight in terms of the numbers of additional children that may inhabit new dwellings and hence require local school places, the current anxiety of the Council to maintain the integrity of its policy stance by minimising exceptions to the requirement where the 9 dwelling threshold is exceeded is entirely understandable and not, in the circumstances, unreasonable in principle.
15. I acknowledge that the additional resources potentially brought to the area through the New Homes Bonus could be put to use to overcome shortfalls in provision but there are doubtless many and diffuse demands placed on such funds whereas a clear purpose of the planning obligation regime (and ultimately CIL) is to mitigate the impact of new development on infrastructure in a direct, proportionate and targeted fashion. The Council's reliance on policy based financial contributions to mitigate harmful impacts on infrastructure is a mainstream approach that is clearly anticipated by the relevant legislation and such harm is an adverse effect which is appropriately weighed in the balance in the context of the presumption in favour of sustainable development articulated in paragraph 14 of the Framework. Although the Planning Guidance indicates that Council's should be flexible when viability is at stake and that Supplementary Planning Guidance should not be used to add unnecessarily to the financial burdens on development, the need for mitigating contributions is inevitably a matter of striking an appropriate balance in the particular circumstances.

Viability and deliverability

16. Ordinarily, the inadequacy of the land supply would weigh heavily in favour of a scheme such as that proposed, all other things being equal, but in this case it is accepted by the appellant that the illustrative 14 dwelling scheme submitted

would not, in current circumstances, be viable in conventional terms, even in the absence of an appropriate contribution to primary education. On the face of it, therefore, it could not be profitably delivered and in all probability would not be delivered as conceived. This clearly negates the weight that might otherwise be placed on considerations of land supply because the imperative in national policy terms is to have a five year supply of available sites that are deliverable, as is very clear from the footnote 11 to paragraph 47 of the Framework.

17. I acknowledge that the site in its current condition represents an ongoing liability for the appellant company and that land value could effectively be foregone to assist the chances of actually creating a development in which the company participated as far as risk is concerned, but this was essentially a possibility rather than a certainty and it was also suggested that the certainty of a planning permission was desired to maximise the prospects for the site on the open market. I recognise the advantages of such certainty but developers habitually purchase sites with a prospect of reasonable return and avoid purchasing sites where profit appears unattainable. The doubts surrounding the viability of this site for the 14 dwellings illustrated are clearly unresolved and to suggest that permission would add to certainty is not in the circumstances a persuasive argument in favour of a permission that would, at that intensity of development, be in breach of established local policy in respect of impact on services.
18. It does appear from the technical evidence presented by the Council concerning viability¹ that a less ambitious scheme for the site (8-10 units) could be viable in conventional terms and, while not all the relevant assumptions were wholly accepted by the appellant's specialist adviser as necessarily precise or appropriate, the overall conclusion was not fundamentally challenged. On the face of the evidence, therefore, it seems that, perhaps unusually, the differences inherent in such a reduced scheme would render it viable. However, it is reasonable to consider the submitted illustrative scheme on its face notwithstanding that the terms of the application allow for a lesser scheme in terms of units. It is not for the decision maker to redesign to achieve viability; the onus in that regard is on the applicant. For the reasons previously given, it is for the decision maker to take viability and deliverability into account in weighing the advantages of a scheme vis-à-vis policy conflicts.

Sustainability versus flood risk

19. In terms of the acceptability in principle of residential development on the site there is no disagreement between the parties, notwithstanding its location in Flood Zone 3a. It is within a densely and historically developed residential area and in terms of access to services, facilities and transport links, inherently sustainable. Existing arrangements regarding warning, evacuation and so forth are long established given the nature of the area and its protection by sea defences that could, potentially, be breached. There is no objection from the Environment Agency subject to the imposition of conditions and a positive outcome to the application of the sequential and exceptions test by the Council, an outcome which the Council accepts is potentially achievable because of the need for the site to be regenerated, in which case the wider sustainability benefits to the community would be considered to outweigh flood risk. The

¹ Document 2

site-specific FRA submitted demonstrates that the site can be made safe without increasing flood risk and, moreover, the development could be made appropriately flood resilient and resistant.

20. The Council's approach to the balance to be struck in the exceptions test is predicated on the advantages of regenerating the site, such regeneration being seen as a sustainability benefit to the community, albeit this would be countered, in its view, by the harmful conflict with the intentions of policy GEN1 in respect of services, specifically the intentions of the SPG, if a development above the threshold of 9 dwellings were to be permitted. Moreover, in the Council's submission, to breach that policy intention in order to permit a development that would not be viable and which would not therefore deliver the regeneration benefit to outweigh the flood risk would be inherently harmful to policy intentions as it would tend to undermine them.
21. There is a persuasive logic in the Council's position, in that to depart from policy without the good reason of assured regeneration would be tantamount to granting permission for a scheme that, realistically, would almost certainly fail to deliver sustainability benefits to the community so as to outweigh flood risk. Therefore the exceptions test would not be satisfied and the intentions of relevant policy on flood risk would in my estimation be harmfully undermined. I acknowledge the best intentions of the appellant company to make beneficial use of the redundant appeal site by developing it, but sale at a significant loss is ultimately an unattractive and unlikely scenario, whilst participating in the development of an unprofitable scheme is equally fraught with difficulty. The balance of probability would be an unimplemented, if not practically unimplementable, planning permission. This would be granted at the expense of important policy intentions.

The balance of considerations including relevant potential planning conditions

22. There has clearly been considerable discussion between the appellant and the Council over the course of time. It seems that the Council, in default of a reasonable alternative, considers that the difficulty it would face in allowing a scheme in excess of the primary education contribution threshold (in the absence of such a contribution) might be overcome by the imposition of a condition, or the entering of an agreement, for a further review of viability in the context of improving market conditions at reserved matters stage and/or practical completion. This would establish whether or not education contributions could at that stage be extracted without unacceptably diminishing the return for the developer.
23. The appellant contends that the approach would be contrary to RICS practice advice² concerning such re-appraisals, these being inherently more suited to phased schemes over a longer term such that there is sufficient certainty for each individual phase, a small scheme such as this being effectively a single phase. I consider that there is a compelling practical logic to the appellant's position on this point. A developer would require a certain basis for designing, costing, financing, building out and selling a scheme such as this without the potential for profit erosion which would be likely to detract from the ability to fund it in the first place.

² RICS Guidance Note GN94/2012 *Financial Viability in Planning*

24. Both parties wish to see the site developed and positive discussions to that end ultimately foundered, it seems to me as a consequence of severe market difficulties leading to harmful conflict with important policy intentions, creating in effect a vicious circle with little prospect of an escape, whereas the situation demands the creation of a virtuous circle to achieve the positive outcomes actually desired by the appellant and the Council, albeit with different objects and responsibilities.
25. Given that it appears a reduced scheme could be viable, there was considerable discussion at the hearing as to how this might be brought about in the context of the application subject to appeal whilst safeguarding policy intentions relevant to sustainability in respect of flood risk together with mitigation of potential impact on primary education. The appellant suggested an additional condition³ to address the possibility of a reduced scheme whilst safeguarding against the possibility of undermining local policy on the latter in the event that improving circumstances opened up the possibility, post-permission, of houses in excess of the threshold. In practical terms, the "scheme" referred to therein would have to involve a planning obligation to enable the relevant contributions to be paid and it has long been established that conditions should not, as matter of practice, be used to require an applicant for planning permission to enter a planning obligation.
26. The confirmation of the content of the on-line Planning Practice Guidance for England, following the close of the hearing, alters the context in which the suggestion may be considered. It is now deemed acceptable as a matter of practice to deploy such a condition, provided it is negatively worded and therefore not a positive requirement to enter an obligation, and circumstances are sufficiently exceptional to warrant the approach. However, it is clear from the tenor of the guidance that this approach is to be reserved for complex and strategically important development that might not otherwise be delivered and whilst there are complexities surrounding the case at issue, I do not consider it would fulfil the relevant criteria.
27. It is nevertheless a core principle of the Framework itself that planning should be a creative exercise which enhances and improves places. The ability to resolve the valid objection to the proposal as it stands, by the use of a planning condition seems to me to strike the right balance between the competing priorities evident in this case. The Council's priority to regenerate the site whilst avoiding harm to its policy approach of requiring funding for primary school is potentially on all fours with the appellant's priority to achieve the certainty of planning permission as a prerequisite of progressing the redevelopment of the site, albeit in the context of a lesser scheme which the Council demonstrates to be potentially viable. Bearing in mind that the application is in outline with all matters except access reserved and is for up to 14 dwellings, I see no difficulty in limiting the development to a maximum of 9 dwellings as this meets both deliverability and, in a technical sense, policy criteria, being necessitated by the need to avoid harmfully undermining the latter. On that basis the Council's exception test vis-à-vis flood risk would also be satisfied.
28. Given the above analysis I consider the circumstances of this case justify the approach and accordingly propose to impose a suitable condition which would

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prevent the site being developed for more houses than would be permissible in the locality in the absence of appropriate financing of additional primary places. There is no need to revert to the parties on the condition specifically because a condition of this type⁴ was canvassed at the hearing. Moreover, it is a core principle of the Framework itself that planning should be a creative exercise which enhances and improves places and the ability to resolve the valid objection to the proposal as it stands, by the use of such a condition seems to me to strike the right balance between the competing priorities, benefits and harms evident in this case.

Other conditions

29. A number of other suggested conditions (SC) were jointly put forward by the parties in the SoCG. Following discussion with the parties at the hearing, I have considered these in the light of the Planning Guidance, including the relevant tests. Most are necessary and appropriate subject to a modicum of re-wording for clarity and in some cases combination for economy.
30. SC1 and 2 reflect the fact that the application is in outline but are better expressed in accordance with the standard model conditions deployed by the Planning Inspectorate. However, the element regarding drainage details would need to be retained as a separate condition encompassing both foul and surface water. SC3 specifying plans is necessary for the avoidance of doubt and to define the permission but only the site plan and the access plan need to be specified.
31. SC4 requires development to be in accordance with measures recommended in the FRA and is both necessary and appropriate.
32. SC5 and SC6 are better combined with SC12 to create a requirement for the approval of a comprehensive construction method statement. This is necessitated by the close proximity of the site to existing residential properties. The premises have apparently been subject to an assessment for asbestos and the safe removal of any such material is governed by other, specific, legislation in any event.
33. SC8 – S11 together comprise a comprehensive suite of conditions concerning contamination. Addressing potential contamination is necessitated by the industrial nature of the site and the proposed residential use but the suggested conditions as drafted are excessively and unnecessarily detailed and prescriptive. A simpler approach requiring investigation, remediation and verification would be equally effective and inherently more robust.
34. The matters raised by the Council's Head of Highways and Transportation⁵ are generally for reserved matters stage or the construction method statement but it is necessary, given the nature of the surrounding area, to specify at this stage a form of internal layout that allows for adequate turning and for the retention of approved parking spaces.

Other matters

35. I have taken into account various concerns raised by local residents and so far as these are material planning considerations, I am satisfied that the

⁴ Subsequently confirmed as acceptable to the appellant in any event

⁵ Memorandum dated 31 October 2012`

imposition of conditions, notably that concerning construction methodology, should address them adequately.

Overall conclusion

36. For the above reasons, and having taken into account all other matters raised, including the comments of the parties in respect of the Planning Guidance after the hearing, I consider the balance of planning advantage to be in favour of the proposed development, provided it is limited by condition to a **maximum of 9** dwellings.

Keith Manning

Inspector

Annex: Schedule of Conditions

- 1) Details of the 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 begins 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 three years from the date of this permission.
- 3) The development hereby permitted shall begin not later than two years from the date of approval of the last of the reserved matters to be approved.
- 4) The development hereby permitted shall be carried out in accordance with the following approved plans: 3597-0200-0102 ('Red Line Plan') and 3597-0200-0103 ('Means of Access').
- 5) No more than 9 dwellings shall be constructed pursuant to this permission.
- 6) No development shall take place until details of foul and surface water drainage have been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details.
- 7) No dwelling shall be occupied until space has been laid out within the site for cars to be parked and for vehicles to turn so that they may enter and leave the site in forward gear in accordance with details to be submitted to and approved in writing by the local planning authority and the turning areas parking spaces provided shall thereafter be retained as such.
- 8) The development shall be carried out in accordance with the following recommendations of the Flood Risk Assessment by Wardell Armstrong dated August 2012:
 - Finished floor levels to be set no lower than 4m AOD with provision for floodwater storage below
 - Flood resilient construction techniques to be deployed to a minimum height of 4.6m AOD

- The development shall not be occupied until a flood management plan has been submitted to and approved in writing by the local planning authority.
- 9) No development shall take place until a contaminated land assessment, including a site investigation and remediation scheme (if necessary) has been submitted to and approved in writing by the local planning authority. If during any subsequent works contamination is encountered that has not previously been identified, then such contamination shall be fully assessed and a remediation scheme shall be submitted to the local planning authority for approval in writing. Any remediation scheme required shall be implemented as approved and, in the event of such a scheme being required, the buildings hereby approved shall not be occupied until a contaminated land closure report has been submitted to and approved in writing by the local planning authority.
- 10) No development shall take place, including any works of demolition, until a Construction Method Statement has been submitted to, and approved in writing by, the local planning authority. The approved Statement shall be adhered to throughout the construction period. The Statement shall provide for:
- i) the parking of vehicles of site operatives and visitors
 - ii) loading and unloading of plant and materials
 - iii) method of demolition
 - iv) storage of plant and materials used in constructing the development
 - v) the erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate
 - vi) wheel washing facilities
 - vii) measures to control the emission of dust and dirt during construction
 - viii) measures to control and mitigate noise and vibration during construction
 - ix) method of piling
 - x) hours of working
 - xi) a scheme for recycling/disposing of waste resulting from demolition and construction works

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APPEARANCES

FOR THE APPELLANT:

Paul Bedwell BA (Hons) DipTRP MRTPI	Spawforths
Jen Ashworth BA (Hons) DipTP MA MRTPI	Spawforths
Tim Howe FRICS MAPM	Tim Howe Consultancy Ltd
David Haith	
Rachael Haith	

FOR THE LOCAL PLANNING AUTHORITY:

Richard Limmer	Planning Officer
Alison Blakeway MRICS MRTPI	Evolution PDR Limited
Christine Steer	Assets Protection for Schools

INTERESTED PERSONS:

Janet Hodge	Local resident
Steve Mortlock	Local resident

DOCUMENTS

- 1 School rolls information (Queen Mary Infant School and William Barcroft Junior School)
- 2 Email: Alison Blakeway to Richard Limmer 12 June 2013 attaching appraisals for 8 and 10 unit schemes
- 3 Appellant's suggestion for additional condition
- 4 Appellant's costs application
- 5 Council's response to appellant's costs application