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## Appeal Decision

Site visit made on 13 May 2019

**by Ben Plenty BSc (Hons) DipTP MRTPI**

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

**Decision date: 14<sup>th</sup> June 2019**

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**Appeal Ref: APP/N3020/W/19/3222859**

**Sol Homes Limited, Vale Road, Colwick, Nottingham, Nottinghamshire NG4 2EG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Sol Homes Limited against the decision of Gedling Borough Council.
  - The application Ref 2016/0347, dated 25 February 2016, was refused by notice dated 6 December 2018.
  - The application sought planning permission for the demolition of offices, car parking and storage and erection of 44 dwellings with associated roads and sewers without complying with a condition attached to planning permission Ref 2008/0287, dated 3 July 2008.
  - The condition in dispute is No 12 which states that: The development shall be carried out in accordance with the approved plans reference 919/SS/01, PL/1, PL/2, PL/3, PL/4, PL/5, PL/11, PL/12, PL/13, PL/14 Rev A, PL/17, PL/18, PL/G02, PL/G04 and SK/02 Rev B unless otherwise prior agreed in writing by the Borough Council.
  - The reason given for the condition is: for the avoidance of doubt.
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### Decision

1. The appeal is allowed. The section 73 application is granted to amend Condition 12 (approved plans), on planning application reference 2008/0287, (to demolish offices, car parking and storage areas and erection of 44 dwellings with associated roads and sewers), at Sol Homes Limited, Vale Road, Colwick, Nottingham, Nottinghamshire NG4 2EG, in accordance with; the terms of the application 2016/0347 dated 25 February 2016; a Unilateral Undertaking for an education contribution of £75,000; and subject to the attached condition schedule.

### Procedural Matter

2. I have revised the description of development to more accurately reflect the development to which the appeal relates.
3. Certificate B was signed on the application form, however since that time the appellant became owner of the site and Certificate A was then later signed.
4. The appellant's case is supported by a Viability Appraisal that indicates that the scheme is unviable if it must satisfy the original s106 Legal Agreement. The Council's Review<sup>1</sup> of the Viability Appraisal, concurs that the residential

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<sup>1</sup> DVS Property Services, November 2018, Review of Development Viability Appraisal

development is not viable based on the inclusion of the required contributions and taking into account the site value.

5. A Statement of Common Ground<sup>2</sup> identifies that the single area of disagreement is whether the development would be unsustainable without a full contribution of the education sum.
6. The Council has confirmed that the 2008 approval is considered as extant following the demolition of the original buildings and the laying of slabs for plots 33 and 34. On my site visit I observed that the site has been cleared and there was some evidence of construction.
7. The application is made under section 73 of the 1990 Act as a material amendment to the original decision as development has commenced. As a result, I will consider the proposed changes to the approved plans as a retrospective application. The alteration seeks revised, but not substantially different, designs to the original dwellings approved in 2008. The appeal seeks the removal and replacement of condition 12 specifying the plans that reflect the amended designs.
8. A Unilateral Undertaking<sup>3</sup> has been submitted with this appeal that would deliver an education contribution of £75,000 to be paid prior to the occupation of the 44<sup>th</sup> dwelling.

### **Main Issues**

9. From the above, the main issues are:
  - 1) the effect of the proposed alterations on the character and appearance of the area,
  - 2) the effect of the proposal on the living conditions of occupiers of the proposed dwellings and existing dwellings, and
  - 3) whether the proposed development should make an appropriate financial contribution towards off-site education provision.

### **Reasons**

#### *Character and appearance*

10. The site is within the village of Colwick on previously developed land. There is a social club adjacent to the site on Vale Road. The local area is predominantly residential in character.
11. The changes associated with the s73 application are:
  - The realignment of the north-west boundary, one metre into the site, adjacent to plots 23-37.
  - The repositioning of plots 33-36.
  - Changes to doors and windows for plots 1, 2, 3, 4, 5, 6, 7, 8, 14, 15, 16, 17, 19, 20, 21, 22, 26, 32, 33, 34, 35, 36, 41, 43 and 44.

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<sup>2</sup> Statement of Common Ground February 2019

<sup>3</sup> Unilateral Undertaking by Freeth Cartwright LLP 1 May 2019

12. Most of these changes are slight and inconsequential and all have been accepted by the Council. The removal of some rear window detailing and the proposed cosmetic changes to other house-types would have only a very limited effect on the appearance of the development as a whole. As such, the design alterations are acceptable and would not harm the character and appearance of the area.
13. Subsequently, the proposal would accord with Policy 10 of the Broxtowe Borough, Gedling Borough and Nottingham City Aligned Core Strategies Part 1 Local Plan 2014 (ACS) which includes seeking development that would create an attractive environment and make a positive contribution to the public realm. The proposal would also comply with Policy 40 of the Gedling Borough Local Planning Document Part 2 Local Plan 2018 (LP), which seeks amongst other things for development that is of a high standard of design.

#### *Living conditions*

14. The revised boundary change would result in some gardens being marginally reduced in size. However, the affected dwellings were approved with relatively generous gardens. As such, the slight reduction would have a negligible effect on the living conditions of the occupiers of the proposed dwellings.
15. It is proposed to add two further rear windows to the first-floor maisonette of Plot 22. This would provide natural light to a bathroom and a living room/kitchen. These windows would overlook the car park of the social club. Given the intervening distance and the use of the rooms that face towards the club, I do not consider that the living conditions of occupiers of plot 22 would be subject to unacceptable levels of noise or disturbance.
16. New windows are also proposed on the rear elevations of plots 44 and 43, which are located adjacent to the end of Sands Close. The new first-floor rear facing windows would look towards this road and the rear elevation of 51 Sands Close. Due to the separation distances, this relationship would not significantly affect the living conditions of occupiers of neighbouring dwellings through overlooking. This is due to the separation distances involved and the arrangement of existing dwellings.
17. Consequently, I am satisfied that the revised changes will not lead to unacceptable harm to the living conditions of future or existing occupiers and as such, the proposal would accord with Policy 32 of the LP, which seeks amongst other things for development that does not have an adverse impact on the living conditions of existing and proposed occupiers.

#### *Education contribution*

18. Policy 19, of the ACS, requires developers to make contributions towards infrastructure to enable the cumulative impacts of development to be managed, where appropriate. The policy justification also states that "consideration will be given to changes in economic conditions over time and scheme viability". The Nottinghamshire County Council's Planning Obligations Strategy 2018 (SPD) explains the requirement for planning contributions towards education provision at appendix 5. The document sets out that a contribution will only be sought where there is insufficient capacity in local schools. It also identifies that a contribution would not be sought from

development that is solely for apartments as these would be unsuitable for families.

19. The County Council has identified that the local primary and secondary schools are at capacity. It requests a combined sum of £247,175 to increase school places in Netherfield Primary School and Carlton le Willows Academy. Paragraph 94 of the National Planning Policy Framework (the Framework) discusses the importance of education provision. It explains that a sufficient choice of school places should be available to meet the needs of existing and new communities. It also gives great weight to the need to create, expand or alter schools. Taking the above into account, there is clear justification that an education sum is necessary. I am satisfied that the method and approach to identifying the required education sum is robust and it has been clearly identified where the contribution would be spent. Furthermore, it is not in evidence that the infrastructure objectives would breach the pooling requirements of the Regulations. Subsequently, I am satisfied that the education requirement, the method of calculation and recipient of the sum meets the statutory tests of Regulation 122<sup>4</sup> as being necessary and reasonable.
20. However, although the original scheme would have provided the requested obligations, the Council's review of the Viability Appraisal confirms that the scheme cannot make any contributions without becoming unviable. Nevertheless, the appellant has offered a reduced education sum of £75,000 in an attempt to partially off-set the impact of education provision. The Government's PPG advises that local planning authorities are encouraged to apply flexibility in their approach to viability<sup>5</sup> and negotiate where supported with a viability assessment.
21. The Framework seeks to significantly boost the supply of housing. This site is within a large settlement, on previously developed land and subject to an extant approval. As such, it is a good housing site within a sustainable location. Importantly, the proposal includes a substantial number of one- and two-bedroom units, with limited access to private garden areas and which would not be particularly attractive to occupation by families. Subsequently, this would lessen the demand for local school places.
22. There is agreement between the parties that the viability assessment is both accurate and robust. I am satisfied that if a full education sum was required, the development would be unlikely to occur with the site leading to further stagnation. Although I recognise the conflict with the SPD in terms of education provision, I am satisfied that the full requirement for education contributions would make the scheme unviable.
23. Consequently, although there is a significant shortfall in terms of the required education contribution that would be normally expected, I am cognizant of the housing delivery objectives of the Framework as well as the sustainability credentials of this site. Moreover, I am satisfied that when the viability appraisal is taken into account, the proposal would make a reasonable contribution towards education provision. As such, the proposal complies with policy 19 of the ACS which seeks developer contributions to contribute towards the delivery of necessary infrastructure, where appropriate. As in the

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<sup>4</sup> Community Infrastructure Levy Regulations 2010

<sup>5</sup> PPG Ref.ID:10-001-20140306

Mansfield case<sup>6</sup>, I find that a reduced contribution would still serve a useful purpose. Moreover, to not make it would leave a greater financial shortfall for the Council. Furthermore, I am content that the submitted Unilateral Undertaking would properly secure the offered education sum.

### Conditions

24. I have considered the use of conditions in line with guidance set out in the Government's Planning Practice Guidance. The Council has suggested conditions. I shall impose the majority of these with some amendments and adjustments for clarity.
25. The Guidance advises that conditions should not be used to restrict permitted development rights unless there is clear justification to do so<sup>7</sup>, and that exceptional circumstances should be shown when removing these provisions. However, in this case the approved gardens are relatively generous, and the site and surrounding land is relatively flat. Therefore, I see no exceptional reason to remove these rights. Consequently, the removal of permitted development rights for extensions, is not adequately justified and therefore unnecessary. Similarly, I have also not restricted the use of the garages as suggested on the basis that preventing their conversion would not guarantee their use for parking. Consequently, such a condition would also be unreasonable and difficult to enforce.
26. I have removed 'substantial completion' from the landscape condition and replaced this phrase with the requirement for details to be provided prior to 'first occupation' for clarity. Also, a condition to prevent pedestrian access onto Sands Close, is unnecessary as it would have to cross private land within the site. Furthermore, and in any event, an access here is not part of the proposal.
27. I have clarified the visibility splay condition. In accordance with the guidance<sup>8</sup>, I have also deleted reference to "unless otherwise agreed" from several draft conditions to remove uncertainty. A condition requiring the reinstatement of the redundant footway crossing would not satisfy the tests as this would be unreasonable and unnecessary. I have also added timing triggers for the provision of flood protection, obscure glazing, contamination works, landscaping and hard-surfacing for clarity.
28. Subsequently, I have attached the conditions which I consider to be necessary in the interests of certainty [1], to safeguard the character and appearance of the area [2, 3, 4, 5, 10, 11 and 12], to satisfy the living conditions of future occupiers [6 and 15], to meet flood requirements of the Framework [7], to satisfy contamination protection requirements [8], to enhance the ecological value of the site [9], and meet highway safety expectations [13 and 14].

### Planning balance and conclusion

29. Although the proposal would not fully accord with the SPD, the proposal would comply with the Development Plan and the Framework. The Framework seeks to significantly boost the supply of housing and establishes that viability is a material consideration in decision making. As such whilst I apply substantial

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<sup>6</sup> R (oao) Mansfield DC v SSHCLG & Mr J A Clark [2018] EWHC 1794 (admin)

<sup>7</sup> National Planning Policy Guidance Paragraph: 017 Reference ID: 21a-017-20140306

<sup>8</sup> National Planning Policy Guidance Paragraph: 012 Reference ID: 21a-012-20140306

weight to the education needs of the proposal, I attached greater weight to the Development Plan as a whole and the key objectives of the Framework.

30. For the above reasons, and having taken all matters into account, the appeal is allowed, and planning permission given subject to the appended conditions and the associated Unilateral Undertaking.

*Ben Plenty*

INSPECTOR

Richborough Estates



### **Schedule of conditions**

- 1) The development hereby permitted shall be constructed in accordance with the following approved plans: - Location Plan (14/11/17), 917/100/01 Rev E, The Beckford elevations, The Beckford ground floor, The Beckford first floor, The Sherwood elevations, The Sherwood ground floor, The Sherwood first floor, The Sandford elevations, The Sandford ground floor, The Sandford first floor, The Ashfield elevations, The Ashfield ground floor, The Ashfield first floor, The Kirkham and Maybury elevations (proposed), The Kirkham and Maybury ground floor and first floor, The Kirkham and Maybury elevations (approved annotated), The Ashton elevations, The Ashton ground floor, The Ashton first floor, Plots 1 – 6 apartment elevations, Plots 1 – 6 apartment ground floor, Plots 1 – 6 apartment first floor, Plots 1 – 6 apartment second floor, Single garage PL/G02, Double garage PL/G04, The Newland plans and elevations PL/13 and The Witton plans and elevations PL/18.
- 2) The external facing materials to be used in the development shall be as per those approved in conjunction with Condition 3 on planning permission reference 2008/0287.
- 3) Hard surfacing, of the highway and parking areas shall be provided prior to the occupation of the first dwelling in accordance with the details approved in conjunction with Condition 4 on planning permission reference 2008/0287 and shown on drawings 917/200/01 Rev A and 917/200/02 Rev A.
- 4) Prior to the occupation of the first dwelling, landscaping shall be undertaken in accordance with the details approved in conjunction with Condition 5 on planning permission reference 2008/0287 and shown on drawings 917/200/01 Rev A and 917/200/02 Rev A and shall be carried out in the first planting season following the substantial completion of the development. Any planting material which becomes diseased or dies within five years of the completion of the development shall be replaced by the same species of plants in the next planting season.
- 5) Prior to the first occupation of the individual dwellings they serve, the boundary treatments approved in conjunction with Condition 6 on planning permission reference 2008/0287 and shown on drawings 917/200/01 Rev A and 917/200/02 Rev A, shall be erected for each individual plot and shall thereafter be retained in perpetuity.
- 6) Prior to the first occupation of the dwellings they serve, the bin storage facilities, cycle storage and external lighting shall be provided in accordance with the details approved in conjunction with Condition 7 on planning permission reference 2008/0287 and shown on drawings 917/200/01 Rev A and 917/200/02 Rev A.
- 7) Prior to any construction above ground slab level, flood protection and site drainage shall be undertaken in accordance with the details approved in conjunction with Conditions 8 and 9 on planning permission reference 2008/0287.
- 8) Prior to any construction above ground slab level, site remediation works shall be undertaken in accordance with the details approved in

conjunction with Condition 10 on planning permission reference 2008/0287. Validation of the remediation works shall be submitted to and approved in writing by the local planning authority within 3 months of the completion of the works.

- 9) The development shall be carried out in accordance with the mitigation measures proposed within the ecological assessment that was submitted with the application reference SLR 403.0756.00033 dated December 2006 in conjunction with planning application 2008/0287.
- 10) Landscape and communal car parking maintenance shall be undertaken in accordance with the details approved in conjunction with Condition 17 on planning permission reference 2008/0287.
- 11) Prior to the occupation of the first dwelling, the proposed car parking spaces shall be surfaced and marked out in permanent materials and the spaces shall not thereafter be used for any purpose other than the parking of vehicles.
- 12) Prior to the occupation of the first dwelling, the site access junction and internal road of the proposed development shall be designed and constructed, including appropriate drainage and lighting.
- 13) Prior to the occupation of the first dwelling, visibility splays of 4.5m x 55m (southwest) and 4.5m x 70m (northeast) of the site access onto Vale Road and maintaining a minimum carriageway width of 6.75m, shall be provided in a bound material.
- 14) Prior to the occupation of the first dwelling, details of the access, parking and turning facilities shall be submitted and approved by the local planning authority. The details shall include construction specification, drainage outfall proposals, longitudinal and cross-sectional gradients and details of street lighting. The dwellings shall not be occupied until the approved details are fully implemented.
- 15) Prior to the occupation of the dwelling at plot 22, the two first floor windows in the rear elevation of the dwelling of this plot shall be glazed with obscure glass to a minimum privacy level of Pilkington 4. Thereafter the windows shall be permanently retained as such.

**End of conditions**