



Appeal Decision

Hearing Held on 6 January 2022

Site visit made on 7 January 2022

by Matthew Jones BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 February 2022

Appeal Ref: APP/U1105/W/21/3276990

Site of Redgate and land at Tesco Store, Salterton Road, Exmouth EX8 2NS

- 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 S Paull of YourLife Management Services Ltd against the decision of East Devon District Council.
- The application Ref 19/2710/MFUL, dated 5 December 2019, was refused by notice dated 12 March 2021.
- The development proposed is erection of Extra Care/Assisted Living accommodation (Class C2) with communal facilities and car parking. Erection of Class B1 office accommodation and car parking. Development to be accessed from Salterton Road.

Decision

1. The appeal is allowed and planning permission is granted for erection of extra care/assisted living accommodation (Class C2) with communal facilities and car parking; erection of Class B1(b) or B1(c) accommodation (322 sqm employment floorspace) with associated car parking; development to be accessed from Salterton Road at Site of Redgate and land at Tesco Store, Salterton Road, Exmouth EX8 2NS under the terms of the application Ref: 19/2710/MFUL, dated 5 December 2019, in accordance with the conditions in the attached schedule.

Procedural Matters

2. On 1 September 2020 the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987, including the effective absorption of Class B1 into the new Class E(g). Applications submitted prior to 1 September 2020, which includes this one, must be decided based on the use classes to which they refer. I determined the appeal accordingly.
3. Before planning permission was refused by the Council, the proposal was amended by swapping the B1(a) office accommodation out for B1(b) or B1(c) accommodation (hereafter the commercial units). I have therefore used the description of development on the Council's decision notice in my decision above as it accurately reflects the proposed development subject to the appeal.
4. Although not an issue raised in the Council's decision notice, it is incumbent upon me as competent authority to consider whether or not the proposal would be likely to have a significant effect on the integrity of the Exe Estuary Special Protection Area (the SPA) and the Pebblebed Heaths Special Protection Area/Special Area of Conservation (the SAC) (together the European Sites). This is because they are European Sites afforded protection under the Conservation of Habitats Regulations 2017 as amended (the Habitats Regulations). As such, it is necessary to consider this matter as a main issue.

5. The appeal was accompanied by a Unilateral Undertaking (the UU) and a further Supplemental Unilateral Undertaking (the SUU) was submitted after the Hearing. Together, they seek to secure mitigation towards the effect of the proposal on the European Sites, delivery of the commercial units, and delivery of the detailed extra care provision for residents of the assisted living accommodation. I return to these matters later in my decision.

Main Issues

6. The main issues are:

- whether the site would be suitable for the proposal, having regard to the development plan's approach to the delivery of employment provision; and,
- the effect of the proposal upon the integrity of the European Sites.

Reasons

Employment provision

7. The site is an around 2.4-acre area of treed open space in Exmouth, fronting and accessed from Salterton Road. The mainstay of the site, some 0.5 hectare, is allocated for employment uses as Site 040A pursuant to Strategy 22 of the East Devon Local Plan 2013-2031 (adopted 2016) (EDLP). Qualifying trees within Site 040A are also subject to a blanket Tree Preservation Order.
8. The allocation of Site 040A reflects the aim of the EDLP to support significant employment provision in Exmouth. The EDLP's definition of 'employment use' is within the body of Strategy 32. It broadens the term beyond the former B Class to include Sui Generis uses. However, I do not consider that it goes so far as to extend to residential uses like C2, particularly given that paragraph 16.14 of the EDLP equates residential uses to the loss of employment use. As such, given that the extra care accommodation would be within Site 040A, and notwithstanding the actual employment the scheme would generate, it would not deliver an employment use within Site 040A under the EDLP's terms.
9. Strategy 32 does not preclude such a scenario come what may, but states that permission will not be granted where it would harm business and employment opportunities in the area. It then goes on to require, insofar as is relevant, demonstrations that the site has been adequately marketed for at least 12 months and that there is a surplus employment land supply in the locality.
10. The site has been marketed for well in excess of 12 months, but that marketing was found to be flawed in a previous appeal decision in 2019¹. However, I note that this largely turned on a vagueness in the way the allocation was identified in the marketing particulars. The site has since been marketed more clearly and accurately online and, as I observed myself, through its site hoarding as a candidate for employment uses. It seems to me, therefore, that the central issue which previously undermined the marketing has been resolved.
11. At the Hearing the Council maintained that the marketing that has taken place since the 2019 appeal decision has still been insufficient. However, it could not explain how it could have been fortified or improved, even with reference to the Council's Marketing Strategy Statement Guidance document. Concern was raised by interested parties about the site's guide price, another issue at the

¹ Appeal Ref: APP/U1105/W/18/3206548

previous appeal, but the appellant clarified at the Hearing that, to maximise interest, no guide price was set in the recent round of marketing. In the absence of any substantive evidence to counter the appellant's expert evidence on the subject, I must conclude that the site has been adequately marketed.

12. Interested parties also raised the prospect of the market changing for the better, and possible applications to government community funding. However, the policy test relates to marketing preceding the scheme, not an assessment of the potential for market conditions to improve in the future.
13. The previous appeal also failed because of the issue of the level of employment land supply in the locality, or rather, the absence of locality specific employment land supply evidence. I consider 'locality' (and 'area') to translate to Exmouth in this case. This approach was not disputed by the main parties at the Hearing and is now most neatly represented by the jurisdiction of the Exmouth Neighbourhood Plan (made 2019) (ENP).
14. To address this issue, the appellant has taken the Council's latest available Employment Land Review document and used it to cross reference the amount of available employment land with actual completion rates since 2007. This exercise draws the conclusion that Exmouth has a supply of employment land which decisively exceeds that allocated within the EDLP across the plan period, particularly now that the employment allocation at Goodmores Farm has outline planning permission. I have no reason to question that the Goodmores Farm allocation will be delivered and will cater to the requirements of the town. It flows from this that there is surplus employment land supply in the locality.
15. I appreciate that the level and type of employment likely generated by the proposal would not meet the Council nor the local community's aspirations for the allocated site. However, there are further considerations which lead to a tension between these aspirations and what I can conclude with any confidence that the allocation would deliver. Firstly, is the issue of viability. At the last Hearing it was agreed by the main parties and accepted by the Inspector that speculative development in the previous B1 class was unviable without gap funding. I have no reason to reach a contrary view. Although it may be viable for an individual company to take Site 040A on with a bespoke scheme, there has been a near total absence of interest for such in the last twelve months, and the only project for office use that made any real progress was withdrawn.
16. In any event, even if an employment use were found, its delivery could yield a lower quantum of jobs than proposed. This is because of the flexibility of the EDLP's definition of employment uses and the absence of any quantifier of the level of employment the EDLP intends for Site 040A. I am particularly mindful that the only tangible commercial interest which has arisen over the last twelve months from the marketing relates to a builder's merchant; not a likely source of significant employment. A further constraint is the protected trees on the site, most notably a grouping across its eastern extent. They logically impose a further restriction on the practical development potential of the allocated site.
17. For these reasons, the weight of evidence before me points clearly towards the conclusion that the proposal, despite the loss of Site 040A as an employment allocation, would not harm business and employment opportunities in the area. The scheme would therefore accord with the provisions of Strategy 32 of the EDLP and cannot be found to conflict with Strategy 22 when the two policies are read together within the development plan as a whole.

18. The Council's reason for refusal also refers to Policies EE2 and EE3 and Action EEA1 of the ENP. Policy EE2 is supportive of new employment uses and, given the scheme would provide employment floorspace, there would be no conflict in this regard. Policy EE3 refers specifically to the change of use from an employment use to residential, leading to a reduction of employment. By my reading, this relates to existing properties, not allocations, an interpretation endorsed by the supporting text, which refers specifically to the reuse of commercial premises. In my opinion, Action EEA1 is not a policy itself but seeks to endorse the approach to the reuse of allocated employment land reflected within the EDLP and to which I have addressed my analysis above.
19. My attention was drawn at the Hearing to '5. Strategic Policy - Employment Provision and Distribution' of the emerging East Devon Local Plan (the eEDLP). I understand the eEDLP is at a very early stage of preparation which means this policy is clearly liable to change. It thus attracts limited weight in my reasoning.
20. Drawing my assessment of this main issue together, I conclude that the site would be suitable for the proposal having regard to the development plan's approach to the delivery of employment provision. The scheme would not conflict with Strategy 22 and would accord with the objectives of Strategy 32 of the EDLP. It would also accord with Policy EE2 and there would be no conflict with Policy EE3 of the ENP.

European Protected Sites

21. The proposed development falls within the respective zones of influence of the European Sites. The Habitats Regulations require that permission may only be granted having ascertained that the development will not affect the integrity of the European Sites.
22. The SPA qualifies for its overwintering Avocet and Slavonian Grebe, regularly occurring migratory species and as it supports an internationally important assemblage of birds. The SAC qualifies owing to its north Atlantic wet heaths with cross-leaved heath, European dry heaths and the populations of southern damselfly. It regularly supports 2.4% of the UK population of breeding nightjar and 8% of the UK population of breeding Dartford warbler.
23. These European Sites are important recreational and economic resources, and it is likely that occupants of the proposed development would visit them. On this basis, there is no dispute between the main parties, nor Natural England (NE), that it cannot be ruled out that the proposal, when considered alone or cumulatively with other schemes, would have significant effects on the features of interest of both European Sites due to increased recreational use.
24. It is agreed by the main parties and NE that to mitigate against such effects, financial contributions should be secured in relation to both sites, which will contribute towards the delivery of Strategic Access Management and Monitoring. It is also agreed that the monies secured together by the UU and latterly the SUU would provide the necessary contribution to do so, pursuant to the South-East Devon European Sites Mitigation Strategy.
25. At the Hearing, it was suggested that, with regard to the SPA, the secured funding could be put towards demarcations of sailing restrictions within the estuary. Regarding the SAC, it was suggested the funding may contribute to the reconfiguration of public car parks. As such, I am satisfied, on the evidence

before me, that the UU and the SUU together provide a sufficient mechanism to enable the delivery of proportionate and relevant mitigation pursuant to the Council's strategy for development which could affect the European Sites.

26. I therefore find within my Appropriate Assessment that, with the provided mitigation, the proposal would not have an adverse effect on the integrity of the European Sites. It would accord with Strategies 47 and 50 of the EDLP, the Habitats Regulations and the Framework insofar as they seek to secure the protection of such sites and mitigate any adverse effects on their integrity.

Other Matters

27. The EDLP places an importance on delivering Care and Extra Care homes in the larger settlements, including 150 Care/Extra Care Home Spaces at Exmouth. To date, 116 spaces have been delivered/permitted in the town, which means that the total would be modestly exceeded by the scheme with nine years of the plan period left to run. Meeting the allocation in good time is not something the scheme should be penalised for in my view, particularly given that the government views the need to provide housing for older people as critical².
28. This also suggests to me that the other concerns raised about the need for and effect of the proposal on the demographics of the town and the impact on health services has already been anticipated and addressed through the plan making process. Indeed, whilst the ENP has a preference toward accessible and adaptable homes for older people, it accepts that this focus comes beyond the 150 Care/Extra Care home spaces already allocated for Exmouth in the EDLP.
29. My attention was drawn to the aim of the ENP to provide affordable housing (AH), but as is well rehearsed in the various appeal decisions I have on the subject, including the previous appeal decision at this site, Extra Care facilities under Class C2 do not attract a requirement to contribute towards AH. I am satisfied that the site is suitably accessible, given the proximity to services and facilities.

Unilateral Undertakings

30. Community Infrastructure Levy regulation 122 makes clear that it is unlawful for a planning obligation to be taken into account in a decision on a proposal that does not meet all of the following tests. That the obligation is necessary to make the development acceptable in planning terms, is directly related to the development, and is fairly and reasonably related to it in scale and kind.
31. In addition to securing the required payment towards mitigation of the effect of the scheme on the integrity of the European Sites, the UU and the SUU together secure a care package and the C2 land use in association with the extra care facility. These measures provide a level of certainty sufficient to alleviate concerns raised about the legitimacy of the facility.
32. The UU and the SUU provide mechanisms to ensure the timely delivery of the hitherto unviable commercial units and their transfer (as well as the associated car park) to the Council. Interested parties were concerned about a flexibility in the definition of the commercial units across Classes E(g)(i) and E(g)(ii). However, the expert evidence put to me informed that this would maximise the prospect that the units meet local commercial demand as it arises. As such, the UU and the SUU are in compliance with regulation 122.

² Paragraph: 001 Reference ID: 63-001-20190626

Conditions

33. In the event that I was minded to allow the appeal, the Council requested conditions to be applied, which I have assessed with regard to the tests set out in the Framework and the Planning Practice Guidance. I have amended them where appropriate for the sake of clarity and precision.
34. In addition to the standard time condition, it is necessary for a condition to list the approved plans in the interest of certainty. The Council considers that a condition should require further detail as to the specification of the site access, but this is addressed in detail by the drawings before me. Given the scale of the scheme, and in the interest of the living conditions of neighbouring occupants, it is necessary for a condition to address the need for a Construction Environment Management Plan. Considering the nature of this issue, the plan must be approved by the Council prior to the commencement of development.
35. In order to minimise the risks from land contamination, it is necessary for a lengthy condition to set out the remediation requirements put forward by the Council's land contamination expert. In the interest of managing flood risk, a condition must ensure that the drainage strategy is delivered and retained on the basis of the drainage strategy plan. In order to ensure the adequate protection of trees, it is necessary for a single condition to secure the protection measures set out within the appellant's arboricultural evidence.
36. Given the proximity to the adjacent supermarket and petrol filling station, it is necessary for details to be secured of a thermal cooling system to provide residents with the option of keeping windows closed during warmer months. However, the Council's expert does not consider a condition requiring details as to potential odour nuisance necessary, and I have no reason to disagree. In the interests of the character and appearance of the area, it is necessary to secure details of finish materials prior to work above foundation level.
37. Storage details for refuse and bicycles are shown in relation to the Extra Care Facility. Whilst they are required in relation to the commercial units, this can be obtained prior to their first use. In the interest of the living conditions of neighbouring residents, it is essential that a lighting scheme is agreed and implemented. It is also necessary for the same reason that the opening times of the commercial units reflect typical working hours. However, given that B1 uses (and those within Class E(g)) are by definition compatible with residential areas, it is not necessary to further control work undertaken at these premises. Due to the changes to the Use Classes Order, it is essential for a condition to preclude changes to unsuitable uses within the same use class.

Conclusion

38. For the reasons outlined above, and taking all matters raised into account, I conclude that the appeal should be allowed.

Matthew Jones

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Rupert Warren QC
Gian Bendinelli
Jonathan Baynes
James Chaffer

Landmark Chambers, Counsel
The Planning Bureau, Planning
Carter Bains, Marketing
Alder King, Employment Land

FOR THE LOCAL PLANNING AUTHORITY:

Ben Chesters MRTPI

Planning Officer

INTERESTED PERSONS

Ian Cann
Councillor Fred Caygill
Geoff Skinner

Secretary, the Exmouth Civic Society
Exmouth Town Council
Chairman Exmouth Community Association

DOCUMENTS SUBMITTED AT THE HEARING

- Emerging policy 5. Strategic Policy - Employment Provision and Distribution
- Landscaping drawings SO-2427-03-LA-007.1-REV G Detailed Planting-sheet 1 of 2, SO-2427-03-LA-007.2-REV G Detailed Planting-sheet 2 of 2, 1344-KC-XX-YTREE-TreeConstraintsPlan01RevA

SCHEDULE OF CONDITIONS

- 1) The development to which this permission relates must be begun not later than the expiration of three years beginning with the date of this permission.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans:
 - SO-2427-03-AC-00-REV A Site Location
 - SO-2427-03-LA-009 Devon Hedge Bank REV B
 - SW-2427-03-LA-008-REV B
 - SO-2427-03-LA-007.1-REV I
 - SO-2427-03-LA-007.1-REV G Detailed Planting-1 of 2
 - SO-2427-03-LA-007.2-REV G Detailed Planting-2 of 2
 - SO-2427-03-LA-006.1 -REV H Planters Seating and Street Furniture-1 of 2
 - SO-2427-03-LA-006.2 - Planters, Seating and Street Furniture-2 of 2,
 - SO-2427-03-LA-005.1 - REV E Fences Steps and Rails 1 of 2
 - SO-2427-03-LA-005.2 - REV C Fences, Steps and Rails 2 of 2
 - SW-2427-03-LA-004-General Paving Details
 - SW-2427-03-LA-003- REV I Kerbs and Edges
 - SO-2427-03-LA-002 REV L Arrangement
 - SW-2427-03-HE-010-Refuse Vehicle Swept Path Analysis-A
 - SW-2427-03-HE-001-Access Arrangement-D
 - SW-2427-03-DE-052-Proposed Impermeable Areas-E
 - SW-2427-03-DE-051-Flood Exceedance Plan- E,
 - SW-2427-03-DE-050-Proposed Drainage Strategy-F
 - 1344-KC-XX-YTREE-Tree Constraints Plan 01 RevA
 - 1344-KC-XX-Y TREE-Tree Protection Plan 01 Rev B
 - SO-2427-03-AC-83- REV A Perspective Views
 - SO-2427-03-AC-82- REV F Street Context Elevations
 - SO 2427 AC 84 Industrial Unit Elevation
 - SO-2427-03-AC-81- REV C South and West Elevations
 - SO-2427-03-AC-80- REV C North and East Elevations
 - SO-2427-03-AC-60- REV B Typical Sections
 - SO-2427-03-AC-14-Rev C Roof Plan
 - SO-2427-03-AC-13-REV A Third Floor Plan
 - SO-2427-03-AC-12-REV A Second Floor Plan
 - SO-2427-03-AC-11-REV B First Floor Plan
 - SO-2427-03-AC-10-rev B Ground Floor Plan.
 - SO-2427-03-AC-02-REV H Proposed Site Plan
 - SO 2427 03 AC SK050 C
 - SO 2477 03 AC 84
 - 17169_Salterton Road, Exmouth_Drainage and SuDS Maintenance Plan_R01
- 3) A Construction Environment Management Plan (CEMP) must be submitted to and approved in writing by the Local Planning Authority prior to any works

commencing on site and must be implemented throughout the development. The CEMP shall include (a) the timetable of the works; (b) daily hours of construction; (c) pollution prevention and control, and monitoring arrangements (d) any road closure; (e) the compound/location where all building materials, finished or unfinished products, parts, crates, packing materials and waste will be stored (f) areas where delivery vehicles and construction traffic will load or unload; (g) the means of enclosure of the site during construction works; (h) details of wheel washing facilities; (i) the proposed route of all construction traffic exceeding 7.5 tonnes. (j) details of the amount and location of construction worker parking.

- 4) Unless otherwise agreed in writing by the Local Planning Authority, development other than that required to be carried out as part of an approved scheme of remediation must not commence until sub conditions 1 – 4 below have been complied with. If unexpected contamination is found after development has begun, development must be halted on the part of the site affected to the extent specified by the Local Planning Authority in writing until sub condition 4 has been complied with in relation to that contamination.

1. Site Characterisation

An investigation and risk assessment must be completed in accordance with a scheme to assess the nature and extent of any contamination on the site. The contents of the scheme are subject to the approval in writing of the Local Planning Authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the Local Planning Authority. The report of the findings must include: (i) a survey of the extent, scale and nature of contamination; (ii) an assessment of the potential risks to: (a) human health; (b) property (existing or proposed) including buildings, pets, woodland and service lines and pipes; (c) adjoining land; (d) groundwaters and surface waters; (e) ecological systems; (f) archaeological sites and ancient monuments; (iii) an appraisal of remedial options, and proposal of the preferred option(s). This must be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11'.

2. Submission of Remediation Scheme

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 must be prepared, and is subject to the approval in writing of the Local Planning Authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, a timetable of works and site management procedures. The scheme must 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.

3. Implementation of Approved Remediation Scheme

The approved remediation scheme must be carried out in accordance with its terms prior to the commencement of development other than that required to carry out remediation, unless otherwise agreed in writing by the Local Planning Authority. The Local Planning Authority must be given two weeks

written notification of commencement of the remediation scheme works. Following completion of measures identified in the approved remediation scheme, a verification report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the Local Planning Authority.

4. Reporting of Unexpected Contamination

In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the Local Planning Authority. An investigation and risk assessment must be undertaken in accordance with the requirements of sub condition 1, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of sub condition 2, which is subject to the approval in writing of the Local Planning Authority. Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the Local Planning Authority in accordance with sub condition 3.

5. Long Term Monitoring and Maintenance

A monitoring and maintenance scheme to include monitoring the long-term effectiveness of the proposed remediation over a period to be agreed, and the provision of reports on the same must be prepared, both of which are subject to the approval in writing of the Local Planning Authority. Following completion of the measures identified in that scheme and when the remediation objectives have been achieved, reports that demonstrate the effectiveness of the monitoring and maintenance carried out must be produced, and submitted to the Local Planning Authority. This must be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11'

- 5) The development shall be carried out in full accordance with the Surface Water Management Plan forming part of the application.
- 6) A suitable mechanical ventilation system should be installed within residential units of the proposed development in order to afford future residents thermal comfort and cooling during warmer months, without the need for opening windows. The scheme shall be submitted and approved by the Local Planning Authority prior to construction above foundation level.
- 7) Before development above foundation level is commenced, a schedule of materials and finishes, and, where so required by the Local Planning Authority, samples of such materials and finishes, to be used for the external walls and roofs of the proposed development shall be submitted to and approved in writing by the Local Planning Authority. Development shall be carried out in accordance with the approved details.
- 8) The landscaping works shall be carried out in accordance with the approved details before any part of the development is first occupied. Before the development is first occupied a landscape management plan, including long term design objectives, management responsibilities and maintenance schedules for all landscape areas, shall be submitted to and approved in

writing by the Local Planning Authority. The landscape management plan shall be carried out as approved.

- 9) Prior to construction above foundation level, details of arrangements for the storage of refuse and bicycles for the commercial units shall have been submitted to and approved in writing by the Local Planning Authority. The approved storage facilities shall be provided and made available prior to the first use of the commercial units.
- 10) Prior to the occupation of any of the buildings a lighting scheme shall be submitted to and approved in writing for the site which complies with the requirements of the Institute of Light Engineers guidance on the avoidance of light pollution. The approved scheme shall be implemented prior to the occupation of the buildings on the site.
- 11) No commercial unit shall be open for business except between the hours of 8am - 6pm Monday to Friday, 8am-1pm on Saturdays, and not at all on Sundays or Bank Holidays. No machinery shall be operated, processes carried out and no deliveries accepted or despatched outside of these times.
- 12) The development hereby approved shall be carried out in accordance with the recommendations and mitigation measures contained within the ecological report prepared by Devon Wildlife Consultants dated June 2017.
- 13) The development hereby approved shall be carried out in accordance with the recommendations and mitigation measures contained within the Tree Survey and Impact Assessment (Rev B) prepared by Keen Consultants dated 23 November 2020.
- 14) The commercial units shall be used for purposes within Use Class E(g)(i), E(g)(ii) and E(g)(iii) and for no other purpose (including any other purpose in Class E of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) (or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).