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## Appeal Decision

Site visit made on 28 May 2019

**by M Russell BA (Hons) DipTP MRTPI**

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

**Decision date: 19 July 2019**

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**Appeal Ref: APP/F1040/W/18/3216847**

**Land rear of numbers 53 and 67 Woodville Road, Hartshorne, Swadlincote DE11 7ET**

- 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 & Mrs Cartwright & Craner against the decision of South Derbyshire District Council.
  - The application Ref 9/2018/0709, dated 29 June 2018, was refused by notice dated 5 November 2018.
  - The application sought outline planning permission for residential development (approximately 14 dwellings) without complying with a condition attached to planning permission Ref APP/F1040/W/17/3167838, dated 4 July 2017.
  - The condition in dispute is No 9 which states that: The number of affordable housing units built on the application site shall exceed the total number of open market housing and no more than 80% of the open market units shall be occupied before the completion and transfer of the affordable housing units.
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### Decision

1. The appeal is allowed and outline planning permission is granted for residential development (approximately 14 dwellings) at land rear of numbers 53 and 67 Woodville Road, Hartshorne, Swadlincote, Derbyshire, DE11 7ET, in accordance with application Ref. 9/2015/1215, dated 13 December 2015, and the plans submitted with it, subject to the 15 conditions set out in the attached Schedule.

### Procedural Matter

2. The planning permission granted under appeal Ref APP/F1040/W/17/3167838 included a legal Obligation, made under section 106 of the Act. The previous Inspector was satisfied that the contributions in the Obligation were necessary and met the test in the National Planning Policy Framework (the Framework) and the appropriate Community Infrastructure Levy Regulations (CIL).
3. In order to ensure the previously agreed Obligations are secured under any new planning permission, the appellants have provided a Unilateral Undertaking (UU) (dated 5 July 2019) undertaking to provide contributions towards on-site open space, built facilities, healthcare and outdoor sports facilities. In respect of these contributions, the Council has provided a schedule to show where the policy requirement for the contribution comes from; how the contribution will be spent; and whether there are any other 'pooled contributions' under the terms of the CIL Regulations. The Council has confirmed that this schedule was also provided to the Inspector for the

previous appeal on the site. I am satisfied that the UU is necessary and that it satisfies the tests set out in paragraph 56 of the Framework.

4. Following comments on an earlier version of the UU, the Council has been provided with an opportunity to comment on the latest version and have confirmed that their previous comments have been addressed. I am therefore satisfied that the UU appropriately updates the Obligations required for a new planning permission on the site.

### **Background**

5. Outline planning permission was originally granted on appeal in July 2017 for approximately 14 dwellings on the site. The appeal decision included Condition 9 the terms of which are set out in the above heading. The planning application subject to this latest appeal sought to remove this condition.

### **Main Issue**

6. The main issue is whether Condition 9 is reasonable or necessary having regard to the principle of residential development in this location when considered against the development plan and national policy.

### **Reasons**

7. The appeal site is located outside the defined settlement boundary for Hartshorne and in the countryside. This is not disputed by the parties. Policy SDT1 (Settlement Boundaries and Development) of the South Derbyshire Local Plan Part 2 (SDLP2) (2017) sets out that settlement boundaries define the built limits of a settlement. The explanatory paragraphs 2.3 and 2.4 under Policy SDT1 state amongst other things that 'other than in the circumstances permitted by Policy BNE5 and other relevant policies, development will not normally be permitted within the Rural Areas'. Policy BNE5 (Development in Rural Areas) of the SDLP2 states that outside settlement boundaries planning permission will be granted where the development is allowed for by policies including Policy H1 amongst others.
8. Policy H1 (Settlement Hierarchy) of the South Derbyshire Local Plan Part 1 (SDLP1) (2016) sets out that for 'Local Service Villages' including Hartshorne, development of sites adjacent to the settlement boundary will be considered as exceptions or cross subsidy sites as long as they are not greater than 15 dwellings. The appellants contend that the appeal scheme for approximately 14 dwellings adjacent to the settlement boundary is an exception under the terms of this policy. The Council's case however argues that 'exception' under Policy H1 should be taken to mean 'Rural exception site' and that Policy H1 should be read alongside Policy H21 (Affordable Housing) of the SDLP1 which sets out the requirements for 'Rural exception sites' and includes that such developments provide a majority of affordable homes.
9. Policy H21 does cross reference Policy H1, but only to state that the number of dwellings on a 'Rural exception site' is to be in accordance with Policy H1 as an exceptional circumstance to normal policy. Policy H21 does not provide a direct link to Policy H1 in terms of how an 'exceptions or cross subsidy site' is defined nor does it go as far as saying that an 'exception site' and a 'rural exception site' are one and the same thing. Similarly, the definition of 'rural exception sites' as provided in Annex 2 of the Framework, does not assist in resolving the differences in description within the Council's development plan.

10. Policy H1 has an 'or' between 'exceptions' and 'cross subsidy sites' and can only be taken to mean that these are two separate considerations. The definition in the SDLP1 Glossary, combines the terms and defines 'cross subsidy exception sites' and is therefore unhelpful in deciphering what is meant by 'exceptions'. There is no separate definition in the SDLP1 Glossary for 'exceptions'. In the circumstances, the word 'exceptions' can only be taken to mean what is specifically set out in Policy H1 and cannot be assumed to mean 'rural exception site' which is dealt with separately under Policy H21.
11. I therefore concur with the appellants and the conclusions of the Inspectors that dealt with appeals in Melbourne<sup>1</sup> and Repton<sup>2</sup> when considering the requirements of Policy H1. The Council suggests this is an overly legalistic and isolated interpretation of the text in Policy H1 and such an approach is not supported by the Courts. However, I find the Inspectors interpreted the plan policies objectively in accordance with the language used and could not be expected to conclude that Policy H1 says something that it does not. Accordingly, the proposal before me meets the exceptions under Policy H1 given its location adjacent to the settlement boundary and not being greater than 15 dwellings.
12. The Council has referred to another appeal in Repton<sup>3</sup>, however I am not persuaded that this appeal provides any further clarity on the definition of 'exceptions' under Policy H1.
13. I sympathise to a degree with the Council's stance that development of sites outside defined settlements and in the countryside for market housing could undermine a plan led system. I am also particularly mindful that the Council can demonstrate more than a 5-year housing land supply and has an up-to-date development plan. The Council argues that rural exception sites outside settlement boundaries are well established principle up and down the country and that there can be no ambiguity. It contends that the appellants' argument is flawed as without the disputed condition, 'exceptions' would allow for 100% market housing outside settlement boundaries. However, I must have regard to the specific wording of the policy and this is precisely what the policy allows for in this location provided the number of dwellings is not greater than 15. Whether or not this was what was intended when the policy was drafted is not a matter for me to determine under an appeal made under Section 73 of the Town and Country Planning Act 1990 (the Act).
14. The Council suggests the appellants' case gives little regard to the Affordable Housing Supplementary Planning Document (SPD) (2017) which it says makes clear that policies work together to facilitate affordable housing. I agree with the Inspector for the Repton<sup>2</sup> appeal that the SPD does not purport to interpret Policy H1, but simply provides a summary of how the policy can facilitate the delivery of affordable housing within the district.
15. For the above reasons, having given regard to the location and scale of the development the previously imposed Condition 9 is not necessary, and the development would be appropriate taking in to consideration the requirements of Policies S1 (Sustainable Growth Strategy), S4 (Housing Strategy), H1 (Settlement Hierarchy) and H21 (Affordable Housing) of the SDLP1 and Policies

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<sup>1</sup> Ref APP/F1040/W/17/3171029

<sup>2</sup> Ref APP/F1040/W/17/3191604

<sup>3</sup> Ref APP/F1040/W/18/3207758

SDT1 (Settlement Boundaries and Development) and BNE5 (Development in Rural Areas) of the SDLP2, which seek amongst other things to promote sustainable growth and development to a scale appropriate to the size and role of the settlement.

### **Other Matters**

16. The Council identifies that the development would result in visual and landscape harm that, without the benefits secured by the contested condition, would weigh against the proposal. In reaching his decision on the original appeal, the Inspector found that the site does not play an important role visually in forming the edge of the village and would not be harmful to the street-scene or be out of place in the landscape when judged against the appearance of neighbouring development when viewed from the public footpath from the south-east. In any case, Section 73(2) of the Act makes it clear that in considering a proposal seeking to carry out development without complying with a condition, the decision maker "shall consider only the question of the conditions subject to which planning permission should be granted". The Planning Practice Guidance also confirms that it is only the disputed condition under consideration and not a complete re-consideration of the proposal.
17. I note the objections received by the Parish Council and other third parties. The Parish Council wrongly asserts that the Council previously granted planning permission but that this was dismissed on appeal. The previous appeal was allowed.
18. Concerns have been raised that there is a need for affordable housing in the area. As set out above, under the relevant Policies of the development plan, affordable housing is not a necessity to allow for a development of the scale proposed in this location. That the Inspector for the previous appeal made his own assessment of the proposal against the development plan and considered it appropriate to attach the condition corresponded with the considerations in the case before him at that time and is not on its own reason to dismiss the current appeal. Equally, I have assessed the proposal based on the evidence before me which includes a focus on the specific nuances of the wording within the relevant policies and reference to other appeal decisions that have considered similar matters. On the basis of my findings the condition previously attached does not pass the necessary test set out in the Planning Practice Guidance.
19. Any additional financial gain for the appellants if affordable housing is not required is not a material planning consideration. Reference is made to the other appeals referenced where the Inspectors have concluded that affordable housing was not a requirement related to sites adjacent to Melbourne and Repton and that these are 'Key service villages' in the settlement hierarchy and larger than Hartshorne. However, other than the maximum number of dwellings for an exception site in these villages being not greater than 25 dwellings, when compared with not greater than 15 dwellings for 'Local service villages' such as Hartshorne, the text in Policy H1 in terms of sites adjacent to settlements boundaries is the same.
20. Section 73 of the Town and Country Planning Act 1990 allows for applications seeking to carry out development of land without complying with conditions subject to which a previous planning permission was granted, and therefore the

appellants are not required to submit a full planning application as is implied in the written representations submitted.

21. The potential impact of the proposal on the privacy for the occupiers of existing dwellings was a matter considered under the previous appeal. The Inspector in that case noted that the proposal was in outline and that the specific scale of development was not committed and would be dependant on the subsequent detailed plans. It was acknowledged at the time that any subsequent reserved matters application would be considered in respect of the normal standards for new development and this would include ensuring neighbouring living conditions are protected.

### **Conditions**

22. Other than Condition 9, none of the other conditions attached to the previous appeal on the site are being contested. The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those conditions that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.
23. With regards to Condition 1 in respect of the time limit for submission of reserved matters, Section 73(5) of the Act and the Planning Practice Guidance confirms that planning permission must not be granted under this section to the extent that it has the effect of extending the time within which an application for approval of reserved matters must be made. Other than the condition contested under this appeal, which I have removed, I consider all remaining conditions are reasonable and necessary. The majority of conditions are therefore unaltered, including those with a pre-commencement requirement which I consider to be appropriate given the details relate to protection of habitats, safe access during the construction phase and disposal of surface water and foul sewage which may require works below the surface before hard surfacing is laid. However, the condition requiring a detailed lighting survey could reasonably be provided at a later point and I consider it reasonable to alter the wording to this condition requiring the details to be provided prior to any development beyond slab level.

### **Conclusion**

24. For the reasons given the appeal is allowed.

*Martin Russell*

INSPECTOR

### **Schedule of conditions**

- 1) Application for approval of the reserved matters shall be made to the Local Planning Authority before 4 July 2020. The development hereby permitted shall be begun before the expiration of two years from the date of approval of the last of the reserved matters to be approved.



- 2) This permission is granted in outline under the provisions of Article 5(1) of the Town & Country Planning (Development Management Procedure) (England) Order 2015, and the further approval of the Local Planning Authority is required (before any development is commenced) with respect to the following reserved matters: Appearance; Landscaping; Layout; and Scale of the development.
- 3) Details submitted under condition 2 shall include the proposed finished floor levels to the dwellings, including existing and proposed surrounding land levels relative to the dwellings, as well as proposed boundary treatments and surfacing materials, and the retention of the landscaping buffer to Woodville Road.
- 4) No development shall commence until all retained hedgerows have been fenced with steel mesh fencing to 2.3m high supported by steel scaffold poles staked at 3 metre centres. The fencing shall be retained in position until all building works on adjoining areas have been completed unless otherwise agreed in writing with the Local Planning Authority.
- 5) No development shall commence until a Landscape and Ecological Management Plan has been submitted to and approved by the Local Planning Authority. Temporary mitigation provisions shall be implemented prior to any works commencing on site and thereafter retained throughout the course of construction. Permanent mitigation and enhancement measures shall be implemented prior to first occupation of the dwellings hereby approved and thereafter maintained as such.
- 6) No development shall take place until a construction management plan or construction method statement has been submitted to and been approved in writing by the Local Planning Authority. The approved plan/statement shall be adhered to throughout the construction period. The statement shall provide for the storage of plant and materials, site accommodation, loading, unloading of goods vehicles, parking of site operatives' and visitors' vehicles, routes for construction traffic, hours of operation, method of prevention of debris being carried onto highway and any proposed temporary traffic restrictions.
- 7) No development shall be commenced on site until a temporary access into the site to Woodville Road for construction purposes has been provided in accordance with a detailed design first submitted to and approved in writing by the Local Planning Authority. The access shall have a minimum width of 5.5m, 10m radii, constructed to base level and be provided with visibility sightlines of 2.4m x 65m in each direction. The area forward of the sightlines shall be cleared and maintained throughout the period of construction clear of any obstruction exceeding 600mm in height relative to the nearside carriageway edge.
- 8) Before any development takes place beyond slab level, a detailed lighting strategy shall be submitted to and approved in writing by the Local Planning Authority. Such approved measures will be implemented in full.
- 9) No work shall take place on the site until details of schemes for the disposal of foul water and surface water drainage from the site have been submitted to and agreed in writing by the Local Planning Authority. The agreed schemes shall be carried out in conformity with the details which have been agreed before the development is first brought into use and the schemes shall be retained thereafter.

- 10) Prior to the first occupation of any dwelling on the site, the new access shall be laid out in accordance with application drawing, constructed to base level, drained and lit in accordance with Derbyshire County Council's specification for adoptable roads. The access shall have a minimum width of 5.5m, be provided with 2 x 2m footways, 6m radii and visibility splays of 2.4m x 65m in each direction. The area forward of the sightlines shall be level, form part of the public highway, be constructed as footway and not part of any plot or other sub-division of the site.
- 11) Prior to the first occupation of any dwelling, space shall be provided within each plot curtilage for the parking of two vehicles and maintained throughout the life of the development free of any impediment to its designated use. For the avoidance of doubt, where a garage is counted as a parking space, the internal dimensions should not be less than 3m x 6m.
- 12) The new dwellings shall not be occupied until the proposed new estate street, between each respective plot and the existing public highway, has been laid out in accordance with the approved application drawings, constructed to base level, drained and lit in accordance with the County Council's specification for new housing development roads.
- 13) Notwithstanding the submitted information, a subsequent reserved matters or full application shall include design of the internal layout of the site in accordance with the guidance contained in the 60s Design Guide and the "Manual for Streets" document issued by the then Departments for Transport and Communities and Local Government.
- 14) The gradient of the new estate street accesses shall not exceed 1:30 for the first 10m into the site from the highway boundary and 1:20 thereafter.
- 15) No removal of hedgerows, trees or shrubs shall take place between 1st March and 31st August inclusive, unless a competent ecologist has undertaken a careful, detailed check of vegetation for active birds' nests immediately before the vegetation is cleared and provided written confirmation that no birds will be harmed and/or that there are appropriate measures in place to protect nesting bird interest on site. Any such written confirmation should be submitted to the local planning authority.