

**APPEAL BY MR EMERY OF CSTG LIMITED AGAINST THE DECISION OF THE COUNCIL TO REFUSE TO GRANT PLANNING PERMISSION FOR THE DEMOLITION OF EXISTING BUILDERS YARD AND THE ERECTION OF 7 DWELLING HOUSES WITH ASSOCIATED ROAD AND LANDSCAPING AT NEW FARM, CROSS LANE, OFF ALSAGER ROAD, AUDLEY AND APPLICATION FOR A FULL AWARD OF COSTS AGAINST THE COUNCIL**

<b><u>Application Number</u></b>	<b>18/00122/FUL</b>
<b><u>LPA's Decision</u></b>	<b>Refused by Planning Committee 9<sup>th</sup> October 2018</b>
<b><u>Appeal Decision</u></b>	<b>Appeal allowed and planning permission granted</b>
<b><u>Costs Decision</u></b>	<b>Partial award of costs against the Council</b>
<b><u>Date of Appeal Decision</u></b>	<b>7<sup>th</sup> June 2019</b>

### **The Appeal Decision**

The Inspector identified the main issues in the consideration of the appeal to be;

- whether the proposal would be inappropriate development within the Green Belt for the purposes of the National Planning Policy Framework, having regard to the nature of the development and its effect upon the openness of the Green Belt,
- whether the appeal site is a suitable location for the proposed dwellings having regard to local and national planning policy, and
- whether the proposal makes adequate provision for any additional need for open space and affordable housing arising from the development.

In allowing the appeal the Inspector made the following key comments and observations:-

#### *Whether inappropriate development and effect upon openness*

- Paragraph 145 of the National Planning Policy Framework (the Framework) (2019) advises that the construction of new buildings should be regarded as inappropriate in the Green Belt other than in a limited number of exceptions. The partial or complete redevelopment of previously developed land, whether redundant or in continuing use which would not have a greater impact on the openness of the Green Belt than the existing development is identified as an exception under this paragraph.
- Notwithstanding the representations received from third parties, the appeal site comprises a series of buildings which are used as part of builder's yard business.
- The appellant provided volume calculations of the existing buildings on the site and compared this with the proposed dwellings and their garages. There would be a reduction of 788 cubic metres which is equivalent to a 10% decrease in overall built volume as a consequence of the proposed development. When account is taken of containers on the site the reduction is even greater.
- Although the layout of the buildings would be different, given their lesser overall volume and the removal of the other paraphernalia associated with the builder's merchant business, the proposed development would not have a greater impact on the openness of the Green Belt than the existing development and is therefore not inappropriate development in the Green Belt.

#### *Suitability for housing*

- The appeal site is located outside any defined development boundary and is in open countryside for the purposes of applying planning policy.
- Policy H1 of the Local Plan seeks to direct residential development towards identified urban areas or within village envelopes and Policy SP1 of the Core Spatial Strategy (CSS) 2006-20261 sets out spatial principles of targeted regeneration and seeks to direct new housing to sites within identified areas. The appeal proposal would therefore conflict with policies H1 and SP1 in this regard.

- The Framework supports the development of brownfield land. Although CSS Policy SP1 aims to support regeneration, it is restrictive and is based upon a strategy which is undeliverable. The Policy doesn't accord with the Framework in this respect and therefore the policy is out of date. Notwithstanding this, the general aim (of the policy) to reuse previously developed land and to locate development where it provides access to services and service centres by foot, public transport and cycling generally accords with the Framework and this is afforded substantial weight.
- The appeal site is approximately 600m from the edge of Audley which offers a range of services and facilities that could meet the day-to-day requirements of future occupants of the dwellings. It is therefore accepted that facilities and services are located further in the village, approximately 1400m from the appeal site. However, there is a public footpath which runs along much of Alsager Road between the appeal site and Audley. A condition could be used to secure the provision of a new footway from the appeal site to the existing footway, as proposed by the appellant removing the need for pedestrians to cross Alsager Road which would enable future occupants to walk into the village. Whilst there is likely to be some dependence upon private car, given the proximity of the site to Audley, future occupants would be able to make sustainable transport choices.
- Paragraph 78 of the Framework states that to promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. Given the range of facilities offered by Audley, it is likely that future occupants would choose to use these facilities which would help minimise travel and help enhance the vitality of Audley.
- Although the site is currently in use as a builder's merchants, a number of the buildings are in very poor condition and appeared to be underutilised at the time of my site visit. Although an intrusive investigation is required to confirm the presence and extent of contamination on the site the preliminary site investigation found that it is likely that contamination, particularly asbestos, will be present on the site, exceeding residential thresholds. The proposal would therefore make use of brownfield land which is supported by Paragraph 118 c) of the Framework which states that decisions should support appropriate opportunities to remediate despoiled, degraded, derelict, contaminated or unstable land and d) which promotes and support the development of under-utilised land and buildings. This is a matter to which substantial weight is attached.
- Thus, whilst conflict with Policies H1 and SP1 was identified, for the reasons given above, the site is a suitable location for the proposed development and would enhance the vitality of Audley

#### *Affordable Housing and Open Space*

- Planning obligations can only be sought where they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind to the development
- The appellant has provided a Development Appraisal which concludes that the appeal scheme is not viable with financial contributions for affordable housing and Public Open Space (POS). The Council advise that independent advice from the District Valuer came to a similar conclusion. Nevertheless, the appellant has submitted a planning obligation as part of the appeal which would secure provision for this matter to be reviewed in the event substantial commencement of the development does not occur within 12 months of the date of the planning permission.
- The Developer Contributions SPD (September 2007) sets out the approach the Council will take with respect to securing contributions. In relation to viability, it acknowledges that in some circumstances, an applicant may believe that what is being asked for will render a development unviable. In such circumstances, for the Council to be persuaded to reduce its requirements, the onus will be on the applicant to justify why and how special circumstances apply.
- Given the nature of the site and the time and investment likely to be required to get the development to the point where substantial commencement is achieved, the requirement to review the development appraisal would introduce unnecessary uncertainty and cost for the appellant and would therefore not pass the test of reasonableness. Moreover, the Planning Practice Guidance advises that viability

assessments should be informed by current costs and values wherever possible, nor is there any requirement set out within Policies CSP5 or CSP6 of the Spatial Strategy for applicants to review the viability of a development.

- For these reasons, therefore, the proposed development would accord with relevant local and national planning policy in respect to affordable housing and open space without the relevant obligation of the S106 Agreement.

#### *Planning Balance and Conclusion*

- The appellant is not seeking to challenge that the Council can demonstrate a 5 year supply of housing. Nevertheless, it is asserted that Paragraph 11(d) of the Framework is engaged because the policies of most importance in determining this appeal are out of date. Attention has been drawn to the appeal decision at Gravel Bank, which, as a consequence, the Council advise that conflict of the proposed development with Policy H1 and ASP6 should only be given limited weight and that paragraph 11(d) of the Framework should now be engaged. The Inspector agreed that limited weight should be given to the conflict with Policies H1 and ASP6.
- It was, however, disputed that Policy SP1 is out of date. The Council assert that Policy SP1 of the CSS was not said to be out of date by the Inspector in the Gravel Bank decision and continues to apply. However, the Gravel Bank site was predominantly a greenfield site. The Inspector concludes that Policies H1 of the NLP and ASP6 and SP1 of the CSS are out of date. In such circumstances, the Framework states that where the policies which are most important for determining the application are out of date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.
- There would be environmental and economic benefit from redeveloping brownfield land. The Council assert that the provision of new housing should only be given limited weight because it is able to demonstrate a 5.45 year supply of housing. However, given the Government's objective of significantly boosting the supply of homes the proposal would deliver moderate social benefits through the provision of 7 dwellings. There would be conflict with Policies H1 and ASP6 which seek to direct new development to within development boundaries and village envelopes and Policy SP1 of the CSS which seeks to direct new housing towards identified sites. However, the village of Audley would be accessible on foot or by bicycle; there would therefore be sustainable transport opportunities. As such, the policy conflict would be minor, and the proposal would accord with the development plan as a whole.
- In the context of paragraph 11 of the Framework, the adverse impacts of the development would not significantly and demonstrably outweigh the benefits. Therefore, the development benefits from the presumption in favour of sustainable development which points towards the grant of planning permission.
- Thus, for the reasons given above, and having regard to all matters raised, the appeal is allowed.

#### **The Costs Decision**

In allowing an award of costs against the Council in part, the Inspector made the following comments:

- The Planning Practice Guidance advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The applicant states that the Council has prevented development which should have been permitted, having regard to an overall planning balance which weighs in favour of the proposed development. The main thrust of the applicant's case is that the Council has persisted in objecting to a scheme which, it is asserted, benefits from the presumption in favour of sustainable development.
- The Planning Practice Guidance advises that local authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include

preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

- The Council took a report to Planning Committee in August 2018 with a recommendation for approval subject to a S106 agreement to secure a review mechanism in relation to affordable housing and public open space. The decision was deferred by the Planning Committee for further information to be provided to substantiate the claim that the site is previously developed land. A subsequent report was submitted to Planning Committee in October 2018. However, between the report being published and the Committee the Council issued its Five Year Housing Land Supply Statement: 2018-2023 which set out that the Council could demonstrate a five year housing land supply. The Council subsequently refused the application on two grounds, Reason 1 relates to the suitability of the site's location and Reason 2 relates to the absence of the aforementioned planning obligation.

With respect to the first reason for refusal:-

- The main difference between the Council's stance prior to its decision was the absence of the 5 year housing land supply. However, as is accepted by the Council, following the publication of the Gravel Bank decision, published on 25 January 2019, paragraph 11(d) should now be engaged. As is set out within the appeal decision, the proposal benefits from the presumption in favour of sustainable development. This means 'granting permission unless: ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.'
- The appeal was submitted on 21 December 2018 and was confirmed as valid on 4 February 2019. The Council received the Gravel Bank decision prior to receiving the timetable for the appeal on the 4 February and, it is reasonable to conclude, had the opportunity to review the decision and consider any implications for this appeal. Indeed, the Council makes reference to the decision within its Statement of Case, but continues to defend the appeal on the basis that the adverse impacts of the development, namely 'the reliance on the use of private motor vehicles due to the site's location, would significantly and demonstrably outweigh any benefits of the development when assessed against the policies of the Framework'.
- Since the Council now accepts that the proposal benefits from the presumption in favour of development, it would be expected that its assessment of the proposal against Paragraph 11(d) would broadly similar to that contained within its officer report to the August 2018 Planning Committee. Whilst the weight the Council gave to the benefit associated with the provision of new housing changed, the Inspector is not persuaded that it warranted a different conclusion in terms of the assessment, particularly given the Government's objective of significantly boosting the supply of homes, as set out in the Framework.
- Furthermore, the Council set out within its Officer Reports that there are significant benefits of the scheme, in particular the fact that unsightly buildings and external storage areas would be removed. In its appeal Statement of Case however, the Council's position in this respect appears to have changed. It is stated that the replacement of unsightly buildings in the landscape would be a benefit but the introduction of 7 2-storey dwellings replacing single storey sheds of an agricultural appearance will have some adverse urbanising impact on the character of this part of the countryside. The report concludes that such a benefit could only, therefore, be given very limited weight. This change in position has not been clearly justified by the Council.
- The Council assert that Policy SP1 of the CSS was previously said to not be out of date by the Planning Inspectorate and continues to apply. However the Inspector had concluded that the policy was out of date. Furthermore, as set out above, the Council's position is that paragraph 11(d) should be engaged. Thus, it is concluded by the Inspector that the Council's behaviour in respect of Reason 1 has been unreasonable.

With respect to the second reason for refusal: –

- The Inspector notes that the Planning Practice Guidance sets out that local authorities are at risk of an award of costs if they require that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the National Planning Policy Framework, on planning conditions and obligations. With regards to Reason 2, the Inspector had found that the proposed development would accord with relevant local and national planning policy in respect to affordable housing and open space without the relevant obligation of the S106 Agreement. The Agreement is therefore not necessary to make the development acceptable in planning terms and does not accord within the tests set out in Paragraph 56 of the Framework.
- Notwithstanding the above, a planning obligation to address such matters would not, of itself fail to accord with the law or relevant national policy in the National Planning Policy Framework. In this respect the Inspector does not believe that the Council has acted unreasonably.

In conclusion the Inspector finds that the Council has not acted unreasonably with respect to Reason 2 but that they have acted unreasonably with respect to Reason 1. Therefore unreasonable behaviour by the Council, resulting in unnecessary and wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a partial award of costs is justified.

### **Your Officer's comments**

Whilst there are a number of mistakes within the 2 decision letters – such as the reference to the site being a builder's merchants – and incomplete statements, these are considered to be of limited significance.

The decision with respect to the merits of the appeal is a further example of an Inspector's view on the weight to be attributed to policies within the Development Plan relating to the location of new housing. The Inspector's view in this appeal is that policy SP1 of the CSS does not accord with the Framework and is therefore out of date. Likewise he agrees with the Council's position in the Gravel Bank appeal that policies H1 and ASP6 are also out of date – a position that was accepted by the Inspector in that appeal. The Inspector also concludes that the adverse impacts of the development would not significantly and demonstrably outweigh the benefits and the development benefits from the presumption in favour of sustainable development which points towards the grant of planning permission. This appeal decision is a further material consideration to which your Officers will have regard in the determination of applications for new housing in the countryside. Whilst it might be considered to contrast with the appeal decision for The Lodge, Station Road, Onneley that was reported to the June meeting it is important to note that both Inspectors considered paragraph 11(d) of the Framework to be engaged – the different weight being given to CSS policy SP1 reflecting whether or not the Inspectors were dealing with greenfield (as in Onneley) or brownfield sites (as was the case here). The relative proximity of this site to both the edge of Audley (600m), its facilities (1400m), and the existence of a footway connecting them, and the Inspector's view that occupiers would be able to make sustainable transport choices were, it would appear, critical.

The Inspector's conclusion that a Section 106 agreement to secure a review of financial viability in the event of substantial commencement not being achieved within a period of time was not reasonable merits comment. Interestingly this did not form part of the appellant's case at all and for this reason the Council did not consider it necessary to set out its full case for such a review. It is indeed the case that national planning guidance does not expressly support a requirement for such reappraisals, and nor do policies within the development plan (which were developed prior to Developer Contributions SPD). Members will be aware that it has been the Council's common practice when accepting that a development should not be required, on grounds of a lack of financial viability, to make policy compliant contributions, to seek to secure a financial reappraisal mechanism if development is not substantially commenced within 12 months or some other period of time from the date of the planning permission. This position has in part been based upon the advice of those undertaking the appraisal that financial circumstances and thus viability can change markedly over time, and

up until now that position has been supported on appeal. At this stage your Officer does not intend to alter this approach, although the trigger for such reassessments will need to be carefully set.

The decision to grant against the Council a partial award of costs is acknowledged. The circumstances of this case – a positive recommendation being given at one point which was then followed by a negative recommendation when officers sought to take into account a new housing land supply position are unusual (and the Inspector has drawn out what he considers to be unexplained inconsistencies between the two), but the underlying message is the need for the Council to continually review and be prepared to review its position in appeal proceedings. There were particular demands upon the Planning Service at the time the appeal timetable became known, reflecting available staffing resources. Members will note that one of the recommendations given in the Annual Appeal performance report is that a proactive approach be taken by officers to appeal handling with early holding of case conferences where appropriate, the strength of the case being continually reassessed in the light of any new evidence received and the Committee taking a similar approach.

When the amount of the costs have been agreed the sum will be reported to the Committee for information.

**Recommendation: That the appeal decision, the costs decision and your Officer's comments be noted**

Date report prepared : 2nd July 2019