
Appeal Decisions

Site visit made on 7 January 2019

by I Radcliffe BSc (Hons) MRTPI MCIEH DMS

an Inspector appointed by the Secretary of State

Decision date: 07 March 2019

Appeal A Ref: APP/X1545/W/18/3204432

Land west of Fambridge Road, North Fambridge, Essex

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by conditions of a planning permission.
 - The appeal is made by David Wilson Homes against the decision of Maldon District Council.
 - The application Ref 17/05154/DET, dated 15 September 2017, sought approval, amongst other matters, of details pursuant to conditions Nos 12,13,17,31 & 33 of planning permission Ref OUT/MAL/14/01016, granted on 18 March 2016.
 - The application in relation to these conditions was refused by notice dated 15 May 2018.
 - The development proposed is an outline planning application for up to 75 market and affordable dwellings, a village centre of up to 1000sqm of flexible commercial and community floorspace, a 1.8ha village green and public open space
 - The details for which approval is sought are:
 - Condition 12: No development shall commence until details of who shall be responsible for the maintenance of the surface water drainage system in perpetuity have been submitted to and approved in writing by the Local Planning Authority. The management of the surface water drainage system shall accord with the approved details thereafter.
 - Condition 13: No development approved by this permission shall be commenced until a scheme for the improvement of the existing foul and surface water drainage system has been submitted to and approved in writing by the local planning authority. The scheme needs to set out the phasing of the development in terms of dwellings built and occupied alongside the foul and surface water system improvements needed. The scheme shall be implemented as approved. No occupation of dwellings approved by this permission shall occur until each phase of the scheme for improvement of the existing foul and surface water drainage system has been completed and confirmation obtained of available permitted capacity in the network and at the treatment works.
 - Condition 17: Prior to commencement of the development details showing the means to prevent the discharge of surface water from the development onto the highway shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be carried out in its entirety prior to the access becoming operational and shall be retained at all times.
 - Condition 31: No development shall commence until a detailed wastewater strategy has been submitted to and approved in writing by the local planning authority. The development shall be carried out in complete accordance with the approved details and retained as such thereafter.
 - Condition 33: No development shall commence until a foul water strategy has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in complete accordance with the approved details and retained as such thereafter.
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Appeal B Ref: APP/X1545/W/18/3204434

Manor Farm, The Avenue, North Fambridge, Essex

- The appeal is made under section 78 of the Town and Country Planning Act 1990

against a refusal to grant consent, agreement or approval to details required by conditions of a planning permission.

- The appeal is made by David Wilson Homes against the decision of Maldon District Council.
- The application Ref 17/05142/DET, dated 29 August 2017, sought approval, amongst other matters, of details pursuant to conditions Nos 12,15,16, 18 & 29 of a planning permission Ref OUT/MAL/14/01018, granted on 11 January 2016.
- The application in relation to these conditions was refused by notice dated 15 May 2018.
- The development proposed is an outline planning application for up to 30 dwellings.
- The details for which approval is sought are:
- Condition 12: No development shall commence until details have been submitted to and approved in writing by the Local Planning Authority of an on-site construction management plan detailing:
 - phasing of the development;
 - times during which all construction activities will take place;
 - measures to prevent the tracking out of mud and debris onto the highway;
 - measures to manage noise and dust emissions during construction;
 - details of parking areas for construction vehicles and construction workers vehicles;
 - protective fencing to secure the site.

All approved measures shall be put in place prior to development commencing on site and all subsequent construction of the development shall be implemented in accordance with the approved details.

- Condition 15: No development shall commence until details of who shall be responsible for the maintenance of the surface water drainage system in perpetuity, have been submitted to and approved in writing by the Local Planning Authority. The management of the surface water drainage system shall accord with the approved details thereafter.
- Condition 16: No development shall commence until a foul water strategy has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in complete accordance with the approved details and retained as such thereafter.
- Condition 29: No development shall commence until a detailed wastewater strategy has been submitted to and approved in writing by the local planning authority. The development shall be carried out in complete accordance with the approved details and retained as such thereafter.

Decisions

Appeal A

1. The appeal is allowed and the submitted details are approved in relation to conditions 12, 17, 31 and 33 attached to planning permission Ref OUT/MAL/14/01016, granted on 18 March 2016 in accordance with the application dated 15 September 2017 and the plans submitted with it.
2. In relation to condition 13, the appeal is allowed insofar as it relates to the improvement scheme sought and approval is granted for these details. As the latter part of this condition requires confirmation of works and actions prior to occupation that have not yet taken place, these are matters for the local planning authority to assess compliance with and approval is not granted. As a result, the condition as a whole is not discharged.

Appeal B

3. The appeal is dismissed insofar as it relates to details submitted pursuant to conditions 16 and 29. The appeal is allowed and the submitted details are approved insofar as it relates to conditions 12 and 15 attached to planning permission Ref OUT/MAL/14/01018, granted on 11 January 2016 in accordance with the application dated 29 August 2017 and the plans submitted with it.

Procedural matters

4. In relation to Appeal B, the local planning authority also refused to approve details submitted in relation to condition 18 which relates to land contamination. However, the appellant has submitted a further application in relation to the discharge of this condition and has chosen not to include it in this appeal. I have dealt with the appeal on this basis.
5. Since outline planning permission on both sites was granted the Maldon District Replacement Local Plan 2005 has been replaced by the Maldon District Local Development Plan 2014-2029. The submitted details have therefore been assessed against the policies of the Maldon District Local Development Plan.

Main Issues

6. In relation to Appeal A, outline planning permission was granted in 2016 for up to 75 market and affordable dwellings, a village centre of up to 1000sqm of flexible commercial and community floorspace, a 1.8ha village green and public open space. In Appeal B, outline planning permission was granted in the same year for up to 30 dwellings. In relation to both appeals, following an application for approval of details required by condition, the local planning authority refused to approve certain matters. These related to the strategy for surface water and foul water drainage and demonstration that the drainage network and water recycling centre had available capacity to cater for the developments.
7. On the basis of the conditions that the local planning authority refused to discharge, the main issue in Appeal A is whether surface and foul water from the developed sites would be adequately dealt with. This also forms the first of the two main issues in relation to Appeal B. The second main issue in this Appeal B is whether the proposed construction management plan would provide acceptable living conditions for the occupiers of the dwellings that adjoin Crouch Road.

Reasons

Surface water drainage – Appeals A & B

8. The site in Appeal A consists of open undeveloped fields. In Appeal B the site consists of farm buildings and agricultural land.
9. In Appeals A & B sustainable drainage systems are proposed. Through the use of permeable paving to areas of hardstanding and soakaways in the developments ground absorption of surface water would occur. Attenuation basins and an infiltration tank would be used to hold excess on-site surface water run off before discharge into the existing off-site surface water drainage network. As a result, in both schemes surface water run-off from the sites would be considerably less than currently occurs and so would reduce the risk of off-site flooding. To ensure that surface water flows freely into the downstream ditch system, and reduce the current risk of water pooling on Fambridge Road and Avenue Road, silt from the existing culvert under Fambridge Road would also be removed.
10. In preventing surface water on the site discharging onto the adjacent roads, and those roads that would be provided within the site, the proposed arrangements therefore comply with condition 17 in Appeal A.
11. Condition 12 in Appeal A and condition 15 in Appeal B require confirmation of who will maintain the surface water drainage systems. It has been confirmed

that Anglian Water Services (AWS), the statutory undertaker, would do so. The Lead Local Flood Authority (Essex County Council) has raised no objections to this arrangement. In the absence of substantive evidence that AWS would be unable to carry out this maintenance role, and on the basis of the reasonable assumption that it would adequately carry out its responsibilities, I therefore find that these conditions have also been complied with.

Foul water drainage – Appeals A & B

12. A Development Impact Assessment (DIA) considered the effect of foul water from the 105 dwellings in the two proposed appeal schemes on the existing public sewer network in North Fambridge. It concluded that the effect of the combined number of homes in both appeals on the network could be mitigated by providing storage so that foul / waste water would only be pumped into the sewer network when level monitors confirmed that there was capacity.
13. As part of the proposed scheme in Appeal A, storage tanks would be provided on site. As part of the foul water drainage strategy to address the impact of the developments in both Appeals additional storage would also be provided at the Avenue Road Pumping Station. The tanks would have a capacity to store the average hourly flow from the developments for up to 35 hours. On the basis that the Water Industry Association requires only 6 hours for new adoptable pumping stations, this is a considerable storage capacity.
14. The on-site storage tanks and pumping station in the scheme in Appeal A would be constructed by the developer to a standard approved by AWS. In relation to the storage tanks at the Avenue Road Pumping Station, this work would be funded by the developer. Compliance with the appropriate construction standards and the provision of funding would be secured by the provisions of the Water Industry Act¹.
15. Given this, and that in Appeal A condition 13 prevents occupation of dwellings until the improvements to the foul water (and surface water) drainage systems have been completed, there is no substantive reason to believe that the additional storage on-site and at Avenue Road Pumping station will not be completed by the time houses on this site are ready for occupation. In relation to the houses proposed on the site in Appeal B, the drainage evidence from AWS is that they can be occupied before the off-site storage tank is provided without overloading the foul sewer. The proposed drainage scheme with regard to sewer network capacity would therefore address the foul / waste water resulting from the development.
16. Concerns have been raised about the risk of flooding preventing the Avenue Road Pumping Station from operating. Environment Agency mapping shows that the station is located within Flood Zones 2 and 3 which respectively have a medium and high probability of flooding. However, these zones assume that there are no flood defences. The submitted Flood Risk Assessment (FRA) for the schemes shows that the station lies within a defended area and that the defences are in good condition. With an Environment Agency map² provided in the FRA showing the pumping station to be at low risk of flooding, the probability of it actually flooding from river or sea water is therefore significantly less than 1 in 100 annually.

¹ Sections 98 and 104 of the Water Industry Act

² Figure 2b of the FRA

17. In relation to surface water flood risk, Environment Agency mapping also shows that the pumping station is at low risk. Local residents have referred to Fambridge Road flooding. However, on the basis of the flood related mapping it appears to me that this is localised and likely to be as a result of poor maintenance of the drainage ditches and culverts.
18. Taking all these matters into account, I therefore find that Avenue Road Pumping Station is not at notable risk of flooding. Even if this was not the case, Planning Practice Guidance (PPG) advises that sewage transmission infrastructure and pumping stations are water compatible development that are acceptable within Flood Zones 2 and 3³. As a consequence, there are no reasonable grounds for concluding that the Avenue Road Pumping Station would be unable to function in the event of a flood.
19. Moreover, should the pumping stations in the network be unable to function for any reason, there would be sufficient tank storage to hold 35 hours of waste / foul water flow. If, after this period, a pumping station was still out of action tankers would need to empty the storage tanks. It is extremely unlikely therefore that there would be problems with foul water disposal from the sites. In the event of the pumping station not working coinciding with localised flooding of Fambridge Road, tankers would only be prevented from entering the site in Appeal A and accessing Avenue Road pumping station if it was too deep for large vehicles. In the absence of any submitted substantive evidence that this would be the case, I am not persuaded that tankers would be unable to access either site. In this regard I note that the Environment Agency ('the Agency') and AWS are satisfied with the storage, pumping and release of waste / foul water from the sites into the sewer network. I agree with their assessment.
20. In relation to Appeal A, condition 13 prevents occupation of new dwellings on the site until each phase for the improvement of the foul and surface water drainage system has been completed. Based upon the submitted Phasing & Delivery Plan, I am satisfied that the development would not overload the foul sewer network.

Off-site foul water drainage – Appeals A & B

21. By holding back foul water in tanks on the site in Appeal A and at the nearby pumping station until peak flows during the day have passed, the appellant's mitigation works would ensure that the flows to the local foul sewer would be managed so that the additional flows would not reach the Latchingdon Water Recycling Centre (WRC) at peak periods. As I have noted, these works would ensure that the sewer would not be overloaded. However, this would not address the impact of the development on the WRC, which evidence provided shows is over capacity and which discharges approximately 2km upstream of the Blackwater Estuary. The estuary is a Site of Special Scientific Interest (SSSI) and is a component SSSI of the Essex Estuaries Special Protection Area. As such it is a European site and a 'Protected Area' under the Conservation of Habitats and Species Regulations 2017 and the Water Framework Directive (2000/60/EC) (as amended).
22. The Agency and AWS recommended the discharge of related conditions. However, the Agency subsequently raised concerns regarding the provision of improvements to the WRC and, in a later consultation response in relation to

³ Paragraph: 066 Reference ID: 7-066-20140306 Flood Zone and flood risk tables – Table 2: Flood risk vulnerability classification

- the site in Appeal A in July 2018 on a subsequent application to discharge the contested conditions, stated that the Dry Weather Flow at the WRC now exceeds the permitted levels. It identified that the additional waste / foul water generated by the proposed development would threaten the local water environment and further breach legislation. As a result, it recommended that no new dwellings should be occupied until confirmation was received of a new permit and additional treatment capacity at the WRC.
23. Condition 13 attached to the scheme in Appeal A includes a requirement that confirmation is provided of available permitted capacity at the treatment works. The submitted Phasing and Delivery Plan though relates only to on-site works within the control of the appellant. Whilst, as I have noted, further storage paid for by the appellant would be provided at the nearby pumping station, measures to address the capacity issues at Latchingdon WRC are the responsibility of AWS and are not covered by the Phasing and Delivery Plan. As a result, the plan does not demonstrate that there would be sufficient capacity at the WRC to prevent harm to the water environment.
24. Nonetheless, AWS is aware of its statutory duties not to breach the permit for the WRC and with the Agency and Lead Local Flood Authority have identified an intention to implement a strategy to significantly reduce surface water ingress into the foul sewer, which they identify as a key component of the overcapacity issues at the WRC. As part of its investment planning it will also be seeking funds to improve capacity at the WRC based upon the extent of new development proposed for the catchment area. On this basis, following the Agency correspondence in July 2018 referred to above, a joint statement was prepared by AWS and the Agency. The position of these two bodies is that with the action and investment planned and the phasing outlined in the appellant's strategy there is a *'reasonable degree of comfort'* that action can be taken to mitigate the effect of the additional waste / foul water on the WRC. However, as PPG notes, *'the timescales for works to be carried out by the sewerage company do not always fit with development needs. In such cases, local planning authorities will want to consider how new development can be phased, for example so it is not occupied until any necessary improvements to public sewage treatment works have been carried out.'*⁴
25. In response to the consultation on the applications that are the subject of the appeals the position of Natural England and the Agency was that the proposed drainage solutions would not have a harmful impact on protected downstream habitats. However, this pre-dated the Agency's more recent response of July 2018. Whilst as a result of the developments the Agency would provide a new Environmental Permit for the WRC with conditions that protect the downstream habitat, as I have noted, there is no indication of the timetable by which the required improvements would be achieved or that the works would be linked to the phasing of the development.
26. No confirmation has been provided that the funds to improve capacity at the WRC have been secured. Furthermore, I have no confirmed details of the timing of implementation of either the strategy to reduce surface water ingress or the possible infrastructure improvements, nor how these are to be linked to the delivery of housing as required by condition 13 and advised by PPG. As a result, whilst an important consideration, I find that the joint statement by

⁴ Paragraph: 020 Reference ID: 34-020-20140306 *Are there particular considerations that apply in areas with inadequate wastewater infrastructure?*

AWS and the Agency offers insufficient reassurance that the WRC will have sufficient capacity to cater for the housing on the two sites and so prevent harm to the local water environment and protected habitats. As a consequence, I attach only moderate weight to the joint statement in the consideration of this matter.

27. Taking all these matters into account, I therefore conclude that whilst it has been demonstrated that surface water from the two sites would be adequately dealt with and that with the works proposed additional flows would not overload the local foul sewer network, problems would remain with capacity at the WRC.
28. In relation to Appeal A, the requirement in condition 13 that no occupation of dwellings occurs until, amongst other matters, confirmation of the available permitted capacity at the treatment works offers sufficient control over the timing of improvements to ensure that any necessary works are implemented before the houses on this site place demands on the WRC. As a result, waste and foul water from this development would not cause harm downstream to protected waters and habitat and the strategies required by conditions 31 and 33 can be approved.
29. Turning to Appeal B, no such condition preventing occupation or the commencement of development until available permitted capacity at the WRC was confirmed was attached to the planning permission. Whilst conditions (Nos 17 and 30) attached to this permission prevent occupation of the houses on this site until the foul and wastewater strategies required for this development have been implemented, the submitted strategy does not include addressing capacity issues at the WRC. As a result, the 30 houses on this site could be built and occupied before the WRC has available capacity to deal with the additional flow from these dwellings. As a consequence, waste and foul water from this development, which the phasing plan submitted in relation to Appeal A shows would be built out first, is likely to cause harm downstream to protected waters and habitat.
30. Consequently, whilst in Appeal A the scheme would comply with policies D1, D2, H4 and I1 of the Maldon District Local Development Plan, the scheme in Appeal B would not. These policies seek to ensure that the demands of new development on infrastructure are addressed so that, amongst other matters, water quality and the natural environment are not harmed.
31. Condition 13 attached to the permission in Appeal A has therefore, in part, been complied with and sufficient control is retained by the remaining part of this condition for the wastewater and foul water strategies required by conditions 31 and 33 of Appeal A to be approved. In relation to Appeal B, in the absence of control over the capacity of the WRC conditions 16 and 29 should not be approved.
32. Two judgements have been referred to in support of the appeal: Kingsway Investments⁵ and Proberun⁶. The first of the two judgements determined that refusal cannot be used to achieve what would amount to a revocation or modification of a permission already given. The second judgement found that if the approval of an application in which the details would cause planning harm, the issue is whether the scheme being proposed is the best scheme that can be approved within the terms of the planning permission that has been granted.

⁵ Kingsway Investments v Kent County Council [1971] AC 72

⁶ Proberun Ltd v SOSE and Medina BC (1991) 61 P & CR 77

33. In relation to the first judgement, negatively worded conditions prohibiting development until a strategy which includes works on land outside the control of the appellant has been submitted can be correctly used if there are prospects that the required works will be carried out. Given that this is the situation here, refusal to approve the submitted foul and waste water strategy submitted in relation to conditions 16 and 29 in Appeal B would not be illegal.
34. Turning to the second judgement, the appellant is relying on improvements to capacity at Latchingdon WRC rather than providing a water recycling facility on site. As a result this judgement, which relates to achieving the best scheme on land within the appeal site / appellant's control, is not directly relevant to the issue of foul and waste water treatment from these sites. As the scheme that is proposed does not include confirmation that that there would be available permitted capacity at Latchingdon WRC, it is therefore not the best that could be approved. As a result, not fully discharging condition 13 of Appeal A at this point and not discharging conditions 16 and 29 of Appeal B would not be contrary to this judgement.

Living conditions - Appeal B

35. Crouch Road is a short no-through road serving a few dwellings. The absence of regular traffic means that the living conditions of the occupiers of these dwellings are quiet and undisturbed. The construction management plan (CMP) submitted in relation to condition 12 in Appeal B uses Crouch Road only for pedestrians and the fork lift transport of waste from the Manor Farm site to the site on land west of Fambridge Road. In my judgement, this would not amount to an intensive use of Crouch Road and, with the control that the CMP places on the hours of work the noise and disturbance caused by such use, would not materially harm the living conditions of residents along this road. As a result, the CMP would comply with policies D1 and D2 of the Maldon District Local Development Plan, which amongst other matters seeks to prevent such harm, and so should be approved.

Conclusion

36. For the reasons given above, and having regard to all other matters raised, I therefore conclude that Appeal A in relation to conditions 12, 17, 31, 33, and insofar as the drainage system improvement scheme required in relation to condition 13, should be allowed. In relation to Appeal B, the appeal in relation to conditions 12 and 15 should be allowed and in relation to conditions 16 and 29 should be dismissed.
37. If I had intended to fully allow both appeals I would have been obliged to ensure that an appropriate assessment in compliance with a recent judgement on European sites⁷ had been carried out.

Ian Radcliffe

Inspector

⁷ People over Wind, Peter Sweetman v Coillte Teoranta, Court of Justice of the European Union, Case C-323/17