



Appeal Decision

Inquiry opened on 23 February 2016

Site visits made on 29 February and 1 March 2016

by Paul Griffiths BSc(Hons) BArch IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 2 August 2016

Appeal Ref: APP/A2280/W/15/3012034 Land North of Moor Street, Rainham

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
 - The appeal is made by Gladman Developments against The Medway Council.
 - The application Ref.MC/14/3784, is dated 19 December 2014.
 - The development proposed was described as a residential development of up to 200 dwellings (including a minimum of 25% affordable housing), planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from Otterham Quay Lane, and associated ancillary works.
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Preliminary Matters

1. The Inquiry opened on 23 February 2016 and sat on 24, 25, 26, and 29 February before closing on 1 March 2016. I carried out an unaccompanied site visit on the afternoon of 29 February 2016 when I took in the appeal site itself, and the wider area, including the various viewpoints referred to by the main parties in evidence, and included on the helpful itinerary. I carried out a second unaccompanied site visit between 0725 and 0835 hours on the morning of 1 March 2016 when, amongst other things, I observed traffic conditions at the junction of Otterham Quay Lane and Moor Street (the A2).
2. The originating application was made in outline with approval for access sought but appearance, landscaping, layout and scale reserved for future determination. I have dealt with the appeal on the same basis. In the lead up to the appeal, the Council and the appellant agreed to proceed by substituting a subsequent proposal for the development of 190 dwellings on the appeal site¹. This was canvassed at the Inquiry and I found that no-one would be prejudiced if I proceeded on the same basis. I have adopted the revised plans and other material, and amended the description of development to suit.
3. After the Inquiry closed, I reverted to the main parties in order to ascertain whether the decision of the Court of Appeal in *Suffolk Coastal DC v Hopkins Homes; Cheshire East BC v SoSCLG & Richborough Estates* [2016] EWCA 168 and the High Court in *Cheshire East BC v SoSCLG & Renew Land* [2016] EWHC 571 (Admin) and *Forest of Dean DC v SoSCLG* [2016] EWHC 421 (Admin)² had any implications for the cases presented to the Inquiry. I have taken the responses received into account in determining the appeal.

¹ Which was itself refused planning permission by the Council under Ref.MC/15/2731

² Referred to hereafter respectively as *Richborough*, *Renew Land* and *Forest of Dean* respectively

Decision

4. The appeal is dismissed and planning permission for a residential development of up to 190 dwellings (including a minimum of 25% affordable housing), planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from Otterham Quay Lane, and associated ancillary works, on Land North of Moor Street, Rainham, is refused.

Main Issues

5. After the appeal against the failure of the Council to make a decision within the prescribed period had been lodged, the application was nevertheless reported to the Council's Planning Committee. It was decided that if the Council had been in a position to determine the application, planning permission would have been refused for eight reasons. After subsequent discussions with the appellant, the Council withdrew putative reasons 4 (relating to pedestrian connectivity and public transport accessibility), 5 (relating to the potential impact on local facilities and services), and 7 (relating to information needed to satisfy the 2010 Habitat Regulations) on the basis that these matters could be resolved through appropriately worded conditions and planning obligations.
6. That left a series of issues relating to landscape impact (putative reason 1), the loss of best and most versatile agricultural land (2), the effect on three designated heritage assets (3), whether the proposal benefits from the presumption in favour of sustainable development set out in the National Planning Policy Framework³ (6), and the effect of traffic generated by the development on the capacity of the junction of Otterham Quay Lane and Moor Street (the A2) (8)⁴. All were explored in full at the Inquiry.
7. That exploration took place in the context of an agreement between the main parties that the Council cannot demonstrate a five-year supply of deliverable housing sites. There was much discussion and disagreement about the policy implications of that but the correct approach is now settled, thankfully, following the judgement of the Court of Appeal in *Richborough* and the High Court in *Renew Land*.
8. Notwithstanding that, the judgement of the High Court in *Forest of Dean* has implications for the way a case where there are impacts on designated heritage assets, is approached. Put simply, the reference to designated heritage assets in footnote 9 to paragraph 14 of the Framework means that the presumption in favour of sustainable development is not triggered unless the proposal can first pass the simple balancing exercises in paragraph 133 (in cases where any harm to the significance of a designated heritage asset is judged to be substantial) or 134 (where any harm is less than substantial).
9. On that basis, the correct approach to decision-making here is to first assess whether any harm is caused to the significance of the designated heritage assets affected. If any is found, then the degree of that harm needs to be defined. Then, that harm needs to be balanced against the public benefits of the proposal. If the public benefits do not outweigh the harm, then it seems to me that following the Framework path, but having proper regard too to the Development Plan and Statute, planning permission should be refused for the proposal.

³ Referred to hereafter as the Framework

⁴ Repeating the reasons cited in the determination of application Ref.MC/15/2731

10. If the public benefits outweigh the harm caused to the significance of the designated heritage assets, then paragraph 14 would be re-engaged. Bearing in mind that the Council cannot demonstrate a five-year supply of deliverable housing sites, certain policies cited in the putative reasons for refusal would have to be considered out-of-date⁵. That would mean that in terms of the Framework⁶, planning 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 whole⁷.
11. Nevertheless, on the basis of *Forest of Dean*, it is only if the proposal passes the tests of paragraph 133 or 134, that any additional harm to the landscape, the loss of best and most versatile agricultural land, and traffic impacts, need to be considered.

Reasons

Designated Heritage Assets

12. The starting point for dealing with such matters is the Planning (Listed Buildings and Conservation Areas) Act 1990⁸. Section 72(1) of the Act sets out that in the exercise of planning functions, with respect to any buildings or other land in a conservation area, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
13. Section 66(1) of the Act says that in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority, or, as the case may be, the Secretary of State, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
14. Mirroring those provisions, to a large extent, paragraph 132 of the Framework maintains that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. It goes on to note that significance can be harmed or lost through alteration or destruction of the heritage asset, or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification.
15. In their putative reason for refusal 3, the Council refers to three designated heritage assets. It is said that there would be harm to the character and appearance of the Moor Street Conservation Area, and to the settings of West Moor Farm House, a Grade II listed building, and Westmoor Cottage, another Grade II listed building.
16. There are two preliminary points that require examination. First, in dealing with the potential effect on the conservation area, it is important to be clear about the nature of that impact. The Council alleges that the proposal would harm the character and appearance of the conservation area. That cannot be correct because the appeal site does not lie within the conservation area. As such, Section 72(1) of the Act is not engaged.

⁵ Bearing in mind the clarification *Richborough* offers on this point

⁶ On the basis of the judgement in *Renew Land*

⁷ Unless material considerations indicate otherwise

⁸ Referred to hereafter as the Act

17. For similar reasons, Policy BNE12 of the Medway Local Plan⁹ cited by the Council, which reflects Section 72(1) of the Act, does not bear on the proposals.
18. Second, there is the question of whether there would be an impact on the setting of the conservation area, and having regard to the evidence adduced on behalf of the appellant, the listed buildings referred to by the Council.
19. The approach taken by the appellant to this question was ably summarised in closing. It is said that a location is not within the setting of an asset just because you can see it (as in this case) or sense it in another way (in other cases). To experience an asset, you have to have a basic understanding of what you are looking at, whether it is an historic building, settlement, or the like, and something of the qualities that make it significant.
20. I must admit to having some sympathy with that as a proposition and would observe that this was very much the approach favoured by practitioners in the past, before the setting of a heritage asset was first defined¹⁰. That definition was taken forward in the glossary to the Framework. It says that the setting of a heritage asset is the surroundings in which a heritage asset is experienced.
21. It seems to me that if I can see a heritage asset, however far away, or otherwise sense it, I must be experiencing it, and must, therefore, be within its setting. As a consequence, the approach taken by the appellant is at odds with the Framework definition. I would observe that for the appellant's approach to be correct, the definition would have to read: the surroundings in which *the significance* of a heritage asset is experienced.
22. With that in mind, I am content that the relatively distant viewpoints into the conservation area, and of the listed buildings, relied on by the Council, fall within the settings of those designated heritage assets. What is more, the proposal would clearly have an impact on those settings. Paragraph 132 of the Framework makes clear that a harmful impact on the setting of a designated heritage asset can lead to a loss of significance.
23. In terms of the conservation area, there is no adopted Character Appraisal or Management Plan that describes the special interest of the conservation area. However, notwithstanding the presence of some detracting and distracting elements within it, and alongside the boundary, it is not difficult to read. I found it to be a loosely arranged collection of buildings, old and new, forming a distinct settlement, with historic ties to the agricultural and other open land around it, that straddles the historic route formed by the A2. That link to the surrounding land and the sense of individual identity, quite distinct from the built up area of Rainham to the west, are important elements of the special interest of the conservation area.
24. In providing the opportunity for a relatively thick belt of orchard-style planting at points where the appeal site fronts the route through the settlement, and running behind Westmoor Cottage and other buildings on the north side of the route, the scheme has the potential to enhance the setting of the conservation area when viewed outwards from it, returning more of a semblance of its historic appearance, as depicted in the historic (circa 1910) image referred to by the appellant.

⁹ Adopted in May 2003, referred to hereafter as LP

¹⁰ In Planning Policy Statement 5: *Planning for the Historic Environment* I believe

25. There are also important views into the conservation area that emphasise the sense that Moor Street is an individual settlement, separate from Rainham, with links to the surrounding rural land. Some of those views are available from the south-east, along South Bush Lane, from public footpaths to the south, and from the south-east along Meresborough Road. These would be largely unaffected by the proposal.
26. However, there are currently important views across the appeal site, into the settlement, from Otterham Quay Lane, and from Seymour Road. Both sets of views make it plain to the observer that Moor Street has its own identity, that it has, or had, a relationship with the surrounding open land, and that it is in no way part of Rainham.
27. I recognise that at times, the appeal site is used for car boot sales. At those times, these characteristics must be difficult to make out. Nevertheless, most of the time, the appeal site is, as I saw it, open. Notwithstanding the potential inherent in planted buffers, it is clear to me that in these views, and from Otterham Quay Lane in particular, the development of the site for housing would blur considerably the sense that Moor Street is a separate settlement with functional links to the surrounding open land. It would appear as an extension of the built-up area of Rainham.
28. Given the important contribution to significance made by that link to the surrounding land, and the ready identification of Moor Street as a separate settlement, distinct from the built up area of Rainham, this impact on the setting of the conservation area would cause a considerable degree of harm, and it would detract very much from the significance of the conservation area as a designated heritage asset.
29. In dealing with the impact on the settings of West Moor Farm House and Westmoor Cottage, the central policy of the development plan is LP Policy BNE18. This says that development which would adversely affect the setting of a listed building will not be permitted.
30. Lacking any inbuilt balancing provision, this policy fails to accord with the more up-to-date approach of the Framework. Indeed, the policy goes further even than Section 66(1) of the Act. On that basis, bearing in mind the provisions of paragraph 215 of the Framework, the approach of the Framework, and the Act, is to be preferred.
31. West Moor Farm House and Westmoor Cottage are clearly agricultural in origin. As such, their setting, with its clear visual link to the open land surrounding Moor Street that they were once linked to, and the appeal site in particular, is an important contributor to their significance.
32. The possibility that a relatively thick belt of orchard-style planting could be provided at points where the appeal site fronts Moor Street, and running behind Westmoor Cottage and other buildings on the north side of Moor Street, has the potential to enhance the setting of these listed buildings, when they are experienced from Moor Street.
33. However, there are other places where they are experienced with the open land¹¹ of the appeal site in the foreground, notably from Otterham Quay Lane, but also from Seymour Road.

¹¹ Unless the car boot sale is in operation, of course

34. These views make plain the agricultural origin of the buildings, and their relationship with the surrounding land. The development of the site for housing would close off these views completely, and this experience of them. This would have a harmful effect on the setting of the listed buildings, and, as a consequence, their significance.
35. Bringing all those points together, I conclude that while the proposal has the potential to deliver some enhancement, viewed in the round, it would be detrimental to the setting of the conservation area, West Moor Farm House, and Westmoor Cottage.
36. In terms of its harmful impact on the settings of the listed buildings affected, the proposal would be contrary to LP Policy BNE18, and, as a consequence, the development plan. However, for the reasons set out above, that is not definitive, and the approach of the Framework is a weightier material consideration. To properly assess the heritage impacts of the proposal against the provisions of the Framework, one needs to assess whether the harm caused to significance would be substantial, or less than substantial.
37. The Planning Policy Guidance¹² tells us that whether a proposal causes substantial harm will be a matter for the decision-maker and in general terms, substantial harm is a high test. The High Court has held that for substantial harm to be demonstrated there would have to be such a serious impact on the significance of the asset that its significance was either vitiated altogether, or very much reduced¹³.
38. In my judgement, the harmful impacts on the settings of the conservation area and the listed buildings set out, while considerable, do not attain that high threshold. There would be places where the settlement would still be appreciated as a separate entity with open space around it, and the listed buildings themselves would survive intact. On that basis, the harm would be less than substantial.
39. Nevertheless, by dint of paragraph 132 of the Framework, the harm that would be caused to the significance of the conservation area must attract great weight on the negative side of the balance. In terms of the listed buildings affected, the same principle applies but it is bolstered by the operation of Section 66(1) of the Act which creates a strong presumption against development that would have a harmful impact on a listed building or, as is the case here, its setting.

Benefits

40. Paragraph 134 of the Framework says that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.
41. The public benefits of the proposal were helpfully set out by the appellant in closing. In terms of housing land supply, the main parties agree that the Council cannot demonstrate a five-year supply of deliverable housing sites. However, it is important to address the extent of under-supply because the greater the extent of that under-supply, the more benefit there would be in providing market housing.

¹² Referred to hereafter as the PPG

¹³ *Bedford Borough Council v SoSCLG and NUON UK Ltd* [2012] EWHC 4344 (Admin)

42. The appellant says that the Council's base requirement is 1 281 units annually so over 5 years, it is 6 405 units. The backlog is 2 215, giving a total of 8 620. To that needs to be added a 20% buffer¹⁴ giving a total of 10 344. To arrive at an annual requirement, one must divide that figure by 5, which gives 2 068. At the same base date, the Council's claimed supply is 5 587 units. That means the Council can at best, demonstrate 2.7 years supply of deliverable housing sites. There is no good evidence to suggest that the appellant's calculation is in any way incorrect.
43. It is important to note too that under-supply in the Council area is persistent – the requirement has not been met in 17 of the last 20 years recorded. Neither is there any early prospect of housing land being delivered through the development plan. The new Local Plan is at an early (Issues and Options) stage and the suggestion that it will be adopted in 2017 seems to me very optimistic.
44. On top of that, the proposal would deliver affordable housing at a policy compliant rate of 25%. The Council's own figures shows that over the forthcoming plan period (2012 to 2035), 713 affordable homes are needed annually. However, in the last four years, the Council has delivered but 845. The North Kent Strategic Housing and Economic Needs Assessment SHMA says that if affordable housing needs are to be met, 58% of all housing (using the base requirement of 1281 referred to above) would have to be affordable housing. That is unlikely to come about.
45. In that overall context, the market and affordable housing that the proposal would bring forward relatively quickly, must attract considerable weight in its favour.
46. The appellant set out various economic benefits that the scheme would deliver too. There would be a construction spend of £24 million, creating 76 jobs (FTE) over a six year building programme. The scheme would result in an additional annual spend of £400,000 in Rainham, and £2.1 million in Medway. There would be additional Council Tax receipts for the Council and New Homes Bonus payments of around £1.85 million over the build period.
47. Paragraph 18 of the Framework makes clear that the Government is committed to securing economic growth in order to create jobs and prosperity. In that context, the economic benefits that the scheme would bring forward attract significant weight in favour too.
48. The proposal would also bring forward ecological enhancements for the site through additional planting of trees and shrubs and the provision of an attenuation pond which can be managed to provide an enticing habitat. Paragraph 109 of the Framework encourages net gains in biodiversity where possible, contributing to the Government's commitment to halt the overall decline in biodiversity. On that basis, the ecological enhancements proposed weigh in favour of the proposals.

Balance

49. Given the parlous situation in terms of housing land supply in Medway, and the Government's commitment to economic growth as well as boosting significantly the supply of housing, and ecological enhancement, the public benefits set out above carry significant weight in favour of the proposals.

¹⁴ Contrary to the Council's approach, the buffer needs to be applied to the base requirement and the shortfall

50. That said, while I found it to be less than substantial, in the parlance of the Framework, the approach of the Act, and paragraph 132 of the Framework, compels me to attach great weight on the negative side of the scales to the harm that would be caused to the settings, and thereby the significance, of the designated heritage assets affected.
51. In balancing those two conflicting factors, I find that the public benefits of the proposal, while substantial, are insufficient to justify the harm to the significance of the designated heritage assets that would be caused.
52. I reach that conclusion largely because the benefits are generic and would be much the same for any housing scheme of the scale proposed. Paragraph 132 of the Framework requires clear and convincing justification for any harm or loss of significance and Section 66(1) of the Act provides a strong presumption against development that would harm the setting of a listed building. To my mind, for that clear and convincing justification to exist, and for that strong presumption to be set aside, it would need to be shown not only that housing and consequent economic development and ecological enhancement is needed, but that they are needed on this particular site.
53. On that overall basis, in the absence of any other material considerations, and following the route of the judgement in *Forest of Dean*, the appeal must be dismissed, and planning permission for the proposal refused.

Other Matters

54. A range of other matters were explored at the Inquiry. The process set out in the *Forest of Dean* judgement means that these have no bearing on my conclusion set out above. Nevertheless, it may be helpful to the parties to set out very briefly my thinking on these aspects.
55. The Council's putative reason for refusal 8 alleged that the development would have a detrimental impact on the capacity of the junction between Otterham Quay Lane and Moor Street (the A2), leading to increased congestion and delays, with reference to LP Policy T1 which permits development where the highway network has adequate capacity to cater for the traffic generated.
56. However, paragraph 32 of the Framework says that development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe. That is a less stringent test than LP Policy T1 and having regard to paragraph 215 of the Framework, it is to be preferred.
57. The development would generate traffic obviously and it would have something of an impact on the junction which, in the morning peak in particular, is congested. However, on the basis of what I heard, and saw, and bearing in mind that traffic leaving the appeal site need not use the junction because there is an alternative route available on leaving the site, I do not consider that the additional traffic generated by the proposal would increase congestion and delays at the junction to any significant degree. Certainly, the impact could not properly be described as severe. On that basis, had the highways issue been a live one, it would not have weighed against the proposal to any great extent.
58. In landscape terms, the Council referred to the impact of the proposal on the Area of Local Landscape Importance¹⁵.

¹⁵ Referred to hereafter as ALLI

59. LP Policy BNE34 permits development in an ALLI where (i) it does not materially harm the landscape character and function of the area or (ii) the economic and social benefits are so important that they outweigh the local priority to conserve the area's landscape. It goes on to say that development in an ALLI should be sited, designed and landscaped to minimise harm to the area's landscape character and function. I note too that paragraph 109 of the Framework seeks to protect and enhance valued landscapes.
60. Notwithstanding the use of the appeal site for car boot sales, and the lack of any agricultural use, it is generally kept open and as such contributes to the sense that Moor Street is a separate settlement. Development of the appeal site for housing would extend Rainham into the surrounding countryside and erode that sense of separation, causing some harm to the ALLI.
61. An analysis of that involves some crossover with the heritage issue and it is my findings on that that drives my overall conclusions. However, if one ignores for a moment the heritage impacts, it is fair to say that the benefits the proposal would bring forward would easily outweigh the landscape harm. LP Policy BNE34 is clearly relevant to the supply of housing and would have to be considered not to be up-to-date. In any event, on the basis of what I set out above, there would be accord with limb (ii) of the policy. I would draw similar conclusions on the issues around the loss of best and most versatile agricultural land, and LP Policy BNE48, which works in a similar way to LP Policy BNE34, had I been in a position to do so.

Conclusion

62. For the reasons given above I conclude that the appeal should be dismissed and planning permission refused.

Paul Griffiths

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Graeme Keen of Counsel	Instructed by the Head of Legal Services, Medway Council
He called	
David Withycombe	Land Management Services Ltd
MSc CMLI	
Mike Hibbert	TTHC Ltd
MSc MCIT MIHT MILT	
MIOd DipEng	
Emma Rouse	Wyvern Heritage and Landscape Consultancy
MIFA MA (DUNELM)	
BA(Hons) (CANTAB)	
Richard Lloyd-Hughes	Rural Planning Ltd
BSc Est.Man (Hons)	
MRICS	
Tom Ashley	Major Projects Planning Manager, Medway Council
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FOR THE APPELLANT:

Martin Carter of Counsel	Instructed by John Mackenzie MRPTPI, Gladman Developments Ltd
He called	
Phil Rech	Director FPCR
BA BPhil LD CMLI	
Luke Regan	Associate Director, Transportation Team, WYG Group
MSc MCIHT CMILT	Head of Historic Buildings, RPS CgMS
Jason Clemons	
BA(Hons) MA MSc	
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Mr Jason Tait	Director, Planning Prospects Ltd
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INTERESTED PERSONS:

Louise Montgomery	Local Resident
Mr & Mrs Woodhouse	Local Residents
Chris Barber	Local Resident
Mrs Howell	Local Resident
Mrs Harris	Local Resident
Mr R Grice	Local Resident
Alan Wells	Local Resident

DOCUMENTS

- 1 Additional Highways Evidence put in by Council
- 2 Copy of Letter from Mr Rech to Mr Withycombe dated 16 February 2016
- 3 Appellant's Opening Statement
- 4 Council's Opening Statement
- 5 Statement of Common Ground
- 6 Highways Statement of Common Ground
- 7 Revised Table MH14A
- 8 Extract from Cherry Tree Hospital Stockport TA
- 9 Trip Generation Comparison (SoCG, adjusted to 0715-0815 and 1645-1745)
- 10 Copy of Map/Tables (part of Mr Hibbert's 2016 raw data)
- 11 Ms Rouse's Photograph Location Plan
- 12 Extracts from Medway Local Plan
- 13 Extract from PPG on the Setting of a Heritage Asset
- 14 CIL Compliance Paper and Response to it
- 15 Extract from Medway Council Local Plan Issues and Options 2012-2035
- 16 Copy of North Kent Strategic Housing and Economic Needs Assessment SHMA
- 17 NHS Property Request for Developer Contribution
- 18 Suggested Conditions
- 19 Completed Unilateral Undertaking dated 1 March 2016
- 20 Site Visit Itinerary
- 21 Copy of SoS decision and Inspector's Report on APP/Y2430/A/13/2191920 (Asfordby)
- 22 Council's Closing Statement
- 23 Appellant's Closing Statement
- 24 Post Inquiry Submissions on Court of Appeal and High Court Decisions

PLANS

- A 6363-L-01 Revision B: Site Location
- B 6364-L-03 Revision F: Revised Development Framework Plan
- C C14534-200 Revision P1: Proposed Junction General Arrangement