

REFERENCE NOS - 19/501600/OUT & 19/506182/FULL		
APPLICATION PROPOSAL		
19/501600/OUT: Outline application for up to 440 residential dwellings, with associated access, infrastructure, drainage, landscaping and open space (Access being sought with all other matters reserved for future consideration)		
19/506182/FULL: Residential development for 421 dwellings with associated access, infrastructure, drainage, open space and landscaping.		
ADDRESS Land West Of Church Road, Otham, Kent, ME15 8SB		
WARD Downswood And Otham	PARISH/TOWN COUNCIL Otham & Downswood	APPLICANT Bellway Homes Limited AGENT DHA Planning

1.0 UPDATE ON OUTLINE APPLICATION

- 1.01 The applicant lodged an appeal on the basis of non-determination of the outline application with the Planning Inspectorate (PINS) on 11th June. This means that the decision on this application now lies with PINS and not the Council. Any decision now made by Committee on this application will be in order to inform PINS what decision the Council would have made and therefore what position MBC will take at the appeal. The appellant has requested a Public Inquiry procedure which officers have advised PINS they consider is appropriate. The Council has instructed Counsel and preliminary work is underway for the appeal.
- 1.02 The applicant has confirmed that the dedicated church car park will form part of their proposals at appeal and also the additional widening of Church Road to the south of the site.

2.0 BACKGROUND & PROCEDURE

- 2.01 This report provides advice on both applications as the first two reasons for refusal are the same for each application and the third is very similar.
- 2.02 Both applications were heard at Planning Committee on 28th May 2020. The applications were both recommended for approval and the Committee Reports and Urgent Update Reports are attached at the **Appendix**. Contrary to the recommendation of the Head of Planning and Development, the Committee voted to refuse the applications for the following reasons:

Outline Application

- The proposal will result in severe traffic congestion on local road networks (Deringwood Drive, Spot Lane, Mallards Way and Madginford Road) and the increase in traffic will adversely affect residents to the point that air pollution is beyond what is reasonable for the Council to accept contrary to Policies H1(8) criteria 9, DM1 and DM6 of the Maidstone Borough Local Plan 2017.*

2. *The proposal will result in worsening safety issues on Church Road to the south of the site which has not been addressed and due to the constraints of the road likely will never be able to be addressed contrary to policy DM1.*
3. *The proposal will adversely affect the settings of the Grade I listed Church and other listed buildings contrary to Policies SP18 and DM4 of the Maidstone Borough Local Plan 2017 where the development will not be protecting or enhancing the characteristics, distinctiveness, diversity and quality of the heritage assets.*

Full Application

1. *The proposal will result in severe traffic congestion on local road networks (Deringwood Drive, Spot Lane, Mallards Way and Madginford Road) and the increase in traffic will adversely affect residents to the point that air pollution is beyond what is reasonable for the Council to accept contrary to Policies H1(8) criteria 9, DM1 and DM6 of the Maidstone Borough Local Plan 2017.*
2. *The proposal will result in worsening safety issues on Church Road to the south of the site which has not been addressed and due to the constraints of the road likely will never be able to be addressed contrary to policy DM1.*
3. *The proposal will adversely affect the settings of the Grade I listed Church and Grade II listed Church House contrary to Policies SP18 and DM4 of the Maidstone Borough Local Plan 2017 due to the visual effect of the whole development in both long and short-term views and the development will not be protecting or enhancing the characteristics, distinctiveness, diversity and quality of the heritage assets.*

2.03 Pursuant to paragraph 30.3 (a) of Part 3.1 of the Council's Constitution and paragraph 17 (a) of the Local Code of Conduct for Councillors and Officers Dealing with Planning Matters (Part 4.4 of the Constitution), planning and legal officers advised the Committee that they did not consider each reason for refusal was sustainable and they could have significant cost implications before a vote was taken. Therefore, the decisions of the Planning Committee were deferred to its next meeting.

2.04 Paragraph 17(b) outlines that at the next meeting, should the Committee vote to continue with a decision which it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget, Councillors will be requested to refer the consideration of the application to Part II of the meeting (private session), to offer Members further advice on the legal and financial implications, and the likelihood of success at appeal. If the Committee still decides to refuse the application/impose an unreasonable condition, the Head of Planning and Development will on the advice of the Legal Officer present and in consultation with the Chairman of the meeting, immediately after the vote has been taken, refer the application to the Policy and Resources Committee for determination.

3.0 ADVICE

3.01 Officers have sought Counsel's advice on both the relative strengths of the putative grounds of refusal and the associated risk of costs at appeal and have taken this into account in reaching the views set out below. Counsel's full advice is attached as an **Exempt Appendix** to this report.

3.02 In considering each ground of refusal it is important that Members are reminded of the following principles and matters:

- The need to give clear reasons in a case where Members disagree with an officer's recommendation to grant.
- Consistency in decision-making by a Council in order to maintain public confidence in the development control system. Whilst it is open to a decision maker to depart from the reasoning in a previous decision, reasons for the departure should be given. The principle applies to land use planning, as Lindblom LJ confirmed in *DLA Delivery Ltd v. Baronness Cumberlege of Newick and SSCLG [2018] EWCA CIV 1305*, at paragraph 28. It therefore follows that it appeals to both the decision made to allocate the application site for up to 440 houses in the Council's adopted Local Plan and any subsequent development management decisions relating to the same site.
- Reasons for refusal need to be full, clear and precise and refer to all relevant Development Plan policies.

3.03 In terms of the guidance on the risk of costs, Paragraph: 049 Reference ID: 16-049-20140306 of National Planning Practice Guidance states:

What type of behaviour may give rise to a substantive award against a local planning authority?

Local planning 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.*
- *failure to produce evidence to substantiate each reason for refusal on appeal*
- *vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.*
- *refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead*

(This list is not exhaustive.)

Ground 1 On Both Applications (Severe Traffic Congestion & Air Quality)

1. The proposal will result in severe traffic congestion on local road networks (Deringwood Drive, Spot Lane, Mallards Way and Madginford Road) and the increase in traffic will adversely affect residents to the point that air pollution is beyond what is reasonable for the Council to accept contrary to Policies H1(8) criteria 9, DM1 and DM6 of the Maidstone Borough Local Plan 2017.

Traffic Congestion/Capacity

- 3.04 This part of the reason for refusal refers to severe congestion on the named roads. It is advised that this ground is unreasonable, cannot be sustained at appeal, and costs are highly likely to be awarded against the Council if pursued for the following reasons.
- 3.05 The NPPF at paragraph 109 states that development should only be prevented or refused on highways grounds if the residual cumulative impacts on the road network would be severe. KCC Highways in their comments on the applications are not raising objections on the basis of a severe impact upon any of the named roads. The applicant's evidence demonstrates that, with the mitigation proposed, traffic impacts on these roads would not be made any worse by the development when forecasted ahead to 2029.
- 3.06 With regard to Deringwood Drive, and as outlined in the committee reports, the proposed signalisation of the junction with Willington Street will significantly reduce the potential maximum queuing length from 288 vehicles (which includes general traffic growth, other sites with planning permission and the proposed development) down to a maximum of 39 vehicles in the AM peak hour, which would be a clear improvement. It should be noted that even without this development the predicted number of vehicles that will occur in 2029 would be 173 so again this illustrates the proposed mitigation will result in a significant improvement. KCC Highways also did not raise an objection in terms of the traffic impact on Deringwood Drive subject to the mitigation.
- 3.07 With regard to Spot Lane/Mallards Way, the proposed junction improvement where Spot Lane meets the A20 would ensure that the capacity of the junction remains the same when development traffic is taken into account and KCC Highways are not raising objections in terms of the traffic impact on this junction or on Mallards Way.
- 3.08 With regard to Madginford Road, the applicant's evidence shows that there would be no change in the traffic volumes on Madginford Road where it meets Willington Street as a result of the development and KCC Highways are not raising objections in terms of the traffic impact on this road.
- 3.09 For the above reasons it is advised that a ground relating to severe traffic congestion on the roads referred to could not be reasonably defended at

appeal and costs are highly likely to be awarded against the Council for unreasonable behaviour.

- 3.10 KCC Highways have been consulted for their views on the grounds for refusal. They have advised they do not consider there is evidence to support the view that a severe impact will arise on Spot Lane, Mallards Way or Madginford Road. In relation to Deringwood Drive, they advise the proposed junction improvement would mitigate the impact on this road but reiterate their view that this would result in a severe impact on Willington Street. In their words, they consider, *"there is thus an evidenced inter-dependency and KCC Highways could therefore support MBC on this element of the refusal reason at an appeal."*
- 3.11 Whilst KCC Highways are advising they would support the Council relating to Deringwood Drive, to pursue the ground on this basis would be unreasonable and this not recommended. The ground specifically relates to the traffic impact on Deringwood Drive only (where officers and KCC Highways advise the traffic impact can be mitigated) and not Willington Street. If the Council attempted to stretch this ground to cover Willington Street, where Committee have not raised an objection, this would be regarded as unreasonable behaviour and costs are highly likely to be awarded against the Council. It would be for KCC Highways to defend their own position if they took this approach at any appeal.
- 3.12 In terms of consistency in decision-making, the site is allocated under policy H1(8) for up to 440 dwellings and Full Council previously voted for the policy to be adopted in the Local Plan. In doing so they have found it to be sound and the Local Plan Inspector has also found the policy to be sound through an Examination in Public. The traffic impacts and congestion for the South East Maidstone Strategic sites, which include this site, were comprehensively assessed (including using the Council's own commissioned modelling) and this was a major reason for Full Council agreeing on this site allocation with the Local Plan adopted in 2017. The grounds put forward by Planning Committee do not explain what is different in 2020 from when the Council decided the site was suitable for 440 dwellings in 2017, and it is advised that there is not a defensible reason for reaching a different decision on traffic congestion. For these reasons it is advised that a ground relating to severe traffic congestion on the roads referred to would also be unreasonable on the basis of inconsistent decision-making.
- 3.13 There were some discussions at the previous meeting suggesting that because the Plan was adopted nearly 3 years ago the traffic data and evidence behind it is potentially out of date. Officers advised that this was not the case because transport evidence makes assessments into the future and in the case of the Local Plan to 2031, and for this application to 2029. This includes assessing the cumulative impact of traffic from other planned developments and background traffic growth. As such, the traffic assessment work carried out for the Local Plan remains highly relevant.

Air Quality

- 3.14 This element of the ground considers that air pollution from the traffic on the named roads would be beyond what is reasonable contrary to policy H1(8) criterion 9, DM1 and DM6. It is advised that this ground is unreasonable, cannot be sustained at appeal, and costs are highly likely to be awarded against the Council if pursued for the following reasons.
- 3.15 As outlined in the committee reports, the applicant's Air Quality Assessment concludes that small increases in NO₂ concentrations are expected as a result of the proposed development and overall these increases are expected to have a negligible impact on air quality and would not cause any exceedances of the relevant Air Quality Standards. The Council's Environmental Health section has reviewed the assessment and raises no objections to these conclusions. In line with the Council's Air Quality Planning Guidance, an emissions mitigation calculation has been used to quantify potential emissions from the development and provides a suggested mitigation value for proportionate mitigations to be integrated into the development. A number of potential mitigation measures are outlined and the specific measures are secured by recommended conditions.
- 3.16 For the reasons above and as there is no evidence to the contrary, it is advised that the grounds relating to air quality impacts could not be successfully defended at appeal and costs would be very likely awarded against the Council.
- 3.17 (In the event that Committee wishes to pursue this reason for refusal policy DM21 should be referred to which concerns the transport impacts of development.)

Ground 2 On Both Applications (Highway Safety on Church Road to the South of the Site)

2. The proposal will result in worsening safety issues on Church Road to the south of the site which has not been addressed and due to the constraints of the road likely will never be able to be addressed contrary to policy DM1.

- 3.18 It is advised that this ground is unreasonable, cannot be sustained at appeal, and that there is a risk of costs being awarded against the Council if this ground is pursued but that the risk is low for the following reasons.
- 3.19 This ground is based on KCC Highways objection to both applications on the basis of worsening safety hazards for road users on Church Road. For clarity, outside the application site Church Road will be widened to 5.5m. The objection relates to the section of Church Road from a point south of the application site to the point where Church Road meets White Horse Lane (approximately a 1km distance). It relates to the narrow width of this section of Church Road, forward visibility, and no pavements. The width is below 4.8m for much of its length (between 4.1m and 4.5m) and at 3.9m for a very short section and KCC Highways require a 5.5m width along the full length of Church Road.

- 3.20 As outlined in the committee reports, Church Road is already a two-way road with a low incidence of accidents which is shown in the collected data and KCC acknowledge the road is already well-used and has a relatively good crash record. Their concern is that there will be additional traffic movements from the development. However, the predicted increase from the development is on average just over one additional movement a minute over the peak hour and the peak hour traffic associated with the development is likely to be light vehicles. On this basis it is difficult to maintain a robust objection on highway safety grounds relating to Church Road south of the site and for this reason officers remain of the view that the ground is considered to be unreasonable.
- 3.21 In addition, the applicant has put forward some mitigation in the form of extending the 30mph limit around 500m south of the Church, introducing build-outs with a give way feature on a bend just to the south of the site where there is limited visibility, and widening Church Road to 5.5m for approximately a 210m section to the south of 'Little Squerryes'. KCC Highways have acknowledged that these measures will provide improvements but will not overcome their objection. If Members pursue this ground they need to make clear whether they have considered these measures and whether they overcome their concerns or not.
- 3.22 Importantly, Policy H1(8) does not require the widening of any part of Church Road. The Local Plan Inspector explored the highway safety issues of this Policy and did not require any widening of Church Road, or reject the site allocation on this basis. Again, Full Council decided that the site allocation was sound and the Committee has not given any reason why they now take a different view. For this reason, it is advised that a ground relating to highway safety on Church Road would also be unreasonable on the basis of inconsistent decision-making.
- 3.23 The risk of costs is considered to be lower for this ground because as a matter of fact Church Road is narrow in places to the south of the site so the substance of the ground is not unfounded. However, for the reasons outlined above it is still advised that to pursue this ground would be unreasonable and so there is a risk of costs. As a matter of planning judgement, it is considered that an Inspector is unlikely to support the reason for refusal and will find highway safety conditions to the south of the site, as proposed to be mitigated, acceptable. KCC Highways have advised they will support this ground and so would be expected to lead on this ground at appeal should it be pursued by Committee.

Ground 3 On Both Applications (Harm to the Setting of Listed Buildings)

Outline

3. *The proposal will adversely affect the settings of the Grade I listed Church and other listed buildings contrary to Policies SP18 and DM4 of the Maidstone Borough Local Plan 2017 where the development will not be protecting or enhancing the characteristics, distinctiveness, diversity and quality of the heritage assets.*

Full

3. The proposal will adversely affect the settings of the Grade I listed Church and Grade II listed Church House contrary to Policies SP18 and DM4 of the Maidstone Borough Local Plan 2017 due to the visual effect of the whole development in both long and short-term views and the development will not be protecting or enhancing the characteristics, distinctiveness, diversity and quality of the heritage assets.

3.24 It is advised that this ground is unreasonable, cannot be sustained at appeal, and costs are highly likely to be awarded against the Council if pursued for the following reasons.

3.25 In agreeing to allocate the site for up to 440 houses the Council have accepted that there will inevitably be an impact upon the setting of the nearby listed buildings otherwise the site would not have been allocated at all, or a smaller area of the site and/or lower number of houses would have been allocated.

3.26 The Council's decision to adopt policy H1(8) implies an acceptance that if there was an undeveloped section of land retained along the eastern edge of the site, if the Church Road frontage was built at a lower density, and if open land to the north of the Church was retained, this would protect the setting of the Church as required under criterion 3, 4, and 6. For the outline application the detailed layout of the development is not being considered at this stage and so these requirements could be fulfilled at the reserved matters stage. For the full application the Policy requirements are being fulfilled. As such, there is no explanation as to why the Committee now considers there to be an adverse impact when the Council's adopted policy outlines how this could be avoided and has been complied with.

3.27 For the full application Members were asked to clarify if a specific element of the proposed development was causing harm to the setting of the listed buildings. Committee clarified it is the whole development that causes the adverse harm and so by implication that no development at the site is acceptable for heritage reasons. This is clearly unreasonable on the basis that the Council has allocated the site for up to 440 houses.

3.28 For the full application, the reason refers to long and short-term views (assumed to mean long 'distance' and short 'distance' views) but policy H1(8) has already specified what is necessary to ensure open views of the Church are maintained whether they be short or long distant.

3.29 Officers, including the Council's Conservation Officer have advised that the level of harm to the setting of the Church and Church House is 'less than substantial' and this is also the view of Historic England. The layout was developed in discussion with Historic England and in their comments on the full application they state, "*we also accept that it is unlikely the overall harm can be reduced given other constraints on the site and thus that the proposal in its current form is capable of meeting NPPF requirements to*

minimise and thus also justify harm.” Their objection centres on the lack of a church car park.

3.30 Where the harm is considered to be ‘less than substantial’ paragraph 196 of the NPPF requires this harm to be weighed against the public benefits of the development. In this case the public benefits are significant including providing over 400 houses in order for the Council to meet its housing requirement up to 2031 and which includes a significant quantum of affordable housing, the delivery of which is the top priority under policy ID1 (Infrastructure Delivery) of the Local Plan. This balancing exercise does not appear to have been undertaken by the Committee.

3.31 For these reasons it is advised that both reasons for refusal are unreasonable. The outline application could comply with the site policy and the full application does comply. There is no good reason for taking a different view from when the site was allocated because the number of dwellings being proposed is the same as, or less than, what is endorsed by Policy H1(8).

3.32 (In the event that these grounds are pursued on both applications they should state specifically which listed building settings are harmed. One would also expect the listed buildings affected would be the same for both applications. In relation to the full application it should clarify what is meant by a ‘long term and short term’ views.)

4.0 CONCLUSION

4.01 Reasons for refusal 1 and 3 on both applications are unreasonable, cannot be sustained at appeal, and are highly likely to result in significant costs awards against the Council. Reason for refusal 2 is unreasonable, cannot be sustained at appeal, and there is a risk of a significant costs award against the Council but this is considered to be low.

4.02 It is difficult to advise the precise level of costs, however, the appeal already lodged will be carried out under the Public Inquiry procedure where legal representation and expert witnesses (planning, highways, air quality, and heritage) will be required by all parties and this process is already underway. Counsel has advised that a costs award against the Council could be in the region of £95,000 which is considered to be a reasonable estimate. This excludes the Council's usual liability to bear its own costs associated with defending any appeal.

4.03 For the outline application, it is recommended that Committee decides to advise PINS that the Council ‘would have’ approved planning permission subject to the conditions and legal agreement as set out in the committee reports.

4.04 For the full application, it is recommended once more that planning permission is granted for the development subject to the conditions and legal agreement as set out in the committee report.